NEW YORK UNIVERSITY ANNUAL SURVEY OF AMERICAN LAW

VOLUME 76
ISSUE 2

NEW YORK UNIVERSITY SCHOOL OF LAW
ARTHUR T. VANDERBILT HALL
Washington Square
New York City

New York University Annual Survey of American Law
is in its seventy-sixth year of publication.

L.C. Cat. Card No.: 46-30523
ISSN 0066-4413

New York University Annual Survey of American Law is published biannually at 110 West 3rd Street, New York, New York 10012. Subscription price: $30.00 per year (plus $4.00 for foreign mailing). Single issues are available at $16.00 per issue (plus $1.00 for foreign mailing). For regular subscriptions or single issues, contact the *Annual Survey* editorial office. Back issues may be ordered directly from William S. Hein & Co., Inc., by mail (2350 North Forest Rd., Getzville, NY 14068), phone (800-828-7571), fax (716-883-8100), or email (order@wshein.com). Back issues are also available in PDF format through HeinOnline (http://heinonline.org).

Manuscripts: The *Annual Survey* invites the submission of unsolicited manuscripts. Text and citations should conform to the 20th edition of *A Uniform System of Citation*. Please enclose an envelope with return postage if you would like your manuscript returned after consideration.

Editorial Office: 110 West 3rd Street, New York, N.Y. 10012
(212) 998-6540
(212) 995-4032 Fax
http://www.annualsurveyofamericanlaw.org

For what avail the plough or sail
Or land or life, if freedom fail?
EMERSON

NEW YORK UNIVERSITY
ANNUAL SURVEY OF AMERICAN LAW

2020–2021 BOARD OF EDITORS

SUMMARY OF CONTENTS

Articles

Notes

PLEA BARGAINING AND MASS INCARCERATION

*ALBERT W. ALSCHULER**

INTRODUCTION

Here are two basic facts about criminal justice in the United States. First, the United States imprisons a higher proportion of its population than any other nation in the world,[1] and second, the United States is more dependent on plea bargaining than any other nation.[2] Those things are not a coincidence.

The thesis of this Article is that plea bargaining was a major cause of the United States' mass incarceration. Together with new sentencing laws and other developments, it produced skyrocketing imprisonment. If U.S. prosecutors had bargained less or not at all, imprisonment rates would be lower.

I.
DEPENDENCY ON PLEA BARGAINING LEADS TO LONGER, NOT SHORTER, SENTENCES

Plea bargaining produces more severe sentences than would exist without it—a proposition that may seem counterintuitive. Criminal defendants plead guilty in overwhelming numbers because they believe bargaining reduces their sentences, and when one looks to the harsh dilemmas they face, they are correct. In the federal courts, the sentences imposed following guilty pleas are only about one-third as long as those imposed following convictions

* Julius Kreeger Professor Emeritus, The University of Chicago Law School. I am grateful to Marc Mauer, William Ortman, and Stephen Schulhofer for valuable comments.

1. ROY WALMSLEY, WORLD POPULATION List 2 (12th ed. 2018), http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf [https://perma.cc/YGB6-T97Y].

2. Ninety-seven percent of the felony convictions in the federal courts and ninety-five percent of those in the state courts are the result of guilty pleas. No other nation matches those numbers. *See* U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT FISCAL YEAR 2017, Table 2A, https://www.justice.gov/usao/page/file/1081801/download [https://perma.cc/L5EH-3U7W]; U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL CASES: SUMMARY FINDINGS (July 3, 2018), https://www.bjs.gov/index.cfm?ty=TP&tid=23 [https://perma.cc/LP5H-YKLT].

at trial.[3] Justice Scalia called plea bargaining a way to "beat the house, that is, to serve less time than the law says [an offender] deserves."[4] It's easy to suppose that sentences would be longer in the absence of this practice and that incarceration rates might be higher.

It's a mistake, however, to view the sentences imposed following conviction at trial as a baseline. These sentences may be especially severe because they've been inflated to induce guilty pleas, not because the sentences imposed following guilty pleas are more lenient than they otherwise would have been.

Justice Scalia's statement about how defendants can beat the house by bargaining came in a dissenting opinion, and the Supreme Court majority took a different view. It quoted with approval Professor (now Judge) Bibas: "The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less a bargain."[5] In another case, the Court quoted Professor Barkow: "[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes."[6]

---

3. RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 131 (2019); *see* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ [https://perma.cc/J7PN-AAM6] ("In 2012, the average sentence for federal narcotics defendants who entered into any kind of plea bargain was five years and four months, while the average sentence for defendants who went to trial was sixteen years."); Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L. J. 1195, 1202 (2015) (finding that "federal defendants convicted at trial receive sentences that are sixty-four percent longer than similar defendants who plead guilty, *excluding* the effects of charge and fact bargaining") (emphasis added).

Russell Covey examined two groups of exonerated state-court defendants, noting that, despite their innocence, most defendants in each group had pleaded guilty. For one group, "trial sentences were . . . on average 6.7 times longer than plea sentences, with no apparent qualitative differences among the types of crimes charged or the criminal history of the defendants," and for the other, trial sentences were thirteen times longer. Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1166-70 (2013).

4. Lafler v. Cooper, 566 U.S. 156, 186 (2012) (Scalia, J., dissenting).

5. *Id.* at 168 (majority opinion) (quoting Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1138 (2011)).

6. Missouri v. Frye, 566 U.S. 134, 144 (2012) (quoting Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006)).

A Chicago trial judge offered this description of plea bargaining: "He takes some of my time—I take some of his. That's the way it works."[7] The inflation of post-trial sentences to induce guilty pleas is not a sometime thing. It is systematic and pervasive.

Consider where we are. The United States, with five percent of the world's population, houses one-quarter of the world's prisoners.[8] Its incarceration rate is seven times higher than the average rate in West European democracies.[9] We lock up more people and keep them locked up longer[10] for reasons that have little to do with our differing crime rates.[11] Our incarceration rate—665 per 100,000 people—is also substantially higher than the rate in authoritarian nations like Russia (402), Iran (284), and Saudi Arabia (197).[12] Currently, 2.1 million people are behind bars in U.S. pris-

7. Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1089 (1976). The judge offered this explanation to a young lawyer named Dallin Oaks who is now, at age 89, first counselor in the First Presidency and President of the Quorum of the Twelve Apostles of the Church of Jesus Christ of the Latter-day Saints. Oaks had been appointed to represent an indigent defendant charged with the sale of narcotics, an offense carrying a mandatory minimum sentence of ten years. At a conference in the judge's chambers, the prosecutor offered to reduce the charge and to recommend a sentence of two-to-five years if the defendant would plead guilty. When Oaks appeared hesitant, the judge said, "I'm not going to tell you what to do, young man, but I can tell you what *I'll* do. If your client goes to trial and is convicted, the minimum term will not be just the ten years required by the statute. The minimum term will be twenty years in the penitentiary." The judge added after a pause, "He takes some of my time—I take some of his. That's the way it works."

8. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 1 (2017).

9. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 37 (Jeremy Travis et al. eds., 2014).

10. *See* JUSTICE POLICY INST., FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICES OF OTHER NATIONS (2011) (comparing the frequency and length of prison sentences in Canada, England and Wales, Germany, and the United States); Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933 (2016) (exploring differences in the frequency of capital sentences, the frequency of sentences of life without parole, the frequency of sentences longer than ten years, prison conditions, the treatment of repeat offenders, the imposition of civil disabilities, and the ability of released prisoners to secure employment). *See generally* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003).

11. *See* FRANKLIN ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 3–21 (1997) (demonstrating that, apart from crimes of lethal violence, "rates of crime are not greatly different in the United States from those in other developed nations").

12. WALMSLEY, *supra* note 1, at tbl.1.

ons and jails.[13] Nearly all of them pleaded guilty—97% percent of those convicted of felonies in federal courts and 95% of those convicted of felonies in state courts.[14]

Ponder, then, these questions. Do you suppose the members of this army got lucky and found a way to "beat the house"? Do you imagine they are punished less than they deserve? Do you suppose their sentences are inadequate to protect the public? Do you believe the United States achieved its record for mass incarceration while punishing 95% of all offenders too lightly to accomplish whatever-on-earth it is that criminal punishment is supposed to accomplish? If you do, there's a bridge within two miles of the NYU Law School I want to sell you.

Gerard Lynch commented in 2003, "Given the extreme severity of sentencing in the United States by world standards, . . . it is hard to take seriously the notion that ninety percent of those serving our remarkably heavy sentences are the beneficiaries of 'bargains.'"[15] Moreover, what happened in the United States is what's likely to happen whenever a nation becomes dependent on plea bargaining.

As a thought experiment, consider the prosecutor who invented this practice. Once upon a time, he lived in a land in which both the sentences imposed following convictions at trial and those imposed following guilty pleas were the sentences defendants were thought to deserve. One day, however, this prosecutor said to a defendant, "The resources our criminal justice system can devote to trying cases are limited. Besides, a jury might acquit you. If you plead guilty, I will therefore recommend a punishment less severe than the one you deserve." (Or perhaps this prosecutor took an instrumental rather than a retributivist view of punishment and said to the defendant, "Because resources are limited and a jury might

13. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016 at 2 tbl.1 (2018), https://www.bjs.gov/content/pub/pdf/cpus16.pdf [https://perma.cc/Q5HX-6RS3]; *see* PFAFF, *supra* note 8, at 2 ("[I]t's clear that tens of millions of Americans have spent time in prison or jail since the 1970s."); Rachel Werner, *Almost Half of U.S. Adults Have Seen a Family Member Jailed, Study Shows*, WASH. POST (Dec. 6, 2018), https://www.washingtonpost.com/crime-law/2018/12/06/almost-half-us-adults-have-seen-family-member-jailed-study-shows/?utm_term=.366809b65137 [https://perma.cc/SG8T-UJFC] (reporting that at least one family member of almost half of all U.S. adults has been incarcerated).

14. UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT FISCAL YEAR 2017, *supra* note 2, at tbl.2A; BUREAU OF JUSTICE STATISTICS, CRIMINAL CASES: SUMMARY FINDINGS, *supra* note 2.

15. Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off*, 55 STAN. L. REV. 1399, 1402 (2003).

acquit you, I will recommend a punishment less severe than the one needed to deter crime if you plead guilty.")

This prosecutor might have struck many bargains before people noticed that nearly all offenders were receiving less punishment than they deserved and less than was necessary to protect the public. At this point, however, someone would have observed that, if the object was to ensure conviction in doubtful cases and conserve judicial and prosecutorial resources, the prosecutor's sacrifice of public values was unnecessary. Increasing the punishment of defendants convicted at trial would deter trials and ensure conviction just as effectively as reducing the punishment of defendants who plead guilty. It would accomplish these things, moreover, while fully protecting the public and punishing offenders as much as they deserve. If the punishment for standing trial were tough enough, nearly all defendants would abandon the right to trial. Carrying out the threat to punish them would only occasionally be necessary. Upon hearing this insight, almost everyone other than criminal defendants—prosecutors, legislators, judges, and even some defense attorneys—might have cheered.

Of course, the enhancement of post-trial sentences to encourage guilty pleas probably did not happen in precisely this way. Much of it—though not all—might have been unconscious. Sane societies, however, do not sentence 95% of all offenders to less than they deserve—especially when punishing a small number of offenders for the crime of standing trial can accomplish the same economy. Perhaps plea bargaining once reduced deserved sentences in exchange for pleas, just as Justice Scalia imagined it did. The dynamics of plea bargaining, however, pushed toward increased post-trial sentences.[16] And when the sentences imposed through plea bargaining are appropriate for the crimes committed and the sentences imposed following conviction at trial include a tariff, aggregate sentences increase.

The fact that plea bargaining pushes a society toward harsher sentences, however, is only the start of the story.

16. One likely instrument of change in legislative bodies is Zimring's eraser. *See* Franklin E. Zimring, *Making the Punishment Fit the Crime: A Consumer's Guide to Sentencing Reform*, 6 HASTINGS CTR. REP., Dec. 1976, at 13, 17 ("[I]t takes no more than an eraser and a pencil to make a one-year 'presumptive sentence' into a six-year sentence for the same offense.").

II.
PLEA BARGAINING INCREASES THE NUMBER OF PEOPLE SENT TO PRISON

That plea bargaining produces tougher sentences may seem counterintuitive. That plea bargaining increases the number of people sent to prison, however, isn't counterintuitive at all. It may in fact seem too obvious to mention. Increasing the number of convictions is what plea bargaining is for. It enables the courts to process more cases, and it assures conviction in cases that otherwise would end in acquittal. According to many of its boosters, the chief virtue of plea bargaining is that it produces more punishment bangs for the buck.[17]

Almost invariably, however, the judges, lawyers, and scholars who praise plea bargaining focus only on the cost of producing punishment orders (sentences), not on the cost of carrying them out. And by reducing the cost of imposing criminal punishment, plea bargaining has given America more of it.[18]

When people can require others to pay the costs of their actions—when they need not "internalize" costs—economists describe the situation as one of moral hazard. And American prosecutors and trial judges usually can be tough on crime without pausing to consider imprisonment costs. Neither they nor the governments for which they work pay these costs. The prosecutors and judges typically are county officials while imprisonment costs are paid by the state.

The counties that employ prosecutors and judges, however, run the jails where inmates serve sentences of one year or less, and they also run the offices that administer non-incarcerative sentences. As John Pfaff summarizes the effect of this arrangement, "For the prosecutor, leniency is actually more expensive than severity, and severity is practically free."[19] Even in the federal system, however, in which one set of taxpayers funds both prisons and prosecutors, prosecutors do not appear to take much account of impris-

17. *See, e.g.*, Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309 (1983).

18. *See* Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 220 (2014) ("Cheaper convictions make for cheaper criminal law enforcement, which is likely to mean *more* criminal punishment."); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529 (2001) ("[A]ll of us tend to respond to price changes: we do more of something when it becomes cheaper and less when it becomes more expensive.").

19. PFAFF, *supra* note 8, at 143.

onment costs. Defended as a "market system,"[20] plea bargaining in fact has produced an assembly-line pile-up of the sort depicted in a 1952 episode of *I Love Lucy*.[21] The machinery for mass-producing imprisonment orders just keeps running.

In 1983, I published an article titled *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*.[22] In 1984, Stephen Schulhofer published one titled *Is Plea Bargaining Inevitable?*[23] Together, we devoted almost 200 pages to refuting the claim that plea bargaining is an economic necessity. But we blew it. Instead of merely arguing that plea bargaining is unnecessary as a cost-saving measure, we should have observed that it's a budget-buster.[24] State and local spending on prisons and jails rose from about $6 billion per year in the early 1980s to nearly $80 billion in 2013.[25] In the years between 1985 and 2000, federal and state governments opened an average of one new prison each week.[26]

III.
THE STORY OF MASS INCARCERATION IS A STORY OF INCREASED PROSECUTORIAL POWER

A. The Legitimation of Plea Bargaining

The American imprisonment rate varied little from the late nineteenth century until 1972. Then this rate (the rate of people in prisons, not jails) rose nearly six-fold in 36 years—from 93 per 100,000 in 1972 to 536 per 100,000 in 2008.[27] Since 2008, the im-

20. *See* Easterbrook, *supra* note 17.

21. *See I Love Lucy: "Lucy and Ethel Wrap Chocolates"* (CBS television broadcast Sept. 15, 1952), https://www.youtube.com/watch?v=8NPzLBSBzPI [https://perma.cc/84ES-XVFG].

22. Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983).

23. Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984).

24. If we'd done that, however, people would have been even more convinced that we were crazy. Some of the economizing measures we proposed would have enabled criminal courts to process many cases with limited resources. Unlike plea bargaining, however, they would have produced convictions only when prosecutors could establish guilt beyond a reasonable doubt. These alternatives would have reduced the number of prisoners, probably substantially. *See infra* Part IV.

25. PFAFF, *supra* note 8, at 94. In constant 2013 dollars, the increase was from about $17 billion yearly to nearly $80 billion yearly.

26. MARC MAUER, RACE TO INCARCERATE 1–2 (2d ed. 2006).

27. *See* PFAFF, *supra* note 8, at 1–2.

prisonment rate has declined to 498 per 100,000, slightly more than five times its 1972 level.[28]

Shortly before the imprisonment rate shot upward, plea bargaining became legitimate. Despite the disapproval of appellate courts,[29] bargaining was a frequent practice by the time a series of crime commission reports documented its extent in the 1920s.[30] As William Ortman comments, "[The crime commissions] were aghast by the phenomenon they'd exposed, which they decried as prosecutorial 'corruption,' manipulated by criminals to 'escape' their due punishment."[31]

In the late 1950s and the 1960s, a number of judicial decisions approved plea bargaining.[32] Many observers, however, continued to regard the practice as seedy, unbecoming, and illegal.[33] In 1957, a panel of the Fifth Circuit wrote, "Justice and liberty are not the subjects of bargaining and barter,"[34] and in 1965, the Sixth Circuit declared, "It is clear, of course, that a plea of guilty induced by a promise of lenient treatment is an involuntary plea and hence void."[35] Although guilty pleas were said to account for 90 percent of all convictions in the mid-1960s,[36] plea bargaining remained so disreputable that, according to the authors of the American Bar Association *Standards for Criminal Justice*, "It was not uncommon . . . for defendants to plead guilty, declaring to the court that no promises

28. *Id.* Historic data concerning the jail-incarceration rate and thus the total incarceration rate are unavailable for the period before 1970. The total incarceration rate rose from 161 per 100,000 in 1972 to a high of 767 per 100,000 in 2007. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., supra note 9, at 33 (2014). Although I refer to the "total" incarceration rate, this rate does not include people in military prisons, immigration detention facilities, and police lockups, and it does not include people committed to mental hospitals.

29. *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 19–24 (1979); *cf.* Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) ("A man may not barter away his life or his freedom, or his substantial rights.").

30. *See* Alschuler, *supra* note 29, at 26–32.

31. William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435, 1435 (2020).

32. *See* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 51 n.11 (1968) (citing cases).

33. *See, e.g.*, Samuel Dash, *Cracks in the Foundation of Criminal Justice*, 46 Ill. L. Rev. 385, 392–405 (1951).

34. Sheldon v. United States, 242 F.2d 101, 113 (5th Cir.), *rev'd en banc*, 246 F.2d 571 (5th Cir. 1957), *rev'd per curiam*, 356 U.S. 26 (1958).

35. Scott v. United States, 349 F.2d 641, 643 (6th Cir. 1965). The Sixth Circuit was behind the times. The legal proposition it called clear in 1965 was already very shaky. *See supra* note 32 and accompanying text.

36. DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966).

of any kind had been made, despite knowledge by all the parties that the prosecutor had agreed to dismiss certain charges or to recommend a particular sentence in return for the guilty plea."[37]

In 1967 and 1968, the American Bar Association and the President's Commission on Law Enforcement and the Administration of Justice concluded that it was time to bring plea bargaining from the shadows and to place plea agreements on the record.[38] The President's Commission declared, "Plea negotiations can be conducted fairly and openly, can be consistent with sound law enforcement policy, and can bring a worthwhile flexibility to the disposition of offenders."[39]

In 1970, the Supreme Court, departing from the standards of waiver it observed in every other situation,[40] upheld the constitutionality of plea bargaining.[41] A year later, one year before the prison explosion began, the Court observed, "Disposition of charges after plea discussions is not only an essential part of the

37. ABA STANDARDS FOR CRIMINAL JUSTICE § 14-3.1 cmt. (A.B.A. 2d ed. 1980); *see* WILLIAM F. MCDONALD, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 110 (1985) (referring to the "'pious fraud' of denying for the record that any promises, threats, or inducements had influenced the plea").

38. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEA OF GUILTY ((Tent. draft) ed. 1967) (approved by the ABA with minor revisions in 1968, *see* 2 Crim. L. Rep. 2419, 2422 (1968)); PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 134–37 (1967).

39. PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, *supra* note 38, at 135. The Commission added, "[Plea bargaining] imports a degree of certainty and flexibility into a rigid, yet frequently erratic system. The guilty plea is used to mitigate the harshness of mandatory sentencing provisions and to fix a punishment that more accurately reflects the specific circumstances of the case than otherwise would be possible under inadequate penal codes." *Id.*

Although the Commission's talk of flexibility sounded good, the legal profession's attachment to flexibility proved fleeting. Before long, Marvin Frankel argued that American law provided far too much flexibility in the disposition of offenders. *See* Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972); MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973). Frankel's work sparked a movement for sentencing guidelines that, in practice, restricted the discretion of judges, left the discretion of prosecutors untouched, and afforded the benefits of flexibility only to defendants who pleaded guilty. *See infra* Section III.C.

40. *See* Albert W. Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 68–69 (1975) (noting that a waiver of rights would be invalid if a prosecutor obtained it by promising a lighter sentence in exchange for a defendant's agreement to stand trial without an attorney or not to cross-examine any of the state's witnesses and calling it "incongruous for the Court to uphold a guilty plea that waives . . . these rights and more").

41. Brady v. United States, 397 U.S. 742 (1970).

[criminal] process, but a highly desirable part for many reasons."[42] With bargaining open, respectable, and commended, the stage was set for an ever-greater realization of its potential to subvert rights, foreclose trials, and increase punishment.

B. The Law's Shadow

Although settlement negotiations are said to occur in the shadow of the law,[43] Stephanos Bibas, William Stuntz, and others have argued that this metaphor does not capture how plea bargaining works.[44] Bargaining prosecutors and defense attorneys do not simply estimate the sentence that would be imposed if a defendant were convicted at trial, discount this sentence by the likelihood of acquittal, and approve only bargains that improve both parties' expected return.[45]

Private defense attorneys, for example, profit from disposing of cases quickly, especially when they've collected their fees in advance. Their interests can lead them to accept sentences more se-

---

42. Santobello v. New York, 404 U.S. 257, 261 (1971).

43. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

44. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 44, 49–60 (1988) (showing that "criminal procedure lacks the distinctive equilibrium mechanisms that characterize ordinary commercial markets"); Alschuler, *supra* note 32, at 52-53 (observing that bargaining prosecutors act in four different roles, only one of which requires them to "estimate the sentence that seems likely after a conviction at trial, discount this sentence by the possibility of an acquittal, and balance the 'discounted trial sentence' against the sentence [they] can insure through a plea agreement"); Albert W. Alschuler, *Personal Failure, Institutional Failure, and the Sixth Amendment*, 14 N.Y.U. J. OF L. & SOC. CHANGE 149, 149 (1986) ("Apologists for plea bargaining draw pictures of well-informed defendants, advised by capable attorneys, making rational assessments of surrender and gain. These apologists know that, were they to peer into the pit, they often would find their assumptions unjustified.").

45. Bibas maintains that adhering to this model would "mean there is no need to abolish plea bargains . . . because plea outcomes already [would] incorporate the value of trial safeguards." Bibas, *supra* note 44, at 2466. Trials, however, punish defendants only after someone finds them guilty. The "shadow" model declares that a defendant can be half-guilty and can appropriately be punished half as severely as an honest-to-God criminal would be punished. Even if plea bargaining matched this model, it would be a nearly perfect device for convicting the innocent. *See generally* Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 70 ALBANY L. REV. 919 (2016).

vere than the "shadow" metaphor indicates they should.[46] Similarly, prosecutors may not seek to maximize defendants' sentences because, as Stuntz explained, in "a large fraction of cases" today "the legally authorized sentence is harsher than the sentence prosecutors want to impose."[47] If the expected post-trial sentence is harsh enough and the likelihood of conviction great enough, prosecutors can simply *sentence*. In Stuntz's words, a prosecutor "has no incentive to order the biggest meal possible. Instead, her incentive is to get whatever meal she wants, as long as the menu offers it."[48]

Even when plea agreements depart from the "shadow" model, however, the law casts a shadow.[49] If Stuntz was correct that prosecutors can impose the sentences they prefer, for example, the reason is the one he noted—that the sentences imposed following trial convictions would be tougher. The bargaining power of prosecutors has burgeoned in years since America legitimized plea bargaining, and prosecutors have used their enhanced power to produce mass incarceration.[50]

---

46. *See* Bibas, *supra* note 44, at 2477–78; Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1181–206 (1975).

47. Stuntz, *supra* note 44, at 2554.

48. *Id.* at 2549.

49. *See* Bibas, *supra* note 44, at 2545 ("Trials affect pleas, but so do many other influences unrelated to the merits.").

50. Jeffrey Bellin describes as "empty" the claim that prosecutors "have lots of power." Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 176 (2019). He defines power as the ability to carry out one's will despite resistance—a definition drawn from Max Weber but apparently not endorsed by any dictionary. *See, e.g.*, THE CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/power [https://perma.cc/8FMB-SJ7L] (defining power in part as "the ability to control events"). Bellin then asks whether prosecutors can carry out their will despite the resistance of other officials, not whether they can carry out their will despite the resistance of defendants. Bellin, *supra*, at 176.

At least as Bellin applies it, Weber's definition misses the mark. When the king decided to spend his days playing golf and enjoying a dissolute life, he asked his valet to make all official decisions, promising to ratify them and sign the necessary papers before going to bed. Peasants complained that the king had granted the cruel valet enormous power. Because the valet would have been unable to carry out his will if the king had resisted, however, Bellin apparently would have assured the peasants that the valet had no power at all. Bellin also might have concluded that every official in a government of checks and balances is powerless because none can carry out his will when others resist.

Justice Jackson, Professor Stuntz, and the other writers that Bellin disparages understood that the power of U.S. prosecutors is de facto, not de jure, and that prosecutors have this power because legislators and judges have allowed it. Bellin offers no response to these writers' empirical claims—for example, Stuntz's observation that in many cases prosecutors effectively set sentences. He instead denies that de facto power or power granted by others qualifies as power. *Cf.* BARKOW,

C. Empowering Prosecutors

The legitimation of plea bargaining was only one of the things that sparked escalation of the American prison population. According to the FBI's Uniform Crime Reports, the rate of violent crime in the United States rose from 1960 through 1991, increasing almost five-fold from 161 per 100,000 people to 758 per 100,000. After its peak in 1991, this rate fell sharply for seventeen years, but the incarceration rate continued a sharp ascent. The crime rate had fallen to 459 per 100,000 people by the end of this period (2008). Then the incarceration rate also turned downward (slightly) while the violent crime rate continued to fall.[51] America's current violent crime rate (338[52]) is as low as it was when the incarceration explosion began in 1972, but its incarceration rate remains five times higher. According to John Pfaff, increased crime explains no more than half of the growth of the U.S. prison population that occurred in the 1970s and 1980s, and it explains much less of the increase that occurred after crime rates turned downward early in the 1990s.[53]

Here's an astonishing fact. In the 1960s, while the violent crime rate more than doubled,[54] the population of federal and state prisons fell by 12%.[55] During this decade, it was defense attorneys, not prosecutors, who gained bargaining leverage. The principal source of their enhanced power was the U.S. Supreme Court, whose decisions extended the Fourth Amendment exclusionary rule to the states,[56] expanded the scope of the Fourth Amendment,[57] guaranteed indigent defendants the right to appointed counsel at trial,[58] guaranteed indigent defendants the right to ap-

---

supra note 3, at 130 ("[P]rosecutors combine legislative, executive, and judicial powers under one roof—the very definition of tyranny that the separation of powers was designed to guard against.").

51. U.S. DEPT. OF JUSTICE, UNIFORM CRIME REPORTING STATISTICS, https://www.bjs.gov/ucrdata/Search/Crime/State/RunCrimeStatebyState.cfm [https://perma.cc/D9JR-9TBE].

52. U.S. DEPT. OF JUSTICE, 2017 CRIME IN THE UNITED STATES: VIOLENT CRIME, https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/violent-crime [https://perma.cc/34U3-ZRSH].

53. PFAFF, *supra* note 8, at 3–4.

54. UNIFORM CRIME REPORTING STATISTICS, *supra* note 51 (showing a growth of 104% in the violent crime rate during the 1960s and a 109% rise in the property crime rate).

55. MARGARET WERNER CAHALAN, HISTORICAL CORRECTION STATISTICS IN THE UNITED STATES, 1850–1984 at 29 tbl.3-2 (1986), https://www.bjs.gov/content/pub/pdf/hcsus5084.pdf [https://perma.cc/B2QM-N6GU].

56. Mapp v. Ohio, 367 U.S. 643 (1961).

57. Katz v. United States, 389 U.S. 347 (1967).

58. Gideon v. Wainwright, 372 U.S. 335 (1963).

pointed counsel on appeal,[59] extended the right to jury trial to the states,[60] forbade comment on a defendant's failure to testify,[61] required prosecutors to reveal exculpatory evidence,[62] expanded the availability of habeas corpus relief,[63] restricted police interrogation,[64] limited police lineups,[65] and more. Not only did a broader right to counsel empower lawyers directly, but other procedural rights, diverted from their apparently intended purposes, became bargaining chips for lawyers to trade for sentencing discounts.

Studies in some jurisdictions show that sentences declined and convictions on reduced charges increased in the 1960s.[66] Prosecutors apparently found it necessary to offer greater concessions to keep the level of guilty pleas constant. A Massachusetts prosecutor commented in 1968, "If guilty pleas are cheaper today, it is simply because Supreme Court decisions have given defense attorneys an excellent shot at beating us."[67]

The politics of criminal justice took a sharp turn as the 1960s ended. In 1964, Barry Goldwater was the first major-party nominee for President to make crime a national issue.[68] Although Goldwater lost badly, Richard Nixon supported the "peace forces" against the "criminal forces" in 1968 and won.[69]

Nixon's appointments transformed the Supreme Court, and since 1970, the Court's decisions have afforded increasing leverage to prosecutors. The Court has authorized "pretext" traffic stops to

59. Douglas v. California, 372 U.S. 353 (1963).

60. Duncan v. Louisiana, 391 U.S. 145 (1968).

61. Griffin v. California, 380 U.S. 609 (1965).

62. Brady v. Maryland, 373 U.S. 83 (1963).

63. Fay v. Noia, 372 U.S. 391 (1963).

64. Miranda v. Arizona, 384 U.S. 436 (1965).

65. Wade v. United States, 388 U.S. 218 (1967).

66. *See* Edward J. McLaughlin, *Selected Excerpts for the 1968 Report of the New York State Joint Legislative Committee on Crime, Its Causes, Control, and Effect on Society*, 5 CRIM. L. BULL. 255, 258 (1969); REPORT OF THE PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA 243 tbl.5, 245, 248–49 (1966).

67. Alschuler, *supra* note 29, at 38 (quoting Assistant Attorney General Donald L. Conn).

68. *See* Charles Mohr, *Goldwater Links the Welfare State to Rise in Crime*, N.Y. TIMES, Sept. 11, 1964, at A1.

69. *See* Richard M. Nixon, *Remarks in New York City: "Toward Freedom from Fear"* (May 8, 1968), THE AMERICAN PRESIDENCY PROJECT, http://presidency.proxied.lsit.ucsb.edu/ws/index.php?pid=123915 [https://perma.cc/PDL9-D2SS]. Theodore H. White's book on the 1960 presidential election had no index entry for crime. THEODORE H. WHITE, THE MAKING OF THE PRESIDENT 196 (1961). His book on the 1968 election devoted a chapter to that issue. THEODORE H. WHITE, THE MAKING OF THE PRESIDENT 1968 188–223 (1969); *see* Stuntz, *supra* note 18, at 524 n.85 (noting this difference between White's two books).

search for drugs;[70] roadblock stops to find drunk drivers;[71] checkpoint stops based partly on ethnicity to discover illegal immigrants;[72] suspicion-less drug testing in schools;[73] searches of the homes of probationers and parolees without probable cause and without warrants;[74] full searches of the interior of automobiles as an incident of arrest for any offense;[75] investigative stops of people who evade the police in high-crime neighborhoods;[76] "consent" searches at airports (including a "consent" strip search);[77] and "consent" searches of the hand luggage of passengers on interstate busses that have been stopped mid-journey.[78] The Court has limited *Miranda* rights in more than 20 cases[79] and repeatedly restricted the scope of the Fourth Amendment exclusionary rule.[80] It has severely limited the right to receive exculpatory evidence,[81] essentially withdrawn the right to counsel at lineups,[82] and greatly restricted the availability of habeas corpus relief.[83] The Court has upheld lengthy sentences mandated by three-strikes laws (including a sentence of 50 years for stealing videotapes from Kmart).[84] It has found the Federal Sentencing Guidelines constitutional[85] and upheld a bizarre sentencing provision that turned years of imprisonment on whether someone sold LSD in blotter paper or sugar cubes.[86] It has refused to consider whether coerced confessions and other violations of rights produced guilty pleas when defendants were represented by adequate lawyers.[87] It has held that defendants

70. Whren v. United States, 517 U.S. 806 (1996).

71. Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

72. United States v. Martinez-Fuerte, 428 U.S. 543, 563–64 (1976).

73. Board of Educ. v. Earls, 536 U.S. 822 (2002).

74. United States v. Knights, 534 U.S. 112 (2001).

75. New York v. Belton, 453 U.S. 454 (1981). The Court retreated from *Belton* without formally overruling this decision in *Arizona v. Gant*, 556 U.S. 332 (2009).

76. Wardlow v. Illinois, 528 U.S. 119 (2000).

77. United States v. Mendenhall, 446 U.S. 544 (1980).

78. United States v. Drayton, 536 U.S. 194 (2002).

79. *See* Albert W. Alschuler, Miranda*'s Fourfold Failure*, 97 B.U. L. Rev. 849, 868–73 (2017).

80. *See* Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 Ohio State J. Crim. L. 463, 463, 510–11 (2009).

81. United States v. Bagley, 473 U.S. 667 (1985).

82. Kirby v. Illinois, 406 U.S. 682 (1972).

83. Wainwright v. Sykes, 433 U.S. 72 (1977); Teague v. Lane, 489 U.S. 288 (1989).

84. Lockyer v. Andrade, 538 U.S. 63 (2003).

85. Mistretta v. United States, 488 U.S. 361 (1989).

86. Chapman v. United States, 500 U.S. 453 (1991).

87. Tollett v. Henderson, 411 U.S. 258 (1973).

may plead guilty even when they deny their guilt.[88] The Court has upheld a life sentence under a habitual offender statute that a prosecutor sought and obtained because a defendant charged with forging an $88 check rejected a five-year plea offer.[89] It sometimes has construed federal criminal statutes expansively (though it has done so less consistently than the lower federal courts).[90]

Like the courts, state and federal legislatures have empowered bargaining prosecutors—sometimes by limiting defendants' procedural rights. In the Feeney Amendment to the PROTECT Act of 2003,[91] Congress restricted downward (but not upward) judicial departures from the Federal Sentencing Guidelines and barred judges from approving a three-level reduction for "acceptance of responsibility" unless a prosecutor requested it.[92] Other legislation required judges to obtain a prosecutor's permission before approving a Guidelines departure for "substantial assistance."[93] More significant legislation, the Antiterrorism and Effective Death Penalty Act of 1996, restricted habeas corpus relief.[94] Nearly every state legislature has approved measures to increase the number of juveniles prosecuted as adults and to punish them more severely.[95]

Congress and state legislatures have regularly added new crimes to criminal codes and rarely subtracted them. In the federal courts, a powerful pry-pole for pleas is the Racketeer Influenced and Corrupt Organizations Act (RICO), enacted in 1970.[96] It threatens defendants with financial forfeitures and long sentences for conducting the affairs of an enterprise through a pattern of racketeering activity. The threat, however, frequently vanishes when defendants agree to plead guilty to some of the "predicate" crimes alleged to constitute the racketeering activity. Other bargaining tools provided by Congress include the Continuing Criminal Enter-

88. North Carolina v. Alford, 400 U.S. 25 (1970).

89. Bordenkircher v. Hayes, 434 U.S. 357 (1978).

90. *See* Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 903–25 (2005) (describing the federal courts' construction of RICO, the Hobbs Act, and the mail fraud statute).

91. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650. Congress has never enacted legislation giving "tools" to defense attorneys.

92. *See generally* Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIM. 295 (2004).

93. *See* 18 U.S.C. § 3553(e) (2018); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1. (U.S. SENTENCING COMM'N 2004).

94. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

95. BARKOW, *supra* note 3, at 35.

96. 18 U.S.C. §§ 1961–1968.

prise or "drug kingpin" statute (1970),[97] the federal program bribery statute (1984),[98] the Money Laundering Control Act (1986),[99] and a statute criminalizing deprivations of "the intangible right of honest services" (1988).[100] Congress has made federal crimes of possessing a firearm in a school zone (1990),[101] carjacking (1992),[102] drive-by shooting (1994),[103] interstate domestic violence (1994),[104] material support for terrorism (1994),[105] and perhaps 4450 other things.[106] Between 2008 and 2013, Congress approved an average of eighty new crimes per year.[107]

William Stuntz maintained that American over-criminalization is driven not only by "get tough" electoral politics (which he predicted would someday end) but also by the internal dynamics of the criminal justice system, which are unlikely to change as long as plea bargaining "*is* the criminal justice system," as the Supreme Court says it is.[108] Stuntz wrote, "[T]he story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes."[109] He noted, "Legislators gain when they write criminal statutes in ways that benefit prosecutors. Prosecutors gain from statutes that enable them more easily to induce guilty pleas."[110]

Civil forfeiture of the instrumentalities of crime has a venerable history, but Congress first authorized criminal forfeiture (a more expansive forfeiture imposed as part of a criminal sentence) in the RICO and Continuing Criminal Enterprise statutes of 1970. Since then, Congress has made this kind of forfeiture an authorized

---

97. 21 U.S.C. § 848.

98. 18 U.S.C. § 666.

99. 18 U.S.C. § 1956.

100. 18 U.S.C. § 1346. The Supreme Court construed this statute narrowly twenty-two years after its enactment. *See* Skilling v. United States, 561 U.S. 358 (2010).

101. 18 U.S.C. § 992(q).

102. 18 U.S.C. § 2129.

103. 18 U.S.C. § 36.

104. 18 U.S.C. § 2261.

105. 18 U.S.C. § 2339A.

106. JOHN BAKER, REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES (2008), https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes [https://perma.cc/G9HM-XMWN].

107. BARKOW, *supra* note 3, at 29–30.

108. Missouri v. Frye, 566 U.S. 134, 144 (2012) (emphasis added) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

109. Stuntz, *supra* note 18, at 510.

110. *Id.* at 528.

punishment for more than 250 criminal activities.[111] Threats of financial ruin prove negotiable, however, when defendants agree to plead guilty and add to the ranks of American prisoners.

The legislative action most commonly associated with both mass incarceration and the enhancement of prosecutorial power is the reform and toughening of sentencing laws in the final quarter of the twentieth century. California pioneered the movement in 1976 by abolishing parole and greatly limiting judicial sentencing discretion.[112] Twenty other states then revised their sentencing laws before the federal government joined the movement in 1984.[113] Today, twenty-one states have sentencing guidelines;[114] twenty-eight have three-strikes statutes;[115] and all fifty have mandatory minimum sentencing provisions.[116] The total number of mandatory minimum sentencing provisions increased from 77 in 1980 to 284 in 2000.[117]

In the Sentencing Reform Act of 1984, Congress abolished federal parole and created the U.S. Sentencing Commission, which it directed to prepare mandatory sentencing guidelines.[118] These guidelines were to require sentences "at or near the maximum term authorized" when offenders had previously been convicted of various crimes,[119] and they also were to "minimize the likelihood that

111. NORMAN ABRAMS, SARA SUN BEALE & SUSAN RIVA KLEIN, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 1041 (5th ed. 2010); *see* 21 U.S.C. §§ 853, 881.

112. *See* PHILLIP E. JOHNSON & SHELDON I. MESSINGER, CALIFORNIA'S DETERMINATE SENTENCING LAW: HISTORY AND ISSUES (1978); *see also* Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 571 (1978) (describing the California Determinate Sentencing Law as "a bargainer's paradise"); *id.* at 574 n.70 (quoting the statement of D. Lowell Jensen, then the District Attorney of Alameda County, that many prosecutors supported the Determinate Sentencing Law precisely because it enhanced their power).

113. *See* SANDRA SHANE-DUBOW, ALICE P. BROWN & ERIK OLSEN, SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT (1985) (state-by-state survey); Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. CRIM. & CRIM. 1550, 1551 (1981).

114. *See* NAT'L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM (2008), https://www.ncsc.org/~/media/microsites/files/csi/state_sentencing_guidelines.ashx [https://perma.cc/8LER-6WE8].

115. *See Three-Strikes Law*, WIKIPEDIA, https://en.wikipedia.org/wiki/Three-strikes_law [https://perma.cc/8SCM-RDHX].

116. DALE PARENT ET AL., MANDATORY SENTENCING (1997), https://www.ncjrs.gov/txtfiles/161839.txt [https://perma.cc/ZX2S-PUYA].

117. BARKOW, *supra* note 3, at 33.

118. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976. In 2005, a constitutional ruling of the Supreme Court made the guidelines discretionary. United States v. Booker, 543 U.S. 220 (2005).

119. 28 U.S.C. § 994(h).

the Federal prison population will exceed the capacity of the Federal prisons."[120]

At the time Congress enacted the Sentencing Reform Act, it also approved the Armed Career Criminal Act of 1984.[121] This statute mandated a minimum sentence of fifteen years for a felon in possession of a firearm who had three or more prior convictions for robbery or burglary. In 1986 and later years, Congress added other mandatory minimum sentences for possessing or using firearms while committing violent or serious drug crimes.[122]

The Anti-Drug Abuse Act of 1986 created mandatory minimum sentences for a large number of drug-trafficking offenses.[123] Most notably, after legislators vied with one another to offer the toughest proposals for punishing crack crimes, Congress enacted the most severe and racially discriminatory proposal of all, one requiring only one one-hundredth as much crack as powder cocaine to trigger the same minimum sentences.[124] The possession of five grams of crack for purposes of sale triggered the lightest of these penalties—five years.[125] Five grams is the weight of two pennies or one nickel.[126] Congress added more mandatory minimum sentences for drug offenses in 1988,[127] and it later approved mandatory minimum sentences for sexual abuse, sex trafficking, child pornography, and identity theft.[128]

In 1987, the U.S. Sentencing Commission submitted its guidelines—guidelines that critics predicted would greatly reduce the use of probation, dramatically increase the length of prison terms,

120. 28 U.S.C. § 994(g).

121. Armed Career Criminal Act of 1984, Pub. L. 98-473, 98 Stat. 2185.

122. *See* 18 U.S.C. § 924.

123. Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207.

124. *See* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1289 (1995) (noting that 91% of federal crack defendants in one recent year were Black and only 3% white); *id.* at 1296–97 (describing the "partisan bidding war [in Congress] over the penalties for crack trafficking"); *id.* at 1303–04 (noting some racially tinged rhetoric accompanying passage of the 1986 statute).

125. *Id.* at 1287.

126. U.S. MINT, COIN SPECIFICATIONS, https://www.usmint.gov/learn/coin-and-medal-programs/coin-specifications [https://perma.cc/JZ35-BZB5]. In 2010, Congress lowered the powder-crack ratio to 18-to-1 but did not authorize any reduction of sentences already imposed. Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372.

127. Omnibus Anti-Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181.

128. U.S. SENTENCING COMM'N, OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 13–14 (2017), https://www.ussc.gov/research/research-reports/2017-overview-mandatory-minimum-penalties-federal-criminal-justice-system [https://perma.cc/3GF3-FQ6X].

and cause a massive increase in the number of federal prisoners.[129] In 1994, the Violent Crime Control and Law Enforcement Act[130] included a three-strikes provision[131] and created 60 new capital crimes.[132]

Stephen Schulhofer notes that mandatory minimum sentences are of two types—"mandatory mandatory minimums" and "discretionary mandatory minimums." The vast majority are discretionary.[133] These "discretionary mandatory minimums" bind judges. Prosecutors, however, can make them vanish when they charge crimes without mandatory penalties or substitute charges without these penalties in exchange for pleas of guilty.

The severity of minimum sentences that are mandatory for judges alone has led judges to resign. "I just can't do it anymore," one federal judge said.[134] Another declared, "I cannot be paid enough to do this."[135] One who remained on the bench despite her qualms later declared, "Mandatory minimums made me feel unethical, even dirty. While I bore the title 'Honorable Judge,' I felt less than honorable and more like a complicit tool of an unjust system."[136] Some federal judges declare that eighty percent of the mandatory minimum sentences they have been required to impose have been unjust.[137] A judge who wept on the bench as he imposed

129. *See, e.g.*, *Sentencing Guidelines: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 100th Cong. 816 (1987) (statement of Albert W. Alschuler).

130. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796.

131. 18 U.S.C. § 2559(c).

132. Andrew Glass, *House Approves Anti-Crime Bill, Aug. 21, 1997*, POLITICO (Aug. 21, 2017) https://www.politico.com/story/2017/08/21/this-day-in-politics-aug-21-1994-241808 [https://perma.cc/J3LN-Y8HC].

133. Steven J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 202 (1993).

134. *Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES, Sept. 30, 1990, at A1 (quoting Judge Lawrence Irving).

135. POWERLESS ON THE BENCH, CATO POLICY REPORT 9 (2018), https://www.cato.org/policy-report/januaryfebruary-2018/powerless-bench [https://perma.cc/MY84-5VNK] (quoting Judge Kevin Sharp).

136. Shira A. Scheindlin, *"I Sentenced Criminals to Hundreds More Years than I Wanted to. I had No Choice"*, WASH. POST (Feb. 17, 2017) https://www.washingtonpost.com/posteverything/wp/2017/02/17/i-sentenced-criminals-to-hundreds-more-years-than-i-wanted-to-i-had-no-choice/?utm_term=.e180b1f161f1 [https://perma.cc/Q3AN-29UN].

137. Mallory Simon & Sara Sidner, *The Judge Who Says He's Part of the Greatest Injustice in America*, CNN POLITICS (June 3, 2017) https://www.cnn.com/2017/06/02/politics/mandatory-minimum-sentencing-sessions/index.html [https://perma.cc/U9PQ-AY8P] (quoting Judge Mark Bennett); Nancy Gertner & Chiraag

one of these sentences declared, "It may profit us very little to win the war on drugs if in the process we lose our soul."[138]

Congress has reduced black-robed senior officials charged with being impartial to impotency and tears. It has left officials who can be counted on to use their power to coerce waivers of the right to trial unfettered.[139] The Federal Sentencing Commission reported in 2004 that, after the exercise of prosecutorial discretion in charging and plea bargaining, only 20% of the defendants who used firearms to commit drug offenses received the supposedly mandatory sentences prescribed by federal law, and offenders who carried firearms without using them received these sentences less often.[140] Throughout the world and throughout history, criminal justice has offered an array of dreadful scenes. The picture of shackled judges, triumphant prosecutors, and two million souls in hell ranks highly.

Congress surely knew that the mandatory minimum sentences it enacted were "discretionary mandatories." It understood that it was carrying out the "good-cop, bad-cop" stratagem on a grand scale, playing the bad cop's role and setting the stage for prosecutors to promise fair treatment if only defendants would acknowledge their guilt and cooperate. What one federal judge said of the

---

Bains, *Mandatory Minimum Sentences are Cruel and Ineffective. Sessions Wants Them Back*, WASH. POST (May 15, 2017) https://www.washingtonpost.com/posteverything/wp/2017/05/15/mandatory-minimum-sentences-are-cruel-and-ineffective-sessions-wants-them-back/?utm_term=.d86a8f0fc95f [https://perma.cc/LNM3-CSLP] (offering the view of Judge Nancy Gertner).

138. Katherine Bishop, *Mandatory Sentences in Drug Cases: Is the Law Defeating Its Purpose?*, N.Y. TIMES, June 8, 1990, at B16 (quoting Judge William W Schwarzer); *see* United States v. Washington, 301 F. Supp. 2d 1306 (M.D. Ala. 2004) (protesting a "draconian" 40-year sentence the court was required to impose in the case of a 22-year-old defendant who had no criminal record until he was arrested twice for possessing drugs and a firearm); United States v. Angelos, 345 F. Supp. 2d 1227 (D. Utah 2004) (declaring a 55-year sentence the court was required to impose on a first-offender "cruel, unjust, and irrational" but declining to hold this sentence unconstitutional), *aff'd*, 433 F.3d 738 (10th Cir. 2006); United States v. Kupa, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013) ("To coerce guilty pleas . . . prosecutors routinely threaten ultra-harsh enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate. And to demonstrate to defendants generally that those threats are sincere, prosecutors insist on the imposition of the unjust punishments when the threatened defendants refuse to plead guilty.").

139. As one Twitter user remarked, legislators trust prosecutors to determine sentences until they become judges. PFAFF, *supra* note 8, at 131 (quoting Greg Newburn).

140. U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 90 (2004), *https://www.ussc.gov/sites/default/files/pdf/. . .and. . ./15-year. . ./15_year_study_full.pdf* [https://perma.cc/88AD-9VTP].

federal sentencing guidelines was true of Congress's mandatory minimum sentences and other measures as well: "Enhanced plea bargaining is actually the central goal."[141]

D. The Uses of Prosecutorial Power

1. *More guilty pleas.* One might reasonably expect that increasing prosecutorial power would lead to an increase in the percentage of defendants convicted by guilty plea, but when the Federal Sentencing Guidelines were new, I doubted it would happen. I wrote, "Guilty plea rates are currently so high that even substantial increases in prosecutorial bargaining power cannot yield great increases in these rates."[142] I envisioned some cases in which prosecutors would refuse to bargain, and I also imagined a stubborn group of defendants who would refuse to plead guilty whatever they were offered: a group composed partly of innocent defendants with an irrational faith that the truth would set them free, partly of overly optimistic guilty defendants, partly of guilty defendants too ashamed to admit their guilt, and partly of both innocent and guilty defendants who, like the experimental subjects in retaliation games, would resist unfair treatment even when they were certain to pay a price.

But I was wrong. If a core group of defendants exists who simply will not plead guilty, it is small. Guilty pleas, which accounted for 87% of all federal convictions in the years before the Guidelines, account for 97% today.[143] As crime rates, caseloads, convictions, and prison populations burgeoned, not only the percentage of federal criminal cases resolved by trial but also the *number* of trials in the federal courts declined:

---

141. United States v. Green, 346 F. Supp. 2d 259, 270 (D. Mass. 2004) (Young, J.).

142. Albert W. Alschuler, *The Selling of the Sentencing Guidelines*, *in* THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE 49, 91 n.4 (Dean J. Champion ed., 1989).

143. U.S. SENTENCING COMM'N, *supra* note 140, at 30; UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT FISCAL YEAR 2017, *supra* note 2, at Table 2A. The seemingly irresistible bargains offered by federal "fast track" programs have produced an "Ivory Snow" guilty plea rate of 99.4% in immigration cases. Brown, *supra* note 18, at 203.

Number of Authorized Federal District Court Judgeships, Federal Prisoners, and Federal Criminal Trials in 1962 and 2017[144]

	1962	2017
Judgeships	302	667
Prisoners	24,000	186,000
Criminal Trials	5,097	2,123

As this table shows, since 1962—as the number of authorized district court judgeships doubled and the number of prisoners multiplied eight times—the number of criminal trials declined by 60%. Marc Miller remarks that the Federal Sentencing Guidelines "achieved the virtual elimination of trials in the federal system."[145] And the Guidelines had help.

2. *More Sweeping Waivers*. Prosecutors can use their bargaining power to obtain not only waivers of the right to trial but waivers of other rights too. Before plea bargaining became legitimate and incarceration rates began their ascent, agreements that included waivers of the right to appeal were rare or nonexistent.[146] In 1999, however, an amendment to the Federal Rules of Criminal Procedure approved agreements barring both appeals and post-conviction review.[147] By 2003, nearly two-thirds of the plea agreements in

144. *See* UNITED STATES COURTS, AUTHORIZED JUDGESHIPS, https://www.uscourts.gov/judges-judgeships/authorized-judgeships [https://perma.cc/FQN4-RPLN] (District Courts, Additional Authorized Judgeships Since 1960 (pdf)); PATRICK A. LANGAN ET AL., HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925-86 at 15 tbl.3 (1988); FEDERAL BUREAU OF PRISONS, STATISTICS, https://www.bop.gov/about/statistics/population_statistics.jsp [https://perma.cc/B5ZA-DEB9]; Mark Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 493 (2004).

145. Marc L. Miller, *The Foundations of Law: Sentencing Equality Pathology*, 54 EMORY L.J. 271, 277 (2005).

146. *See* Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 128–29 (1995) (declaring that appeal waivers "emerged" "in recent years" and citing decisions in 1982 and 1986 that called these waivers "uncommon" and "not a widespread practice").

147. Fed. R. Crim. P. 11(b)(1)(N) (requiring courts to determine that a defendant understands "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence"). Proponents of this provision maintained that it would "help protect any appeal waivers against reversal." Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 221-24 (2005).

a federal court sample included waivers of the right to appeal.[148] In 2002, the Supreme Court upheld a provision the government included in a boilerplate plea agreement requiring defendants to abandon the right to receive exculpatory impeachment material.[149]

The rationales commonly offered for plea bargaining mark no stopping point before all rights vanish. The principal constitutional right retained by defendants who plead guilty is the Sixth Amendment right to the effective assistance of counsel, and commentators enthusiastically welcomed two Supreme Court decisions in 2012 that reinforced and expanded this right.[150] One gushed, "The Supreme Court's decisions in these two cases constitute the single greatest revolution in the criminal justice procedure since *Gideon v. Wainwright* provided indigents the right to counsel."[151] A former federal prosecutor, however, was equal to the challenge. He suggested that a new term added to plea agreements could eviscerate the new rulings:

> Knowing . . . that he may receive poor advice from his counsel, and that such advice (or failure to advise) may result in an outcome less favorable than he would receive with a typically competent lawyer, the defendant waives any remedy that would involve vacating his conviction or lessening the sentence ultimately imposed, in exchange for the government's agreement to negotiate a disposition of this case.[152]

The U.S. Justice Department is "confident that a waiver of a claim of ineffective assistance of counsel is both legal and ethical." Its current policy, however, is not to seek such waivers.[153] Nancy King notes that several courts have upheld plea agreements waiving

148. *Id.* at 212.

149. United States v. Ruiz, 536 U.S. 622 (2002); *see* United States v. Mezzenatto, 513 U.S. 196 (1995) (upholding a waiver of the right to exclude from evidence statements made during plea negotiations).

150. Missouri v. Frye, 566 U.S. 134, 144 (2012) (affording relief to a defendant whose lawyer's defective representation caused him to lose a beneficial plea agreement); Lafler v. Cooper, 566 U.S. 156 (2012) (same).

151. Adam Liptak, *Justices' Ruling Expands Rights of Accused in Plea Bargains*, N.Y. Times (Mar. 21, 2012) https://www.nytimes.com/2012/03/22/us/supreme-court-says-defendants-have-right-to-good-lawyers.html [https://perma.cc/6LFE-D2VD] (quoting Wesley Oliver).

152. Bill Otis, Comment on *One Notable Case Showing Impact of and Import of* Lafler *and* Frye, Sent'g L. & Pol'y Blog (Nov. 27, 2012, 2:09 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2012/11/one-notable-case-showing-impact-and-import-of-lafler-and-frye.html [https://perma.cc/TU8Y-8GBE].

153. Memorandum from Deputy Attorney General James M. Cole: Department Policy on Waivers of Claims of Ineffective Assistance of Counsel (Oct. 14, 2014).

the right to effective legal assistance, and she concludes that these agreements are valid.[154]

3. *More Prosecutions*. Plea bargaining enables prosecutors to obtain convictions in cases they would not have filed without it. It sweeps aside resource constraints on the total number of prosecutions and enables prosecutors to charge defendants when the likelihood of their conviction is not high enough to justify taking their cases to trial. The greater the prosecutors' bargaining power, the lower they can set their threshold for charging crimes.

John Pfaff concludes, "The primary driver of incarceration is increased prosecutorial toughness when it comes to charging people, not longer sentences."[155] Pfaff reports that between 1994 and 2008 in 34 states (the only states that provided reliable data on charging practices), crime rates fell, and so did the number of arrests. Nevertheless, the number of felony cases filed by prosecutors rose from 1.4 million per year to 1.9 million. The likelihood that an arrest would lead to a felony prosecution grew from about one in three to about two in three, and once a charge was filed, the likelihood that it would produce a conviction remained about the same. In the end, "the number of people admitted to prison rose by about 40 percent, from 360,000 to 505,000, and almost all of that increase was due to prosecutors bringing more and more felony cases against a diminishing pool of arrestees."[156]

---

154. *See* Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance: Waiving* Padilla *and* Frye, 51 DUQ. L. REV. 647, 648 (2013). *But see* Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. J. 73, 107 (2015) (strongly disapproving of bargained waivers of the right to effective legal assistance and suggesting they "might be considered unconstitutional").

155. PFAFF, *supra* note 8, at 6.

156. *Id*. at 72-73. When prosecutors file weaker cases but the conviction rate remains constant, a reasonable inference is that the prosecutors' bargaining power has grown. When the conviction rate *increases* as the cases filed grow weaker, a reasonable inference is that the prosecutors' bargaining power has grown *a lot*. Katherine Beckett observes that when Pfaff describes the conviction rate as "fairly stable," the figures upon which he relies include misdemeanor convictions. The likelihood that a felony charge would lead to a *felony* conviction, however, increased, just as one would expect if enhanced bargaining power enabled prosecutors to harvest more felony guilty pleas from people they could not have convicted at trial. *Both* increased felony filings *and* a higher rate of felony convictions (no doubt by guilty plea) contributed to mass incarceration. *See* Katherine Beckett, *Mass Incarceration and its Discontents*, 47 CONTEMP. SOC. 11, 20 (2018) (noting that "the share of (urban) defendants who were charged with, and subsequently convicted of, a felony increased from 50 to 59 percent between 1990 and 2004").

4. *Tougher Sentences*. As William Stuntz noted, prosecutors often can threaten harsher sentences than they want to impose. Their goal in bargaining is not always to maximize punishment.[157] Prosecutors nevertheless like to win, and their view of appropriate punishment is generally hawkish. The greater the prosecutors' bargaining power, the tougher the sentences they can obtain through plea bargaining.

John Pfaff contrasts his claim that prosecutorial charging decisions drove mass incarceration with what he calls the standard story, a story that portrays harsher sentences and the war on drugs as more important drivers.[158] The best judgment, however, is probably that increased incarceration rates should be "attributed about equally to the two policy factors—prison commitments per arrest and time served."[159]

Longer sentences certainly played a crucial role in some jurisdictions and for some crimes. Between 1988 and 2012, the average time served by federal prison inmates more than doubled—from 17.9 to 37.5 months.[160] Between 1984 and 2004 for state and federal prisoners combined, the time people convicted of robbery were expected to serve grew from 3.51 to 5.04 years; that for people convicted of rape and sexual assault from 5.05 to 8.09 years; and

157. *See* Stuntz, *supra* note 44, at 2554.

158. The most influential telling of the standard story is Michelle Alexander's. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR-BLINDNESS (2010).

159. ALLEN J. BECK & ALFRED BLUMSTEIN, TRENDS IN U.S. INCARCERATION RATES: 1980-2010, at 27 (2012). Separate reviews of Pfaff's book by Jeffrey Bellin and Kathryn Beckett cited Beck and Blumstein and other impressive scholarship in support of the proposition that both increased prison admissions per arrest and increased sentence length contributed to the explosion of incarceration rates. Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 841 (2018); Beckett, *supra* note 156, at 17.

Pfaff responded effectively to these reviewers' criticism of the data from the National Center for State Courts on which he relied to show increased felony filings, and he explained why these data were superior to other data indicating a considerably smaller increase in felony filings. *See* John F. Pfaff, *Prosecutors Matter: A Response to Bellin's Review of* Locked In, 116 MICH. L. REV. ONLINE 165 (2018). Beckett, however, argued persuasively (1) that Pfaff's methodology for assessing the increase in sentence length was defective, (2) that Pfaff focused on a period after much of the growth in sentences had occurred, and (3) that "time served did increase notably in recent decades, especially in the 1990s." Beckett, *supra* note 156, at 17; *see* Bellin, *supra* note 159, at 839–41 (similar).

160. PEW, PRISON TIME SURGES FOR FEDERAL INMATES: AVERAGE PERIOD OF CONFINEMENT DOUBLES, COSTING TAXPAYERS $2.7 BILLION PER YEAR (2015), https://www.pewtrusts.org/~/media/. . ./prison_time_surges_for_federal_inmates.pdf [*https://perma.cc/P4P2-BE4R]*.

that for people convicted of murder and manslaughter from 9.2 to 14.27 years.[161]

5. *Ka-Ching!* Whether changed prosecutorial charging practices or harsher sentences drove mass incarceration is a less important issue than it may seem. The issue's perceived significance probably stems from the assumption that the effect of American statutes and judicial decisions depends on what they say. If tough sentences are the problem, tough sentencing laws are likely to seem the cause, and reforming these laws is likely to look like the solution. If prosecutorial charging decisions are the problem, implementing guidelines for charging may appear to be a better response. The view that sentencing laws govern sentencing and procedural rules govern procedure, however, misses how the American criminal justice system works. Prosecutors can use their bargaining power as they like, and they sleep wherever they want.

Although John Pfaff emphasizes that prosecutorial charging practices grew tougher, he does not imagine that the transformation occurred simply because prosecutors everywhere had the same idea at the same time. Rather, he points to several reasons for increased felony filings. One was simply that there were more prosecutors.[162] Another was that "[two- and three-]strike laws, other repeat offender laws, mandatory minimums, gun enhancements, [and] long maximum sentences [made] the prosecutor's threat to go to trial riskier for the defendant."[163] (Even if tougher *sentences* did not cause mass incarceration, tougher sentencing *laws* apparently did. These laws could have affected incarceration rates, not by increasing sentences, but by increasing the number of people charged and convicted.) Over-criminalization contributed to tougher charges too,[164] as did the failure of state and local governments adequately to fund indigent defense.[165] So did other things.[166]

The content of statutes and judicial decisions matters up to a point. For one thing, a small minority of defendants still exercise

---

161. STEVEN RAPHAEL & MICHAEL A. STOLL, WHY ARE SO MANY AMERICANS IN PRISON 51 tble.2.4 (2013).

162. PFAFF, *supra* note 8, at 135.

163. *Id.*

164. *Id.* at 130–32.

165. *Id.* at 136–38.

166. *See id.* at 136–40 (noting that the growing cohort of people with criminal histories might have made prosecutors more ready to file charges, that police arrests might have become less vulnerable to challenge, and that the war on crime might have given prosecutors new political opportunities they sought to exploit by charging and convicting more people).

the right to trial, and for them, the law may apply more-or-less as written. Moreover, for other defendants, statutes and decisions establish how much bargaining currency the parties have and the marketplaces in which they can spend it. A prosecutor can spend the bargaining bangs created by a mandatory sentence for selling crack cocaine, for example, only in the crack-case marketplace; this currency has no value in bank robbery cases. Once a law applies or arguably applies to a case, however, the currency it creates can be used for any purpose.

In the United States, it's a mistake to suppose that substantive criminal laws determine what conduct will be punished, that procedural laws determine what procedures will be followed, and that sentencing laws determine what punishments will be imposed. Prosecutors can use the currency created by substantive laws to charge more people, to induce more of them to plead guilty, to make their guilty pleas more sweeping waivers of rights, and to punish them more severely. Similarly, they can use the currency created by procedural laws to charge more people, to induce more of them to plead guilty, to make their guilty pleas broader waivers of rights, and to punish them more severely. And they can use the currency created by sentencing laws to charge more people, to induce more of them to plead guilty, to make their guilty pleas broader waivers of rights, and to punish them more severely. Whenever new statutes apply or arguably apply, they might as well say, "One bargaining bang for prosecutors (ka-ching), two bargaining bangs for prosecutors (ka-ching), one bargaining bang for defense attorneys (ka-ching), and three more bargaining bangs for prosecutors (ka-ching)." Some laws deliver more bangs than others, but bargaining bangs are fungible. And nearly every way in which prosecutors spend their bangs causes prison populations to rise.[167]

Mass incarceration in the United States is the product of countless state and federal actions conferring power on bargaining prosecutors. In recent years, governments have repealed some mandatory minimum sentences and other prominent power-enhancing legislation.[168] Trimming the ugliest trees in a forest culti-

167. Not *every* way. For example, when Christopher J. Christie was the United States Attorney for New Jersey, he obtained a deferred prosecution agreement requiring a corporate defendant to contribute $5 million to Christie's law school alma mater, Seton Hall. These funds endowed a chair in business ethics, leaving the prison population unaffected. Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 174 (2008).

168. *See, e.g.*, Ames Grawert & Tim Lau, *How the First Step Act Became Law—and What Happens Next*, BRENNAN CENTER FOR JUSTICE (Jan. 4, 2019), https://

vated over 50 years, however, may not go far toward reducing prison populations.[169]

CONCLUSION

Would the United States have achieved mass incarceration without plea bargaining? Bargaining certainly did not cause either the crime surge that began in 1960 or the elections of Richard Nixon, Ronald Reagan, and Bill Clinton. Tough-on-crime politics probably would have led to increased incarceration even if prosecutors had not bargained.

But in a world without plea bargaining, the prison population probably would be less. For one thing, mass incarceration would have cost more. Taxpayers would have been required to pay the costs of giving people trials as well as the costs of imprisoning them. This cost might not have been great if policy makers had given defendants only nonjury trials.[170] Implementing the constitutional right to jury trial, however, would have made it very difficult for the United States to set world incarceration records.

Even more importantly: According to John Pfaff, mass incarceration occurred primarily because prosecutors charged people with felonies whom they previously would have charged with misdemeanors or not charged at all. In many cases, only increased bargaining leverage made these charges a plausible investment. The people who were charged with crimes only because bargaining leverage increased certainly would not have been charged had there been no bargaining at all. If Pfaff is correct or nearly correct, people who would not have been charged with crimes in the absence of plea bargaining probably swelled the ranks of prisoners.

Discussions of plea bargaining (especially favorable discussions) generally assume that "the law" is exogenous. The law may

---

www.brennancenter.org/blog/how-first-step-act-became-law-and-what-happens-next [https://perma.cc/9J66-3YLX].

169. Rachel Barkow reviews and praises recent state sentencing reforms but concludes that they "will not make much of a dent in the overall sweep of incarceration or criminal punishment in the United States." BARKOW, *supra* note 3, at 12, 119–22. Barkow proposes revamping the architecture of criminal-justice decision-making to reduce the influence of populist politics and afford greater weight to expert analyses of the effectiveness of crime-control measures.

170. *See* Schulhofer, *Is Plea Bargaining Inevitable?*, *supra* note 23, at 1040, 1084–86 ("[A] genuine [nonjury] trial does not require many more resources than a guilty plea does.").

One should not assume that Americans chose to pay even the costs of mass incarceration they did pay. When plea bargaining churns out punishment orders, the money to carry out these orders out must be found.

cast a heavy or a light shadow, but this brooding omnipresence is *just there*. Prosecutors and defense attorneys take it into account when they bargain. Bargaining, however, does not create the law or alter it.

This view of the criminal justice process is short-sighted. As William Stuntz observed, the dynamics of plea bargaining push toward broader substantive prohibitions, and plea bargaining leads to harsher sentences too. Harsh laws may encourage plea bargaining, but plea bargaining also encourages harsh laws. The causal arrows point both ways. The process isn't always subtle: Legislators sometimes approve measures for the purpose of enhancing prosecutors' bargaining power.

Increased harshness reflects a kind of rationality built into a system of plea bargaining. This system depends on punishing defendants convicted at trial more severely than defendants who plead guilty, and punishing the vast majority of offenders less than they deserve is a bad idea. The only way to punish offenders who plead guilty appropriately while maintaining overpowering incentives to plead guilty is to punish offenders convicted at trial severely. Plea bargaining is likely to work its way toward punishments whose coerciveness and injustice are almost too obvious to deny.

A familiar psychological process is at work too. When one rationalizes small shortcuts, the shortcuts get larger. If bargaining for guilty pleas doesn't seem so bad and in fact may benefit all concerned, bargaining for waivers of other rights begins to look good too—first the right to appeal, then the right to receive exculpatory evidence, then the right to the effective assistance of counsel, then the right to be free of cruel and unusual punishments, and finally, perhaps, the right to read the Qur'an. As plea bargaining becomes normal, one may see no reason not to make it more effective. A regime that once might have appeared defensible on the ground that it simply offered defendants a break can become one in which no one gets a break, exercising the right to trial is a crime, and imprisonment rates set a record. Walter Schaefer observed, "It is easy indeed to get used to a particular procedural system. What is familiar tends to become what is right."[171]

In 1970, the United States legitimized plea bargaining. Beneath a cloud of contrived rhetoric, it repudiated two basic principles of criminal justice—that a court or jury should be willing to hear what someone accused of a crime can say in his defense and

171. Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 7 (1956).

that an offender's punishment should rest on what he did. The Supreme Court and other tribal elders declared these principles sour grapes because one of the wealthiest nations on earth was unwilling to expend the resources needed to implement them. It looked like a bargain with the devil, and we know how those usually turn out.

CHIMES OF FREEDOM FLASHING: FOR EACH UNHARMFUL GENTLE SOUL MISPLACED INSIDE A JAIL

REBECCA BROWN AND PETER NEUFELD***

TABLE OF CONTENTS

* Rebecca Brown is the Director of Policy for the Innocence Project. Peter Neufeld is the co-Founder of the Innocence Project. The authors would like to acknowledge Rachelle Bishop and Amanda Witt from Sheppard Mullin, who assisted immeasurably in helping us with endless citations and were extraordinarily generous with their time. We also want to extend our gratitude to Joey Baruh and Catherine E. Cazes of NYU Law for their extensive reviews and helpful edits.

** I have known Stephen Schulhofer all my life. Our mothers were best friends since childhood and our families traveled, dined, and debated together for as long as I can remember. As I am eight years his junior, I went through my early life with my mother all too often suggesting I do whatever Stephen had already accomplished. Given his extraordinary achievements, that would be impossible. Stephen graduated summa from Princeton and summa from Harvard Law School, edited the Harvard Law Review, and clerked for Justice Hugo Black upon graduation. Perhaps my first insecurity about a career in law occurred my senior year in high school when I visited Harvard. I had been instructed by my mother to find Stephen at the law school. After several false steps I finally encountered him buried in the stacks, surrounded by endless open volumes, scribbling madly on yellow pads. That was the moment I temporarily eliminated the law from my future plans. Many years later I realized that in addition to being a champion of justice, he's a very nice guy.

INTRODUCTION

The more than 375 post-conviction DNA exonerations, all secured since 1989,[1] confirm with great certainty that the criminal legal system makes serious mistakes, and by design, contributes to erroneous adjudications of guilt. Over the last thirty years, DNA has provided irrefutable proof of innocence and has secured freedom for a significant but small proportion of those who have been convicted of crimes they did not commit.[2] DNA testing of biological evidence stored for more than forty years after the initial conviction produces more reliable outcomes than the original investigation or trial. Further, in half the cases, the new DNA testing not only clears the wrongly convicted, but it also identifies the person who actually committed the crime.[3]

The Innocence Project was founded with a single mandate to use DNA evidence to free the factually innocent who had been wrongly convicted.[4] However, our policy department was not established until more than ten years later. Although the Innocence Project is perhaps best known for its success in freeing the innocent, we came to realize that the most effective means for reducing the risk of wrongful conviction is through systemic policy reform. By 2000, a robust network of ten innocence organizations, had formed across

1. *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ [https://perma.cc/YA2C-PXSV] [hereinafter *DNA Exonerations in the United States*].

2. *Id.*

3. *Id.*

4. The Innocence Project was founded in 1992 by Barry C. Scheck and Peter J. Neufeld at the Benjamin N. Cardozo School of Law at Yeshiva University, to assist people who could be proven innocent through DNA testing. Now an independent nonprofit organization affiliated with Cardozo, the Innocence Project's mission is nothing less than to free the staggering numbers of innocent people who remain incarcerated and to bring substantive reform to the system responsible for their unjust imprisonment. *About,* INNOCENCE PROJECT, https://www.innocenceproject.org/about/ [https://perma.cc/C4LK-8SRS].

the country, litigating cases of innocence and establishing local presences that would serve our advocacy work to come. By 2002, we had amassed a substantial dataset of DNA-based exonerations, which helped us to determine many of the main contributing factors to wrongful conviction. We then set about identifying prospective reforms that were both evidence-based and, where possible, authenticated through jurisdictional practice.[5]

Thus, a key part of our policy effort has been to change laws, policies, and court rules, procedures and practices to eliminate some of the clear and more obvious pathways to wrongful conviction. Today we work in collaboration with partners in state-based innocence organizations within the Innocence Network,[6] now numbering more than fifty-six domestic groups, with legislatures and the courts to mandate systemic reforms, and with the executive branches of state and local governments and the federal government to secure remediation. Much of our reform agenda has been powered successfully not only through years of scientific research, but also by the extraordinarily compelling experiences of, and advocacy by, exonerated men and women.

We are also dedicated, however, to doing more to leverage the voices of the innocent to make broader and more impactful changes to our criminal legal system, from attacking the volume-based plea system that makes a mockery of due process and other constitutional protections, to addressing and combatting other factors, like racial bias,[7] that plague the criminal legal system from street stops through post-conviction work.

---

5. Some people erroneously believe that now that DNA testing is routine, there is no need to develop reforms for improving the reliability of non-DNA evidence. DNA is only present in a small minority of cases and thus whether reviewing old convictions or investigating current crimes, DNA will not be relevant most of the time. *See infra* note 8. But the causes of wrongful conviction are present whether or not DNA is available. Thus, if we are going to meaningfully reduce the risk of an erroneous result, we have to remediate the causes broadly to enhance the accuracy of the overwhelming majority of investigations and adjudications. Hence, an ever-critical role of the innocence movement has been to improve laws, policies, and procedures across the United States.

6. The Innocence Network is an affiliation of 69 organizations from all over the world dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted and working to redress the causes of wrongful convictions. Currently, the Innocence Network consists of 56 U.S.-based and 13 non-U.S.-based organizations. *About,* INNOCENCE NETWORK, https://innocencenetwork.org/about/ [https://perma.cc/7HAQ-HX8S].

7. *See* Innocence Project, *Human Factors in Wrongful Convictions: Implicit Bias, Psychological Phenomena That Can Lead to Wrongful Convictions*, YOUTUBE (Nov. 19,

In this article, we explore the Innocence Project's policy reform agenda, from its infancy to the present time. First, we begin with a discussion of the broader factors which contribute to false convictions, including how racial bias exacerbates both the reality and frequency of wrongful convictions. Next, we describe the Innocence Project's foundational reforms, which flowed from the identification of the most easily discernible contributing factors to wrongful conviction documented in our early cases. We then describe our advocacy in the states to allow the use of post-conviction DNA testing and move into a discussion of how the Innocence Project was able to use the results of its deconstruction of DNA exonerations to lobby for reforms to improve the quality of evidence. In addition to describing these advocacy efforts to date, we also explore other areas of reform within each of these topics that we will seek to pursue in the future. Finally, we turn to just a few examples of future and aspirational work, some of which is already underway, that we believe will have even broader impact on the criminal legal system by bringing the innocence voice to bear. These areas include exposing and reforming the problem of the coerced plea deal including in the misdemeanor setting, eliminating unscientific presumptive drug testing as a basis for detention or conviction, and monitoring and assuring external oversight of emerging technologies that could have adverse effects on people of color, privacy interests, and human rights. It is our hope that readers will appreciate how, through the innocence frame, policymakers might begin to envision a reimagined criminal legal system.

I.
SCOPE OF THE PROBLEM

The first 375 exonerations reflect the known successes of the Innocence Project as well as of other innocence organizations and post-conviction lawyers devoted to overturning wrongful convictions. However, these DNA-based exonerations likely reflect only the tip of the proverbial iceberg of erroneous convictions for several reasons. First, the wrongly convicted must bring the case to our attention, which may not happen if the individual is worn down by decades of judicial indifference. Second, our work is generally limited to old cases in which crime scene evidence containing biological material central to guilt or innocence was collected. Third, even if there was critical biological evidence, that evidence may be lost or

2018), https://www.youtube.com/watch?v=PEUXY8T_Fyg&feature=EMb_title [https://perma.cc/9RHL-23V9] [hereinafter *Psychological Phenomena*].

destroyed and no longer viable as a basis for exoneration. It has been estimated by crime lab directors that merely 10 to 20% of crimes have evidence suitable for DNA testing.[8] Tallies by other organizations give a taste for how large the number of false convictions may be. For example, the National Registry of Exonerations has attempted to track DNA as well as non-DNA exonerations. When the numbers are combined, a whopping 2,850 men and women have been exonerated since 1989.[9] And the figures estimated by the National Registry of Exonerations exclude the many people who were wrongly convicted due to serial or mass misconduct perpetrated by rogue members of law enforcement.[10] Finally, scholars have analyzed hard data on homicides, sexual assaults, and other crimes to get a handle on the frequency of wrongful convictions. The most robust analysis available reported a wrongful conviction rate of about 4% for capital cases.[11] A 2018 study on a general prison population by Charles Loeffler and colleagues reported an overall rate of about 6%, with considerable conviction-specific variability (from less than 1% to more than 10%).[12] This study provides some support for the previous estimate and reinforces the need for more research focusing on specific crimes and circumstances of conviction. Even if the frequency is half of what the research suggests, thousands of innocent people languish in prison.

While the universe of known wrongful convictions is limited, our analysis of those cases indicates that the problems which cause false convictions in the known cases are likely to be present in the unknown cases. Therefore, analyzing the known cases for common flaws reveals areas of the criminal legal system in need of reform. Our analysis of the DNA cases or the National Registry of Exonerations' much larger dataset reveals that the flaws are deep, systemic,

8. TERRY M. ANDERSON & THOMAS J. GARDNER, CRIMINAL EVIDENCE: PRINCIPLES AND CASES 321, 427 (9th Ed. 2014).

9. *See Summary View of Exonerations*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/browse.aspx [https://perma.cc/33FV-YZ2N] [hereinafter *Summary View of Exonerations*].

10. *See* Christine Hauser, *'A Stain on the City': 63 People's Convictions Tossed in Chicago Police Scandal*, N.Y. TIMES (Feb. 13, 2019), https://www.nytimes.com/2019/02/13/us/chicago-exonerations-drug-sentences.html [https://perma.cc/MFJ4-G29L]; *18 Exonerated in Chicago's Second Mass Exoneration*, INNOCENCE PROJECT (Sept. 24, 2018), https://www.innocenceproject.org/second-mass-exoneration-in-chicago/ [https://perma.cc/8G2R-N6SA].

11. *See* Samuel R. Gross et al., *Rate of False Convictions of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCI. U.S. 7230, 7230 (2014).

12. *See* Charles E. Loeffler et al., *Measuring Self-Reported Wrongful Convictions Among Prisoners*, J. QUANTITATIVE CRIMINOLOGY 259, 259 (2018).

and oftentimes multi-dimensional.[13] Among the most common contributing factors to those wrongful convictions are eyewitness misidentification, false confessions, the misapplication of forensic science, and incentivized jailhouse informants—which are explored in detail in this article—as well as other factors we address in our work beyond what is discussed in this article, such as police and prosecutorial misconduct, and inadequate defense counsel.[14] Although police policy reforms are not addressed here, it is self-evident that enhancing police transparency and accountability are essential first steps to achieve a greater measure of justice in criminal legal proceedings, and the Innocence Project has been engaged at the state and local level on a range of policing reforms, from ensuring that police disciplinary records are publicly available to the elimination of qualified immunity, a legal doctrine which has persistently prevented financial justice for victims of police violence

13. Our DNA-based dataset is neither random nor necessarily representative of the entire universe of wrongful conviction cases. The DNA data set is biased because it focuses only on the cases where DNA testing could be dispositive of innocence. Thus, particularly in the early years, the Innocence Project focused on sexual assaults and sexual assault murders where semen was recovered from the victim's genitals or blood from the wounded assailant left a line of drips as he fled the scene. Although in our DNA dataset, eyewitness and victim misidentification is the most common contributing factor, we cannot extrapolate that to all wrongful convictions. *See DNA Exonerations in the United States*, *supra* note 1. Our data set is conveniently skewed toward sexual assaults because DNA exclusions on semen, particularly in the early years of the Innocence Project, were the strongest evidence of innocence. The most common inculpatory evidence in sexual assault cases was the positive identification by the victim. *See* Samuel R. Gross & Michael Schaffer, Exonerations in the United States 1989-2012, NAT'L REGISTRY OF EXONERATIONS 40 (June 2012), https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf [https://perma.cc/B5Y7-STBD]. Once we showed the post-conviction DNA test on semen deposited by a non-consensual donor excluded the convicted person, a finding of misidentification inevitably followed. In comparison, if we looked only at the homicide DNA exonerations, the most common contributing factor is false confessions. *See* Samuel Gross & Maurice Possley, *For 50 Years, You've Had "The Right to Remain Silent"*, MARSHALL PROJECT (June 12, 2016), https://www.themarshallproject.org/2016/06/12/for-50-years-you-ve-had-the-right-to-remain-silent [https://perma.cc/Z48A-ZVAW]. Although the National Registry includes other types of crimes in addition to homicides and sexual assaults, and the frequency of contributing factors varies, they find the same contributing factors as the DNA data. *Cf. Summary View of Exonerations, supra* note 9.

14. *See The Causes of Wrongful Convictions*, INNOCENCE PROJECT, https://www.innocenceproject.org/causes-wrongful-conviction./ [https://perma.cc/U25Z-5QR2]; *Psychological Phenomena, supra* note 7.

and wrongful conviction[15] Pervading all these procedural and evidentiary failings is the United States' history of racism, from slavery to Jim Crow to mass incarceration.

Unconscious racial bias and explicit racism harm people of color, especially young and adult Black men.[16] From disproportionately high rates of police encounters which lead to arrest, to consistently more serious charges for the same conduct, denial of bail, inadequate defense, the likelihood of misconduct by prosecutors and police, indifference by judges and juries, and disparities in sentencing and parole, Black people are routinely treated far worse by the system.[17] It is not surprising that this disparity applies to the conviction of the innocent as well. Black men are overrepresented within the wrongful conviction dataset, even accounting for the disproportionate numbers convicted of homicide or sexual assault.[18] Black exonerees received longer sentences than white exonerees for the same type of crime.[19]

Consider the case of Calvin Johnson, a young African American man from Georgia who was arrested and accused of two separate rapes of white women in 1983.[20] Although the two assaults shared similar features—they occurred two days apart, in close proximity, and with the same highly unusual modus operandi—the county line separating Fulton and Clayton counties ran between the two victims' homes, thus necessitating two separate trials.[21] Both trials involved the particular difficulties associated with cross-racial

15. As we go to press, the Innocence Project has already begun efforts in collaboration with others to ensure the transparency of police disciplinary records and eliminate the doctrine of qualified immunity.

16. *See, e.g.*, Samuel R. Gross et al., Race and Wrongful Convictions in the United States, NAT'L REGISTRY OF EXONERATIONS 1 (2007), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf [https://perma.cc/PV4N-RAVC].

17. *See generally Report Regarding Racial Disparities in the United States Criminal Justice System*, SENTENCING PROJECT (Mar. 2018), https://www.sentencingproject.org/wp-content/uploads/2018/04/UN-Report-on-Racial-Disparities.pdf [https://perma.cc/73DK-TQXR] [hereinafter Sentencing Project Report]. Increasingly, Black women have become ensnared by the criminal legal system, leading to the #sayhername social movement coined by the African American Policy Forum. *See Say Her Name: Resisting Police Brutality Against Black Women*, AFR. AM. POL'Y F. 1–2 (July 2015), http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF_SMN_Brief_Full_singles-min.pdf [https://perma.cc/7CJQ-G9NU].

18. *See* Gross et al., *supra* note 16, at iii, 1.

19. 19 *See id.* at iii, 6-9.

20. *Calvin Johnson*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/calvin-johnson/ [https://perma.cc/BMS2-KREW].

21. BARRY SCHECK ET AL., ACTUAL INNOCENCE 198–99 (2000).

identifications. The Clayton County rape was tried first. The judge, the prosecutor, and every single member of the jury were white.[22] (While two black jurors had originally sat in the jury box, they were stricken when the prosecution used its "peremptory" challenges to remove them.)[23] The all-white jury rejected the alibi testimony offered by four black witnesses: Mr. Johnson's fiancé, his fiancé's mother, his mother, a beloved community member known for her charitable activities, and his father, a respected businessman and lawyer who had served as a state senator in Ohio before moving his family from the segregated city of Cincinnati to the racially integrated greater Atlanta community.[24] Instead they credited the testimony of not one but both white victims. The Fulton County victim was permitted to testify at the Clayton County trial, contrary to the usual prohibition of such testimony, once the judge ruled that the second rape was a similar transaction. The serology testing (forensic DNA testing had not yet been invented) was uninformative, but microscopic analysis of three "Negroid"[25] pubic hairs recovered from the victim's bedsheet excluded Mr. Johnson.[26] The prosecutor exploited the jury's racism, suggesting that the hairs were irrelevant, no doubt inadvertently attached to her white sheet when the victim was compelled to do her laundry at a racially integrated laundromat or to her body at a public toilet.[27] After a very brief deliberation, he was convicted and sentenced to life.[28]

Seven months later, he was tried in Fulton County, where the case against Mr. Johnson was stronger, because Mr. Johnson was cross examined on his recent rape conviction in Clayton County.[29] Nevertheless, Mr. Johnson was acquitted.[30] There was one notable difference at the second trial: the composition of the jury. A jury of five white and seven black people unanimously questioned the reliability of the cross racial identification.[31] The second jury evidently

22. *See id.* at 202.

23. *See id.*

24. *See id.* at 199–200.

25. At that time, crime labs differentiated hairs into three categories: Caucasoid, Negroid and Mongoloid. *See* Douglas W. Deedrick & Sandra L. Koch, *Microscopy of Hair Part 1: A Practical Guide and Manual for Human Hairs*, 6 FORENSIC SCI. COMM. 1 (2004), https://archives.fbi.gov/archives/about-us/lab/forensic-science-communications/fsc/jan2004/research/2004_01_research01b.htm [https://perma.cc/394X-CKLQ].

26. CALVIN C. JOHNSON, JR. & GREG HAMPIKIAN, EXIT TO FREEDOM 239 (2003).

27. *See id.*

28. *See id.* at 127.

29. *See* SCHECK ET AL., *supra* note 21, at 198–99.

30. *Id.* at 202.

31. *See id.*

found the alibi testimony of Calvin's mother and father more credible.[32] Sixteen years later, DNA testing on the semen left by the rapist in Clayton County excluded Calvin Johnson.[33] The same prosecutor who years earlier had suggested to the jury that the pubic hairs were irrelevant, in 1999 demanded they be tested since they could have been deposited by the rapist.[34] The testing revealed that the DNA profiles for the sperm and hairs were identical. The hairs were obviously left by the rapist. On June 15, 1999, without an appropriate apology from anyone responsible for this miscarriage of justice, Mr. Johnson's conviction was vacated and all charges were dismissed.[35] In addition to other contributing factors, a racially skewed jury and a racist appeal by the prosecutor were likely responsible for this wrongful conviction.

When it comes to securing freedom, race-based disparities are also present. It takes, on average, three years longer to clear an innocent black man for murder than one who is white; it takes four years longer if the defendant is on death row.[36] Given the human factors which contribute to wrongful convictions, we understand that true criminal legal policy reform requires more than changes to the law and its policies and practices; it also requires a massive cultural transformation such that people are suspected of, prosecuted, and tried for criminal acts based only on reliable, accurate, and objective evidence and not because of the color of their skin.

II.
FOUNDATIONAL REFORMS THAT REVEAL WRONGFUL CONVICTIONS

The initial wave of DNA exonerations led to a revolution in the criminal legal system. For the first time, prevailing law enforcement and prosecutorial conduct as well as court rules and doctrine were called into question. The Innocence Project's first priority was to establish policies that would help to reveal more wrongful convictions through the provision of statutory access to post-conviction DNA testing. With a favorable result, the innocent would be allowed go back into court to have the conviction vacated and the charges dismissed. When the Innocence Project was founded, most states had strict time limits on raising claims of innocence based on newly discovered evidence, and only two states—New York and Illi-

32. *See id.*
33. *See id.* at 207.
34. *Id.*
35. *See Calvin Johnson*, *supra* note 20.
36. *See* GROSS ET AL., *supra* note 16, at 7.

nois—had laws granting access to post-conviction DNA testing.[37] Today, all fifty states and the federal system have statutes providing post-conviction access to DNA testing and either laws or court rules to permit convicted persons to vacate their convictions with newly discovered evidence of innocence with or without DNA evidence.[38]

However, many of these statutes continue to be limited in substance and scope. As of this writing, the state of Alabama only permits post-conviction DNA testing to those who have been capitally-charged[39] and the state of Kentucky prohibits post-conviction DNA testing for those people who plead guilty.[40] Removing barriers in existing laws that provide only limited access to post-conviction DNA testing often proves more difficult than their original passage, as the more hard fought and controversial provisions were not successfully added in the initial efforts to pass those statutes. That said, gains continue to be made. In the states of Maryland, Pennsylvania, and Virginia, for instance, the Innocence Project recently and successfully lobbied for the removal of the prohibition on testing for people who previously plead guilty.[41]

An attendant reform to the establishment of robust post-conviction DNA testing laws is the proper retention of biological evidence. Since governments did not anticipate the probative value of DNA evidence, very little regard was given to proper preservation of that evidence. Indeed, innocence organizations across the country continue to struggle to locate evidence that can be subjected to post-conviction DNA testing. Evidence retention policies and practices varied from state to state and, within states, from county to county. In many jurisdictions there was no policy. If the local police or courthouse had a large, unused basement, evidence was serendipitously recovered for testing. While the Innocence Project worked in various states to craft evidence retention laws, it also lob-

37. *See* JEREMY TRAVIS & CHRISTOPHER ASPLEN, U.S. DEP'T OF JUSTICE, POST-CONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 10 (1999), https://www.ncjrs.gov/pdffiles1/nij/177626.pdf [https://perma.cc/2QAY-EAAJ].

38. *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT, https://www.innocenceproject.org/causes/access-post-conviction-dna-testing/ [https://perma.cc/3EBK-KPXN] [hereinafter *Access to Post-Conviction DNA Testing*].

39. ALA. CODE § 15-18-200(a) (2018).

40. *See* KY. REV. STAT. ANN. § 422.285 (West 2017). As of November 2015, 15% of exonerations came from convictions that included guilty pleas. *See Innocents Who Plead Guilty*, NAT'L REGISTRY OF EXONERATIONS (Nov. 24, 2015), http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf [http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdfhttps://perma.cc/XSK9-WVQX].

41. *See* MD. CODE ANN., CRIM. PROC. § 8-201 (West 2018); *see also* 42 PA. STAT. AND CONS. STAT. ANN. § 9543.1 (West 2016).

bied the federal government to create a Technical Working Group to provide guidance to states and localities, which resulted in the publication of two reports—one for evidence custodians[42] and the other for policymakers.[43] Those reports continue to provide guidance to state and local governments.

The rising number of DNA exonerations due to laws which enable post-conviction DNA testing has consequently eroded the "doctrine of finality," which historically prevented the convicted from regaining access to the court system, despite newly discovered evidence, when that evidence was uncovered many years after the original conviction.[44] The "doctrine of finality" endorses a hard cut-off point, after which even the actually innocent could not challenge the correctness of the conviction in the interest of finality (i.e., ensuring that courts would not have to potentially revisit a matter years after the original trial).[45] When the Innocence Project started, all but nine states had a strict time limit for getting back into court.[46] For example, Virginia had one of the most onerous: 21 days after the conviction was final, there could be no judicial remedy for innocence.[47] The rationale for this finality was that after ten, twenty, or thirty years, memories fade, witnesses die, and evidence is lost. Thus, one was less likely to achieve a more reliable outcome of innocence or guilt at the re-trial than was secured at the original adjudication. But the availability of post-conviction DNA evidence has tipped the balance in favor of getting access to the courts. The courts, legislatures, and other policymakers generally came to recognize that DNA evidence which excluded the convicted individual, even if presented thirty years after conviction, was a far more reliable indication of innocence than the fallible identification, jailhouse informant, or unrecorded confession produced

42. *See* NAT'L INST. STANDARDS & TECH., U.S. DEP'T OF COMMERCE, THE BIOLOGICAL EVIDENCE PRESERVATION HANDBOOK: BEST PRACTICES FOR EVIDENCE HANDLERS (2013), https://nvlpubs.nist.gov/nistpubs/ir/2013/NIST.IR.7928.pdf [https://nvlpubs.nist.gov/nistpubs/ir/2013/NIST.IR.7928.pdfhttps://perma.cc/HB4X-N8YQ].

43. *See* NAT'L INST. STANDARDS & TECH., U.S. DEP'T OF COMMERCE, BIOLOGICAL EVIDENCE PRESERVATION: CONSIDERATIONS FOR POLICY MAKERS (2015), https://nvlpubs.nist.gov/nistpubs/ir/2015/NIST.IR.8048.pdf [https://nvlpubs.nist.gov/nistpubs/ir/2015/NIST.IR.8048.pdfhttps://perma.cc/8NZZ-PW5N].

44. *See* Sarah L. Cooper, *Forensic Science Developments and Judicial Decision-Making in the Era of Innocence: The Influence of Legal Process Theory and Its Implications*, 19 RICH. PUB. INT. L. REV. 211, 228 (2016).

45. *See* Herrera v. Collins, 506 U.S. 390, 409 (1993) (debating whether to impose a time limit in the interest of finality).

46. *See id.* at 411 ("[N]ine States have no time limits.").

47. *See id.* at 410 n.8 (citing Va. SUP. CT. R. 3A:15(b) (1992)).

at the original trial. Virginia has since done away with its 21-day rule and many other states have made it easier to get back into court.[48] The growing recognition that other forms of evidence might be fallible has also opened the door to quelling objections—grounded in the "doctrine of finality"—to expanded post-conviction mechanisms for courts to revisit convictions based on other forms of evidence. Not only is it now easier to get back into court with DNA evidence, but we have made inroads with non-DNA evidence as well.[49]

Another consequence of the emergence of a sizeable number of DNA-based exonerations is the realization that police and prosecutors had, for decades, relied on many other forensic methods lacking a proper scientific foundation. The misapplication of forensic science, including bitemark analysis, flawed conventional serology, dog sniffing evidence, shoe impression evidence, and hair and fiber comparisons contributed to almost half the wrongful convictions proven through post-conviction DNA testing.[50] In response, California and Texas led the way, creating a statutory framework to get back into court if the convicted person could show that either the scientific community's understanding of a forensic method's probative value has diminished over time or that the prosecution's original trial expert now repudiates his trial testimony.[51] Connecticut,[52] Michigan,[53] Nevada,[54] West Virginia,[55] and Wyoming[56] have

48. VA. CODE ANN. § 19.2-327.1. *See generally* MD. CODE ANN., CRIM. PROC. § 8-201 (West 2018); 42 PA. CONS. STAT. § 9543.1 (2018).

49. *See Policy Reform*, INNOCENCE PROJECT, https://www.innocenceproject.org/policy/ [https://perma.cc/VS3E-8XJ8].

50. *Overturning Wrongful Convictions Involving Misapplied Forensics*, INNOCENCE PROJECT, https://www.innocenceproject.org/overturning-wrongful-convictions-involving-flawed-forensics/ [https://perma.cc/9QSB-JR8S] [hereinafter *Misapplied Forensics*].

51. In 2014, California enacted a law that allowed convicted people to seek relief based on flawed forensic evidence used in their convictions. CAL. PENAL CODE § 1473(e)(1) (West 2018). In 2013, Texas passed the first law in the nation allowing people to challenge their convictions based on new or discredited scientific evidence. TEX. CODE CRIM. PROC. ANN. art. 11.073 (West 2017).

52. In 2018, Connecticut enacted a law removing the 3-year time limit in its law regarding motions for new trial to permit the introduction of new, non-DNA evidence after conviction. The new law includes a provision to clarify that new evidence may include new scientific research, guidelines, or expert recantation. CONN. GEN. STAT. ANN. § 52-582 (West 2018).

53. In 2018, Michigan amended its court rule that dictates post-appeal relief. The changes allow a person to file a post-conviction motion for relief based on new scientific evidence, including but not limited to: shifts in a field of scientific knowledge, changes in expert knowledge or opinion, and shifts in a scientific method used in a conviction. MICH. COMP. LAWS ANN. § 6.502(G)(3) (West 2019).

also adopted comparable "changes in science" frameworks by statute or court rule through the advocacy efforts of the Innocence Project, partner Innocence Network organizations, and other groups. Even though courts have become more accessible, and despite more than 2000 non-DNA exonerations, it remains unreasonably difficult to secure a vacatur where exculpatory DNA evidence is unavailable.[57] While advocates have worked diligently to obtain clear and efficient pathways to prove innocence, procedural, practical, and political barriers continue to impair our ability in many jurisdictions to prove the innocence of the wrongfully convicted. Therefore, this aspect of our policy agenda remains a priority.

III.
REFORMS THAT PREVENT WRONGFUL CONVICTION

Regaining access to court and securing post-conviction DNA testing long after appeals have been exhausted are "back end" reforms to correct a miscarriage of justice. Simultaneously, we needed to couple the "back end" reforms with "front end" improvements of police, prosecutorial, and crime lab practices to prevent the innocent from being convicted in the first place. Once we identified the most common causes of wrongful conviction, our team leveraged

54. In 2019, Nevada enacted a 'changes in science' law that clarifies that new evidence may include "[r]elevant forensic evidence . . . that was not available at trial" or that materially undermines forensic evidence presented at trial. "Forensic scientific evidence is considered to be undermined if new research or information exists that repudiates the foundational validity of scientific evidence or testimony or the applied validity of a scientific method or technique." NEV. REV. STAT. ANN. § 34.930 (West 2019).

55. W. VA. CODE ANN. § 53-4A-1 (WEST).

56. In 2018, Wyoming enacted a 'factual innocence' law to remove the state's two-year time limit for introducing new, non-DNA evidence. The law includes a provision which clarifies that new evidence may include new scientific research, guidelines, or expert recantations that undermine forensic evidence used for convictions. WYO. STAT. ANN. § 7-12-402 (West 2018).

57. Many state statutes contain procedural bars to the post-conviction consideration of new evidence, such as newly secured video surveillance evidence, digital evidence corroborating an alibi, or recanting witnesses who attribute the original false statement to police coercion. *See Misapplied Forensics*, *supra* note 50. Even newly elected, reform-oriented prosecutors, who attempt to correct past errors by vacating convictions are thwarted sometimes by Attorneys General. *See* State v. Johnson, No. ED108193, 2019 Mo. App. LEXIS 2011 (Ct. App. Dec. 24, 2019); *see also* Richard A. Oppel, Jr., *30 Prosecutors Say Lamar Johnson Deserves a New Trial. Why Won't He Get One?*, N.Y. TIMES (Dec. 25, 2019), https://www.nytimes.com/2019/12/25/us/criminal-justice-missouri-conviction.html [https://perma.cc/7B3W-U3ET].

years of extant academic scientific research with the power of the exonerees' experiences to secure reforms that mitigate some of the causes. We have contributed to the passage of more than 200 statutory reforms, many new court rules, and an untold number of instances of voluntary cooperation between the prosecution and those seeking exonerating DNA evidence.[58]

We were able to show law enforcement and judges that these reforms would enhance the reliability and accuracy of the criminal legal system, establishing the Innocence Project's credibility and expediting the adoption of these reforms. Other stakeholders immediately grasped the fact that every time the state convicted an innocent, the person who actually committed the crime remained at liberty to commit other crimes. Getting it right not only protected the innocent, it was also a matter of urgent public safety.

A. Eyewitness Misidentification

Eyewitness misidentification[59] is one of the single largest contributing factors of erroneous conviction in cases of exonerations proven through post-conviction DNA testing. There are few things more compelling to a jury than a victim of a violent crime stating on the witness stand, "As God as my witness, I will never forget the face of the person who attacked me." Eyewitness identifications are invariably accepted by jurors as accurate because they are communicated with a great degree of emotion and confidence. Indeed, jurors give more credence to confident witnesses, even though research indicates that eyewitness confidence and accuracy are generally not well correlated.[60]Jurors are understandably eager to believe and validate victims of crime who have endured unspeakable vio-

58. *See, e.g.*, *Eyewitness Identification Reform*, INNOCENCE PROJECT, https://innocenceproject.org/eyewitness-identification-reform/ [https://perma.cc/YZL9-2UDN] [hereinafter *Eyewitness Identification Reform*]; *Inadequate Defense*, INNOCENCE PROJECT, https://www.innocenceproject.org/causes/inadequate-defense/ [https://perma.cc/N96M-5L6K]; *Informing Injustice: The Disturbing Use of Jailhouse Informants*, INNOCENCE PROJECT (Mar. 6, 2019), https://www.innocenceproject.org/informing-injustice/ [https://perma.cc/PY5H-85PA] [hereinafter *Informing Injustice*]; *Misapplied Forensics*, *supra* note 50.

59. *See DNA Exonerations in the United States*, *supra* note 1. We are not suggesting that misidentification is in fact the most common contributing factor in the universe of wrongful convictions. Rather, in most sexual assaults the victim's identification is the key piece of evidence, whereas in our homicide cases, the most frequent contributing factor is a false confession. *Id.*

60. *See* J.T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence & Identification Accuracy: A New Synthesis*, 18 PSYCHOL. SCI. PUB. INT. 10, 18 (2017); *see also* Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 624 .

lence. They have no motive to lie. In his book, Calvin Johnson, the exonerated man referenced earlier in this article described the victim eyewitness's testimony in his case , *Exit to Freedom*: "Listening to her testimony, it is impossible not to be moved, and it is obvious she has the jury's sympathy. . . . I pray that the jury is not so steeped in sympathy for this woman that they will believe her incredulous identification."[61] Unfortunately, however, juror desire to value the word of a victim is coupled with the common and mistaken belief that memory operates much like a videorecorder. In reality, the memory of a person's face is typically tested during an eyewitness identification procedure that is performed often days—and sometimes months—after the crime, which often yields an incorrect recall. The more accurate method would be a reconstruction of the face the witness saw.

There are a range of factors outside of the identification procedure used by law enforcement that impede or prevent an accurate identification. There are variables that hinder a clear viewing of the perpetrator by the eyewitness, including distance, lighting, obstructions, angle, disguise (e.g., hats or hoods) and visual acuity. There are also factors that impede the reliable encoding of that viewing into memory, including extreme stress, the presence of a weapon (which leads witnesses to focus on a gun, for instance, rather than on a face), and "own race bias." Further, if eyewitness identification procedures are not conducted using pristine, scientifically supported best practices and conditions, the possibility for misidentification is ever greater because, like other forms of crime scene evidence, memory can easily be contaminated.[62]

The Innocence Project endorses a range of reforms to improve the accuracy of eyewitness identification. These reforms have been recognized by police, prosecutors, and judges, as well as by the National Academy of Sciences (the nation's premier independent scientific entity), the U.S. Department of Justice, the International Association of Chiefs of Police and the American Bar Association.[63] The benefits of these reforms in achieving more accurate and relia-

61. *See* JOHNSON, supra note 26, at 97.

62. *See* Wells et al., *supra* note 59.

63. *See Eyewitness Identification Reform*, *supra* note 57. *See generally* INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY: EYEWITNESS IDENTIFICATION (Sept. 2010); NAT'L RESEARCH COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION (2014), https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification [https://perma.cc/Y59F-74N8]; U.S. DEP'T OF JUSTICE OFFICE OF THE DEPUTY ATTORNEY GEN., EYEWITNESS IDENTIFICATION: PROCEDURES FOR CONDUCTING PHOTO ARRAYS (Jan. 6, 2017).

ble eyewitness identifications are corroborated by a half-century of peer-reviewed comprehensive research.[64]

1. Initial Reform Efforts

While there are many areas ripe for eyewitness identification improvement, the Innocence Project's initial police practice policy focus was guided by key reform recommendations endorsed by the scientific community, including:

1. Blind Administration: A "double-blind" lineup is one in which the administrator of an identification procedure does not know the identity of the suspect. This prevents the administrator from providing inadvertent or intentional cues to influence the eyewitness to pick the suspect.[65]

2. Instructions: "Instructions" are a series of statements issued by the lineup administrator to the eyewitness that deter the eyewitness both from assuming the actual perpetrator is present in the line-up or identification procedure and from feeling pressured or compelled to make a selection. One of the recommended instructions includes the directive that *the perpetrator may or may not be present in the lineup*.[66]

3. Composing the Lineup: Research recommends composing a line-up with non-suspect photographs and/or live lineup members (fillers) that both involve a "match to description," i.e., fillers should be selected based on their resemblance to the description provided by the eyewitness, while also assuring that fillers resemble the suspect such that the suspect should not noticeably stand out from among the other fillers.[67]

4. Confidence Statements: Immediately following the identification procedure, the eyewitness should be asked to provide a statement, in his or her own words, that articulates the level of confidence in the identification made. It is important to capture the level of certainty at the time the identification is made because

---

64. *See generally* NAT'L RESEARCH COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION, *supra* note 62.

65. Wells et al., *supra* note 59, at 627.

66. *See* Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 LAW & HUM. BEHAV. 283, 294 (1997).

67. *See* Gary L. Wells et al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification*, 44 LAW & HUM. BEHAV. 3, 17–20.; *see also* Innocence Project, REEVALUATING LINEUPS: WHY WITNESSES MAKE MISTAKES AND HOW TO REDUCE THE CHANCE OF MISIDENTIFICATION 5, 10, 18, (2009), https://www.innocenceproject.org/wp-content/uploads/2016/05/eyewitness_id_report-5.pdf [https://perma.cc/XY92-5XT6] [hereinafter REEVALUATING LINEUPS].

eyewitness confidence can be artificially inflated over time through confirming feedback.[68]

The first state to adopt reform in this area was New Jersey in 2001, under former Attorney General John Farmer.[69] In New Jersey, Attorney General law enforcement guidelines are tantamount to law, as the Attorney General enjoys unique plenary authority over local and state law enforcement.[70] Following the issuance of these guidelines, however, eyewitness identification reforms in other states initially stalled. Because of law enforcement resistance to uniform mandates guiding their practice in this area, by 2013, only seven states had implemented statewide reform.[71] Given the prevalence of eyewitness misidentification in our exoneration cases and the slow adoption of reform, the Innocence Project prioritized advocacy over a five-year period. Today, twenty-six states[72] have uniformly adopted improved eyewitness practices through policy or law, and three additional states also require what is arguably the single most important reform: namely the blind administration of lineups.[73]

2. Addressing Estimator Variables

Modifications to police practice are central to helping crime victims and witnesses make accurate and reliable identifications free from government influence. These changes, however, do little to address what are referred to as "estimator variables": factors that cannot be controlled by properly conducted identification procedures and that impact the quality of an eyewitness's memory of the event to begin with.[74] For instance, a properly administered identification procedure cannot repair conditions that prevented an eyewitness from having a good opportunity to view the perpetrator.

---

68. NAT'L RESEARCH COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 108 (2014) [hereinafter IDENTIFYING THE CULPRIT].

69. *See* Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, WIS. L. REV. 615, 616 (2006).

70. *See id.* at 634–35.

71. CAL. PENAL CODE § 859.7 (West 2020); COLO. REV. STAT. ANN. § 16-1-109 (West 2015); MD. CODE ANN., PUB. SAFETY § 3-506.1 (West 2015); MINN. STAT. ANN. § 626.8433 (West 2020); N.M. STAT. ANN. § 29-3B-3 (West 2019); N.C. GEN. STAT. ANN. § 15A-284.52 (West 2019); OHIO REV. CODE ANN. § 2933.83 (West 2010); VT. STAT. ANN. tit. 13, § 5581 (West 2014).

72. *Eyewitness Identification Reform*, *supra* note 57; VA. CODE ANN. § 19.2-390.02 (West 2005).

73. *See* FLA. STAT. ANN. § 92.70 (West 2017); 725 ILL. COMP. STAT. ANN. 5/107A-2 (West 2015); N.Y. CRIM. PROC. LAW § 60.25(1)(a)(ii) (McKinney 2017).

74. IDENTIFYING THE CULPRIT, *supra* note 67, at 17.

These factors include: whether or not the eyewitness was wearing corrective eyewear; the physical distance between the eyewitness and the perpetrator; and whether there was sufficient lighting to allow for a clear view of the perpetrator.[75] Other estimator variables have less to do with viewing conditions and instead implicate cognitive factors. For instance, research has demonstrated that witnesses are significantly better at identifying members of their own race than those of other races.[76]

As a result, the Innocence Project continues to educate the judiciary, the defense, and the prosecution in efforts to familiarize them with scientific research that demonstrates the fallibility of identifications that were negatively influenced by poor viewing conditions or other estimator variables. Remedies take the form of judicial suppression (when accompanied by suggestiveness), issuance of jury instructions, and the admission of expert testimony. Judicial education efforts have taken place in West Virginia and Maryland, and defense trainings are regularly conducted by Innocence Project staff throughout the country.

Additionally, we have begun to see momentum for renovation of the traditional legal framework established by the U.S. Supreme Court,[77] which has been widely rejected by the scientific community. In *Manson v. Brathwaite*, the Court created a two-part balancing test for determining the admissibility of eyewitness identification evidence, requiring first an assessment of whether a questioned identification procedure was unnecessarily suggestive and, if so, whether the identification evidence is nonetheless reliable.[78] The *Manson* decision and its five enumerated factors for assessing reliability[79] preceded the emergence of critical social science research that would have better informed the factors used to determine reliability. In the same way that police practice has begun to shift to accom-

75. *Id.*

76. *See id.* at 96.

77. Manson v. Brathwaite, 432 U.S. 98 (1977).

78. *See id.* at 110–14.

79. The factors to be considered are: (1) "the opportunity of the witness to view the criminal at the time of the crime"; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description; (4) "the level of certainty demonstrated at the confrontation"; and (5) the time passed between the crime and the confrontation. *Id.* at 114. Science has shown four of the five "reliability" factors to be highly unreliable. Opportunity to view, degree of attention, accuracy of description, and certainty arise from the witness's own self-reporting, and thus are susceptible to suggestion and inaccuracy. *See* Alexis Agathocleous, *Confronting the Problems of* Manson v. Brathwaite*: Scientifically Sound Approaches to Suppression in Eyewitness Identification* Cases, CHAMPION 18, 19–20 (Nov. 2019).

modate the legal changes grounded in scientific research that have developed over the past few decades, so too have the courts. Since the *Manson* ruling, six states have abandoned their traditional balancing tests in favor of new frameworks, some of which incorporate carefully tailored jury instructions that provide fact-finders with scientific explanations of how certain non-*Manson* variables may impact the reliability of the identification.[80] For instance, the state of New Jersey has issued a set of tailored jury instructions that educate fact-finders not only about those variables that law enforcement can control (system variables), but also those factors that it cannot (estimator variables).[81]

3. Where We Want to Go

While the Innocence Project initially focused on a set of improvements that were scientifically supported and fairly easy to adopt, the next wave of reforms in this area should address the following additional system variables:

1. Documenting the Procedure: Ideally, lineup procedures should be video recorded.[82] If this is impracticable, there should be an audio recording. Recordation provides rich contextual information about an identification procedure. It will show, for instance, evidence of explicit and sometimes subtle feedback from law enforcement. It might also reveal "jump out" identifications, identifications that happen quickly and are more likely to be accurate because they flow from actual recognition versus other identifications that may instead be generated from a reasoning process and are less likely to be accurate.[83]

2. Regulating Show-Up Identifications: Show-up procedures, in which an eyewitness is presented with a single, live suspect for the purposes of identification or exclusion, are inherently suggestive and should only be used when absolutely necessary. When show-up procedures are used, regulated protocols should be employed for reducing suggestiveness.[84]

---

80. *See* UTAH R. EVID. 617; State v. Kaneaiakala, 450 P.3d 761, 772–73 (Haw. 2019); State v. Harris, 191 A.3d 119, 144–45 (Conn. 2018); Young v. State, 374 P.3d 395, 412 (Alaska 2016); State v. Lawson, 291 P.3d 673, 690 (Or. 2010) (en banc); State v. Henderson, 27 A.3d 872, 919 (N.J. 2011).

81. *See Henderson*, 27 A.3d at 919–24.

82. *See* IDENTIFYING THE CULPRIT, *supra* note 67, at 108.

83. *See id.* at 109.

84. *See id.* at 107.

3. Prohibiting Composites: Composite procedures have been shown to contaminate memory and should therefore be prohibited.[85]

4. Prohibiting Multiple Identification Procedures: Only one identification procedure should be used for each suspect. Multiple procedures can create a "commitment" effect in which the eyewitness recognizes a lineup member from a previous identification procedure rather than from the time the perpetrator was viewed during the crime.[86]

5. Training Dispatchers: When a dispatcher is provided with an incomplete description of the perpetrator, there are more opportunities to ensnare the innocent. Researchers are identifying ways of asking non-leading follow-up questions to those who report viewing a crime so that dispatchers are able to obtain fuller descriptions of perpetrators when 911 calls come in.[87] Once there is a scientific foundation for a stronger dispatcher protocol, the Innocence Project will issue policy recommendations that will assure more detailed descriptions of those who commit crimes. This is of particular importance given the overrepresentation of people of color in street stops by law enforcement. Court rulings have noted that Black men, in particular, who are often viewed with suspicion and seek to avoid police interactions for legitimate reasons—these rulings have cited incomplete descriptions as a contributing factor to the unfounded police stop.[88] Arguably, fuller descriptions of suspects through improved dispatcher protocol and training can help to avoid unwarranted street stops that ensnare the innocent and could potentially lead to more wrongful convictions.

The Innocence Project will also continue to advocate for the abolition of "in-court identifications."[89] In-court identifications,

85. *See* REEVALUATING LINEUPS, *supra* note 66, at 15.

86. *See* Nancy K. Steblay & Jennifer E. Dysart, *Repeated Eyewitness Identification Procedures with the Same Suspect*, 5 J. APPLIED RES. MEMORY & COGNITION 284, 285 (2016).

87. *See* Brittany P. Kassis, 911 Dispatchers: Their Role as Evidence Collectors 23–34 (Dec. 2017) (Masters thesis) (on file with CUNY Academic Works).

88. "Lacking any information about facial features, hairstyles, skin tone, height, weight, or other physical characteristics, the victim's description 'contribute[d] nothing to the officers' ability to distinguish the defendant from any other black male' wearing dark clothes and a 'hoodie' in Roxbury." *See* Zeninjor Enwemeka, *Mass. High Court Says Black Men May Have Legitimate Reason to Flee Police*, WBUR NEWS (Sept. 20, 2016), https://www.wbur.org/news/2016/09/20/mass-high-court-black-men-may-have-legitimate-reason-to-flee-police [https://perma.cc/QQH7-8KGM].

89. Connecticut and Massachusetts have both curtailed in-court identifications. In 2016, the Connecticut Supreme Court held that witnesses cannot make an

which typically follow other out-of-court identification procedures, mask problems with those previous procedures and invite the jury to focus only on the identification procedure they witness themselves in the courtroom, which is the least reliable or probative procedure possible. For instance, when one considers that confidence can be artificially inflated through confirming feedback by law enforcement to the witness at the time when the first identification was made, meaning that an uncertain witness's confidence can be—even unintentionally—manufactured, the in-court identification provides no additional evidentiary value but instead promises to prejudice fact-finders.[90] Introducing a reliable out-of-court identification should be ample proof of identity.[91]

B. False Confessions

One of the most counterintuitive aspects of human behavior is the decision to self-incriminate, and in particular, to do so falsely. While the general public and lawmakers understandably believe a false confession is anomalous—we wouldn't falsely confess to a serious crime unless a gun was pointed at our heads—we have discovered through DNA-based exonerations that it is a frequent contributing factor to wrongful convictions, present in nearly 30% of our DNA exonerations.[92] In homicide exonerations, it is the most common contributing factor to false conviction among the DNA cases.[93] And while counterintuitive to most, sometimes the decision to falsely confess to a crime is a perfectly rational choice given the circumstances of the interrogation.

A person might falsely confess to a crime he or she did not commit due to stress, exhaustion, disorientation and confusion, feelings of inevitability and hopelessness, the threat—or perceived threat—of violence or adverse treatment of the suspect and/or loved ones by law enforcement, fear of a harsher punishment for a failure to confess, substance use, mental limitations, among

in-court identification unless they knew the defendant prior to witnessing the crime, already identified the defendant in an out-of-court procedure, or the defendant's identity is not contested. *See* State v. Dickson, 141 A.3d 810, 836–37 (Conn. 2016). The Massachusetts Supreme Court held in 2014 that without a prior out-of-court identification procedure, in-court identifications could only be made where "good reason" exists. *See* Commonwealth v. Crayton, 21 N.E.3d 157, 169 (Mass. 2014).

90. *See* IDENTIFYING THE CULPRIT, *supra* note 67, at 109–11.

91. *See id.* at 110–11.

92. *DNA Exonerations in the United States*, *supra* note 1.

93. *See id.*

others.[94] While there are some particularly vulnerable groups, including young people and people with cognitive deficits or mental illnesses,[95] it is important to understand that mentally competent adults are capable of, and often do provide, false confessions.[96] Even more troubling is the fact that judges and juries uncritically believe confessions when confronted with them, since, historically, it was nearly impossible to discern a true confession from a false one.[97]

This is particularly troubling when one considers the fact that false confessions are persuasive enough to overpower exculpatory DNA evidence and have the ability to trump scientific certainty in the minds of fact-finders. One such example is Juan Rivera of Lake County, Illinois, an innocent man who was convicted of the rape and murder of an 11-year-old girl on the basis of a false confession, even after DNA testing of the semen recovered from the deceased excluded him, at the time of the trial, as the possible contributor. He was eventually exonerated after spending twenty years in prison.[98] Shockingly, it is not uncommon for confession evidence to trump the power of exculpatory DNA evidence, as can be seen in many of the DNA-based confession exonerations.[99] Indeed, cases like Juan's demonstrate that confessions have more impact on jury verdicts than other, more potent, forms of evidence.[100]

---

94. *See, e.g.*, Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 14–22 (2010) [hereinafter *Police-Induced Confessions*].

95. *Id.* at 19. The outsized weight given to confessions has been known for some time. DNA reveals the catastrophic consequences. *See* Colorado v. Connelly, 479 U.S. 157, 174 (1986) (Brennan, J., dissenting) ("Our distrust for reliance on confessions is due, in part, to their decisive impact upon the adversarial process. Triers of fact accord confessions such heavy weight in their determinations that 'the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained.'" (quoting E. CLEARY, MCCORMICK ON EVIDENCE 316 (2d ed. 1972)).

96. *See Police-Induced Confessions supra* note 93, at 20–21; *see also* Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCHIATRY & L. 332, 335 [hereinafter Leo, *False Confessions*].

97. *Police-Induced Confessions*, *supra* note 93, at 5; Leo, *False Confessions*, *supra* note 95, at 333.

98. *See Juan Rivera*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3850 [https://perma.cc/UHB3-W3MG].

99. *See generally* Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCHOLOGIST 431 (2012).

100. *See* Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 17 CURRENT DIRECTIONS PSYCHOL. SCI. 249, 252 (2008).

There are several reasons why fact-finders may find a confession more convincing than DNA evidence. One explanation is that people have a strong tendency to believe statements that fly in the face of self-interest.[101] Yet post-conviction exonerations have shown that there are a number of reasons why a person may issue an erroneous confession, including those cited above, despite the disservice it does to their case.

Another reason that confessions may sometimes overpower DNA evidence is the notion that confessions must be true if they contain accurate details about the crime, including non-public details that could have been known only to the perpetrator. Adding to this perception is the fact that police are—at least in theory—trained to minimize the risk of false confessions. Indeed, the experienced detective deliberately holds back from the press and the community certain details of the crime scene, so that when a suspect is ultimately apprehended and tells the police, "I did it," the police can test the veracity of the admission based on whether the suspect is able to provide the held-back details during interrogation.[102] Logically, to corroborate the admission, the non-public details must originate with and be volunteered by the suspect.[103] These withheld details are usually facts that cannot be guessed or learned through the media or community gossip.[104] Typically, a police chief or prosecutor declines to answer a reporter's question because doing so would reveal some crime scene details the police

101. *See* Leo, *False Confessions*, *supra* note 95, at 333.

102. For more than three decades, the leading text used by law enforcement emphasized the importance of the suspect revealing non-public facts about the case that only the true perpetrator could have known or that could be independently verified. *See* FRED INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 173, 183, 191 (3rd ed. 1986).

103. *See Police-Induced Confessions*, *supra* note 93, at 25.

104. The held-back details could involve something unusual about the crime scene such as that the perpetrator left silver dollars covering the eyes of the deceased, took with him a particular item of clothing belonging to the victim, or hid the weapon in an unusual place. *See, e.g.*, *Earl Washington*, NAT'L REGISTRY OF EXONERATIONS https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3721 [https://perma.cc/Y5TL-H6CW]. Earl Washington, a man with significant intellectual deficits, wrongly convicted of rape and murder, was fed the detail that he hid his bloody t-shirt, previously found by the police, in the top drawer of the victim's dresser. *Id.* Bruce Godschalk's confession included the non-public fact that the rapist had removed a tampon from the victim and threw it beneath her nightstand, where it had been previously recovered by police. *See* Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 762 (2013) [hereinafter *Promoting Accuracy in the Use of Confession Evidence*].

have decided to hold back. The assertion at trial by a detective that a confession contained non-public details that only the police and perpetrator could know frequently becomes the centerpiece of the prosecutor's case.

Post-conviction exonerations, however, have provided new insight into the source of this sort of inside information. Given that the false confessor was actually innocent and had nothing to do with the crime, these non-public, held-back details most likely could not have originated with him. Rather, the more plausible interpretation is that the police contaminated the evidence by intentionally or inadvertently feeding the non-public details to the suspect during interrogation. Once the confession has been contaminated by the police, the internal control for determining the veracity of the "I did it" has been rendered worthless. In sixty-two of the first sixty-six false confession DNA exonerations, the police had contaminated the confession with inside information.[105]

1. Recording of Custodial Interrogations

The primary reform sought by the innocence community to both reveal and deter false confessions was the call for the mandatory recordation of custodial interrogations. The uninterrupted recording of interrogations is a foundational reform in that it (1) creates a record of what transpires during the course of an interrogation, including the interaction that leads to a confession;[106] (2) ensures that a suspect's rights are protected in the interrogation process;[107] (3) creates a possible deterrent against improper and coercive interrogation techniques that might be employed absent the presence of a recording device;[108] and (4) alerts investigators, prosecutors, judges, and juries if the suspect has

105. Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 404 (2015).

106. In almost all the false confession cases, no part of the interrogation was recorded. Police most often relied on statements hand-written or typed by the police and signed by the suspect. In several of the false confession cases, the final confession was recorded. However, the hours of custodial interrogation leading up to the dramatic climax were not. Without the recording of the entire interrogation there is no way to tell whether the non-public facts originated with the accused or the police. *See False Confessions & Recording Of Custodial Interrogations*, INNOCENCE PROJECT, https://www.innocenceproject.org/false-confessions-recording-interrogations/ [https://perma.cc/YWN4-L6ZU]

107. *Id.*

108. *Id.*

mental limitations or other vulnerabilities that make them more susceptible to a false confession.[109]

The innocence community has prioritized the passage of legislation and encouraged court action through case law and court rules to mandate the electronic recording of interrogations. This advocacy has led to adoption of the practice by more than half the states, the District of Columbia, and federal agencies.[110] Since 2003, the number of states requiring law enforcement agencies to electronically record at least some custodial interrogations has risen from two to twenty-seven.[111] In 2014, the Department of Justice issued a policy directing federal law enforcement agencies, including the FBI, the DEA, and the ATF, to electronically record interrogations for individuals suspected of any federal crime.[112]As is the case with other reform efforts, many opportunities exist to improve existing laws and policies, including the broadening of crime categories for which mandated recording is required and enhanced compliance through stronger remedies, such as suppression when

109. *Id.*

110. *See* CAL. PENAL CODE § 859.5 (West 2019); COLO. REV. STAT. ANN. § 16-3-601 (West 2018); CONN. GEN. STAT. ANN. § 54-1o (West 2017); 725 ILL. COMP. STAT. ANN. § 5/103-2.1 (West 2003); KAN. STAT. ANN. § 22-4620 (West 2017); 25 ME. REV. STAT. ANN. § 2803-B(1)(K) (2004); MD. CODE CRIM. PROC. §2-402 (West 2007); MICH. COMP. LAWS. ANN. § 763.7 (West 2012); MO. ANN. STAT. § 590.700 (West 2009); MONT. CODE ANN. § 46-4-407 (West 2009); NEB. REV. STAT ANN. § 29-4501 (West 2008); NEV. REV. STAT. ANN. § 171.1239 (West 2019), N.M. STAT. ANN. § 29-1-16 (West 2006); N.Y. CRIM. PROC. LAW § 60.45 (McKinney 2017); N.C. GEN. STAT. Ann. § 15A-211 (West 2011); OKLA. STAT. ANN. tit. 22, § 22 (West 2019); OR. REV. STAT. ANN. § 133.400 (West 2010); IND. R. EVID. 617 (2011); N.J. R. EVID. 3.17 (2005); OHIO REV. CODE ANN. § 2933.81 (West 2016); TEX. CODE CRIM. PROC. ANN. art. 2.32, 38.22 (West 2017); UTAH R. EVID. 616 (2016); 13 VT. STAT. ANN. tit. 13, § 5581 (2014); WASH. REV. CODE ANN. § 9.73.090 (West 2011); WIS. STAT. ANN. § 972.115 (West 2005); Mallot v. State, 608 P.2d 737, 742 n.5 (Alaska 1980); Commonwealth v. DiGiambattista, 813 N.E.2d 516, 534 (Mass. 2004); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).

111. *See* Brandon L. Bang et al., *Police Recording of Custodial Interrogations: A State-By-State Legal Inquiry*, 20 INT'L J. POLICE SCI. & MGMT. 1, 10. *See also* Saul Kassin & David Thompson, *Opinion: Videotape All Police Interrogations*, N.Y. TIMES (Aug. 1, 2019), https://www.nytimes.com/2019/08/01/opinion/police-interrogations-confessions-record.html [https://perma.cc/U9BC-P5XZ]; *Oklahoma Becomes 25th State to Require Recording of Interrogations*, INNOCENCE PROJECT (May 10, 2019), https://www.innocenceproject.org/governor-signs-landmark-laws-for-preventing-wrongful-convictions/ [https://perma.cc/T2MU-L7RX]; VA. CODE ANN. § 19.2-390.04 (West 2020); NEV. REV. STAT. ANN. § 171.1239 (West 2019).

112. *See* Memorandum from James M. Cole, Deputy Att'y Gen., to Assoc. Att'y Gen. et al. 2 (May 12, 2014), http://s3.documentcloud.org/documents/1165406/recording-policy.pdf [https://perma.cc/VYU8-YG8X].

interrogations are not recorded and a narrower articulation of allowable exceptions to the mandate.

2. Where We Want to Go

Reliability Assessments

Whereas reliability is the lynchpin of admissibility for eyewitness testimony,[113] and *Daubert* and Federal Rule of Evidence 702 mandate a reliability finding as a threshold for forensic expert testimony to be admissible,[114] the Supreme Court has held there is no constitutional reliability requirement for the admissibility of confessions. Under *Colorado v. Connelly*, the Due Process Clause merely requires a showing of voluntariness, and the protection is limited to excluding statements secured through unduly coercive police interrogation.[115] Extreme coercion, even rising to the level of brutality, to squeeze a confession out of a suspect, if committed by a private person, does not violate due process.[116] However, such behavior, as well as other less extreme police interview practices, can render a confession objectively unreliable. Since in *Connelly* the respondent's lawyers only argued that the confession was involuntary, the Court did not address the question of its reliability. In fact, the Court invited states to enact statutes to restrict a confession's admissibility to those deemed reliable: "A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum."[117] Our goal is to have states take up the Court's invitation and enact measures to ensure the reliability of a confession.

A pre-trial assessment of reliability is particularly important since so many false confessions resulted from police contamination of the confession as discussed above. In theory, contamination of the confession could be factored into a finding that it was involuntary—if the suspect simply parrots whatever he is told by the police, his will was probably overborne. However, very few of the trial courts that presided over exoneration cases considered contamination as a factor in assessing voluntariness.[118] Instead, rather than

113. Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

114. *See* FED. R. EVID. 702; Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993).

115. Colorado v. Connelly, 479 U.S. 157, 169–70 (1986).

116. *See id.*

117. *See id.* at 167.

118. *See* People v. Thomas, 22 N.Y.3d 629, 642 (2014) (reversing trial court's denial of motion to suppress coerced confession); Warney v. State, 16 N.Y.3d 428, 436 (2011) (finding the trial court prematurely dismissed the claim when it failed

evaluating the totality of the facts, most courts found the confession voluntary and hence admissible as long as the police provided complete *Miranda* warnings and the defendant knowingly and voluntarily waived them.[119] Observance of *Miranda* became a shorthand for a careful examination of all the facts.[120] In the false confession/false admission[121] DNA exoneration cases that went to trial, admissibility hearings were almost always held, and courts invariably resolved the swearing contest between police and accused in favor of the police.[122] Since every one of these people was actually innocent, as proven by DNA evidence, we know that their confessions were unreliable. There needs to be a change in pre-trial admissibility hearings; if not, courts will continue to routinely admit false and fabricated confessions which will be received by the fact finder as the most persuasive evidence of guilt.We will be urging states to evaluate the reliability of the confession at the same hearing that assesses voluntariness. With widespread electronic recording of the entire custodial interrogation, the court is in a much better position to watch or listen to the tape and thus review the objective record, ignore the swearing contest, and determine whether the non-public details originated with the accused or with the police.[123] In addition to non-public facts, a confession can be found to be reliable if it leads to the discovery of new evidence previously unknown to the police (e.g., the murder weapon or property stolen from the victim)[124] and in the case of multiple defendants, whether, in addition to the above, the co-defendants' statements are consistent with one another.[125]

Improved Interrogation Methods

Most police agencies in the United States, in stark contrast to their European counterparts, are allowed by courts to employ psychologically coercive yet legally permissible interrogation tech-

to consider that police conduct may have led to inclusion of non-public details in Warney's coerced confession).

119. *See Police-Induced Confessions*, *supra* note 93, at 27; Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1025–26 (2001).

120. *See Police-Induced Confessions*, *supra* note 93, at 27.

121. In the first forty false confession DNA exonerations that went to trial, twenty-eight exonerees had received pre-trial admissibility hearings and all confessions were regarded as admissible. *See* Garrett, *supra* note 104, at 402 n.29.

122. *See Promoting Accuracy in the Use of Confession Evidence*, *supra* note 103, at 782–83.

123. *See* Leo, *False Confessions*, *supra* note 95, at 342.

124. *Promoting Accuracy in the Use of Confession Evidence*, *supra* note 103, at 792–93.

125. *Id.* at 805–06.

niques including knowingly lying to the subject in order to get a confession. These confrontational techniques, rather than information-gathering, are guilt-presumptive. The lies, deceptions, and implied albeit false promises of leniency can induce innocent people to give up, sometimes eventually believing that they must have committed the crime although they have no memory of doing so.

First, law enforcement is permitted by the Supreme Court's interpretation of the Constitution to employ what is described as the "false evidence ploy," whereby interrogators may tell suspects, for instance, that forensic evidence—that has never been tested or may not exist—links the suspect to evidence collected at the crime scene.[126] Suspects may be told that a bloody fingerprint located at the crime scene "matches" the suspect's fingerprint, or that the suspect has failed a polygraph test.[127] The police can also legally lie to the suspect by saying that his co-defendant or the victim of the crime has implicated him.[128] In the case of the Exonerated Five (previously known as the Central Park Five case) in New York City and in the Englewood Four case in Chicago, factually innocent suspects broke down and confessed after the police misrepresented that their friends and associates not only confessed but also implicated them in the crime.[129] In other cases, after being falsely told by the police that their fingerprints or DNA were recovered at the

126. *See* United States v. Ruiz, 536 U.S. 622, 629 (2002); Katie Wynbrant, *From False Evidence Ploy to False Guilty Plea: An Unjustified Path to Securing Convictions*, 126 YALE L.J. 545, 546 (2016) (citing Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U.L. REV. 979, 1030–31, 1041–42, 1050 (1997)).

127. *See* Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 101, 104 (2006).

128. *See id.* Many of the false confession cases involved multiple teenage defendants whose confessions implicated one another. The first defendant would be told falsely that his friend in the next room implicated him and said he was "the heavy." He would then be told by the police that they doubted he was the primary culprit but that the only way he could avoid a terrible result was to implicate his friend. Once he implicates the friend, he is told that for it to appear to be truthful, he must put himself at the crime scene as well. *See* Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 263–67 (2006); *see also* Jill Filipovic, *The Painful Lessons of the Central Park Five and the Jogger Rape Case*, GUARDIAN (Oct. 5, 2012), https://www.theguardian.com/commentisfree/2012/oct/05/central-park-five-rape-case [perma.cc/LGK6-Q4WY].

129. *See* Filipovic, *supra* note 127; Steve Mills & Todd Lighty, *Prosecutor admitted in FBI report that Englewood Four teens coerced into false confessions*, CHI. TRIB. (Nov. 17, 2016), https://www.chicagotribune.com/news/ct-prosecutor-framed-englewood-four-met-20161117-story.html [https://perma.cc/N72H-W5YM].

crime scene, innocent men confessed simply to end the anxiety of the stressful interrogation, confident that when the physical evidence was retested, it would exclude them.[130] In many cases, subsequent testing did exclude them but to no avail—the confession diluted the significance of the other exculpatory evidence.[131] This sort of explicit deception should be banned from police practice, and the Innocence Project has begun to initiate advocacy efforts in this area.[132]

A murkier area of the traditional American interrogation method is when deception is less explicit. Known as a "minimization" technique, law enforcement can suggest to the suspect that he will receive better treatment in the legal process if he agrees to confess.[133] This can take the form of minimizing the seriousness of an offense and by extension its legal consequence by, for instance, suggesting to the suspect that his actions may constitute self-defense rather than criminal activity. While it is well-established anecdotally through DNA exoneration cases that minimization techniques have the propensity to yield false confessions, they are also part of a limited number of tools available to law enforcement to extract confessions from the actually guilty. When more research has been established to develop a reasonable balance between the prevention of wrongful convictions and the collection of reliable confessions, deception that implies leniency must be more fully addressed. Indeed, states have begun to take notice of the deleterious effects of the use of deception during interrogations, and through the advocacy of the Innocence Project and its partners, both the Illinois[134] and Oregon[135] legislatures in 2021 banned law enforcement deception during juvenile interrogations. It is our hope that the age of the suspect does not bear on future legislative proposals, however, the passage of these two laws within one legislative session speaks to a growing awareness of the need for reform in this area.

---

130. *See* Leo, *False Confessions*, *supra* note 95, at 338.

131. *Id.* at 340.

132. The International Investigative Interviewing Research Group, among others, has moved away from the guilt presumptive and confrontational approach to one in which police try to develop a rapport with the subject. *See* Harriet Jakobsson Öhrn & Christer Nyberg, *Searching for Truth or Confirmation?*, IIIRG BULLETIN, June 2010, at 11.

133. Gohara, *supra* note 124, at 130.

134. 705 ILL. COMP. STAT. ANN. 405/5-401; 725 ILL. COMP. STAT. ANN. 5/103-2.2.

135. OR. REV. STAT. Ann. § 487.

Research does establish, however, that prolonged interrogations lead to less reliable confessions.[136] It has been demonstrated that protracted isolation during the course of an interrogation incentivizes innocent suspects to confess.[137] Psychologists and other experts caution against interrogations that last more than four hours and have observed that those interrogations that exceed six hours just by virtue of their length lead to false confessions, indicating that lengthy interrogations in general are inherently coercive.[138] This is supported by exonerations that were at least partially predicated on the presence of a false confession.[139] In fact, 80% of 125 proven false confessions were derived from interrogations that lasted more than six hours.[140] Therefore, the Innocence Project has begun to explore state-based exoneration data and jurisdictional practice to identify jurisdictions that are most prone to extended interrogations to explore further policy reforms in this area.

C. Forensic Science Reform

The misapplication of forensic science by prosecution experts, primarily lab technicians and forensic practitioners employed by law enforcement-controlled crime laboratories, is the second most common contributing factor to wrongful convictions in our DNA exoneration dataset.[141] Forty-four percent of all the original trials resulting in wrongful convictions were undermined by forensic "experts" either exaggerating the probative value of the evidence, relying on testing methods that had never been scientifically validated as accurate and reliable, or fabricating data or results.[142] Mischaracterization of the evidence occurred frequently in pattern and impression disciplines where crime labs attempt to match a hair, bullet, tire tread, or shoe print found at a crime scene with a particular suspect. Despite the fact that for decades, prosecutors relied on this type of expert witnesses and evidence to "prove" that the defen-

136. *Police-Induced Confessions*, *supra* note 93, at 16.

137. *Id.*

138. Stephen A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 948 (2004); *False and Coerced Confessions*, Ctr. Wrongful Convictions, http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/issues/falseconfessions/ [https://perma.cc/RE3F-4FGE].

139. *See* Drizin & Leo, *supra* note 135, at 957.

140. *See id.* at 948.

141. *See Wrongful Convictions Involving Unvalidated or Improper Forensic Science that Were Later Overturned Through* DNA Testing, Innocence Project, https://www.innocenceproject.org/wp-content/uploads/2016/02/DNA_Exonerations_Forensic_Science.pdf [https://perma.cc/MLC5-ENKV].

142. *Id.*

dant (or the defendant's head, gun, truck tire, or sneaker) was the source of the crime scene evidence, a landmark report in 2009 from the National Academy of Sciences concluded that most of the expert testimony routinely admitted by state and federal judges for years lacked an essential scientific basis.[143] In the NAS report, "Strengthening Forensic Science in the United States: A Path Forward," the Academy made clear that "[w]ith the exception of nuclear DNA analysis, no forensic method has been rigorously shown to have the capacity to consistently and with a high degree of certainty demonstrate a connection between evidence and a specific individual or source."[144] How could such errors have gone on for so long without intervention?

We have observed that most prosecutors and criminal defense lawyers are not well-versed in the scientific method. They chose law over a career in science or medicine. The judiciary, more often than not, is unfamiliar with the fundamentals of science. The compromised system of the last hundred years encourages the bench and bar to litigate and rule on the admissibility of the proffered "scientific" evidence so that twelve scientifically illiterate jurors can decide the appropriate weight the evidence should be given. This problem was exacerbated by the fact that when an "expert" takes the witness stand, preferably in a white lab coat, her testimony takes on a "mystic infallibility."[145] Not only is this systemic failure responsible for many miscarriages of justice but, in contrast to clinical laboratories, forensic labs never enjoyed the financial support, research, or oversight of independent regulatory bodies, which could provide a backstop ensuring the integrity of forensic devices and test results. In the family of scientists, forensic practitioners have always been treated as "poor stepchild[ren]."[146] Whereas the entire population cares profoundly and personally about the accuracy and reliability of our medicine and clinical tests, people accused or convicted of crimes comprise a comparatively limited historical constituency for ensuring rigor in crime labs. The latter, up until the revelation of wrongful convictions, simply had no clout.

143. *See* NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 110 (2009).

144. *Id.* at 7.

145. United States v. Allison, 498 F.2d 741, 744 (D.C. Cir. 1974).

146. KELLY PYREK, FORENSIC SCIENCE UNDER SIEGE: THE CHALLENGES OF FORENSIC LABORATORIES AND THE MEDICO-LEGAL INVESTIGATION SYSTEM 17 (2007).

Before the consumer is subjected to most clinical drugs and diagnostic tests, extensive basic and applied research is the norm[147] and is often financially supported by grants from huge national enterprises, such as the National Science Foundation and the National Institutes of Health. Nothing comparable ever existed for forensics. Once new drugs undergo extensive research and clinical trials to establish safety and efficacy (or, in the case of diagnostic tests, accuracy and reliability), they are evaluated by the Food and Drug Administration before they can be marketed. There is no FDA or any other federal agency to pass on the accuracy and reliability of a forensic test before it is used in a court of law.[148] In addition to the FDA, the Federal Clinical Laboratory Improvement Act and the Commission on Medicare and Medicaid Services provide further regulation on the reliability of clinical tests.[149] The only test for forensics is the so called "crucible of the court" which for generations meant no meaningful test at all.[150] The jury could consider the evidence as long as a lay judge found the forensics admissible. Prior to the publication of the 2009 NAS report, there was a near-total absence of validation studies or studies of accuracy and error rates for many other non-DNA forensic technologies.[151]

Through countless dismissals before trial and post-conviction exonerations, DNA has revealed the fallibility of the original evidence used to indict or convict innocent people. DNA testing also demonstrates the extensive testing and investigation that a scientific theory or method must pass through before it is accepted as an

147. *See* Jonathan R. Genzen, *Regulation of Laboratory-Developed Tests: A Clinical Laboratory Perspective*, 152 AM. J. CLINICAL PATHOLOGY 122, 123 (2019).

148. *See* Simon A. Cole, *Who Will Regulate American Forensic Science?*, 48 SETON HALL L. REV. 563, 568–73 (2018).

149. *See Research Testing and Clinical Laboratory Improvement Amendments of 1988 (CLIA) Regulations*, CTRS. FOR MEDICARE & MEDICAID SERVICES, https://www.cms.gov/Regulations-and-Guidance/Legislation/CLIA/Downloads/Research-Testing-and-CLIA.pdf [https://perma.cc/C7Q6-2V9H].

150. Proponents of the "crucible" expected defense lawyers to mount a vigorous challenge to the bona fides of the proffered evidence. Given that most forensics arise in street crime, most defendants are poor and represented by overworked and underfunded public defenders and the best and the brightest scientists choose to work where the funding is. In reality, there never was a crucible. Nor has the judiciary been helpful. It didn't make much difference whether a trial judge applied the 1923 Frye test or the 1993 Daubert test of admissibility. Studies indicate that judges almost always rule in favor of prosecutors when they offer forensic evidence, against defense lawyers when they offer it, for defense lawyers when they represent large corporations in civil suits and against individual civil plaintiffs attempting to introduce scientific evidence to prove causation. *See* NAT'L RESEARCH COUNCIL, *supra* note 140, at 96.

151. *See* Cole, *supra* note 145, at 569.

accurate and reliable technique for investigating and adjudicating criminal cases. Before DNA was ever used in a criminal court, there were years of extensive basic and applied research. Shortly after introduction in court, the National Academy of Sciences established laboratory standards for forensic DNA.[152] Congress singled out DNA for legislation to perpetuate quality standards for forensic DNA testing in federal, state, and local crime labs.[153] The failure of most other forensic techniques to pass through any of these steps supports the conclusion that many of the non-DNA forensic methods were not developed in accordance with basic principles of science. Unsurprisingly, scandals in the crime lab were soon to follow.

1. Initial Reforms: Leveraging Scandals and Reconsidering the Science

The Innocence Project leveraged the frequent scandals in state and federal crime labs to secure audits of past cases, one of the most notable of which involved the FBI's acknowledgement that its hair microscopy unit offered false testimony in 96% of the hundreds of cases they reviewed in an audit requested by the Innocence Project and the National Association of Criminal Defense Lawyers.[154] The impetus for the review was three post-conviction DNA-based exonerations in which three different FBI hair examiners had provided erroneous statements in reports or testimony at trial.[155] As a result of the audit, the Department of Justice wrote an

152. *See generally* NAT'L RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE (1992); *see also* NAT'L RESEARCH COUNCIL, THE EVALUATION OF FORENSIC DNA EVIDENCE (1996).

153. *See* John M. Butler, *The Future of Forensic DNA Analysis*, 370 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y B 1, 2–3 (2015).

154. Press Release, FBI, FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review (Apr. 20, 2015), https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review [https://perma.cc/DN28-RBTL] [hereinafter FBI Press Release].https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review Several years earlier the FBI had acknowledged that their testimony in composite bullet lead analysis cases—matching a bullet found at the crime scene to a particular box of cartridges recovered from the defendant's home—was without scientific support. Letter from John Crabb, Jr., Special Counsel, DOJ, to Deforest R. Allgood, District Attorney (May 6, 2013) (on file with authors). The admission came after the critical 2009 report produced by the National Academy of Sciences. *See* NAT'L RESEARCH COUNCIL, *supra* note 140 at 107 n.82.

155. *See* Press Release, FBI, Root Cause Analysis for Microscopic Hair Comparison Analysis Completed (Apr. 14, 2019), https://www.fbi.gov/news/pressrel/press-releases/root-cause-analysis-for-microscopic-hair-comparison-analysis-completed [https://perma.cc/EW2D-NZBY] [hereinafter Root Cause Press Release];

unprecedented letter to all U.S. Attorneys instructing them to waive all procedural bars to post-conviction review,[156] so that the challenges to these convictions could be decided on the merits. The FBI, with help from the National Association of Criminal Defense Lawyers and the Innocence Project, tracked down hundreds of convicted people and notified them in writing that the prosecutions' expert testimony or reports were erroneous and not supported by science. Thus far, sixteen people have had their convictions vacated based on the flawed FBI hair evidence, and ten of those individuals have been exonerated.[157]

The problem of exaggerating the probative value of evidence—a failure of compliance, in our view, with the principles of statistics—was not restricted to hair microscopy. For the same reasons, the FBI routinely exceeded the limits of science in their reporting and testimony in many pattern-and-impression disciplines, including fibers, shoe prints, tire marks, tool marks, and ballistics.[158] We requested similar audits of reports and testimony in the other compromised forensic methods, and by 2015, the DOJ was developing a plan.[159] After some time, however, the DOJ became reluctant to initiate reviews that could call into question the integrity of hundreds of other convictions and ended the process in 2017.[160]

---

see also Timothy Bridges, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4845 [https://perma.cc/42CL-RDNC].

156. *See* 28 U.S.C. § 2254 (2020); FBI Press Release, *supra* note 151.

157. *See Wrongful Convictions*, *supra* note 138; Innocence Staff, *How Santae Tribble's Wrongful Conviction Prompted Review of the FBI's Use of Hair Analysis and Inspired the Innocence Project's Research*, INNOCENCE PROJECT (July 15, 2020), https://innocenceproject.org/santae-tribble-inspired-hair-analysis-review-work/ [https://perma.cc/FD5R-7GWR].

158. *See* PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS 1–4 (2016), https://obamawhitehouse.archives.gov/sitefs/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf [https://perma.cc/C2AC-KCRN] [hereinafter PCAST REPORT]; Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 14–15 (2009); *Sample Letter to Prosecutors*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/file-repository/sample-letter-to-prosecutors.pdf/view [https://perma.cc/UR52-YCAD].

159. *See* FBI Press Release, *supra* note 151.

160. *See* Spencer S. Hsu, *Sessions Orders Justice Dept. to End Forensic Science Commission, Suspend Review Policy*, WASH. POST (Apr. 10, 2017), https://www.washingtonpost.com/local/public-safety/sessions-orders-justice-dept-to-end-forensic-science-commission-suspend-review-policy/2017/04/10/2dada0ca-1c96-11e7-9887-1a5314b56a08_story.html [https://perma.cc/JZ7C-KX2H].

The bombshell revelation that much of what passed for reliable evidence for decades in criminal prosecutions had in fact never been validated scientifically, coupled with the statistic that almost half the DNA exonerations involved serious problems with the forensic evidence relied upon in the original conviction, led to the creation of the National Commission on Forensic Science ("NCFS"), and critically, to the inclusion for the first time of academic leaders in the basic sciences to establish the needs of the forensics community moving forward.[161] The Commission passed multiple recommendations which were adopted by the U.S. Attorney General and the Director of the National Institute of Standards and Technology.[162]

Unfortunately, one of the early actions of the Trump Administration was the shuttering of the NCFS.[163] This necessitated a shift in our forensics advocacy efforts from the federal level to the state level. Our current state-based policy work is focused on attempts to set up structures that are well-positioned to react to the types of forensic misconduct, negligence, and other adverse events that demonstrably give rise to wrongful convictions. The Texas Forensic Science Commission is one such success story.[164] Recently, the In-

161. *See* NAT'L COMM'N ON FORENSIC SCI., U.S. DEP'T OF JUST., REFLECTING BACK—LOOKING TOWARD THE FUTURE 3, 4 (2017), https://www.justice.gov/archives/ncfs/page/file/959356/download [https://perma.cc/CH3F-2URM].

162. *See, e.g.*, Memorandum from Loretta E. Lynch, Att'y Gen., to Heads of Department Components 1–2 (Nov. 23, 2015), https://www.justice.gov/ncfs/file/799001/download [https://perma.cc/8RJL-FBA8]https://www.justice.gov/ncfs/file/799001/download; Memorandum, Memorandum of Understanding Between the Department of Justice and the National Institute of Standards and Technology in Support of the National Commission on Forensic Science and the Organization of Scientific Area Committees 3 (Aug. 4, 2015), https://www.justice.gov/archives/ncfs/file/761051/download [https://perma.cc/64U2-AJU5].

163. *See* Hsu, *supra* note 157.

164. The Texas Forensic Science Commission was created in 2005 to "investigate allegations of professional negligence or professional misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by an accredited laboratory." *See About Us*, TEX. FORENSIC SCI. COMM., https://txcourts.gov/fsc/about-us/ [https://perma.cc/F4SX-KVB5]. Over the years, the relevant bill was revised to expand the Commission's investigative duties and responsibilities and expand its oversight duties by tasking it with the responsibility of accrediting the state's crime laboratories and the establishment of a forensic disciplines licensing program. *See* TEX. CODE CRIM. PROC. ANN. art. 38.01 §§ 4, 4-a (West 2019). The Commission has successfully created a system and culture of self-disclosure by forensic science service providers and a robust and transparent process for investigating complaints, as well as enabled first-of-its-kind reforms. Among these reforms are the establishment of a defendant notification process, *see* TEX. FORENSIC SCI. COMM., TEXAS DEPARTMENT OF PUBLIC SAFETY HOUSTON REGIONAL CRIME LABORATORY SELF-DISCLOSURE 15, 27 (2013), https://txcourts.gov/media/

nocence Project worked with the New England Innocence Project, the Committee on Public Counsel Services, the Boston College Innocence Program, and other partners to create a forensic science commission in the wake of enormous scandals that were exposed in two crime laboratories in Massachusetts.[165] In one, a rogue analyst falsified records and fabricated drug test results without ever actually conducting the drug tests. More than 21,000 convictions were vacated.[166] We are hopeful that the Commonwealth of Massachusetts, as it begins its work, will look to the experience of Texas, which has done more than any other state in response to the misapplication of forensic science.[167]

An additional state-based remedy, which was described above, is the "change in science" statute or court rule that enables a convicted person to petition to vacate the conviction if they can show that the scientific community no longer supports the type of foren-

---

1441008/12-02-final-report-texas-dps-houston-regional-crime-lab-self-disclosure-20130405.pdf https://txcourts.gov/media/1441008/12-02-final-report-texas-dps-houston-regional-crime-lab-self-disclosure-20130405.pdf[https://perma.cc/P9C5-5PRE], calling for a moratorium on bitemark comparison, *see* TEX. FORENSIC SCI. COMM., FORENSIC BITEMARK COMPARISON COMPLAINT FILED BY NATIONAL INNOCENCE PROJECT ON BEHALF OF STEVEN MARK CHANEY 15, 15-6 (2016), https://www.txcourts.gov/media/1440871/finalbitemarkreport.pdf [https://perma.cc/W9ZP-Y7CA], and raising public awareness about the use of unreliable forensic practices. Numerous exonerations have flowed from the work of the Commission, as well as wrongful convictions prevented.

165. *See CJPP Applauds Massachusetts Criminal Justice Reform Bill and the Establishment of a Forensic Science Commission*, CRIM. JUST. POL'Y PROGRAM (Apr. 25, 2018), http://cjpp.law.harvard.edu/news-article/cjpp-applauds-massachusetts-criminal-justice-reform-bill-establishment-forensic-science-commission [https://perma.cc/P9XW-8UTC]; Jon Schuppe, *Epic Drug Lab Scandal Results in More than 20,000 Convictions Dropped*, NBC NEWS (Apr. 18, 2017), https://www.nbcnews.com/news/us-news/epic-drug-lab-scandal-results-more-20-000-convictions-dropped-n747891 [https://perma.cc/6XYP-VUVEhttps://www.nbcnews.com/news/us-news/epic-drug-lab-scandal-results-more-20-000-convictions-dropped-n747891]; *More Trouble for Massachusetts*, INNOCENCE PROJECT (Apr. 5, 2013), https://www.innocenceproject.org/more-trouble-for-massachusetts-crime-labs/ [https://perma.cc/EKP6-YRS2].

166. Fifteen years ago, we identified false reporting and fabricated results in the Boston Police Crime Lab but the authorities refused to take any remedial action. But after dozens more scandals and hundreds of exonerations nationwide, government correction and remediation was more forthcoming. *See Neil Miller*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3472 [https://perma.cc/LJ9U-V8UA]; Innocence Staff, *Massachusetts Supreme Judicial Court to Vacate 21,587 Drug Conviction Cases*, INNOCENCE PROJECT (Apr. 19, 2017), https://innocenceproject.org/historic-massachusetts-drug-vacation/ [https://perma.cc/ZLC6-REDS].

167. *See supra* note 161 and accompanying text.

sic testimony offered at the original trial or if, as a result of new scientific understanding, the prosecution's trial expert repudiates his earlier testimony.[168]

Another reform focuses on a forensic laboratory's ethical duty to correct errors of which they are aware and to notify all potentially affected parties even if the serious error is first identified many years after the conviction.[169] Texas adopted similar language modeled on the NCFS.[170]

Finally, when a serious error is revealed, the laboratories should proceed with a root cause analysis ("RCA"). The purpose of the RCA is not to point the finger at individuals who made the mistakes or engaged in misconduct. Rather, it is to identify the systemic (root and cultural) causes of the error and to recommend systemwide remedies to avoid recurrence. In response to the FBI's hair forensics scandal, the Bureau took the unprecedented step of retaining an external entity to identify the root causes of the persistence of erroneous microscopic hair comparison analysis testimony and reports in its laboratory from the 1950s through the 1990s.[171] The August 2019 report found that insufficient quality management and institutional resistance to external expertise contributed to the persistent and uncorrected errors.[172] We urge all forensic labs as well as police and prosecutors to conduct RCAs whenever a serious error or misconduct undermines the integrity of the criminal legal process. Only by addressing the institutional root causes will an entity sufficiently reduce the risk of future errors.

---

168. *See supra* notes 51–56 and accompanying text.

169. Memorandum from Loretta E. Lynch, Att'y Gen., to Heads of Dep't Components 1 (Sept. 6, 2016) (on file with Department of Justice Archive).

170. 37 TEX. ADMIN. CODE § 651.219 (2019). *S*ee Nat'l Comm'n Forensic Sci., National Code of Ethics and Professional Responsibility for the Forensic Sciences (2016) https://www.justice.gov/archives/ncfs/page/file/788576/download [https://perma.cc/68AB-HASL].

171. *See* ABS GROUP, ROOT AND CULTURAL CAUSE ANALYSIS OF REPORT AND TESTIMONY ERRORS BY FBI MHCA EXAMINERS 12 (2018), https://vault.fbi.gov/root-cause-analysis-of-microscopic-hair-comparison-analysis/root-cause-analysis-of-microscopic-hair-comparison-analysis-part-01-of-01/view [https://perma.cc/8CTZ-2EQP] [hereinafter ROOT CAUSE REPORT]; *see also* Root Cause Press Release, *supra* note 152. By the late 1990s, the FBI Lab began treating hair microscopy as a screening test. If an association was suspected, DNA testing on the hair would follow. *See* ROOT CAUSE REPORT, *supra*, at 3.

172. Specifically, the report found "overconfidence by Laboratory management in the belief that they did not need outside expertise (e.g., legal, statistical and quality assurance) and did not see the value in formalized processes" and that "[i]nstead of acting like impartial scientists, the FBI Laboratory culture embraced FBI agent-examiners acting like detectives." *See* ROOT CAUSE REPORT, *supra* note 168, at 13, 26.

2. Where We Want to Go

Our state-based strategy cannot and should not supplant the need for uniform standard-setting at the federal level. The 2009 Report from the NAS recommended the creation of a new science-based federal agency to regulate forensics.[173] The NAS report made it clear that the Department of Justice could not take on that role because of its relationship to law enforcement and prosecutors and the potential for conflicts of interest "between the needs of law enforcement and the broader needs of forensic science," including serving the defense function "equally."[174] For a variety of budgetary and other reasons, a new federal agency was not realistic. The National Commission on Forensic Science recommended that the National Institute of Standards and Technology ("NIST") accept the responsibility of assessing the foundational scientific validity[175] and reliability of all forensic methods and that only those with demonstrable validity be used to adjudicate criminal prosecutions.[176] This approach was endorsed in 2016 by the President's Council of Advisors on Science and Technology ("PCAST"),[177] critiquing the criminal legal system for continuing to routinely admit unscientific evidence.There would be consistent and more effective compliance with the explicit mandate of Rule 702 of the Federal Rules of Evidence if a federal science-based agency took on this task. The federal rule, also adopted by twenty-three states, permits an expert to testify in the form of an opinion or otherwise if the testimony is the product of reliable principles and methods and the expert has reliably applied the principles and methods to the facts of the case.[178]

---

173. *See* NAT'L RESEARCH COUNCIL, *supra* note 140, at 18.

174. *Id.* at 17 (noting the "strong consensus in the committee that no existing or new division or unit within DOJ would be an appropriate location for a new entity governing the forensic science community").

175. "Foundational validity" for a forensic science method requires "that it be shown, based on empirical studies, to be repeatable, reproducible, and accurate, at levels that have been measured and are appropriate to the intended application." PCAST REPORT, *supra* note 155, at 4.

176. NIST was originally ruled out by the NAS, primarily due to its limited ties to the forensic community. *See* NAT'L RESEARCH COUNCIL, *supra* note 140, at 17. But in the last ten years that relationship has deepened in research pilot projects to assess foundational validity, and in standard setting through the creation of the Organization of Scientific Area Committees (OSAC) for Forensic Science. *See* ORG. SCI. AREA COMMS., ANNUAL REPORT 1 (2016), https://www.nist.gov/system/files/documents/2016/09/13/osac_annual_report_2015-2016.pdf [https://perma.cc/H5AX-KSDY].

177. *See* PCAST REPORT, supra note 155, at 14.

178. *See* FED. R. EVID. 702; Brandon L. Garrett & Chris Fabricant, *The Myth of the Reliability Test*, 86 FORDHAM L. REV. 1559, 1598–99 (2018).

However, in practice, few judges have rigorously accepted their gatekeeping function. A review of hundreds of state and federal cases citing the reliability requirement of Rule 702 revealed that most courts merely pay lip service to the requirement, almost always admitting unvalidated and unreliable evidence and inadequately citing to precedent or the credentials of the expert.[179] Both the NAS and PCAST have found that the most effective way to assess scientific reliability is for a disinterested federal science-based agency to do so.[180] The disparities between prosecution and defense resources, including access to experts, and a lack of scientific knowledge of the bench and criminal bar, render the adversary system a poor choice for an informative and technical scientific assessment. Delegating the task to NIST, as the NCFS and PCAST recommended, would make it easier for the courts to rule on admissibility if an objective scientific body published the methods it concluded were valid and reliable.

D. Regulation of Jailhouse Informants

In-custody or "jailhouse informants" are detained or incarcerated people who provide information or testimony against a defendant often with the expectation of receiving leniency or other benefits. The jailhouse informant is most frequently called as a prosecution witness to claim that a defendant, usually lodged in the same or an adjoining cell as the informant, confessed to the crime for which he is charged.[181] Jailhouse informants, only one form of incentivized witnesses, have testified for the prosecution falsely in nearly one-fifth of DNA-based exoneration cases.[182] Jailhouse informants play a disproportionate role in homicide cases and have been found, along with false confessions, to be a leading cause of wrongful conviction in capital cases.[183] They have no incentive to testify truthfully or disincentive to lie. The real or perceived benefits of their testimony include: sentence reduction, special inmate privileges, monetary payments, and reduced charges in pending criminal cases.[184]

---

179. *See* Garrett & Fabricant, *supra* note 175, at 1564.

180. *See* NAT'L RESEARCH COUNCIL, *supra* note 140, at 18; PCAST REPORT, *supra* note 155, at 57.

181. *See Informing Injustice*, *supra* note 57.

182. *See id.*

183. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 88, 92–93 (2008).

184. *See* Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 652, 658 (2004).

In Los Angeles, for instance, a Grand Jury investigation into jailhouse informant abuses found that detained people would offer information to the government in anticipation of receiving benefits in the future or putting cooperation "in the bank."[185] Informants are aware that their testimony is of greater use to the government if they can state they have not received or been promised a benefit, so it is therefore in their interest to articulate a pretextual reason, such as moral reasons, for their cooperation.[186]

The jail and prison experience also teaches would-be informants that benefits will often be conferred in exchange for information even if they are not expressly promised. The Los Angeles Grand Jury Report found that jailhouse informant inmates understood being placed in a cell next to a high-profile defendant as an implicit instruction from the government to elicit information from that defendant, even if no governmental actor explicitly requested such information.[187] Indeed, more than a quarter-century after the inquiry into the dishonor brought by the Los Angeles informant system, a major scandal emerged in neighboring Orange County, in which the prosecutor's office was colluding with the sheriff's office to intentionally place high-profile defendants in cells close to known informants.[188] Of course, this phenomenon isn't limited to California—a man is currently on death row in Pinellas County, FL, based in large part on the word of a jailhouse informant who testified or supplied information in thirty-seven cases and was himself accused of crimes involving moral turpitude, including pedophilia.[189] In Philadelphia, PA, the murder conviction and

185. *See* L.A. Cnty., Report of the 1989-90 Los Angeles County Grand Jury: Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County (1990) [hereinafter Los Angeles Grand Jury Report].

186. Professor Alexander Natapoff, Testimony Before the Timothy Cole Exoneration Review Commission: Regulating Jailhouse Informants to Prevent Wrongful Conviction (June 28, 2016), https://www.txcourts.gov/media/1401449/Meeting-Book.pdf https://www.txcourts.gov/media/1401449/Meeting-Book.pdf[https://perma.cc/Z6H9-S7MB].

187. *See* Los Angeles Grand Jury Report, *supra* note 182, at 25–26.

188. *See* Press Release, Dep't of Justice, Justice Department Opens Investigations of Orange County, California, District Attorney's Office and Sheriff's Department (Dec. 15, 2016), https://www.justice.gov/opa/pr/justice-department-opens-investigations-orange-county-california-district-attorney-s-office-0 [https://www.justice.gov/opa/pr/justice-department-opens-investigations-orange-county-california-district-attorney-s-office-0https://perma.cc/38NS-VPM7].

189. *See* Pamela Colloff, *How This Con Man's Wild Testimony Sent Dozens to Jail, and 4 to Death Row*, N.Y. Times (Dec. 4, 2019), https://www.nytimes.com/2019/12/04/magazine/jailhouse-informant.html [https://perma.cc/DD6X-Y279].

death sentence of Walter Ogrod was vacated and dismissed with the concurrence of the District Attorney who concluded, based on a lengthy re-investigation, that Ogrod was innocent. When Mr. Ogrod was first tried in 1993, a mistrial was declared when the jury deadlocked eleven-to-one for acquittal. Three years later, he was retried. In the interim, the prosecution's case became much stronger with the addition of two jailhouse informants who claimed that Ogrod had confessed to them in great detail. At the second trial, the jury convicted after a mere ninety minutes of deliberation and unanimously recommended a death sentence, which the court pronounced. One of the informants was nicknamed "the Monsignor" because he was a serial informant, having been a cooperating witness in a dozen homicide cases. The second informant, who testified at the retrial, falsely denied a history of mental illness and denied receiving any benefits. Years later it was revealed that "the Monsignor" had enlisted his wife to obtain additional details about the personal life of Ogrod to help the second informant embellish the fraud. Medical records turned over in 2020 demonstrated that the second informant had a lengthy history of mental illness including schizophrenia which had never been disclosed to the defense.[190]

According to Law Professor Alexandra Natapoff, a leading scholar on the informant phenomenon, the use of incentivized witnesses causes a:

> disturbing marriage of convenience: both snitches and the government benefit from inculpatory information while neither has a strong incentive to challenge it. The usual protections against false evidence, particularly prosecutorial ethics and discovery, may thus be unavailing to protect the system from informant falsehoods precisely because prosecutors themselves have limited means and incentives to ferret out the truth.[191]

Given the inherent potential for false testimony and its close association to wrongful conviction, we have started a national public education and advocacy campaign to strengthen the regulation and accountability mechanisms of informant use to reduce the risk of fabricated evidence being introduced at trial. Reforms being sought on the state-level require rigorous criteria to be used to assess the reliability of informant testimony in criminal proceedings.

190. *See Walter Ogrod*, NAT'L REGISTRY OF EXONERATIONS (June 25, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5752 [https://perma.cc/JQY5-3JAB].

191. Alexandra Natapoff, Comment, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 108 (2006).

This reform would which require a centralized tracking systems that collect a range of information, including the informant's history of testifying in other cases and the benefits promised and ultimately conferred upon them. The collection and tracking of this information should also require its disclosure, which promises a reduction in their use. Over the past four years, the Innocence Project has successfully lobbied six states for laws that will ensure tracking and disclosure of key information.[192] Illinois and Connecticut also require pre-trial reliability hearings before jailhouse informants can testify.[193] The effort to reform the informant system is in its infancy and the Innocence Project will monitor how the various advocacy initiatives work in practice in an effort to determine which policies that would best be replicated.

Resistance to Reforms

While reforms structured around more reliable and accurate evidence would seem politically viable, the innocence agenda can still be met with distrust and resistance. In the past few years, for instance, we saw significant resistance to a number of state-based proposals that sought to simply regulate and track the use of informants.[194]

Nor is resistance limited to informant reform. In our home state of New York, which had one of the most restrictive discovery laws in the country and a bail framework weighted heavily towards incarceration, reform eluded us for more than forty years and was met with robust opposition from many elected prosecutors.[195] Pros-

192. *See* Act Concerning the Testimony of Jailhouse Witnesses, Pub. L. No. 19-131, 2019 Conn. Sess.; NEB. REV. STAT. ANN. § 29-4704 (West 2019); 725 ILL. COMP. STAT. ANN. § 5-115/21 (West 2018); TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2017); OKLA. STAT. ANN. tit. 12, § 2510 (West 2014); H.B. 637, 441st Sess. of the Gen. Assemb. (MD 2020). See also Dave Collins, *Lying Prisoners: New Laws Crack Down on Jailhouse Informants,* HARTFORD COURANT (Sept. 16, 2019), https://www.courant.com/news/connecticut/hc-news-connecticut-jailhouse-informants-20190916-ttahvkqiubeahj2gikyyf5dn7y-story.html [https://perma.cc/93F9-ZV3V].

193. *See* Collins, *supra* note 189.

194. *See* Ellen Reasonover, *Midlands Voices: Why Are Nebraska Prosecutors Blocking Justice?*, OMAHA WORLD-HERALD (Apr. 9, 2018), https://www.omaha.com/opinion/midlands-voices-why-are-nebraska-prosecutors-blocking-justice/article_4da33b31-f346-58ee-8928-eb3cd7b7c192.html [https://perma.cc/42MV-DY35]; *see also* Mitch Ryals, *Bill Would Require Prosecutors to Fess Up to Confidential Informant Deals*, INLANDER (Jan. 26, 2017), https://www.inlander.com/Bloglander/archives/2017/01/26/bill-would-require-prosecutors-to-fess-up-to-confidential-informant-deals [https://perma.cc/GWQ8-8CBC].

195. *See generally* CTR. CT. INNOVATION, DISCOVERY REFORM IN NEW YORK: MAJOR LEGISLATIVE PROVISIONS (May 2019)https://www.courtinnovation.org/sites/default/files/media/document/2019/Discovery-NYS_Full.pdf; Jake Offenhartz,

ecutors and law enforcement engaged in a sophisticated media campaign appealing to public fear that successfully rolled back recently-enacted bail reform and, to a lesser extent, discovery.[196] We still see large states that turn a blind eye to the most basic wrongful conviction reforms, like simple scientific research-supported modifications to lineups that have already been adopted in nearly half the states.[197] Law enforcement often opposes laws that mandate recording of interrogations; yet once implemented police not only adapt,[198] they often become proponents for expanding recording to more crime categories. In forensics, many practitioners and their allies in law enforcement resist any external oversight that will give world class research scientists a voice in determining what methods are valid and reliable and what standards should be obligatory at every crime lab.[199] This was the rationale for shutting down the National Commission on Forensic Science and replacing it with an in-house Department of Justice forensics czar plucked from a local prosecutor's office.[200] So despite major progress, there is much work left to be done in these traditional areas of innocence reform.

IV.
FUTURE AND ASPIRATIONAL WORK: INNOCENCE AS A WEDGE FOR BROAD CRIMINAL LEGAL REFORM

The revelation of wrongful convictions has been, and could be in the future, a more powerful advocacy tool in advancing other progressive criminal legal policies not exclusively in the wheelhouse of the "innocent." For instance, the innocence movement has had a

Movement to Reform New York's Discovery Statute Faces a Familiar Foe: Prosecutors, THE APPEAL (Mar. 6, 2018), https://theappeal.org/movement-to-reform-new-yorks-discovery-statute-faces-a-familiar-foe-prosecutors-4b2bd2f8ac/ [https://perma.cc/QC3Q-6XNF].

196. *See* Pete DeMola, *Local Opposition Mounting to Criminal Justice Reforms*, DAILY GAZETTE (Nov. 12, 2019), https://dailygazette.com/article/2019/11/12/local-opposition-mounting-to-criminal-justice-reforms [https://perma.cc/S5CR-6XH5].

197. *See Eyewitness Identification Reform*, *supra* note 57.

198. THOMAS P. SULLIVAN, CTR. WRONGFUL CONVICTIONS, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 6–8 (2004)http://mcadams.posc.mu.edu/Recording_Interrogations.pdf, http://mcadams.posc.mu.edu/Recording_Interrogations.pdf [https://perma.cc/XBP2-WCVK].

199. *See, e.g.*, Jon Schuppe, *'We Are Going Backward': How the Justice System Ignores Science in the Pursuit of Convictions*, NBC NEWS (Jan. 23, 2019), https://www.nbcnews.com/news/us-news/we-are-going-backward-how-justice-system-ignores-science-pursuit-n961256 [https://perma.cc/QQ8L-QF99].

200. See Hsu, *supra* note 157.

transformative impact on the effort to end capital punishment. It is the risk of executing an innocent that has caused many lawmakers and jurists, who would otherwise validate the morality of the death penalty, to rethink their position on the ultimate and irreversible sentence. There have been twenty-eight capital convictions cleared by DNA[201] and, in all, 172 people have been exonerated after they had been sentenced to death.[202] In 2008, Justice John Paul Stevens wrote in his *Baze v. Rees* concurring opinion: "Whether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses."[203] Notably, the risk of executing the innocent has been explicitly mentioned by governors in three states that declared moratoriums.[204] Similarly, we expect to expand our programmatic work and hope the innocence argument will soon exert lasting influence in the national campaign to end mass incarceration and achieve a much greater measure of racial justice. The United States has close to 5% of the world's population and nearly 25% of the world's incarcerated people.[205] The power of the innocents' narratives coupled with empirical data and scientific research should continue to move lawmakers to ask fundamental questions about the operation, fairness, equity, and efficacy of the entirety of criminal investigations and adjudications.

Our expanded agenda, a few elements of which are described below, will rely on three guiding principles that will focus our work through policy campaigns and communications strategies, employ-

201. *Innocence Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence-database?filters%5BdnaEvidence%5D=yes [https://perma.cc/TC5A-J4ZE].

202. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., https://files.deathpenaltyinfo.org/documents/pdf/FactSheet.f1601652961.pdf [https://perma.cc/68QF-3L6Z].

203. Baze v. Rees, 553 U.S. 35, 86 (2008) (Stevens, J., concurring).

204. Ca. Exec. Order No. N-09-19 (Mar. 13, 2019), https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf [https://perma.cc/384S-SAC4] ; Press Release, John Kitzhaber, Governor of Or., Statement on Capital Punishment (Nov. 22, 2011), https://media.oregonlive.com/pacific-northwest-news/other/Microsoft%20Word%20-%20Final%20Final%20JK%20Statement%20on%20the%20Death%20Penalty.pdf [https://perma.cc/RF9W-TAUQ]; Wallace McKelvey, *Gov. Tom Wolf Declares Moratorium on Death Penalty in PA*, PENN LIVE (Feb. 13, 2015), https://www.pennlive.com/politics/2015/02/gov_tom_wolf_declares_moratori.html [https://perma.cc/U66W-M8YQ].

205. *See, e.g.*, *Mass Incarceration*, ACLU, https://www.aclu.org/issues/smart-justice/mass-incarceration [https://perma.cc/P9MR-M283].

ing innocence as a wedge to assist in the deconstruction of the volume-based criminal legal system:

A global theory of reliability;

A commitment to fairness, equity, and human rights; and

An obligation to expose, rectify, and prevent racial injustice.

A. Exposing the Plea Problem

Given that 95% of all criminal convictions are secured by a guilty plea—generally one that avoids exposure to the most extreme potential sentence—instead of a trial, and that 18% of the nation's men and women whose innocence was ultimately proven through post-conviction DNA testing and other means pleaded guilty to crimes they did not commit,[206] wrongful convictions help expose the profound unfairness of the penalty for exercising one's right to trial. The abject injustice of an innocent viewing a guilty plea as a rational choice is reflective of a fundamental distrust of a process that leverages the threat of an extremely long sentence in exchange for the acceptance of a plea accompanied by a shorter sentence.[207]

We have long exposed the problem of innocent people pleading guilty to serious felonies (e.g., sexual assault and homicide) in the post-conviction setting.[208] At the Congressional Black Caucus's annual policy conference in 2017, the Innocence Project presented on the guilty plea phenomenon and highlighted the story of an exonerated man from New Jersey, Rodney Roberts, who spent decades in confinement for a crime he didn't commit.[209] When describing why he pled guilty, he alluded to a fundamental distrust of the criminal process when he tragically said, "I knew I was inno-

206. *Why Do Innocent People Plead Guilty to Crimes They Didn't Commit?*, INNOCENCE PROJECT, https://guiltypleaproblem.org/ [https://perma.cc/97W3-387J].

207. Notably, this also raises the question of how the state takes any comfort in the excessive incarceration of a person who exercised her Constitutional rights to go to trial when the state would otherwise be satisfied with a drastically reduced sentence had she pleaded guilty.

208. *See id*.

209. *See* Audrey Levitin, *How Rodney Roberts' Case Exposes the Injustice of Guilty Pleas*, INNOCENCE PROJECT (Sept. 13, 2018), https://www.innocenceproject.org/what-rodney-roberts-case-exposes-about-injustice/ [https://perma.cc/B5RF-GMZV]; *Join Congressional Black Caucus Panel: "Innocence Denied: Exploring the Intersection of Race, Bail & Guilty Pleas,"* INNOCENCE PROJECT (Sept. 18, 2017), https://www.innocenceproject.org/congressional-black-caucus-panel-innocence-denied/ [https://perma.cc/RQG3-ERYG].

cent, but I had to choose the lesser of two evils. It's like you got to pick between Satan and Lucifer."[210]

Rodney's experience pleading guilty to a serious, violent felony crime should make it all the more obvious that someone would more easily make the same choice as Rodney when faced with a seemingly less significant sanction for a misdemeanor plea. Thirteen million misdemeanors are filed each year[211] and more than 95% of misdemeanor convictions result from guilty pleas.[212] While it is true that the consequences are less dire for a misdemeanor conviction than for a felony, they can still be life-changing, resulting in people being "jailed, fined, supervised, tracked, marked and stigmatized."[213] Their conviction could impact employment, child custody, housing, immigration status, and government benefits.[214] Further, they may be disqualified for loans and professional licenses, and their credit status and financial health may be destroyed.[215] Misdemeanor convictions are far from insignificant.

Moving forward, we hope to target the vast misdemeanor system, which over-criminalizes conduct as a means of extending power over marginalized populations. To stigmatize people with all the consequences of criminal prosecution by charging them with very minor offenses or victimless charges cannot meaningfully be defended with a just underlying theory of punishment. Even in the category of misdemeanors for which there may be some justification, the full penal consequences are simply too extreme to justify the conviction.[216] Prosecution for possession of an open container of alcohol, vagrancy, or simple trespass, is offensive to the principles of diversity, inclusion, and fairness.[217] Initially we can educate policymakers and the general public. We can start research-based policy reform efforts that decrease the pressures on the innocent to plead guilty to crimes they did not commit and to decriminalize conduct which should not have been criminalized in the first place. We have already begun this work to address the larger coerced plea problem by participating in advocacy efforts for pretrial reforms,

210. Antoine Goldet, *Bad Deals: The Perils of Bargaining for Justice*, Reveal News (Aug. 28, 2016), https://www.revealnews.org/article/bad-deals-the-perils-of-bargaining-for-justice/ [https://perma.cc/FT6V-TV88].

211. Alexandra Natapoff, Punishment Without Crime 13 (2018).

212. *Id.* at 5.

213. *Id.* at 19–20.

214. *Id* at 20.

215. *Id.* at 20.

216. Jenny Roberts, *The Innocence Movement and Misdemeanors*, 18 B.U. L. Rev. 779, 818–21 (2018).

217. *See, e.g.*, *id.* at 812.

including reforming monetary bail and discovery laws and practices in various jurisdictions.[218]

B. Eliminating Unscientific Presumptive Drug Testing as a Basis for Detention or Conviction

As we explained above, most of forensic science has little oversight or input from the broader and more objective scientific community. Routinely, police stop people on the street or stop cars on the roads before lawfully or unlawfully searching the pedestrians or cars and their occupants and seizing items to test them "for the presence of controlled substances." In contrast to rape and murder, law enforcement's decision to focus on a particular target for a drug offense is not triggered by a victim, but generally by the police themselves. Police prioritize certain groups or individuals by applying the same racial biases utilized in selecting people, blocks, neighborhoods, or thoroughfares to surveil. Racial disparities in discretionary stops and low-level vehicular infraction stops are commonplace.[219] Although national studies confirm that the percentage of white and Black people who use illicit drugs is nearly equal, police and prosecutors again and again single out Black people for arrest and imprisonment.[220] Black people are far more likely to be wrongfully convicted of drug crimes than white people.[221]

Yet forensic tests quite frequently used in the field are merely "presumptive"—sensitive but not very specific with an unacceptably high rate of false positives for everyday household materials.[222] The

218. *See Innocence Project Gears Up to Launch New Guilty Plea Campaign*, INNOCENCE PROJECT (Jan. 9, 2017), https://innocenceproject.org/innocence-project-guilty-plea-campaign/ [https://perma.cc/FG9T-A7EY]. https://www.innocenceproject.org/innocence-project-guilty-plea-campaign/

219. *See generally*, Alexandra Natapoff, *The High Stakes of Low-level Criminal Justice*, 128 Yale L.J. 1648 (2019); ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018).

220. *See* AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS 18 (2013) https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf [https://perma.cc/AFM7-DEAT].

221. *See* SAMUEL R. GROSS ET AL., NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 16–17 (2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf [https://perma.cc/UP6R-ZK2E].

222. *See* Ryan Gabrielson & Topher Sanders, *How a $2 Roadside Drug Test Sends Innocent People to Jail*, N.Y. TIMES (July 7, 2016), https://www.nytimes.com/2016/07/10/magazine/how-a-2-roadside-drug-test-sends-innocent-people-to-jail.html [https://perma.cc/JRR4-J3UJ] [hereinafter *Roadside Drug Test*].

tests are applied by uniformed police rather than in a controlled laboratory environment. Presumptive drug testing has been inappropriately relied upon to arrest, prosecute, and convict the innocent. Even in states where, at trial, labs must first complete confirmatory testing, there is nothing to prevent a plea of guilty prior to trial based on nothing more than the presumptive test. For example, based on a faulty presumptive drug test following a roadside stop, Amy Albritton of Houston, Texas pled guilty to crack possession despite her innocence when she faced two years in detention.[223] She ultimately served twenty-one days and lost her job and her home.[224] A Fox News team in Dekalb County, Georgia found more than thirty "positive" tests indicating drug possession for crack, cocaine, and meth that were later shown to be breath mints, cotton candy, and headache medication, respectively.[225] A research study found that nine of ten prosecutor offices across the country accepted pleas based solely on a presumptive drug test.[226] Also, according to an exposé by The New York Times, more than 100,000 people each year plead guilty to drug possession in the wake of a presumptive field test.[227] Not only does this problematic method develop suspects through unvalidated forensic tests, it elicits guilty pleas from the innocent.[228]

The Innocence Project will launch a campaign that seeks to limit or prohibit reliance on presumptive testing as a basis for an arrest or guilty plea. We also plan to develop data resources and educate the public regarding racial disparities and the collateral consequences and costs of false arrests and pre-trial detention and continue to amplify the role of coerced guilty pleas in the misdemeanor setting. Finally, we will highlight the unfairness of the cash bail system and how it makes any detention based on presumptive testing much more likely to result in a coerced guilty plea.

---

223. *See id.*

224. *See id.*

225. *See* Randy Travis, *Driver Wrongly Jailed After Field Test on Breath Mint Shows Positive for Crack*, FOX 5 ATLANTA (July 12, 2018), https://www.fox5atlanta.com/news/driver-wrongly-jailed-after-field-test-on-breath-mint-shows-positive-for-crack [https://perma.cc/8Y22-RQZW]. *See also* Randy Travis, *Police Delay Drug Arrests in Wake of FOX 5 I-Team Investigation Into Field Test Kits*, FOX 5 ATLANTA (Oct. 31, 2018), https://www.fox5atlanta.com/news/police-delay-drug-arrests-in-wake-of-fox-5-i-team-investigation-into-field-test-kits [https://perma.cc/MP9Q-WDZW].

226. *See Roadside Drug Test*, *supra* note 219.

227. *See id.*

228. *See* Ryan Gabrielson & Topher Sanders, *Confusion Over Drug Tests Highlights Lack of Training for Florida Officers*, PROPUBLICA (Nov. 22, 2016), https://www.propublica.org/article/confusion-over-drug-tests-highlights-lack-of-training-for-florida-officers [https://perma.cc/QU82-TS45].

C. Just Because it is Based on Science, Doesn't Mean it is Fair, Equitable, or Unbiased

We can expect that new policing technologies will be introduced more frequently and more rapidly in the near future. Without external oversight to assess accuracy, uncover implicit biases, or measure its adverse effects on people of color, privacy interests, and other human rights, there are few impediments or disincentives to the use of any tool that at least superficially is perceived as advancing a law enforcement purpose.

Many new technologies have the potential to adversely and disproportionately impact communities of color because of a reliance on biased historical data. For instance, "risk assessment" instruments rely on algorithms to determine pre-trial release, parole, probation, future dangerousness, sentencing, or even the deployment of police in neighborhoods for the next crime hot spot.[229] These algorithms apply math and computer technology to generate a set of directions used to predict the future based on information collected from the past.[230] The stated purpose is to make these very consequential decisions streamlined and more objective.[231] But although the algorithms may appear facially race-neutral, they are often based on historical variables and data correlated to race and poverty.[232] That historical data is itself influenced by racial, economic, and cognitive biases.[233] If we are not careful, uncritical reliance on algorithms can become a tool of further racial discrimination and of legitimizing other explicit and implicit biases.[234]

---

229. *See Algorithms in the Criminal Justice System: Pre-Trial Risk Assessment Tools*, ELECTRONIC PRIVACY INFO. CTR., https://epic.org/algorithmic-transparency/crim-justice/ [hereinafter *Algorithms in the Criminal Justice System*] [https://perma.cc/MH8F-7S6H]

230. *Id.*

231. *Id.*

232. *See* Beth Schwartzapfel, *Can Racist Algorithms Be Fixed?*, MARSHALL PROJECT (July 1, 2019), https://www.themarshallproject.org/2019/07/01/can-racist-algorithms-be-fixed [https://perma.cc/7CHN-EV4D]*; Algorithms in the Criminal Justice System, supra* 226.

233. *See* Schwartzapfel, *supra* note 229. The misuse of algorithms has been referred to as "weapons of math destruction." KATHY O'NEIL, WEAPONS OF MATH DESTRUCTION 3 (2016). It is easier to identify false positives and retrain the algorithm than to identify false negatives that have already unfairly hurt the target community. *See* Richard Berk et al., *Fairness in Criminal Justice Risk Assessments: The State of the Art*, SOC. METHODS & RES. 31–35 (2017), https://crim.sas.upenn.edu/sites/default/files/Berk_Tables_1.2.2018.pdf [https://perma.cc/WM8N-7E6S].

234. Algorithms predict the future based on past behavior. For example, since police do not have a means to directly assess tomorrow's criminal hot spot,

New technologies also have the potential to impact and intrude on individual privacy, especially in the realm of DNA. Genetic genealogy combines traditional genealogy which uses documents and interviews to trace an individual's ancestry with a newer type of DNA testing commercially available at direct-to- consumer databases. These databases allow anyone to learn more about their ancestry or pre-dispositions to certain diseases and disorders. Already, the technique has been credited with solving more than seventy cold cases and leading to one exoneration of a wrongfully convicted innocent man.[235] In the simplest cold case, the blood or semen left by an unknown perpetrator (that could not otherwise be identified through CODIS, the FBI's national database) is tested using an array of hundreds of thousands of short DNA fragments or sequences. That profile is then uploaded to one of the publicly available databases to which consumers submit their own profiles to in an effort to learn about their ancestry, for adoptees to identify biological parents, or to identify and locate cousins or other relatives. No one expects the crime scene sample to make a perfect match to anyone in the database, but if one or two profiles in the database share a significant number of common fragments with the crime scene sample, then the data suggests that these profiles most likely are related to the perpetrator. Depending on the amount of DNA in common, they could be, e.g., first cousins, second cousins, second cousins once removed, third cousins, and so on. Once the source of the somewhat shared DNA is identified by the custodian of the consumer database, the genealogist takes over tracking that person's ancestry back to the great grandparents, and then reverses direction downward filling in all the offspring of the great grand-

---

the algorithm is trained using prior arrest/location data as a proxy. *See* Schwartzapfel, *supra* note 229. But the prior arrest data is itself biased because police focused on communities of color rather than white neighborhoods. *Id.* Marijuana is smoked at the same rate in white and black communities, but the arrest rate for marijuana is much higher in black communities. *See The War on Marijuana in Black and White,* ACLU (June 2013), https://www.aclu.org/report/report-war-marijuana-black-and-white?redirect$^{C}_{R}$iminal-law-reform/war-marijuana-black-and-white [https://perma.cc/3MU4-SL5T]. Thus tomorrow's hot spot is far more likely to be a black neighborhood.

235. Paige St. John, *DNA Genealogical Databases Are a Gold Mine for Police, but with Few Rules and Little Transparency*, L.A. TIMES (Nov. 24, 2019), https://www.latimes.com/california/story/2019-11-24/law-enforcement-dna-crime-cases-privacy [https://perma.cc/F56Z-JQ65]https://www.latimes.com/california/story/2019-11-24/law-enforcement-dna-crime-cases-privacy; Mia Armstrong, *In an Apparent First, Genetic Genealogy Aids a Wrongful Conviction Case*, MARSHALL PROJECT (July 17, 2019), https://www.themarshallproject.org/2019/07/16/in-an-apparent-first-genetic-genealogy-aids-a-wrongful-conviction-case [https://perma.cc/LF7B-ZP8B].

parents, at least to those alive at the time the crime was committed. Ideally, the genealogist will identify the one person or few people in the family tree who were the right age and sex and could have been in the same city as the victim on the day the crime was committed. Law enforcement will then surreptitiously collect a drinking cup or discarded cigarette butt from those few suspects and, hopefully, secure a match to the crime scene sample. In the process, the experienced genealogist will have to overcome the unrecorded adoptions, unknown parentage and misattributed paternity—not infrequent when you go back two or three generations—that can create dead ends and mislead the investigator.[236]

Years ago, when courts upheld the right of police to force a suspect to provide a DNA sample, judges had to weigh the competing interests of the individual to genetic privacy and to freedom from police intrusion when there was at least sufficient cause to believe the subject committed the crime, against the public safety interest in identifying and apprehending the perpetrator of a serious crime. Judges understood that DNA collection was different from other types of police intrusion. DNA has the potential to reveal many personal and private health related details about the source and, indirectly, about the source's family. That awareness is one reason the United States does not have a universal DNA database in the hands of the government. When judges balanced the competing interests before ordering an accused to provide a DNA sample, one compelling factor that weighed heavily in favor of authorizing involuntary collection from suspects was that the thirteen or so DNA markers with which a suspect and crime scene sample were compared were "junk DNA" that did not code for phenotypical traits.[237] But in genetic genealogy, instead of thirteen or twenty

236. For a more detailed description of genetic genealogy and examples of its utility in actual cases, see generally Ellen M. Greytak et al., *Genetic Genealogy for Cold Case and Active Investigations*, 299 FORENSIC SCI. INT'L 103 (2019).

237. Or at least scientists did not yet know how the markers were expressed. *See* Richard Lempert, *Maryland v. King: An Unfortunate Supreme Court Decision on the Collection of DNA Samples*, BROOKINGS (June 6, 2013), https://www.brookings.edu/blog/up-front/2013/06/06/maryland-v-king-an-unfortunate-supreme-court-decision-on-the-collection-of-dna-samples/ [https://perma.cc/3WY6-QHMB]https://www.brookings.edu/blog/up-front/2013/06/06/maryland-v-king-an-unfortunate-supreme-court-decision-on-the-collection-of-dna-samples/; Jennifer K. Wagner, *Courts in Unsettled Territory Turn to the Map Available*: United States v. Mitchell, PRIVACY REP. (Apr. 2, 2012), https://theprivacyreport.com/2012/04/02/courts-in-unsettled-territory-turn-to-the-map-available-united-states-v-mitchell/ [https://perma.cc/ZF8M-WYZS]. The original thirteen marker test has been expanded to more than twenty markers, but their purpose remains unknown. *Laboratory Services: Combined DNA Index System (CODIS)*, FBI, https://www.fbi.gov/services/laboratory/

markers, the labs compare more than 600,000 markers and these markers were selected specifically because they reveal not only a person's ancestry but their genetic predisposition for various diseases and disorders.[238] Moreover, the procedure encourages collection, surreptitiously, of DNA samples not only from suspects who turn out to be innocent, but also from known innocent people just to obtain additional genetic information to further narrow the search.[239]

When the genealogist constructs the multi-generational family tree, the identities and relatedness of several hundred or more people who did not consent, most of whom did not even know they were related and definitely did not allow their DNA to be part of a commercial database, will become known and their relatedness mapped. For the first time, members who had unrecorded adoptions or misattributed paternity will be revealed even though they never sought to question the relatedness of the people who raised them. Investigators or other interested parties could potentially learn far more about the extended family's members' genetic indicators for disease and general well-being, even without their corresponding genetic data, simply by virtue of their relatedness. Additionally, there is the risk that some might, through deception, submit real or artificial genomes for uploading just so they can access the identity of other people in the database with matching segments of DNA known to correlate with health-related matters.[240] Normally, we would expect that a technology with such far reaching consequences to personal privacy and other civil liberties would first be reviewed for its ethical, legal, and social implications and a regulatory scheme effectively restricting disclosure of data in place before being rolled out in casework. But currently, with the excep-

biometric-analysis/codis [https://perma.cc/8D6J-254L]; JOHN M. BUTLER, ADVANCED TOPICS IN FORENSIC DNA TYPING: METHODOLOGY 99–139 (2012) (discussing Short Tandem Repeat (STR) loci and kits).

238. *See* Erika Check Hayden, *Genetics Extends the Long Arm of the Law*, KNOWABLE MAG. (Jan. 18, 2019), https://knowablemagazine.org/article/technology/2019/genetics-extends-long-arm-law [https://perma.cc/K8HN-A98W]https://www.knowablemagazine.org/article/technology/2019/genetics-extends-long-arm-law; Erin Murphy, *Law and Policy Oversight of Familial Searches in Recreational Genealogy Databases*, 292 FORENSIC SCI. INT'L e5, e5 (2018).

239. *See* Madison Pauly, *Police Are Increasingly Taking Advantage of Home DNA Tests. There Aren't Any Regulations to Stop It.*, MOTHER JONES (Mar. 12, 2019), https://www.motherjones.com/crime-justice/2019/03/genetic-genealogy-law-enforcement-golden-state-killer-cece-moore/ [https://perma.cc/PCL3-6CG7].

240. Michael D. Edge & Graham Coop, *Attacks on genetic privacy via uploads to genealogical databases*, ELIFE (Jan. 7, 2020), https://elifesciences.org/articles/51810 [https://perma.cc/BXZ5-5XYY]https://elifesciences.org/articles/51810.

tion of an interim and inadequate guideline prepared by the FBI,[241] there has been no federal legislation and only one state statute (Maryland) to meaningfully control forensic genetic genealogy.[242]

Facial recognition is another instance where technology has the potential to intrude excessively on people's privacy. Facial recognition systems enable the user (law enforcement and anyone else with access) to upload a facial photo of interest and translate the physical structure of the face to a mathematical formula relying on facial geometry.[243] The results are then compared to the facial geometry of many other photos populating the databank.[244] Most likely matches are spit out and ranked by degree of similarity.[245] Critically, the effectiveness of facial recognition requires the acquisition of large databanks of facial images.[246] This often means that our faces are added to these databases without our consent by using, e.g., our drivers' licenses, arrest photos (no matter how minor the infraction), and FBI, Homeland Security, and ICE datasets. A 2016 study found that half of the U.S. adult population are in law enforcement facial recognition databases.[247] But even these numbers are dwarfed by the algorithm developed and licensed to hun-

241. The FBI and DOJ issued a guideline in September 2019, but without either public discussion or sufficient input from medical bioethicists, privacy experts, or other stakeholders. *See* DEP'T OF JUST., INTERIM POLICY: FORENSIC GENETIC GENEALOGICAL DNA ANALYSIS AND SEARCHING (Sept. 2, 2019), https://www.justice.gov/olp/page/file/1204386/download [https://perma.cc/EL9W-UG2F]. Moreover, compliance is not mandatory, but merely recommended. Even as guidance it does not alter the behavior of state and local prosecutors who have jurisdiction over the overwhelming majority of crimes for which this technology is useful. The guidelines expressly permit surreptitious collection from persons who are not suspects if it could help develop leads. Presently, genetic genealogy is limited to the most violent crimes. *See id.* at 2, 4–6. But just as other forensic DNA databases were limited to serious felonies at the beginning but rapidly were expanded to include all felons and then arrestees, mission creep will likely broaden the use of genetic genealogy to any investigation a detective wishes to pursue.

242. Ellen Wright Clayton et al., *The Law of Genetic Privacy: Applications, Implications, and Limitations*, 6 J.L. & BIOSCIENCES 1 (2019). The authors conclude that only the new Maryland law (Chapter 681) enables meaningful control to individuals over disclosures of genetic related or derived information that may affect them.

243. *See Background*, THE PERPETUAL LINEUP, GEO. L. CTR. PRIVACY & TECH. (Oct. 18, 2016), https://www.perpetuallineup.org/background [https://perma.cc/ZU4T-FTFF]https://www.perpetuallineup.org/.

244. *See id.*

245. *See id.*

246. *See id.*

247. *See Executive Summary,* THE PERPETUAL LINEUP, GEO. L. CTR. PRIVACY & TECH. (Oct. 18, 2016), https://www.perpetuallineup.org/ [https://perma.cc/2ZDR-VFDT].https://www.perpetuallineup.org/

dreds of law enforcement agencies by Clearview AI.[248] Clearview enables the user to upload any photo and almost immediately get back social media and internet photos (scraped from Facebook, YouTube, and millions of other websites including employment, educational, and news sites) of the same person—a multi-billion image database—from which almost no one is excluded.[249] Even more dangerous is the fact that when the photos are revealed, so too are the links from which they came.[250] Thus instantly, the user not only learns the identity of the previously unknown subject, but also where they live, work, who their friends are, and many personal private facts.[251] The implicit biases held historically by a user will be perpetuated by facial recognition, with members of the more vulnerable groups more frequently the subject of surveillance and unwanted intrusion.[252] The disparate surveillance will be exacerbated by the reality that Black people are disproportionately more likely to have contact with police.[253] In addition to crime scene photos, police can upload a photo they take of an activist at a rally, a pedestrian who frequents a particular corner, or just about anyone they are curious about while on patrol.[254] None of these facial recognition systems are regulated, and, with the exception of San Francisco and a handful of small cities and towns, only a few localities have banned the use of these systems due to the very real diminution of privacy and concerns about the end of anonymity. There are no authentic state or federal limits, nor meaningful privacy protections, on the proliferation and application of these techniques.[255]

As these databases get larger, the risk of false matches increases (the broader the search, the more likely there are people who closely resemble us). Only a limited number of the facial recogni-

248. *See* Kashmir Hill, *The Secretive Company That Might End Privacy as We Know It*, N.Y. TIMES (Jan. 18, 2020), https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html [https://perma.cc/DQ69-EUJJ] https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html[hereinafter Hill, *Privacy*].

249. *See id.*

250. *See id.*

251. *See id.*

252. *See Risk Framework,* THE PERPETUAL LINEUP, GEO. L. CTR. PRIVACY & TECH. (Oct. 18, 2016), https://www.perpetuallineup.org/risk-framework [https://perma.cc/A3QB-HQDB]https://www.perpetuallineup.org/.

253. *See id.*

254. *See id.*

255. *See id.*; Levi Sumagaysay, *Berkeley Bans Facial Recognition*, MERCURY NEWS (Oct. 16, 2019), https://www.mercurynews.com/2019/10/16/berkeley-bans-facial-recognition/ [https://perma.cc/8GSY-L376]https://www.mercurynews.com/2019/10/16/berkeley-bans-facial-recognition/.

tion providers have voluntarily submitted their algorithms for an accuracy test with NIST.[256] Initial assessments indicate a wide range of accuracy between and, depending on demographics, within algorithms.[257] The methods tend to have fewer false positives with males than females and with lighter as opposed to darker-skinned subjects, indicating that this technology could disproportionately harm Black women.[258] This deficiency could have been avoided, or at least minimized, had the algorithms been trained using more women and more people with darker skin.[259] Most of the providers acknowledge that their systems are not sufficiently reliable to use with images clipped from videos, but Clearview AI claims (without independent verification) that its system works well with videos and less than excellent quality still images.[260] There are no rules requiring a threshold of quality as a predicate for police identifying a suspect. All of these technologies were licensed to law enforcement without first being tested for accuracy, reliability, and fairness by a government agency with oversight.[261] Nor is there any prohibition against licensing these methods for private use.[262] All of these issues should have been addressed during the research phase of development.

Once the ethical, legal, and social implications, including racial bias, have been fairly explored and weighed, and the accuracy and reliability of the technique proven, it is essential that these technologies become transparent and equally accessible to the prosecution and defense, both before they start being used in actual cases and once they become routine. Without a regulatory

256. *See Identification,* FACIAL RECOGNITION VENDOR TEST, NIST 3 (Sept. 2019), https://www.nist.gov/publications/face-recognition-vendor-test-frvt-part-2-identification [https://perma.cc/UVC3-YS5V]https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8271.pdf.

257. PATRICK GROTHER ET. AL., FACIAL RECOGNITION VENDOR TEST (FRVT) PART 3: DEMOGRAPHIC EFFECTS 6, 7 (Dec. 2019), https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf [https://perma.cc/P4KY-FNYT]https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf [hereinafter DEMOGRAPHIC EFFECTS].

258. *See id.* at 63; Tom Simonite, *The Best Algorithms Struggle to Recognize Black Faces Equally*, WIRED (Ju 22, 2019), https://www.wired.com/story/best-algorithms-struggle-recognize-black-faces-equally/ [https://perma.cc/PQ2K-9H55].

259. *See* DEMOGRAPHIC EFFECTS, *supra* note 254, at 4.

260. *See* Hill, *Privacy*, *supra* note 245.

261. *See* Shirin Ghaffary, *How to Avoid a Dystopian Future of Facial Recognition in Law Enforcement*, VOX (Dec. 10, 2019), https://www.vox.com/recode/2019/12/10/20996085/ai-facial-recognition-police-law-enforcement-regulation [https://perma.cc/4T2Y-XKQX].

262. *See id.*

body like the FDA, once the prosecution proffers novel scientific evidence, the only chance to challenge the test's validity is in court. But, as we explained above, when it comes to forensics, courts have been poor gatekeepers as neither the bar nor the bench has sufficient forensic fluency to apply to the cases that come before them. The problem is further exacerbated when defense efforts to question the validity of a new technique and to seek access to the software for their own experts to analyze are often thwarted by the court's deference to the company's assertion of proprietary secrets.[263] A trial by "black box" is not consistent with traditional notions of due process or the rights of the accused. Further, there is a huge technology gap between the prosecutor and defense counsel, particularly for public defenders.[264] The Manhattan DA has a $10 million forensics lab to mine digital data from smart phones, computers, and other digital devices,[265] whereas public defenders have minimal resources.[266] There simply is no money available to create in-house forensic capacity at most offices, and single case retention of outside experts can be prohibitively expensive and slow.[267]Defendants need access to the technology, often to prove their innocence or impeach prosecution witnesses. The subject matter experts cannot be monopolized by law enforcement.[268] The Stored Communications Act, a1986 federal law, requires that law enforcement secure a warrant before technology companies provide access to emails, messages, and other private data.[269] Defend-

263. *See* People v. Superior Court, No. B258569, 2015 WL 139069 (Cal. Ct. App. Jan. 9, 2015) (denying defendant access to forensic software program source code and classifying code as trade secret); Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property and the Criminal Justice System*, 70 STAN. L. REV. 1343, 1356–69 (2018) (citing State v. Loomis, 881 N.W.2d 749 (Wis. 2016)) (finding system weights and input variables of predictive computer system protected trade secrets).

264. *See* Kashmir Hill, *Imagine Being on Trial. With Exonerating Evidence Trapped on Your Phone.*, N.Y. TIMES (Nov. 22, 2019), https://www.nytimes.com/2019/11/22/business/law-enforcement-public-defender-technology-gap.html [https://perma.cc/FHB9-3K6S] [hereinafter Hill, *Phone*].

265. Jeff J. Roberts & Robert Hackett, *Exclusive: Inside America's Newest Digital Crime Lab*, FORTUNE (Nov. 15, 2016), https://fortune.com/longform/vance-crime-lab/.

266. *See, e.g.*, Alexa Van Brunt, *Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them*, GUARDIAN (June 17, 2015), https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked [https://perma.cc/DV55-8Q5M].

267. *See* Hill, *Phone*, *supra* note 261.

268. *Id.*

269. *See* 18 U.S.C. § 2703 (2019); Sean Fernandes, *Supreme Court Addresses Stored Communications Act Cases*, ABA (Feb. 15, 2019), https://

ants can get subpoenas but lack the authority to secure "warrants."[270] Without following the explicit terms of the Act, technology companies feel free to ignore defense subpoenas, even if signed by a judge.[271] Constant vigilance and regulation of emerging technologies and investigative systems, from predictive policing to gang databases to risk assessment tools, will be crucial in stymying efforts, referred to by racial justice experts as "The New Jim Code,"[272] to bring these tools to court without adequate, independent scrutiny. The Innocence Project will use its voice to help create appropriate external and objective oversight before forensic methods are applied to actual casework, if they are to be used at all.

V.
CONCLUSION: REIMAGINING JUSTICE

As public recognition of the biases and incentives baked into the criminal legal system grows, so too will the demand that the system be reimagined. We expect the innocence frame, innocence organizations, and exonerated men and women to be central to the coalition responsible for the structural and cultural changes to come. The wrongly convicted offer a powerful first-person narrative to identify and remediate disparity and intolerance. The consequences and perils of high-volume policing practices, from quotas to "hot spot" policing, fall into focus when seen through their personal experiences. For instance, can truly consensual searches ever exist given the presence of an inherently coercive blue uniform manifesting the unequal power relationship?

It will take more than mandatory changes in policies and practices to prevent wrongful convictions or, for that matter, to end mass incarceration and over-criminalization. Memory malleability and eyewitness misidentification are more readily acknowledged than is the legacy of slavery. Reforms that seek to shield us from contextual information or mitigate confirmation bias may be politi-

---

www.americanbar.org/groups/litigation/committees/privacy-data-security/practice/2018/supreme-court-addresses-stored-communications-act-cases/ [https://perma.cc/Y9CQ-KTH9].

270. *See* Facebook, Inc. v. Superior Court, 417 P.3d 725, 729 (Cal. 2018) (finding that criminal defendants may issue subpoenas for private and public digital content to technology companies).

271. *See* Stephanie Lacambra, *A Constitutional Conundrum That's Not Going Away—Unequal Access to Social Media Posts*, ELECTRONIC FRONTIER FOUND. (May 31, 2018), https://www.eff.org/deeplinks/2018/05/ca-supreme-court-leaves-scales-tipped-prosecutions-favor-defense-gets-access [https://perma.cc/A2UA-2YM4].

272. *See* RUHA BENJAMIN, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE 8 (2019).

cally viable, but they do not confront personal and systemic racism. Today's meaningful legislation and regulation can be diluted or reversed in the next election. Lasting social and cultural change will not happen without winning hearts and minds. For far too long the engine defining and driving the intersection of law and crime has been fueled by fear and retribution. We must expand our agenda and extend our reach so that we can join others in remaking the engine, replacing fear with optimism, and turning retribution into compassion.

FUTURE SEX

*BENNETT CAPERS**

INTRODUCTION

Reports of the death of utopia have been greatly exaggerated.
—Caitríona Ní Dhúill, *Sex in Imagined Spaces*[1]

"After decades of intense scrutiny and repeated attempts at ambitious reforms, our laws against rape and sexual harassment still fail to protect women from sexual overreaching and abuse. What went wrong?"[2] Thus opens Stephen Schulhofer's seminal book, written just over two decades ago, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*. Schulhofer was far from alone in his assessment.[3] Moreover, it is safe to say that, despite continued reform efforts, results still remain underwhelming, at least in terms of protecting women from sexual assault. Now, more than two decades later, Schulhofer's question still echoes. What went wrong?

This brief essay does not attempt to chronicle everything that went wrong with the reform movement, though elsewhere I have suggested a few missed opportunities.[4] Rather, in this essay I raise questions of my own, questions that seem as necessary, and as urgent, as Schulhofer's "What went wrong?" My own first question is this: If we truly want to craft reforms that "protect women"—and allow me to add men[5]—"from sexual overreaching and abuse," in

 Stanley A. August Professor of Law, Brooklyn Law School. B.A. Princeton University; J.D. Columbia Law School. Assistant U.S. Attorney, Southern District of New York 1995–2004. E-mail: Bennett.capers@brooklaw.edu.

1. CAITRÍONA NÍ DHÚILL, SEX IN IMAGINED SPACES: GENDER AND UTOPIA FROM MORE TO BLOCH 1 (2010).

2. STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW ix (Harvard Univ. Press rev. ed. 2000).

3. *See, e.g.*, CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT (1992); Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 12 (1998) (observing that despite decades of reforms "designed to free rape law from . . . misogynistic antecedents, contemporary courts remain hostage to the traditional definitions, which require rape victims to surmount special legal obstacles that the victims of other crimes are spared.").

4. *See, e.g.*, I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345 (2010); I. Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259 (2011); I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826 (2013).

5. As I have written previously, male victim rape has too long been confined to the margins and footnotes. Put simply, "male-victim rape is real rape, too." Capers, *Real Rape Too*, *supra* note 4, at 1264.

short, from *unwanted* sex, then doesn't it behoove us to begin by having an open, honest discussion about *wanted* sex? Second, and perhaps more importantly: In crafting real reforms that make a real difference, might there be advantages to imagining what a future with only wanted sex would look like? This essay contends that the answer to both questions is yes.

Allow me to say up front that I view this intervention as a friendly amendment to the project Schulhofer laid out in *Unwanted Sex*, a project which continues, albeit this time as a group effort, as he spearheads efforts of the American Law Institute to revise the sexual assault provisions of the Model Penal Code. Schulhofer himself describes the ALI project as the "messy and frustrating work of legislative compromise, trying to design law reform that can be both progressive and enactable."[6] Schulhofer makes no bones about the fact that his goal is to pass reforms that move "our criminal justice system in a progressive direction, to the place where society ought to be."[7] My intervention is to suggest that we think about wanted sex first. And that we envision what our ideal would be. Put differently, that we imagine a future perfect, so to speak.[8] After all, it is this future that should be our north star, that will help us keep our eyes on the prize and reduce the likelihood of our being sidetracked or losing track and ending up someplace else. It will reduce too the likelihood of us passing reforms that inadvertently contribute to mass incarceration, over-criminalization, and the racialized and gendered policing that seem to accompany them.

My argument proceeds in two parts. Part One begins with a thumbnail sketch of where we are now with respect to rape law, including the reform efforts of the ALI, and the sea change that the #MeToo movement does, and does not, herald. It then turns to how we have sex now, and suggests that wanted sex must inform how we think about, and craft reforms to deter, unwanted sex. Part Two begins an argument for imagining the future, and then borrows from visions of science fiction writers and other futurists to imagine a world free from unwanted sex. Put differently, it explores how feminist futurists have imagined sexual autonomy in a utopian

6. Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 LAW & INEQ. 335, 335 (2017).

7. *Id.*

8. This essay thus falls into the category of legal futurist scholarship, which imagines the distant future, and the law's role in that future. For an early bibliography of legal futurist writing, *see* David A. Funk, *Legal Futurology: The Field and Its Literature*, 73 L. LIBR. J. 625 (1980). For a recent example, *see* I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1 (2019).

world. And it argues that imagining an ideal future is the first step in mapping a path there.

I.
(UN)WANTED SEX

> Science fiction isn't just thinking about the world out there. It's also thinking about how that world might be—a particularly important exercise for those who are oppressed, because if they're going to change the world we live in, they—and all of us—have to be able to think about a world that works differently.
>
> —Samuel Delany[9]

Before turning to what a society with only wanted sex might look like, it makes sense to first begin by taking stock of where we have been, and where we are now. If nothing else, this starting point will give us a sense of how much ground there is to cover. This part accordingly sketches out the black letter law of rape that predominated up until the 1970s, the reforms that followed feminist agitation for change, and ongoing efforts to reform rape law. But this is only the first goal of this part. The second goal is to add an honest discussion of wanted sex, or how we have sex now, to the conversation about the law of unwanted sex.

A. Past Imperfect

As any student of rape law knows, the black letter law of rape has always been deceptively simple. At English common law, rape was defined as "carnal knowledge of a woman forcibly and against her will,"[10] and American jurisdictions for the most part adopted this definition.[11] The elements of the offense were also deceptively simple: to be guilty of rape, the prosecution had to establish that there had been vaginal intercourse, that the intercourse was obtained by force, and that the intercourse occurred despite nonconsent.[12]

---

9. Samuel R. Delany, *The Art of Fiction No. 210*, 197 PARIS REV. 27 (2011).

10. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 210 (Chicago Press ed. 1979) (1765–1769).

11. Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 L. & PHIL. 35, 36–37 (1992).

12. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 318 (7th ed. 2001).

As any student of the history of rape law also knows, the definition of rape favored men, not women.[13] For example, courts interpreted the force element as requiring not only that the defendant used force to obtain sex, but that the complainant resisted with force of her own. In fact, her own use of responsive force was essential to establish two elements: that the "defendant's force was really force and to prove that the victim's nonconsent, no matter how many times expressed verbally, was really nonconsent."[14] Nor would just any quantum of force do. At common law, women were required to resist to the utmost before a defendant could be found guilty. As one court put it, "[N]ot only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, that this must be shown to persist until the offense is consummated."[15] Absent such defensive force, a claim of rape would not stand. As Anne Coughlin wryly put it, early rape law permitted men something akin to a "woman's failure of actus reus defense."[16]

Evidentiary rules tipped the scales in favor of defendants as well. Rape was one of the few crimes where a complainant's word was insufficient. Before a defendant could be found guilty, there had to be some independent corroboration of the complainant's account, as well as evidence that the complainant complained promptly.[17] These evidentiary rules were considered so essential to protect defendants that the Model Penal Code's drafters, who at the time were considered progressive thinkers,[18] included them in the sexual assault provisions of the Code.[19] In addition, evidentiary

13. *See, e.g.*, Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1780–81 (1992) (observing that rape laws have always had the effect of "reinforcing the interest of males in controlling sexual access to females"); SUSAN ESTRICH, REAL RAPE 62–63 (1987) (arguing that rape law protected "male access to women where guns and beatings are not needed to secure it").

14. Capers, *Real Women, Real Rape*, *supra* note 4, at 834.

15. Brown v. State, 106 N.W. 536, 538 (Wis. 1906).

16. Coughlin, *supra* note 3, at 36.

17. *See generally* Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 953–64 (2004); Capers, *Real Women, Real Rape*, *supra* note 4, at 835; SANFORD H. KADISH, STEPHEN J. SCHULHOFER, & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES 436–37 (10th ed. 2001).

18. MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 6–22 (2002); *see also* Luis E. Chiesa, *The Model Penal Code and Mass Incarceration*, 25 GEO. MASON L. REV. 605 (2018).

19. MODEL PENAL CODE § 213.6(4), (5).

rules allowed defendants to cross-examine complainants about their sexual history, and in some cases even introduce extrinsic evidence of a complainant's prior sexual history, to contest the lack of consent and to undermine the complainant's credibility.[20] In effect, evidentiary rules allowed the defendant to put the complainant on trial "to determine whether she was the type of woman who consents, the type of woman to lie about it, and hence the type of woman who should not be protected by the law, at least not at the expense of the presumptively good man."[21] As I have written before, "All of this served to frame rape trials as pitting bad women against good men. All of this served to tip the scales in a way that benefited these men to the detriment of women."[22]

There is one other point to be made, however. The common narrative that rape law advantaged men and disadvantaged women becomes more complicated, and even false, when race is added to the analysis. Before the Reconstruction Amendments, black letter law often dictated harsher punishments for black men convicted of raping white women—the whiteness of the victim essentially triggered a sentencing enhancement, even capital punishment.[23] But even after explicit distinctions were invalidated or fell into desuetude, a type of unwritten law remained.[24] This unwritten law, which I have elsewhere described as a type of "white letter law"[25]—think of white ink on white paper, invisible to the naked eye, but there nonetheless—continued to disfavor black men accused of sexually assaulting white women.[26]

The common narrative was also different for black female victims. During the long period of slavery, enslaved black women were denied any sexual autonomy, with the law granting owners license and sexual access to enslaved blacks, both for sexual gratification and for forced breeding with other slaves.[27] Though less common,

20. Capers, *Real Women, Real Rape*, *supra* note 4, at 835.

21. *Id.*

22. *Id.* at 839.

23. Capers, *The Unintentional Rapist*, *supra* note 4, at 1355–56.

24. *Id.* at 1357.

25. I first introduced the concept "white letter law" in an earlier article. *See* I. Bennett Capers, *The Trial of Bigger Thomas: Race, Gender, and Trespass*, 31 N.Y.U. REV. OF L. & SOC. CHANGE 1, 7–8 (2006). Unlike black letter law, which brings to mind statutory law, written law, the easily discernible law set forth as black letters on a white page, "white letter law" suggests societal and normative laws that stand side by side and often undergird black letter law but, as if inscribed in white ink on white paper, remain invisible to the naked eye.

26. Capers, *The Unintentional Rapist*, *supra* note 4, at 1364–71.

27. Sharon Block, *Lines of Color, Sex, and Service: Comparative Sexual Coercion in Early America*, *in* SEX, LOVE, RACE: CROSSING BOUNDARIES IN NORTH AMERICAN HIS-

it is also worth noting that black women were subjected to medical experimentation, often without anesthesia, in the name of science—to these nonconsenting women, we owe the science of gynecology.[28] To justify this denial of sexual autonomy, black women were cast as naturally libidinous, and indeed as "unrapeable."[29] Gary LaFree's study of juror attitudes suggests that present-day jurors remain less likely to view the rape of black women as real rape.[30]

B. Agitation for Reform

With the Women's Rights movement came agitation for reform. The result was nothing less than game-changing, at least in terms of reforms on the books. Indeed, it can be argued that no other area of criminal law witnessed as much change.[31] Within the space of years, jurisdictions abandoned or limited the resistance requirement and concomitantly reduced the force requirement, and added degrees to the offense rape—giving prosecutors and jurors more options.[32] They recognized that marriage was not the same as consent in perpetuity, and abolished marital immunity rules.[33] Rape statutes were revised with gender-neutral language.[34] Jurisdictions retreated from corroboration and prompt reporting requirements.[35] Perhaps most importantly, there was a widespread

---

TORY 141, 141 (Martha Hodes ed., 1999); *see also* Capers, *Real Women, Real Rape*, *supra* note 4, at 865.

28. *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 175–76 (1997); HARRIET A. WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT 61–68 (2008).

29. Darci E. Burrell, *Recent Developments, Myth, Stereotype, and the Rape of Black Women*, 4 UCLA WOMEN'S L.J. 87, 89 (1993); Capers, *Real Women, Real Rape*, *supra* note 4, at 865–71; *see also* Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 118–22 (1983).

30. Gary D. LaFree et al., *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389, 397–402 (1985); *see also* Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 37–43 (2006) (reviewing studies).

31. *Cf.* Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L.J. 651, 651 (2008) ("Seldom has an aspect of the criminal law changed as dramatically as has the law governing sexual offenders.").

32. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 627-28 (4th ed. 2006).

33. *Id.* at 641.

34. *Id.* at 618.

35. *Id.* at 642–43.

adoption of rape shield rules, protecting complainants from cross-examination and evidence about their sexual histories at trial.[36]

These changes happened relatively quickly, but this is not to suggest that rape law has been stagnant since the 1970s. Far from it, though changes have been piecemeal and have not had the same widespread impact as in earlier years. There have been efforts to move from requiring evidence of consent (yes) rather than evidence of non-consent (no).[37] And for the last several years, Professors Schulhofer and Erin Murphy have been spearheading an effort to revise the MPC.[38] Of course, changes in the law of rape tell only part of the story. What have been equally significant are the changes in culture, again from "no means no" to "yes means yes." There is an awareness of sexual assault in the military and on campus like never before. Church scandals have brought the victimization of boys into the national conversation, though the sexual assault of adult men remains in the margins, largely invisible.[39] Cases like those involving Stanford swimmer Brock Turner[40] or the Steubenville teens[41] have become lightning rods for discussion, as did the #Slutwalk movement[42] a few years earlier. The most significant cultural phenomenon, however, has been the #MeToo movement, and with it the realization that unwanted sex remains prevalent. One of the interesting things about the #MeToo movement is how little impact it has had on rape law itself.[43] Indeed,

36. For an overview of these changes and other changes, *see* SUSAN CARINGELLA, ADDRESSING RAPE REFORM IN LAW AND PRACTICE (2009). *See also* SPOHN & HORNEY, s*upra* note 3.

37. *See* Schulhofer, *supra* note 6, at 340–41.

38. *Id.* at 335.

39. *See* Capers, *Real Rape Too*, *supra* note 4.

40. For a discussion of the Turner case, *see* Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (June 6, 2016), https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html [https://perma.cc/2KJ5-UNTZ]. The Turner case has also been the focus of at least one law review article. *See* Michael Vitiello, *Brock Turner: Sorting Through the Noise*, 49 MCGEORGE L. REV. 631 (2017).

41. For an overview of the Steubenville case, *see* Ariel Levy, *Trial by Twitter*, NEW YORKER (Aug. 5, 2013), https://www.newyorker.com/magazine/2013/08/05/trial-by-twitter [https://perma.cc/A9JD-SZV8].

42. *See* Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1458-59 (2014).

43. *Cf.* Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 101 (forthcoming 2019). *See* Anthony Michael Kries, *Defensive Glass Ceilings*, 88 GEO. WASH. L. REV. 147 (2020) (noting that much of #MeToo has been exogenous to the law, though some legal reform has resulted). *But see* Linda S. Greene et al., *Talking about Black Lives Matter and #MeToo*, 34 WISC. J. L. GENDER & SOC'Y 109, 163 (2020)

what #MeToo highlights is that rape law, or the law of unwanted sex, is still inadequate.

C. The Way We Live (and Have Sex) Now

It is common in scholarship providing an overview of rape law to stop here, and then proceed to offer a normative vision of how rape law can be reformed. But to state this should reveal how inadequate it seems. Indeed, it may explain why we have failed so badly at protecting individuals from sexual assault and other violations of their sexual autonomy. Put bluntly, if we want to protect individuals from *unwanted* sex, which involves line drawing, then it makes sense to give some thought to *wanted* sex. And to give some attention to the role the law has played in regulating both. Indeed, once we begin to think about wanted sex, the connection between regulating both unwanted sex and wanted sex becomes hard *not to see*.

The law's regulation of unwanted sex, however inadequate, has never operated alone. At the same time the law prohibited the Blackstonian version of rape—man/woman/force/sex/nonconsent— the law was also active in circumscribing and policing wanted sex.[44] Indeed, Anne Coughlin has persuasively argued that "we cannot understand rape law unless we study [it], not in isolation, but in conjunction with the fornication and adultery prohibitions with which it formerly resided and, perhaps, continues to reside."[45] Allow me to add the bans on same-sex sex and polygamy[46] and even seduction[47] to the list of laws that operated in conjunction with rape laws. One could also add Comstock laws and the Motion Picture Production Code, which aimed to protect traditional family values by regulating the circulation of "obscene" material.[48] In

(discussing proposed and adopted legislation addressing sexual harassment in employment).

44. *See generally* REGULATING SEX: THE POLITICS OF INTIMACY AND IDENTITY (Elizabeth Bernstein & Laurie Schaffner eds., 2005).

45. Coughlin, *supra* note 3, at 6.

46. Interestingly, in *Reynolds v. United States*, 98 U.S. 145 (1879), the Court not only upheld a criminal law prohibiting polygamous marriage, but went on to equate polygamous marriages with "despotism" and monogamous marriages with democracy. *Id.* at 165–66. For a discussion of the absurdity of this linkage, *see* Jill Elaine Hasday, *Invisible Women: How Erasing Women's Struggles for Equality Perpetuates Inequality*, at 25 (on file with author).

47. *See* Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (2012) (using the history of statutes criminalizing seduction to argue that marriage has been used and continues to be used as state-imposed discipline).

48. For a fascinating discussion of the origins of the Comstock Act and Hays Code see GEOFFREY R. STONE, SEX AND THE CONSTITUTION 153–78 (2017). It is telling, for example, that the Motion Picture Production Code was troubled by the use

short, the law has always played an active and disciplining role in suppressing sexual difference altogether, and channeling the one type of sex the law approved of—heterosexual sex—to marriage, or what Ariela Dubler calls the "marriage cure."[49]

Here too, race mattered. State-approved sex was not only heterosexual sex in the privacy of the marital home, but was also required to be same-race sex.[50] Indeed, this racial policing likely explains why different-race couples were often the target of cohabitation prohibitions.[51] In the case of same-race heterosexual couples, there was at least the possibility that their sexual congress might metastasize into marriage; there was no such possibility with different-race couples, at least not until 1967 when the Court invalidated anti-miscegenation statutes in *Loving v. Virginia*.[52] A similar sexual policing also explains why same-sex sex was so heavily policed—consider the pastime of heterosexuals making out in cars and lovers' lanes,[53] and the different policing brought to bear on

---

of the phrase "damned to you" in *Gone With the Wind*, but not the suggested rape scene in the film. *See* STEVE WILSON, THE MAKING OF GONE WITH THE WIND 37 (2014). The Motion Picture Production Code also barred depictions of interracial relationships and "sexual perversion," i.e., homosexuality. *See* VITO RUSSO, THE CELLULOID CLOSET: HOMOSEXUALITY IN THE MOVIES (1987). *See generally* Bob Mondello, *Remembering Hollywood's Hays Code, 40 Years On*, NPR (Aug. 8, 2008), https://www.npr.org/templates/story/story.php?storyId=93301189 [https://perma.cc/ULZ6-W6SQ].

49. *See* Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 117 YALE L.J. 756, 764 (2006). *See also* Laura A. Rosenbury & Jennifer E. Rothman, *Sex in and out of Intimacy*, 59 EMORY L.J. 809 (2010).

50. Indeed, it would be even more accurate to say race and gender mattered. During the colonial period, laws were modified to turn a blind eye to consensual and non-consensual sex between white men and black slave women, and to mark any offspring as property. At the same time, laws and norms prohibited unions between black men and white women. For example, in 1664, Maryland declared it a "disgrace to the Nation" for "English women [to] intermarry with Negro slaves." Both Maryland and Virginia eventually made it an offense for white women to have sexual relations with black men. Thomas Jefferson even lobbied for banishment of any white woman who bore a black child. *See* IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 40–41, 117 (2016).

51. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964) (invalidating a cohabitation law targeting different-race couples). A same-race couple living together could pass as married and escape scrutiny. By contrast, because interracial marriage itself was barred, the fact that a different race couple was living together was on its face proof of a crime: either they were violating marriage laws, or they were violating cohabitation laws.

52. 388 U.S. 1 (1967).

53. *See, e.g.*, Carol Sanger, *Girls and the Getaway: Cars, Culture, and the Predicament of Gendered Space*, 144 U. PA. L. REV. 705, 730–33 (1995).

gay men in parks[54]—and how a necessary corrective to such discriminatory policing was not just *Lawrence v. Texas*,[55] but also *Obergefell v. Hodges*.[56] In short, it is not just unwanted sex that the law regulates, but also wanted sex.[57]

Before engaging in line-drawing to distinguish illicit sex from licit sex, it also makes sense to have an open discussion about how we have sex now. As Deborah Tuerkheimer noted several years ago, "[W]omen's sexuality and our sense of its dimensions have continued to evolve."[58] We know that, of women between the ages of 18 and 49, most have engaged in oral sex in the past year, and that almost half have engaged in anal sex.[59] Mary Fan adds that we are in a "casual sex culture," where young adults "are abandoning traditional dating and increasingly engaging in casual sex with people they do not know very well," including "sex outside of relationships or in concurrent relationships."[60] In fact, it is very likely that these descriptions only begin to cover how we have sex now. For example, a recent survey of over 200 individuals over the age of 18 revealed that approximately 44% have engaged in sex in a public place, that 21% have been tied up or tied up someone else as part of sex, that over 50% have engaged in mutual masturbation, and that approximately 32% have engaged in spanking as part of sex.[61] Another

54. *See, e.g.*, Jordan Blair Woods, *Don't Tap, Don't Stare, and Keep Your Hands to Yourself! Critiquing the Legality of Gay Sting Operations*, 12 J. OF GENDER, RACE, AND JUST. 545 (2009); J. Kelly Strader & Lindsey Hay, *Lewd Stings: Extending* Lawrence v. Texas *to Discriminatory Enforcement*, 56 AM. CRIM. L. REV. 465 (2019).

55. 539 U.S. 558 (2003) (invalidating same-sex sodomy laws as violating the right to liberty under the Due Process Clause).

56. 135 S. Ct. 2071 (2015) (holding that the right to marry is a fundamental liberty and that prohibiting same-sex couples from marrying violates due process).

57. As I have written previously, by marking which conduct it deems illicit, the law "also indirectly marks other conduct as licit":

> For example, a law that criminalizes same-sex sex almost by definition gives its imprimatur to heterosexual sex, contributing to what Adrienne Rich long ago terms "compulsory heterosexuality." A law that penalizes adultery not only condemns sex outside of marriage, but concomitantly privileges sexual fidelity within marriage . . . . In short, the criminal law has always played favorites.

I. Bennett Capers, *Home is Where the Crime Is*, 109 U. MICH. L. REV. 979, 988 (2011).

58. Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461, 1464 (2012).

59. *Id.*

60. Mary Fan, *Sex, Privacy, and Public Health in a Casual Encounters Culture*, 45 U.C. DAVIS L. REV. 531, 537–43 (2011).

61. Debby Herbenick, et al., *Sexual Diversity in the United States: Results from a Nationally Representative Probability Sample of Adult Women and Men*, PLOS ONE (July 20, 2017), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0181198 [https://perma.cc/6YCQ-QN3V].

study, focusing on men, showed that 15% had performed analingus, and that 24% had received anal fingering.[62] Add to this the prevalence of casual sex apps such as Grindr and Tinder, the latter of which is used by approximately a quarter of all adults between the ages of 25 and 34.[63] Add evidence that online pornography featuring violence against women is more popular among women than men,[64] and that the most popular search term for women consumers of online porn, after "lesbian," is "threesome."[65] What else? A recent study suggests that fewer than half of teens (ages 13 to 20) identify as "exclusively heterosexual."[66] There is evidence that many adults find kissing more intimate than sex, even though sexual assault laws tend to regulate only the latter.[67] And that a lot of women worry about why their boyfriends don't want sex more.[68] Studies also show that women under-report consensual sexual activities, especially activities that may be frowned upon such as having multiple

62. Michael Castleman, *Heterosexual Anal Play: Increasingly Popular*, PSYCHOLOGY TODAY (Dec. 1, 2010), https://www.psychologytoday.com/us/blog/all-about-sex/201 012/heterosexual-anal-play-increasingly-popular [https://perma.cc/77NZ-3GU2].

63. *See Percentage of U.S. internet users who use Tinder as of January 2018, by age group*, STATISTA (2019), https://www.statista.com/statistics/814698/share-of-us-internet-users-who-use-tinder-by-age/ [https://perma.cc/N3EB-P4NL]. Although Tinder is not solely for casual sex, nearly half of surveyed respondents state they use Tinder specifically for "hooking up." *See* Sammy Nickalls, *More than 50% of People Who Use Tinder Do It Out of Boredom*, ESQUIRE (Sep. 7, 2017), https://www.esquire.com/lifestyle/sex/a12149373/tinder-statistics-study/ [https://perma.cc/6RUM-MKPN].

64. SETH STEPHENS-DAVIDOWITZ, EVERYBODY LIES: BIG DATA, NEW DATA, AND WHAT THE INTERNET CAN TELL US ABOUT WHO WE REALLY ARE 121 (2017).

65. Michael Castleman, *Surprising New Data from the World's Most Popular Porn Site*, PSYCHOLOGY TODAY (Mar. 15, 2018), https://www.psychologytoday. com/us/blog/all-about-sex/201803/surprising-new-data-the-world-s-most-popular-porn-site [https://perma.cc/ZJ8S-JJ8C]. The next most popular search term for women consumers, after "lesbian" and "threesome," are "big dick," "ebony," and "gangbang." *Id.*

66. Zing Tsjeng, *Teens These Days are Queer AF, New Study Says*, VICE (Mar. 10, 2016), https://www.vice.com/en_us/article/kb4dvz/teens-these-days-are-queer-af-new-study-says [https://perma.cc/NM3B-TTS7].

67. Noam Shpancer, *What's in a Kiss?*, PSYCHOLOGY TODAY (Nov. 3, 2013), https://www.psychologytoday.com/us/blog/insight-therapy/201311/what-s-in-kiss. [https://perma.cc/PG3V-ST9J]. Proposed revisions to the MPC's sexual assault provisions criminalize nonconsensual touching of certain intimate body parts, but do not criminalize nonconsensual kissing. Thus, knowingly touching someone's inner thigh without consent is criminal under the revisions. "Stealing" a kiss is not. *See* MODEL PENAL CODE §§ 213.0(6)(c), 213.7 (AM. L. INST., Proposed Official Draft 2017).

68. STEPHENS-DAVIDOWITZ, *supra* note 64, at 122.

sexual partners.[69] By contrast, because having multiple sexual partners is often viewed as a badge of honor among men, men tend to over-report the number of their sexual partners.[70] What else? People are increasingly ceding control with technology, allowing others to remotely operate sex toys, sometimes referred to as teledildonics.[71]

All of this is a far cry from the notions of sex during the time of Blackstone when we defined rape as forced vaginal penetration by a male despite nonconsent. It is also a far cry from how we had, and thought about, sex just a few decades ago. Consider that long after the MPC was drafted, female sexuality in particular was still thought of as

> romantic, non-genital, passive/responsive, monogamous, and not open to autonomous expression. In this stereotype, the normal woman is so chaste that her arousal can scarcely be termed sexual, but is instead a purely emotional response: "romantic longing." . . . Female sexual desire [becomes] not so much an end in itself as . . . a means for fulfilling other needs and desires: love and motherhood.[72]

We've come a long way, baby.[73] And it is the fact that we have traveled so far that should prompt a series of questions. If, for example, we believe the best way to protect sexual autonomy is to insist, through laws and norms, that consent be obtained before sex, then what do we mean by sex? If consent is to be based on the totality of the circumstances, what might that mean given the myr-

---

69. Shervin Assari, *Why Men and Women Lie About Sex, and How This Complicates STD Control*, THE CONVERSATION (Apr. 2, 2017), https://www.thebodypro. com/article/why-men-and-women-lie-about-sex-and-how-this-compl [https://perma.cc/36SF-V6TN].

70. *Id.*

71. *See, e.g.*, *The Future is NOW: 13 Remote-Controlled Sex Toys Available Today*, HUFFINGTON POST (Apr. 8, 2016), https://www.huffpost.com/entry/the-future-is-now-13remo_b_9645460?guccounter=1&guce_referrer=AHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAMzGXfPkTnjDUWKDQC4J3eF8-inL-TenvOobxWs2i3EmszDHsFui_msZFGct2Kdsmu_7vtbQJeI0SbQYQ7rX8L1lKWlV_Lyr9Mdxrck8-x-EcPv5OmcYgvbG9JJI0hm8dHPJKleL08wPF9wQ9qg-gAt3dnFBF1-YU3ftA_Pu1AgmY [https://perma.cc/X5Q2-LQ6P].

72. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 207 (2001) (quoting REBECCA MARIE YOUNG, SEXING THE BRAIN: MEASUREMENT AND MEANING IN BIOLOGICAL RESEARCH ON HUMAN SEXUALITY 251, 299 (2000) (unpublished Ph.D. dissertation)).

73. "You've Come a Long Way, Baby" was both an advertising slogan and a frequent refrain of the early feminist movement. *See* Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy*, *in* Hibbs, 58 STAN. L. REV. 1871, 1872 (2006) (discussing phrase).

iad ways in which we communicate and have sex now? And if we're serious about reforms to reduce unwanted sex, should we not invite to the table individuals who write and think about wanted sex? As a case in point, the invited participants in the American Law Institute's project to re-write the Model Penal Code's sexual assault provisions include professors and judges, prosecutors and defense lawyers, and victim rights advocates. It does not include Dan Savage or any sex worker or sex expert.[74] Indeed, it hardly includes anyone under 40. And there are other questions still. What might rape law look like if we abandon our antiquated notions about how people have sex, and really think about how people have sex now? Indeed, what might rape law look like if we could let go of the historical baggage that rape law brings with it, if we could shake off the centuries of patriarchy and norms, and start anew? If we stopped seeing sex "as something that is *done to, not by*, women?"[75] And if we recognized sex as something that is done to, not just by, men? With a tabula rasa, starting afresh, what might rape law look like now? And to quote the queer and feminist theorist Katherine Franke, "Can the law protect pleasure?"[76] Is it possible that by answering these questions, we might realize that the "overwhelming attention we have devoted to prohibitions against bad or dangerous sex has obscured, if not eliminated, a category of desires and pleasures in which women"—and men—"might actually want to indulge"?[77]

II.
FUTURE SEX

> The point of creating futures is to get people to imagine what they want and don't want to happen down the road, and maybe do something about it.
>
> —Marge Piercy[78]

Thus far I have focused attention on the failure of our efforts to reduce unwanted sex, which I attribute in part to our failure to talk openly and honestly about wanted sex. This final part goes a step further to ask what a future world where there is little or no unwanted sex would actually look like, and if there are necessary preconditions to such a world. Specifically, this part turns to how

74. *Participants, Model Penal Code: Sexual Assault and Related Offenses*, AMERICAN L. INST. https://www.ali.org/projects/show/sexual-assault-and-related-offe nses/#participants [https://perma.cc/7U62-L69H].

75. Franke, *supra* note 72, at 199.

76. *Id.* at 183.

77. *Id.* at 200.

78. MARGE PIERCY, WOMAN ON THE EDGE OF TIME vii (2016).

feminist futurists have imagined a world where sexual autonomy is the norm. And it asks, "What happens to gender arrangements, to sexual identities and sexual and reproductive practices, when they are imagined anew within the fictional space of a utopian order?"[79]

The point of exploring how feminist futurists have imagined utopia free from unwanted sex is not necessarily so that we can mark a particular feminist vision as our end point, but to use these visions "as a necessary stimulus to socio-political transformation."[80] Put differently, the point is to prompt *us* to consider what an ideal future without unwanted sex might look like. Literary theorist Caitríona Ní Dhúill's observation is useful here:

> "[B]y portraying differently constructed social orders, [these alternative futures] draw attention to the constructedness of social orders generally, thus suggesting that existing structures are not inevitable."[81] The point, in other words, is to consider what social structures we expect will be part of, and even necessary to, a world without unwanted sex. The hope is that this exercise can "get people to imagine what they want and don't want down the road, and maybe do something about it."[82]

To be clear, most early imaginings of sexual futures would today strike us as decidedly retrograde. There is the 1938 short story, "Helen O'Loy," about a scientist who designs the perfect wife by creating a robot.[83] There is Robert Heinlein's novel *Podkayne of Mars*, featuring a female protagonist who, however adventurous in the opening pages, by the end embraces traditional notions of gender and sex, proclaiming, "We were designed for having babies. A baby is a lot more fun than differential equations."[84] Far more typical, however, was a failure to imagine women in anything that went beyond a secondary or even tertiary role. In the much-heralded film *2001: A Space Odyssey*, women are almost entirely absent, except as

---

79. *Id.* at 2.

80. Michael J. Griffin & Tom Moylan, *Introduction* to EXPLORING THE UTOPIAN IMPULSE: ESSAYS ON UTOPIAN THOUGHT AND PRACTICE 11 (Michael J. Griffin & Tom Moylan eds.) (2007).

81. DHÚILL, *supra* note 1, at 8.

82. PIERCY, *supra* note 78.

83. *See* Lester Del Rey, *Helen of Troy*, *in* SCIENCE FICTION HALL OF FAME 73 (Robert Silverberg ed., 1971). As one SF scholar observed, the robot-wife "learns about romance from TV soap operas, cooks, cleans, and sobs her heart out when her 'husband-inventor' arrives home late from work. Beverly Friend, *Virgin Territory: Women and Sex in Science Fiction*, 14 EXTRAPOLATION 49, 49 (1972).

84. ROBERT HEINLEIN, PODKAYNE OF MARS 56 (1963).

mini-skirt-wearing stewardesses and an assistant to a male scientist.[85] In the original *Star Trek* series, the only prominent female cast member is Lt. Uhura, a "communications officer," whose job recalls a switchboard operator.[86] The remaining women, usually new ones each episode, largely appear as sexual conquests of the main character Captain Kirk, a "footloose, carefree adventurer, the James Bond of interstellar travel."[87]

Other futurist works explore future sex, but are decidedly dystopian. I am thinking here of Aldous Huxley's *Brave New World*,[88] George Orwell's *Nineteen Eighty-Four*,[89] Margaret Atwood's companion novels *The Handmaid's Tale*[90] and *The Testament*,[91] and Naomi Alderman's recent bestseller, *The Power*.[92] Or if not completely dystopian, at least dystopian-ish. An example of the latter is Sally Gearheart's *The Wanderground*, which concludes that "women and men cannot yet, and may not ever, love one another without violence; they are no longer of the same species."[93]

What motivates my inquiry, however, is not *dystopia* but its opposite, utopia. More importantly, I want to consider utopian visions

---

85. *See* Barry Keith Grant, *Of Men and Monoliths: Science Fiction, Gender, and 2001: A Space Odyssey*, *in* STANLEY KUBRICK'S 2001: A SPACE ODYSSEY, NEW ESSAYS 65 (Robert Kolker ed., 2006).

86. Marc Bernandin, *'Star Trek Beyond' Stars on 'Uncomfortable Conversations, Sulu's Sexual Orientation, and the Future*, L.A. TIMES (July 21, 2016), https://www.latimes.com/entertainment/movies/la-et-mn-star-trek-beyond-roundtable-20160705-snap-story.html [https://perma.cc/T4F6-Z6B6] (observing that "[f]or all of 'Star Trek's groundbreaking inclusion in 1966, Uhura was kind of a switchboard operator."). *See also* TO BOLDLY GO: ESSAYS ON GENDER AND IDENTITY IN THE STAR TREK UNIVERSE (Nadine Farghaly & Simon Bacon eds., 2017).

87. Anne Cranny-Francis, *Sexuality and Sex-Role Stereotyping in* Star Trek, 12 SCI. FICTION STUD. 274, 274 (1985).

88. *See* ALDOUS HUXLEY, BRAVE NEW WORLD (1932). Whether the novel is dystopian is debated. It depicts a world where citizens' needs are all met, and where there is unlimited sexual gratification. The government distributes the drug soma to keep citizens happy. However, the novel's protagonist craves to know suffering, which he views as essential to being human.

89. *See* GEORGE ORWELL, NINETEEN EIGHTY-FOUR (Berkley ed., Penguin Group 2003) (1948). In the novel, sex for pleasure is a crime. The Party aspires to a world in which procreation "will be an annual formality, like the renewal of a ration card. We shall abolish the orgasm." *Id.* at 276.

90. *See* MARGARET ATWOOD, THE HANDMAID'S TALE (1985). As the character Aunt Lydia explains to the women who have been kidnapped and forced into becoming child bearers in exchange for protection, the past was about "freedom to. Now you are being given freedom from. Don't underrate it." *Id.* at 33.

91. *See* MARGARET ATWOOD, THE TESTAMENT (2019).

92. *See* NAOMI ALDERMAN, THE POWER (2016).

93. SALLY MILLER GEARHEART, WANDERGROUND 115 (1979).

as not just light entertainment, but as a critical practice.[94] After all, as literary theorist Frances Bartkowski observes, the utopian voice "is always tendentious; it has designs on the reader."[95] (It is not insignificant that the work that coined the term utopia—Thomas More's *Utopia*, written in 1516—discusses, among other things, sexual relations and the harshness of the penal code.)[96] In particular, I am interested in the handful of decidedly feminist utopias—part of what Marleen Barr calls "feminist fabulations"[97]—that we find in science fiction. Even in narrowing the focus to feminist utopias, though, some further culling is necessary. For starters, I am putting to the side the feminist utopias that exclude men altogether.[98] Charlotte Perkins Gilman's *Herland* and Joanna Russ's *The Female Man* fall in this category.[99] I put them aside because, as literary scholar Marleen Barr observes, these women-only utopias "fail to answer a question important to women who are not separatists: how do men and women live together with dignity and equality."[100] I am also putting to the side utopias that depend on genetic modifications, such as Ursula LeGuin's *The Left Hand of Darkness*, in which individuals have both sets of sexual organs and typically "have no predisposition to either sexual role."[101] Although the end result may seem inviting—there is "no unconsenting sex, no rape . . . coitus can be performed only by mutual invitation and

94. DHÚILL, *supra* note 1, at 7 (embracing utopian fiction as a "critical practice").

95. FRANCES BARTKOWSKI, FEMINIST UTOPIAS 9 (1989).

96. *See* THOMAS MORE, UTOPIA (1516).

97. MARLEEN BARR, LOST IN SPACE: PROBING FEMINIST SCIENCE FICTION AND BEYOND 13 (1993) (defining "feminist fabulation as an umbrella term that includes science fiction, fantasy, utopian literature, and mainstream literature (written by both women and men) that critiques patriarchal fictions").

98. It is possible that these feminist writers viewed a utopia with men as a nonstarter, an impossibility, an oxymoron. As the futurist Joanna Russ writes, "[i]f men are kept out of these [feminist utopias] it is because men are dangerous. They also hog the good things in this world." JOAN RUSS, TO WRITE LIKE A WOMAN: ESSAYS IN FEMINISM AND SCIENCE FICTION 77 (1995). To my knowledge, there is no male counterpart: outside of gay fiction, male writers do not imagine all male utopias.

99. *See* CHARLOTTE PERKINS GILMAN, HERLAND (1915); JOANNA RUSS, THE FEMALE MAN (1975).

100. BARR, *supra* note 97, at 69–70.

101. URSULA LE GUIN, THE LEFT HAND OF DARKNESS 90 (1969). Note too that there is "no division of humanity into strong and weak halves, protective/protected, dominant/submissive, owner/chattel, active/passive." *Id.* at 93.

consent; otherwise it is not possible"[102]—the means of getting there do not.[103]

That leaves non-separatist, and dare I say plausible, feminist utopias, such as Ursula LeGuin's *The Dispossessed*,[104] Samuel Delaney's *Trouble on Triton*,[105] Marge Piercy's *Woman on the Edge of Time*,[106] and Octavia Butler's utopia-in-waiting in *Parable of the Sower*[107] and *Parable of the Talents*.[108] What is notable is that so many of these feminist utopias "not only ask the same questions and point to the same abuses; they provide similar answers and remedies."[109] It is telling, for example, that in these feminist utopias, not only is there no unwanted sex, but there is also complete gender equality. It is perhaps also telling that these utopias depict communal, classless societies where government plays no role, or a very limited one.[110] Perhaps most importantly, these feminist utopias are all sexually permissive and today would be described as "sex positive."[111] In *Woman on the Edge of Time*, for example, since almost everyone exists on a sexual continuum, bisexuality is the norm, so much so that it is barely perceived as a category at all. It just *is*. Indeed, even gendered pronouns have been retired; an individual is simply a "per."[112] Similarly, in *The Dispossessed*, all forms of sexual activity are treated as respectable, whether they are monogamous or casual or heterosexual or not. In addition, in perhaps the most feminist of these utopias—*Woman on the Edge of Time*—pregnancy has been decoupled from biological sex, and gender has been decoupled from child-rearing; in a sense, these visions engage with and concre-

102. *Id.* at 93.

103. *Id.* I am also putting to the side Delany's *Stars in My Pocket Like Grains of Sand*. In his novel, gender is contingent; the pronouns "he" and "she" are not about sex organs, but rather are assigned depending on whether one desires or is desired. *See* SAMUEL R. DELANY, STARS IN MY POCKET LIKE GRAINS OF SAND (20th ed. 2014).

104. *See* URSULA K. LEGUIN, THE DISPOSSESSED (1974).

105. *See* SAMUEL DELANY, TROUBLE ON TRITON: AN AMBIGUOUS HETEROTOPIA (1976).

106. PIERCY, *supra* note 78.

107. *See* OCTAVIA E. BUTLER, PARABLE OF THE SOWER (1993).

108. *See* OCTAVIA E. BUTLER, PARABLE OF THE TALENTS (1998). Butler's companion novels are set in a dystopian future, but their protagonist envisions a utopian end goal centered around a belief system described as Earthseed.

109. RUSS, TO WRITE LIKE A WOMAN, *supra* note 98, at 136.

110. Russ makes a similar observation. *See id.* at 136–39.

111. For an overview of sex-positive feminism, *see* Margot Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 94–98 (2014); Ummni Khan, *Let's Get It On: Some Reflections on Sex-Positive Feminism*, 38 WOMEN'S RTS. L. REP. 346 (2017).

112. PIERCY, *supra* note 78, at 57.

tize the theoretical writings of Shulamith Firestone in *The Dialectic of Sex*[113] and Dorothy Dinnerstein in *The Mermaid and the Minotaur*.[114] Since Part One of this essay emphasized how race has shaped the application of the law of unwanted sex, it pays to mention how these utopias treat race. In these feminist utopias, race exists, but has ceased to divide people or matter. As a member of the utopian society in *Woman on the Edge of Time* explains,

> [W]e decided to hold on to separate cultural identities . . . . We want there to be no chance of racism again. But we don't want the melting pot where everybody ends up a thin gruel. We want diversity, for its strangeness breeds richness.[115]

A similar sentiment pervades Butler's novels. Indeed, one of the tenets of the feminist vision in *Parable of the Sower* is "Embrace diversity. Or be destroyed."[116]

Again, the point of looking to feminist visions of utopias is to use them "as a necessary stimulus to socio-political transformation"[117] and motivate *us* to consider what an ideal future without unwanted sex might look like. The point too is for us to raise questions about that future, questions that range from the seemingly mundane to the seemingly consequential.

For example, in our future world free from unwanted sex and unwanted sexual advances, are men still the primary initiators of sex, or has sexual pursuit been de-gendered? Do men grow their hair long, or only women? Are there still segregated restrooms, or what critical theorist Jacques Lacan aptly called "urinary segregation,"[118] and the expressive normative message of sexual difference inherent in such a division? Are there still things straight couples do in public without a care in the world, things that can trigger

---

113. *See* SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION (1970).

114. *See* DOROTHY DINNERSTEIN, THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE (1976).

115. PIERCY, *supra* note 78, at 96–97. Indeed, one of the most feminist things about Piercy's novel is that it features as its protagonist a poor woman of color, Connie Ramos, who has experienced domestic violence, child abuse, and racism.

116. BUTLER, *supra* note 107, at 181. Or as one scholar put it, "Difference, disagreement, and diversity provide the life force of [Butler's] utopias." *See* Michelle Erica Green, *"There Goes the Neighborhood": Octavia Butler's Demand for Diversity in Utopias*, *in* UTOPIAN AND SCIENCE FICTION BY WOMEN: WORLDS OF DIFFERENCE 166, 168 (Jane L. Donawerth & Carol A. Kolmerten eds., 1994).

117. Griffin & Moylan, *supra* note 80.

118. Jacques Lacan, *The Agency of the Letter in the Unconscious*, *in* ECRITS: A SELECTION 161, 167 (Alan Sheridan trans., Norton 1977).

violence when done by other couples, like holding hands?[119] Do people hug each other when they greet, or has this fallen out of fashion in response to concerns about unwanted touching? Do people, wanting and needing physical contact,[120] instead cuddle pets and robots?[121] Speaking of robots, how common are sex robots, embedded with "haptic interfaces" in their external membrane for maximum realism?[122] Is the commodification of sex still illegal, or is exchanging sex for money viewed on par with being a social worker, or a personal trainer? Has using apps to signal interest in sex become the norm?[123] Do the Alexas and Siris of the future function as panopticons, ever present police, to deter sex without consent? Or will Alexa and Siri seem curious relics, since we will have all become cyborgs, as the cyberfeminist Donna Haraway predicts?[124] With our smartphones—now so common that "the proverbial visitor from Mars might conclude they were an important

119. *See* Matt Stopera, *15 Things All Straight People Do That 2/3 of Gay People Are Still Afraid To*, BUZZFEED (Mar. 19, 2019), https://www.buzzfeed.com/mjs 538/straight-people-do-this-but-23-of-gay-people-are [https://perma.cc/8WN9-HZN9] (summarizing the violence lesbian and gay people experience simply from holding hands in public).

120. Suzanne Degges-White, *Skin Hunger: Why You Need to Feed Your Hunger for Contact*, PSYCHOL. TODAY (Jan. 7, 2015), https://www.psychologytoday .com/us/blog/lifetime-connections/201501/skin-hunger-why-you-need-feed-your-hunger-contact [https://perma.cc/76YT-KPJF].

121. Already animatronic pets are used to provide tactile comfort to residents at nursing homes. *See* Brittany Britto, *Animatronic Pets at Retirement Homes a Sign of How Robots Will Contribute to Our Lives*, BALT. SUN (Mar. 30, 2017), https://www.baltimoresun.com/features/pets/bs-lt-companion-cat-20170402-story.html [https://perma.cc/6VX8-VEBP].

122. For more on the future of sex robots, *see* Jenny Kleeman, *The Race to Build the World's First Sex Robots*, THE GUARDIAN (Apr. 27, 2017), https://www.theguardian. com/technology/2017/apr/27/race-to-build-world-first-sex-robot [https://perma.cc/RF34-MGJD]. *See also* DAVID LEVY, LOVE + SEX WITH ROBOTS: THE EVOLUTION OF HUMAN-ROBOT RELATIONSHIPS (2007).

123. Such apps are already being promoted on college campuses. *See* Meg Graham, *New Apps Urge Mutual Consent, 'Yes Means Yes,' When It Comes To Sex*, CHI. TRIB. (July 02, 2015), https://www. chicagotribune.com/bluesky/originals/ct-we-consent-app-michael-lissack-bsi-20150720-story.html [https://perma.cc/Q9EB-HW3T]; Maya Salam, *Consent in the Digital Age: Can Apps Solve a Very Human Problem*, N.Y. TIMES (Mar 2, 2018), https://www.nytimes.com/2018/03/02/technology/consent-apps.html [https://perma.cc/A85U-VHSU].

124. Or rather, Donna Haraway argues that we are already cyborg, given our symbiotic relationship with technology such as cars and smartphones. For Haraway, embracing our cyborg selves is also a way of undoing gender hierarchies.

See DONNA J. HARAWAY, SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE 149–50 (1991). In this sense, it might be more accurate to ask whether, in the future, we will have embraced our cyborg nature.

feature of human anatomy"[125]—is the concept of consent a relic of the past, looked upon as a curious formality in a world in which "desire can't help but make itself known? It speaks, it demands, it begs."[126] Has the line "between object and subject become[ ] hopelessly blurred"?[127] "I want you because you want me because I want you because you want me"?[128] Are there sex clubs? Do people speak honestly? Or is sex still viewed with something akin to shame, spoken of with circumlocution and evasion? Do only men go topless, or women too?[129] Have we unsexed pregnancy?[130] Have we unsexed mothering?[131] Do we continue to give toys of aggression to boys and toys of future maternity to girls? Do women still ride on the back of motorcycles?[132] Are men and women equal? Will we still think "women and children first"?[133] Are queer and straight people equal? Do we still racialize sex and sexualize race? Do condoms require four hands to open?[134] Does the Supreme Court still police women's bodies? Is there still mass incarceration, and do we still

125. Riley v. California, 573 U.S. 373, 387 (2014).

126. Maya Dusenbery, *Dispatch from the Post-Rape Future: Against Consent, Reciprocity, and Pleasure*, *in* THE FEMINIST UTOPIA PROJECT: FIFTY-SEVEN VISIONS OF A WILDLY BETTER FUTURE 17, 19 (Alexandra Brodsky & Rachel Kauder Nalebuff eds., 2015).

127. *Id.* at 24.

128. *Id.*

129. *See* Nassim Alisobhani, *Female Toplessness: Gender Equality's Next Frontier*, 8 U.C. IRVINE L. REV. 299 (2018).

130. *See* David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309 (2019) (arguing that much of the carework of pregnancy can be disaggregated from gender).

131. Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 HARV. J. L. & GENDER 57, 60 (2012). Rosenblum argues that "mothering" and "fathering" have been inappropriately tethered to biosex. He goes on to argue: "'Mothering' should be unsexed as the primary parental relationship. 'Fathering,' correspondingly, should be unsexed from its breadwinner status. In an ideal world, people now considered 'mothers' and 'fathers' would be 'parents' first, a category that includes all forms of caretaking." *Id.* at 60.

132. Jessica Glenza, *Women Shift Gears in Motorcycle Culture: "It's About Being on the Front of the Bike,"* THE GUARDIAN (Aug. 16, 2015), https://www.theguardian.com/sport/2015/aug/16/women-motorcycle-culture-litas-utah [https://perma.cc/6UG3-N3ES] (noting the association of women as passengers on bikes, "the subjugated companions of outlaw biker men," and how the rear seat is even referred to as the "bitch seat").

133. The term "women and children first" originated as a norm for evacuation procedures in case of an emergency. For a critique of the concept as predicated on gender stereotypes and chivalry, and as inconsistent with gender equality, *see generally* WOMEN AND CHILDREN FIRST: FEMINISM, RHETORIC, AND PUBLIC POLICY (Sharon M. Meagher & Patrice DiQuinzio eds., 2005).

134. This is a reference to a "consent condom" developed in Argentina which requires four hands to open. *See* Marissa Dellatto, *The 'Consent Condom' Takes Four*

shackle pregnant prisoners during birth?[135] Have we abolished prisons?[136] Do women and men say "no" when they're thinking "no," and "yes" when they're thinking "yes," addressing at least one of the problems raised by scholars such as Aya Gruber and Kimberly Ferzan?[137] Is there still erotic role-playing and kink, from puppy masks[138] to tree sex[139] to old-fashioned BDSM? To borrow from futurist Joanna Russ, in this utopia, are women "erotic integers and not fractions waiting for completion"?[140] Do people speak honestly? Has power been reconfigured? Is everyone equal?

All of these questions are interconnected, and relate to unwanted sex. While they do not directly respond to Schulhofer's question, the question that opened this essay, "What went wrong?", they certainly seem essential to answering the question that lies just beneath his question, and the question that motivates so many of us writing and thinking about rape law: "How do we make things go right?" What is our utopia, our *alter mundus*? For us, does utopia—a Greek pun that could mean two things—lean towards "no place" (*utopia*) or "the good place" (*eutopia*)?[141] All of these questions seem essential if we are serious about mapping a way to a future perfect that does not involve missteps and misdirection and the perpetuating or exacerbating of the current ills of the criminal justice system.

Hands to Open, N.Y. POST (Apr. 4, 2019), https://nypost.com/2019/04/04/this-consent-condom-takes-four-hands-to-open/ [https://perma.cc/QDW5-F7UF].

135. *See, e.g.*, Priscilla Ocean, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239 (2012).

136. *See, e.g.*, ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 9, 42 (2003); Amna A. Akbar, *Toward a Radical Imagination of the Law*, 93 N.Y.U. L. REV. 405, 430 (2018); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 284 (2007).

137. *See, e.g.*, Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397 (2016); Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 405 (2006).

138. Blake Montgomery, *We Live in Packs*, N.Y. TIMES (Apr. 26, 2019), https://www.nytimes.com/2019/04/26/style/pup-play.html [https://perma.cc/B22V-56JF] (describing the rise in puppy play, a subgenre of gay BDSM which often involves participants donning puppy masks).

139. *See* Neil McArthur, *Ecosexuals Believe Having Sex with the Earth Could Save It*, VICE.COM (Nov. 2, 2016), https://www.vice.com/en_us/article/wdbgyq/ecosexuals-believe-having-sex-with-the-earth-could-save-it [https://perma.cc/X79X-MUUV] (quoting a member of the ecosexual movement as describing the movement as encompassing, on one end, people "who enjoy skinny dipping and naked hiking," and on the other hand, "people who roll around in the dirt having an orgasm" and "people who fuck trees, or masturbate under a waterfall.").

140. RUSS, TO WRITE LIKE A WOMAN, *supra* note 98, at 142.

141. DHÚILL, *supra* note 1, at 5.

This is my hope: That when we reach our future perfect, we will look back and wonder about our dysfunctions, our circumlocutions, and how they contributed to both misunderstandings and bad intentions and misplaced reforms and, yes, unwanted sex. We will understand how the use of force could be an aggravating factor, but react with perplexity that it was once the sine qua non to prove rape. Looking back, we will ponder why people had so much trouble saying no; but really, we will ponder why people had so much trouble asking: *Want to?* We will see how this contributed to mistake of fact defenses—I thought she was into it—the fact that people didn't ask, didn't answer, and didn't speak honestly. We will question our prudishness about naming victims,[142] and how such prudishness contributed to the notion of there being property value in women, that being a rape victim marks one as damaged goods.[143] We will look back at the gendered assumptions in rape law, and even the gendered assumptions of progressive reformers—from the drafters of the MPC[144] to Schulhofer[145] to the many Advisors of the ALI's current effort to revise the MPC's sexual assault provisions[146]—with surprise. We will be embarrassed not only by the benefit of the doubt given to white men accused of sexual assault, but also the presumption of guilt imposed on black men,[147] and how feminist reforms challenged the former while ignoring the

142. *See* Deborah W. Denno, *Perspectives on Disclosing Rape Victims' Names*, 62 FORDHAM L. REV. 125 (1994).

143. I. Bennett Capers, *Rape, Truth, and Hearsay*, 40 HARV. J. L. & GENDER 183, 186 n.17 (2017).

144. Deborah W. Denno, *Model Penal Code Second: Good or Bad Idea?: Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled And Replaced*, 1 OHIO ST. J. CRIM. L. 207, 210 (2003) (critiquing the MPC's gender specific requirement for rape).

145. The one shortcoming in Schulhofer's *Unwanted Sex* is its reliance on the trope of weak female victims and male perpetrators. His language, too, is often gendered, as for example when he writes that a woman's right to sexual autonomy too often does "not exist—until she begins to scream or fight back physically." SCHULHOFER, *supra* note 2, at 10. I doubt Schulhofer would have chosen the word "scream" in the case of a male victim. Even in his discussion of doctors, lawyers, therapists, and other professionals who may exert their power to negotiate sex, Schulhofer seems to have trouble imagining anything other than a male professional.

146. For example, a preliminary draft of the proposed revisions to the MPC's Sexual Assault Provisions included, among intimate body parts, a woman's breast but not a man's breast, a distinction that seems both gendered and hetero-normative. *See* A.L.I., MPC: SEXUAL ASSAULT AND RELATED OFFENSES, PRELIMINARY DRAFT NO. 8 (Sep. 15, 2017).

147. Capers, *The Unintentional Rapist*, *supra* note 4, at 1371–74.

latter.[148] We will question the easy turn to governance feminism,[149] carceral feminism,[150] the turn to state violence, and wonder why, comparatively, we paid so little attention to healing victims. We will wonder, "Why prisons?", and wonder what exactly we were expecting to accomplish other than more unwanted sex, both in prison and when prisoners were released. We will certainly cringe at the way we ignored male victim rape, other than to make jokes about dropping the soap in prison.[151] We will wonder why so many advocates against unwanted sex were silent when the specter of bestial black and brown men—think *Birth of a Nation*, think Willie Horton, think "When Mexico sends its people, they're not sending their best . . . . They're rapists"[152]—was co-opted to promote white supremacy, to disenfranchise blacks, to win a Presidential election, to shut down the government for the sake of a border wall.

We might even look back to this point in time, this liminal moment, and think not only of the issues raised here, and the #MeToo movement, and the absence of women in President Trump's administration to say nothing of his casual sexism, but also litigation before the Court. In April 2019, the Court heard oral argument in the case *Iancu v. Brunetti*.[153] In dispute: whether the U.S. Patent and Trademark Office's refusal to register the clothing brand FUCT, pursuant to Section 2(a) of the Lanham Act, violated the Free Speech Clause of the First Amendment. What upstaged the legal issue, however, was the Justices' discomfort in saying the brand name FUCT during oral argument.[154] Even the Solicitor General

148. Capers, *Real Women, Real Rape*, *supra* note 4, at 859–71.

149. *See* Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape Prosecution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. OF L. & GENDER 335, 340 (2006) (coining the term to describe "the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power"); *see also* JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 20–22 (Princeton Univ. Press 2006).

150. For a discussion of the rise of carceral feminism, *see* Erin Collins, *The Criminalization of Title IX*, 13 OHIO ST. J. CRIM. L. 365, 368–73 (2016).

151. *See, e.g.*, Capers, *Real Rape Too*, *supra* note 4.

152. Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Immigrants and Crime*, WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?noredirect=ON&utm_term=.Ea54929947b2 [https://perma.cc/56N8-UVSM].

153. 139 S. Ct. 2294 (2019), *aff'g* In re Brunetti, 877 F.3d 1330 (Fed. Cir. 2017).

154. Adam Liptak, *A Vulgar Term Goes Unmentioned as It Gets Its Day in Court*, N.Y. TIMES (April 15, 2019), https://www.nytimes.com/2019/04/15/us/politics/

avoided saying the word, opting instead to call it "the equivalent of the past participle form of the paradigmatic profane word in our culture."[155]

If nothing else, I suspect in our future perfect world, we'll be comfortable saying people fuck. Men fuck women. Women fuck women. Women fuck men. Men fuck men. In combinations of two's and three's and a host of other permutations. They use tongues and assholes and strap-ons and lips and breasts and hands and fists and apps and remote devices. I suspect in this future world, like the worlds imagined in feminist futures, we will be comfortable with all of the above. And with that comfort, we will make laws accordingly. Until we make laws unnecessary.

supreme-court-vulgarity-trademark.html?searchResultPosition=1 [https://perma.cc/Q7UQ-PW5H].

155. *Id.*

PRIVACY'S POLITICAL ECONOMY AND THE STATE OF MACHINE LEARNING: AN ESSAY IN HONOR OF STEPHEN J. SCHULHOFER

MARIANO-FLORENTINO CUÉLLAR AND AZIZ Z. HUQ***

ABSTRACT

Our aim in this essay is to consider how policymakers make decisions about government surveillance in what we might call the machine-learning state: a nation state with sufficient bureaucratic and technological capacity to rely extensively on machine learning techniques for surveillance, enforcement, and security. In order to lay the groundwork for more nuanced engagement with the legal and policy trade-offs in this domain, we focus particularly on how the use of privacy-relevant technologies is affected by the machine-learning state's political economy –– the mix of agendas, pressures, and constraints affecting institutions and the policymaking process.

We propose that a nation state's adoption of machine learning instruments for surveillance occurs in the context of what Robert Putnam famously characterized as a "two-level game." The state is operating simultaneously in a domestic political environment populated by institutions mediating conflicts involving civil society and firms competing to expand and monetize machine-learning capacities, and also in an international environment in which it is competing with other sovereign nations that are cultivating and deploying similar capacities for geostrategic ends. How and to what end machine learning instruments are deployed depends on the strategic choices the national government makes in these two overlapping yet distinct contexts. It would thus be a mistake to analyze such deployment purely in terms of responses to domestic legal, policy, or political considerations, because states may be willing to shoulder the costs of domestic backlash so they can further geostrategic goals. We elucidate the pressures likely to affect legal and policy interventions in this space, and in the process, map some of the concerns and trade-offs relevant to the reasonable evaluation of possible reforms. We consider new directions for privacy-related scholarly research. Finally, we discuss

* Justice, California Supreme Court, Herman Phleger Visiting Professor of Law, Stanford Law School, and affiliated scholar, Freeman Spogli Institute for International Studies at Stanford University.

** Frank and Bernice J. Greenberg Professor of Law and Mark C. Mamolen Teaching Scholar, University of Chicago Law School. Thanks to Kristen Eichensehr for useful feedback, and the Frank J. Cicero Fund for support.

the limitations of existing Fourth Amendment doctrine as a means of addressing the situation we describe, and the potential for state and federal legislative or regulatory alternatives to fill the gap.

INTRODUCTION

In September 2002, Stephen Schulhofer published a short book entitled "The Enemy Within: Intelligence, Law Enforcement and Civil Liberties after September 11."[1] Those expecting a breathless "libertarian panic"[2] from a leading liberal scholar of constitutional criminal procedure would have been disappointed. Instead, "The Enemy Within" reflected Schulhofer's characteristically scrupulous care and lawyerly skill. Taking meticulous care to sidestep harsh overreaction, he set out to map the complex practical, statutory, and doctrinal terrain of domestic electronic surveillance––how information-gathering techniques justified on national security grounds were not confined to the national security sphere, for example,[3] and how the state's information-gathering activities are inevitably mediated by organizational practices and institutional realities.[4] By subjecting this terrain to careful scholarly attention, he demonstrated how to glean from its features some degree of normative guidance.

One could pick any number of Schulhofer's works to make similar observations. But "The Enemy Within" provides an especially salient launching point for this essay. It offers important historical groundwork for our project. It also deploys a more general methodological orientation relevant to scholars working on fractious national security, technology, and privacy related questions.

In the two eventful decades since the publication of "The Enemy Within," political and technological changes have brought to the fore new questions about the circumstances under which people can make privacy claims against the state.[5] Driving these changes in important part is the emergence and deployment at scale of new computational tools described using terms like 'ma-

1. STEPHEN SCHULHOFER, THE ENEMY WITHIN (2002).

2. The term is a skeptical neologism coined in Adrian Vermeule, *Libertarian Panics*, 36 RUTGERS L.J. 871, 871–72 (2005). The empirical premises of the concept are, however, fragile. Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 934–43 (2012).

3. SCHULHOFER, *supra* note 1, at 1–5, 29–48.

4. *Id.* at 55–64.

5. We bracket here the question whether privacy's principal adversary is no longer the state, but instead the coterie of companies that harvest and analyze personal data. We aim to take up that question in other work.

chine learning' or 'artificial intelligence.' These extract correlations or predictive inferences from large data sets. Advocates and critics of these technologies alike make bold claims about the extension of epistemic capabilities flowing from new computational instruments.[6] Already, machine learning tools underline predictions of criminal violence and play some role in allocating responsive state coercion.[7] Increasingly, they also play a role in the allocation of military force.[8] Deployment of new computational technologies in the criminal justice context has provoked concerns about their threat to privacy values.[9] To date, however, we still lack an account of the social, economic, and political forces that shape adoptions of these technologies *by (or on behalf of) the state*.[10] Without a coherent account of this political economy, however, we are ill-equipped to evaluate either the justifications for or the likely trajectory of such technological change in the forms of state power. Nor would we possess the tools to identify meaningful efforts, or the ultimate consequences for privacy relative to the state.

Our aim in this essay is to offer a preliminary sketch of the basic political economy of privacy in what we might call *the machine learning state*. This is a nation state with sufficient bureaucratic and technological capacity to rely extensively on machine learning techniques for surveillance, enforcement, and security.

We focus particularly on the question of how the machine learning state's political economy influences its decisions to adopt privacy-relevant technologies. Since machine learning tools can be deployed by government in many ways, and can be used in very different domains ranging from pharmaceutical regulation to education, we adopt a narrow focus. In particular, we train upon a sub-

6. *Compare* PEDRO DOMINGOS, THE MASTER ALGORITHM: HOW THE QUEST FOR THE ULTIMATE LEARNING MACHINE WILL REMAKE OUR WORLD 1 (2015) (offering an optimistic take on machine learning's impact), *with* CATHY O'NEILL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY 203–06 (2016) (decrying the regressive tendencies of big-data technologies generally).

7. Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 109 DUKE L.J. 1043, 1068–76 (2019) (documenting adoption of new risk-assessment algorithms).

8. Ashley S. Deeks, *Predicting Enemies*, 104 VA. L. REV. 1529 (2018).

9. *See* Kiel Brennan-Marquez, *"Plausible Cause": Explanatory Standards in the Age of Powerful Machines*, 70 VAND. L. REV. 1249, 1255–57 (2017); Emily Berman, *A Government of Laws and Not of Machines*, 98 B.U. L. REV. 1277, 1339 (2018) (exploring privacy concerns).

10. In other work, we have criticized the leading extant accounts as insufficiently attentive to the effects of state adoption of such tools. *See* Mariano-Florentino Cuéllar & Aziz Z. Huq, *Economies of Surveillance*, 133 HARV. L. REV. 1280 (2020).

set of contexts––particularly surveillance for counter-intelligence, criminal, and regulatory enforcement purposes––that we think most likely to trigger particularly acute public concerns about privacy given their close association with state coercion. We make no claim to map the whole waterfront of machine learning as an instrument of state policy. Though we begin mapping some of the normative trade-offs that arise for such states and their citizens, our attention here is largely taken up by descriptive questions, not prescriptive ones.

To lay the groundwork for more nuanced engagement with the legal and policy trade-offs in this domain, we map what we perceive to be the main technological and institutional forces that shape state's adoption of new machine learning instruments.[11] Even if we acknowledge that people, organizations, and states are driven by a variety of motivations, the more general pressures and incentives we incorporate into our political-economy framework are pertinent. In particular, they help us map the possibility conditions of privacy vis-à-vis the state in the age of machine learning.

Our central contribution here is to suggest that state adoption of machine learning instruments for surveillance occurs through a version of what Robert Putnam famously characterized as a "two-level game."[12] That is, the state is operating simultaneously in a domestic political environment dominated by firms competing to expand and monetize machine learning capacities, and simultaneously in an international environment in which it is competing with other sovereign nations that are cultivating and deploying the same technological capacities for geostrategic ends. How and to what end machine learning instruments are deployed turns on the strategic choices that the national government makes in these two overlapping yet distinct contexts.[13] It would thus be a

11. We focus on the federal government. State and municipal governments adopt predictive computational tools for different purposes, under different fiscal constraints, and under different political conditions. For a recent account of local resistance to national control of local security functions, see Trevor G. Gardner, *Immigrant Sanctuary as the 'Old Normal': A Brief History of Police Federalism*, 119 COLUM. L. REV. 1 (2019).

12. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Game*s, 42 INT'L ORG. 427 (1988). Our use of Putnam's analytic framework, we stress, is limited. We are not focused, for example, on his account of negotiation dynamics. Rather, it is the possibility of dynamic interactions between the domestic and the international that we find most useful.

13. Our analytic frame is consistent with the "new interdependence approach" developed by Henry Farrell and Abraham Newman, in which "institutions [act] as opportunity structures that facilitate cross-national coordination between collective actors" and (particularly resonant with our account) "political contesta-

mistake to analyze such deployment in terms of responses to purely domestic legal, policy, or political considerations.

Our focus here is primarily descriptive. But we also offer a preliminary sense of how to think about the possibility conditions for privacy in the context of this two-level game. We also recognize the limitations of existing Fourth Amendment doctrine as a means of addressing the situation we describe and the potential for legislative and regulatory alternatives to fill the gap, though we offer no fully developed prescriptions at this stage. Rather, we hope to elucidate the main pressures likely to impinge on legal and policy interventions in this space. In the process, we aim to map some of the concerns and trade-offs that reasonable interventions would need to address. In developing this account, we make no claim that machine learning is the only technology with deployments that are shaped by an interleaved domestic and international dynamics game.[14] Quite the contrary—much of our analysis might be transposed to other technologies. But we think there are distinctive ways in which a similar dynamic influences how machine learning specifically is adopted.

In Part I, we define "machine learning" and "artificial intelligence," and explain how such technologies tend to have implications (negative and positive) for various forms of privacy. Part II shows that adoption of such technologies occurs against the context of a two-level domestic and international game. It further considers how this context shapes the privacy impacts of machine learning. It thereby offers the essential context for closely related doctrinal questions and institutional design problems. A conclusion briefly considers how those impacts, to the extent that they are perceived as undesirable, might be mitigated.

I.
MACHINE LEARNING'S IMPACT ON PRIVACY

As terms like "machine learning" and "privacy" are far from self-explanatory, we begin by offering definitions of these two central concepts. We can then offer a preliminarily sketch of the technology's implications for privacy by first noting how privacy intrusions might occur, and then explaining how emerging technology can enable or constrain such intrusions.

---

tion . . . takes place in multiple and overlapping venues." HENRY FARRELL & ABRAHAM L. NEWMAN, OF PRIVACY AND POWER: THE TRANSATLANTIC STRUGGLE OVER FREEDOM AND SECURITY 29 (2019).

14. *See id.* at 69–160 (developing detailed case studies of interjurisdictional conflict about financial and airline passenger data).

Exactly what is enabled by any technological change is contingent on the organizational and legal context shaping society's use and understanding of such change. The technical possibility that computational tools can impinge on privacy does not mean that such harms will inevitably arise. To the contrary, one of our key assumptions is that the manner in which new technologies are adopted depends on social as well as technical conditions. A "successful technological innovation occurs only when all the elements of the system, the social as well as the technological, have been modified so that they work together effectively."[15] The immanent potentialities of a new technology remain unexpressed in the absence of social, institutional, and economic circumstances (or "affordances"[16]) in which they become relevant. Our account of the 'raw' technology of machine learning, therefore, must be understood as necessarily incomplete; its implications are latent and unexpressed until revealed by social and institutional context.

A. The Domain of Machine Learning

We are concerned in this essay with a group of computational tools called "machine learning." Machine learning, in its most general terms, is a technique for using computing platforms to solve a "learning problem . . . [for] improving some measure of performance when executing some task through some type of training experience."[17] Although these computational tools are often called "artificial intelligence" tools, we generally avoid that term here because––relative to the phenomena we describe here––artificial intelligence may be both somewhat over-broad and under-inclusive relative to the primary focus of our analysis.[18] Whether or not the computational tools we have in mind here are capable of self-modification through "learning" in the way the "artificial intelligence" label might suggest, they are invaluable for analyzing vast volumes

15. Bryan Pfaffenberger, *Social Anthropology of Technology*, 21 ANN. REV. ANTHROPOLOGY 491, 498 (1992).

16. Ryan Calo, *Can Americans Resist Surveillance?*, 83 U. CHI. L. REV. 23 (2016) (using the term "affordance" to describe not only the enabling effects of artifacts but also those of cultural practices and norms).

17. M.I. Jordan & T.M. Mitchell, *Machine Learning: Trends, Perspectives, and Prospects*, 349 SCI. 255, 255 (2015).

18. *Cf.* STUART RUSSELL & PETER NORVIG, ARTIFICIAL INTELLIGENCE: A MODERN APPROACH 4–8 (3d ed. 2013) (offering a series of alternative definitions of artificial intelligence that encompass concepts and processes different from what "machine learning" covers, including thinking and acting humanly as well as rationally). The international relations literature uses the term "artificial intelligence," so we find we cannot completely avoid it.

of data that would be enormously cumbersome for humans to sift. They are certainly capable of identifying subtle patterns that could elude even perceptive human observers or analysts using only conventional tools of statistical inference.

In most respects, the basic intuition animating machine learning is not new. An elementary form of the underlying computational model, called the perceptron, was developed to facilitate supervised learning of binary classifiers; it's been well understood since the late 1950s.[19] An important technical breakthrough, however, occurred in 1985, when the computer scientist Geoffrey Hinton and his colleagues developed a tool called "backpropagation."[20] This enabled a spectacular and rapid adoption of a kind of machine learning called "neural networks." Still, it would take another 26 years before sufficient computing power was generally available to make this method a plausible one for commercial use.[21]

A brief explanation of the basic technology helps us understand its range of possible state uses. Most machine learning algorithms ordinarily work by sorting a class of examples (e.g., images or individuals) into a set of categories.[22] For instance, a machine learning tool for visual recognition might sort images into the classes of "face" and "not face." A bail algorithm might class suspects into the classes of "very dangerous," "dangerous," and "not dangerous." The classification is possible because the algorithm has already encountered a set of training data—i.e., a data set in which the individual items have already been classified. By examining relationships between individuals in the training data and an outcome of interest, the algorithm can "learn[ ] rules [for classification] from data," rules that can then be applied to new, previously unknown data sets.[23] The ensuing classifications of new data, however, are typically correlational and not causal in nature. They can be

19. *See* Frank Rosenblatt, *The Perceptron: A Probabilistic Model for Information Storage and Organization in the Brain*, 65 PSYCH. REV. 386 (1958).

20. *See* JOHN KELLEHER, DEEP LEARNING 125–26 (2019).

21. *See* James Somers, *Is AI Riding a One-Trick Pony?*, MIT TECH. REV. (Sept. 29, 2017), https://www.technologyreview.com/2017/09/29/67852/is-ai-riding-a-one-trick-pony/ [https://perma.cc/HJV3-Z5HJ].

22. *See* NAT'L RSCH. COUNS., *Frontiers in Massive Data Analysis* 104 (2013), http://www.nap.edu/catalog.php?record_id=18374 [https://perma.cc/NF74-RVGB]; *accord* PETER FLACH, MACHINE LEARNING: THE ART AND SCIENCE OF ALGORITHMS THAT MAKE SENSE OF DATA 14 (2012).

23. Ziad Obermeyer & Ezekiel J. Emanuel, *Predicting the Future—Big Data, Machine Learning, and Clinical Medicine*, 13 NEW ENGLAND J. MED. 1216, 1217 (2016). *See also* PEDRO DOMINGUES, THE MASTER ALGORITHM: HOW THE QUEST FOR THE ULTIMATE LEARNING MACHINE WILL REMAKE OUR WORLD 6–7, 23 (2015).

predictive, or can pick out patterns in existing data. As a result, a machine learning algorithm's performance is usually gauged in terms of how well it captures the strength of the correlative relationship of *x* to *y*, and not by its ability to discern causal relationship of *x* and *y*.[24] Machine learning can be used to make predictions of outcomes in the case of supervisory data, or to identify clusters or associations (in the case of recommendation systems such as those employed by Netflix and Amazon).[25] Computationally, machine learning tools can be implemented through a wide range of strategies. These include associational learning,[26] 'neural networks,'[27] and the "random forests" approach.[28] We will ignore the differences between these approaches for present purposes.

One taxonomy of machine learning's practical applications emphasizes four common functionalities: (1) the identification of clusters or associations within a population under analysis, (2) the identification of outliers within a population, (3) the development of associational rules, and (4) prediction problems of classification and regression applied to out-of-sample data.[29] Examples abound, and we offer only a small handful here to illustrate the technology's possibilities.

A first comes in the form of a recent study of the allocation of hip replacement surgery among otherwise eligible patients.[30] The study used machine learning tools to identify which patients would live long enough to benefit from the surgery.[31] A second use in-

24. Jordan & Mitchell, *supra* note 17, at 255–57 (noting that performance can be defined in terms of accuracy, with false positive and false negative rates being assigned a variety of weights).

25. Judea Pearl, Professor of Comput. Sci. & Stats., UCLA, *Keynote Talk at the 11th ACM International Conference on Web Search and Data Mining: Theoretical Impediments to Machine Learning with Seven Sparks from the Causal Revolution* 1–2 (Feb. 7, 2018), https://ftp.cs.ucla.edu/pub/stat_ser/r475.pdf [https://perma.cc/6M6Y-84WQ] (arguing that the inability of machine learning to analyze counterfactuals to infer causation is a major impediment).

26. Trevor Hastie et al., *Unsupervised Learning*, *in* THE ELEMENTS OF STATISTICAL LEARNING 485, 487 (2d ed. 2009).

27. The following draws on the lucid accounts in ETHEM ALPAYDIN, INTRODUCTION TO MACHINE LEARNING 267–313 (3d ed. 2014), and Yoshua Bengio, *Machines Who Learn*, SCIENTIFIC AM., June 2016, at 46–51. *See also* SEAN GERRISH, HOW SMART MACHINES THINK 109–23 (2019) (providing a lucid explanation of neural networks in action).

28. Leo Breiman, *Random Forests*, 45 MACH. LEARNING 5, 5–6 (2001).

29. JOHN D. KELLEHER & BRENDAN TIERNEY, DATA SCIENCE 151–80 (2018) (providing examples of these different tasks).

30. Jon Kleinberg et al., *Prediction Policy Problems*, 105 AM. ECON. REV. 491, 493–94 (2015).

31. *Id.* at 493.

volves algorithms designed to predict the spatial occurrence of future crime patterns—and hence to help determine future police deployments.[32] A third is the deployment of machine learning instruments to scan large volumes of video footage in search of specific faces. In the United Kingdom, for instance, facial recognition tools have been used since 2017 to identify suspects from surveillance and make arrests.[33] Law enforcement in the United States is presently adopting a similar tool, to some controversy given the absence of oversight over its roll-out and uncertainty about the instrument's quality.[34] The list of public and private uses could be extended for some time without running out of extraordinary and novel uses of the technology.

B. Machine Learning against Privacy

To further understand the implications of machine learning for privacy, we must acknowledge the often-contentious debates associated with even defining privacy, let alone weighing the tradeoffs associated with protecting it. Vigorous debates about privacy have been familiar features of American political culture since the concept emerged in its modern form during the late nineteenth century.[35] Well before privacy became entangled in late twentieth century doctrinal disputes about federal constitutional rights, what Samuel Warren and Louis Brandeis called "the right to be let alone," was a focus of spirited disagreement about matters such as the scope of civic life and the nature of dignity.[36] The emergence of Fourth Amendment jurisprudence organized around the idea of privacy, which happened only in the second half of the twentieth

32. *See* Laura Nahmias & Miranda Neubauer, *NYPD Testing Crime-Forecast Software*, POLITICO (July 8, 2015, 5:52 AM), https://www.politico.com/states/new-york/city-hall/story/2015/07/nypd-testing-crime-forecast-software-090820 [https://perma.cc/3G49-UP9B].

33. Cara McGoogan, *British Police Arrest Suspect Spotted with Facial Recognition Technology*, TELEGRAPH (June 7, 2017, 4:31 PM), http://www.telegraph.co.uk/technology/2017/06/07/british-police-arrest-suspect-spotted-facial-recognition-technology [https://perma.cc/Q5H7-W4QF]; *see generally* Sarah Brayne, *Big Data Surveillance: The Case of Policing*, 82 AM. SOC. REV. 977, 981–1004 (2017) (documenting the adoption of such technologies by the Los Angeles Police Department).

34. Kashmir Hill, *The Secretive Company that Might End Privacy as We Know It*, N.Y. TIMES (Jan. 18, 2020), https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html [https://perma.cc/M7XB-F69C].

35. SARAH E. IGO, THE KNOWN CITIZEN: A HISTORY OF PRIVACY IN MODERN AMERICA 2–3 (2018).

36. Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

century, did not abate that controversy. To the contrary, the jurisprudence still encompasses a jostling bundle of analytically distinct models,[37] while scholars still argue about appropriate underlying theoretical models of Fourth Amendment protection in terms that either reinterpret or reject a privacy touchstone.[38]

Without trying to settle these seemingly intractable debates, we identify three forms of privacy that might be implicated by the adoption of machine learning tools and, where possible, supply examples. We map these forms of privacy using examples from the Fourth Amendment case law. We do not intend, however, for our analysis to begin and end with that body of federal constitutional doctrine. Rather, the cases are simply helpful as a source of illustration.

The first, and perhaps most obvious, form of privacy impacted by machine learning tools is 'informational' privacy; that is, a person's interest in preventing the disclosure of information that she wishes to keep secret. This form of privacy might be conceptualized as a kind of intellectual property interest: a right to control the possibility of transactions over or dissemination of a given piece of information. For instance, in the recent decision of *Carpenter v. United States*, the U.S. Supreme Court described government acquisition of cell-site locational data from a suspect's telecommunications provider as "a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals."[39]

A second potential form of privacy focuses on its dignitary aspect. This might be understood to encompass instances in which a physical space, such as a home, is viewed as a domain of special normative concern such that intrusions on that space are perceived to be undesirable, even objectionable, without regard to whether

37. *See* Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 504–08 (2007) (explaining Fourth Amendment doctrine in terms of four competing paradigms).

38. For a reinterpretation of privacy, see, for example, Matthew B. Kugler & Lior Jacob Strahilevitz, *Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory*, 2015 SUP. CT. REV. 205, 211 (including "perceived intrusiveness" of a search as relevant to reasonable expectations of privacy per Fourth Amendment doctrine); and Richard M. Re, *Fourth Amendment Fairness*, 116 MICH. L. REV. 1409, 1413 (2018) (contending "a search or seizure is unreasonable when any principle that permitted it would be one that a Fourth Amendment rights holder could reasonably reject"). For a rejection of a privacy touchstone, see William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1877–78 (2016) (reasoning that, under the positive law model, a court may decide to apply the waiver of positive law rights to Fourth Amendment protections for threshold search and seizure questions).

39. 138 S. Ct. 2206, 2216 (2018).

they yield the disclosure of any new information. Hence, the U.S. Supreme Court has repeatedly described the home as a location deserving of special solicitude under the Fourth Amendment.[40] The home is protected doctrinally without regard to whether an intrusion yields information.[41]

Yet a third dimension of privacy relates to political power and the nature of the relationship between the state and those subject to its authorities. In this dimension, privacy is a political concept as well as a legal or ethical concept insofar as it speaks to the nature of the relationship between (say) the state and the individual subjects (citizen and noncitizen) that it potentially regulates. Privacy is a method of calibrating the distance between state and subject so as to maintain a certain "equilibrium" defined in terms of the power the state potentially exercises over the subject.[42] This political notion is consistent with the origins of the Fourth Amendment (although perhaps not with the manner in which it has now been implemented in the ordinary criminal law context).[43] At its inception, that amendment "was about maintaining space for individuals to compete for offices created by the separation of powers system—individuals who might play vital roles in resisting incipient despotism."[44]

In the hands of a state functional enough to staff, maintain, and deploy complex organizations, machine learning has the potential to influence each of these three forms of privacy. Consider first this technology's possible impact on informational privacy. Machine learning tools can be applied to large pools of publicly available data in order to acquire information that otherwise would not be available. For example, metadata from telephone communications can be analyzed without machine learning to "reveal[ ] what and who we're interested in and what's important to us, no matter how private," including illnesses (both ours and those of people

40. Wilson v. Layne, 526 U.S. 603, 612 (1999) (describing protection of the home as "core" to the Fourth Amendment); Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 912–13 (2010) (collecting related cases).

41. An example of this is the rule requiring officers to knock and announce their presence when executing a warrant. Wilson v. Arkansas, 514 U.S. 927 (1995). The so-called "knock and announce" rule does not prevent the disclosure of information. It does protect a dignitary interest in the home.

42. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480 (2011).

43. Aziz Z. Huq, *How the Fourth Amendment and the Separation of Powers Rise (and Fall) Together*, 83 U. CHI. L. REV. 139, 143 (2016).

44. *Id.* at 146–47.

close to us); intimate decisions (such as decisions to have children or to abort a pregnancy); and decisions to acquire goods (such as a weapon).[45] It has long been the case that a diligent investigator could infer some things from aggregated transactional records, say from a bank or telephone company. Machine learning, however, makes the analysis of large pools of such transactional data much more revealing. Hence, one study has used such tools to extract both age and gender information solely from metadata about telephone usage.[46] This change in the magnitude of inference might translate into a significant change in the sheer power of the state.

Further, machine learning can be used to expand the range of data that is epistemically fruitful, thereby allowing for inferences in ways that compromise both informational privacy and dignity values. One well-known example involves the de-anonymization of large putatively non-individualized datasets.[47] Another is the use of data generated by internet usage to profile and predict people's behavior—a measure that is already standard among private advertisers[48]—and their underlying psychological states. A 2017 study, for instance, showed how a trained algorithm could use Instagram feeds to predict markers of clinical depression better than a human

45. BRUCE SCHNEIER, DATA AND GOLIATH: THE HIDDEN BATTLES TO COLLECT YOUR DATA AND CONTROL YOUR WORLD 21–22 (2015).

46. Bjarke Felbo et al., *Using Deep Learning to Predict Demographics from Mobile Phone Metadata* (2016), https://openreview.net/forum?id=91EEnoZX0HkRlNvX-UKLA [https://perma.cc/2L6C-5GKB].

47. The pathbreaking example involved a de-anonymization of the Netflix database used in its algorithm design contest and credit card data. Arvind Narayanan & Vitaly Shmatikov, *Robust De-anonymization of Large Sparse Datasets*, *in* PROCEEDINGS OF THE 2008 IEEE SYMPOSIUM ON SECURITY AND PRIVACY 111–25 (2008) ("[V]ery little auxiliary information is needed [to] deanonymize an average subscriber record from the Netflix Prize dataset."); Yves-Alexandre de Montjoye et al., *Unique in the Shopping Mall: On the Reidentifiability of Credit Card Metadata*, 347 SCI. 536, 536 (2015) ("We study 3 months of credit card records for 1.1 million people and show that four spatiotemporal points are enough to uniquely reidentify 90% of individuals."). Where other databases are available to be cross-referenced, it may be even easier to de-anonymize data. *See* Latanya Sweeney, *k-Anonymity: A Model For Protecting Privacy*, 10 INT'L J. ON UNCERTAINTY, FUZZINESS & KNOWLEDGE-BASED SYS. 557, 557 (2002).

48. Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54, 91 (2019) ("Since websites often rely on predictive algorithms to analyze people's online activities—web surfing, online purchases, social media activities, public records, store loyalty programs, and the like—they can create profiles based on user behavior, and predict a host of identity characteristics that marketers can then use to decide the listings that a user sees online.").

diagnosis.[49] Computer vision can also reveal information that otherwise could not be secured—such as the identity of a person being extracted from visual data that solely depicted that person's gait.[50] The IC Realtime Company now offers an application called "Ella," which can recognize and execute natural language queries in respect to the contents of CCTV footage.[51]

The outer perimeter of computational inference remains analytically and ethically murky. In 2018, a pair of Stanford researchers published findings controversially suggesting that sexual preferences could be accurately inferred from facial images.[52] Their findings, however, have since been challenged on technical grounds. But it remains unclear whether inference of traits such as sexual preference from facial images will be feasible in the near term.[53] Indeed, under the right circumstances (say, in the hands of a very conservative or theocratic state), even a weakly predictive instrument for drawing sexuality-related preferences from image data might pose significant and troubling normative implications. And having the state make imprecise predictions about sexuality, we hasten to add, can impinge on individuals in troubling ways even in a well-functioning democracy.

We think that it is also important to note that at least some uses of facial recognition technology work simply as substitutes for presently available technologies in ways that have no discernable privacy impact. The use of facial recognition to manage secure entry of government employees into their workplace, for instance, in lieu of other forms of identification, does not provide a reason for new privacy related concerns-–unless, of course one has a functional theory addressing how deployment of such technology in the building-access context might facilitate public habituation or doctrinal justifications for more widespread use.[54] By itself, at least, the care-

49. Andrew G. Reece & Christopher M. Danforth, *Instagram Photos Reveal Predictive Markers of Depression*, 6 EPJ DATA SC. 15, 15–16 (2017).

50. SCHNEIER, *supra* note 45, at 29.

51. James Vincent, *Artificial Intelligence is Going to Supercharge Surveillance*, THE VERGE (Jan. 23, 2018, 10:54 AM), https://www.theverge.com/2018/1/23/16907238/artificial-intelligence-surveillance-cameras-security [https://perma.cc/U4SN-VFL2].

52. Yilun Wang & Michal Kosinski, *Deep Neural Networks Are More Accurate than Humans at Detecting Sexual Orientation from Facial Images*, 114 J. PERSONALITY & SOC. PSYCHOL. 246 (2018).

53. Nicolas Baya-Laffite et al., *Deep Learning to Predict Sexual Orientation in the Public Space*, 211 RÉSEAUX 137, 139–140 (2018) (challenging the Wang-Kosinski result).

54. Equally, the use of translation software depending on machine learning tools, such as Google Translate, does not by itself appear to raise privacy concerns.

fully cabined use of such technology to heighten the efficiency of building access creates no change in the quality or sheer quantity of state epistemic power.

Machine learning also helps unlock genetic information. Whether focused on single alleles or drawing on a population-wide database of whole genomes, the use of enormous computing power and population data to discern patterns in genetic information will likely continue to sharpen the state's interest in learning what might once have been elusive if not downright unobtainable without face-to-face questioning of individuals. Recent studies have used genome-wide complex trait analysis and the use of polygenic scores (sometimes referred to as polygenic risk scores) to make predictions of social and perhaps political preferences.[55] Not surprisingly, scholars intensely debate the accuracy and implications of this work. On the one hand, a leading study from 2012 has pointed out that at least some genetic studies result, at present, in predictions that are only weakly powered.[56] On the other hand, a number of other studies find (for example) that single genetic traits related to serotonin transport provide a level of predictive acuity in respect to voter turnout behavior.[57] These incremental steps are unlikely to be the end of debates about the epistemic gains from genetic data.[58] At minimum, it seems not implausible that a piece of physical evidence (such as blood or spit) will at some point be able to reveal

---

Such examples show that an analysis should focus on the specific uses of a technology, rather than the technology in the abstract. *But see* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003) (offering analytically-plausible rationales associated with multi-peaked preferences, attitude change, small-change tolerance, and political power and momentum to explain how policy or technological changes in one context may spread to other domains despite judicial efforts to cabin the process).

55. *See generally* David B. Braudt, *Sociogenomics in the 21st Century: An Introduction to the History and Potential of Genetically Informed Social Science*, 12 SOCIO. COMPASS 1 (2018) (surveying recent advances in sociogenomics).

56. Daniel J. Benjamin et al., *The Genetic Architecture of Economic and Political Preferences*, 109 PROC. NAT'L ACAD. SCI. 8026, 8026 (2012).

57. Kristen Diane Deppe et al., *Candidate Genes and Voter Turnout: Further Evidence on the Role of 5-HTTLPR*, 107 AM. POL. SCI. REV. 375 (2013) (replicating earlier studies, and adding new studies, to show a measure of predictive power); *see also* Sven Oskarsson et al., *Linking Genes and Political Orientations: Testing the Cognitive Ability as Mediator Hypothesis*, 36 POL. PSYCHOL. 649 (2015).

58. For a useful and succinct treatment of the perils of over-interpreting polygenic risk scores, see Michelle Meyer et al., *Response to Charles Murray on Polygenic Scores*, MEDIUM (Feb. 3, 2020), https://medium.com/@michellenmeyer/response-to-charles-murray-on-polygenic-scores-e768cf145cc [https://perma.cc/79NR-79L3].

not just identity but also a range of preferences and behavioral traits.[59]

Finally, machine learning is likely to influence power-related definitions of privacy. Machine learning's availability shifts the balance of power between institutions and individuals. "[L]arge institutions—both governments and corporations—are gaining the upper hand . . . by tracking vast quantities of information about mundane aspects of our lives."[60] The acquisition of these large pools of data is of limited importance without machine learning, which provides the computational pathways to extract individualized information from them. Such tools, however, require large amounts of money, expertise, and computational power to employ.[61] Their use to acquire private information or to impinge on individual dignity is largely confined to the state and entities with the same level of resources as the state. At the same time, machine learning algorithms themselves can be opaque since they are "not explainable in human language,"[62] or else are commonly shielded from public scrutiny by legal regimes such as trade secrets.[63] Hence, even as they increase the capacity of the state to acquire information about its subjects, the instruments through which such acquisition occurs may become more difficult (or more costly) to understand. Just as public and private life become a degree more transparent to the state, so the state as a consequence of the same technology becomes less transparent to its public.[64]

---

59. It is interesting to note that Justice Gorsuch discussed governmental acquisition of DNA from third parties as something that would violate reasonable expectations of privacy, notwithstanding the absence of genetic profiling in the case there at bar. *Carpenter v. United States*, 138 S. Ct. 2206, 2262–63 (2018) (Gorsuch, J., dissenting).

60. JULIA ANGWIN, DRAGNET NATION: A QUEST FOR PRIVACY, SECURITY, AND FREEDOM IN A WORLD OF RELENTLESS SURVEILLANCE 19 (2014).

61. This seems to us generally true, but there is some evidence that it is changing. *See* Cade Metz, *Good News: A.I. Is Getting Cheaper. That's Also Bad News*, N.Y. TIMES (Feb. 20, 2018), https://www.nytimes.com/2018/02/20/technology/artificial-intelligence-risks.html?action=click&module=relatedCoverage&pgtype=article&region=footer [https://perma.cc/V9TH-WGV7].

62. Tal Z. Zarsky, *Transparent Predictions*, 2013 U. ILL. L. REV. 1503, 1519 (2013). On the risk of opacity, see Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 25 (2014) (arguing for oversight and transparency).

63. Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343, 1350 (2018) (documenting "the introduction of trade secret evidence into criminal cases"); *see also* FRANK PASQUALE, THE BLACK BOX SOCIETY 12–15 (2013).

64. It is possible to design algorithms so that they are more 'explainable.' *See* Deven R. Desai & Joshua A. Kroll, *Trust but Verify: A Guide to Algorithms and the Law*,

The modern state is therefore defined to some extent by explicit and implicit choices about the relationship between information, public power over tools to gather and analyze it, and mechanisms (or their absence) to oversee and render accountable the use of those tools. As even the drafters of the Fourth Amendment were well aware, asymmetrical access to information can be a potent instrument of political control. The Chinese state, for example, uses "facial recognition and artificial intelligence to identify and track 1.4 billion people" and thereby "assemble a vast and unprecedented national surveillance system."[65] Chinese police stationed at transportation hubs such as train stations, for instance, already use dark glasses with embedded data streams employing facial recognition technology, such that merely looking at a person pulls up their identity and related information.[66] An algorithmic classification tool sorts surveillance data for ethnic Uighur faces, producing a detailed accounting of the precise movements and actions of a single ethnic class.[67] Whether or not this technology works well—the Chinese government has not rushed to say—it may well be that technological change, along with improvements in the acquisition and cleaning of data, will make such instruments meaningfully effective within the next couple of decades. One of the predictions to emerge from our analysis later in the paper is that even if the full effects of machine learning on political power have not materialized in consolidated democracies yet, it may well only be a matter of time before uses now associated with authoritarian regimes turn up rather closer to home.

Most of the privacy-relevant uses of machine learning we have canvassed here concern the extraction of private information from large pools of data. It is worth noting the possibility of another use that does not impinge directly on privacy values, but that does at least touch on a related normative value—i.e., the individualized prediction of criminal behavior.

---

31 HARV. J.L. & TECH. 1, 10–11 (2017). But notice that where the state is concerned, it will be the state's decision whether or not to do so.

65. Paul Mozur, *Inside China's Dystopian Dreams: A.I., Shame, and Lots of Cameras*, N.Y. TIMES (July 8, 2018), https://www.nytimes.com/2018/07/08/business/china-surveillance-technology.html [https://perma.cc/3TNM-E4JZ].

66. Paul Mozur, *Looking Through the Eyes of China's Surveillance State*, N.Y. TIMES (July 16, 2018), https://www.nytimes.com/2018/07/16/technology/china-surveillance-state.html [https://perma.cc/7CBZ-6UJP].

67. Paul Mozur, *One Month, 500,000 Face Scans: How China Is Using A.I. to Profile a Minority*, N.Y. TIMES (April 14, 2019), https://www.nytimes.com/2019/04/14/technology/china-surveillance-artificial-intelligence-racial-profiling.html [https://perma.cc/CT8S-KDQM].

To illustrate this point, imagine that the government employs a machine learning tool to analyze historical training data as a means of determining how money launderers can be identified. The machine learning tool predicts that a person who has visited a casino in the last ninety days is more likely than not to be engaging in money laundering. The government in response enacts regulation requiring those who visit casinos to report this fact. The resulting disclosures are then used to direct investigative resources related to fraud. To be sure, this simple hypothetical is vulnerable to the objection that criminals would quickly adapt; imagine that fraudsters would learn to wait ninety-two days before gambling with their projects or else might migrate to unregistered online sites. But it still seems likely that regulated actors' behavior will not be perfectly elastic to the incentives created by the law, whether as a result of ignorance, inattention, or irrationality.

The same exercise, moreover, can be pursued with criminal actions that ought to be relatively inelastic, such as ideologically motivated violence[68] or child sexual abuse.[69] This species of 'individualized crime prediction' does not directly raise an informational privacy issue. Depending on how it is implemented, however, it might conceivably impose harms associated with imposition of shame or loss of dignity (e.g., requiring people to reveal a shameful aspect of their character, such as a gambling habit), or induce people to forego activities they would otherwise have pursued.[70] As such, it would mark a new vector of state control over individual behavior. We think that such examples presently lie on the periphery of the privacy-machine learning interaction. But they are hardly trivial as a practical matter or implausible in the near future.

In brief, then, the deployment of machine learning technologies at scale in the last decade has already had, and will likely increasingly have, an impact on several elements of privacy. Given the state's ready access to growing computing capacity and at least the potential to gather enormous data—whether initially obtained by private actors or directly through state surveillance techniques—

68. Existing models of the individual turn to terrorism, however, are deeply flawed. Aziz Z. Huq, *Modeling Terrorist Radicalization*, 2 DUKE F. FOR L. & SOC. CHANGE 39 (2010).

69. For a skeptical account of machine learning-based predictions in one experimental context, see Philip Gillingham, *Predictive Risk Modelling to Prevent Child Maltreatment and Other Adverse Outcomes for Service Users: Inside the 'Black Box' of Machine Learning*, 46 BRIT. J. SOC. WORK 1044, 1044–58 (2015) (analyzing New Zealand's pilot program).

70. David Sklansky, *Too Much Information: How Not to Think About Privacy*, 102 CAL. L. REV. 1069, 1094–95, 1106 (2014).

government officials can more cheaply and easily learn more about who is doing what, with whom, and with what apparent intentions. Where the state is concerned, less material or digital information will be required to make an increasing number of inferences about a person, or alternatively to impinge on a private domain. The net result will be a widening of the power gap between the state and its individual subjects.

C. Technological Protections for Privacy

Yet the tango of privacy and technology leads in more than one direction. At the same time that we underscore the privacy impacts associated with the state's use of machine learning, it is also important to see that the same (or similar) technologies can be designed to provide a measure of protection from the intrusions on privacy enumerated above. Two examples warrant particular attention here.

First, a method has been designed for preventing the deanonymization of datasets such that any query run on the dataset will produce the same result regardless of a specific subject's inclusion or exclusion. This technique, which is known as "differential privacy," provides at least one technical constraint on the deanonymization of at least some large data sets.[71] Differential privacy works by "deliberately add[ing] noise to computations, in a way that promises that any one person's data cannot be reverse engineered from the results."[72] It is necessarily "built and reasoned about on a case-by-case basis,"[73] and cannot be used in all machine learning contexts. For instance, differential privacy does not provide a shield against the facial recognition technologies we have already described.

---

71. Cynthia Dwork, *A Firm Foundation for Private Data Analysis*, COMM. ASS'N FOR COMPUTING MACHINERY, Jan. 2011, at 86, 91 (defining differential privacy).

72. MICHAEL KEARNS & AARON ROTH, THE ETHICAL ALGORITHM: THE SCIENCE OF SOCIALLY AWARE ALGORITHM DESIGN 37 (2019).

73. Arvind Narayanan & Vitaly Shmatikov, *Privacy and Security Myths and Fallacies of "Personally Identifiable Information*," COMM. ASS'N FOR COMPUTING MACHINERY, June 2010, at 24, 26, http://www.cs.utexas.edu/~shmat/shmat_cacm10.pdf [https://perma.cc/6HW4-TCYN]. Differential privacy is unavailable, for example, if the learning algorithm draws data from a continuous distribution. Kamalika Chaudhuri & Daniel Hsu, *Sample Complexity Bounds for Differentially Private Learning*, 19 JMLR: WORKSHOP & CONF. PROC. 155, 155–56 (2011). Another critique of differential privacy focuses on the difficulty of knowing when and where it will be needed. Kate Crawford & Jason Schultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, 55 B.C. L. REV. 93, 99 (2014).

At the same time, in its sphere of application, it can be quite powerful. Hence, a 2012 study suggested that Facebook's publicly released ad-related data has been subject to a number of modifications that enable a measure of effectual differential privacy.[74] Both Apple and Google have since then employed differential privacy for iPhone and browser metadata respectively.[75] The current consensus view among experts of differential privacy thus appears to accept its utility in respect to some kinds of data and under some circumstances, while resisting the idea that it is some kind of global privacy solution.

Second, innovations in the healthcare domain are instructive. Concerns about patient privacy have pushed some research institutions to develop "synthetic" datasets for analysis, rather than relying on real datasets that are amenable to reidentification.[76] In this method, existing data is used to construct a simulated dataset that has the same properties. The method is not absolute proof against reidentification. But a recent study concluded that the trade-off achieved through synthetic datasets between "the possibility of *measurably* small privacy leakage in exchange for perhaps mathematically provable protection against reidentification," tended to increase privacy.[77] Like differential privacy, therefore, synthetic data works in only certain domains; even then, it does not work perfectly. It is a 'leaky' solution that improves but does not wholly mitigate the privacy dilemma (when it is applicable). At the same time, though, just as we should be alert to the possibility that intrusive tools will increase in efficacy over time, so too should we be aware that countermeasures such as differential privacy or synthetic privacy will also improve over time.

At a very minimum, therefore, machine learning technology need not always and necessarily be viewed as privacy's nemesis. The existence of such counter-measures again suggests that how a technology such as machine learning impacts privacy depends on the circumstances of its adoption and the technical choices embedded

74. Andrew Chin & Anne Klinefelter, *Differential Privacy as a Response to the Reidentification Threat: The Facebook Advertiser Case Study*, 90 N.C. L. REV. 1417, 1455 (2012).

75. KEARNS & ROTH, *supra* note 72, at 47.

76. *See, e.g.*, Neha Patki et al., *The Synthetic Data Vault*, INT'L CONF. ON DATA SCI. & ADVANCE ANALYTICS, Oct. 2016, https://dai.lids.mit.edu/wp-content/uploads/2018/03/SDV.pdf [https://perma.cc/57NC-GY5D] (demonstrating a technique—the synthetic data vault—used to create synthetic data from five publicly available datasets).

77. Steven M. Bellovin et. al., *Privacy and Synthetic Datasets*, 22 STAN. TECH. L. REV. 1, 50 (2019).

in its code. Differential privacy and a reliance on synthetic data are not discrete measures that individual users can deploy.[78] Rather, they are measures that are adopted, if at all, at an institutional level as part of the overall strategy of integrating machine learning into the performance of a policy function. Their availability will depend on the political economy of the institutions doing the adoption. It is that topic to which we now turn.

II.
A POLITICAL ECONOMY OF MACHINE LEARNING, PRIVACY, AND THE STATE

A. Surveillance in a Two-Level Domestic/International Game

Governments make decisions affecting people and organizations even as agencies and policymakers are also affected by their context. Hence, we begin from the simple premise that use of computational tools by government is affected by the social and institutional landscape––what problems policymakers and the public are trying to solve and at what cost, with what tolerance for risk, and subject to what contingencies. Artificial intelligence researchers refer to this in terms of "affordances."[79] We provide in this part a general account of the way in which exogenous social and political forces, both domestic and transnational, shape the relevant affordances of machine learning. In so doing, we take the methodological step of presupposing that a technology such as machine learning is not somehow 'self-applying.' It has no natural or inevitable patterning of uses in the world. Rather, its adoption and dissemination are functions of conscious choices or, at worst, negligent drifts in institutional formation resulting from inattention and an absence of oversight.

To understand the forces that shape machine learning's privacy-relevant adoption, we adopt (and also modify) the influential two-level framework famously developed by Robert Putnam in the international affairs domain to model the production of international agreements.

---

78. Pursued at the individual level, privacy is a "luxury good" that requires time, money, and technological expertise to implement. Julia Angwin, *Has Privacy Become A Luxury Good?*, N.Y. TIMES (Mar. 3, 2014), https://www.nytimes.com/2014/03/04/opinion/has-privacy-become-a-luxury-good.html [https://perma.cc/AZV3-VX7Z].

79. Thomas E. Horton et al., *Affordances for Robots: A Brief Survey,* 3 AVANT 70, 73 (2012) (discussing the use of the theory of affordances in the field of artificial technology in order to "develop better agents").

In Putnam's rightly influential account, the negotiation of such agreements by chief executives occurs at two levels simultaneously—at the level of international diplomacy and also at the level of domestic politics. Each leader sits at "the international table [with] his foreign counterparts," while at "the domestic table behind him sit party and parliamentary figures, spokespersons for domestic agencies, representatives of key interest groups, and the leader's own political advisors."[80] For an agreement to be secured at the international level, the chief executive must also satisfy the demands of those at the domestic table. Putnam's work suggested that a domestic constraint can either help parties define the contours of a potential agreement at the international level because it limits the chief executive's ability to make concessions during negotiations, or it may doom the agreement because it eliminates wholly the existence of a "win set," i.e., the domain of outcomes acceptable to the relevant domestic interest groups.[81]

The core insight we take from Putnam's work is the possibility of interaction between domestic and international levels of policymaking. Our analysis, though, does not focus on a negotiated output at the international level, nor upon the dynamics of negotiation per se. Rather, we focus on decisions about the use of privacy-salient machine learning tools as a surveillance technology at the domestic level. But a basic intuition of Putnam's two-level theory can be applied, *mutatis mutanda*, here as well. That is, the circumstances and forms of domestic adoption of the technology will be a function not only of a domestic 'game,' but also of an international 'game.' It is this basic intuition that we seek to put into action here.

Moving beyond Putnam's original model, we think that international dynamics may often facilitate policy change at the domestic level. Alternatively, the international game may hinder or even preclude the possibility of domestic policy stability. In either case, domestic policy is a function of a complex interaction between domestic and international dynamics, which simultaneously impinge on a state's policy choices.[82]

To be clear, we think this dynamic is not unique to machine learning. It occurs with many other technologies. For instance, the

80. Putnam, *supra* note 12, at 434.

81. *Id.* at 433–51; *accord* Keisuke Iida, *When and How Do Domestic Constraints Matter?*, 37 J. CONFLICT RESOL. 403, 403–05 (1993).

82. Our approach is consistent with, although different in emphasis from, the "New Interdependence Approach," which emphasizes instead the ways in which "globalization opens up political channels for other actors beside the state to engage in international politics." FARRELL & NEWMAN, *supra* note 13, at 26.

global diffusion of critical internet resources, such as the domain-name system, means that when domestic interest groups lobby to secure online protection for their intellectual property, the resulting legislative efforts necessarily interact with global internet governance frames.[83] We think that each technology will generate its own distinct game-form. The manner in which domestic-international dynamics shape key internet-design decisions, that is, will almost certainly diverge from the way in which they influence the diffusion of CRISPR-Cas9.

Our aim here is not to offer a precise prediction of how the two-level game will play out in respect to machine learning. Rather, it is to demonstrate that there is a two-level game in the first place. As a result, any analysis of or prescription for the machine learning state and its surveillance capabilities must account for the two-level nature of its dynamics, and explain why it will prove stable under pressures from both levels. Given the preliminary and theoretical nature of our analysis, we sketch in general terms the way the two-level dynamic will likely unfold, rather than offering a misleadingly precise point-estimate prediction.

To that end, the following analysis focuses on demonstrating that a two-level dynamic exists specifically with respect to the adoption of machine learning tools. At the domestic level, the state decides on whether to adopt such tools in the context of their rapid private adoption, along with the rapid and extensive creation of deep pools of data necessary to exploit them. In the international sphere, democracies such as the United States must account for the deployments of machine learning tools for both internal and external purposes by other powers. In this domain, we think it is especially useful to focus on China as a consequential actor.

B. The Domestic Level

We begin by thinking about the ecology of interest groups that will influence the government's decisions to adopt, or to limit, machine learning tools with privacy-relevant effects. There is a robust coalition of interest groups who depend upon the information made available by machine learning tools, even where it can yield disclosures of private information or embarrassing slights to dignity.

In a recent scholarly article and popular book, Shoshana Zuboff has dubbed this formation of companies, academic institu-

83. Laura DeNardis, The Global War for Internet Governance 2–6, 187 (2014).

tions, and investors a distinctive social formation called "surveillance capitalism" that comprises a "new form of information capitalism [that] aims to predict and modify human behavior as a means to produce revenue and market control."[84] The largest actors in this ecosystem are companies such as Google, Facebook, and Amazon.[85] According to Zuboff, all these entities follow the same business model: acquire personal data inadvertently produced through interaction with digital goods and services; develop predictive models from these large pools of interaction-derived data to sell to advertisers; and then launch strategies for "behavioral modification" in order to make predictions even more attractive to advertisers (and therefore more lucrative).[86] In addition to the entities Zuboff stresses, there is a class of data brokers, or "companies that specialize in the collection and exchange of personal information" such as Experian, Axciom, Rapleaf and Datalogix, that comprise a roughly $200 billion industry.[87] The information held by those entities on specific individuals can be extensive, including all addresses and phone numbers used during adult lives, all relatives, every email contact and web search made, an account of shopping habits, and internal communications with employers.[88]

While we have elsewhere raised concerns about elements of Zuboff's account,[89] we think the term "surveillance capitalists" is useful here to characterize those private entities that are likely to resist most regulation of the private sector. The available evidence suggests that they are likely to be successful in that regard. In her account of Google and Facebook, Zuboff argues that both companies' chief executives have repeatedly shown "contempt for law and regulation" because their financial success depends on them "ignoring, evading, contesting, reshaping, or otherwise vanquishing laws that threaten [their supply of behavioral data]."[90]

84. Shoshana Zuboff, *Big Other: Surveillance Capitalism and the Prospects of an Information Civilization*, 20 J. INFO. TECH. 75, 75 (2015).

85. *Cf.* SCOTT GALLOWAY, THE FOUR: THE HIDDEN DNA OF AMAZON, APPLE, FACEBOOK, AND GOOGLE 1–12 (2017) (detailing the positions of these players, inter alia, in the surveillance economy).

86. SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER 8–12, 138–56, 512–16 (2018) [hereinafter ZUBOFF, AGE OF SURVEILLANCE CAPITALISM] (summarizing argument made in book as a whole); *see also* SCHNEIER, *supra* note 45, at 55 (noting the centrality of advertising to surveillance capitalism).

87. Matthew Crain, *The Limits of Transparency: Data Brokers and Commodification*, 20 NEW MEDIA & SOC'Y. 88, 90 (2018).

88. ANGWIN, *supra* note 60, at 94–95.

89. Cuéllar & Huq, *supra* note 10, at 1309–25.

90. ZUBOFF, AGE OF SURVEILLANCE CAPITALISM, *supra* note 86, at 105.

Even if one does not completely accept Zuboff's depiction of Google and Facebook's attitude to the law,[91] it is difficult to characterize Google's expenditure of $21 million or Facebook's expenditure of $13 million on federal lobbying in 2018 as an effort to go quietly with the regulatory flow.[92] These actors, therefore, are a well-organized and powerful interest group. And where their lobbying efforts fail and regulation ensues, those companies also vigorously assert the First Amendment as a shield against legal constraint.[93] Adding to their power is the fact that government and surveillance economy firms are entangled in mutually beneficial dependencies. The latter are in effect national champions upon whom the country's economic success rides. At the same time, they are also vulnerable to regulatory hold-ups by the government, which can curtail or even stop their operations. These dynamics mean that private-sector development of privacy-relevant forms of machine learning are likely to flourish relatively untended by regulation.

The power of surveillance capitalists can also be attributed to the fact that to date, legal arrangements rooted in familiar doctrinal domains such as contract or consumer protection do not readily seem for many observers to serve as an effective check on this surveillance economy.

The leading regulatory strategy with respect to privacy is as familiar as it is an effective invitation to roll one's eyes: it entails requiring individualized consent before the acquisition of information. It has not proved a success. Privacy scholars have argued that disclosures are not only "vague and general," but also "tend to conflate important distinctions between remembering users' preferences, creating predictive profiles that may also include other, inferred data, using those preferences for targeted marketing, and tracking users across multiple websites, devices, and locations."[94]

---

91. By contrast, the record of large companies faced with government demands for data is decidedly mixed. *See Cooperation or Resistance?: The Role of Tech Companies in Government Surveillance*, 131 HARV. L. REV. 1722, 1725 (2018). This complicates Zuboff's view of these companies as scofflaws across the board.

92. Ben Brody, *Google, Facebook Set Lobbying Records as Tech Scrutiny Intensifies*, BLOOMBERG (Jan. 22, 2019), https://www.bloomberg.com/news/articles/2019-01-22/google-set-2018-lobbying-record-as-washington-techlash-expands [https://perma.cc/WBP5-KRTS].

93. ZUBOFF, AGE OF SURVEILLANCE CAPITALISM, *supra* note 86, at 109–10.

94. Julie E. Cohen, *Turning Privacy Inside Out*, 20 THEORETICAL INQUIRIES L. 1, 6 (2019).

A yet more profound challenge to consent-based privacy regimes is that consumers seem to place different values on these goods depending on whether they have been asked to consider how much money they would accept to disclose otherwise private information or how much they would pay to protect otherwise public information.[95] That is, the baseline distribution of information seems to shape judgments about privacy's value. Consumers also appear to have time-inconsistent preferences, in the sense that they are (perhaps irrationally) willing to accept low rewards now in exchange for the "possibility [of a] permanent negative annuity in the future."[96]

A final factor is the relative success of surveillance capitalists in obtaining a favorable regulatory environment. In contrast to the narrow applicability of consumer privacy protections, those companies' statutory immunities have been construed broadly. For instance, "internet intermediaries" benefit under the Communications Decency Act from wide protection from liability based on the speech they facilitate.[97] In short, whereas privacy protections tend to fail, protections for entities that benefit from harvesting private data tend to thrive.

The relative absence of regulatory constraint on surveillance capitalist firms redounds to the benefit of the government in the form of an expanded capacity to acquire private information through those private intermediaries. As currently practiced in the United States and many other countries, surveillance capitalism presupposes that large segments of the public find it convenient, or even fun, to use third-party services that elicit their information.[98] At least until recently, the resulting shared pools of data categorically fell outside the scope of federal constitutional protection under the Fourth Amendment as a consequence of the third-party doctrine.

Accordingly, the more successful players in the surveillance economy are in acquiring data, the more data its law-enforcement elements can acquire without the cost of even a warrant. The recent

95. Alessandro Acquisti et al., *What is Privacy Worth?*, 42 J. LEG. STUD. 249, 249–51 (2013).

96. Alessandro Acquisti et al., *The Economics of Privacy*, 54 J. ECON. LITERATURE 442, 442–43 (2016). For similar results, see Kirsten Martin, *Privacy Notices as Tabula Rasa: An Empirical Investigation into How Complying with a Privacy Notice Is Related to Meeting Privacy Expectations Online*, 34 J. PUB. POL'Y & MKTG. 210 (2015).

97. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1604 (2018) (discussing the judicial construction of § 230 of the Communications Decency Act).

98. SCHNEIER, *supra* note 45, at 58.

Supreme Court decision in *Carpenter v. United States*, holding that acquisition of cell-site locational data from a suspect's telecommunications provider counted as a "search" under the Fourth Amendment,[99] may signal a change in that doctrinal rule. How great a shift, though, remains to be determined through future jurisprudence.[100] And it is still possible that an opposite evolutionary dynamic could emerge. That is, the federal courts might find that popular habituation to the pervasive sharing of data has the effect of changing what state activities impinge upon a reasonable expectation of privacy for the purposes of the Fourth Amendment. Habit might rub away at the reach of the Fourth Amendment, or at least work as a frictional constraint on its expansion.

Under the present doctrinal framework, the security elements of the government have strong incentives not just to allow surveillance capitalism to flourish, but also to reap benefits from its epistemic fruit. Data are not just "an essential basis for economic exchange" but also "a potent source of control for government."[101] As the legal scholar Jon Michaels has documented, "informal intelligence agreements with corporations" are already favored because they allow agencies to "direct broad swaths of intelligence policy without having to seek ex ante authorization or submit to meaningful oversight."[102] The result, he notes, is that "the intelligence agencies [already] depend greatly on private actors for information gathering."[103] Machine learning's advent exacerbates and accelerates such dependency.[104]

---

99. 138 S. Ct. 2206, 2214–15 (2018) (considering whether acquisition of cell-site locational data from a third-party data provider constitutes a "search").

100. One constraint on the development of such principles is the *Leon* rule, pursuant to which certain good faith efforts of constitutional law will not trigger the exclusionary rule. United States v. Leon, 468 U.S. 897, 923–24 (1984). The effect of *Leon* and its progeny is to eliminate Fourth Amendment rightsholders' incentive to pursue their constitutional interests in the class of cases in which the law is least clear and most in need of clarification. *See* Aziz Z. Huq & Genevieve Lakier, *Apparent Fault*, 131 HARV. L. REV. 1525, 1550–51 (2018) (describing the effect of *Leon* on doctrinal development); *see also* Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on* Camreta v. Greene *and* Davis v. United States, 2011 CATO SUP. CT. REV. 237, 237–39 (2011) (discussing convergence in these two lines of Fourth Amendment remedies). Another question is whether privacy will override the property rights that surveillance capitalists and others assert in aggregated data and metadata.

101. FARRELL & NEWMAN, *supra* note 13, at 18.

102. Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CAL. L. REV. 901, 904 (2008).

103. *Id.* at 907.

104. As we write this, the COVID-19 pandemic is accelerating with frightening rapidity. We, no more than anyone else, know what social and policy changes it will

Could pressure emerge to counterbalance these forces? Could, for example, inadvertent leaks of private data alter public perceptions or privacy risks? To date, breaches of data entrusted to by either the government or private entities have not proven focal points for public ire sufficient to have a material, longer-term impact on politics. But this could change. There may come a point when public frustration with the absence of data integrity, or the monetization of data by large technology companies at a time of income inequality, will create an opening for political entrepreneurs. A sufficiently large data breach might create a tipping point in privacy expectations and behavior.[105]

Even without an exogenous shock, new norms of commercial actors competing for market share might generate new expectations of privacy that courts may be willing to recognize as 'reasonable.' A pro-privacy coalition might be the basis of a new political alignment, or at least a novel coalition. Or firms might respond to the existence of overlapping national regulatory regimes by seeking a more privacy-friendly compromise than the one struck domestically.[106] We should also not reject out of hand the possibility that courts might play a role in creating new focal points for privacy-oriented concern, or as providing a spur to legislative action at either the state or the federal level. Should such a realignment of preferences emerge, it would create pressure not just on surveillance capitalists but also upon government in respect to deployments of machine learning that impinge on privacy (as well as uses, such as the prediction of individual crime that only peripherally touch on privacy). It is likely that the leaders of such a broad-based public movement would have to overcome enormous barriers to engage in effective collective action. Consider, for instance, the difficulty (or, if you prefer, "transaction costs") of organizing users of a market-dominant search engine to go on "strike" for a few days in order to force the kind of bargain that would yield a data dividend or higher-quality services for users.[107]

These difficulties are clearly daunting. But this is no reason to ignore the so-called 'privacy paradox' arising from consumers' in-

---

bring. But changes there are likely to be, including to attitudes toward privacy and surveillance.

105. For a fascinating fictional account, see BRIAN K. VAUGHN & MARCOS MARTIN, THE PRIVATE EYE (2015).

106. FARRELL & NEWMAN, *supra* note 13, at 26–28.

107. *Cf.* JARON LANIER, TEN ARGUMENTS FOR DELETING YOUR SOCIAL MEDIA ACCOUNTS RIGHT NOW (2018) (developing a set of ten arguments in favor of a permanent social-media strike).

consistent preferences.[108] Perhaps slowly, public perceptions may change about the relationship between individual economic well-being and the generation of data. A harbinger of such change is recent talk of a "data dividend" in the political rhetoric of states such as California.[109] Skepticism about the societal benefits associated with the practices of large technology companies, moreover, can cut across the political spectrum.[110] And at least in countries like the United States with relatively independent judiciaries, state and federal courts may yet play a role in that process as they help the public coalesce around particular ideas of what constitutes a breach of trust from public officials.[111] Courts can play this function, for example, if they more clearly articulate the scope of privacy rights in doctrinal contexts ranging from federal constitutional disputes,[112] to state constitutional interpretation,[113] to tort suits assessing the nature of the harm suffered from data breaches.[114]

Against these prospects stand large "surveillance capitalist" technology companies, and to some extent even government agencies. All reap concentrated benefits from the status quo, while the costs to the public are generally widely dispersed.[115] Vast segments of the public have accepted entrenched business models built on the putatively free provision of services in exchange for data. These arrangements have a path-dependent quality. This is in part because consumers unhappy with these arrangements face collective action problems similar to those citizens face in coordinating behavior to pressure their governments. Political polarization and partisan distrust, at least in the United States, both lowers the

108. *See*, *e.g.*, M. Ryan Calo, *The Drone as Privacy Catalyst*, 64 STAN. L. REV. ONLINE 29 (2011) (discussing the potential effect of the commercial use of drones and how this use may advance privacy protections).

109. *See* Kartikay Mehrotra, *California Governor Proposes Digital Dividend Aimed at Big Tech*, BLOOMBERG (Feb. 12, 2019), https://www.bloomberg.com/news/articles/2019-02-12/california-governor-proposes-digital-dividend-targeting-big-tech [https://perma.cc/EZ2F-ZNSE].

110. *See The New Center Takes on Big Tech Companies*, PR NEWSWIRE (Nov. 26, 2018, 1:30 PM), https://www.prnewswire.com/news-releases/new-center-takes-on-big-tech-companies-300754385.html [https://perma.cc/C5W9-6K7L].

111. Mariano-Florentino Cuéllar, *From Doctrine to Safeguards in American Constitutional Democracy*, 65 UCLA L. REV. 1398, 1409 (2018).

112. *See, e.g.*, United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010), *aff'd sub nom.* United States v. Jones, 565 U.S. 400 (2012).

113. People v. Buza, 413 P.3d 1132, 1163–78 (Cal. 2018) (Cuéllar, J., dissenting).

114. *See generally* Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007 (2010).

115. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1971).

probability of legislative deals that might have otherwise seemed particularly feasible because privacy issues can scramble the familiar left-right political divide. All of which probably leaves governments in advanced capitalist economies with considerable ability to rely on machine learning to monitor the public, either directly or through large technology company intermediaries.[116]

This particular alchemy of technology, economics, and politics creates a partial symbiosis between elements of business and government. In the absence of discontinuities in the nature of policy entrepreneurship or social movements, the domestic political environment is one in which private entities (Zuboff's "surveillance capitalists") have the ability to harvest and monetize large volumes of personal data, and in which government benefits from their activities (notwithstanding occasional gestures of concern about individual privacy). Government and surveillance capitalists, moreover, are in a sufficiently entangled relationship of mutual dependency that the former is likely to have either direct or indirect access to machine learning tools or their fruit. We think that these forces make it more difficult for machine learning instruments, whether in private or public hands, to be constrained by law. While a countervailing public movement can be imagined, it would face daunting barriers to organization and effectual intervention.

Together, these dynamics create conditions in which both powerful interest groups and the government have strong, convergent interests in maintaining privacy-salient uses of machine learning relatively lightly regulated. Countervailing domestic forces will no doubt continue recurring to litigation, advancing doctrinal arguments to help police distinctions between private sector and government access to data, for example, or to raise constitutional or statutory challenges to the use of machine learning to automate governmental decisions using enormous data. Yet given the extent of convergent interests in amassing information and consumers' apparent acceptance of surveillance-driven business models in exchange for convenience, domestic opposition to expanded

116. There is nothing inevitable about this in principle; Europe has taken a different path. FARRELL & NEWMAN, *supra* note 13, at 46–53. But cultural and institutional differences no doubt exert a powerful influence on the likelihood of different legal, policy, and political changes in the United States relative to other countries. *See, e.g.*, Mariano-Florentino Cuéllar, *Administrative War*, 82 GEO. WASH. L. REV. 1343 (2014) (discussing institutional and ideological constraints shaping the American approach to administering war mobilization and adapting public law on the eve of, and during, World War II).

surveillance will likely remain fragile—though perhaps not necessarily doomed to political failure.

C. The International Level

Political failure is what former House Speaker Tip O'Neill steadfastly avoided. That "all politics is local" is perhaps the phrase most associated with his storied career.[117] Although domestic pressures and concentrated economic consequences unquestionably matter, the only way O'Neill's statement can be right––at least in the realm of privacy and machine learning––is if we understand "local" to stretch to encompass even the geopolitical realities constraining even the most powerful states. Just as countries navigate both domestic and international pressures when setting trade policy, deciding on the size and allocation of military budgets, and managing migration, so it is the same (we contend) with privacy. Which is why the second level in which a national government's decision on whether or not to adopt privacy-relevant machine learning tools must be understood as international and geopolitical in scope. The national government's decisions on such technology will necessarily be made in light of the parallel decisions to adopt or not adopt such tools by the nation's geostrategic opponents. Domestic nonstate actors will also use the international sphere as a channel for lobbying and advocacy on behalf of desired policy choices. This international level thus interacts with, and complicates, the domestic dynamics described above in complex ways. We set forth the basic dynamics, and then turn to the likely interactions.

Inter-state competition over machine learning, as well as the larger class of artificial intelligence-related technologies, is multifaceted and complex. We have already mentioned China's use of machine learning tools, and China looms large as the other potential "AI superpower."[118] But it is not alone. Russia, South Korea, and Israel have also acquired the skilled personnel, large reservoirs of data, and computational resources to compete globally, with nations like India lagging behind.[119] As President Vladimir Putin pro-

117. *See* Charles P. Pierce, *Tip O'Neill's Idea that All Government is Local is How Government Dies*, ESQUIRE (Jul. 17, 2015), https://www.esquire.com/news-politics/politics/news/a36522/how-all-government-is-local-and-thats-how-it-dies/ [https://perma.cc/XKE6-56EG].

118. For a prediction of Chinese and American duopoly, see KAI-FU LEE, AI SUPERPOWERS: CHINA, SILICON VALLEY, AND THE NEW WORLD ORDER x (2018).

119. Amandeep Singh Gill, *Artificial Intelligence and International Security: The Long View*, 33 ETHICS & INT'L AFFS. 169, 171, 178–79 (2019). For illuminating analy-

nounced bombastically, "[a]rtificial intelligence is the future, not only for Russia, but for all humankind, [and w]hoever becomes the leader in this sphere will become the ruler of the world."[120] These efforts to acquire leadership in the artificial intelligence space are occurring contemporaneously with national efforts in countries where the government is attempting to exercise more extensive control over internet-based communications.[121] The two efforts are not unconnected. For instance, China has complemented its so-called "Great Firewall," with what the Canadian research group Citizen Lab called a "Great Cannon," an offensive, internet-based system that "hijacks traffic to (or presumably from) individual IP addresses" and "can arbitrarily replace unencrypted content," so as to "manipulate[ ] the traffic of 'bystander' systems outside China, silently programming their browsers to create a massive [distributed denial of service] attack."[122] The Great Cannon is derived from the same code used to run the Great Firewall, and relies on the same pool of computational tools as machine learning.

Machine learning is a geostrategic asset because it can be used to amplify existing military capacities, sharpen cyberwarfare ability, and generate new security-related instruments. For instance, machine learning can be used to make targeted email attacks on adversaries' security services more efficient; to mimic voices or create audio files that facilitate unauthorized access or spread disinformation; or even to target other automated systems (think of a hijacking by a foreign adversary of self-driving cars).[123] Moreover,

---

ses of the global situation, see Tom Simonite, *For Superpowers, Artificial Intelligence Fuels New Global Arms Race*, WIRED (Sept. 8, 2017), https://www.wired.com/story/for-superpowers-artificial-intelligence-fuels-new-global-arms-race/ [https://perma.cc/3MHZ-L5AW]; Julian E. Barnes & Josh Chin, *The New Arms Race in AI*, WALL ST. J. (Mar. 2, 2018), https://www.wsj.com/articles/the-new-arms-race-in-ai-1520009261 [https://perma.cc/G3LX-ULGC].

120. James Vincent, *Putin Says the Nation that Leads in AI 'Will Be the Ruler of the World,'* VERGE (Sept. 4, 2017), https://www.theverge.com/2017/2019/2014/16251226/russia-ai- putin-rule-the-world [https://perma.cc/HZW2-MBRC].

121. *See, e.g.*, Vindu Goel, *India Proposes Chinese-Style Internet Censorship Rules*, N.Y. TIMES (Feb. 14, 2019), https://www.nytimes.com/2019/02/14/technology/india-internet-censorship.html [https://perma.cc/Q6AF-VG5X]; Rebecca MacKinnon, *Liberation Technology: China's "Networked Authoritarianism,"* 22 J. DEM. 32, 34 (2011).

122. Bill Marczak et al., *China's Great Cannon* 1–2, THE CITIZEN LAB (Apr. 10, 2015), https://citizenlab.ca/2015/04/chinas-great-cannon/ [https://perma.cc/7XA3-TSVB].

123. Miles Brundage et al., *The Malicious Use of Artificial Intelligence: Forecasting, Prevention, and Mitigation* 20–21, ARXIV (Feb. 2018), https://arxiv.org/ftp/arxiv/papers/1802/1802.07228.pdf [https://perma.cc/E6AA-HE7Y].

"the properties of efficiency, scalability, and exceeding human capabilities" means that highly effective cyberattacks will become "more typical."[124] As a result of these military affordances, an "arms race" in the "vigorous prevention and mitigation measures" seems likely (if not extant).[125] Perhaps in recognition of this international dynamic, the White House recently issued an executive order on "maintaining American leadership" on artificial intelligence.[126] The fiscal implications of perceived international competition over machine learning for surveillance capitalists such as Google and Amazon, we think, are fairly straightforward.[127]

Perhaps the most interesting geostrategic competitor to the United States will be China, where development of national AI resources has been elevated to the level of a "megaproject," and become the object of sustained multiyear investment and planning since 2017.[128] The existence of a Chinese "party-industrial" complex in which national champions like Baidu, Alibaba, and Tencent are seamlessly integrated into, and even lead, major initiatives on artificial intelligence. This means that dual-use technologies can be rapidly identified and implemented.[129] It likely also means that domestic security functions of artificial intelligence can be integrated frictionlessly into the manufactured fabric of goods and internet-based services. Perhaps the most interesting potential development is a convergence in artificial intelligence and quantum computing occurring at Tsinghua University's National Key Laboratory of Intelligent Technologies and Systems.[130] Were this convergence to be

124. *Id.* at 21.

125. *Id.* at 45; *accord* Michael Horowitz et al., *Strategic Competition in an Era of Artificial Intelligence*, CTR. FOR NEW AM. SEC. 10 (July 2018), https://www.cnas.org/publications/reports/strategic-competition-in-an-era-of-artificial-intelligence [https://perma.cc/2KCT-DE75].

126. EXEC. ORDER NO. 13859, 84 Fed. Reg. 3,976 (Feb. 11, 2019), https://www.whitehouse.gov/presidential-actions/executive-order-maintaining-american-leadership-artificial-intelligence/ [https://perma.cc/C826-PBYR]. The order itself exhorts agencies to "consider AI as an agency R&D priority" but does little that is concrete to achieve this. *Id.* § 4.

127. To be sure, those companies also have offsetting reasons to seek the mitigation of international conflict. It seems likely that such firms have an interest in maintaining strong global supply chains, access to global markets (including markets for data), and access to foreign talent through a relatively flexible immigration system. At a retail level, firms may thus take different policy postures.

128. Michael Horowitz et al., *supra* note 125, at 12–13 (describing the December 2017, Three-Year Action Plan to Promote the Development of New-Generation Artificial Intelligence Industry).

129. *Id.* at 13.

130. Elsa B. Kania & John K. Costello, *Quantum Hegemony? China's Ambitions and the Challenge to U.S. Innovation Leadership*, CTR. FOR NEW AM. SEC. 18 (2018),

fully realized, it could "accelerate the process of machine learning, for which computing capabilities remain a bottleneck at present."[131] It might, in other words, be a gamechanger at the geostrategic level.

D. Domestic-International Interactions Around Machine Learning

The international dynamics described here directly shape the domestic policy environment. On rough first approximation, our suggestion here is that their interaction makes the effective regulation of machine learning technologies less, rather than more likely, whether they are in private or public hands (a distinction that is likely, in any case, to become increasingly blurred over time).

Correspondingly, the international level of the privacy-machine learning interaction is likely to increase the rate of privacy violations. In all, the interaction of the international and the domestic hence quickens settlement on an equilibrium characterized by extensive private and public adoption of machine learning tools capable of invading privacy, with little by way of redress for those whose interests are sapped. This prediction, to be clear, applies to machine learning; it is not meant to generalize to other, unrelated technologies caught in a two-level domestic-international game.

There are several salient pathways through which this dynamic might well play out. First, and probably most importantly, the arms-race quality of international competition over the development of machine learning means that no participating nation can afford to slacken innovation and implementation for fear of losing a strategic advantage.[132] The brute force of international competition, that is, minimizes the space for domestic pro-privacy innovation, such as differential privacy or synthetic data sets, or relegates it to geostrategically peripheral actors. Where government regulation (whether of the government's own use of machine learning to invade privacy, or the parallel and entangled activities of private actors) can be opposed not only because it undercuts profits, but also because it impinges on national security, it is less likely to be enacted. Consistent with this dynamic, the jurisdiction with the most privacy-leaning regulatory framework—the European Union—is also a relatively minor player in the geostrategic sphere (at least in

---

https://www.cnas.org/publications/reports/quantum-hegemony [https://perma.cc/2J8Q-27FH].

131. *Id.*

132. *See* Nick Bostrom, *Strategic Implications of Openness in AI Development*, 8 GLOB. POL. 135, 139–40 (2017). Bostrom advocates a more open model of technological development. *Id.*

comparison to China and the United States).[133] Lacking as great a stake in that context, Europeans have a freer hand when it comes to the regulation of privacy-salient machine learning tools.

Second, the surveillance capitalists who comprise the most powerful domestic political lobby in the United States are also the target of foreign cyberattacks.[134] In responding to those hacks, surveillance capitalists have turned to the federal government for aid,[135] although often with disappointing results.[136] The threat of foreign cyberattack, which is perhaps most crisply exemplified in China's "Great Cannon," only deepens the relationship of mutual dependency between those companies and the government. At the same time, the federal government increasingly relies on those same companies for military applications (much to the chagrin of some of their employees)[137] and raw data.[138] Hence, both the defensive and offensive elements of geopolitical dynamics work to weave together the interests of the surveillance economy and the government.

Third, the pursuit of geostrategic interests requires that governments account for the possibility that both personnel and projects will migrate overseas in order to arbitrage differences in regulatory stringency. Imagine, for example, that the federal government imposed a moratorium on individualized predictive tech-

133. For a sobering analysis, see *What Would Happen if America Left Europe to Fend for Itself?*, ECONOMIST (Mar. 3, 2019), https://www.economist.com/special-report/2019/03/14/what-would-happen-if-america-left-europe-to-fend-for-itself [https://perma.cc/J4EJ-N7WE].

134. *See, e.g.*, Kim Zetter, *Google Hack Was Ultra-Sophisticated, New Details Show*, WIRED (Jan. 14, 2010), https://www.wired.com/2010/01/operation-aurora/ [https://perma.cc/SN6K-PMPT]. The 2018 hack of Facebook, however, has not been linked to a foreign nation. Mike Isaac & Sheila Frenkel, *Facebook Security Breach Exposes Data of 50 Million Users*, N.Y. TIMES (Sept. 28, 2018), https://www.nytimes.com/2018/09/28/technology/facebook-hack-data-breach.html [https://perma.cc/4YPL-4VQB].

135. Kim Zetter, *Google Asks NSA to Help Security Network*, WIRED (Feb. 4, 2010), https://www.wired.com/2010/02/google-seeks-nsa-help/ [https://perma.cc/T74X-3YQF].

136. Kristen E. Eichensehr, *Public-Private Cybersecurity*, 95 TEX. L. REV. 467, 494–99 (2017). Having documented the absence of effectual government aid, Eichensehr nevertheless reports that "the government has an incentive to cooperate, or at least maintain open lines of communication, [with surveillance capitalists.]" *Id.* at 502.

137. *Id.* at 500; *see also* Alexia Fernández Campbell, *How Tech Employees Are Pushing Silicon Valley to Put Ethics Before Profit*, VOX (Oct. 18, 2018), https://www.vox.com/technology/2018/10/18/17989482/google-amazon-employee-ethics-contracts [https://perma.cc/3TTT-9K5X].

138. FARRELL & NEWMAN, *supra* note 13, at 18.

nologies focused on the identification of future criminality. A computer scientist interested in that field has every incentive to migrate to a jurisdiction that does allow testing, and perhaps even implementation, of those technologies. As a result, the regulation of a particular form of privacy-limiting machine learning may well have the effect of facilitating a foreign adversary's development and deployment of that technology. To the extent that research into a given application is federally funded, moreover, even the withdrawal of such monies may well have the same effect. The basic dynamic at issue here arises in other scientific fields, where the practice of pursuing experiments prohibited in one jurisdiction by finding laxer testing grounds is called "ethics dumping."[139]

That these international pressures constantly intersect with the domestic (or, in O'Neill's terms "local") sphere is the essential backdrop for understanding how privacy and machine learning will affect the state. To a first approximation, these intersecting forces largely serve to exacerbate the tendency for governments to enable and encourage private action that undermines privacy (and that can be shared with government to allow for state intrusions on privacy), and to underinvest in technologies that might mitigate the negative privacy-related effects of such technologies. It is plausible to think that at least in the medium term, the domestic-international interaction in this field will lock in an equilibrium in which privacy is assigned low priority (again, in relation to private or public action alike), and privacy-reducing innovations are more rather than less likely.

CONCLUSION: IMPLICATIONS OF PRIVACY'S POLITICAL ECONOMY IN A MACHINE LEARNING AGE

We began by underscoring our debt to Stephen Schulhofer's close, clear-eyed read of institutional particularity. We have pursued in this essay a parallel project aimed at starting to map the political economy dynamics at work in relation to the development of machine learning tools with privacy implications. At a very general level, we have articulated a two-level (international and domestic) dynamic that presses toward acquisition and use. Based on this political economy, we suggest that there are few incentives *not* to collect data, and few incentives not to innovate in respect to the

139. *Recent Events Highlight an Unpleasant Scientific Practice: Ethics Dumping*, ECONOMIST (Feb. 2, 2019), https://www.economist.com/science-and-technology/2019/02/02/recent-events-highlight-an-unpleasant-scientific-practice-ethics-dumping [https://perma.cc/95U3-EZKY] (discussing the use of CRISPR-CAS9 to modify a human embryo as an example).

machine learning tools needful to its exploitation. In contrast, doctrinal innovation is likely to lag, not least thanks to the obstacles confronting any effort at statutory reform on the one hand, and the 'good faith' exception to the Fourth Amendment's immunity on the other hand. Technology may well present law with a *fait accompli*.

Our aim here is not to praise the resulting regulatory equilibrium, or to render its outputs as inevitable and therefore acceptable. Instead, our main effort here has been to understand and describe some of the domestic and geostrategic forces likely to shape the practices and policies affecting privacy in states where machine learning is deployed at scale in the public and private sectors. We think that the likely pressures for greater use of privacy-relevant machine learning in government enforcement and related contexts provide an opportunity––and for some members of the public, lawyers, judges, and policymakers, a need––to clarify the values that society is trading off when it endeavors to protect privacy.

Efforts to do so will no doubt engage familiar debates that have been raging for years. But we think it is clear that the terrain has been substantially changed by the emergence of new machine learning tools. Their advent comes at a moment in which social norms about privacy are changing, when a measure of political pressure on "surveillance capitalism" is crystallizing, and when decisions must be made on the future infrastructure for public and private surveillance (e.g., 5G-enabled IOS, the shift from IPv4 to IPv6, and so on, is expanding).[140] To the extent these dynamics produce unexpected openings for greater pro-privacy regulation, they raise questions of how such efforts would be enacted and what their substantive content would be.

As these questions merit further exploration, we simply flag here some preliminary responses to these puzzles.[141] As a threshold matter, it seems tolerably clear that Fourth Amendment doctrine, particularly as inflected by the third-party doctrine, provides only a limited vehicle for addressing the concerns raised by privacy-relevant machine learning tools. Since the latter emerge in both the private and the public sector, and since their epistemic gains can be

140. *See, e.g.,* Allan Holmes, *5G Cellphone Infrastructure is Coming: Who Decides Where It Goes?*, N.Y. TIMES (Mar. 2, 2018), https://www.nytimes.com/2018/03/02/technology/5g-cellular-service.html [https://perma.cc/AX8G-CAJE].

141. For a first cut at those questions, see Mariano-Florentino Cuéllar & Aziz Z. Huq, *Toward the Democratic Regulation of AI Systems: A Prolegomenon* (U. Chi. Pub. L. Working Paper No. 753, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3671011 [https://perma.cc/GD65-6B92].

easily triaged across the public-private divide, a doctrine that hinges on state action is a poor fit. One response may be to modify the doctrine to account for the blurring of public and private functions.[142] Another might be, as we suggested earlier, to expect development of legislative approaches accounting for some of these issues, particularly at the state level. Indeed, in June 2018 Governor Jerry Brown of California signed the California Consumer Privacy Act, which, beginning in 2020, will create a "right to opt out" of the sale of "personal information about the consumer to third parties."[143] State courts, which can elaborate their own constitutions' privacy protections, perhaps without regard to the state action requirement of the Fourteenth Amendment, are another pathway.[144] Yet another possibility could be grounded in (state or federal) administrative law, which might be used as a basis for regulations or internal operating procedures to vindicate privacy-related concerns. Such standards could make it easier to achieve a degree of convergence about the relevant norms among civil society leaders, responsible public officials, and members of the public concerned about privacy––convergence that could facilitate greater policing of transgressions when they occur.[145]

The full menu of conceivable (if difficult) regulatory pathways and the substance of desirable regulation remain to be fully explored. Our aim here has been more modest: to lay the foundation for that exercise by elucidating the two-level political economy that will continue shaping how privacy-related developments will play out in countries with organizations capable of deploying machine learning at scale. There is little prospect for any legal adaptation to technological change in this area that could reasonably be described as equitable, or even decent, without an understanding of the pressures affecting how organizations will use machine learning

142. One approach would be to advance the "instrumental" approach suggested by William Stuntz, wherein "constitutional limits on law enforcement [are] aimed at minimizing the sum of the costs of crime and the costs of crime prevention." William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2144–45 (2002). Machine learning changes the cost of producing security given its privacy-related effects. Hence, it ought to prompt clarification or modification of the doctrine.

143. Assemb. B. 375, 2017-2018 Leg., Reg. Sess. (Cal. 2018). For an extended discussion, see Aziz Z. Huq, *A Right to a Machine Decision*, 106 VA. L. REV. 611 (2020).

144. *Cf.* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 177, 189 (2018) (exploring more generally the possibilities of state constitutionalism in relation to privacy protections).

145. Cuéllar, *supra* note 108, at 1411.

to learn about behavior––and what they will tend to with that knowledge.

THE PERILS OF "OLD" AND "NEW" IN SENTENCING REFORM

*JESSICA M. EAGLIN**

Table of Contents

INTRODUCTION

The introduction of actuarial risk assessment tools is a popular, but controversial, bipartisan sentencing reform.[1] These tools standardize predictions of a defendant's likelihood of engaging in criminal behavior in the future. As a reform, these tools produce new and/or improved information meant to shape and guide judicial sentencing discretion. Advocates suggest their use could lead to a reduction in incarceration all while maintaining public safety.[2]

Scholarship debates this reform from many angles, often emphasizing why this reform is "new" and focusing on whether it is

* Associate Professor of Law, Indiana University Maurer School of Law. Thanks to Aziza Ahmed, Monica Bell, Eisha Jain, and Irene Joe for feedback on this project.

1. *See, e.g.*, First Step Act, Pub. L. No. 115–391, 115th Cong. (2018) (bipartisan bill expanding use of risk assessments in federal system); *Evidence-Based Sentencing*, CTR. FOR SENTENCING INITIATIVES, (Feb. 4, 2020), https://www.ncsc.org/microsites/csi/home/Evidence-Based-Sentencing.aspx [https://perma.cc/4DH2-RPL6] (encouraging expansion of actuarial risk assessments at sentencing in the states).

2. *See, e.g.*, *Joint Meeting of Parole Advisory Council: Hearing in Minneapolis, Minnesota*, May 11, 2017 (statement of Jennifer Skeem) ("If we're interested in undoing mass incarceration without a surge in crime, we'll have to use risk-assessment technology.").

good or bad for sentencing law and policy.[3] Important critiques are generated from these debates, but, as I will suggest in this Essay, they miss a bigger picture. The popularity of this tool as a sentencing reform reflects a broader preference for more technology as the *primary* response to demands for criminal justice reform.[4] Framing debate about this practice around what is "new" facilitates the shift by orienting focus around technical advancements as solutions, while obscuring changes in punishment and society during the buildup of the carceral state in the late twentieth century.[5]

This Essay turns attention from actuarial risk assessment tools as a reform to the inclination for a technical sentencing reform more broadly. When situated in the context of technical guidelines created to structure and regulate judicial discretion in the 1980s and beyond, the institutionalization of an actuarial risk assessment at sentencing is both an old and new idea. Both sentencing guidelines and actuarial risk assessments raise conceptual and empirical questions about sentencing law and policy. This Essay drills down on two conceptual issues—equality and selective incapacitation—to highlight that actuarial risk assessments as a reform raise recurring questions about sentencing, even as social perspectives on resolving those questions are shifting. Rather than using the "old" nature of the questions as evidence that tools should proliferate; however, this Essay urges critical reflection on the turn toward the technical in the present day, in the face of mass incarceration. It calls for expanding the methodological scope of critiques about actuarial risk tools as sentencing reform going forward. I thank the Annual Survey of American Law and NYU School of Law for the opportunity to reflect on these issues in the context of a symposium celebrating the work of Professor Stephen Schulhofer.

This contribution unfolds in four parts. Part I introduces actuarial risk tools as a sentencing reform. Part II complicates the per-

3. *See, e.g.*, Richard Berk & Jordan Hyatt, *Machine Learning Forecasts of Risk to Inform Sentencing Decisions,* 27 FED. SENT'G R. 222 (2015); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014); Michael Tonry, *Legal Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT'G R. 167 (2014).

4. For critiques of technical reforms in other criminal justice contexts, *see, e.g.*, Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 465–70 (2018) (body cameras and police reform); Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. (forthcoming 2020) (electronic monitoring and corrections reform).

5. For a more detailed discussion of this argument, see generally Jessica M. Eaglin, *Technologically Distorted Conceptions of Punishment*, 97 WASH. U. L. REV. 483 (2019).

ception that the tools are "new" by framing this reform in the context of the turn toward judicial sentencing guidelines as a reform in the 1980s. Part III considers how recurring issues of equality and incapacitation obscure social transformations related to expansion of the carceral state between implementation of sentencing guidelines and proliferation of actuarial tools in the present day. Part IV asserts that the framing of "old" and "new" in current scholarship about actuarial risk tools as a sentencing reform is detrimental. It encourages expanding methodological approaches that inform scholarship on this type of reform going forward.

I.
ACTUARIAL RISK TOOLS AS A NEW SENTENCING REFORM

Since 1970, the United States has experienced an exponential increase in its prison population.[6] This increase is disproportionately concentrated on poor communities of color.[7] By 2009, one in 100 people in the United States were incarcerated;[8] one in three black men faced incarceration in their lifetime;[9] and the correctional apparatus expanded much further than ever before.[10] Today, this phenomenon is referred to as "mass incarceration."[11] While

6. Between 1970 and 2010, the number of people incarcerated in state and federal prisons jumped from 196,000 to more than 1.6 million. *Compare* BUREAU OF JUST. STAT., PRISONERS IN 1925–81 2 tbl.1 (1982) *with* E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2016 3 tbl.1 (2018).

7. In 1950, the U.S. incarcerated just over 200,000 people; today it incarcerates 2.2 million. In 1950, the prison population was 70% white; today it is 60% black and brown.

8. PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 6 (2008).

9. ACLU, Mass Incarceration (Feb. 10, 2020), https://www.aclu.org/issues/smart-justice/mass-incarceration/mass-incarceration-animated-series [https://perma.cc/FXQ9-E3GJ].

10. PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 4–5 (2009) (detailing expansion of U.S. population under correctional supervision through probation and parole).

11. There have been modest reductions in the prison population since 2007, but none significant enough to suggest an end to mass incarceration. *See* JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2017 1 (describing a 17% decline in prison admission rate between 2007 and 2017, but noting that the actual decline in prisoners decreased by closer to 3%). Rather, these reductions suggest that the U.S. prison population may be stabilizing at a different, and much higher, rate of incarceration after a period of significant growth. *See* FRANKLIN ZIMRING, MASS INCARCERATION MOMENTUM (examining trends in state correctional populations to assess whether states are significantly changing incarceration practices) (transcript on file with author).

scholars debate the causes of this increase in prisoners over the last forty years,[12] a growing consensus exists among law and policymakers that the growth of prison populations should be addressed through criminal justice reforms.[13]

At sentencing, the institutionalization of statistically robust actuarial risk tools is an increasingly popular reform in the states.[14] Actuarial risk assessment tools purport to predict a defendant's likelihood of engaging in criminal behavior in the future, defined as "recidivism."[15] The tools' outcome is based on statistical analyses of data which document the presence or absence of objective factors about offenders in the past that correlate with recidivism.[16] These "risk factors" are weighted and compiled into a risk tool that ranks defendants by their similarity to the profile of those who recidivate.[17] Most tools divide defendants into standardized categories based on the assessment of a defendant's level of recidivism risk, such as low, medium, or high.[18] Court administrators may use the

12. For examples of debate on the causes of incarceration, *compare* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (politics and racism) *with* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 198–201 (2017) (prosecutors and discretion).

13. *See, e.g.*, Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018); Rachel E. Barkow, *The Criminal Regulatory State*, *in* THE NEW CRIMINAL JUSTICE THINKING 33–35 (Sharon Dolovich & Alexandra Natapoff eds., 2018) (noting the fiscal and social costs that create pressure to address incarceration).

14. Note that actuarial risk assessments and other predictive analytic techniques are growing in popularity *outside* the post-conviction sentencing context as well. *See, e.g.*, Andrew Guthrie Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1115 (2017) (policing); Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677 (2018) (pretrial bail determinations); Cecelia Klingele, *The Promise and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537 (2015) (corrections). This Essay is contained to a discussion of the use of actuarial risk tools at post-conviction sentencing. While its observations and takeaways may have some application in those other contexts, it is beyond the scope of this Essay to explore those connections fully.

15. Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 75–78 (2017).

16. *Id.* at 78–84.

17. *Id.* at 83–84.

18. *Id.* at 86. Advanced tools may predict other features of a defendant, like their susceptibility to drug addiction or responsiveness to specific types of behavioral interventions. *See, e.g.*, Kelly Hannah-Moffatt, *Punishment and Risk*, *in* THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY 129, 132–37 (Jonathan Simon & Richard Sparks eds., 2013) (describing evolution of actuarial risk assessment technologies).

tools' assessment to inform a judge's discretion when sentencing a defendant.[19]

These actuarial risk tools are increasingly being incorporated into sentencing processes across the country. Advocates suggest the tools will improve judicial discretion and criminal system efficiency without increasing crime by identifying low-risk defendants most suitable for diversion from incarceration.[20] Critics suggest that the tools will replicate and entrench problematic features of the carceral state. Put simply, the tools may exacerbate already existing racial disparities in the criminal justice system because the tools rely on data skewed by current practices that disproportionately burden marginalized populations.[21] Furthermore, the aspect of the tools which encourages increasing punishment for some defendants on the basis of unrealized future behavior undermines normative limits on punishment.[22] Thus, this reform may expand the carceral state and rate of incarceration rather than contract it.[23] Despite opposition from scholars and policymakers, advocates have supported the proliferation of actuarial risk tools in states as a pragmatic reform with the potential to reduce the economic and social pressures of mass incarceration.[24] Today, nearly thirty states permit, encourage, or require consideration of actuarial risk tools at sentencing.[25]

---

19. *See* Erin Collins, *Punishing Risk*, 107 GEO. L. J. 57, 66 (2018) (shaping sentencing decision regarding length and location of punishment); Eaglin, *supra* note 5, at 494 (shaping length, location, and conditions of supervision if diverted to community supervision).

20. *See, e.g.*, Richard P. Kern & Meredith Farrar-Owens, *Sentencing Guidelines with Integrated Offender Risk Assessment*, 25 FED. SENT'G REP. 176 (2013); MODEL PENAL CODE: SENTENCING § 6B.09 (AM. L. INST., Proposed Final Draft, 2017).

21. *See, e.g.*, Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237 (2015); Attorney General Eric Holder, Remarks at the National Association of Criminal Defense Lawyers 57th Annual Meeting (Aug. 1, 2014); Starr, *supra* note 3, at 806.

22. *See, e.g.*, Tonry, *supra* note 3; Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671 (2015).

23. *See, e.g.*, Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189 (2013); Collins, *supra* note 19, at 91.

24. *See, e.g.*, MODEL PENAL CODE, *supra* note 20, at § 6B.09 cmt. d–e; NAT'L CTR. FOR STATE CTS, USE OF RISK AND NEEDS ASSESSMENT INFORMATION IN STATE SENTENCING PROCEEDINGS (Sept. 2017).

25. *See* Megan T. Stevenson & Jennifer L. Doleac, *Algorithmic Risk Assessment in the Hands of Humans* 54–55 app. A.1 (IZA Inst. of Labor Econ. Discussion Paper No. 12853, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513695 [https://perma.cc/ZR2J-CXF7] (collecting list of states). There is some discrepancy in what counts here. This number includes states with evidence of using risk

II.
ACTUARIAL RISK TOOLS AS "NEW" AND "OLD": SITUATING A TECHNICAL REFORM IN HISTORICAL CONTEXT

Much of the enthusiasm for actuarial risk tools as reform generates from the perception that the tools offer a "new" solution to improve sentencing determinations. The proliferation of actuarial risk tools appears "new" for two reasons. First, tools are more technically robust than ever before, and the capacity for further technical improvements into the future is clear.[26] Whereas sentencing structures often encourage judges to take recidivism risk into account through consideration of criminal history, studies suggest that, as a predictor of risk, this metric operates as an imprecise proxy for future behavior.[27] Actuarial risk tools rely on more data and have empirical backings that suggest that their predictions of recidivism risk are more consistently accurate than human judgment.[28] In this sense, the tools are new because they are more accurate as measured by evolving statistical standards.[29]

Second, actuarial risk tools appear "new" because they are offered as a means to *reduce* sentences to incarceration for some defendants rather than simply a mechanism to *increase* it. To date, most efforts to incorporate consideration of recidivism risk into sentencing have served as a one-way ratchet to increase a defendant's likely punishment for a crime. For example, sentencing guidelines and mandatory minimum penalties of the 1980s and 1990s introduced sentencing enhancements that were either explicitly or implicitly based upon the idea that the most dangerous offenders should be incapacitated for longer periods of time.[30] These en-

assessment tools at sentencing. *See id.* For insight into the significance of tool selection, see Eaglin, *supra* note 15, at 114–116.

26. *See, e.g.*, Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 Duke L.J. 1043, 1062–76 (2019) (framing entry of predictive risk tools in criminal justice as new, and explaining machine based learning techniques on the horizon).

27. *See, e.g.*, Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of Prior Conviction Exception to Apprendi*, 97 MARQ. L. REV. 523, 532–37 (2014).

28. For a summary of scholarship making the human to tool comparison, see MODEL PENAL CODE, *supra* note 20, at § 6B.09 cmt. a. For a study debating the superior accuracy of tools to humans, *see* Julia Dressel & Hany Farid, *The Accuracy, Fairness, and Limits of Predicting Recidivism*, 4 SCI. ADVANCES 1–2 (2018).

29. *See* Eaglin, *supra* note 15, at 89–94 (questioning application of technical standards to assess the accuracy of an actuarial risk tool at sentencing).

30. *See* JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA 17–46 (2014) (describing the logic of total incapacitation and its basis in various sentencing reforms in Cali-

hancements serve as a key factor in increasing the length of sentence for many defendants across the country. In turn, increased sentence lengths contribute to the increased number of people behind bars.[31] However, in the face of economic and social pressures to reduce incarceration that emerged around 2010,[32] states are now more willing to divert defendants from incarceration because they present a low risk of recidivism.[33] Embracing risk and seeking to manage it, advocates suggest, may smartly reduce crime and incarceration with bipartisan support.[34] Thus, risk tools offer a new way to approach the old fear of recidivism that contributed to the increase in prison populations throughout the country from the 1970s onward.

In short, the introduction of actuarial risk tools appear "new" because they reflect a turn toward utilizing technical advancements to improve judicial decision-making, ensure consistency and rationality, and resolve social, political, and economic pressures to address the phenomenon of mass incarceration smartly.

But this should all sound somewhat familiar to those scholars and practitioners knowledgeable of the larger trends in sentencing reform over the past forty years. Not only are risk assessments nothing new in criminal justice, but the idea that a technical project can operate to resolve sociopolitical problems reflected most poignantly at sentencing has a similarly deep history. In other words, from the perspective of sentencing law and policy, this reform is, in important respects, old.

---

fornia); Eaglin, *supra* note 23, at 196–99 (framing various sentencing reforms from the 1980s–90s in the states as part of the turn toward total incapacitation).

31. *See, e.g.*, NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 70 (2014) (attributing the great number of people behind bars in the U.S. to increases in the use and severity of prison sentences).

32. It is difficult to pinpoint the exact year that momentum for criminal justice reforms to reduce prison populations took off. For a description of confluent factors leading to sentencing reforms in the 2010s, see Eaglin, *supra* note 23, at 190–91 n.3–6.

33. There are limits to eligibility for diversion aside from a defendant's actuarial risk level. *See, e.g.*, Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595 (2016) (highlighting how the focus on low-level, nonviolent drug offenders can limit actual reduction in prison populations).

34. The bipartisan nature of the reform generates from its disaggregation with sociopolitical realities leading to the racialized nature of mass incarceration and the orientation around fiscal impact. *See* Eaglin, *supra* note 5, at 535.

Actuarial risk tools are "old" in the sense that risk assessments have been used in criminal justice administration since the 1930s.[35] For example, Illinois incorporated actuarial risk assessments into its parole release determinations as early as 1932.[36] Risk assessments also played a prevalent role in the construction of sentencing guidelines in the 1980s.[37] It undergirded some of the most draconian sentencing enhancements of the 1990s as well, including the controversial three-strikes laws in California and other states.[38] Consideration of risk, and in particular an emphasis on risk as a means to rationalize sentencing practices through systemic reform, is surely nothing new.[39]

Nor are technical projects meant to standardize judicial decision-making at sentencing new as criminal justice reform. Numerous states, and the federal government, built administrative apparatuses around initiatives to create technical projects designed to improve judicial decision-making in the last quarter of the twentieth century.[40] These sentencing commissions often managed development of guidelines largely based on numerical grids to predict and standardize sentence outcomes. Though these technical structures were ultimately used to *reduce* judicial discretion and eventually raised constitutional issues that led to their current nonmandatory status,[41] as a sentencing reform these structures were offered as a bipartisan solution to rising sociopolitical pressures to address disparities in sentencing.[42]

To be sure, the proliferation of actuarial risk tools is not the same as the creation of sentencing guidelines. The guidelines purported to narrow the range of sentences appropriate for a defen-

35. BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (2007) (detailing the origin of predictive tools in Illinois in the 1930s).

36. *Id.*

37. *Id.* at 77 (describing the proliferation of actuarial assessments from the 1960s forward); *see also* Eaglin, *supra* note 5.

38. HARCOURT, *supra* note 35.

39. *See* Eaglin, *supra* note 5, at 505, 508 (tracing role of actuarial risk assessments from rehabilitative treatment decisions to systemic parole guidelines to judicial sentencing guidelines).

40. *See id.* at 543.

41. Blakely v. Washington, 542 U.S. 296 (2004); United States v. Booker, 543 U.S. 220, 242 (2005).

42. *See, e.g.*, NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 106–111 (2014) (explaining the ambiguity of the "disparity" problem); KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998) (guidelines as bipartisan solution to critiques of sentencing discretion).

dant based on the severity of crime and a limited set of characteristics about the offender. Actuarial risk tools only seek to standardize a particular factor considered at sentencing. Thus, whereas sentencing guidelines sought to standardize a defendant's substantive sentence outcome, actuarial risk tools do not. Nor have risk tools yet been used as a means to *limit* judicial discretion, while the guidelines were implemented in that exact way.[43]

Yet, in many ways the introduction of actuarial risk assessments as a solution to the economic and social pressures of mass incarceration recycles an old idea. Technical projects were key to several reforms implemented before and during the buildup of the carceral state.[44] The sentencing guidelines created in the 1980s were generated from technical projects meant to respond to bipartisan critiques of criminal sentencing.[45] The parole guidelines, which served as the basis upon which sentencing guidelines developed, were generated from a technical project to structure parole release decisions in response to political pressures about criminal justice administration in the 1970s.[46] The esteemed era of clinical rehabilitation, which immediately preceded the rise of U.S. prison populations, also relied on technical projects to shape decision-making in response to social and political transformations in the 1950s.[47] Initial technical reforms were not meant to affect *judges'* discretion, but instead that of parole boards and parole officers. Nevertheless, the idea that a tool generated from a technical project could reduce the sociopolitical pressures visible at sentencing has deep roots in the history of sentencing reform.[48]

---

43. *But see, e.g.*, Brandon L. Garrett & John Monahan, *Judging Risk*, 108 CAL. L. REV. __, 34–35 (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3190403 [https://perma.cc/3MRC-7P5V] (suggesting that legislatures or sentencing commissions could make sentencing guidelines "more binding" to anchor judicial decision-making to actuarial risk assessment outcomes).

44. On the development of technologies and intersection with carceral state build up, *see generally* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN THE UNITED STATES (2016).

45. *See* Eaglin, *supra* note 5, at 504.

46. *See id.* at 509.

47. *See id.* at 506–07.

48. In this sense it is unsurprising that among scholars of sentencing law and policy, those who embraced the sentencing guidelines of the 1980s often encourage the use of actuarial risk tools at sentencing today. *Compare* John F. Pfaff, *The Continued Vitality of Structured Sentencing following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 237 (2006) *with* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION – AND HOW TO ACHIEVE REAL REFORM 198–201 (2017) (encouraging adoption of actuarial risk tools as sentencing reform); Kevin R. Reitz, *"Risk Discretion" at Sentencing*, 30 FED. SENT'G REP. 68 (2017)

III.
BEYOND THE QUANTITATIVE DEBATES: REVISITING "OLD" SENTENCING PROBLEMS IN NEW FORM

Whereas many scholars advance empirical critiques of actuarial risk tools today, this Part highlights two "old" conceptual problems which are revived within current debates about actuarial risk assessment. The introduction of these tools as a reform raises questions about the meaning of equality at sentencing. It also begs revisiting the theoretical idea of incapacitation in practice. Framing debates about actuarial risk assessments around these recurring conceptual issues cautions that the enthusiasm for what makes these tools new threatens to obscure social transformations by undermining efforts to reduce the pressures of mass incarceration. By locating the turn toward actuarial risk tools in the context of shortcomings from recent history, this Part offers a different perspective on actuarial risk assessments as a sentencing reform.

A. Equality

"Equality" at sentencing could refer to many things, and different sociopolitical perspectives give resonance to different types of equality. Actuarial risk tools, like the sentencing guidelines before them, give rise to debate about how to pursue equality at sentencing. However, they may obscure the sociopolitical component of the debate in the process.

Guidelines introduced (or perhaps just brought to the fore) a deeper debate about what makes sentence outcomes "equal." Stephen Schulhofer, among others, produced important work to illuminate how fraught a simple demand for equality at sentencing can be.[49] As he suggested, there are at least three different types of equality in sentencing outcomes: all defendants get the same sentence (leading to unwarranted similarities in outcomes); all offenses get the same sentence (leading to unwarranted disparities in outcome); or different defendants get different sentences on the basis of the same "relevant" factors.[50] In pursuit of the latter aim—to ensure different sentences on the basis of the same factors—the

(encouraging domestication of statistically robust risk tools in sentencing structures); *but see* Tonry, *supra* note 3, at 167.

49. Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 835–37 (1992).

50. *Id.*

guidelines often introduced the first and second kind of errors into sentence outcomes.[51]

In addition to the three types of equality described above, technical guidelines introduced a fourth type of overarching inequality to sentencing. This inequality occurs when a defendant receives a formally sound sentence (as defined by the standards described above), which is irrational by any contextual standard. For example, in *Chapman v. United States*,[52] the Supreme Court upheld a defendant's sentence based on the weight of LSD, where the weight included the "mixture or substance" containing LSD. This metric created the "bizarre" outcome that a defendant's sentence could vary under the federal sentencing guidelines between a fifteen- to twenty-year range and less than a year based upon the drug's form.[53] That is, the key sentencing factor became whether the drug dealer transferred the drug in a weighty sugar cube or in pure liquid form.[54] Though the Court held this method to distinguish between drug offenders to be rational, the case highlighted a threat of equality when excessively focused on the "*in*puts" of a sentence rather than the substantive justice of a sentence. As Albert Alschuler described it, such focus could produce "equal nonsense for all."[55]

For purposes of this discussion, the key point to highlight is that one can choose a type of formal equality to pursue at sentencing and at the same time sacrifice substantive justice.[56] In the context of the sentencing guidelines, law and policymakers often chose to construe *uniformity* in sentencing guidelines as substantive equality in sentencing outcomes.[57] This decision invited the institutionalization within sentencing structures of sentencing practices that would disproportionately impact racialized minorities and sustain

51. *See id.*

52. Chapman v. United States, 500 U.S. 453 (1991).

53. *Id.* at 468 (Stevens, J., dissenting).

54. *See id.* at 458 n.2.

55. Albert W. Alschuler, *A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 918 (1991).

56. Aya Gruber, *Equal Protection under the Carceral State*, 112 NW. L. REV. 1337, 1367–68 (2018) (critiquing the guidelines as an example of reform that pursues equality by "leveling up criminal punishment").

57. *See* Schulhofer, *supra* note 49.

extended sentence lengths for various crimes.[58] These factors directly contribute to the phenomenon of mass incarceration.[59]

Debates about equality in the construction of actuarial risk tools for sentencing parallel this guideline debate. Scholars divide on what makes a risk assessment equal and whether it matters for sentencing. Advocates for the tools assert that more statistically robust actuarial tools that consider more "risk factors" that would otherwise be excluded from consideration at sentencing make the tools more technically accurate. That technical accuracy—as measured by its statistical value—can produce a form of parity because all defendants are measured by the same standards.[60] This parity, advocates suggest, is equality.[61] Some critics of the tools focus on the fact that the tools include factors that are deeply controversial and potentially illegal, such as the use of gender and potentially race.[62] Other common risk factors, such as education level, employment history, neighborhood of origin, and age of first arrest, correlate with poverty and social disadvantage. Some scholars suggest that inclusion of these factors, regardless of the outcome, fosters inequality.[63] Thus, scholars—and the courts—divide on whether similar outcomes based on rational distinctions (such as criminal history or actual recidivism) make an outcome equal or whether avoidance of dissimilar outcomes based on irrational distinctions (by, for example, eliminating racial disparities in outcomes even if that means taking race into account) makes an outcome equal.[64]

---

58. *See* Eaglin, *supra* note 5, at 524; Gruber, *supra* note 56, at 1367–68 (highlighting how federal sentencing guidelines introduced harsh sentences and greater racial disparities).

59. The increase in the prison population is, in a technical sense, the product of an increase in the number of offenders entering the system and the length of time served when entering the system. Sentencing practices that disproportionately keep minorities in the system longer increase the racialized character of prison. Sentencing practices that increase the length of time for defendants increase the amount of time served.

60. Any number of statistical values can stand in for a measure of technical accuracy. These include predictive parity, false negative rates, false positive rates, and many more. For an overview of the different measures and their implications for the pursuit of equality in prediction, see Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2241, 2241–47 (2019). *See also* Huq, *supra* note 26.

61. *See, e.g.*, Huq, *supra* note 26.

62. *See, e.g.*, Starr, *supra* note 3, at 824; Sidhu, *supra* note 22; Tonry, *supra* note 3, at 171–72; Eaglin, *supra* note 15.

63. *See, e.g.*, Starr, *supra* note 3, at 838.

64. *See, e.g.*, Mayson, *supra* note 60, at 2241–47 (providing overview of this debate and erring on the side that a predictive tool should seek predictive parity based on as many risk factors as possible).

This narrow construction debate illuminates a change in perspective rather than just a change in the tools. What actuarial risk assessment tools predict and how the tools are designed to arrive at their predictions calls to mind the larger debate set off by the introduction of sentencing guidelines. Technical interventions like sentencing guidelines or actuarial risk tools privilege a particular type of equality at sentencing—that of standardized inputs producing substantively just outcomes. That shift in focus can have a concrete effect on criminal justice policy. It pushes aside the question of whether sentencing practices driving at uniformity produce substantively irrational sentences.[65] For example, in the context of drug offenses, the pursuit of equality through standardized inputs obscures the policy question of what an appropriate drug sentence should be.[66] It also buries problematic sociological features of the carceral state, like its disproportionate burden on marginalized populations, in technocratic morass.[67] All the while, individual sentence outcomes may appear more sound yet remain excessively punitive.[68]

B. Selective Incapacitation

Consideration of actuarial risk tools as a reform demands revisiting the role of incapacitation theory in sentencing practices. Actuarial risk tools are useful as a reform now because they encourage the selective distribution of punishment on the basis of a defendant's likelihood of engaging in future criminal behavior in order

65. *See* Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 494–503 (2014) (describing anchoring effect studies); Jelani Jefferson Exum, *Forget Sentencing Equality: Moving from the "Cracked" Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95 (2014) (describing the anchoring effect of sentencing guidelines in sentencing reformers' agendas).

66. *See* Exum, *supra* note 65, at 117 (noting that an equality-based critique of crack cocaine sentencing "raises important concerns" but "by not arguing that drug sentencing is altogether purposeless, reformers are limiting reform possibilities").

67. *See* Starr, *supra* note 3, at 806.

68. *Compare* Exum, *supra* note 65, at 119–20 (noting the problematic anchoring effect of drug sentencing guidelines) *and* Bennett, *supra* note 65, at 519–29 (noting the same gravitational pull of sentencing guidelines more broadly, beyond just drug sentencing) *with* Starr, *supra* note 3, at 867–69 (providing empirical analysis of a sentencing hypothetical wherein actuarial risk assessments gravitationally pulled defendants' sentences up) *and* Collins, *supra* note 19, at 68–69 (providing anecdotal evidence of actuarial tools anchoring sentences by increasing punitiveness as well).

to reduce reliance on incarceration as punishment. Yet this shift in perspective invites a different language to discuss punishment practices that obscures the political nature of an expanding carceral state.

Selective incapacitation refers to the notion that states could identify those individuals most likely to reoffend to save resources and make crime control more efficient.[69] If sentencing laws ensured that these high-risk individuals were incarcerated for longer terms, then they would reduce crime and the costs of incarceration.[70] This notion inspired several sentencing reforms which were implemented during the buildup of the carceral state. For example, three strikes laws and criminal history enhancements in Washington, D.C. in the 1970s, and the federal sentencing guidelines in the 1980s, increased sentence length for repeat offenders based on this idea.[71] Even state sentencing guidelines, which were often far less draconian than the federal guidelines, often institutionalized this idea within their sentencing structures.[72] Such incapacitation-driven reforms directly led to increases in the prison population associated with mass incarceration.[73]

The proliferation of more statistically robust actuarial risk tools now reuses the idea of selective incapacitation, but they are meant to operate in the opposite direction. That is, by using more statistically robust predictions of risk, the institutionalization of tools reflects the notion that states can identify those who are most likely *not* to reoffend. By *diverting* these people from longer terms of incarceration while leaving other defendants to current sentencing practices (and potentially longer terms of incarceration), advocates suggest that states may reduce crime and the costs of incarceration.[74] Only now, instead of identifying this predictive logic as some version of incapacitation, it is conceptualized as what I have else-

69. *See* PETER W. GREENWOOD SELECTIVE INCAPACITATION (Rand Corp. vii 1982).

70. *See id.*

71. "Selective incapacitation" as a formal theory emerged in the 1980s, but the idea was prevalent in the 1970s as well. *See* HINTON, *supra* note 44, at 173–74 (sentencing reforms in the 1970s); *see also* HARCOURT, *supra* note 35, at 32 (sentencing reforms in the 1980s).

72. *See* Eaglin, *supra* note 5, at 516.

73. *See* NAT'L RESEARCH COUNCIL, *supra* note 31, at 70 *(*attributing the increase in length of prison sentences to, among other reforms, "the enactment in more than half the states and in the federal system of three strikes and truth-in-sentencing laws").

74. *See, e.g.*, MODEL PENAL CODE, *supra* note 20, at § 6B.09 cmt. d–e.

where referred to as "neorehabilitation."[75] Actuarial risk tools as a sentencing reform are considered part of a rehabilitative turn because the assessments may encourage courts to divert some defendants from prison terms and toward needed treatment alternatives or other diversion programs (although this outcome is not necessarily guaranteed).[76]

But actuarial risk tools as a sentencing reform implemented to further neorehabilitation may not resolve the problems of mass incarceration, including the economic pressures it places on states. This "new" way to shape sentencing practices through actuarial risk assessments may encourage expansion of the carceral state among the populations already most affected by mass incarceration. Because actuarial tools rely on data collected based on current practices, they will disproportionately target the poor and communities of color because the carceral state's expansion has disproportionately impacted these subpopulations.[77] Even if the tools are used for their most benevolent purpose—to reduce incarceration and encourage rehabilitation—they will likely encourage a different kind of rehabilitation focused on behavioral modifications and surveillance rather than simply job training and skills building.[78] By *increasing* surveillance on the communities already over-surveilled in the carceral state, this outcome undermines the likelihood that even the best tools will *reduce* incarceration in the long term.[79]

75. Eaglin, *supra* note 23.

76. The rehabilitative component of a diversion-from-prison sentence is not guaranteed. Alternatives to prison-incarceration do not equate rehabilitation. In Virginia, for example, the legislature structured decision-making so that an actuarial risk assessment score encourages the court to divert a defendant from a long prison sentence and instead sanction the defendant through "jail, release, probation, community service, outpatient substance abuse treatment or electronic monitoring." BRANDON GARRETT ET AL., NONVIOLENT RISK ASSESSMENT IN VIRGINIA SENTENCING: THE SENTENCING COMMISSION DATA 5 (2018). Some of these alternatives may further rehabilitative aims, like treatment services, but others may not, like electronic monitoring. *See, e.g.*, Eaglin, *supra* note 5, at 39–40 (noting the problematic intersection between rehabilitative rhetoric and incapacitative reforms); Eaglin, *supra* note 33, at 631–34 (critiquing the ways that treatment-oriented diversions can obscure the expanding reach of the carceral state). For an interesting critique of the limited use of diversion-from-prison sentences and actuarial risk assessments in Virginia, see Brandon Garrett et al., *Judicial Reliance on Risk Assessment in Sentencing Drug and Property Offenders: A Test of the Treatment Resource Hypothesis*, 46 CRIM. JUSTICE & BEHAV. 799 (2019).

77. For a more detailed explanation of this assertion, see Harcourt, *supra* note 21. *See also* Eaglin, *supra* note 23.

78. Eaglin, *supra* note 23; Eaglin, *supra* note 5, at 507.

79. For a description of the cycle of correctional supervision to incarceration, see, e.g., Arnett, *supra* note 4.

Rather, this reform may encourage different kinds of incapacitation within the carceral state that can sustain the higher levels of incarceration in the United States over time.

In a way, actuarial risk tools and technical sentencing guidelines share in this obfuscation of incapacitation's political shortcomings. Whereas actuarial risk assessments are associated with a turn toward rehabilitation, the sentencing guidelines were associated with a shift toward retribution.[80] Both tools distract from the political nature of incapacitation logics in practice. For example, incapacitation raises questions about how to allocate resources inside the carceral state while eliding questions about whether and how to allocate resources outside it. This may include strategically responding to different social problems like drug addiction and mental health in nonpunitive ways.[81] In the context of sentencing guidelines, even simple questions like how much it costs to build and maintain technical reforms in comparison to investing in nonpunitive responses to social problems were erased from discussion.[82] Similar questions have yet to be explored in the context of actuarial risk assessments proliferating in the states today.

These strategic questions are political in nature, but are implicated in sentencing reforms. A focus on technical sentencing guidelines as reform then, just like a focus on technical actuarial assessments now, threatens to obscure these kinds of political questions of punishment by insulating sentencing from politics. Ironically, both technical tools obscure those questions even as they seek to manage a different kind of political pressure to be "tough," rather than "smart," on crime.[83] But until policymakers start responding to social problems with methods other than criminal enforcement, meaningful reductions in incarceration are not guaranteed. This remains true even if a technical reform encour-

80. *See* Eaglin, *supra* note 15.

81. *See* Eaglin, *supra* note 33; Aya Gruber et al., *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333 (2016).

82. *See* Alschuler, *supra* note 55 (critiquing the cost saving argument regarding technical sentencing guidelines); Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419 (2018) (critiquing framing of cost analysis in criminal justice).

83. *See, e.g.,* PFAFF, *supra* note 12, at 196–200 (encouraging the use of data-driven, technical reforms like sentencing guidelines and actuarial risk assessments to manage the tough-on-crime politics of sentencing for violent offenses); *see generally* Rachel E. Barkow, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 177 (2019) (calling for "smartly designed expert agencies" to shape criminal justice policies but recognizing that such policies cannot grapple with "cultural shifts beyond the scope of an institutional fix").

ages a language of punishment that shifts toward a softer version of incapacitation. In this sense, a "new" technical reform threatens to obscure the same "old" sociopolitical questions about incapacitation and society implicated by the expansion of the carceral state.

IV.
RETHINKING "OLD" AND "NEW": LOOKING TO THE FUTURE, LEARNING FROM THE PAST

Juxtaposing issues with actuarial risk tools and sentencing guidelines urges caution as states and policymakers encourage a new technical intervention at sentencing. Technical sentencing reforms can raise important questions about punishment while obscuring realities about punishment in society. Critically engaging with technical reforms through a framework of "old" and "new" may obscure the clear choices that law and policymakers are making—choices that beg deeper questions about punishment and society. While actuarial risk tools offered today appear to be a new technical reform meant to change punishment practices and possibly reduce sentences to incarceration for some defendants, this discussion highlights that these tools exist within a larger status quo. That is, as some things change (namely, our notions of equality at sentencing and the idea of selective incapacitation) to accommodate technical reforms, the bigger picture (like using the criminal apparatus as the primary form of government intervention) may fall further from view and, in turn, stay the same.

This concern has implications for the kind of scholarship that is needed to fully grasp and confront how we are choosing to respond to the pressures of mass incarceration. While there is a wealth of scholarship emerging on actuarial risk assessments at sentencing and beyond, it is lacking in part due to the orientation around what is "new." Thus, scholars are drawing upon empirical methodologies assessing the tools' accuracy, theoretical data science literature debating the tools' construction, and the social sciences more broadly.[84] To a lesser extent, scholars are drawing upon punishment theory to critique the tools as well.[85] These methodolo-

84. *See, e.g.*, Starr, *supra* note 3; Huq, *supra* note 26 (discussing theoretical data science literature); Reitz, *supra* note 48 (discussing administrative law).

85. For an interesting critique of excessive reliance on punishment theory, see Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 4 (2014). For examples of recent scholarship relying on punishment theory to critique the proliferation of actuarial risk tools, see, e.g., Tonry, *supra* note 3; Collins, *supra* note 19. I have, myself, drawn on these theories as well in past scholarship. *See* Eaglin, *supra* note 15.

gies result in a "formalist" approach to criminal justice scholarship that "has little to say about the consequences of punishment, the nature of incarceration, or the forms of enforcement or social control that criminal law might trigger."[86] In other words, what is "new" in technical terms struggles to incorporate what is known about mass incarceration in sociological terms.

Looking back at the scholarship developed around the introduction of sentencing guidelines and other systemic sentencing reforms reveals the need for a different kind of scholarship. Stephen Schulhofer's empirical work examining mandatory minimum sentences, for example, was so profound because it showed how a systemic reform operated in the context of realities about the administration of criminal justice.[87] His inquiries about the sentencing guidelines interrogated assumptions about the guidelines and equality *in practice* by looking to actual outcomes from implementing the reform.[88] There is a relative dearth of this kind of empirical scholarship around the introduction of actuarial risk assessments as sentencing reform.[89] To be sure, it exists but often is dismissed as outside the mainstream of critiques.[90] This is to our detriment. If the question is whether risk tools improve upon current sentencing practices, the answer should be informed by what, exactly, we are currently doing. Only with this kind of empirical reflection—one focused on the tools' impact in practice and not those metrics created to measure tools' accuracy in the abstract—can we fully grasp the impact of more technical, system-wide sentencing reforms.

But there is also a need to look beyond quantitative methodologies to grasp the implications of this sentencing reform, too. Legal scholarship driven by the humanities should complement empirical inquiries of the tools' impact by metrics other than the tools' inter-

86. *See* Benjamin Levin, *Mens Rea Reform and its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 520 (2019).

87. Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199 (1993).

88. *See, e.g.*, Ilene Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992); Schulhofer, *supra* note 49.

89. *But see, e.g.*, HARCOURT, *supra* note 35. To the extent this scholarship does exist, it often suggests or presumes that the problem lies with human decisionmakers rather than with the interplay between the tools, punishment, and society. Megan Stevenson & Jennifer Doleac, *Algorithmic Risk Assessment in the Hands of Humans* 36–37 (IZA Inst. of Labor Econ. Discussion Paper No. 12853, 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513695 [HTTPS://PERMA.CC/GXZ7-GJ5Y].

90. *See* Mayson, *supra* note 60 (dismissing Harcourt's call to be skeptical about prediction as "unrealistic").

nal measures of success. Humanist methodologies, including history, social theory, and political theory, were often implemented to ground critiques of sentencing guidelines.[91] Sociohistorical critiques continue to emerge that reframe technical reforms' impact on criminal justice policies and practice in relation to mass incarceration and beyond its scope.[92] As the concepts around criminal justice shift to accommodate technical reforms, legal scholarship would do well to draw upon these humanist works and methodologies to critique actuarial risk tools and other reforms oriented around the assumption that automation improves decision-making without cost.[93] These humanist critiques inform our understanding of how we got to the present crisis point where 2.2 million people are incarcerated in the United States, a disproportionate number of whom are people of color. Infusing such critiques into legal scholarship can also inform our understanding of where we are headed when we adopt certain responses to this crisis. If nothing else, such scholarship illuminates that sentencing reform exists in context. Let that context be as rich with the shortcomings of the past as the promises of the future. For only by fully reflecting on how we arrived at this point of crisis can we begin to comprehend what we are doing when we respond to it.

CONCLUSION

This Essay reflects upon a controversial sentencing reform—actuarial risk tools—in the context of another controversial sentencing reform of the 1980s—the sentencing guidelines. By situating the two reforms in one conversation about conceptual transformations, this piece illuminates how the inclination to reach for a technical tool in response to the pressures of mass incarceration is a road well-traveled. While our perspective—here, our understanding of what actuarial risk tools do and whether they accord with our notions of equality and justice—has changed, our inclination has not. It is this inclination for technical solutions that needs

91. *See, e.g.*, Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33 (2003) (history).

92. *See, e.g.*, HINTON, *supra* note 44 (approaching the problem from history and criminal justice); MURAKAWA, *supra* note 42 (approaching the problem from politics and criminal justice); HUNTER HEYCK, THE AGE OF SYSTEM: UNDERSTANDING THE DEVELOPMENT OF MODERN SOCIAL SCIENCE (2015) (approaching the problem from history and society).

93. For an interesting example of the intersection of law and history scholarship regarding criminal justice reform more broadly, see Sara Mayeux, *The Idea of "The Criminal Justice System,"* 45 AM. J. CRIM. L. 55 (2018).

critique. This Essay calls upon scholars to make those critiques on bases both quantitative and qualitative in nature. This is, I suspect, exactly what an esteemed scholar like Stephen Schulhofer would expect given the wealth of critiques of sentencing guidelines upon which his work built. We should expect no less in the face of actuarial risk tools and the acceleration of the trend toward technical criminal justice reforms.

A DATA-DRIVEN REMEDY FOR RACIAL DISPARITIES: COMPSTAT FOR JUSTICE

PHILLIP ATIBA GOFF AND KIM SHAYO BUCHANAN***

Police executives and policymakers have long affirmed a core principle of sound organizational management: law enforcement agencies must "measure what matters."[1] And they do: since the New York Police Department popularized the COMPSTAT process in the late 1990s, the systematic, ongoing analysis of crime and arrest data has achieved widespread acceptance by law enforcement agencies across the United States.[2] Police officers and employees record every crime and arrest that occurs at every location within a precinct or jurisdiction over the past week, month, and year, allowing officers to identify geographic and temporal trends in lawbreaking and redirect policing resources accordingly. Police executives meet regularly with unit commanders to evaluate the success of their unit's actions in reducing crime, evaluating in real time how well police behavioral interventions are working. Judging by their commitment to measurement and accountability, law enforcement agencies are very serious about reducing crime.

On the other hand, our policing data practices suggest that the influence of law enforcement on vulnerable communities does not

* Franklin A. Thomas Professor of Policing Equity at John Jay College of Criminal Justice, President and Co-Founder of the Center for Policing Equity.

** Senior Academic Writer, Center for Policing Equity.

1. *See generally* U.S. DEP'T OF JUST., MEASURING WHAT MATTERS: PROCEEDINGS FROM THE POLICING RESEARCH INSTITUTE MEETINGS (Robert H. Langworthy ed., 1999), https://www.ncjrs.gov/pdffiles1/nij/170610.pdf [https://perma.cc/4Z6C-3TC8]; Robert C. Davis et al., *Revisiting "Measuring What Matters": Developing a Suite of Standardized Performance Measures for Policing,* 18 POLICE Q. 469 (2015); THOMAS V. BRADY, MEASURING WHAT MATTERS: PART ONE: MEASURES OF CRIME, FEAR, AND DISORDER (U.S. Dep't of Just. 1996), https://www.ncjrs.gov/pdffiles/measure.pdf [https://perma.cc/E9U5-C6K4].

2. By 2014, forty-three of the fifty largest municipalities in the United States had adopted "some form of CompStat." *See* DR. OLIVER ROEDER ET AL., WHAT CAUSED THE CRIME DECLINE? 58 (Brennan Ctr. for Just. 2015). For a description and assessment of the widespread adoption of COMPSTAT in U.S. policing, see generally James J. Willis et al., *Making Sense of COMPSTAT: A Theory-Based Analysis of Organizational Change in Three Police Departments,* 41 L. & SOC'Y REV. 147 (2007).

matter as much as it should.[3] Police leadership and policymakers routinely declare their commitment to racial equity in policing. They urge, as academics do, that policing reforms must be informed by empirical realities.[4] Nonetheless, most local jurisdictions do not require the collection or analysis of data about racial disparity in the ways they police Black, Latinx, or Indigenous communities.[5] About 20 states collect some form of information on racial disparities (most often in vehicle stops),[6] but none of them use that

3. The recent National Academies of Sciences, Engineering, and Medicine report on proactive policing noted that the influence of police behaviors on communities is woefully underexamined. *See* NAT'L ACADS. OF SCIS, ENG'G, & MED., PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES (Nat'l Acads. Press 2018), https://www.nap.edu/catalog/24928/proactive-policing-effects-on-crime-and-communities [https://perma.cc/J8FG-GRJW].

4. *See, e.g.*, PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 19–25 (Office of Cmty. Oriented Policing Servs. 2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [https://perma.cc/9UAG-JW9B] [hereinafter 21ST CENTURY POLICING TASK FORCE REPORT]; "*Recommendations to the President's Task Force on 21st Century Policing" Listening Session on Training and Education* (written testimony of Anthony Braga et al., Ad Hoc Comm. to the President's Task Force on 21st Century Policing, Div. of Policing, Am. Soc'y of Criminology, February 13–14, 2015); Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative,* 101 J. CRIM. L. & CRIMINOLOGY 335, 335 (2011) (calling for an "empirically-grounded shift" to a procedural justice model of policing); Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights,* 111 MICH. L. REV. 1045, 1066–73 (2013) (reviewing WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011)) (marshalling criminal justice and social science data that counters Aziz Huq, *Racial Equity in Algorithmic Criminal Justice,* 68 DUKE L.J. 1043, 1069 (2019) (claiming that the introduction of professionalized policing and *Miranda* and *Mapp* rights accounted for the increase in crime from the 1970s through the 1990s)); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident,* 82 U. CHI. L. REV. 159 (2015); Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts,* 129 HARV. L. REV. 2049, 2070-85 (2016); Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing,* 101 MINN. L. REV. 2397 (2017); Aziz Huq, *Racial Equity in Algorithmic Criminal Justice,* 68 DUKE L.J. 1043, 1069 (2019) [hereinafter Huq, *Racial Equity*].

5. Notable exceptions include 2015 Cal. Legis. Serv. Ch. 466 (A.B. 953) [hereinafter California AB 953] (requiring data collection of all stops by state and local law enforcement agencies in California) and CONN. GEN. STAT. §§ 54-1l and 541m [hereinafter CT Racial Profiling Prevention Act] (requiring data collection of all vehicle stops by state and local law enforcement agencies).

6. *It's Time to Start Collecting Stop Data: A Case for Comprehensive Statewide Legislation,* POLICING PROJECT AT NYU SCHOOL OF LAW (Sept. 30, 2019), https://www.policingproject.org/news-main/2019/9/27/its-time-to-start-collecting-stop-data-a-case-for-comprehensive-statewide-legislation [https://perma.cc/CH8S-NRK3].

data to compel behavioral change. Institutional failure to analyze racial disparities or hold departments accountable to the goal of equity—the way they typically do for crime-reduction—belies our outward commitments, making it seem as though we, as a polity, do not care very much about what policing does to Black and other non-White people. Meanwhile, those same communities and others concerned with racial justice continue to insist that governments and law enforcement agencies do more to affirm that "Black Lives Matter."

In this Essay, we call for COMPSTAT for Justice (C4J), a novel process for real-time data analysis that will empower law enforcement agencies to identify the racial disparities that result from police behaviors and respond to them in real time. Part I of this Essay sets out the strengths and shortcomings of the existing COMPSTAT model, demonstrating the need for sustained, timely analyses of racial disparities in policing behavior. Part II describes the C4J process, which will illuminate the sources of racial disparities in stops, searches, and use of force, allowing law enforcement agencies to change their practices to reduce racial disparities and evaluate the effectiveness of these interventions. Part III explains how C4J can empower police departments to meaningfully reduce racial disparities in ways that have not, until now, been possible.

I.
MEASURING JUSTICE: THE NEED FOR C4J

Law enforcement agencies use COMPSTAT to track crime data, identify trends, and hold themselves accountable to shared goals of social order. If there is a series of car thefts in one neighborhood, they increase patrols there. When gun violence spikes, police try to anticipate that trend and stop it. By keeping track of how often, where, and when crimes take place, police departments are able to direct resources with the goal of preventing increases in crime from becoming outbreaks. This usually works simply by counting crimes, mapping crimes, and/or tracking the cadence of crimes. Why not do that with racial bias? Why not create a COMPSTAT for justice?

Law enforcement agencies, like researchers and advocates, need timely analysis of data, examined and presented in ways that will generate actionable information that empowers law enforcement agencies to identify and respond to the portion of disparities that police can change before they become entrenched.

If an organization of any kind is serious about its goals, it must measure its progress toward those goals, and hold the organization

accountable to that metric.[7] That challenge is especially tricky in the case of racial justice because descriptive analysis—in essence, counting, mapping, or time sequencing which provides the analytic power for most COMPSTAT processes—tends to reveal little more than the existence of disparities. If police data indicate that motorists who are stopped or searched are disproportionately Black or Latinx compared to the local population, this finding cannot tell us how much of the observed disparity is caused by factors that police can control, and how much is not. Sophisticated statistical analyses are needed to distinguish between the disparities that police departments likely cannot mitigate and the factors that are ripe for police intervention. How much of the disparity is predicted by factors such as poverty or housing disparities? How much arises from law enforcement policies or behaviors that police departments could change?

If we want to change behavior by introducing accountability, evaluation is essential. To date, data about policing behavior have not been widely available to researchers, forcing researchers to resort to incomplete or non-representative datasets to estimate racial disparities in law enforcement behaviors.[8] Most scholarly analyses of

7. *See generally* JOHN DOERR, MEASURE WHAT MATTERS: HOW GOOGLE, BONO, AND THE GATES FOUNDATION ROCK THE WORLD WITH OKRS (2018) (advocating the use of OKR, or "objectives and key results," metrics to set goals and monitor organizational progress).

8. For example, the datasets used by scholars to assess racial disparity in fatal shootings by police officers are incomplete, and appear to greatly undercount the number of fatal shootings by police officers. For recent estimates of police-involved shootings, see FATAL ENCOUNTERS, https://www.fatalencounters.org/ [https://perma.cc/R9RT-M5F3]; THE GUARDIAN, *The Counted: People Killed by Police in the U.S.*, https://www.theguardian.com/us-news/series/counted-us-police-killings [https://perma.cc/T5RW-3CCB]; U.S. DEP'T OF JUST., ARREST-RELATED DEATHS PROGRAM REDESIGN STUDY, 2015–16: PRELIMINARY FINDINGS (2016), https://www.bjs.gov/content/pub/pdf/ardprs1516pf.pdf [https://perma.cc/2ND9-ST2W].

Recently published academic studies, however, relied on limited datasets that were unlikely to be representative. *See, e.g.*, James W. Buehler, *Racial/Ethnic Disparities in the Use of Lethal Force by U.S. Police, 2010-2014,* 107 AM. J. PUB. HEALTH 295 (2017) (relying on death certificates indicating injuries inflicted by police officers as the cause of death to estimate racial disparities in police use of force); Sarah DeGue et al., *Deaths Due to Use of Lethal Force by Law Enforcement: Findings from the National Violent Death Reporting System, 17 U.S. States, 2009-2012,* 51 AM. J. PREVENTATIVE MED. S173, S176 (2016) (noting that both the FBI's Uniform Crime Reporting system and the CDC's death certificate data are likely to undercount deaths caused by police officers). *See also* Amanda Charbonneau et al., *Understanding Racial Disparities in Police Use of Lethal Force: Lessons from Fatal Police-on-Police Shootings,* 73 J. SOC. ISSUES 744 (2017) (analyzing racial disparities among 26 shootings of on-

racial disparities in policing have been limited to one or a handful of states or police departments that could be persuaded to share data with researchers.[9] Other recent studies have relied on open data or on data obtained through public records requests.[10] While these efforts are useful, it seems unlikely that data from law enforcement agencies that make their data public, or respond in a timely way to a public-records request, are free of a sampling bias that would prohibit further generalization.

Another limitation of the extant scholarly literature is that analyses have been restricted to backward-looking snapshots in time, using retrospective analysis of racial disparity across a specific time period in the past.[11] Because, to date, no COMPSTAT-like system exists for the ongoing collection and analysis of policing data,

---

and off-duty police officers killed by other police officers across a 29-year period to infer racial disparities in mistaken shootings by police).

9. *See, e.g.*, Andrew Gelman et al., *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias,* 102 J. AM. STAT. ASS'N. 813 (2007); Adrienne N. Milner et al., *Black and Hispanic Men Perceived to Be Large Are at Increased Risk for Police Frisk, Search, and Force,* 11 PLOS ONE (2016), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0147158 [https://perma.cc/FYB8-U2SX]; Steven Raphael & Sandra V. Rozo, *Racial Disparities in the Acquisition of Juvenile Arrest Records,* 37 J. LAB. ECON. 125 (2019); Frank R. Baumgartner et al., *Targeting young men of color for search and arrest during traffic stops: evidence from North Carolina, 2002–2013,* 5 POL., GROUPS, & IDENTITIES 107 (2016) [hereinafter Baumgartner, *Targeting*]; CHARLES R. EPP ET AL., PULLED OVER 12 (John M. Conley & Lynn Mather eds., 2014); Frank R. Baumgartner et al., *Racial Disparities in Traffic Stop Outcomes,* 9 DUKE F. FOR L. & SOC. CHANGE 21 (2017) [hereinafter Baumgartner, *Racial Disparities*]; Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210 (2019) (using data shared by Los Angeles, three cities in Texas, and six counties in Florida, as well as data from the Police-Public Contact Survey and open data on NYPD stops and frisks); Kimberly B. Kahn et al., *Protecting Whiteness: White Phenotypic Racial Stereotypicality Reduces Police Use of Force,* 7 SOC. PSYCHOL. & PERSONALITY SCI. 403, 405 (2016) ("a large department on the West Coast of the United States"); William Terrill & Eugene A. Paoline III, *Police Use of Less Lethal Force: Does Administrative Policy Matter?*, 34 JUST. Q. 193 (2016) (examining Charlotte-Mecklenburg, Colorado Springs, and Albuquerque); JOEL H. GARNER & CHRISTOPHER D. MAXWELL, UNDERSTANDING THE USE OF FORCE BY AND AGAINST THE POLICE IN SIX JURISDICTIONS (2002).

10. *See, e.g.*, Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States* (June 18, 2017), https://arxiv.org/abs/1706.05678 [https://perma.cc/BYM7-2L9B] [hereinafter Pierson 2017] (analyzing data from 20 state patrol stops made between 2011 and 2015); Emma Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States*, 4 NATURE HUM. BEHAV. 736 [hereinafter Pierson 2020] (analyzing data from 21 statewide patrol agencies and 29 municipal police departments between 2011 and 2017).

11. *See, e.g.*, Gelman, *supra* note 9; Pierson 2020, *supra* note 10.

forward-looking studies of police behavior are exceedingly rare, and have not been available to shape and evaluate interventions aimed at racial justice. This means that even simple pre-post-policy change analyses require special research events that departments' day-to-day practices are not set up to exploit.[12]

Open data alone cannot solve this problem, as improper analyses or reliance on descriptive analyses (e.g., racial disparities benchmarked against population demographics) are prone to entrench the presuppositions of both communities and law enforcement. Police-reform advocates may view evidence of disparities as evidence of bias, while defenders of law enforcement may attribute disparities to higher crime and poverty in non-White communities.

A final limitation of most police behavioral research to date is that, although several studies have deployed exemplary statistical methodologies to diagnose racial disparities in stops and searches of groups such as Black and Latinx men,[13] their methodologies take a great deal of research time, and so are not easily replicated on a multi-jurisdictional scale.[14]

The greatest barrier to timely analysis of policing data is often their uneven quality.[15] Police data collection is designed to serve the needs of law enforcement agencies, not researchers. Police data

12. For example, Terrill and Paoline conducted a retrospective study of three municipal police departments, finding that departments with less-restrictive policies about when force is permissible had lower incidence of reported use of force. *See* Terrill & Paoline, *supra* note 9. This methodology could not, of course, show whether a departmental change to a more restrictive use-of-force policy would reduce use of force incidence. Another 1997 single-department study found that a department's adoption of a less-restrictive policy with respect to use of oleoresin capsicum spray was associated with an increase in use of the spray. *See* E.V. Morabito & W.G. Doerner, *Police use of less-than-lethal force: Oleoresin Capsicum (OC) spray,* 20 POLICING 680, 691 (1997).

13. *See generally* Gelman, *supra* note 9; John Knowles et al., *Racial Bias in Motor Vehicle Searches: Theory and Evidence,* 109 J. POLIT. ECON. 203 (2001); Pierson 2020, *supra* note 10; Baumgartner, *Targeting*, *supra* note 9.

14. For a review and evaluation of various methodologies for analysis of policing data, see Greg Ridgeway & John MacDonald, *Methods for Assessing Racially Biased Policing, in* RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS 180 (Stephen K. Rice & Michael D. White, eds., 2010).

15. *See* Sharad Goel & Cheryl Phillips, *Police Data Suggests Black and Hispanic Drivers Are Searched More Often Than Whites*, SLATE (June 19, 2017, 12:38 PM), https://slate.com/technology/2017/06/statistical-analysis-of-data-from-20-states-suggests-evidence-of-racially-biased-policing.html [https://perma.cc/KF75-LPTB] (noting that among the 20 states that shared usable stop and search data analyzed in Pierson 2017, *supra* note 10*,* "the data came in myriad formats, requiring thousands of hours to clean and standardize"). *See also* Pierson 2020, *supra* note 10, at 2.

collection and reporting practices vary between law enforcement agencies, among work groups within an agency, and even between individual officers. Within the constraints of state laws that may govern their data collection obligations,[16] law enforcement agencies define for themselves what counts as a "stop" or use-of-force "incident" that their officers must record. Some departments may record vehicle stops but not pedestrian stops, may exclude some types of non-consensual police encounters from their definition of "stops," or may exempt certain types of force from their use-of-force reporting requirements. Even within a single work unit, data fields may be completed in inconsistent ways by different recorders.[17] Thus departmental datasets often provide an incomplete or inconsistent picture of what officers are doing in the field. Counts of vehicle stops or use-of-force incidents may not be directly comparable across departments within an agency, much less between agencies.

As a result, the data standardization that is an essential precondition for statistical analysis can be an arduous and time-consuming project that precludes the production of racial-disparity findings fast enough for police departments to respond to emerging disparities in a timely way.[18]

Despite all these difficulties, the need for timely, large-scale data analyses and reporting is urgent. Across the country, Black, Latinx, and Indigenous communities express concern that they are treated unfairly by police. The results of many recent, methodologically rigorous, multi-jurisdiction studies across the United States tend to support those concerns, finding systematic racial disparities that disfavor Black, Latinx, and other nonwhite persons in stops, searches, and use of force by police. Several studies have found that the more frequent stops experienced by Black and Latinx pedestrians and motorists (compared to their White counterparts) are not readily explained by legitimate law enforcement considerations,[19] and Black and other non-White persons are more likely than their White counterparts to be subjected to police use of force.[20]

16. *See, e.g.*, California AB 953; CT Racial Profiling Prevention Act.

17. *See* Goel & Phillips, *supra* note 15.

18. *Id. See generally* Michal S. Gal & Daniel L. Rubinfeld, *Data Standardization*, 94 NYU L. REV. 737, 750–52, 742 (2019) (noting that standardization facilitates analysis and interoperability of data, and that "data standardization can lead to smoother data flows, better machine learning, and easier policing in cases where rights are infringed or unjustified harms are created by data-fed algorithms").

19. *See generally* Pierson 2017, *supra* note 10; Pierson 2020, *supra* note 10; Baumgartner, *Racial Disparities, supra* note 9; Gelman, *supra* note 9.

20. *See* Kahn, *supra* note 9; PHILLIP A. GOFF ET AL., THE SCIENCE OF JUSTICE: RACE, ARRESTS, AND POLICE USE OF FORCE 4 (Ctr. for Policing Equity 2016) https://

But what if data could be collected, uploaded, and rigorously analyzed in a timely and sustained way, so that sites, sources, and trends in racial disparity could be identified and law enforcement agencies could respond to them in real time? A sophisticated system of data collection and analysis could create a "heat map" of racial disparity to shine a light on areas where police departments could change their practices with immediate effect. Police already analyze and respond to data about crime rates this way, by using COMPSTAT. COMPSTAT revolutionized policing by providing timely analysis of crime-rate developments. It is a performance management process for systematic, timely, ongoing measurement and data analysis with respect to crime rates and other outcomes important to police.[21] Although each department implements it in its own way, the shared objective of COMPSTAT is "to implement strong management and accountability within police departments to execute strategies based on robust data collection, to reduce and prevent crime."[22] By providing actionable, real-time information about crime rates and other outcomes that are important to law enforcement agencies, COMPSTAT allows for rapid deployment of resources to areas of need, using tactics that will prove effective, and measuring outcomes to evaluate that effectiveness.[23]

The COMPSTAT process—periodic quantitative review and analysis that allows for the identification of priority areas where timely changes to police behaviors is needed—has been shown to work. The spatial targeting of police interventions on localized crime "hotspots" has been found to be effective at reducing crime—at least in the relatively short term.[24] Even though police

policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf [https://perma.cc/E2GA-CRUM] [hereinafter GOFF ET. AL., THE SCIENCE OF JUSTICE]; Cody T. Ross, *A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County Level in the United States, 2011-2014*, PLOS ONE (Nov. 5, 2015), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0141854 [https://perma.cc/TL9G-GMS8].

21. COMPSTAT has been widely adopted by law enforcement agencies throughout the United States. *See, e.g.*, BUREAU OF JUST. ASSISTANCE & POLICE EXEC. RESEARCH FORUM, COMPSTAT; ITS ORIGINS, EVOLUTION, AND FUTURE IN LAW ENFORCEMENT AGENCIES 6 (2013), https://www.bja.gov/Publications/PERF-Compstat.pdf [https://perma.cc/3TZB-JXB4] [hereinafter PERF] (finding that "nearly all agencies embrace the principles" of COMPSTAT).

22. ROEDER, *supra* note 2, at 66.

23. PERF, *supra* note 21, at 2.

24. *See* Anthony A. Braga, *Hot spots policing and crime prevention: A systematic review of randomized controlled trials,* 1 J. EXPERIMENTAL CRIMINOLOGY 317 (2005); ROEDER, *supra* note 2, at 75 (finding that COMPSTAT was responsible for a 5 to 15% reduction in crime in cities that used it); Leslie W. Kennedy et al., *Risk Clus-*

officers have only limited control over the factors that may contribute to crime in a particular location, COMPSTAT has been found to be effective, reducing crime in cities that use it by about 5 to 15% within the first year of implementation.[25]

Unlike COMPSTAT, which targets crimes that are proximally caused by decisions and actions of people outside the law enforcement agency, a C4J would empower police commanders and leadership to identify racial disparities that result from the policies and practices of the police themselves. Given that a C4J could disaggregate disparities resulting from police behavior from those resulting from factors outside police control (such as poverty and differential crime rates), and that police management has greater control over the behavior of police officers than it has over lawbreakers, it seems plausible that a well-designed C4J could greatly reduce racial disparities in police behaviors such as stops, searches, and use of force.

It should be acknowledged that law enforcement agencies have been criticized for using COMPSTAT in self-interested ways, for example by adopting "those COMPSTAT elements that were most likely to confer legitimacy [and] . . . implementing them in ways that would minimize disruption to existing organizational routines."[26] Law enforcement agencies have tended not to utilize the potential of machine learning to identify and address priorities raised by members of the community.[27] In some cases, officers have responded to COMPSTAT accountability by downgrading or failing to report crimes in order to maintain the appearance of a sustained

---

ters, Hotspots, and Spatial Intelligence: Risk Terrain Modeling as an Algorithm for Police Resource Allocation Strategies, 27 J. QUANT. CRIMINOLOGY 339, 340-41 (2011). *See also* Lawrence W. Sherman et al., *Hot Spots of Predatory Crime: Routine Activities and the Criminology of Place*, 27 CRIMINOLOGY 27 (1989); Hyunseok Jang et al., *An Evaluation of CompStat's Effect on Crime: The Fort Worth Experience,* 13 POLICE Q. 387, 399, 406–07 (2010).

25. *See* ROEDER, *supra* note 2, at 75.

26. *See* Willis et al., *supra* note 2, at 147 (adding that COMPSTAT was "less successful when trying to provide a basis for rigorously assessing organizational performance, and when trying to change those structures and routines widely accepted as being 'appropriate'").

27. *See, e.g.*, JAMES J. WILLIS, FIRST-LINE SUPERVISION UNDER COMPSTAT AND COMMUNITY POLICING: LESSONS FROM SIX AGENCIES; A REPORT SUBMITTED TO THE OFFICE OF COMMUNITY ORIENTED POLICING SERVICES 11, 15–18 (2011) [hereinafter WILLIS, FIRST-LINE SUPERVISION] (finding that COMPSTAT had been deployed to address police departments' crime control priorities but "sergeants did not mention receiving information that helped them systematically identify community problems, determine priorities, and document results").

reduction in crime.[28] While faulty data inputs could trouble any data-driven system, Bayesian analytic techniques—or even some simple numeric triggers—can be used to identify questionable inputs based on population, previous contact, and arrest demographics.

Traditional COMPSTAT models have also been fairly criticized for a tendency to overlook the effects of targeted policing on the communities that experience high rates of police contact as a result of COMPSTAT-driven patrol deployment.[29] Several scholars have criticized the failures of COMPSTAT (and other algorithmic tools used in criminal justice) to account for the external effects of policing practices, such as racial disparity, mass incarceration, and the effects of law enforcement on families and communities, and urge the use of algorithmic tools to address these oversights.[30] A C4J would be designed to address exactly these concerns.

II.
C4J: HOW AND WHY IT WOULD WORK

C4J could deploy data-driven analyses to address a priority that most police departments have identified, but tend not to systematically assess: racial equity in police practices. But how? Scholars disagree about how racial disparities in police outcomes should be analyzed. Some of this debate is disciplinary, with sociologists often using more descriptive approaches like hierarchical count models,[31] and economists and political scientists preferring more inferential approaches such as formal difference-in-difference

28. *See, e.g.*, John A. Eterno & Eli B. Silverman, *The NYPD's Compstat: Compare Statistics or Compose Statistics?* 12 INT'L J. POLICE SCI. & MGMT. 426, 440 (2010) (suggesting that COMPSTAT may increase pressures for "unethical" crime-reporting practices designed to make it look like index crime is decreasing); DAVID N. KELLEY & SHARON L. MCCARTHY, THE REPORT OF THE CRIME REPORTING REVIEW COMMITTEE TO COMMISSIONER RAYMOND W. KELLY CONCERNING COMPSTAT AUDITING 47 (2013), *available at* https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/crime_reporting_review_committee_final_report_2013.pdf [https://perma.cc/EE23-FYYG] (finding evidence that "certain types of incidents may be downgraded as a matter of practice in *some* precincts").

29. *See, e.g.*, Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice,* 116 MICH. L. REV. 187, 198 (2017) (noting that COMPSTAT might allow police departments to "ge[t] better at managing their own resources in a cost-effective way," but does not assist police in identifying or addressing the external consequences of their behavior, such as the effects of their practices on bail and prosecutions, and thus on mass incarceration).

30. *See* Huq, *Racial Equity, supra* note 4, at 1069; Bierschbach & Bibas, *supra* note 29, at 215; *see generally* WILLIS, FIRST-LINE SUPERVISION, *supra* note 27.

31. *See* Gelman, *supra* note 9, at 817–18.

modeling.[32] These approaches differ in the degree to which they can make attributions to specific causes for racial disparities and in how readily available the data is to conduct the analyses—the more causal, the harder to find the data. But much of the substantive debate is how to deal with the possible endogenous effects of bias on the model. In other words, if police bias produces higher arrest rates for Black residents than White residents (independent of any differential rates of law breaking), then it is difficult to use arrest rates as a benchmark for estimating racial bias in subsequent outcomes such as police force.

This problem begins with a fundamental flaw in all crime data: not all crimes can be counted. All data about "crime" is actually data about crimes that police departments know about and count. So while an assault is a crime regardless of who commits it or where it is committed, it will not register in any crime dataset unless it is reported to police, or discovered by them.[33] Crimes and arrests, therefore, are influenced by who feels comfortable reporting, whose reports are believed and taken seriously, and who police believe they can productively arrest. Given significant racial disparities in trust of the police[34] and broad suspicions of police bias,[35] it is reasonable that researchers would balk at controlling for reported-crime rates in an assessment of racial disparity in police responses to crime. Because the stereotype of Black criminality is so pervasive among officers and citizens,[36] the use of arrests or reported-crime rates as a benchmark would tend to mask disparities in police be-

32. *See* Ridgeway & MacDonald, *supra* note 14.

33. Data on crime victimization also provides its own challenges. National estimates often undercount vulnerable groups, such as women and immigrants, and until recently may not have asked about contemporary forms of crime (e.g., identity theft) or may have asked in ways that tend to reduce the likelihood of response. Ronet Bachman & Bruce H. Taylor, *The Measurement of Family Violence and Rape by the Redesigned National Crime Victimization Survey*, 11 JUST. Q. 499 (1994).

34. *See generally* Tom R. Tyler, *Policing in Black and White: Ethnic Group Differences in Trust and Confidence in the Police,* 8 POLICE Q. 322 (2005); Christopher Muller & Daniel Schrage, *Mass Imprisonment and Trust in the Law,* 651 ANNALS AM. ACAD. POL. & SOC. SCI. 139 (2013)

35. *On Views of Race and Inequality, Blacks and Whites are Worlds Apart*, PEW RESEARCH CENTER (June 27, 2016), https://www.pewsocialtrends.org/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart/ [https://perma.cc/VHT7-QAJS] (finding that 84% of Black Americans and 50% of White Americans believe that police treat Black people less fairly than White people).

36. *See, e.g.*, Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing,* 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004); Phillip A. Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children,* 106 J. PERSONALITY & SOC. PSYCHOL. 526, 526 (2014).

havior: "if officers are in fact racially biased, then we cannot use their arrests to represent what we would expect of an unbiased police force."[37] Likewise, using calls for police assistance as a benchmark could underestimate racial disparities if, for example, members of the public are more likely to call police on Black or other non-White individuals than on White persons engaged in the same behavior.[38]

However, some kind of benchmark is needed, if only to address the powerful counter-hypothesis that the reason Black and Latinx people experience more frequent police contact is that they, or their communities, are involved in crime.[39] If the benchmarks against which we measure racial disparity in police stops or use of force tend to incorporate police biases or discrimination against these groups (as reported-crime rates and arrest rates do), this endogeneity makes our test a conservative one. In other words, if our analyses control for crime and poverty and still reveal significant disparities, it is far less plausible that those disparities result from factors entirely outside of police control. The extant literature using such benchmarks has robustly demonstrated that crime rates and neighborhood poverty tend not to fully explain such racial disparities.[40]

A C4J could thus provide a routine, conservative test that could identify the geographic locations or incident types that produce the widest disparities that cannot be explained by non-police factors—illuminating the locations or types of contact where a change to police policy or behavior would be most likely to make a difference.

The regular cadence of a C4J would identify priority areas, whether geographic or incident-based, where the portion of unexplained racial disparity is highest or where the trend is going in the wrong direction. These analyses would allow law enforcement agencies to identify where *their practices* might exacerbate racial disparity. This presents an opportunity to pinpoint changes to their policies, norms, and enforcement practices. Most importantly, they will be able to evaluate the effects of those changes in real time.

Like COMPSTAT (and unlike existing academic analyses of police behaviors), C4J could be ongoing and sustained, rather than

37. Ridgeway & MacDonald, *supra* note 14, at 185.

38. *Id.* at 186.

39. *See* Robert D. Crutchfield et al., *Racial and Ethnic Disparity and Criminal Justice: How Much is Too Much?*, 100 J. CRIM. L. & CRIMINOLOGY 903, 907 (2010); Ridgeway & MacDonald, *supra* note 14, at 185.

40. *See, e.g.*, Gelman, *supra* note 9; NAT'L ACADS. OF SCIS, ENG'G, & MED., *supra* note 3; GOFF ET AL., THE SCIENCE OF JUSTICE, *supra* note 20.

finite and retrospective as most research on race and policing, until now, has had to be. Like other disparities that are broad and pervasive, racial disparities are unlikely to be eliminated by one-time interventions at the most disparate locations. For example, in 2015, Salesforce audited the gender equity of its employees' salaries. Salesforce discovered they paid women less than men in the same jobs, and equalized the salaries.[41] Nonetheless, a follow-up audit the next year found that the pay gap had returned. In the year since the initial audit, Salesforce had acquired a number of companies with similar pay disparities. Where a form of injustice is widespread and pervasive outside an organization, it is likely to persist within the organization, even where leadership has sterling intentions and adopts best practices.[42] Racism, like sex discrimination—or crime, for that matter—cannot be solved with a one-time assessment. It requires a sustained commitment to evaluation for justice.

To conduct such analyses, of course, researchers need access to a sustained flow of police data from departments across the country, and the capacity to analyze and report on it. They need a nationwide database of stops, searches, and use of force incidents. The best candidate to date is the National Justice Database (NJD), which has grown for the past seven years at the Center for Policing Equity (CPE). Currently the NJD contains data from departments serving roughly one third of the U.S. population. The better the data and the broader its sources, the better analysts would be able to check for anomalies (such as officers, precincts, or departments attempting to game the system) and refine the utility of the analyses.

III.
C4J: EMPOWERING INSTITUTIONAL CHANGE

The theory of change that informs our work at the CPE can be broken into four parts. To make real progress toward just processes and outcomes, a law enforcement agency, or anyone else who wants to make real change, must meet four challenges: (1) the issue must be a shared priority; (2) change agents should have a shared understanding of the problem; (3) those empowered to make changes must have access to solutions they can implement; and (4) those empowered to make changes must have the resources to implement

41. Lesley Stahl, *Leading By Example to Close the Gender Pay Gap,* 60 MINUTES (Apr. 15, 2018), https://www.cbsnews.com/news/salesforce-ceo-marc-benioff-leading-by-example-to-close-the-gender-pay-gap/ [https://perma.cc/YJM4-JK9H].

42. *Id.*

them. The first challenge—the existence of a moral, fiscal, and democratic crisis in criminal justice—is now widely acknowledged. C4J would empower communities, law enforcement agencies, governments, and civil society to address the second, third, and fourth challenges.

First, the crisis: over the past five to ten years, a bipartisan consensus has emerged (though it is by no means unanimous) that our current practices of criminal justice yield consequences—extreme racial disparities and mass incarceration—that are unsustainable. Organizations from the Charles Koch Foundation to Black Lives Matter, from the ACLU to federal and state governments, recognize the moral urgency of this crisis.[43] All of these entities urge governments to act.[44]

But what should be done about this crisis? The first obstacle to meaningful solutions may be the lack of a shared understanding of the problem. Law enforcement agencies and community advocates do not necessarily agree on the nature or scope of the problem. Is the disparate representation of Black, Latinx, or Indigenous persons in stops, searches, arrests, and use of force justifiable, or does it reflect racial profiling? If there were no discrimination, what would the racial distribution of such policing activities look like? Furthermore, racism is too often framed as a problem of individual attitudes. For example, racial disparities are often attributed to implicit bias or explicit prejudice in individual hearts and minds.[45]

---

43. *See Criminal Justice Reform*, CHARLES KOCH FOUND. https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/ [https://perma.cc/ABR9-H76B]; SHANELLE MATTHEWS & MISKI NOOR, BLACK LIVES MATTER: CELEBRATING FOUR YEARS OF ORGANIZING TO PROTECT BLACK LIVES 6 (2017), https://drive.google.com/file/d/0B0pJEXffvS0uOHdJREJnZ2JJYTA/view [https://perma.cc/R2PF-CG2T]; *Criminal Law Reform*, ACLU, https://www.aclu.org/issues/criminal-law-reform [https://perma.cc/EK3T-6CY8].

44. *See, e.g.*, First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018); California AB 953; Connecticut Racial Profiling Prevention Act.

45. For literature exploring this idea, see Jill K. Swencionis & Phillip A. Goff, *The Psychological Science of Racial Bias and Policing,* 23 PSYCHOL., PUB. POL'Y, & L. 398 (2017); Phillip A. Goff, *Identity traps: How to think about race & policing,* 2 BEHAV. SCI. & POL'Y 11 (2016); Phillip A. Goff et al., *The Space Between Us: Stereotype Threat and Distance in Interracial Contexts,* 94 J. PERSONALITY & SOC. PSYCHOL. 91 (2008). Many commentators have explored the impact of implicit bias on racial disparities in policing. *See, e.g.,* Kirsten Weir, *Policing in Black and White,* 47 AM. PSYCHOL. ASSOC. MONITOR ON PSYCHOL. 36, 37 (2016); Fritz Risch, *After Atatiana Jefferson shooting, Fort Worth must confront institutional racism,* Fort Worth Star-Telegram (Oct. 17, 2019, 12:06 PM), https://www.star-telegram.com/opinion/opn-columns-blogs/other-voices/article236360323.html [https://perma.cc/4YKH-38SS] (defining "institutionalized racism and sexism" as "unconscious biases and assumptions"). Other commentators have noted that explicit bias may also contribute to such dis-

Thus disparities in traffic stops are often attributed to conscious or unconscious biases in the minds of individual police officers.[46]

While some disparate treatment of non-White persons by police is certainly attributable to officers' intentional or unconscious biases,[47] to locate disparate outcomes in officers' hearts and minds

---

parities. *See* Clarence Edwards, *Race and the Police,* NAT'L POLICE FOUND. BLOG, https://www.policefoundation.org/race-and-the-police/ [https://perma.cc/XU7A-66Y3] (noting that "negative attitudes and or stereotypes" and "personal prejudices or partiality" among police officers may affect the fairness of their behavior in low-income Black neighborhoods); Eoin O'Carroll, *When keepers of the peace harbor hate,* CHRISTIAN SCI. MONITOR (Sept. 11, 2019), https://www.csmonitor.com/USA/Justice/2019/0911/When-keepers-of-the-peace-harbor-hate (quoting an African-American homicide sergeant: "Most cops are not racist, she says, 'But if you think that there are no white supremacists, you're definitely wrong. You're definitely wrong.'").

46. *See, e.g.*, Daniel P. Mears et al., *Thinking fast, not slow: How cognitive biases may contribute to racial disparities in the use of force in police-citizen encounters,* 53 J. CRIM. JUST. 12 (2017); Baumgartner, *Racial Disparities, supra* note 9, at 26 ("With marching orders to make a lot of stops in order to find drug dealers, but without any clear indicators of who the drug dealers are . . . police officers utilize stereotypical criminal profiles to decide who gets stopped. In America, people of color and young Black men in particular are associated (either implicitly or explicitly) with criminality and thus more likely to arouse police suspicions. Crucially, even if for most officers these biases are slight, with only a small marginal likelihood of affecting their behavior, the cumulative effect could still be very great. That is, even if most officers are only slightly more likely to search a Black driver, on average Black drivers would experience many more searches than whites."). *See generally* Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process, in* 10 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 173, 183 (Leonard Berkowitz ed., 1977) (defining the "fundamental attribution error" as "the tendency for attributors to underestimate the impact of situational factors and to overestimate the role of dispositional factors in controlling behavior"); Andrew Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right,* 8 OHIO ST. J. CRIM. L. 7, 17 (2010) (describing the fundamental attribution error by which behaviors are attributed to individual character or disposition rather than to the situation the person is in) (citations omitted); L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment,* ARIZ. ST. L.J. 267, 269–71 (2012) (same). *But see* Kimberly B. Kahn & Karin D. Martin, *Policing and Race: Disparate Treatment, Perceptions, and Policy Responses,* 10 SOC. ISSUES & POL'Y REV. 82, 88 (2016) (pointing out the difficulty of disaggregating effects of individual officer prejudice from those of situational factors such as institutional policy choices to deploy more officers to low-income, non-white neighborhoods or to mandate stop and frisk programs that target young men of color).

47. *See, e.g.*, Goff et al., *The Space Between Us, supra* note 45, at 104 (finding that officers' fears of being stereotyped as racist predicted greater use of force); PHILLIP A. GOFF & KARIN D. MARTIN, UNITY BREEDS FAIRNESS: THE CONSORTIUM FOR POLICE LEADERSHIP IN EQUITY REPORT ON THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT (2012) (finding that officers' experience of a masculinity threat predicted greater use of force).

makes racism seem nearly insoluble. Police officers and executives, like anyone else, can become defensive when they feel that others are deeming them racist.[48] Reforming the heart or mind requires an intervention that may be almost mystical: education, a personal relationship, a religious experience, or a powerful encounter with art. If we locate racism in hearts and minds, the solution is salvation—difficult to accomplish individually and even harder at scale.[49] If racism boiled down to bigotry, our solution would have to be a sea-change in culture of a kind the American experiment has not accomplished in its 243 years.

When we define the problem of racial justice in policing as a question of behavior, rather than attitudes, we can align the definition of the problem between law enforcement and communities. Fortunately, we do not need to discern the biases of police officers or impugn their motives. It is policing *behaviors* that have to change, not officers' hearts or minds.

Luckily, police behaviors may be quite amenable to change. In earlier decades, some criminologists predicted that police management had limited ability to influence officers' behavior, since officers' prejudices and preferences might not align with managerial directives[50] and supervisors generally cannot directly observe officers' behavior in the field.[51] These predictions may have let man-

48. *See, e.g.*, Kim S. Buchanan & Phillip A. Goff, *Racist Stereotype Threat in Civil Rights Law,* 67 UCLA L. REV. (forthcoming 2020) (on file with authors); PHILLIP A. GOFF ET AL., PROTECTING EQUITY: THE CONSORTIUM FOR POLICE LEADERSHIP IN EQUITY REPORT ON THE SAN JOSE POLICE DEPARTMENT 5, 11 (2012) (finding that police officers who believed that community members stereotyped them as racist were more likely to use force).

49. Even the most successful experiments with implicit bias training have found only limited effects, over a short term. *See, e.g.*, Patricia G. Devine et al., *Long-term reduction in implicit race bias: A prejudice habit-breaking intervention,* 48 J. EXPERIMENTAL PSYCHOL. 1267, 1277 (2012).

50. *See, e.g.*, Fryer, *supra* note 9, at 33–40 (theorizing that racial disparity in use of force arises from the minds of police officers in one or both of two ways: either from the officer's assessment of the statistical likelihood that a person of a certain race may be dangerous, or from a taste-based preference for discrimination); JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC 40–44, 171 (1999) (arguing that officers are likely to comply with management directives where their "predispositions" favor the management policy, or where they fear a "credible threat of punishment").

51. *See, e.g.*, JOHN BREHM & SCOTT GATES, *supra* note 50; Steve Herbert, *Police Subculture Reconsidered,* 36 CRIMINOLOGY 343, 354 (1998); KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice,* 69 YALE L.J. 543, 552–53 (1960); JAMES Q. WILSON, VARIETIES OF POLICE

agement off the hook too easily. Criminal and constitutional laws, as well as institutional rules and norms, can and do shape the behavior of individual police officers on duty.[52]

For example, a 2018 study of NYPD stop-and-frisk data, by John MacDonald and Anthony Braga, found that 2013—the year of the *Floyd v. City of New York* decision invalidating NYPD's stop-and-frisk policy as unconstitutional[53]—marked a transformation of NYPD's notorious "stop and frisk" practice.

For years prior to 2013, researchers and advocates had documented severe racial disparities among the people stopped and frisked by police in New York City, and the neighborhoods in which such stops and searches occurred. Nearly all the searches involved Black or Latinx boys and young men, and the neighborhoods where the stop-and-frisks occurred were disproportionately low-income, Black, and Latinx.[54]

In 2013, NYPD stop-and-frisk policy was transformed. In March 2013, during the final stages of the *Floyd* litigation, the NYPD issued

---

BEHAVIOR: THE MANAGEMENT OF LAW & ORDER IN EIGHT COMMUNITIES 227 (1968); ELIZABETH REUSS-IANNI, TWO CULTURES OF POLICING: STREET COPS AND MANAGEMENT COPS (1983) (arguing that divergent subcultures of "management cops" and "street cops" lead to officers' divergence from managerial directives in the field).

52. John MacDonald & Anthony A. Braga, *Did Post-Floyd et al. Reforms Reduce Racial Disparities in NYPD Stop, Question, and Frisk Practices? An Exploratory Analysis Using External and Internal Benchmarks,* 36 JUST. Q. 954 (2019) (finding a steep decrease, from the later stages of the *Floyd* litigation through the end of 2015, in the number of stop-question-and-frisks, and finding that racial disparity of SQF stops (by race and by neighborhood demographics) was eliminated in 2014 and 2015, suggesting that court-ordered remedies could be effective). *See also* Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio*'s Pathway to Police Violence,* 64 UCLA L. REV. 1508 (2017) (arguing that constitutional laws permitting stop and question practices create opportunities for interactions that end in violence by police).

53. *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013) (finding that the NYPD stop-and-frisk policy violated the Fourth and Fourteenth Amendments); Floyd v. City of New York, 959 F. Supp. 2d 668, 688–91 (S.D.N.Y. 2013) (granting injunctive relief, appointing a monitor, and requiring the parties to enter into an agreement with respect to stop-and-frisk and racial profiling).

54. *See, e.g.*, Floyd, 959 F. Supp. 2d at 660 (finding that racial disparity in stop-and-frisks was widespread and intentional); MacDonald & Braga, *supra* note 52, at 976–77 (finding significant racial disparities in stop-and-frisk by neighborhood racial demographics and between similarly-situated individuals prior to 2012; the disparities declined in 2013 and were eliminated in 2014 and 2015); Gelman, *supra* note 9, at 821–22; Report of Plaintiffs' Expert Dr. Jeffrey Fagan, Ligon v. City of New York, 2012 WL 8282311 (2012) (No. 44-5); N.Y. CIVIL LIBERTIES UNION, STOP-AND-FRISK 2011: NYCLU BRIEFING (2011), https://www.nyclu.org/sites/default/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf [https://perma.cc/NU9Y-NPU6].

a department-wide rule requiring more detailed documentation of every stop-and-frisk;[55] in August, a federal district court held NYPD's stop-and-frisk practice unconstitutional, and ordered the city to enter an agreement supervised by a court-ordered monitor;[56] and in January 2014, the newly elected mayor, who had run on a platform of ending stop-and-frisk, announced an agreement with the *Floyd* plaintiffs to drop the city's appeal of the *Floyd* decision and cooperate with police, communities, and the court-ordered monitor to implement police reform.[57]

MacDonald and Braga analyzed NYPD's open-source data on stop-and-frisks from January 2012 through December 2015. As other analysts had observed, the racial disparity in 2012 was substantial. In 2013, the number of stop-and-frisks, and the racial disparity in such stops, declined steeply. In 2014 and 2015 (the last year for which they had data), MacDonald and Braga found that the racial disparity in such encounters had been eliminated.[58]

We can assume that the individual beliefs and prejudices of NYPD officers did not undergo any sudden transformation in 2013. Rather, the sudden and durable transformation of NYPD's stop-and-frisk practice demonstrates that departmental directives can and do affect officers' behavior, at least where officers understand that the formal changes are meant to signal meaningful changes in day-to-day policing practice. Racial justice in policing does not require changing how police officers feel. It requires changing how they act.

Once we define the problem of racial justice in policing in terms of behaviors, not attitudes, a third hurdle arises: what to do about it. Law enforcement leadership may want to reduce racial dis-

---

55. A March 5, 2013 memorandum from the Chief of Patrol to "Commanding Officer, All Patrol Boroughs," made it mandatory, "effective immediately" for officers who conducted pedestrian stops to complete the narrative section of UF-250 form, describing the circumstances and reasons for the stop, rather than simply checking boxes. *See* Ryan Devereaux, *NYPD stop-and-frisk memo revealed in civil rights court battle,* GUARDIAN (Mar. 27, 2013, 6:34 PM), https://www.theguardian.com/world/2013/mar/27/nypd-stop-and-frisk-memo [https://perma.cc/5KWC-33JT]; *NYPD Reveals Memo Revising Stop-and-Frisk Procedure*, CTR. FOR CONSTITUTIONAL RTS. (Mar. 27, 2013), https://ccrjustice.org/home/press-center/press-releases/nypd-reveals-memo-revising-stop-and-frisk-procedure [https://perma.cc/68AW-WA4R].

56. Floyd, 959 F. Supp. 2d at 688–91.

57. Press Release, City of New York, *Mayor de Blasio Announces Agreement in Landmark Stop-and-Frisk Case* (Jan. 30, 2014), https://www1.nyc.gov/office-of-the-mayor/news/726-14/mayor-de-blasio-agreement-landmark-stop-and-frisk-case#/0 [https://perma.cc/AB3V-N5YL].

58. MacDonald & Braga, *supra* note 52, at 977–80.

parity in stops, searches, and use of force, but how?[59] Without knowing the sources of racial disparity, they lack an empirically-informed strategy for changing it. Which disparities are the most amenable to changes in policing practice? Where do they arise? And which changes, exactly, should police leadership make?

Fortunately, the behavior of police officers is readily amenable to objective measurement. Stops, searches, yield rates, arrest rates, and use of force can be measured, analyzed, and compared. The location of the encounters, the race of the person, the reasons for the encounter, and its results can all be tracked in real time. Our algorithm will assess police behaviors against their public safety objectives—for example by comparing search rates to the rates at which searches yield contraband, or tracking the charges filed against persons who are subjected to police use of force. Everyone can see what's being counted, and what's being measured can be changed.

Once C4J identifies the locations where disparity is most likely to result from police behaviors, the solutions would likely arise in the same way that they do in traditional COMPSTAT: police and communities would collaborate on a diagnosis and a solution. It could be as simple as choosing not to enforce quality-of-life offenses in a particular neighborhood, or as complex as a multi-agency collaboration to deal with homelessness, as the Minneapolis Police Department (MPD) recently did to address CPE's finding that a disproportionate number of MPD use of force incidents involved homeless people. After preliminary analyses revealed homelessness as a risk factor for force, MPD worked with the city to provide services to the homeless before law enforcement was called to respond. The result was a drop in use of force of roughly 18% during the three years CPE was active in Minneapolis.[60] While we cannot make strong causal inferences from these observations, this reduction followed a three-year uptick in MPD use of force during the three years prior to our active involvement (2013–2015).[61] This suggests that the reduction in use of force during our intervention was unlikely to have been wholly unrelated to the shift in MPD policy.

59. On the difficulty of predicting the consequences of policing interventions, see generally David M. Jaros, *Perfecting Criminal Markets*, 112 COLUM. L. REV. 1947, 1983–85 (2012); Brandon C. Welsh & David P. Farrington, *Monetary Costs and Benefits of Crime Prevention Programs*, 27 CRIME & JUST. 305, 345–46 (2000).

60. Use of force incidents recorded by Minneapolis Police declined from 951 in 2016 to 778 in 2018, an 18.2% decrease. *Minneapolis Use of Force Incident Information*, MINNEAPOLIS POLICE DEP'T https://www.insidempd.com/datadashboard/ [https://perma.cc/JC35-739H] (last accessed March 23, 2020).

61. *See id.*

Because C4J would use data that law enforcement agencies already collect, its implementation would not require police departments to invest in additional data-collection training for their officers, which might otherwise pose a significant barrier to law enforcement adoption. While data quality would limit the number of departments who could benefit from the service, data engineers could help solve some existing data capture issues across law enforcement by creating software to clean, audit, and standardize police data automatically. This process could also produce best practices for new data capture protocols, which could help advance the national movement toward standardizing data collection.[62] Law enforcement agencies will need a research partner capable of gathering data from the U.S. Census and American Community Survey and integrating those with police data. This process is both labor intensive and time consuming, but is one that technologists could aid greatly by automating the capture, cleaning, auditing, and standardization of law enforcement data.

Aided by these kinds of technological innovations, C4J could offer a cost-effective, implementable solution that aligns the definition of the problem between law enforcement and communities, and empowers law enforcement agencies to take action to mitigate it. Whether or not C4J yields the dramatic effects seen in Minneapolis, it would illuminate the scope and sources of racial disparity, align police and community understandings of how law enforcement practices affect communities, and evaluate the effectiveness of disparity-reduction interventions. If we care enough to denounce racial injustice, we must care enough to measure it and to evaluate whether the actions we take to reduce racial disparity are doing the job.

CONCLUSION

Despite the distance between current national standards of police data capture and the ideal articulated in this essay, the notion of measuring the portion of racial disparity most likely associated with law enforcement policy and behavior is one that solves a number of intractable problems in the current crisis of police legiti-

62. *See* MARIE PRYOR ET AL., GUIDEBOOK TO POLICE DATA COLLECTION IN CALIFORNIA (2019) (manuscript on file with authors); Racial and Identity Profiling Act of 2015, CAL. GOV'T CODE § 12525.5 (West 2015) (requiring detailed data collection for every stop conducted by state or local police officers, and requiring annual reporting of such data); CAL. GOV'T CODE § 12525.2 (West 2015) (requiring data collection on use of force by and against state or local police officers); 21ST CENTURY POLICING TASK FORCE REPORT, *supra* note 4, at 13.

macy. Members of affected communities are concerned that police do not treat them fairly. Federal recommendations from the Task Force on 21st Century Policing urge departments to deploy data collection and analysis to achieve equity and legitimacy. The momentum in police accountability is towards data-driven metrics, yet the existing science of racial disparities in policing has yet to develop ways to hold police accountable for inequalities that are within their capacity to control. The biggest question about a C4J may be: why has it not happened yet?

A STEP IN THE RIGHT DIRECTION ON CRIMINAL JUSTICE REFORM

*KARA GOTSCH AND MARC MAUER**

On the eve of the longest government shutdown in U.S. history—and days before Christmas 2018—an unlikely scene played out in the Oval Office. Surrounded by Republican and Democratic members of Congress, President Donald Trump aired his frustration with Senate Democrats who were holding up funding for one of his central campaign promises: the construction of a southern border wall that he asserted would stop the flow of illegal drugs into the United States and curb gang activity.[1] Moments later, he signed bipartisan criminal justice reform legislation that would expand prison rehabilitation programs and reduce sentences for federal drug offenses.[2] The praise and congratulations that swept the room were emotional and universal.[3]

That Trump, who campaigned as a tough on crime candidate,[4] was now endorsing a significant reduction in penalties, including for people convicted of repeat offenses, was surprising and noteworthy. Jared Kushner, the President's son-in-law and the White House's chief proponent of the First Step Act, acknowledged the unlikely circumstance:

---

* Kara Gotsch is the Deputy Director, and Marc Mauer is a Senior Advisor, of The Sentencing Project.

1. *See* Press Release, White House, Remarks by President Trump at Signing Ceremony for S. 756, the "FIRST STEP Act of 2018" *and* H.R. 6964, the "Juvenile Justice Reform Act of 2018" (Dec. 21, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-ceremony-s-756-first-step-act-2018-h-r-6964-juvenile-justice-reform-act-2018/ [https://perma.cc/MC7U-F2E9] [hereinafter Remarks].

2. *See* Remarks, *supra* note 1.

3. Both Republicans—Senator Ted Cruz and Vice President Mike Pence—and Democrats—Senate Minority Leader Chuck Schumer—thanked the President. *See* Remarks, *supra* note 1. Senator Mike Lee thanked Donald Trump and added that it was "almost hard for [him] to speak about this without being emotional." *Id*.

4. Ayesha Rascoe, *How Trump Went From 'Tough On Crime' To 'Second Chance' For Felons*, NPR (Dec. 17, 2018), https://www.npr.org/2018/12/17/676771335/how-trump-went-from-tough-on-crime-to-second-chance-for-felons [https://perma.cc/Q5G2-9D3S] (noting that Trump made "'tough on crime' one of his calling cards," and had, for instance, previously called for the death penalty for drug smugglers).

> [E]veryone kept asking me, "Will the President be on board? Will the President be on board?" And I said, "Look, I don't know." I mean, this was not an issue that, you know, you'd spent time with. It was not relevant to the real estate industry that you were in before.[5]

Trump's decision to support the First Step Act does not represent an evolution in his thinking about crime and punishment. Indeed, less than two months after the signing ceremony where he urged second chances for people in prison and lamented the excesses of decades in prison for nonviolent offenses, Trump praised China for its willingness to execute its citizens for drug trafficking offenses.[6] Trump claimed Chinese President Xi Jinping credited the extreme penalty for the apparent low incidence of drug use in China.[7] Trump admonished the U.S. response to drug selling, suggesting that those who committed drug offenses here were simply "fined."[8]

Understanding the origins and the passage of the First Step Act requires more than simply parsing the complicated ideology of the Trump administration. Complex bipartisan legislation—particularly on criminal justice reform—does not evolve quickly. It requires years of building pressure from the grassroots, developing models of reform, negotiation, and compromise.

This essay will provide an overview of the politics that led to adoption of the First Step Act, along with an assessment of its accomplishments and challenges. It concludes with a discussion of lessons learned from the Act's passage and implications for the movement challenging mass incarceration.

I.
THE CONTEXT FOR CRIMINAL JUSTICE REFORM

After forty years of unrelenting growth in U.S. incarceration levels, the country has finally seen a reduction in the prison population. Nationally, between 2009 and 2017, the number of people in prison fell 7% to 1.4 million.[9] This modest outcome is the result of

---

5. Remarks, *supra* note 1.

6. *See NBC News*, *Trump 'Most Excited' About Death Penalty for Drug Dealers in China Trade Deal* (NBC television broadcast Feb. 15, 2019), https://www.nbcnews.com/video/trump-most-excited-about-death-penalty-for-drug-dealers-in-china-trade-deal-1443276355542 [https://perma.cc/4PJQ-F3U9].

7. *See id.*

8. *Id.*

9. *See* Nazgol Ghandnoosh, *Can We Wait 75 Years to Cut the Prison Population in Half?*, SENTENCING PROJECT 1 (Mar. 8, 2018), https://www.sentencingproject.org/

nationwide changes at the state, local, and federal level to sentencing, corrections, and reentry policies, as well as law enforcement and prosecutorial decision making.[10] As of 2017, five states had achieved prison population reductions of at least 30% of their peak population.[11] Even several states that have historically claimed the country's highest rates of incarceration have achieved double-digit percentage reductions in their prison populations since reaching their peak levels.[12] As this criminal justice reform has occurred, overall crime rates have continued to decline and are at historic lows.[13]

The Federal Bureau of Prisons population, the largest in the country, peaked in 2013 at 219,000.[14] As of November 2019, the population was just over 176,000 people.[15]

A combination of reforms contributed to this decline. Most significant were a series of actions taken by the U.S. Sentencing Commission to reduce the sentencing guidelines—first for crack cocaine offenses and later for all drug offenses. Each drug guideline amendment was made retroactive so that tens of thousands of

---

publications/can-wait-75-years-cut-prison-population-half/ [https://perma.cc/E9ND-ZGYX]; Nazgol Ghandnoosh, *U.S. Prison Population Trends: Massive Buildup and Modest Decline*, SENTENCING PROJECT 1 (Sept. 17, 2019), https://www.sentencingproject.org/publications/u-s-prison-population-trends-massive-buildup-and-modest-decline/ [https://perma.cc/59ZF-YMME] [hereinafter Ghandnoosh, *U.S. Prison Population Trends*].

10. Dennis Schrantz et al., *Decarceration Strategies: How 5 States Achieved Substantial Prison Population Reductions*, SENTENCING PROJECT 5–8 (Sept. 5, 2018) https://www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions/ [https://perma.cc/EPP9-EMAQ]; *Diversion and Alternatives to Prosecution*, FAIR & JUST PROSECUTION https://fairandjustprosecution.org/issues/diversion-and-alternatives-to-incarceration/ [https://perma.cc/C3GS-N92W].

11. Ghandnoosh, *U.S. Prison Population Trends*, *supra* note 9, at 1.

12. *Id.* (noting that Mississippi and South Carolina have seen declines in their prison populations).

13. *See, e.g.,* Press Release, Brennan Center for Justice, Crime Remains at Historic Lows in America (June 12, 2018), https://www.brennancenter.org/our-work/analysis-opinion/crime-remains-historic-lows-america [https://perma.cc/VQ87-RKYN] (reporting "consistently low" crime rates in the 30 largest American cities); John Gramlich, *5 Facts About Crime in the U.S.*, PEW RSCH. CTR. (Oct. 17, 2019), https://www.pewresearch.org/fact-tank/2019/10/17/facts-about-crime-in-the-u-s/ [https://perma.cc/G568-8L8T] ("The two most commonly cited sources of crime statistics in the U.S. both show a substantial decline in the violent crime rate since it peaked in the early 1990s.").

14. *Statistics*, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops (last visited Nov. 15, 2019) [https://perma.cc/WU5R-J5KL].

15. *Id.*

people in prison had their sentences reduced by several years.[16] The passage of the Fair Sentencing Act, which Congress enacted in 2010, also played an important role in spurring a reduction in the prison population.[17]

The Fair Sentencing Act addressed a very specific issue: the 100-to-1 sentencing disparity between crack and powder cocaine. The penalties for crack cocaine offenses were established by the Anti-Drug Abuse Acts of 1986 and 1988. Under the 1980s bills, convictions for simple possession or possession with intent to distribute as little as five grams of crack cocaine—the equivalent of two sugar packets—were subject to a five-year mandatory minimum.[18] Fifty grams of crack cocaine—the weight of an average candy bar—would trigger a ten-year mandatory minimum for a first-time offense.[19] Distribution of powder cocaine, a substance pharmacologically identical to crack, required 100 times the quantity of crack to trigger similar mandatory minimum penalties.[20]

This 100-to-1 drug quantity disparity galvanized racial justice advocates for decades because of the profound racial disparity associated with the sentencing scheme. African Americans comprised the overwhelming majority of people convicted of crack cocaine offenses in federal court, while whites and Latinos accounted for the bulk of powder cocaine convictions.[21] Research and recommendations by the U.S. Sentencing Commission criticized the disparity, noting in 2002 that crack cocaine penalties "apply most often to offenders who perform low-level trafficking functions, wield little decisionmaking [sic] authority, and have limited responsibility."[22]

---

16. *See* Amendments to the Sentencing Guidelines, U.S. SENTENCING COMM'N (2014); Sari Horwitz, *Justice Department Set To Free 6,000 Prisoners, Largest One-time Release*, WASH. POST (Oct. 6, 2015), http://www.washingtonpost.com/world/national-security/justice-department-about-to-free-6000-prisoners-largest-one-time-release/2015/10/06/961f4c9a-6ba2-11e5-aa5b-f78a98956699_story.html [https://perma.cc/S2TF-CYLZ].

17. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 and 28 U.S.C.).

18. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-2 § 1002 (1986); Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of 21 U.S.C.).

19. *Id.*

20. *See* 21 U.S.C. § 841(b) (2000).

21. *See* U.S. SENTENCING COMM'N, SPEC. REP. TO CONG.: COCAINE AND FED. SENTENCING POLICY 93, 152 (1995) (issued after a review of cocaine penalties as directed by Pub. L. No. 103-322, § 280006).

22. U.S. SENTENCING COMM'N, REP. TO CONG.: COCAINE AND FED. SENTENCING POLICY 99–100 (2002).

A robust advocacy campaign to dismantle the crack cocaine disparity began in 2006 and eventually secured the lead sponsorship of Senator Joseph Biden on a bill to eliminate the quantity-based penalty differences between the two forms of cocaine.[23] While the bill never passed, Biden continued to prioritize reform after he assumed the Vice Presidency, eventually encouraging President Barack Obama to take the issue on as a central feature of his civil rights agenda.[24]

Senator Richard Durbin took over Biden's bill in the Senate and, with support from the White House, moved aggressively to advance the bill.[25] Unable to find unanimous support among Democratic members on the Senate Judiciary Committee, Durbin began negotiations with Republicans on a compromise proposal that ultimately reduced the quantity disparity between crack and powder cocaine to 18-to-1.[26] Republicans and Democrats agreed that the disproportionate harm caused to African Americans and the distrust it perpetuated in the criminal justice system made change essential.[27] The Fair Sentencing Act passed overwhelmingly in Congress and was signed into law in August of 2010. However, its provisions did not have retroactive effect.[28]

23. *See Federal Cocaine Sentencing Laws: Reforming The 100-To-1 Crack/Powder Disparity: Hearing Before the S. Subcomm. on Crime & Drugs*, 110th Cong. (2008) (statement of Sen. Joe Biden, Chairman, S. Comm. on Crime & Drugs) ("After 21 years of study and review, these facts have convinced me that the 100-to-1 disparity cannot be supported and that the penalties for crack and powder cocaine trafficking merit similar treatment under the law.").

24. *See* Ian S. Thompson, *Now is the Time to Crack the Disparity Once and For All!*, ACLU (Nov. 13, 2008, 6:52 PM), https://www.aclu.org/blog/smart-justice/mass-incarceration/now-time-crack-disparity-once-and-all [https://perma.cc/LTY4-4A4Q] (noting that the Barack Obama and Joe Biden's "transition agenda" included support for ending the disparity).

25. *See* Press Release, Senator Dick Durbin, Durbin's Fair Sentencing Act Passed By House, Sent To President For Signature (July 28, 2010), https://www.durbin.senate.gov/newsroom/press-releases/durbins-fair-sentencing-act-passed-by-house-sent-to-president-for-signature [https://perma.cc/NV67-W98J].

26. *Id.*

27. *See Obama signs bill reducing cocaine sentencing gap*, CNN (Aug. 3, 2010, 4:45 PM), https://www.cnn.com/2010/POLITICS/08/03/fair.sentencing/index.html [https://perma.cc/D48C-DK25] (noting that "several key Republicans . . . pushed for the change").

28. *See* Press Release, Senator Dick Durbin, *supra* note 25.

II.
THE LONG ROAD TO THE FIRST STEP ACT

The bipartisan nature of the crack cocaine compromise made passage a significant milestone and inspired additional federal bipartisan proposals. In the years that followed, Senator Durbin teamed up with Republican Senator Mike Lee to introduce the Smarter Sentencing Act, which would cut mandatory minimum sentences for all drugs in half.[29] That bill passed out of the Senate Judiciary Committee but failed to advance further in the Democratic Senate for fear of the political consequences for Democrats running for reelection in 2014.[30] At the time, the House of Representatives had already flipped to Republican control.[31]

Despite the precaution, Democrats lost control of the Senate and a new tough on crime chairman, Charles Grassley, took over the Senate Judiciary Committee.[32] Grassley was not a fan of the Smarter Sentencing Act and spent the first few months of 2015 blasting the "leniency industrial complex" in several Senate floor speeches.[33] By April of that year, however, increasing mobilization of faith leaders in Grassley's home state of Iowa would help shift his thinking. He was presented with a letter signed by 130 faith leaders from across the state urging him to allow sentencing reform legislation to progress.[34] Three Bishops—a Roman Catholic, a United Methodist, and a Lutheran—published an op-ed in the *Des Moines Register* highlighting the letter and calling for change. They wrote:

> As Iowans, we are privileged to have Senator Grassley hold unique influence in the trajectory of America's sentencing policy. We hope he will use this authority to enact drug sentencing reforms that are more appropriate, will reduce the prison pop-

29. *See* Smarter Sentencing Act of 2014, S.1410, 113th Cong. (2013–2014).

30. *Id.*

31. *See* Dan Robert et al., *Republicans win majority in US Senate, giving party full control of Congress*, GUARDIAN (Nov. 5, 2014), https://www.theguardian.com/us-news/2014/nov/04/us-midterm-elections-republican-wins-senate-takeover [https://perma.cc/V2VR-GSG6].

32. *See Committee Assignments*, SEN. CHUCK GRASSLEY, https://www.grassley.senate.gov/about/committee-assignments [https://perma.cc/V86S-SGF9] (last visited Oct. 17, 2020).

33. Kara Gotsch, *Faith Leaders Influencing the Debate on Drug Sentencing*, JUSTICE UNBOUND (June 5, 2015), https://justiceunbound.org/faith-leaders-influencing-the-debate-on-drug-sentencing/ [https://perma.cc/PRE5-9B4Z].

34. *See* Julius Trimble et al., *Bishops call on Grassley to reform sentencing*, DES MOINES REGISTER (Apr. 30, 2015, 11:07 PM), https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2015/05/01/bishops-call-grassley-reform-sentencing/26682887/ [https://perma.cc/Z2CG-AG4N].

> ulation and take into account the complicated factors that lead people to sell drugs. . . . [W]e pray for the thousands of Iowans still behind bars, their families and the many thousands more who will be subject to extreme sentencing policies in years to come if lawmakers choose not to act.[35]

The continued coverage of the controversy by Iowan news outlets undoubtedly influenced Grassley's next steps on criminal justice reform. Within weeks, Grassley convened a bipartisan group of senators who had previously signaled their interest in advancing criminal justice reform legislation during the 114th Congress.[36] Most prominent in the negotiations were Senators Durbin and Lee—who sought significant changes to drug mandatory minimum sentences—and Senators John Cornyn and Sheldon Whitehouse—who had introduced a bipartisan bill, the CORRECTIONS Act, to expand rehabilitative programming in federal prisons.[37] The bill also created a system for awarding earned time credits to individuals who completed prison programming. These credits would allow beneficiaries to transition from prison to a halfway house or home confinement earlier than otherwise contemplated at sentencing.[38]

After months of negotiation, Grassley introduced the Sentencing Reform and Corrections Act, a modified combination of the Smarter Sentencing Act and the CORRECTIONS Act. The bill quickly passed out of the Senate Judiciary Committee on a bipartisan vote, though five Republican committee members opposed the measure.[39] Despite repeated acknowledgements at the time by Majority Leader Mitch McConnell regarding the consensus on Capitol Hill for criminal justice reform, and regular urgings by his number two (Cornyn), the Sentencing Reform and Corrections Act never advanced to a floor vote.[40] Similar bipartisan legislation in the

35. *Id.*

36. *See* Lauren Fox & National Journal, *The Story Behind a Breakthrough: How a Team of Senators Convinced Chuck Grassley on Justice Reform*, ATLANTIC (Oct. 1, 2015), https://www.theatlantic.com/politics/archive/2015/10/the-story-behind-a-breakthrough-how-a-team-of-senators-convinced-chuck-grassley-on-justice-reform/446253/ [https://perma.cc/94EU-2HY9].

37. *See* Corrections Act, S. 467, 114th Cong. (2015–2016).

38. *Id.*

39. Authors' observation at Senate vote.

40. *See* Carl Hulse, Why the Senate Couldn't Pass a Crime Bill Both Parties Backed, N.Y. TIMES (Sept. 16, 2016), https://www.nytimes.com/2016/09/17/us/politics/senate-dysfunction-blocks-bipartisan-criminal-justice-overhaul.html [https://perma.cc/D3J6-FFWE].

House also failed to gain sufficient traction to move beyond committee approval.[41]

When Trump took office the hopes for passing criminal justice reform legislation diminished.[42] Even among some initial Senate champions of the Sentencing Reform and Corrections Act, the belief was that the best hope to pass reform was confined to legislation that covered only prison programming, rather than programming *and* sentencing reform. Indeed, Cornyn choose not to cosponsor the Sentencing Reform and Corrections Act in the 115th Congress, keeping instead to his CORRECTIONS Act, despite his strong advocacy for the broader bill in 2016.[43] Grassley, on the other hand, remained steadfast. Despite initial signals from his Republican colleagues and the White House that the President was not willing to support sentencing reform, Grassley repeatedly insisted that criminal justice legislation that failed to address sentencing would not move through his committee.[44]

Meanwhile, in the House of Representatives, Republican Representative Doug Collins of Georgia and Democratic Representative Hakeem Jeffries of New York joined together to update and introduce prison reform legislation previously sponsored by Jason Chaffetz, who retired from the House of Representatives in 2017. The bill was renamed the Prison Reform and Redemption Act but would eventually be reintroduced as the FIRST STEP Act, or the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act.[45] Despite previous bipartisan agreements that

41. *See* Sentencing Reform Act of 2015, H.R. 3713, 114th Cong. (2015–2016); Corrections and Recidivism Reduction Act of 2016, H.R. 759, 114th Cong. (2015–2016).

42. *See, e.g.*, Jamiles Lartey, *Obama Made Progress on Criminal Justice Reform. Will It Survive the Next President?*, GUARDIAN (Nov. 14, 2016, 6:15 PM), https://www.theguardian.com/us-news/2016/nov/14/barack-obama-criminal-justice-reform-prison-sentencing-police [https://perma.cc/EY69-WRDY] ("And now, as the nation prepares for President Donald Trump, who ran a campaign openly hostile to the prospect of progressive criminal justice reform, there's ample reason to fear that whatever progress has been made could be lost in the blink of an eye.").

43. *See* Sentencing Reform and Corrections Act of 2015, S.2123, 114th Cong. (2015–2016) (listing cosponsors, Cornyn not among them).

44. *See, e.g.*, Press Release, Senator Chuck Grassley, Sentencing Reform Means More Resources for Law Enforcement, Less Burdens on Taxpayers (Apr. 30, 2018), https://www.grassley.senate.gov/news/news-releases/grassley-sentencing-reform-means-more-resources-law-enforcement-less-burdens-0 [https://perma.cc/2L4Y-2RFJ].

45. *See* Prison Reform and Redemption Act of 2017, H.R. 3356, 115th Cong., 1st Sess. (2017–2018); FIRST STEP Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 115th Cong. (2017–2018).

prison and sentencing reform would move together, the House bill did not include the latter.[46] Under the proposed House legislation, each person in federal custody would be assessed and assigned a risk level, either minimal, low, medium, or high. One's risk level determined how much earned time could be accrued for participation in prison programming and when those credits could be redeemed to allow for earlier transition to community corrections (i.e., halfway houses or home confinement).[47]

Progressive advocates, including the ACLU, Leadership Conference for Civil and Human Rights, and Human Rights Watch, expressed their frustrations with the House strategy in letters and meetings.[48] Progressive advocates raised concerns about the potential racial disparity associated with the legislation's risk assessment tool,[49] and objected to the long list of categories of people disqualified from earned time credits because of their offense type, including those convicted of immigration and violent offenses.[50] Without the promise of also moving *sentencing reform* proposals through the House, most progressive organizations opposed or did not endorse passage of the First Step Act.[51]

Despite the strong objections to the First Step Act from traditional proponents of criminal justice reform, the bill was able to advance because of the support of the White House and the strong engagement of Jared Kushner. Kushner, who had been marked by his father's incarceration years earlier, was dogged in lining up bi-

46. H.R. 3356.

47. *See Vote No on the First Step Act*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (May 21, 2018), https://civilrights.org/resource/vote-no-first-step-act-2/ (arguing that the earned time credits system risks [https://perma.cc/F9JS-73K6] ("embedding deep racial and class bias into decisions that heavily impact the lives and futures of federal prisoners and their families").

48. *See id.* (including the omission of sentencing reform among its concerns with the First Step Act).

49. For an explanation of the potential for racial disparity, *see* Risk Assessment Issues, *infra* pp. 12–13.

50. *See* LEADERSHIP CONF. ON CIV. & HUM. RTS., *supra* note 47 (stressing that "[c]ategorically excluding entire groups of people from receiving early-release credits will undermine efforts to reduce prison overcrowding and improve public safety . . . ").

51. *See, e.g.*, *id.*; Eugene Robinson, *In Prison Reform, a Little of Something is Better Than a Lot of Nothing*, WASH. POST (May 28, 2018, 5:21 PM), https://www.washingtonpost.com/opinions/in-prison-reform-a-little-of-something-is-better-than-a-lot-of-nothing/2018/05/28/d3862c6e-605c-11e8-9ee3-49d6d4814c4c_story.html [https://perma.cc/8HSV-JX8J] (noting that "[p]rogressives are sharply divided on the measure, mostly because of what it doesn't do [i.e. reforming sentencing laws]").

partisan supporters for prison reform.[52] He connected with Van Jones, a CNN political personality and cofounder of #Cut50, who was likewise committed to securing bipartisan passage of the bill.[53] The early coalition of supporters for the First Step Act also included conservatively aligned groups, such as Prison Fellowship and Right on Crime, as well as Mark Holden, the General Counsel for Koch Industries.[54] With all of this support, the bill passed the House resoundingly, 360 to 59.[55]

With House passage, and increasing White House engagement, the pressure on Grassley to move forward with the prison reform bill was intense. A meeting between one of the authors and Senator Durbin revealed that while Grassley began dialogue with the White House, he simultaneously recommitted his intentions to only move forward a bill that incorporated the sentencing reforms he and Durbin had negotiated years earlier. In November, Trump finally announced his support for the inclusion of limited sentencing reforms as part of the First Step Act package.[56] The changes to the bill, including tweaks to the prison reform provisions, were enough to win over most advocates participating in the Justice Roundtable, a progressive coalition that includes the ACLU and The Sentencing

52. *See* Annie Karni, *The Senate Passed the Criminal Justice Bill. For Jared Kushner, It's a Personal Issue and a Rare Victory*, N.Y. TIMES (Dec. 14, 2018), https://www.nytimes.com/2018/12/14/us/politics/jared-kushner-criminal-justice-bill.html [https://perma.cc/8KTS-DYAX] (discussing Kushner's role in passing the bill).

53. *See* Brian Bennett, *How Unlikely Allies Got Prison Reform Done—With an Assist From Kim Kardashian West*, TIME (Dec. 21, 2018), https://time.com/5486560/prison-reform-jared-kushner-kim-kardashian-west/ [https://perma.cc/FCJ5-3WV3] (reporting on the key role Van Jones played in the fight to pass the bill).

54. *See, e.g.*, Emily Greene, *What is the First Step Act?,* PRISON FELLOWSHIP, https://www.prisonfellowship.org/2019/01/what-is-the-first-step-act/ [https://perma.cc/374X-TDCX]; Press Release, Senator Chuck Grassley, Diverse Group of Organizations Endorse Bipartisan First Step Act (Nov. 21, 2018), https://www.grassley.senate.gov/news/news-releases/diverse-group-organizations-endorse-bipartisan-first-step-act [https://perma.cc/TL6Y-MXF8] (listing Right on Crime among the bill's supporters); *Koch-Backed Criminal Justice Reform Bill To Reach Senate*, NPR (Dec. 16, 2018, 5:37 PM), https://www.npr.org/2018/12/16/677252467/koch-backed-criminal-justice-reform-bill-to-reach-senate [https://perma.cc/RP2E-DJJ6].

55. *See* FIRST STEP Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 115th Cong. (2017–2018).

56. *See* Jamiles Lartey, *Trump Endorses Bipartisan Criminal Justice Reform Bill*, GUARDIAN (Nov. 14, 2018, 5:42 PM), https://www.theguardian.com/us-news/2018/nov/14/trump-endorses-criminal-justice-reform-bill-first-step-act [https://perma.cc/D2UG-VC5D].

Project.[57] Notable exceptions included organizations led and founded by formerly incarcerated people, JustLeadership USA and the National Council of Incarcerated and Formerly Incarcerated Women and Girls.[58]

Despite the president's support, a month of contentious political debate ensued over the legislation. Ultimately, the bill passed the Senate 87 to 12 and two days later the House adopted the Senate-passed version of the bill 358 to 36.[59] On December 21, 2018, Trump signed the bill into law, securing a rare bipartisan victory.[60]

III.
THE ACCOMPLISHMENTS

The First Step Act received its new name shortly before its passage by the House in May 2018 as a signal to opponents who criticized the bill for its lack of sentencing reforms and limited scope.[61] It was a shrewd marketing tactic because proponents could agree with opponents that more criminal justice reform was necessary while also supporting some progress over none at all. As noted, several progressive opponents of the bill came on board following the inclusion of the sentencing reform provisions, while others contended that the potential for racial disparity in the risk assessment instrument, the expansion of electronic monitoring, and an anticipated increase in for-profit monitoring contracts, along with the

57. *See* Charlotte Resing, *How the FIRST STEP Act Moves Criminal Justice Reform Forward*, ACLU (Dec. 3, 2018 4:00 PM), https://www.aclu.org/blog/smart-justice/mass-incarceration/how-first-step-act-moves-criminal-justice-reform-forward [https://perma.cc/W5T7-WTYD]; MARC MAUER, THE SENTENCING PROJECT CALLS ON CONGRESS TO PASS FIRST STEP ACT (2018), https://www.sentencingproject.org/publications/letter-support-first-step-act/ [https://perma.cc/3X3B-Y3QZ].

58. *See* Press Release, JustLeadership USA, JustLeadershipUSA joins with National Partner Organizations In Opposing Revised First Step Act Legislation (Nov. 20, 2018), https://jlusa.org/media-release/justleadershipusa-joins-with-national-partner-organizations-in-opposing-revised-first-step-act-legislation/ [https://perma.cc/N359-DKAT] (stating that both organizations opposed the legislation).

59. *See Senate Passes Landmark Criminal Justice Reform*, COMM. ON THE JUDICIARY (Dec. 18, 2018), https://www.judiciary.senate.gov/press/rep/releases/senate-passes-landmark-criminal-justice-reform [https://perma.cc/JU77-JQCS]; Katherine Tully-McManus, *House Approves Criminal Justice Overhaul, Sends to President*, ROLL CALL (Dec. 20, 2018, 2:13 PM), https://www.rollcall.com/news/politics/house-approves-criminal-justice-overhaul-sends-president [https://perma.cc/A8XQ-ZCQB].

60. *See* Remarks, *supra* note 1.

61. *See* FIRST STEP Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 115th Cong. (2017–2018) (noting that the Act was formerly known as the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act).

modest impact of the legislation were too problematic to earn their support.[62]

The positive consensus centered on four sentencing reform components added in the Senate after intense negotiations between Grassley and the White House. All of these provisions had previously been components of Grassley's Sentencing Reform and Corrections Act[63]:

- **Fair Sentencing Act Retroactivity**: The 2010 law to increase the quantity of crack cocaine necessary to trigger a five- or ten-year mandatory minimum sentence did not apply to people previously sentenced under the old 100-to-1 crack cocaine sentencing disparity.[64] Eight years after enactment of the Fair Sentencing Act, thousands of people in federal custody were still serving sentences under the outdated law.[65] One year after the retroactive provision in the First Step Act took effect, the Federal Bureau of Prisons reported that 2,612 people were granted sentence reductions.[66] About 90% of the beneficiaries were African American.[67]
- **Safety Valve Expansion:** In 1994, as part of a massive crime bill, Congress allowed judges to sentence a person below the prescribed mandatory minimum for a drug offense if the individual met five requirements, including that the person's offense was low-level and non-violent, and that the person had fully cooperated with prosecutors.[68] In 2018, approximately 21% of the people convicted of a federal drug trafficking offense carrying a mandatory minimum penalty qualified for this safety valve.[69] The updated safety valve, as enacted in the First Step Act, will extend the pool of eligible recipients by permitting individuals with more

62. *See, e.g.*, Marie Gottschalk, *Did You Really Think Trump Was Going to Help End the Carceral State?* JACOBIN (Mar. 2019), https://www.jacobinmag.com/2019/03/first-step-act-criminal-justice-reform [https://perma.cc/Q9J9-8N4H].

63. *See* Sentencing Reform and Corrections Act of 2015, S.2123, 114th Cong. (2015–2016).

64. *See* Fair Sentencing Act §§ 21, 28.

65. U.S. SENTENCING COMM'N, SENTENCE AND PRISON IMPACT ESTIMATE SUMMARY, S. 756, THE FIRST STEP ACT OF 2018 (2019).

66. *First Step Act*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/fsa/ [https://perma.cc/N9KK-DRJS] (last visited Oct. 17, 2020).

67. U.S. SENTENCING COMM'N, FIRST STEP ACT OF 2018 RESENTENCING PROVISIONS RETROACTIVITY DATA REP. (Aug. 2019).

68. *See Safety Valves in a Nutshell*, FAMILIES AGAINST MANDATORY MINIMUMS (FAMM) (July 7, 2012), https://famm.org/wp-content/uploads/FS-Safety-valves-in-a-nutshell.pdf [https://perma.cc/E2RP-SS9H].

69. U.S. SENTENCING COMM'N, ANNUAL REPORT 121 tbl. D-13 (2018).

extensive criminal histories to qualify.[70] The U.S. Sentencing Commission estimates that this expansion will impact 2,045 people annually with an average sentence reduction of one year. The sentence reductions will result in a decrease of 1,072 federal prison beds in five years.[71]

- **Reduced Enhancements for Prior Drug Offenses**: The mandatory minimum sentences for people subject to a sentencing enhancement for a drug offense because of one or two prior felony drug convictions were reduced from twenty to fifteen years for one prior and from life without parole to twenty-five years for two or more priors. The Commission estimates that fifty-six people will be impacted by the sentencing change annually, with an average sentence reduction of four years and eight months.[72]
- **Ending Stacking in "Gun Bump" Cases**: Individuals charged with a drug or violent offense who possess, brandish, or use a firearm during the commission of their offense are subject to an additional mandatory minimum sentence of five to ten years on top of their underlying penalty.[73] The imposition of these additional mandatory minimums was governed by § 924(c). Previously, "a second or subsequent count of conviction under § 924(c) triggered a higher mandatory minimum penalty, as well as mandatory 'stacking' of these sentences for each count of conviction."[74] This was true even if these subsequent counts pertained to the same set of underlying events and existed within the same indictment.[75]

  The extreme nature of § 924(c) sentencing is well-illustrated by the case of Weldon Angelos, a young music producer in Utah. On three occasions, Angelos sold a total of approximately $1,000 of marijuana to an undercover agent. During the transactions, Angelos possessed a gun, which he

70. Criminal history points measure the prior criminal record of defendants. A significant criminal history will normally be evidenced by three or more criminal history points. Under the 1994 legislation, individuals with more than a single criminal history point became ineligible for safety valve release. Under the First Step Act that ceiling was raised to four criminal history points. *See* U.S. SENTENCING COMM'N, REP.: FIRST STEP ACT (Feb. 2019).

71. U.S. SENTENCING COMM'N, SENTENCE AND PRISON IMPACT ESTIMATE SUMMARY S. 756, THE FIRST STEP ACT OF 2018, at 1 (2019).

72. *See id.*

73. *See* 18 U.S.C. § 924(c)(1)(A) (2011).

74. U.S. SENTENCING COMM'N, REPORT: FIRST STEP ACT 4 (Feb. 2019).

75. *Id.*

did not use or threaten to use. Because Angelos was charged with three separate offenses and convicted on the same day in court, under the § 924(c) provisions the judge was obligated to impose a combined mandatory penalty of fifty-five years in prison.

By contrast, under the First Step Act, the twenty-five-year mandatory minimum for prior gun involvement in a drug offense can only be imposed if the initial gun involvement was finalized *prior* to the new case.[76] The change is expected to impact fifty-seven people annually with an average sentence reduction of twenty-seven years and four months.[77]

- **Expanded Good Time Credits:** While an often-overlooked component of the bill, this provision will likely have an outsized impact on the prison population. The expansion of good time credit is estimated to impact 142,448 people currently serving sentences other than life without parole in federal prisons, as well as those who will be incarcerated in the future. Each eligible individual can receive up to fifty-four days of good time credit, an increase of seven additional days a year off their sentences for good behavior.[78] The change is retroactive and therefore applies to time already served. The Commission estimates its overall impact will save 27,126 "bed years" of incarceration over the next twenty years.[79] The benefits of the First Step Act's sentencing reform provisions became visible in 2019. One year after the bill's passage almost 2,500 people received a sentence reduction because of retroactive application of the Fair Sentencing Act.[80]

  Most notable among those who have been released is Matthew Charles. Charles had first gained notoriety when he was erroneously released in 2016 as a consequence of the U.S. Sentencing Commission's earlier Sentencing Guideline amendments. Once the error was discovered, despite

76. *Id.*

77. U.S. SENTENCING COMM'N, SENTENCE AND PRISON IMPACT ESTIMATE SUMMARY, S. 756, THE FIRST STEP ACT OF 2018, at 1 (2019).

78. *See id.*; *see also An Overview of the First Step Act*, BUREAU OF PRISONS, https://www.bop.gov/inmates/fsa/overview.jsp#incentives_for_success [https://perma.cc/M4VK-4PKU].

79. *Id.* "Bed years" is a measure of the overall impact on the prison population, derived from cumulative estimates of the reduced time served in prison for the prison population over time.

80. *First Step Act*, FED. BUREAU OF PRISONS, *supra* note 66.

> living an exemplary two years in the community, Charles was returned to prison in 2018.[81] After his ultimate release from prison in January 2019, President Trump introduced him at the 2019 State of the Union and welcomed him home.[82] (As a sad commentary on the wide-ranging effects of mass incarceration, even following this high-level of attention, Charles had great difficulty finding a landlord who would rent to him because of his felony conviction.[83]) In Rhode Island, federal judges proactively sought out qualified individuals and began the process of sentence reductions.[84] U.S. District Chief Judge William E. Smith in Rhode Island told the Providence Journal, "[i]f people have already served their sentences under the Fair Sentencing Act, they deserve to be released."[85]

IV.
THE LIMITATIONS

While the sentencing reform provisions of the First Step Act will modestly reduce individual sentences and the federal prison population, the practical challenges of implementing the prison reform components may compromise the impact of those provisions. Following is a discussion of some of these issues.

A. Federal Bureaucratic Challenges

The long list of civil rights, faith-based, and criminal justice reform organizations that cautioned against advancing a bill that was

81. *See Tennessee Man Sent Back to Prison After Release "Worthy of a Second Chance,"* CBS (June 7, 2018, 7:37 AM), https://www.cbsnews.com/news/matthew-charles-sent-back-to-prison-after-release-friend-advocates-grossly-unfair/ [https://perma.cc/L77G-GTJ9].

82. Mariah Timms, *President Trump: 'Welcome Home' to Matthew Charles, Man Released from Nashville Prison under First Step Act*, TENNESSEAN (Feb. 5, 2019, 8:43 PM), https://www.tennessean.com/story/news/2019/02/05/donald-trump-state-of-the-union-matthew-charles-alice-johnson-first-step-act-free/2783545002/ [https://perma.cc/7L6Q-5VDJ].

83. Kayla Epstein, *Why This Former Inmate is Struggling to Rent a Home, Even with Kim Kardashian's Help*, WASH. POST (Mar. 28, 2019, 6:13 PM), https://www.washingtonpost.com/arts-entertainment/2019/03/18/why-this-former-inmate-is-struggling-rent-home-even-with-kim-kardashians-help/ [https://perma.cc/9YYK-EKG9].

84. *See, e.g.*, Katie Mulvaney, *'First Step' Toward Freedom for R.I. Drug Offenders*, PROVIDENCE JOURNAL (Mar. 2, 2019), https://www.providencejournal.com/news/20190302/first-step-toward-freedom-for-ri-drug-offenders [https://perma.cc/9YMP-D7SJ].

85. *Id.*

solely focused on prison programming often pointed to the challenges of implementation under a Department of Justice led by officials who were not supportive of the premise of the legislation. Former Attorney General Jeff Sessions had been a fierce opponent of sentencing reform in Congress, and specifically of the First Step Act.[86] His replacement, William Barr, pledged during his confirmation hearing before the Senate Judiciary Committee to faithfully implement the law, but critics raised concerns about Barr's historical endorsement of mass incarceration.[87] Indeed, while thousands of sentence reductions for people with convictions involving crack cocaine have been approved by federal judges, the Department of Justice ("DOJ") has attempted to block hundreds of eligible beneficiaries. The DOJ has been largely unsuccessful in its opposition but has appealed several approved cases and is seeking to reincarcerate these individuals.[88]

In other areas of the bill the Department of Justice interpreted that waiting periods required for earned time credit implementation, which were contingent on the creation of a risk and needs assessment tool to determine programming, also applied to the good time credit expansion. Good time credits have been awarded in federal prisons for decades based on good behavior. This delay contradicted Congress's intention and subjected thousands of people whose cumulative good time credits warranted immediate release to serve extended stays in prison, beyond what was necessary.[89] When this provision was finally implemented, almost

86. *See* Tony Pugh, *Trump, Sessions Feud Spills over into Dispute over Policy on Criminal Justice Reform*, McClatchy DC: Impact2020 (Aug. 21, 2018, 3:14 PM), https://www.mcclatchydc.com/news/politics-government/white-house/article217065005.html [https://perma.cc/CHR9-ZFQF].

87. *See* Tim Lau, *Barr Pledges to Implement FIRST STEP Act*, Brennan Ctr. for Justice (Jan. 15, 2019), https://www.brennancenter.org/our-work/analysis-opinion/barr-pledges-implement-first-step-act [https://perma.cc/AQY3-6FQ6]; U.S. Dep't Justice, The Case for More Incarceration (1992).

88. *See* Neena Satija et al., *Trump Boasts That His Landmark Law Is Freeing These Inmates. His Justice Department Wants Them to Stay in Prison*, Wash. Post (Nov. 7, 2019, 12:45 PM), https://www.washingtonpost.com/investigations/trump-brags-that-his-landmark-law-freed-these-inmates-his-justice-department-wants-them-to-stay-in-prison/2019/11/07/5f075456-f5db-11e9-a285- 882a8e386a96_story.html [https://perma.cc/B243-S8RG]; *see also* Joe Atmonavage, *Judge Released 4 N.J. Men After Nearly 20 Years in Prison. Now, the Feds Want to Send Them Back*, NJ.Com (Jan. 26, 2020), https://www.nj.com/news/2020/01/judge-released-4-nj-men-after-nearly-20-years-in-prison-now-the-feds-want-to-send-them-back.html [https://perma.cc/J2RU-GV7V].

89. *See* Stephen R. Sady & Elizabeth G. Daily, *Delayed Implementation of the First Step Act's Good Time Credit Fix Violates the Rules of Statutory Construction and Due Process*

seven months after the bill's enactment, approximately 3,000 people who had accrued enough credits to exceed their sentences were released from federal prisons.[90]

Another serious concern pertains to the Bureau of Prisons' ("BOP") reluctance to take full advantage of community corrections placements. Despite press reports of limited space in federal halfway houses in recent years, many such facilities are underutilized—partly as a consequence of BOP's failure to allot funds and enable placements to these programs.[91] Given that a major component of the First Step Act involves program completion incentives for placements in community corrections,[92] this track record raises serious questions about the extent to which this provision will be fully enacted.

B. Limited Funding

The First Step Act authorized just $75 million per year to carry out the bill's programming mandates to create a risk assessment tool that determines earned time credit eligibility and to expand programming and community corrections capacity.[93] If that sum were applied equally to all prisoners it would equate to spending about $400 per year on each individual.[94] In October, 2019, BOP Director Kathleen Hawk Sawyer told lawmakers at a House Judiciary Committee hearing that the agency would need additional money to appropriately implement the law.[95] At the same hearing, John Walters of the Hudson Institute, a member of the First Step Act's

of Law, LISA LEGAL INFO (Feb. 2019), http://www.lisa-legalinfo.com/wp-content/uploads/2019/02/Oregon-memo.pdf [https://perma.cc/VQL5-B84Q].

90. Sarah N. Lynch, *About 3,100 Federal Inmates to be Released Early Under New U.S. Law*, REUTERS (July 19, 2019, 1:42 PM), https://www.reuters.com/article/us-usa-justice-prisons/about-3100-federal-inmates-to-be-released-early-under-new-us-law-idUSKCN1UE25G [https://perma.cc/QU2B-ZUVU].

91. *See* Eli Watkins, *Bureau of Prisons Ending Contracts with 16 Halfway Houses*, CNN (Nov. 20, 2017; 5:04 PM), https://www.cnn.com/2017/11/20/politics/bureau-of-prisons-mark-inch-jeff-sessions/index.html [https://perma.cc/AK2T-P3Q7].

92. *See* FIRST STEP Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 115th Cong. (2017–2018).

93. *Id.*

94. *See* Kara Gotsch, *One Year After the First Step Act: Mixed Outcomes*, SENTENCING PROJECT (Dec. 17, 2019), https://www.sentencingproject.org/publications/one-year-after-the-first-step-act/ [https://perma.cc/LU26-PBU9].

95. *See* Kanya Bennett, *The First Step Act Was Exactly That, a First Step. What Comes Next?*, ACLU (Oct. 25, 2019), https://www.aclu.org/news/smart-justice/the-first-step-act-was-exactly-that-a-first-step-what-comes-next/ [https://perma.cc/W2C7-PSLS].

Independent Review Committee, reiterated the comment and said it would take hundreds of millions of dollars to meet the law's requirements.[96]

Even aside from the challenges of implementing change within a large bureaucratic institution that rejects it, the bill's underfunded prison reforms are unlikely to address the genuine crisis plaguing the Bureau of Prisons. Indeed, as of 2018, the federal prison system was operating at 14% above capacity, with higher rates at high and medium security institutions, 24% and 18%percent respectively.[97] Moreover, prison safety concerns are at critical levels. The federal system's current "inmate to correctional officer" ratio of 8.9-to-1 is among the highest in the country.[98] Meanwhile, the rate for some types of assaults in federal prisons has steadily increased since 2014.[99] The First Step Act's reforms do nothing to alleviate these issues.

There is also an immense programming deficit to overcome at the BOP. The waiting list for the BOP's literacy program alone is 16,000.[100] And, because of overcrowding and staff shortages, many programming staff are regularly required to augment correctional officer duties, resulting in fewer programming opportunities.[101] This staffing shortage may partly explain why the number of people completing their GED dropped by 59% between fiscal year 2016 and fiscal year 2017.[102]

C. Exclusions from Program Incentives

Negotiations between the White House and some Republican lawmakers led to legislative compromises that weakened the impact of the bill. A case in point relates to the provision whereby individuals who complete programming can gain earned time credits that allow them earlier access to community corrections, including halfway houses, home confinement, and supervised release (though

96. *See id.*

97. FED. BUREAU OF PRISONS, PROGRAM FACT SHEET 1 (2018).

98. *Id.*

99. *See, e.g.*, FED. BUREAU OF PRISONS, ADJUDICATED ASSAULTS RECORDED IN SENTRY CHRONOLOGICAL DISCIPLINARY RECORDS (2018).

100. U.S. DEP'T OF JUSTICE, FY 2019 PERFORMANCE BUDGET: CONGR. SUBMISSION 27 (2018).

101. *See* Kevin Johnson, *As Federal Prisons Run Low on Guards, Nurses and Cooks Are Filling In*, USA TODAY (Feb. 13, 2018; 2:21 PM), https://www.usatoday.com/story/news/politics/2018/02/13/ill-equipped-and-inexperienced-hundred-scivilian-staffers-assigned-guard-duties-federal-prison-secur/316616002/ [https://perma.cc/QST6-K9BS].

102. FED. BUREAU OF PRISONS, PROGRAM FACT SHEET, *supra* note 98, at 1.

not earlier release from a sentence, as has often been erroneously reported). But a long list of exclusions incorporated into the legislation will bar about 40% of the federal prison population from earning these credits.[103] These exclusions are generally based on the offense of conviction, but also exclude people due to their immigration status. Namely, individuals—whether undocumented immigrants or legal permanent residents—who are subject to removal as a consequence of a felony conviction are excluded from participation in the earned time provisions. Many of these individuals were convicted only of immigration offenses and would not score as "high risk" for public safety considerations.[104]

Other exclusions will target individuals convicted of sex offenses, murder, violent firearms offenses, or those who are organizers, leaders, managers, or supervisors in the fentanyl and heroin drug trade. This cohort could likely score as "high risk" on the assessment measure to be developed. Their exclusion conflicts with research that demonstrates that prison programming and associated incentives are most cost-effective when provided to the highest risk groups.[105] Since about 95% of federal prisoners will eventually be released, it is counterproductive to expend disproportionate resources on lower risk populations—after all, by definition, they are "lower risk."

D. Risk Assessment Issues

The First Step Act requires the creation of a risk and needs assessment system by the Department of Justice, in conjunction with an Independent Review Committee, to determine eligibility for the pre-release custody and supervised release program mandated by the law. In July 2019, the DOJ released a preliminary report regarding the new tool designed for determining risk levels among the federal prison population.[106] Advocates and stakeholders were invited to present statements to DOJ officials providing feedback on the new tool. Organizations like The Sentencing Project, Leader-

103. *See* FIRST STEP Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 115th Cong. (2017–2018).

104. Nazgol Ghandnoosh & Josh Rovner, *Immigration and Public Safety*, SENTENCING PROJECT (Mar. 16, 2017), https://www.sentencingproject.org/publications/immigration-public-safety/#V.%20Immigrants%20are%20Under-Represented%20in%20U.S.%20Prisons [https://perma.cc/2TQL-2X8P].

105. *See, e.g.*, NATHAN JAMES, RISK AND NEEDS ASSESSMENT IN THE FEDERAL PRISON SYSTEM 15 (2018), https://fas.org/sgp/crs/misc/R44087.pdf [https://perma.cc/78KG-92W4].

106. *See* U.S. DEP'T OF JUSTICE, THE FIRST STEP ACT OF 2018: RISK AND NEEDS ASSESSMENT SYSTEM (2019).

ship Conference for Civil and Human Rights, and the Brennan Center for Justice all highlighted concerns.[107]

For example, static factors that cannot be changed, such as age and criminal history, comprised the bulk of an individual's risk score in the tool. Dynamic factors that can be changed, such as prison programming participation, were underweighted. As a result, a majority of the prison population was expected to be classified as medium or high risk.[108] Moreover, because of extreme shortages in prison programming, the likelihood of high and medium risk individuals completing prescribed programing, and thereby reducing their risk levels and transitioning earlier to community corrections, appeared limited.

Another major concern relates to the incorporation of factors into the tool that are racially biased and therefore contribute to higher risk scores for people of color. For example, because criminal history is often a significant factor in a risk assessment tool, we see significant racial disparity in score outcomes.[109] People who reside in heavily policed low-income communities of color will have higher arrest rates that may in part be a function of higher involvement in certain crimes, but also result from the greater presence of law enforcement.[110] The use of an assessment that does not mitigate for these factors could lead to racial disparities in early transfers to community corrections.

---

107. *See, e.g.*, Statement of Kara Gotsch, Director of Strategic Initiatives, SENTENCING PROJECT (Sept. 10, 2019), https://www.sentencingproject.org/wp-content/uploads/2020/01/FSA-Prisoner-Assessment-Tool.pdf [https://perma.cc/6KK4-L4U3]; Letter from American Civil Liberties Union et al. to David B. Muhlhausen, Dir. of the Nat'l Inst. of Justice (Sept. 3, 2019), http://civilrightsdocs.info/pdf/policy/letters/2019/The%20Leadership%20Conference%20et%20al%20Comment%20Letter%20to%20Department%20of%20Justice%20on%20PATTERN%20%20First%20Step%20Act%209%203%202019.pdf [https://perma.cc/64VW-MHRB]; Letter from Brennan Center to David B. Muhlhausen, Dir. of the Nat'l Inst. for Justice (Sept. 3, 2019), https://www.brennancenter.org/sites/default/files/2019-09/Brennan%20Center_RNAS%20Comment%20Letter.pdf [https://perma.cc/Y4W8-4KUX].

108. *See* Emily Tiry & Julie Samuels, *How Can the First Step Act's Risk Assessment Tool Lead to Early Release from Federal Prison?*, URBAN WIRE (Sept. 5, 2019), https://www.urban.org/urban-wire/how-can-first-step-acts-risk-assessment-tool-lead-early-release-federal-prison [https://perma.cc/7Y26-BRKL] ("About half of the population described in the DOJ report scored at high or medium risk.").

109. *See* Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218 (June 2019).

110. *See id.*

E. People Left Behind

The earlier legislation that the First Step Act's sentencing provisions were based upon contained elements of retroactivity that were not incorporated in the enacted legislation. Specifically, the reduced enhancements for prior drug offenses and the un-stacking of mandatory minimums in so-called "gun bump" cases will not benefit people sentenced prior to enactment of the First Step Act. As a result, anyone sentenced for a "third strike" drug offense the day before the legislation was signed is now serving a sentence of life without parole, while those sentenced the day after the bill was enacted are subject to a twenty-five-year minimum sentence.[111] By failing to apply these changes to people currently serving such lengthy prison terms, the bill's impact is dramatically reduced. Excluding retroactivity of these two key sentencing provisions of the First Step Acts leaves an estimated 4,000 people in prison behind.[112]

V.
NEXT STEPS

Since passage of the First Step Act, joy and frustration stemming from the legislation's accomplishments and challenges continue to play out. In March 2019, presidential candidate and New Jersey Senator Cory Booker introduced a criminal justice reform bill titled the Next Step Act. In an op-ed published in *The Washington Post* announcing the bill, Senator Booker stressed the impact that criminal justice reform has on affected individuals and cited this impact as the inspiration for his bill. He told the story of Edward Douglas, a beneficiary of Fair Sentencing Act retroactivity, who was released from a life without parole sentence:

After that life-changing phone call, Douglas returned to his [prison] pod, where he lived with roughly 130 other guys in the same area of the prison. He jumped onto a table and shouted the good news: "I'm getting immediate release!" His podmates—many of whom had come to view Douglas as a mentor figure—joined him at the table. Dozens of others—grown men behind bars—began

111. *See* FIRST STEP Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 115th Cong. (2017–2018).

112. *See* U.S. Sentencing Comm'n, Sentence and Prison Impact Estimate Summary, S. 1917, The Sentencing Reform and Corrections Act of 2017 (Aug. 2018).

crying, hugging and jumping for joy. They just had one sobering message for Douglas amidst all the celebration: "Don't forget us."[113]

The sentiment of this reminder is what fuels the federal criminal justice reform movement. While progress over the years—best demonstrated by the nearly 40,000 person drop in the federal prison population since 2013—is undeniable, sentences remain extreme and disproportionately impact people convicted of drug offenses, as well as Black and Latinx people.[114] Moreover, the federal prison system is the largest in the country,[115] and its underfunded process for rehabilitation has exacerbated the burdens plaguing people entangled within it. More work remains.

The Justice Roundtable, a broad coalition of more than 100 organizations[116] working to reform federal criminal justice laws, called for a much more ambitious next step in criminal justice reform in a letter to Senate and House Judiciary Committee leaders. Its policy recommendations include:

- Ending mandatory minimum sentences in drug cases;
- Instituting a judicial review of sentences or "second look" ten years into a prison term to assess the continued appropriateness of a lengthy sentence;
- Eliminating life without parole sentences for youth and adults;
- Setting fines and fees of a criminal sanction to levels that do not exacerbate poverty and account for a person's ability to pay; and
- Better review of the impact of technical violations and public registries.[117]

---

113. Cory Booker, *It's Time for the Next Step in Criminal Justice Reform*, WASH. POST (Mar. 10, 2019, 8:00 AM), https://www.washingtonpost.com/opinions/2019/03/10/cory-booker-its-time-next-step-criminal-justice-reform/ [https://perma.cc/4ZG4-TLNS].

114. *See, e.g.*, *Statistics*, FED. BUREAU OF PRISONS (2020); U.S. SENTENCING COMM'N, QUICK FACTS (2018).

115. *See* Jennifer Bronson & E. Ann Carson, *Prisoners in 2017*, U.S. DEP'T OF JUSTICE 4–5 (Apr. 2019), https://www.bjs.gov/content/pub/pdf/p17.pdf [https://perma.cc/EC3G-XWVG].

116. JUSTICE ROUNDTABLE, https://justiceroundtable.org/about/ [https://perma.cc/XWQ9-ZT3U].

117. *See* Letter from Justice Roundtable to Sens. Lindsey Graham and Dianne Feinstein (Mar. 29, 2019), https://justiceroundtable.org/wp-content/uploads/2019/03/Sentencing-Reform-Coalition-Priorities-Letter-SENATE-1-1.pdf [https://perma.cc/V4PC-N6FC].

VI.
LESSONS LEARNED

The bipartisan celebration lauding the First Step Act's passage may be setting unrealistic expectations of its impact among lawmakers. Indeed, the White House hailed the legislation as a "groundbreaking reform" that promised reductions in recidivism related to the programming enhancements.[118]

The problem in this regard is that while effective programming in prison can reduce recidivism rates, the magnitude of that decline is relatively modest. Several factors account for this: the high level of social, educational, and therapeutic needs of the prison population; the fact that incarceration itself may be "criminogenic" as a result of negative peer influences and separation from the community; and the scale of resources necessary to provide high-quality programming.

These challenges do not suggest that policymakers should not support rehabilitative programming in prison. But they do tell us that we should be realistic in our expectations of success, particularly when operating the largest corrections system in the country, and that individual gains will in large part depend on the scale of resources devoted to such programming. This situation should also serve as a reminder that prison should only be used as a sentencing option if no other set of conditions can meet the needs of sentencing in an individual case.

Another key lesson we can draw from this experience is to remind ourselves how mass incarceration developed and what it will take to undo it. Critics of the First Step Act who argued that the legislation would not end mass incarceration are, of course, right. The bill only applies to the federal prison population (about 12% of all people in prison) and its sentencing reforms are relatively modest.[119] But even a more wide-ranging bill would not in itself end mass incarceration.

Mass incarceration developed in a political environment that extolled "individual responsibility" and demonized people of color as a criminal class. The policies and practices that produced the massive expansion of prisons and jails resulted from decisions made at every level of government, both in legislative change and practi-

118. *President Donald J. Trump Is Committed to Building on the Successes of the First Step Act*, THE WHITE HOUSE (Apr. 1, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-committed-building-successes-first-step-act/ [https://perma.cc/72CU-WZQ2].

119. *See* Bronson & Carson, *supra* note 116, at 3.

tioner decision-making. Important as incremental victories are, no single step in itself will resolve this crisis. Rather, as we work to achieve substantial reductions in corrections populations, we will need to continue to transform the political environment into one that is not driven by racism and political slogans, but rather by problem-solving and compassion.

Among those states that have achieved substantial reductions in their prison populations, we can see the effects of practitioner changes in driving reform. In New York state, for example, the 17% decline in the state's prison population between 2000 and 2009 was driven in large part by law enforcement decisions in New York City (the main contributor to the state's prison population) to reduce the number of felony arrests.[120] In part this was an outgrowth of the city's shift toward "quality of life" arrests, which generally resulted in misdemeanor charges, and in part it reflected the discretion available in charging drug cases as either felonies or misdemeanors.[121] The end result is that felony arrests can result in prison time, whereas misdemeanor arrests only produce jail time of generally far less duration than prison terms. New York state has continued to experience downsizing of its prison population, alongside ongoing declines in crime.[122]

At the federal level, Attorney General Eric Holder's charge to federal prosecutors to use their discretion to avoid bringing drug charges that would trigger a mandatory minimum sentence was credited with a 25% reduction of such cases within two years of its implementation.[123] Despite the fact that there were no identified problems resulting from this policy, Attorney General Jeff Sessions reversed this initiative shortly after taking office in 2017, calling on federal prosecutors to bring the most serious charge available in every criminal case.[124]

Ending mass incarceration involves undoing the vast web of policies and practices that led to the incarceration of more than 2

120. *See* James Austin & Michael Jacobson, *How New York City Reduced Mass Incarceration: A Model For Change?*, Vera Inst. of Justice 6 (2012), https://www.brennancenter.org/sites/default/files/publications/How_NYC_Reduced_Mass_Incarceration.pdf [https://perma.cc/Z4MT-X564].

121. *Id.*

122. *See, e.g.*, Ghandnoosh, *U.S. Prison Population Trends*, *supra* note 9, at 1–2.

123. *See* Alan Vinegrad, *DOJ Charging and Sentences Policies: From Civiletti to Sessions*, 30 FED. SENT'G REP. 3, 4 (2017).

124. *See* Kara Gotsch & Marc Mauer, *Jeff Sessions Decision to Re-Up in the Drug War Won't Work*, HILL (May 14, 2017, 1:00 PM), https://thehill.com/blogs/pundits-blog/crime/333333-jeff-sessions-decision-to-re-up-in-the-drug-war-wont-work [https://perma.cc/95L4-ZAFM].

million people and the community supervision of more than 4.5 million.[125] Further, the criminal justice "system" is in fact not a single system, but rather the combined impact of the fifty states, the District of Columbia, and the federal government.

To point this out is not to suggest that the challenge before us is too overwhelming to take on, but rather to employ a sophisticated understanding of the mechanisms of reform. It has also become clear that substantial downsizing of institutional populations is in fact possible, such as the 40,000 population decline in the federal prison system and the reductions of at least 30% in five states over the past two decades.[126] While these reforms have come about through the focused attention of policymakers and practitioners, they resulted from the decades-long critique of the "wars" on drugs and crime that helped to develop the emerging consensus around the need to challenge mass incarceration.[127] The First Step Act represents one more step along that road, but its full impact will only be known once the "next steps" are taken.

125. *See State-by-State Data*, SENTENCING PROJECT, https://www.sentencingproject.org/the-facts/#map [https://perma.cc/9YEX-9QP4].

126. Ghandnoosh, *U.S. Prison Population Trends*, *supra* note 9, at 1.

127. *See, e.g.*, MARC MAUER & ASHLEY NELLIS, THE MEANING OF LIFE: THE CASE FOR ABOLISHING LIFE SENTENCES 175–80 (2018); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012); SMART DECARCERATION: ACHIEVING CRIMINAL JUSTICE TRANSFORMATION IN THE 21ST CENTURY (Matthew Epperson & Carrie Pettus-Davis eds. 2017).

THE LANGUAGE OF INTELLIGENCE: HOW WORD GAMES HIDE SURVEILLANCE FROM PUBLIC OVERSIGHT (2019 UPDATE)

*JENNIFER STISA GRANICK**

I. INTRODUCTION

In 2013, the American public learned, among other bombshells, that for years the federal government had been indiscriminately collecting our phone call and Internet records in bulk.[1] In addition, some of our conversations with foreigners were and continue to be collected and made available to criminal investigators.[2] Law enforcement agents can search those conversations without judicial approval or probable cause.[3] If it were not for Edward Snowden, a whistleblower who revealed to journalists highly-classified documents detailing these practices, the public would still be in the dark about these and many other policies.

Despite these public disclosures, as I detail in my 2016 book, *American Spies: Modern Surveillance, Why You Should Care, and What to*

* Jennifer Granick is surveillance and cybersecurity counsel with the ACLU Speech, Privacy, and Technology Project and author of the book *American Spies: Modern Surveillance, Why You Should Care, and What To Do About It*, which won the 2016 Palmer Civil Liberties Prize.

1. Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013), https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order [https://perma.cc/6459-NY23]; Glenn Greenwald, *NSA Collected US Email Records in Bulk for More Than Two Years Under Obama*, GUARDIAN (June 27, 2013), https://www.theguardian.com/world/2013/jun/27/nsa-data-mining-authorised-obama [https://perma.cc/CY56-53M6].

2. Jennifer Granick, *Reining in Warrantless Wiretapping of Americans*, CENTURY FOUND. (Mar. 16, 2017), https://tcf.org/content/report/reining-warrantless-wiretapping-americans/?session=1 [https://perma.cc/78XA-KGC8]; Louise Matsakis, *Congress Renews FISA Warrantless Surveillance Bill For Six More Years*, WIRED (Jan. 11, 2018), https://www.wired.com/story/fisa-section-702-renewal-congress/ [https://perma.cc/2VPU-77DZ].

3. Memorandum Opinion and Order, [REDACTED] at 26–30, No. [REDACTED] (FISA Ct. Nov. 6, 2015), https://www.intelligence.gov/assets/documents/702%20Documents/oversight/20151106-702Mem_Opinion_Order_for_Public_Release.pdf [https://perma.cc/R85Q-FVZ3] (approving NSA Section 702 targeting and minimization procedures and discussing compliance failures).

Do About It, government "word games" are a major hurdle to public oversight and reform.[4] Language shapes the way we see the world. In politics, the way we talk about policies shapes public opinion. With the ability to mold language comes the power to manipulate individual and collective values.[5] The language that intelligence agency and Department of Justice (DOJ) officials use to discuss surveillance, as well as other national security practices, masks the reality of those practices from the public.

Confusing language and counterintuitive definitions put proponents of robust democratic control of surveillance at a disadvantage. These word games have two distinct effects. One such effect is to help hide programs from democratic oversight. Actual practices are kept secret when the government can deny that something is taking place based on a secret and counterintuitive parsing of words. For example, on March 12, 2013, in response to a question from Senator Ron Wyden (D-OR), then-Director of National Intelligence James Clapper testified under oath that the National Security Agency (NSA) does not "collect" any type of data at all on millions or hundreds of millions of Americans.[6] In fact, the NSA was collecting Americans' phone records[7] and had collected Internet records[8] for years. After reporters released Snowden documents showing that Clapper's statements were false, Clapper admitted that the intelligence agencies relied on a concocted definition of the word "collect."

---

4. *See* JENNIFER GRANICK, AMERICAN SPIES 27-40 (Cambridge Univ. Press ed., 2017).

5. George Orwell, POLITICS AND THE ENGLISH LANGUAGE (1946); *See generally* GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE—THE ESSENTIAL GUIDE FOR PROGRESSIVES (Chelsea Green Publ'g ed., 2004).

6. Glenn Kessler, *James Clapper's 'Least Untruthful' Statement to the Senate*, WASH. POST (June 12, 2013), www.washingtonpost.com/blogs/fact-checker/post/james-clappers-least-untruthful-statement-to-the-senate/2013/06/11/e50677a8-d2d8-11e2-a73e-826d299ff459_blog.html [https://perma.cc/9APW-84AD].

7. PRIV. AND CIV. LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 8-9 (2014), https://www.pclob.gov/library/215/Report_on_the_Telephone_Records_Program.pdf [https://perma.cc/5WE9-M5NK].

8. OFF. OF THE DIR. OF NAT'L INTEL. PUB. AFF. OFF., IC ON THE RECORD, NEWLY DECLASSIFIED DOCUMENTS REGARDING THE NOW-DISCONTINUED NSA BULK ELECTRONIC COMMUNICATIONS METADATA PURSUANT TO SECTION 402 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (2014) https://icontherecord.tumblr.com/post/94459123638/newly-declassified-documents-regarding-the [https://perma.cc/FL4Y-AL63].

In an interview with NBC's Andrea Mitchell, Clapper explained that his denial that the NSA broadly collects Americans' data turned on a definition of "collect:" "There are honest differences on the semantics of what—when someone says 'collection' to me, that has a specific meaning, which may have a different meaning to him."[9] Clapper said that "collect" doesn't mean acquire or gather; it means "taking the book off the shelf and opening it up and reading it."[10]

For months, Clapper's dissembling successfully shielded problematic surveillance practices from democratic review. Had it not been for Snowden's disclosures a few months later, the public would have stayed in the dark. Once the public had accurate information, Congress passed legal reforms to end this bulk collection practice.[11] Of course, that was exactly the outcome that the intelligence agencies hoped to avoid through their word games.

Democratic oversight of surveillance is also disadvantaged when officials use banal language to describe controversial or even potentially illegal activities. Press coverage is necessarily less critical and public opposition is dampened, essentially through effective branding. Orwellian nomenclature makes controversial or even outrageous practices seem more palatable.

The United States' policy of torturing people is one example of successful manipulation of language to squelch public opposition. International and domestic law both prohibit torture.[12] Yet, in the years following the attacks of September 11th, the Central Intelligence Agency (CIA) adopted the practice of nearly drowning people to death on the grounds that these individuals were suspected of being Al-Qaeda operatives who might reveal useful information under duress.[13] This practice was labeled "waterboarding." It can

9. GRANICK, *supra* note 4, at 34 (quoting Interview by Andrea Mitchell with James R. Clapper, Director of National Intelligence, in Tysons Corner, Va. (June 8, 2013)).

10. *Id.*

11. *See, e.g.*, USA Freedom Act of 2015, Pub. L. No. 114–23, 129 Stat. 268 (2015).

12. *See, e.g.*, G.A. Res. 39/46, Convention Against Torture and Other Cruel, Unhuman or Degrading Treatment of Punishment, at 1 (Dec. 10, 1984); *see also* 18 U.S.C. § 2340 (2001) (defining torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering").

13. Julian E. Barnes & Scott Shane, *Cables Detail C.I.A. Waterboarding at Secret Prison Run by Gina Haspel*, N.Y. TIMES (Aug. 10, 2018), https://www.nytimes.com/2018/08/10/us/politics/waterboarding-gina-haspel-cia-prison.html [https://perma.cc/BTT7-CCXJ].

induce convulsions and vomiting and render the victim "completely unresponsive."[14] In addition to waterboarding, the CIA also subjected people in custody to "rectal feeding,"[15] slamming detainees against walls, shackling people in physically painful positions, locking people in coffin-like boxes, and other excruciating physical and mental torments. These and other tactics came to be called "enhanced interrogation techniques."[16]

Torture involves the infliction of "severe physical or mental pain or suffering."[17] Bush administration Department of Justice officials asserted, in a series of secret legal memoranda, that there was uncertainty as to whether use of at least some of the techniques met the legal definition of "torture" under U.S. law.[18] Additionally, these memos claimed that, if the violence was directed at protecting the country from additional attacks, "necessity or self-defense may justify interrogation methods that might violate" the criminal prohibition against torture.[19] Eventually all the "torture memos" were rescinded, and U.S. officials, including President Barack Obama immediately after taking office,[20] acknowledged that these "enhanced interrogation techniques" constituted torture.[21] But, at the time, official insistence on euphemisms for torture was very useful. Anodyne language muddied the question of whether what the CIA was doing was either immoral or illegal. It also whitewashed the gruesome nature of the practices, thereby tamping down public outrage.

By insisting on this banal terminology, the CIA put lawmakers, non-governmental organizations, and the media in a position where telling the truth felt like taking sides. Because "torture" has a

14. S. Rep. No. 113-288, at xii (2014).

15. Physicians for Hum. Rts., Medical Professionals Denounce "Rectal Feeding" as "Sexual Assault Masquerading as Medical Treatment" (Dec. 2014), *available at* https://s3.amazonaws.com/PHR_other/fact-sheet-rectal-hydration-and-rectal-feeding.pdf [https://perma.cc/NML8-NJGA].

16. S. Rep. No. 113-288, at 36-37 (2014); *see also* Anne D. Miles, Perspectives on Enhanced Interrogation Techniques 5 (Jan. 8, 2016) (citing George Tenet, *Guidelines on Interrogations Conducted Pursuant to the (Redacted)*, IG Special Review, 2003, at Appendix E).

17. 18 U.S.C. § 2340 (2001).

18. *See* Memorandum from Jay Bybee, Assistant Att'y Gen., Off. of Legal Couns., Interrogation of Al-Qaeda Operative, to John Rizzo, Acting Gen. Couns., C.I.A. (Aug. 1, 2002) (advising that certain proposed conduct, including a "facial hold," "confinement boxes," and "sleep deprivation" did not "inflict[ ] severe pain," and so would not violate Section 2340A).

19. S. Rep. No. 113-288, at xiv (2014).

20. Exec. Order 13491, 74 Fed. Reg. 4893 (Jan. 27, 2009).

21. *See* Husayn v. United States, 938 F.3d 1123, 1123 (9th Cir. 2019).

specialized legal meaning as well as a plain-English one, and because the Department of Justice disputed that CIA agents were acting illegally, at first the New York Times did not use the word "torture" to describe CIA conduct. The Times asserted that using the plain-English word meant taking sides in the legal argument.[22] The Times initially used phrases like "harsh" in describing interrogation methods, but later graduated to "brutal." In 2014, the paper changed its practices.[23] Neither National Public Radio (NPR) nor the Washington Post followed suit, sticking with phrases like "harsh interrogation tactics."[24]

It is hard to say how much impact these word games had. We do know that those responsible were insulated from the consequences of their roles. Attorneys who wrote legal memos justifying torture[25] are now professors at well-regarded law schools[26] or federal judges.[27] Gina Haspel, who headed up a CIA torture site in Thailand in 2002, served as Director of the CIA from 2018 until 2021.[28]

22. Adam Martin, *Bill Keller on the New York Times's Definition of 'Torture'*, ATLANTIC (Apr. 26, 2011), https://www.theatlantic.com/business/archive/2011/04/bill-keller-says-calling-us-interrogation-torture-would-be-polemical/350015/ [https://perma.cc/55SY-GSQQ] (quoting the New York Times editors as saying "[s]ome of the interrogation methods may fit a legal or common-sense definition of torture. Others may not. To refer to the whole range of practices as 'torture' would be simply polemical.").

23. *See* Dean Baquet, *The Executive Editor on the Word "Torture"*, N.Y. TIMES (Aug. 7, 2014), https://www.nytimes.com/times-insider/2014/08/07/the-executive-editor-on-the-word-torture [https://perma.cc/M986-G6HK].

24. *See* Jim Naureckas, *Refusing to Take Sides, NPR Takes Sides with Torture Deniers*, FAIR (Dec. 12, 2014), https://fair.org/home/refusing-to-take-sides-npr-takes-sides-with-torture-deniers [https://perma.cc/X4CQ-KRMJ].

25. David Irvine, *LDS Lawyers, Psychologists Had a Hand in Torture Policies*, SALT LAKE TRIB. (Apr. 29, 2009), https://web.archive.org/web/20120301090557/http://www.sltrib.com/opinion/ci_12256286 [https://perma.cc/J8AD-8NMC].

26. *See, e.g.*, *John Yoo*, WIKIPEDIA (Oct. 31, 2019, 3:38 PM), https://en.wikipedia.org/wiki/John_Yoo [https://perma.cc/C7PK-WSEJ].

27. *See, e.g.*, *Jay Bybee*, WIKIPEDIA (Oct. 31, 2019, 3:38 PM), https://en.wikipedia.org/wiki/Jay_Bybee [https://perma.cc/6WBM-GBWN].

28. *See Gina Haspel*, WIKIPEDIA (Oct. 6, 2019, 4:11 AM), https://en.wikipedia.org/wiki/Gina_Haspel [https://perma.cc/TL3E-FUHY]; *see also Director of the Central Intelligence Agency*, WIKIPEDIA (Feb. 3, 2021, 8:16 PM), https://en.wikipedia.org/wiki/Director_of_the_Central_Intelligence_Agency [https://perma.cc/D4D3-QXUQ].

Obfuscation reigns in national security talk.[29] The term "extraordinary rendition" refers to kidnapping.[30] A "disposition matrix" is a "kill list" of individuals subject to assassination.[31] "Collateral damage" refers to civilians we kill during military operations.[32] Even the common term "intelligence community" is a catch-all term for seventeen agencies with very different missions[33] and a range of more to less controversial policies. Who would oppose intelligence or community?

Euphemisms convey a sense of legal and moral consensus that does not actually exist by distorting the truth and providing protection for those committing repulsive acts. This well-considered[34] Orwellian nomenclature has its impacts on democratic oversight and protection of human rights. By dictating the terms of national debate, the intelligence officials have put civil libertarians at a serious disadvantage. We struggle to learn their vocabulary so we can understand what they are saying, know what they are doing, and then make our case to the public and to the courts.

In the remainder of this article, I update "Word Games," chapter two of my book, with three additional examples of national security-related word games in the context of surveillance.

II.
SPYING ON LAWYERS

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its pur-

29. It may be that the need for euphemisms to hide official atrocities is over. President Donald Trump has lauded "torture" and "much worse." *See* Jenna Johnson, *Trump Says 'Torture Works,' Backs Waterboarding And 'Much Worse'*, WASH. POST (Feb. 17, 2016), https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html [https://perma.cc/8RDD-7W82].

30. *Extraordinary Rendition*, WIKIPEDIA (Jan. 26, 2020, 9:59 PM), https://en.wikipedia.org/wiki/Extraordinary_rendition [https://perma.cc/D993-347U].

31. *Disposition Matrix*, WIKIPEDIA (Jan. 10, 2021), https://en.wikipedia.org/wiki/Disposition_Matrix [https://perma.cc/58XZ-3TL4].

32. *Collateral Damage*, WIKIPEDIA (Jan. 10, 2021), https://en.wikipedia.org/wiki/Collateral_damage, [https://perma.cc/V9XX-6ZTQ].

33. *Intelligence Community*, WIKIPEDIA (Jan. 10, 2021), https://en.wikipedia.org/wiki/United_States_Intelligence_Community#Members [https://perma.cc/VH4F-VZBH].

34. *See, e.g.*, Bonnie Azab Powell, *Framing the Issues: UC Berkeley Professor George Lakoff Tells How Conservatives Use Language to Dominate Politics*, BERKELEY NEWS (Oct. 27, 2003), https://www.berkeley.edu/news/media/releases/2003/10/27_lakoff.shtml [https://perma.cc/5ZTJ-N94E] ("Over the last 30 years their think tanks have made a heavy investment in ideas and in language.").

pose is to encourage full and frank communication between attorneys and their clients and thereby "promote broader public interests in the observance of law and administration of justice."[35] The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. The U.S. Supreme Court has recognized the importance of the privilege dating back to at least 1888.[36]

Does the attorney-client privilege shield individuals' conversations with their lawyers from surveillance? If the government is indeed listening in, attorneys and the people we seek to help are in a bind. This is not an uncommon scenario in the criminal wiretap context in which agents are cautioned to avoid collecting conversations when an attorney is one of the communicants.[37] But in the foreign intelligence context, the NSA maximizes the data it collects and is supposed to parse out irrelevant and protected information after the fact. For intelligence surveillance, since the up-front collection is broad, "minimization procedures" are supposed to do the work of protecting confidentiality.[38] Minimization procedures detail how investigators must take steps to limit—"minimize"—the distribution and use of collected information that is nevertheless irrelevant to the approved investigation. Foreign Intelligence Surveillance Act (FISA) minimization procedures generally do not prohibit the government's acquisition of attorney-client privileged communications but do establish procedures that should protect those attorneys' and clients' conversations nonetheless.

Section 702 of FISA permits the programmatic and warrantless acquisition of phone call, email, and other communications targeting noncitizens located overseas and includes collection of messages to, from, or about entities of foreign intelligence inter-

35. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (stating that the attorney-client privilege is the oldest evidentiary privilege and that it is necessary to "promote broader public interests in the observance of law and administration of justice").

36. Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

37. U.S. DEP'T OF JUST., ELECTRONIC SURVEILLANCE MANUAL PROCEDURES AND CASE LAW FORMS 12-13 (2005), https://www.justice.gov/sites/default/files/criminal/legacy/2014/10/29/elec-sur-manual.pdf [https://perma.cc/9F8H-WSJG] ("[B]oth the minimization language in the affidavit and the instructions given to the monitoring agents should contain cautionary language regarding the interception of privileged attorney-client conversations.").

38. 50 U.S.C. § 1801(h)(1) (2019) ("specific procedures . . . reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons . . . .").

est.[39] The 2011 minimization procedures meant to protect private messages obtained through warrantless communications surveillance under Section 702 showed disregard for the attorney-client privilege.[40] Section 4 of those 2011 procedures stated that the provisions meant to protect the attorney-client privilege do not apply unless the client is under indictment—charged with a crime and talking to their lawyer about that criminal activity.[41] This policy allowed intelligence agencies to analyze and use communications that are covered by the attorney-client privilege, as the privilege applies to both civil and criminal representation and begins with the first attorney-client conversation, not just conversations post-indictment.[42] Rather than protect the privilege, the 2011 minimization rules did the bare minimum, addressing the situation where there is a constitutional right to counsel under the Sixth Amendment but ignoring longstanding common law and evidentiary privileges.[43]

Further, the 2011 provisions did not protect privileged communications from government eyes. Rather, the materials were to be segregated to keep them from review or use in criminal proceedings. The minimization procedures nevertheless permitted the information to be used in other circumstances.[44] In 2014, for example, the public learned from the Snowden documents that the FBI targeted two attorneys from Muslim-American civil rights organizations.[45] This surveillance could have gathered substantial amounts of information about these attorneys' clients—information that the procedures appear to allow to be used in any context other than in a criminal proceeding.

---

39. 50 U.S.C. § 1802 *et seq* (2019).

40. *See* OFF. OF THE DIR. OF NAT'L INTEL., MINIMIZATION PROCEDURES USED BY THE NATIONAL SECURITY AGENCY IN CONNECTION WITH ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED (2011) (hereinafter 2011 NSA MINIMIZATION PROCEDURES), https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2011oct_nsaminimizationprocedures.pdf [https://perma.cc/N7RU-LQSS].

41. *Id.* at 7-8.

42. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (Am. Law. Inst. 2000); LAURA K. DONOHUE, THE FUTURE OF FOREIGN INTELLIGENCE: PRIVACY AND SURVEILLANCE IN A DIGITAL AGE 114 (2017) ("[A]s a matter of ordinary civil or criminal law, an individual may have privileged communications with an attorney prior to [indictment].").

43. 2011 NSA MINIMIZATION PROCEDURES, *supra* note 40, at § 4.

44. *Id.*

45. *See* Kim Zetter, *Latest Snowden Leaks: FBI Targeted Muslim-American Lawyers*, WIRED (July 9, 2014), https://www.wired.com/2014/07/snowden-leaks/ [https://perma.cc/Q2KE-X72M].

After public outcry, in 2017, the provisions were changed to apparently broaden the attorney-client protections.[46] Still, large portions of those minimization procedures have been withheld from the public. Without seeing them, we cannot know whether attorney-client communications are sufficiently shielded from the government.

III.
AVOIDING NOTICE

Another word game is the way in which intelligence agencies have misinterpreted FISA in a manner that enables them to withhold notice to defendants who have been surveilled by foreign intelligence authorities. This trick involves a novel—and classified—definition of the phrase "derived from."

FISA requires that the United States notify individuals who have been subject to electronic surveillance before that information is disclosed or submitted as evidence in a case.[47] Notice not only preserves defendants' constitutional right to confront the evidence against them, it also gives the public an opportunity to learn of government policies and see them challenged in court—a critical part of our governmental system of checks and balances. For this reason, FISA requires the government to notify aggrieved parties of surveillance before introducing any information obtained or derived from FISA surveillance into any legal proceeding.[48]

Solicitor General Donald Verrilli told the Supreme Court that this notice provision would ensure that courts would be able to re-

46. OFF. OF THE DIR. OF NAT'L INTEL., MINIMIZATION PROCEDURES USED BY THE NATIONAL SECURITY AGENCY IN CONNECTION WITH ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED 7-9 (2017), https://www.dni.gov/files/documents/icotr/51117/2016-NSA-702-Minimization-Procedures_Mar_30_17.pdf [https://perma.cc/2ZGQ-QADV] (applying special procedures for the acquisition and handling of attorney-client communications, defined as communications "between an attorney . . . and a client").

47. 50 U.S.C. § 1806(c) ("Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.").

48. 50 U.S.C. § 1806(b)(c) (2019).

view the lawfulness of Section 702 surveillance. He offered this assurance during litigation of *Amnesty International v. Clapper*, a challenge to the constitutionality of Section 702 by journalists and human rights lawyers.[49] Recall that Section 702 establishes procedures by which the government can conduct surveillance targeting non-Americans located overseas without getting a search warrant approved by a judge.[50] In *Clapper*, the American Civil Liberties Union (ACLU) argued that the regime inevitably obtained Americans' conversations too, and that that warrantless acquisition violated the Fourth Amendment.[51] But the Supreme Court never reached the substantive question of whether Section 702 violated the Fourth Amendment. Rather, it dismissed the case on standing grounds, holding that the plaintiffs were only speculating that they would be spied on under this top-secret program.[52]

But how could any plaintiffs ever know if they were secretly surveilled, unless the government decided to tell them? The government assured the Supreme Court that defendants in criminal prosecutions, in which the government would provide notice of Section 702 surveillance, would have standing to challenge the law, thereby providing courts with the opportunity to review the law's constitutionality.[53] Justice Sonia Sotomayor asked the Solicitor General if anyone would have standing to challenge Section 702 or if the ruling he was asking the Supreme Court to make would completely insulate the statute from judicial review altogether.[54] Mr. Verrilli, referring to Section 1806(c), told the Justices that if the government wants to use information gathered under the surveillance program in a criminal prosecution, the source of the information would have to be disclosed.[55] The subjects notified of such surveillance, Verrilli continued, *would* have standing to challenge the program.[56]

In reality, it was the policy of the DOJ's National Security Division to use parallel construction techniques to hide the fact that evidence had been derived from warrantless surveillance—and

49. *See* Transcript of Oral Argument at 27–55, Amnesty Int'l v. Clapper, 568 U.S. 398 (2013) (No. 11-1025).

50. 15 U.S.C. § 1881(a).

51. Amnesty Int'l v. Clapper, 568 U.S. 398, 407 (2013).

52. *Id.* at 422.

53. See Brief of Petitioners at 15, Amnesty Int'l v. Clapper, 568 U.S. 398 (2013) (No. 11-1025).

54. Transcript of Oral Argument at 7, Amnesty Int'l v. Clapper, 568 U.S. 398 (2013).

55. *Id.* at 4:12-17.

56. *Id.* at 5:5-8.

thereby ensure that courts did not have the opportunity to review it, nor the public to critique it.[57] Faced with revelations about the controversial Section 702 surveillance program,[58] intelligence surveillance supporters wanted to defend the law. Senator Dianne Feinstein (D-CA), under pressure to identify cases in which Section 702 surveillance had been effective, told the press about a pending criminal case against Adel Daoud, a mentally ill young man accused of planning to bomb a Chicago bar. The government had initially told Daoud's lawyers that the evidence against their client came from traditional FISA surveillance and not from warrantless surveillance under Section 702.[59] In at least three additional prosecutions, warrantless Section 702 surveillance supposedly preempted terrorist plots, but the defendants in these prosecutions were not told that the government's evidence was obtained under that controversial provision of law.[60] This fact runs directly contrary to the argument presented to the Supreme Court in *Clapper*. After this reporting, Solicitor General Verrilli raised questions with his government colleagues, as he realized that the National Security Division had led him to inadvertently misrepresent the facts to the Supreme Court.[61]

In response to the ensuing outcry, the Department of Justice appeared at first to change its policy, issuing five notices in criminal cases.[62] But hardly anyone has received one of these notices. In 2017, journalists at *The Intercept* searched federal court records and found that only ten defendants received notice of Section 702 sur-

57. Patrick Toomey, *Government Engages in Shell Game to Avoid Review of Warrantless Wiretapping*, ACLU (June 25, 2013, 3:51 PM), https://www.aclu.org/blog/national-security/secrecy/government-engages-shell-game-avoid-review-warrantless-wiretapping [https://perma.cc/D3JC-R3EC].

58. *See* Glenn Greenwald, *NSA Prism Program Taps in to User Data of Apple, Google and Others*, GUARDIAN (June 6, 2013), https://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data [https://perma.cc/6JXT-4EYL].

59. Ellen Nakashima, *Chicago Federal Court Case Raises Questions about NSA Surveillance*, WASH. POST (June 21, 2013), https://www.washingtonpost.com/world/national-security/chicago-federal-court-case-raises-questions-about-nsa-surveillance/2013/06/21/7e2dcdc8-daa4-11e2-9df4-895344c13c30_story.html?noredirect=ON&utm_term=.9f7b6ea85453 [https://perma.cc/KZ9P-SLUD].

60. Ramzi Kassem, *Unprecedented Notice of Warrantless Wiretapping in a Closed Case*, JURIST (March 24, 2014), https://www.jurist.org/commentary/2014/03/ramzi-kassem-warrantless-wiretapping/ [https://perma.cc/MV3H-R6BV].

61. *See* Savage, *infra* note 64.

62. Sari Horwitz, *Justice is Reviewing Criminal Cases that Used Surveillance Evidence Gathered Under FISA*, WASH. POST (Nov. 15, 2013), https://www.washingtonpost.com/world/national-security/justice-reviewing-criminal-cases-that-used-evidence-gathered-under-fisa-act/2013/11/15/0aea6420-4e0d-11e3-9890-a1e0997fb0c0_story.html [https://perma.cc/8ZMP-P4AS].

veillance, even though a July 2014 report from the Privacy and Civil Liberties Oversight Board cited "well over 100 arrests on terrorism-related offenses" thanks to the provision.[63] How are prosecutors getting away with denying notice, when the statute requires it? It appears that the government may have a secret legal interpretation of the statute. This secret definition amounts to a word game with the definitions of "obtained from" and "derived from."

Based on public reporting and an ACLU Freedom of Information Act (FOIA) lawsuit, it appears that, from 2008 to 2013, National Security Division lawyers chose to define "derived" in a way that eliminated notice of Section 702 surveillance altogether.[64] According to ACLU National Security Project attorney Patrick Toomey, the DOJ may have decided that evidence is "derived from" Section 702 surveillance only when the DOJ expressly relies on that information in later court filings. It "could then avoid giving notice to defendants simply by avoiding all references to Section 702 information in those court filings, citing information gleaned from other investigative sources instead—even if the information from those alternative sources would never have been obtained without Section 702."[65] Again, these word games allow intelligence agencies to avoid public debate and constitutional review, and because the games themselves take place in secret and behind closed doors, they are almost impossible to combat.

IV.
"WEB TRAFFIC" DOES NOT MEAN "WEBSITES"

In March 2015, the ACLU filed a lawsuit challenging the constitutionality of the NSA's mass interception and searching of Americans' international Internet communications. The lawsuit, *Wikimedia v. NSA*,[66] challenges "Upstream" surveillance, under which the NSA installed surveillance devices on the network of

63. Trevor Aaronson, *NSA Secretly Helped Convict Defendants in U.S. Courts, Classified Documents Reveal*, INTERCEPT (November 30, 2017), https://theintercept.com/2017/11/30/nsa-surveillance-fisa-section-702/ [https://perma.cc/3XRELKDG].

64. Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. TIMES (Oct. 16, 2013), https://www.nytimes.com/2013/10/17/us/politics/us-legal-shift-may-open-door-for-challenge-to-secret-wiretaps.html [https://perma.cc/59WK-VFWT].

65. Patrick Toomey, *Why Aren't Criminal Defendants Getting Notice of Section 702 Surveillance — Again?*, JUST SECURITY (Dec. 11, 2015), https://www.justsecurity.org/28256/arent-criminal-defendants-notice-section-702-surveillance-again/ [https://perma.cc/9Y7R-4QP8].

66. ACLU, *Wikimedia v. NSA – Challenge to Upstream Surveillance Under the FISA Amendments Act* (Sep. 6, 2018), https://www.aclu.org/cases/wikimedia-v-nsa-chal-

high-capacity cables, switches, and routers across which Internet traffic travels. Recall that in *Clapper* the Supreme Court held that the plaintiffs did not have standing to contest the legality of Section 702 because they could not prove that their communications would be intercepted pursuant to warrantless wiretapping conducted under that provision of law.[67] They did not, the Supreme Court ruled, have standing to challenge the law.

In this latest case, however, Wikimedia is the plaintiff. The Department of Justice has been fighting the case by claiming that Wikimedia cannot prove its communications have been intercepted, so it does not have standing to sue.[68] Wikimedia has responded that it does have standing because it is virtually certain that the NSA is copying and reviewing at least some of Wikimedia's trillions of Internet communications.[69] Wikimedia's communications traverse every circuit carrying public Internet traffic on every cable connecting the U.S. with the rest of the world.[70] Further, the NSA monitors communications at one or more of these "international Internet link[s]."[71]

The Department of Justice nevertheless has successfully held off any review of the merits of Wikimedia's case on standing grounds.[72] The ACLU filed the lawsuit on behalf of Wikimedia and

lenge-upstream-surveillance-under-fisa-amendments-act [https://perma.cc/ES6W-5YTY].

67. Amnesty Int'l v. Clapper, 568 U.S. 398, 422 (2013).

68. Memorandum in Support of Defendants' Motion to Dismiss at 17–31, Wikimedia Found. v. NSA, No. 1:15-cv-00662 (D. Md. May 29, 2015), https://www.aclu.org/legal-document/wikimedia-v-nsa-memo-support-defendants-motion-dismiss [https://perma.cc/7YMC-Z8EQ].

69. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 16–49, Wikimedia Found. v. NSA, No 1:15-cv-00662 (D. Md. Sept. 3, 2015), https://www.aclu.org/legal-document/wikimedia-v-nsa-plaintiffs-memorandum-law-opposition-defendants-motion-dismiss [https://perma.cc/3H6R-E2HP]. *See also* Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 68.

70. Wikimedia hosts Wikipedia, approximately the thirteenth largest website in the world. THE TOP 500 SITES ON THE WEB, ALEXA, https://www.alexa.com/topsites [https://perma.cc/AW8G-SGCM].

71. *See* PRIV. AND CIV. LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF FISA 41 n.157 (quoting [Case Title Redacted], 2011 WL 10945618, at *11 (FISA Ct. 2011) ("[T]he government readily concedes that NSA will acquire a wholly domestic "about" communication if the transaction containing the communication is routed through an international Internet link being monitored by NSA or is routed through a foreign server.")).

72. The case was filed in March of 2015. The district court dismissed the case in October 2015 for lack of standing to sue. In May 2017, the Fourth Circuit Court of Appeals reversed, ruling that Wikimedia plausibly pled standing and was enti-

other plaintiffs in March 2015.[73] The district court dismissed the case in October 2015, concluding that the plaintiffs did not have standing because they had not sufficiently alleged that their communications had been intercepted.[74] The ACLU appealed to the Fourth Circuit Court of Appeals,[75] which, in May 2017, unanimously reversed a part of the lower court's dismissal, ruling that Wikimedia, but not the other plaintiffs, has standing to pursue its challenge.[76] On remand, the district court in December 2019 again ruled that Wikimedia did not have standing in December of 2019.[77] Wikimedia appealed again on February 21, 2020.[78]

In the most recent summary judgment litigation, the government argued that, even if one believes that the NSA is conducting collection on at least one international backbone link, something it claims is a state secret that cannot be litigated, Wikimedia did not present sufficient evidence that the NSA is copying all of the data transiting that link.[79] The agency could be blacklisting or whitelisting particular types of internet traffic.[80] Perhaps the agency does not collect traffic to or from Wikimedia's websites. The organization has not, the DOJ argues, proved otherwise.[81]

In response, Wikimedia pointed to the fact that the DOJ has already admitted in a filing before the Foreign Intelligence Surveil-

---

tled to limited discovery. In December 2019, the district court granted summary judgment for the government, again on standing grounds. *See* Wikimedia Found. v. NSA, No. 1:15-cv-00662 (D. Md. Dec. 16, 2019).

73. Complaint, Wikimedia Found. v. NSA, No. 1:15-cv-00662 (D. Md. Mar. 10, 2015), https://www.courtlistener.com/docket/4287483/wikimedia-foundation-v-national-security-agencycentral-security-service/ [https://perma.cc/D8F5-E4GV].

74. Order Granting Defendants' Motion to Dismiss, Wikimedia Found. v. NSA, No. 1:15-cv-00662 (D. Md. Oct. 23, 2015), https://www.courtlistener.com/recap/gov.uscourts.mdd.308766.95.0.pdf [https://perma.cc/9MQX-SM6N].

75. Notice of Appeal, Wikimedia Found. v. NSA, No. 1:15-cv-00662 (D. Md. Dec. 15, 2015); *See also*, Wikimedia Foundation v. NSA/CSS, 857 F.3d 193 (4th Cir. 2017).

76. *Wikimedia v. NSA—Challenge to Upstream Surveillance Under the FISA Amendments Act*, ACLU (Sept. 6, 2018), https://www.aclu.org/cases/wikimedia-v-nsa-challenge-upstream-surveillance-under-fisa-amendments-act [https://perma.cc/RPH9-DW8Y].

77. Wikimedia Found. v. NSA/CSS, No. 1:15-cv-00662, 427 F. Supp. 3d 582 (D. Md. Dec. 13, 2019).

78. Brief for Plaintiff-Appellant, Wikimedia Found. v. NSA/CSS, No. 20-1191 (4th Cir. Jul. 1, 2020), 2020 WL 3884763 (appeal filed Feb. 21, 2020).

79. Brief in Support of Defendants' Motion for Summary Judgment (Nov. 13, 2018) pp. 21-23, Wikimedia Found. v. NSA, No. 1:15-cv-00662 (D. Md. Nov. 13, 2018).

80. *Id.* at 24–26.

81. *Id.* at 26–27.

lance Court (FISC) that it collects "web activity."[82] In response, the DOJ makes the incredible claim that "web activity" need not include communications with Wikimedia's website. Rather, the DOJ lawyers assert that, "[t]he NSA's reference in a FISC filing to collection of 'web activity' is entirely consistent with targeted collection (through combined black- and whitelisting) of specific types of web activity, such as webmail or chat, but not websites such as Wikimedia's."[83] Even more incredibly, the DOJ says that perhaps—in a detailed, highly-technical, top secret, court-ordered response to a FISA judge's precise questions about Section 702 surveillance—NSA attorneys used the phrase "web activity" as a colloquialism referring to Internet activity as a whole.[84] Because "web activity" is fancifully susceptible to an interpretation that excludes websites, the government says that Wikimedia has no evidence that the NSA's collection at Internet nodes includes traffic to or from Wikimedia websites.[85] The district court granted summary judgement in favor of the government, based in part on its claim that white- or blacklisting could theoretically exclude Wikimedia traffic, and the organization cannot prove otherwise.[86]

Wikimedia's lawyers have fought for four years, not on the merits of the constitutionality of Section 702, but merely for the right to ask the court to determine the question in the first place. Obfuscating and dissembling about the meaning of phrases such as "web activity" has enabled the government to avoid judicial scrutiny thus far.

CONCLUSION

Surveillance law and technology are complicated to begin with, but the intelligence world's language games exacerbate the lack of trust between the public and the government. The public is alien-

82. Response in Opposition to Motion for Summary Judgment at 22–23, citing Declaration of Scott Bradner, app. at 30, Wikimedia Found. v. NSA, No. 1:15-cv-00662 (D. Md. 2018); Government's Response to the Court's Briefing Order of May 9, 2011, FISC Submission (June 1, 2011) (referencing "total take of Section 702 upstream collection of web activity").

83. Reply Brief in Support of Defendant's Motion for Summary Judgment at 11, Wikimedia Found. v. NSA, No. 11:15-cv-00662 (D. Md. Feb. 15, 2019).

84. Appendix to Reply Brief in Support of Defendants' Motion for Summary Judgment, Response to Plaintiff's Statement of Material Facts at 3–4, Wikimedia Found. v. NSA, No. 1:15-cv-00662 (D. Md. Feb. 15, 2019).

85. Reply Brief in Support of Defendants' Motion for Summary Judgement at 17, Wikimedia Found. v. NSA, No. 1:15-cv-00662 (D. Md. Feb. 15, 2019).

86. Wikimedia Found. v. NSA, No. 1:15-cv-00662, Memorandum Opinion at 27–30 (D. Md. Dec. 16, 2019).

ated and excluded from the discussion. Congress is confused and distracted. Courts cannot exercise their constitutional role of reviewing Executive Branch activities. Everyone is misled.

"Unfortunately, getting meaningful answers to these questions is a lot like getting a genie to grant your wishes," once said Matt Blaze, an associate professor and security expert at the University of Pennsylvania.[87] Trying to avoid the realm of the magical and esoteric, and in a climate of extreme secrecy, only with extensive documentation, pressure for declassification, and access to multiple sources of information can United States citizens obtain some level of confidence that we know what kind of spying is going on in our names. Until then, suspicion of government—and the way it uses language—is mandatory.

87. Matt Pearce, *NSA Does Not Collect Cellphone Location Data, Officials Say*, L.A. TIMES (June 24, 2013), https://www.latimes.com/nation/nationnow/la-na-nn-nsa-phone-location-data-20130624-story.html [https://perma.cc/7S6Q-DZTS].

THE SECRECY OF CHAMBERS: AN ARGUMENT FOR GREATER IN CAMERA REVIEW OF THE GOVERNMENT'S *GLOMAR* RESPONSE IN FOIA LITIGATION

*KATHRYN G. MORRIS**

The Freedom of Information Act (FOIA) empowers the public with a formal process to request access to records about government operations and activities.[1] Promulgated after an 11-year investigation into government secrecy by the House Special Subcommittee on Government Information, the statute amended the Administrative Procedure Act by granting the public the "right to know" about government processes and operations.[2] The FOIA replaced the government's post-World War II public information policy, which limited access to those with a "need to know" and recognized that an informed citizenry is the cornerstone of public discourse and democratic governance.[3] However, certain records may be protected from disclosure if they fall within one of the discrete categories of exemptions under the FOIA. More controversially, the government may refuse to acknowledge the very existence of those records if the fact of their existence is itself exempt from disclosure.

In January 2018, the U.S. District Court for the District of Columbia held in *James Madison Project* that an agency cannot refuse to confirm or deny the existence of records, a reply known as the

* N.Y.U. School of Law, J.D., 2019; Editor-in-Chief, *Annual Survey of American Law*, 2018-19. I would like to thank Charles R. Miller, FBI FOIA Unit Chief, retired, in part for recommending this research topic, but also for his encouragement, support, and advice throughout my time in law school and in my new career as a government attorney. He is the model civil servant that I always aspire to be. I must also thank Professor Stephen J. Schulhofer, who was integral to the development of this paper and my mentor in law school. I am so appreciative to have met this lifelong learner, with whom I could share my passion for the public trust.

1. Freedom of Information Act, 5 U.S.C. § 552 (1967).

2. Sam Archibald, *The Early Years of the Freedom of Information Act – 1955 to 1974*, 26 POL. SCI. & POL. 726, 728 (1993).

3. Harold C. Relyea, *Extending the Freedom of Information Concept*, 8 PRESIDENTIAL STUD. Q. 96, 97 (1978) ("The 'need to know' tradition was, at base, an outgrowth of the mistaken supposition that government is an organic entity, existing apart from the citizenry who, in fact, created it . . . . [G]overnment information, like the state itself, belongs to the people.").

Glomar response, if that agency has previously made an official acknowledgement through statements or actions that: (1) are as specific as, (2) descriptively match, and (3) publicly disclose the records sought.[4] Just one year before in *Smith*, the court held that the official acknowledgement doctrine in the context of the *Glomar* response, as opposed to the government's withholding of specific information contained within the records, requires a less formalized approach than the three-prong test faithfully applied in *James Madison Project*. [5] The lower standard of *Smith*, in which the three-prong test is not so rigidly applied, recognizes that disclosure of the existence of records is a more generalized request for information than the content of those records.

When research for this paper began, the singular purpose was to explain the disagreement within the jurisdiction about the proper application of the official acknowledgement doctrine to the *Glomar* response and to advance an argument in support of a lower standard. Research included a comprehensive review of litigation resulting from the government's use of the *Glomar* response to information requests, as well as the court's application of the official acknowledgement doctrine to the *Glomar* context. Approximately sixty cases were reviewed from the past forty years, starting with the first few *Glomar* cases that arose in the mid-1970s and continuing through to the present day. Through the course of this research, the judicial opinions also revealed that courts are reluctant to accept classified affidavits explaining an agency's justification for withholding government records. The courts' resistance to further inquiry into agency nondisclosure decisions raises questions about the judiciary's role to ensure that FOIA exemptions are not abused by agencies. This paper primarily discusses the court's disfavor of in camera review and argues against its application to the *Glomar* context.

Part I tells the origin story of the *Glomar* response and describes its first appearance in case law. Part II describes the procedures for judicial review of an agency's disclosure determination pursuant to the FOIA. Part III provides the procedures particular to judicial review of an agency's *Glomar* response, a discussion of the court's divergent applications of official acknowledgement doctrine in *Smith* and *James Madison Project*, and arguments for a lower standard of the official acknowledgement doctrine in the *Glomar* context. Justifications for judicial reluctance to perform in camera

4. *See* James Madison Project v. Dep't of Justice, 302 F. Supp. 3d 12, 20–22 (D.D.C. 2018) (discussing the applicable standards).

5. *See* Smith v. CIA, 246 F. Supp. 3d 28, 32 (D.D.C. 2017).

review of classified affidavits are explained in Part IV, and Part V lists potential harms to both the judicial and executive branches through minimal use of in camera review, especially in the *Glomar* context.

I.
BACKGROUND FOR THE GOVERNMENT'S *GLOMAR* RESPONSE

A. Glomar's Origin Story: The Glomar Explorer and the Sunken K-19

In the early hours of June 5, 1974, a lone security guard was forced at gunpoint to unlock the Hollywood office of the Summa Corporation, Howard Hughes's principal holding company for his various aviation and hospitality enterprises.[6] Carting two oxy-acetylene tanks and a welding torch, a small gang of thieves infiltrated the office safes and absconded with two footlockers of sensitive documents. Initially, Summa only reported a theft of $68,000. After an aborted negotiation involving a million-dollar ransom, the Federal Bureau of Investigation and Los Angeles County Police Department were informed of the safes' full contents. The thieves now possessed a contract between Summa and the Central Intelligence Agency to salvage a sunken Soviet Union submarine from the Pacific Ocean floor.

Six years earlier, in March 1968, the Soviet Navy had initiated a search-and-rescue effort for the missing Golf class submarine, the *K-129*, which earlier that month failed to make routine radio contact or respond to calls from headquarters.[7] The Soviet's exhaustive but ultimately unsuccessful search by air and sea drew the attention of the U.S. Navy. A review of acoustic records from its Sound Surveillance System revealed that an underwater explosion had occurred northwest of Hawaii. For two months, the Navy combed over a ten-mile-square area in a research ship equipped with sonar, electronic scanners, and magnetic sensors until the wreck was finally located.

The discovery was thought invaluable. The Navy suspected that the submarine carried nuclear missiles and torpedoes, as well as targeting and coding devices, which could provide greater insight into the Soviet's Cold War-era weaponry and aid the United States in disarmament talks. The only obstacle was constructing a vessel that could lift the 4,000-ton wreck from its 16,000-foot-deep grave undetected by the Soviets. With the blessing of the White House,

6. William Farr & Jerry Cohen, *CIA Reportedly Contracted with Hughes in Effort to Raise Sunken Soviet A-Sub*, L.A. Times, Feb. 8, 1975, at 18.

7. *The Great Submarine Snatch*, Time, Mar. 31, 1975, at 20.

the Navy appealed to the CIA to orchestrate the covert retrieval, known as Project Azorian. The CIA approached business magnate and famous recluse Howard Hughes to provide its cover story for the creation of the *Glomar Explorer*, a 36,000-ton, deep-sea mining vessel. Hughes agreed. The Summa PR team contacted the press and began promoting the *Glomar Explorer* as Hughes' latest venture to harvest manganese nodules from the ocean floor for iron and steel production. Through his company, Global Marine Development, Inc., the CIA was able to subcontract with Lockheed Corporation for the design of the *Glomar Explorer* and Sun Shipbuilding and Drydock Company for its construction.

The *Glomar Explorer* began operation in the summer of 1974, but faced instant setback. After the ship had seized the wreck in its grappling hooks and raised it halfway to the surface, the *Glomar Explorer* malfunctioned and the *K-129* split in two. The part containing the Soviet's weaponry and code room slipped from the ship's hooks and fell back to the seabed. Empty-handed, the *Glomar Explorer* returned to California for repairs.

On February 8, 1975, while the Los Angeles County District Attorney pursued an extortion charge in the Summa burglary investigation, the *Los Angeles Times* published a front-page article in its evening edition about the CIA's contract with Hughes to raise the sunken submarine.[8] Although the article was riddled with inaccuracies, CIA Director William Colby contacted the editor immediately and asked the newspaper to kill the story. The *Los Angeles Times* declined but moved the article to page 18 in later editions and did not pursue further reporting. The CIA launched a campaign to forestall additional coverage of the *Glomar Explorer* in the press. Director Colby and other CIA officials contacted the *New York Times*, the *Washington Post*, the *Washington Star*, *Time*, *Newsweek*, *Parade*, three television networks including CBS, and the National Broadcasting System to brief their editors on the true mission of the *Glomar Explorer* and to warn of the potential harm to national security that could result from premature disclosure to the public. In exchange for this classified information, the CIA requested silence until the remaining part of the submarine was salvaged.

8. Martin Arnold, *C.I.A. Tried to Get Press to Hold Up Salvage Story: Agency Officials Argued for Delay on Ground of National Security–Media Agreed, But Only Temporarily*, N.Y. TIMES, Mar. 20, 1975, at 31; James Phelan, *An Easy Burglary Led to the Disclosure of Hughes-C.I.A. Plan to Salvage Soviet Sub*, N.Y. TIMES, Mar. 27, 1975, at 18; George Lardner & William Claiborne, *CIA's Glomar "Game Plan": How the CIA Tried to Head Off the Glomar Explorer Story*, WASH. POST, Oct. 23, 1977, at 1.

The news organizations reluctantly agreed to the CIA's terms, with the understanding that as soon as one newspaper broke the pact of silence then others were free to follow suit. Self-censorship in the interest of national security quickly gave way to the competitive urge. On March 18, 1975, reporter Jack Anderson went public with the story on the Mutual Broadcasting System radio station in Washington, D.C., calling the Hughes manganese story a CIA cover up for a 350 million dollar failure.[9] The *New York Times*, the *Washington Post*, and the *Los Angeles Times* quickly printed articles that described not only the *Glomar Explorer*, but also the CIA's extensive efforts to delay coverage. [10] After the dust settled, members of the press wondered whether the CIA's contact with news organizations was actually an attempt to protect Project Azorian or if it was instead a controlled leak of misinformation. Stories circulated that the CIA's true motive was to drum up positive publicity for the agency through an engineering marvel, to conceal from the Soviets that the *Glomar Explorer* had successfully raised all of the *K-129*, or to provide cover for a third and as-yet-unknown covert mission.[11]

B. Military Audit Project and Phillippi I & II: Judicial Acceptance of the Glomar Response

A month after Anderson's scoop, Felice "Fritzi" Cohen, Executive Director of the Military Audit Project and wife of the *Washington Post* reporter Ed Cohen, sought records about the CIA-Hughes contract and other financial arrangements between the government and private parties concerning the *Glomar Explorer*.[12] The conspiracy theories also attracted the curiosity of *Rolling Stone* reporter, Harriet "Hank" Phillippi, who sought CIA records describing the agency's attempt to dissuade the press from reporting on the *Glomar Explorer*.[13]

Both submitted a request for records under the FOIA. The CIA, however, resisted the FOIA's mandate of greater government transparency. Both Cohen and Phillippi's initial requests and later administrative appeals were rejected by the agency.[14] The CIA responded that the records, if any existed at all, were classified and exempted by statute. This was the first instance in which a government agency refused to confirm or deny the existence of records on

9. *The Great Submarine Snatch*, *supra* note 7.
10. *See* sources cited *supra* note 8.
11. *The Great Submarine Snatch*, *supra* note 7.
12. Military Audit Project v. Casey, 656 F.2d 724, 729 (D.C. Cir. 1981).
13. Phillippi v. CIA, 546 F.2d 1009, 1010 (D.C. Cir. 1976).
14. *Military Audit Project*, 656 F.2d at 730; *Phillippi*, 546 F.2d at 1011–12.

the grounds that their existence was itself a fact exempt from disclosure—a posture subsequently termed the *Glomar* response. Cohen, on behalf of the Military Audit Project and joined by U.S. foreign policy expert Morton Halperin, and Phillippi each brought suit in the U.S. District Court for the District of Columbia to enjoin disclosure.

In *Military Audit Project*, the CIA moved for dismissal or alternatively summary judgement.[15] In support of its motion, the CIA provided a brief public affidavit by the Deputy Secretary of State Lawrence Eagleburger and requested leave to submit two classified affidavits in camera. The District Court rejected the request on the basis of the Eagleburger affidavit and required a fuller public record. The CIA responded with public affidavits from CIA Deputy Director Carl Duckett and U.S. National Security Advisor Brent Scowcroft, which stated that acknowledgement of existence or nonexistence of the records sought could compromise intelligence operations, reveal technological developments relating to national security, disrupt foreign relations, and endanger military and diplomatic personnel overseas.[16]

The District Court denied summary judgement and ordered an in camera proceeding that required the CIA to produce the requested records and provide an explanation of the national security harm for each document.[17] The CIA balked and sought relief, arguing that the purpose behind the refusal to confirm or deny would be thwarted by such an order. The CIA again moved for dismissal with a public affidavit by CIA Director George H. W. Bush. Narrowing the focus of potential harm to national security, Bush's affidavit argued that the annual CIA budget, historically protected by Congress, could be inferred from disclosure of CIA expenditures for specific intelligence projects. The Court of Appeals denied the CIA's petition for a writ of mandamus. [18]

As a last resort, eight classified affidavits and testimony of undisclosed witnesses were submitted in camera while on remand, and the District Court dismissed the complaint based, unhelpfully, "on reasons stated in camera."[19] The case returned to the Court of Appeals, where the District Court was admonished for not providing a more informative opinion. The Court disclosed to the Military Audit Project that the identity of agencies involved and the content of

15. *Military Audit Project*, 656 F.2d at 731.
16. *Id.* at 731-33.
17. *Id.* at 733.
18. *Id.* at 734.
19. *Id.*

records sought were exempt from disclosure under exemptions (b)(1) and (b)(2) of the FOIA, which respectively protect classified information and information pertaining to internal personnel rules and practices of an agency. The Military Audit Project was then given 40 days to submit their briefs on appeal with this slightly better understanding of the reason behind the district court's ruling.[20]

Although Phillippi's litigation was certainly less circuitous than *Military Audit Project*, it was by no means more enlightening. In *Phillippi I*, the District Court, after receiving Deputy Secretary Eagleburger's public affidavit and reviewing two classified affidavits in camera, held that the information was exempt from disclosure under exemption (b)(3) of the FOIA, which allows the government to withhold information protected by statute, and granted the CIA's motion for summary judgement.[21] The Court of Appeals reversed and remanded the case to the district court for the CIA to provide a public record justifying its refusal to confirm or deny the existence of the records sought.[22] Additionally, the Court of Appeals rejected the CIA's attempt to introduce National Security Advisor Scowcroft's public affidavit from *Military Audit Project*, holding in part that summary judgement cannot be sustained by documents filed in a separate case concerning different but related issues.[23]

While both cases were in the district court on remand, a change in CIA leadership under the new Carter Administration led the agency to abandon is former position. Responsive records were disclosed revealing the CIA's involvement with the *Glomar Explorer*. In *Military Audit Project*, the CIA released 2,000 pages of responsive documents, while withholding other records pursuant to exemptions (b)(1) and (b)(3).[24] The CIA supported its partial disclosure with public affidavits by Secretary of State Cyrus Vance, then CIA Director Stansfield Turner, CIA Finance Director Thomas Yale, and CIA Associate Deputy Director Ernest Zellmer.[25] During this time, President Carter also issued Executive Order 12065, which established new standards for classification of government records.[26] The CIA reviewed its withholdings and confirmed that the information remained properly classified. Based on the public record, the

20. *Id.*

21. *Phillippi*, 546 F.2d at 1012.

22. *Id.* at 1013.

23. *Id.* at 1014-15.

24. *Military Audit Project*, 656 F.2d at 735.

25. *Id.* at 736.

26. Exec. Order No. 12065, 43 Fed. Reg. 28949 (June 28, 1978).

District Court granted summary judgement for the CIA, and the Military Audit Project appealed.

In *Phillippi I*, the CIA acknowledged that 154 responsive documents existed, releasing 16 in their entirety and 134 with redactions, and withholding four in their entirety.[27] Unsatisfied with the partial release, Phillippi sought the disclosure of the withheld documents and redacted information. In *Phillippi II*, the District Court granted summary judgement for the CIA on the ground that the records were properly withheld under exemption (b)(3), which shields from disclosure information exempt by statute.[28] Specifically, the National Security Act of 1947 provided that the CIA protect "intelligence sources and methods from unauthorized disclosure."[29]

In both cases, the Court of Appeals affirmed summary judgement. Despite unconfirmed CIA leaks to news organizations and partial FOIA disclosures, a national security interest remained in the withheld records.[30] With the same penchant as the press for a good conspiracy theory, the Court reveled in the possibility of the *K-129* explanation as either a second fallback cover after the first was blown by the Summa burglary or as a double bluff to create public speculation about the *Glomar Explorer*'s true purpose. "There may be much left to hide," the Court explained in *Phillippi II*, "and if there is not, that itself may be worth hiding."[31]

II.
JUDICIAL REVIEW OF AN AGENCY'S DISCLOSURE DETERMINATION PURSUANT TO THE FOIA

A. An Agency's Response to a FOIA Request

The FOIA requires federal executive agencies to release government records upon request by any person.[32] The statute's presumption of the value of disclosure and government transparency, however, is balanced by nine categories of exemption that protect, among other things, personal privacy, ongoing criminal investigations, and matters of national security.[33] Exemption (b)(1) of the

27. Phillippi v. CIA, 655 F.2d 1325, 1328 (D.C. Cir. 1981).

28. *Id.* at 1329.

29. 50 U.S.C. § 3523(b)(1)(A) (2018) (originally enacted as The National Security Act of 1947, 50 U.S.C. § 403(d)(3)).

30. *Military Audit Project*, 656 F.2d at 752-54; *Phillippi*, 655 F.2d at 1329–31.

31. *Phillippi*, 655 F.2d at 1331.

32. *See* Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A) (2011).

33. 5 U.S.C. § 552(b); Orrin G. Hatch, Commentary, *The Freedom of Information Act: A Collage*, 46 PUB. ADMIN. REV. 608, 609–10 (1986) ("A society with no

FOIA protects classified information, specifically, government records that are (1) "authorized under criteria established by an [e]xecutive order to be kept secret in the interest of national defense or foreign policy" and are (2) "properly classified pursuant to such [e]xecutive order."[34] Executive Order 13526 currently governs the classification of government records.[35]

Under Executive Order 13526, information may be properly classified only if: (1) an original classification authority classifies the information; (2) the government owns, produces, or controls the information; (3) the information falls within one of the enumerated categories of protected information; and (4) the original classification authority determines that unauthorized disclosure could reasonably be expected to damage national security and is able to identify or describe the damage. [36] Enumerated categories of protected information include matters related to national security and defense; foreign relations and governments; and intelligence activities, sources, and methods. [37] Thus, for an agency to properly invoke exemption (b)(1), it must first comply with classification procedures set forth in Executive Order 13526 and withhold only those records under the FOIA that fall within the executive order's enumerated categories.[38]

Following an agency's review of its records and response to a FOIA request, including a determination that some or all information must be withheld pursuant to exemption (b)(1), the requester may seek judicial review of the agency's disclosure determination.[39] The FOIA empowers a federal court with the authority to enjoin an agency from improperly withholding information and to compel

access to information about its Government would be susceptible to abuses of power, as the builders of our constitutional system were aware. Yet a society in which all information is open to view compromises its primary goal of protecting its citizens against criminal and foreign threats as well as jeopardizes the privacy rights of many unsuspecting citizens.").

34. 5 U.S.C. § 552(b)(1); *see also* Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1367 (4th Cir. 1975).

35. Classified National Security Information, Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) [hereinafter E.O. 13526].

36. E.O. 13526 § 1.1(a); *see also* ACLU v. Dep't of Justice, 808 F. Supp. 2d 280, 298 (D.D.C. 2011).

37. E.O. 13526 § 1.4.

38. *See* King v. Dep't of Justice, 830 F.2d 210, 214 (D.C. Cir. 1987) ("An agency may invoke this exemption only if it complies with classification procedures established by the relevant executive order and withholds only such material as conforms to the order's substantive criteria for classification.").

39. Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973).

production of government records to the requester.[40] Typically, there is no dispute of material facts in a FOIA case and the court may decide on motions for summary judgment.[41]

At summary judgment, the court conducts a de novo review of the agency's disclosure determination, including its classification decision where exemption (b)(1) is invoked.[42] The agency bears the burden of justifying its decision to withhold the requested information through public declaration or affidavit that proper procedures to review the records were followed and the information responsive to the request logically falls within the claimed exemption.[43] The court may choose to examine the contents of the agency records in camera.[44]

B. Judicial Review: The Agency's Burden at Summary Judgment

A court may grant summary judgment to the agency on the basis of public declarations or affidavits that describe both the withheld information and the justification for nondisclosure. It may do so if it is provided with reasonably specific detail sufficient to demonstrate that the information logically falls within the claimed exemption. [45] Further, the agency's decision must not be called into question by contradictory evidence, nor impugned by evidence of agency bad faith.[46] On appeal, the court in question reviews the public record to determine whether the agency's affidavits provide a complete and detailed explanation for nondisclosure, so as to afford the requester a meaningful opportunity to contest and the lower court an adequate foundation to review the agency withholding. [47]

Courts have held that public affidavits, without further requiring in camera inspection of the withheld records, are sufficient to

40. 5 U.S.C. § 552(a)(4)(B).

41. Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."); *James Madison Project*, 302 F. Supp. 3d 12, 19 (D.D.C. 2018).

42. 5 U.S.C. § 552(a)(4)(B); *see also* Hayden v. NSA, 608 F.2d 1381, 1386 (D.C. Cir. 1979).

43. *Hayden*, 608 F.2d at 1387; *see also* Halperin v. CIA, 629 F.2d 144, 147 (D.C. Cir. 1980).

44. 5 U.S.C. § 552(a)(4)(B).

45. *Halperin*, 629 F.2d at 148; Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981).

46. *Id.*

47. *King*, 830 F.2d at 218.

conduct a de novo review.[48] Additionally, Congress has determined that an agency's affidavit concerning the applicability of an exemption, based on its assessment of a cognizable harm resulting from public disclosure, must be accorded substantial weight by the court.[49] This "substantial weight" standard recognizes that an agency's description of a potential future harm, as opposed to an actual past harm, requires a certain amount of speculation, especially in the arena of national security. [50] However, conclusory and generalized statements that the information is exempt from disclosure are inadequate for a court's de novo review.[51] To keep Congress's grant of substantial weight to the agency from usurping the court's role through judicial review, the agency's invocation of an exemption must appear both "logical and plausible" to the court.[52]

To meet its burden, the agency must strike a balance in the public record between specificity and generality. It is not the intent of the courts to require public affidavits with factual descriptions that, if disclosed, would result in the very harm the agency sought to avoid by withholding the records.[53] Yet, the public record must lay an adequate foundation for the requester to contest the nondisclosure and for the court to make a de novo review. Specificity within the public record is necessary "to correct, however, imperfectly, the asymmetrical distribution of knowledge that characterizes FOIA litigation."[54]

Where classified information is concerned, a full public record may be impossible because the level of specific detail necessary to justify nondisclosure could compromise national security. In such cases, a classified affidavit for in camera review is appropriate. [55] Congress has left the decision of when classified affidavits should be

48. Weissman v. CIA, 565 F.2d 692, 697 (D.C. Cir. 1977) ("[W]here the public record is sufficient to permit a legal ruling, the inquiry need go no further."); *Hayden*, 608 F.2d at 1386 ("[T]he court is to afford this opportunity to the agency [to show proper classification through affidavit] before ordering any in camera inspection of documents.").

49. 5 U.S.C. § 552(a)(4)(B).

50. *Halperin*, 629 F.2d at 149.

51. *Vaughn*, 484 F.2d at 826; *see also Hayden*, 608 F.2d at 1387 ("The affidavits will not suffice if the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping.").

52. Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982).

53. *King*, 830 F.2d at 219.

54. *Id.* at 218.

55. *See Hayden*, 608 F.2d at 1385 (explaining that, given "[t]he unique signals intelligence mission of NSA[,] . . . secrecy concerns are greater here than is usual in FOIA cases" and thus receiving affidavits in camera was appropriate).

permitted to the discretion of the courts. [56] De novo determinations based on in camera review, "without full benefit of adversary comment on a complete public record," are fundamentally contrary to the adversarial system.[57] As a result, courts have habitually abstained from the practice unless relevant questions remain unanswered and in camera review is required to make a proper de novo determination.[58] Some judicial opinions have gone so far as to state that, where an agency has met its burden through public affidavit, in camera review is "neither necessary nor appropriate."[59] Courts have thus been discouraged from undertaking in camera review based on the assumption that "it can't hurt."[60]

C. Judicial Review: The Requester's Burden at Summary Judgment

If an agency can show that records have been properly withheld, then the burden shifts to the requester to show that summary judgment should not be granted to the agency.[61] The requester may accomplish this either by proof that the agency has acted in bad faith or has waived its otherwise valid exemption claim through prior disclosure of the protected information.[62]

For all intents and purposes, allegations of agency bad faith have proven unsuccessful in carrying the requester's burden at summary judgment. Bad faith arguments have arisen through two situations: (1) where an agency withholds records concerning government conduct later deemed unlawful and (2) where an agency, after previously withholding the requested information, releases the information after a later review of the records. In the first instance, courts maintain that records produced through illegal government activity may nonetheless contain classified information

---

56. 5 U.S.C. § 552(a)(4)(B).

57. *Hayden*, 608 F.2d at 1385.

58. Wilner v. NSA, 592 F.3d 60, 75–76 (2d Cir. 2009) ("A court should only consider information *ex parte* and *in camera* that the agency is unable to make public if questions remain after the relevant issues have been identified by the agency's public affidavits and have been tested by plaintiffs.").

59. *Hayden*, 608 F.2d at 1387.

60. Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978) (internal quotation marks omitted).

61. *See Halperin*, 629 F.2d at 148.

62. *See* Afshar v. Dep't of State, 702 F.2d 1125, 1131 (D.C. Cir. 1983) (discussing "bad faith or a general sloppiness in the declassification or review process"); *see also* Pub. Citizen v. Dep't of State, 11 F.3d 198, 201 (D.C. Cir. 1993) (discussing the criteria for waiver).

exempt from public disclosure. [63] In the second, courts characterize an agency's willingness to revisit its prior disclosure determination and to release more information to the requester as an act of good, not bad, faith. [64] Further, courts are concerned that penalizing an agency for its initial improper withholding, after self-correction, will deter agencies in the future from revisiting initial, overly cautious withholdings.

Alternatively, the requester may meet his or her burden by showing that the agency has waived its claim to an otherwise valid exemption through prior official acknowledgement of the protected information.[65] Unlike agency bad faith, plaintiffs have frequently asserted official acknowledgement arguments and the doctrine's parameters are well defined through FOIA litigation. Official acknowledgement requires that the information sought (1) be as specific as the information previously disclosed, (2) match the information previously disclosed, and (3) have been made public through a prior official and documented disclosure.[66]

The specificity prong requires that the information previously released be at least as specific as the information sought.[67] For example, in *ACLU*, the court held that the CIA had not waived its right to withhold information concerning individual high value detainees because the requester could only point to a general description in the public domain of the confinement conditions at Guantanamo Bay and the CIA's interrogation techniques.[68] The information previously released, a general description of the CIA program, was not as specific as the information sought, details of the capture, detainment, and interrogation of individual detainees.

The matching prong requires that the information previously released exactly match, rather than be similar to, the information sought. This part of official acknowledgement is implicated where the requester attempts to apply prior disclosure of certain information to related, but still protected, information. For example, the redacted information within a government document released in part cannot be said to match the segregated, unredacted information within that same document. Although related to the overarch-

63. ACLU v. Dep't of Def., 628 F.3d 612, 622 (D.C. Cir. 2011) ("Documents concerning surveillance activities later deemed illegal may still produce information that may be properly withheld under exemption 1.").

64. *Military Audit Project*, 656 F.2d at 752; *Wilner*, 592 F.3d at 75.

65. Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990).

66. *Fitzgibbon*, 911 F.2d at 765. *E.g.*, *Afshar*, 702 F.2d at 1133.

67. Wolf v. CIA, 473 F.3d 370, 378 (D.C. Cir. 2007).

68. *ACLU*, 628 F.3d at 625.

ing subject matter of the document, the redacted and unredacted portions convey different information. [69] This is why the court in *Military Audit Project* and *Phillippi II* upheld the CIA's partial release. Similarly, previously disclosed records that acknowledge a fact at one point in time or at a certain geographical location do not extend to records sought that prove the same fact at another time or location.[70]

Finally, the prior disclosure prong requires the information sought to have been made public through an official and documented disclosure by the agency or its authorized representative. [71] The parameters of prior disclosure have been drawn by courts through a litany of FOIA cases in which the circumstances did not give rise to a prior disclosure.[72]

Courts stringently apply the specificity, matching, and prior disclosure prongs because the records sought often relate to mat-

69. Ancient Coin Collectors Guild v. Dep't of State, 641 F.3d 504, 510 (D.C. Cir. 2011).

70. *Fitzgibbon*, 911 F.2d at 766.

71. *Wolf*, 473 F.3d at 378 (quoting *Fitzgibbon*, 911 F.2d at 765).

72. For example, official acknowledgement cannot be based on public speculation, logical deduction, or undisclosed sources. *Id.* at 378 (quoting *Fitzgibbon*, 911 F.2d at 765); *see also Afshar*, 702 F.2d at 1130; Moore v. CIA, 666 F.3d 1330, 1334 (D.C. Cir. 2011) (holding that the FBI's withholding of information originating with the CIA and at the request of the CIA did not officially acknowledge that CIA records existed on the same subject matter requested from the FBI); Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1370 (4th Cir. 1975) ("It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so."). Official acknowledgement does not result from an agency official's unauthorized disclosure of identical or similar information. *See* E.O. 13526 § 1.1(c) ("Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information."). The court has reasoned that an agency official's leak of classified information cannot waive the agency's right to protect classified information. *See Alfred A. Knopf*, 509 F.2d at 1370. Similarly, official acknowledgement must occur during the course of employment. A former agency official is bound by confidentiality agreements and may not disclose classified information that is known to him or her as the result of employment, regardless of the existence of an independent source for that information. *Id.* at 1371. A disclosure made by another agency is also not considered an official acknowledgement by the agency from which the information is sought. *See* Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999). However, an inadvertent or limited disclosure does qualify as an official acknowledgement. *See* Memphis Pub. Co. v. FBI, 879 F. Supp. 2d 1, 12 (D.D.C. 2012) (holding that the FBI's inadvertent release of confidential human source information waived its right to protect that information from disclosure); Johnson v. CIA, 2018 U.S. Dist. LEXIS 17830, at *13–14 (S.D.N.Y. 2018) (holding that the CIA's limited disclosure of classified information to trusted reporters was a waiver of the right to keep the information private).

ters of national security.[73] The rationale behind official acknowledgement doctrine is that, while intelligence and counterintelligence activities may be an "open secret" among nation states, official confirmation of the fact would force a foreign power to "save face"[74] through retaliation:

> While it is known and accepted that nations engage in secret activities, designed to promote their foreign and national defense policy interests, traditionally, and for sound practical reasons in the conduct of foreign affairs, governments do not officially acknowledge that they engage in such activities. In this context all nations are aware that they may be the objects of such operations and may even unofficially acknowledge this fact. No government, however, could tolerate the official acknowledgment by another government that such an operation has been conducted against it. When such official acknowledgment occurs, the nation that has been the object of such an operation must take some action in response.[75]

Despite the willingness of executive agencies and the courts to tolerate spy games in the absence of official acknowledgement, the public is generally less accepting of unacknowledged open secrets. Jack Anderson, the Washington, D.C. reporter who broke the press pact of silence to cover the *Glomar Explorer* story, explained that "international etiquette" is not a matter of national security. [76]

---

73. ACLU v. CIA, 109 F. Supp. 3d 220, 243 (D.D.C. 2015); *Pub. Citizen*, 11 F.3d at 203 ("We recognize that this is a high hurdle for a FOIA plaintiff to clear, but the Government's vital interest in information relating to national security and foreign affairs dictates that it must be.").

74. Phillippi v. CIA, 655 F.2d 1325, 1332–33 (D.C. Cir. 1981) ("In the world of international diplomacy, where face-saving may often be as important as substance, official confirmation . . . could have an adverse effect on our relations [with other nations]."); *see also Afshar*, 702 F.2d at 1130–31 ("Unofficial leaks and public surmise can often be ignored by foreign governments . . . but official acknowledgment may force a government to retaliate.") (citations omitted).

75. *Military Audit Project*, 656 F.2d at 732.

76. *Anderson Says Soviet Knew Submarine Story*, N.Y. TIMES, Mar. 26, 1975, at 13 ("Mr. Anderson said there had been numerous leaks on the expedition of Glomar Explorer. 'So the Russians knew. We knew they knew. They knew we knew they knew,' Mr. Anderson said. He said he had decided to ignore the appeal of the Director of Control Intelligence, William E. Colby, not to print the story when 'Colby told us it would be "rubbing [the Soviets'] noses in it" to let the American people know.'").

III.
JUDICIAL REVIEW OF AN AGENCY'S *GLOMAR* RESPONSE

Executive Order 13526 expressly authorizes an agency's refusal to confirm or deny the existence or nonexistence of records requested pursuant to the FOIA whenever their existence or nonexistence is itself a classified fact.[77] In a FOIA litigation where an agency has provided a *Glomar* response to the requester, there are no documents for the court to review other than the affidavits justifying the agency's refusal. [78] In addressing some of the earliest *Glomar* cases, the courts contemplated that there may be a greater need to examine classified affidavits in camera and without the benefit of adversarial process.

If an agency can show that the existence of the records is properly withheld, the burden shifts to the requester to demonstrate that the agency has waived its right to assert a *Glomar* response, because the existence or nonexistence of the requested records has been officially acknowledged.[79] In the context of a *Glomar* response, official acknowledgement concerns the existence, not the content, of the requested records. For example, in *Wolf*, where a former CIA director gave a prepared statement before a Congressional hearing that included dispatch excerpts, the court found that the CIA had waived its right to assert that records related to the subject of the prepared statement did not exist.[80] "[I]f the prior disclosure establishes the existence (or not) of records responsive to the FOIA request, the prior disclosure necessarily matches both the information at issue—the existence of records—and the specific request for that information."[81] Similarly, in *ACLU*, the President's acknowledgement that the U.S. government had participated in drone strikes made it neither logical nor plausible for the CIA to claim that it did not have an intelligence interest in the strikes.[82]

If the court determines that the agency has officially acknowledged the existence of records, then the agency may not rely on the *Glomar* response. In an apparent attempt to console agencies,

77. *See* E.O. 13526 § 3.6(a); ACLU v. Dep't of Justice, 808 F. Supp. 2d 280, 298 (D.D.C. 2011).

78. *Phillippi*, 546 F.2d at 1013 ("When the Agency's position is that it can neither confirm nor deny the existence of the requested records, there are no relevant documents for the court to examine other than the affidavits which explain the Agency's refusal.").

79. *Wilner*, 592 F.3d at 70.

80. *Wolf*, 473 F.3d at 370.

81. *Id.* at 379.

82. ACLU v. CIA, 710 F.3d 422, 430 (D.C. Cir. 2013).

courts have explained that defeat of the *Glomar* response does not necessarily result in the compelled disclosure of records. [83] The agency is simply required to review the records and determine what information is exempt and what information, if any, can be released. The FOIA, however, directs the agency to review the records with the objective of partial release of the information if full disclosure is impossible.[84] Foreclosing the use of the *Glomar* response forces an agency to engage with the information within its records, to actively segregate non-exempt from exempt information, and to release the segregable portion of records to the requester.

Although the subject matter that prompted the agency's *Glomar* response is protected from disclosure by exemption, the released information can prove equally valuable for informing the public about government operations. In fact, the process of segregation can create a new figure-ground perception; that is, by removing the particulars of the records, the reader can recognize larger patterns of information. For example, Josh Gerstein, co-plaintiff in the *James Madison Project*, submitted a FOIA request for records related to FBI investigations into leaks of classified information to the press.[85] The FBI released 300 pages of heavily redacted investigative files, removing the names of government employees, the agencies involved, and any information concerning the alleged leaks. By withholding the specific information of each leak's investigation, the FBI, whether inadvertently or not, revealed a systemic problem among agencies within the Intelligence Community. The *New York Sun* published the FOIA release along with a frontpage article by Gerstein describing how the lack of cooperation by victim agencies repeatedly thwarted FBI efforts to uncover the source of leaked information. Although agencies were obligated to report suspected leaks to the Department of Justice for referral to the FBI, agencies often cancelled meetings last minute without rescheduling or failed to provide necessary documents to special agents. In stark contrast

83. *Wolf*, 473 F.3d at 380; *see also ACLU*, 109 F. Supp. 3d at 225 (upholding CIA's release of one redacted memorandum and withholding of all remaining records following remand).

84. 5 U.S.C. § 552(a)(8)(A) ("An agency shall—(i) withhold information under this section only if—(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or (II) disclosure is prohibited by law; and (ii)(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and (II) take reasonable steps necessary to segregate and release nonexempt information. . . .").

85. Josh Gerstein, *Leak Probes Stymied, FBI Memos Show*, N.Y. SUN, Jan. 10, 2007, at 1.

with public statements by CIA officials, the FBI demonstrated agencies' preoccupation with preventing further dissemination of leaked information rather than cooperation to identify the source of the leak and prevent future unauthorized disclosures.

A. Afshar, Fitzgibbon, and Wolf: Development of the Official Acknowledgement Doctrine and First Application in the Glomar Context

In 1983, the elements of official acknowledgement were first developed in *Afshar*, but it was not until 1990 in *Fitzgibbon* that the court formalized the elements as a doctrine. Further, official acknowledgement doctrine was not applied to the *Glomar* context until 2007 in *Wolf*.

Alan Fitzgibbon, a historian studying the disappearance of Jesus de Galindez, a Spanish political writer and exile, submitted a FOIA request to the CIA and FBI.[86] The majority of the records identified as responsive to the request were withheld pursuant to, among others, exemption (b)(1).[87] In dispute was the CIA's withholding of CIA station locations, one of which had been made publicly available through a CIA document shared with Congress.[88] On appeal, the *Fitzgibbon* court formalized the three-prong test for official acknowledgement, which was derived from facts considered important for the court's analysis in a separate case, *Afshar*. [89]

Nassar Afshar sought information pertaining to himself and his activities while serving as an editor of an Iranian newspaper and as chairman of a committee for a free Iran.[90] The court rejected his reliance on books authored by former CIA agents and officials, which discussed the existence of CIA stations in foreign countries and relationships between the CIA and foreign intelligence services.[91] The court explained that Mr. Afshar failed to show an official acknowledgement of a relationship between the CIA and SAVAK, the secret police and intelligence service of the Iranian Pahlavi dynasty, because the books (1) did not specifically describe a relationship between the CIA and SAVAK, (2) did not show a continuing relationship between the two agencies matching the date range of the withheld records, and (3) was not an official and docu-

86. *Fitzgibbon*, 911 F.2d at 757.
87. *Id.*
88. *Id.* at 758.
89. *Id.* at 765 (citing *Afshar*, 702 F.2d at 1133).
90. *Afshar*, 702 F.2d at 1128.
91. *Id.* at 1133.

mented disclosure because the authors were no longer in government service.[92]

From the analysis of the facts in *Afshar*, the *Fitzgibbon* court distilled three factors for official acknowledgement: "First, the information requested must be as specific as the information previously released. Second, the information requested must match the information previously disclosed. . . . Third, we held that the information requested must already have been made public through an official and documented disclosure."[93] The *Fitzgibbon* court concluded that the matching factor of its three-prong test required the officially acknowledged information to temporally match the records sought. Accordingly, records relating to a CIA station at a time before the date of the congressional hearing, in which related information about the CIA station was disclosed, could remain protected.[94]

Almost two decades later, in *Wolf*, the court applied for the first time the official acknowledgement doctrine to an agency's *Glomar* response. After the CIA issued a *Glomar* response to Paul Wolf's FOIA request for records relating to Jorge Gaitan, an assassinated Colombian presidential candidate, Mr. Wolf pointed to congressional testimony by CIA Director R. K. Hillenkoetter.[95] In a prepared statement, Hillenkoetter testified to the CIA's awareness of political unrest following the assassination of Gaitain and preceding the 1948 riots in Bogota. The court found that the testimony, which included excerpts of dispatches from CIA sources in Colombia, was sufficient to draw an inference that the CIA maintained records on Gaitan.[96]

The *Wolf* court addressed the difference in the official acknowledgement standard in the *Glomar* context. Whereas the evaluation in other FOIA cases was for the match between the information requested and the content of the prior disclosure, the prior disclosure in the *Glomar* context must establish the existence or nonexistence of the records sought. "[T]he prior disclosure necessarily matches both the information at issue—the existence of records—and the specific request for that information."[97] Because the specific information at issue was the existence of records per-

92. *Id.*
93. *Fitzgibbon*, 911 F.2d at 765.
94. *Id.* at 766.
95. *Wolf,* 473 F.3d at 373.
96. *Id.* at 379.
97. *Id.* at 378.

taining to Gaitan, Hillenkoetter's testimony and its reliance on CIA dispatches confirmed the existence of those records.

B. Smith and James Madison Project: Application of Divergent Official Acknowledgement Standards

Although the official acknowledgement doctrine is an appropriate means for a requester to carry his or her burden at summary judgment, judges within the U.S. District Court for the District of Columbia disagree about how formalistically the official acknowledgement doctrine should be applied in the *Glomar* context.

Grant Smith, a researcher on Middle Eastern policy, filed a FOIA request with the CIA for its budget line items supporting Israel from 1990 through 2015.[98] The CIA issued a *Glomar* response. After the CIA failed to timely respond to Mr. Smith's administrative appeal, he sought judicial review. [99] To overcome the CIA's *Glomar* response, Mr. Smith provided a statement by President Obama that, due to U.S. military and intelligence assistance, Israel could defend itself against Iran or its proxies.[100] The *Smith* court found that President Obama had provided an official acknowledgement that the budget line items existed, because it could be inferred from his statement that the CIA provided intelligence assistance to Israel and must have means of appropriating funds to provide monetary or non-monetary support. [101] The court distinguished the official acknowledgement exception for FOIA exemptions from the *Glomar* response. Relying on *Fitzgibbon* and *Wolf*,[102] the court explained that, whereas FOIA exemptions required the factors of specificity, matching, and prior disclosure, the *Glomar* response required only prior disclosure because that factor alone settled the point at issue, that is, whether the information existed.[103] The additional factors of specificity and matching were inapplicable. The court concluded that the government's assertion that it did not maintain the records was neither logical nor plausible in light of the official acknowledgement.[104]

Following *Smith*, the court was faced with a similar *Glomar* case. The James Madison Project (JMP), a Washington, D.C. non-profit that educates the public on intelligence gathering and national se-

98. Smith v. CIA, 246 F. Supp. 3d 28 (D.D.C. 2017).
99. *Id.* at 30–31.
100. *Id.* at 32.
101. *Id.* at 33.
102. *Wolf,* 473 F.3d at 379.
103. *Smith*, 246 F. Supp. 3d at 32.
104. *Id.* at 33.

curity, submitted a FOIA request relating to the Trump Dossier by British intelligence operative Christopher Steele.[105] The dossier alleged that the Russian government possessed compromising personal and financial information about then-presidential candidate Donald Trump. The FOIA request, submitted to the Office of the Director of National Intelligence (ODNI), CIA, NSA, and FBI, specifically sought the two-page synopsis of the dossier presented to the President-elect, as well as the agencies' final determinations and investigative files regarding the factual accuracy of the dossier.[106] The ODNI, CIA, and NSA responded that they possessed the synopsis, but withheld the synopsis in full pursuant to exemptions (b)(1) and (b)(3).[107] As to the request for the agencies' analysis of the synopsis, the agencies issued a *Glomar* response.[108] The FBI, on the other hand, responded with a blanket *Glomar* to the entirety of the FOIA request pursuant to exemption (b)(7)(A), which protects information related to a pending law enforcement investigation. [109]

JMP argued that President Trump, former Director of National Intelligence James Clapper, and former FBI Director Jim Comey had all officially acknowledged the existence of the synopsis and related records. JMP pointed to Trump's numerous interviews, tweets, and Comey's termination letter;[110] Comey's testimony before the House Permanent Select Committee on Intelligence and statements made after his removal from office;[111] and Clapper's press release, stating that the dossier was not a product of the Intelligence Community and that no judgment had been made as to its veracity, as well as statements made following his resignation. [112]

105. *James Madison Project*, 302 F. Supp. 3d 16.

106. *Id.* at 17.

107. 5 U.S.C. § 552(b)(3) ("[Disclosure] does not apply to matters that are . . . specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—requires that the matters be with- held from the public in such a manner as to leave no discretion on the issue; or establishes particular criteria for withholding or refers to particular types of matters to be withheld; and if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.").

108. *James Madison Project*, 302 F. Supp. 3d at 18.

109. *Id.*; 5 U.S.C. § 552(b)(7)(A) ("[Disclosure] does not apply to matters that are . . . records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings. . . .").

110. *James Madison Project*, 302 F. Supp. 3d at 24–26.

111. *Id.* at 26–28.

112. *Id.* at 28.

The court declined to extend official acknowledgement to those statements made by former executive officials, even as supplemental material to other evidence, and held that the public official statements did not amount to an official acknowledgement for the information sought. Trump's tweets regarding Comey's possession of the dossier and testimony to Congress confirming the existence of an investigation into Russian interference in the 2016 presidential election did not acknowledge the FBI's possession of the synopsis.[113] While the court acknowledged that a presidential tweet could be an official acknowledgement, Trump's tweets discrediting the dossier appeared to come from media reporting or his own personal knowledge, not through information received from the Intelligence Community.[114]

Relying on *ACLU* and *Smith*, JMP urged the court to adopt a logical and plausible inference standard to overcome a *Glomar* response.[115] Under such a standard, the information previously disclosed would be sufficient to waive the agency's right to invoke a *Glomar* response if that position is neither logical nor plausible in light of the prior disclosure. The court rejected this recommendation and explained that, since *Wolf*, the *Fitzgibbon* three-prong test remains relevant for evaluating a claim of official acknowledgement in the *Glomar* context, if perhaps not as formalistically applied as when evaluating a withheld document's content.[116] Rather, the matching and specificity prongs merge into one, while prior disclosure remains a separate prong.[117] "In the *Glomar* context, the specificity requirement concerns the 'fit' [or match] between the particular records sought and the records that are the subject of the public official statements."[118] The logical and plausible language that appeared in *ACLU* was used to evaluate an agency's justification for applying a FOIA exemption to withhold records or issue a *Glomar* response, but that standard did not displace the specificity requirement within the *Fitzgibbon* three-prong test.[119]

The court explained further that there are two instances in which the burden of proof may be met to establish the existence of

113. *Id.* at 29–30.

114. *Id.* at 33–34.

115. *Id.* at 21.

116. *Id.* ("In the *Glomar* context . . . if the prior disclosure establishes the *existence* (or not) of records responsive to the FOIA request, the prior disclosure necessarily matches both the information at issue—the existence of records—and the specific request for that information.") (quoting *Wolf*, 473 F.3d at 378-79).

117. *Id.*

118. *Id.* at 22.

119. *Id.*

the records sought through official acknowledgement: "(1) where the existence of responsive records is plain on the face of the official statement, e.g., *Wolf*, 473 F.3d at 370, and (2) where the substance of an official statement and the context in which it is made permits the inescapable inference that the requested records in fact exist, e.g., *ACLU*, 710 F.3d at 422."[120]

C. The Right Standard

The disagreement that has arisen within the Fourth Circuit is whether the official acknowledgement doctrine should be revised in the *Glomar* context in light of the fact that the issue is the existence of the records rather than their content. The *Smith* court argues that the standard should be lowered; the *James Madison Project* court believes that it should not.

The lower standard contemplated does not necessarily remove the requirements of specificity, matching, and prior disclosure. What it does recommend is a less formal analysis that does not consider each prong individually, recognizing in the *Glomar* context that satisfaction of matching necessarily satisfies specificity. Although JMP relied on the plausible and logical language, perhaps to its detriment, a departure from the *Fitzgibbon* three-prong test was not unwarranted. The specificity and matching requirements were created to permit the compelled disclosure of agency records—line by line information—by the courts. They are inapplicable to the disclosure that records, without more, exist.

What is relevant in the *Glomar* context is that, through official government statements or actions, an agency has made a prior disclosure of the existence of the records. Prior disclosure can be held by a court on evidence that is circumstantial or direct, that is, an inescapable inference based on an agency's actions or agency statements that are a prima facie acknowledgement.

IV.
THE JUDICIARY'S RELUCTANT USE OF IN CAMERA REVIEW IN FOIA LITIGATION

Where an agency has met its burden at summary judgment through public affidavit, the courts have stated that it is neither necessary nor appropriate to undertake an in camera inspection of the records or, as may be the case with a *Glomar* response, to require in camera review of classified affidavits.[121] The requirement that pub-

120. *Id.* at 22.

121. *See Hayden*, 608 F.2d 1381, 1387 (D.C. Cir. 1979).

lic affidavits contain reasonably specific detail is as much for the purpose to demonstrate that the information logically and plausibly falls within the claimed exemption as it is to allow the court to forgo in camera review, which is treated as a last resort when an affidavit is insufficient to reach a de novo decision. The courts provide several justifications for their reluctance: (1) in camera inspection of the records places a significant administrative burden on the judiciary;[122] (2) in camera review undermines the adversarial process; [123] (3) in camera review does not provide the requisite deference to agency expertise;[124] and (4) the specificity standard for public affidavits ensures reliability of the agency's representations to the court.[125] The courts' justifications, however, are unpersuasive.

A. Administrative Burden

With the increasing number of FOIA litigations, as well as the voluminous amount of records concerned in each case, courts argue that they are ill-equipped to conduct an in camera inspection of all records.[126] In camera inspection of the records significantly taxes court resources, such that it should not be undertaken without a compelling need.[127] Congress did not contemplate that the courts would assume an administrative function by conducting a line by line review of the contested records; [128] instead, Congress placed that burden squarely with the agency.[129]

The courts' reluctance to undertake an in camera review due to the administrative burden of inspecting the withheld records is applicable only where the FOIA litigation concerns exemptions asserted on specific information. Where an agency has issued a *Glomar* response, there are no records for the court to inspect. The

122. See *infra* Section IV.A.

123. See *infra* Section IV.B.

124. See *infra* Section IV.C.

125. See *infra* Section IV.D.

126. *See* Vaughn v. Rosen, 484 F.2d 820, 823–26 (D.C. Cir. 1973) ("We could test the accuracy of the trial court's characterizations by committing sufficient resources to the project, but the cost in terms of judicial manpower would be immense.").

127. Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978).

128. *See* Weissman v. CIA, 565 F.2d 692, 697–98 (D.C. Cir. 1977) (discussing congressional intent); *see also* Military Audit Project v. Bush, 418 F. Supp. 876, 878 (D.D.C. 1976) ("There is . . . justifiable concern that Federal Courts have undertaken responsibilities that were never intended by assuming policy and administrative functions that the Constitution contemplated should properly reside with the Executive or the Congress.").

129. 5 U.S.C. § 552(a)(4)(B) ("[T]he burden is on the agency to sustain its action."); *see also Weissman*, 565 F.2d at 698.

court's in camera review would be of classified affidavits, not withheld records. For this reason, there is little administrative burden in receiving a classified affidavit that provides a fuller description of the cognizable harm than the public record.

B. Adversarial Process

In *Military Audit Project*, the court provided the most complete explanation as to why in camera review of a classified affidavit is contrary to the adversarial process:

> Should the Court choose to proceed in camera in its discretion, the citizen is denied access to the papers and as a practical matter neither he nor his counsel have any opportunity to question the factual grounds on which exemption is sought . . . . Is it not alien to our entire jurisprudence that courts are to function ex parte in private without benefit of the adversary process? Will it not degrade the judiciary if it is used as a mechanism for resolving statutory rights on the basis of undisclosed representations made in chambers to judges by parties having a direct personal interest in the outcome? Surely our whole jurisprudence since the Magna Carta and the abolition of Star Chamber proceedings requires that the judiciary in both fact and appearance remain neutral, independent of Executive or legislative influence. The adversary system is a well-tested safeguard for preserving the integrity of the judicial process. [130]

Here the court was asked by the agency to review classified affidavits in camera without the requester receiving the benefit of a public record to contest the agency's nondisclosure decision. The court rightly rejected this request to review the record in the "secrecy of chambers" as contrary to judicial due process. A full public record was required for the requester to receive a meaningful opportunity to present evidence contradicting the agency's arguments, as well as for the judge to receive the benefit of both arguments in order to make a responsible de novo decision.[131] The court also raised the issue that, by forgoing the adversarial process and permitting in camera review, judges risked an appearance of partiality before the public eye.[132] While the court contemplated permitting the requester's counsel to review the records under a confidentiality agreement, this compromise was ultimately rejected because it could either undermine the attorney-client relationship

130. *Military Audit Project*, 418 F. Supp. at 878.
131. *Id.*
132. *See Weissman*, 565 F.2d at 697.

or disadvantage pro se litigants. The court concluded that in camera review was unnecessary in most instances, and this view has survived through subsequent FOIA litigation. [133]

Although the court's rationale in *Military Audit Project* is based on a valid concern for the legitimacy of the judicial process, the reactionary tone is based on facts unique to the case. The agency had sought to avoid any public record through submission of a classified affidavit to the court. No agency today would contemplate making such a request, as public affidavits are required for the agency to meet its burden at summary judgment.

Additionally, the assumption that the public record can provide specific details sufficient to support the adversarial process, without disclosing the information that the agency seeks to protect through exemption, is based in case law developed through regular FOIA litigation, not cases involving *Glomar* responses. The prevailing assumption that public affidavits provide sufficient specificity does not consider the *Glomar* situation in which the existence, rather than the content, of the record is itself a classified matter. The factual descriptions necessary to justify the *Glomar* position of the agency may also be classified information. Thus, no public record can provide the requester with a meaningful opportunity to contradict the agency's nondisclosure decision. In such a situation, the court should recognize the inevitable disadvantage under which the requester must operate and require the agency to provide a classified affidavit for in camera review. Although the court will not have the benefit of opposing arguments, it is better for the court to base its de novo decision on an imbalance of information provided in camera than on an inadequate public record.

C. Agency Expertise

Congress instructed the judiciary to accord substantial weight to an agency's affidavit describing its nondisclosure determination.[134] The courts have interpreted the substantial weight requirement as a prohibition against substituting the agency's judgment with that of the court, provided that the agency followed proper procedure in making its nondisclosure determination and that the exemption claimed was not pretextual or unreasonable. [135] The rationale underlying the substantial weight requirement is that judges lack the requisite skill or experience in national security matters,

133. *Id.* at 698.
134. 5 U.S.C. § 552(a)(4)(B).
135. *See Weissman*, 565 F.2d at 697.

including international diplomacy and counterintelligence operations, and must defer to agency expertise if the affidavit appears plausible and logical.[136] Congress entrusted national security assessments to executive agencies, not to the courts.[137] Included in the calculus is the type of information considered for disclosure, such as sources, methods, and operations,[138] and the cognizable harm resulting from its disclosure, such as retaliation or countermeasures.[139]

Judicial deference to agency expertise should discourage courts from testing an agency's assessment of harm, or truthfulness

136. *See id.* at 697; Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980); Frugone v. CIA, 169 F.3d 772, 775 (D.C. Cir. 1999). *See also Military Audit Project*, 418 F. Supp. at 878.

137. *Fitzgibbon*, 911 F.2d at 766; *see also* E.O. 13526 § 1.3(a) ("The authority to classify information originally may be exercised only by: (1) the President and the Vice President; (2) agency heads and officials designated by the President; and (3) United States Government officials delegated this authority pursuant to paragraph (c) of this section.").

138. E.O. 13526 § 1.4 ("Information shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security in accordance with section 1.2 of this order, and it pertains to one or more of the following: (a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources; (e) scientific, technological, or economic matters relating to the national security; (f) United States Government programs for safeguarding nuclear materials or facilities; (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or (h) the development, production, or use of weapons of mass destruction.").

139. ACLU v. Dep't of Def., 628 F.3d 612, 625 (D.C. Cir. 2011) ("The CIA asserts that the public disclosure of the withheld information may degrade the CIA's ability to interrogate detainees, improve al Qaeda's insight into the United States' intelligence activities, and hinder the CIA's ability to obtain assistance from foreign nations."); New York Times Co. v. Dep't of Justice, 2017 U.S. Dist. LEXIS 168276, *65–66 (S.D.N.Y. 2017) ("The unauthorized disclosure of information concerning foreign relations or foreign activities of the United States can reasonably be expected to lead to diplomatic or economic retaliation against the United States; identify the target, scope, or time frame of intelligence activities of the United States in or about a foreign country, which may result in the curtailment or cessation of these activities; enable hostile entities to assess United States intelligence gathering activities in or about a foreign country and devise countermeasures against these activities; or compromise cooperative foreign sources, which may jeopardize their safety and curtail the flow of information from these sources.").

absent evidence of bad faith.[140] However, deference does not necessarily proscribe a court's request for a classified affidavit to supplement the public record. Especially where an agency has issued a *Glomar* response, the public affidavit must toe a line between specificity and generality, so as to provide as much information as possible to the requester while still protecting the existence or nonexistence of the records. As a practical matter, the court should request a classified affidavit when the public record is simply inadequate for making a de novo decision about the nondisclosure determination, but in the *Glomar* context, the court should also consider whether the generality required to protect the existence of the agency's records may create misleading, though unintentional, representations within the public record. A classified affidavit, in this instance, does not contravene the substantial weight requirement. The purpose of requesting the classified affidavit is not to question the agency's risk assessment or reliability, but to ensure that the public record is an accurate generalization of the classified factual descriptions and that, through the process of sanitizing classified information, nothing material is lost in its translation for the requester.

D. Specificity and Reliability

Underlying the requirement that public affidavits provide specific detail is the assumption by the courts that specificity is an accurate measure of agency reliability:

> [T]he government's burden does not mean that all assertions in a government affidavit must routinely be verified by audit. Reasonable specificity in affidavits connotes a quality of reliability. When an affidavit or showing is reasonably specific and demonstrates, if accepted, that the documents are exempt, these exemptions are not to be undercut by mere assertion of claims of bad faith or misrepresentation.[141]

Unless the public affidavit is inadequate or there is evidence of bad faith, courts are discouraged from inquiring into the veracity of an agency's explanation for its nondisclosure determination. This is in accordance with a court giving substantial weight to an agency's expertise, so long as the agency provides specific details for its assessment of harm to national security.[142] Specificity, however, is no

140. *Weissman*, 565 F.2d at 697; *see also* Larson v. Dep't of State, 565 F.3d 857, 865 (D.C. Cir. 2009).

141. *Ray*, 587 F.2d at 1195.

142. *See Hayden*, 608 F.2d at 1387 (D.C. Cir. 1979) (explaining that, when affidavits contain information sufficient to place the documents within the exemp-

guarantee for veracity—there is such a thing as an elaborate lie. Given the generality of a public affidavit supporting a *Glomar* response, the requester is at a severe disadvantage to identify an inaccurate representation, whether intentionally or not.

Congress feared more than "bad faith" in the exercise of agency discretion to withhold government information. Even "good faith" interpretations by an agency are likely to suffer from the bias of the agency . . . . Being aware of the dangers of relying too much on agency "expertise," Congress required the courts to take a fresh look at decisions against disclosure as a check against both intentional misrepresentations and inherent biases.[143]

A classified affidavit would ensure that representations made in the public affidavit are supported by classified information provided to the court through in camera review.

V.
POTENTIAL HARMS TO THE JUDICIARY AND EXECUTIVE AGENCIES THROUGH MINIMAL USE OF IN CAMERA REVIEW

The judiciary's reluctance to undertake in camera review of classified affidavits relating to an agency's *Glomar* response is based on justifiable reasoning against in camera inspection of withheld records in a regular FOIA litigation. However, arguments concerning administrative burden, agency expertise, and reliability are less persuasive in the *Glomar* context because the disputed issue is the existence, not the content, of the records. The courts' reluctance to conduct an in camera review may also result in: (1) the failure to make a proper de novo decision as required by Congress; (2) an appearance of partiality that undermines public trust in the judicial process; and (3) the missed opportunity to legitimize an agency's nondisclosure determination.

A. Oversight

By accepting agency representations in public affidavits, there is a risk that the courts forgo making a de novo decision as required by Congress.[144] According substantial weight does not necessarily require the court to defer to agency expertise in making nondisclosure determinations. Congress trusted the courts to approach na-

tion category, it is "in accordance with congressional intent" to inquire no further) (citation omitted).

143. *Ray*, 587 F.2d at 1210 (Wright, C.J., concurring).

144. 5 U.S.C. § 552(a)(4)(B).

tional security matters with, if not expertise, common sense. [145] In *Ray*, the court noted that Senator Edmund Muskie stated that he could not imagine any federal judge "substitut[ing] their judgement for that of an agency head without carefully weighing all the evidence in the arguments presented on both sides" and that to discourage judicial review would "make the classifiers themselves privileged officials, immune from the accountability necessary for Government to function smoothly." [146]

Where the public record is insufficient because the underlying justifications are also a matter of national security, it is proper for the court to review classified affidavits in camera, and if the court finds that the classified affidavits do not in fact contain sensitive information, the court should order release of the information to the requester.[147]

B. Partiality

In FOIA litigation, there is an inherent asymmetry of information:

> [T]he party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. . . . [O]nly one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information. . . . This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under the FOIA this is not true, as we have noted, and hence the typical process of dispute resolution is impossible. In an effort to compensate, the trial court, as the trier of fact, may and often does examine the document in camera to determine whether the Government has properly characterized the information as exempt.[148]

The agency's representations in public affidavits are accepted by the courts as presumptively true and valid. Although the courts

145. *Ray*, 587 F.2d at 1194.
146. *Id.* at 1194 n.18.
147. *Hayden*, 608 F.2d at 1384–85.
148. *Vaughn*, 484 F.2d at 823–25.

cannot require an agency to disclose exempt information on the public record in order to correct this imbalance, the courts do have a responsibility to preserve the adversarial process by ensuring that the agency's advantageous position is not abused. If the judicial branch makes only infrequent inquiries into an agency's justifications through classified affidavit, it risks appearing as a rubber stamp for executive nondisclosure determinations.

Courts have claimed that in camera review deprives the requester of the opportunity to present opposing arguments, but where there is a public record consisting of conclusory or generalized statements, as is sometimes the nature of public affidavits supporting a *Glomar* response, a classified affidavit serves as a necessary backstop against misleading representations.[149] In light of this acknowledgement, the courts' reluctance to request classified affidavits demonstrates a passivity that appears, at best, as indifference to the information imbalance and, at worst, as partiality towards the government.

In *Phillippi II*, the court went to great lengths to explain the CIA's likely strategy to disseminate cover stories for the use of the *Glomar Explorer* and, despite official acknowledgement of one cover story to the press, the agency's justified withholding of records that would confirm or deny the cover stories as the *Glomar Explorer*'s actual or feigned use:

> Almost as important as the substance of the fallback cover would be the way in which the CIA protected it. Any appearance of carelessness would tend to undercut the credibility of the fallback story. The CIA would, therefore, be required to appear to devote as much zeal to protecting the fallback story from disclosure as it would devote to shielding the truth from revelation. Paradoxically, however, when the initial cover story was blown, it would be important for the CIA to arrange for the rapid and convincing dissemination of the fallback story in order to prevent inquisitive reporters from stumbling onto the truth before they could be sold on the authenticity of the fallback story. If there was a fallback cover story for the *Glomar Explorer* project that the vessel was designed to raise a sunken Russian submarine from the ocean floor Director Colby's apparently simultaneous efforts to cover up the fallback story while at the same time assuring its widespread dissemination begin to make sense . . . . [O]nce the fallback story was out, the Government suddenly had to reverse its position and begin re-

149. *Id.*

> fusing to confirm or to deny the stories it could have been planting in the press only days earlier; if the Government openly "admitted" the fallback story, it would thereby in effect declassify it, and as a result lose its ability to refuse to open its files on the subject.[150]

The CIA's controlled and calculated leaks of disinformation to the public are described by the court with an absorption that ignores the government transparency mandated by the FOIA and disserves the judge's role as a neutral arbiter.

C. Legitimacy

The FOIA was created to shift the government's information policy away from an individual's "need to know" to the public's "right to know" about government operations. An informed citizenry fosters public discourse about government policy that was deemed necessary to democratic governance. Functionally, the statute sought to replace the existing regime of information leaks, in which members of the press curried favor with officials to obtain exclusive access to government information. Initially, the FOIA received a cool reception among veteran reporters, who viewed a statute granting equal access to government records as the end to their competitive edge through established connections with government sources.[151] Today, the FOIA is regarded with much of the same disdain as the APA. Instead of shining a light on government operations, the FOIA seeks to delay and obstruct public access to government records through administrative obstacles. [152] The FOIA imposes regulations on both information that should be protected

---

150. *Phillippi*, 655 F.2d at 1330; *see also Military Audit Project*, 656 F.2d at 745 ("[T]he record before us suggests either that the CIA still has something to hide or that it wishes to hide from our adversaries the fact that it has nothing to hide.").

151. Sam Archibald, *The Early Years of the Freedom of Information Act – 1955 to 1974*, 26 POL. SCI. & POL. 726, 728 (1993) ("Many Washington correspondents were little interested in opening up government information. After all, they had their sources, and a law breaking loose government records might open their sources to competitors.").

152. David T. Barstow, *The Freedom of Information Act and the Press: Obstruction or Transparency?*, 77 SOC. RES. 805, 805–06 (2010) ("Nothing in the world makes my blood boil faster than the Freedom of Information Act (FOIA). I have been pounding against this law for over 20 years and I cannot count the number of times government officials have looked me in the eye, given me a little smile, and said, 'Well, you could always file a Freedom of Information request.' They know when they say those words that they are condemning me to Siberia, that they have bought themselves months if not years of delay and obstruction.").

from unauthorized disclosure and information that should not be withheld from the public with undue delay.

In FOIA litigation involving a *Glomar* response, it is the court's responsibility to ensure that government action is legitimate. From the requester's perspective, in camera review provides independent verification of the agency's representations in its public affidavit.[153] From the agency's perspective, in camera inspection of its records bolsters the agency's credibility in its classification assessment, both in the present FOIA action and for future requests.[154] The information sought for which an agency issues a *Glomar* response often relates to matters of significant public interest, such as the military's use of drones,[155] or allegations of government misconduct, such as the detainment and interrogation program at Guantanamo Bay or the NSA's mass surveillance program.[156] The government's refusal to disclose records related to matters of national importance, much less to confirm or deny the existence of those records, undermines the legitimacy of the government by shrouding its operations in secrecy, depriving its citizens of information necessary to participate in public discourse and diminishing the public's trust in a democratic system of governance.

Although an agency's nondisclosure determination is often justified by legitimate national security interests, it may not be possible to describe those interests sufficiently on the public record to satisfy the requester. In such a case, the court should review in camera a fuller description of the agency's justifications to allay the requester's concerns and to lend legitimacy to the agency's nondisclosure determination. In camera review not only ensures the right outcome in the present case, but puts an agency on notice that judicial review of disclosure determinations is likely in the future. "[T]hreat of court review, like the threat of hanging, clears the

153. *Larson*, 565 F.3d at 869.

154. *Military Audit Project*, 418 F. Supp. at 877.

155. ACLU v. Dep't of Justice, 808 F. Supp. 2d 280, 299–300 (D.D.C. 2011) ("The fact that the public may already speak freely of the existence of drones, or speculate openly that such a program may be directed in part or in whole by the CIA, does not emasculate the CIA's warnings of harm were it forced to acknowledge officially the existence or nonexistence of requested records.").

156. Wilner v. NSA, 592 F.3d 60, 75 (2d Cir. 2009) ("We cannot base our judgment on mere speculation that the NSA was attempting to conceal the purported illegality of the [Terrorist Surveillance Program] by providing a *Glomar* response to plaintiffs' requests."); *ACLU*, 628 F.3d at 622 ("We conclude that the President's prohibition of the future use of certain interrogation techniques and conditions of confinement [for high value detainees] does not diminish the government's otherwise valid authority to classify information about those techniques and conditions and to withhold it from disclosure under exemptions 1 and 3.").

mind and leads to a much more . . . careful consideration of what needs to be kept secret than takes place when a document is first produced within the bureaucracy."[157]

CONCLUSION

The courts should recognize that in a FOIA litigation the public is acting from a place of distrust and disadvantage, and that it is in the interest of both the agency and the requester for the court to depart from the rigid formalism of official acknowledgement doctrine where only the existence of the government records is sought. The courts should also demonstrate a greater willingness to accept classified affidavits, because the justifications for discouraging in camera review are less applicable to the *Glomar* context. More importantly, increased in camera review of classified affidavits would help fulfill the statutory requirements for judicial review, improve the appearance of judicial neutrality, and further legitimize agency nondisclosure determinations.

157. Morton H. Halperin, *Freedom of Information and National Security*, 20 J. PEACE RES. 1, 2 (1983) ("The still unsatisfied requester, now the plaintiff in a lawsuit, can ask the judge to overrule the government and order the release of additional information. This never happens. . . . The system nevertheless works, and in many agencies works reasonably well.").

WRITING ON AN UNCLEAN SLATE: CHALLENGES IN SUBSTANTIVE REFORM OF A PENAL CODE

*ERIN MURPHY**

Recent events have focused greater attention on the rules governing sexual assault, both on campuses and in the criminal law. Activists have pressed for legal and social changes that broaden accountability, while critics have argued that reforms have already gone too far. In the midst of this conflict, the American Law Institute undertook a project to revise the sexual assault article of its highly influential Model Penal Code. This process provides occasion to consider the tensions that lawmakers confront when undertaking reforms in hotly contested areas. Conflict has arisen around fundamental issues, such as whether reforms should harmonize punishments relative to harsh existing law or focus on absolute notions of proportionality; to what extent existing collateral consequences should bear on reform efforts; how to balance the "readability" of a law versus technical sophistication; and more. This essay will explore some of the challenges of revising one part of a penal code within a larger framework influenced by political actors and activists, existing bodies of law, both within and outside the control of the reformers, and popular understanding.

In the Spring of 2012, the American Law Institute (ALI) initiated a project to revise Article 213 of its Model Penal Code.[1] That article, titled "Sexual Offenses," contained five distinct subsections of proscribed behavior.[2] Although forward-looking for its time,[3] Ar-

* Professor, New York University School of Law. This paper owes a great debt of gratitude to Stephen Schulhofer, my colleague, friend, and the Reporter for the American Law Institute's project to revise the sexual assault article of the Model Penal Code. As Associate Reporter, I have worked closely with Steve for nearly a decade on the project, and have benefited immeasurably from his immense intellect and profound humanity. Additional thanks are due to Stuart Green, Alec Walen, and the participants in the Theorizing Criminal Law Reform conference, who provided helpful feedback on an early draft of this essay.

1. *See Model Penal Code: Sexual Assault and Related Offenses*, AM. L. INST., https://www.ali.org/projects/show/sexual-assault-and-related-offenses/ [https://perma.cc/LD2S-E3W4]. *See generally* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 323 (2007).

2. *See generally* MODEL PENAL CODE § 213 (AM. LAW INST. 1962). The two most serious crimes were defined as "Rape and Related Offenses" (which included "Rape" and "Gross Sexual Imposition") and "Deviate Sexual Intercourse by Force or Imposition," which covered vaginal penetration and anal and oral sexual penetration, respectively. *Id.* at §§ 213.1, 213.2. Article 213 also set out a list of offenses

ticle 213 now reads as outdated and anachronistic. In just the past few decades, society has witnessed dramatic changes in sexual mores, as well as increased awareness and acceptance of broader understandings of sex, gender, and sexual orientation. With increasing urgency, critics of the Model Penal Code's sexual assault provisions thus called for a wholesale overhaul.[4]

In 2012, the ALI leadership agreed, and selected Stephen Schulhofer—an NYU Law Professor well known for his landmark book about rape—as the Reporter.[5] I was selected as his Associate Reporter, and since 2012 we have drafted reform proposals, guided by an expert panel of advisers. Although our process is not truly legislative in nature, in that our final product is a *model* code voted on by a select group of legal professionals rather than elected officials, some of the difficult questions that we have encountered undoubtedly will arise with regard to any legal reform effort.

In this essay, I address three overarching challenges that the project has faced. Specifically, this essay examines the implications of engaging in piecemeal reform within an existing penal structure (both substantive and procedural); the balance between drafting an appropriately complex statute in a nuanced field and one that is readily intelligible to a wide array of audiences; and the tensions inherent to undertaking reform in a politically charged area.

I.
BACKGROUND

The sexual offense article is a single section nested within the larger Model Penal Code, which was one of the most successful projects of the ALI. Founded in 1923, the ALI is a non-governmental organization of eminent judges, lawyers, and legal scholars that was created with the goal of harmonizing and rationalizing the broad and diffuse body of law found across the United States. Over the years, the ALI became well known for its restatements, which

---

under the heading "corruption of minors and seduction," a contact offense defined as "sexual assault," and an "indecent exposure" crime. *Id.* at §§ 213.3–5.

3. For instance, § 213's recognition of "gross imposition"—an offense requiring something less than extreme physical force—constituted an advance over much of existing law, as did its proscriptions for anal and oral intercourse. *Id.* at § 213.1(2).

4. *See, e.g.*, Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207 (2003).

5. STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (2000).

consist of scholarly overviews of existing fields of law, such as contracts, torts, and trusts.

When ALI leadership turned its attention to a restatement of the criminal law, however, they found "existing law too chaotic and irrational to merit 'restatement.'"[6] So instead the Institute authorized the creation of a *Model* Penal Code (MPC), led by law professor Herbert Wechsler, intended to embody the best of contemporary penal theory and practice. According to the ALI process that remains in place today, Professor Wechsler (as the Reporter) drafted black letter law and accompanying commentary, aided by feedback offered by a panel of expert advisers.[7] Those drafts were then presented to the Council of the ALI—a selective, upper-chamber style governing body—for further revision and approval. Ultimately, provisions approved by Council were then forwarded to the entire membership of the ALI—the elected elites who in turn could accept, amend, or reject proposed provisions.

The MPC project finished in 1962 with the publication of the complete official draft as adopted by the full membership of the ALI.[8] A final version containing consolidated and revised commentaries (which are not formally adopted by the membership) was published in six volumes in 1985.[9] Without question, the project was a resounding success. The text of the general principles of liability (including its mens rea classifications) and specific liability subsections were adopted in part or whole by roughly thirty-four states, and courts and legislatures continue to use its principles as a common touchstone for understanding and assessing penal questions and proposed reforms.[10] Although other aspects of the MPC (such as its original sentencing provisions) were less successful, the project was deemed such a victory that its provisions remained untouched for decades after their passage, withstanding dramatic changes in social mores and criminal justice practices, serious critiques, and calls for comprehensive reform.[11]

In 2009, however, the ALI heeded some of these exhortations and initiated a project to re-examine the death penalty provisions of the MPC. That project ultimately resulted in a vote to withdraw the existing provisions (although not to take a formal stand against

6. Robinson & Dubber, *supra* note 1, at 323.

7. *Id.*

8. *Id.* at 324.

9. *Id.* at 327.

10. *Id.* at 326–28.

11. *See, e.g.*, Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 BUFF. CRIM. L. REV. 53 (2000).

capital punishment).[12] Prompted in part by the success of that single intervention, in 2012 the ALI agreed to consider calls to revise Article 213, the sexual assault provisions of the MPC.

The prospectus proposing the revision project identified the most salient objections to Article 213. Specifically, the most common critiques noted:

- *Its highly gendered character*. Article 213 restricts the most serious penalties for vaginal penetration and does not contemplate that a man might be sexually assaulted by a woman; it further labels anal and oral penetration as "deviate" sexual intercourse.[13]
- *Its procedural and evidentiary rules*. Article 213 retains a marital exemption; permits a defense if the complainant is "promiscuous" or a "voluntary social companion" of the actor; and broadly requires prompt complaint, corroboration, and "special care" jury instructions.[14]
- *Its substantive scope*. Article 213 effectively requires force and resistance for liability; its child-offenses are also fairly restrictive relative to current law.[15]

The ALI leadership approved the project, which, as of 2020, is entering its final stages. Of course, the process of legal reform within the confines of the ALI varies in important ways from a typical legislative process. Moreover, as a model code, certain drafting challenges or practical constraints are lifted—for instance, a model code need not harmonize with the entire body of substantive and procedural law within a jurisdiction. Nonetheless, the process of revising Article 213 offers opportunities to observe and learn from some of the challenges inherent in any criminal legal reform project. This essay therefore seeks to record some of those lessons for the benefit of future efforts.

---

12. AM. L. INST., REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY annex b (2009) (Report to the ALI Concerning Capital Punishment); *see also* Roberta Cooper Ramo, *The President's Letter*, 32 AM. LAW INST. REP. (Am. Law Inst., Philadelphia, PA), Fall 2009, at 1, 3.

13. *See* MODEL PENAL CODE §§ 213.1, 213.2 (AM. L. INST. 1962).

14. *See, e.g.*, Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L. J. 1465 (2003).

15. *See, e.g.*, Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953 (1999).

II.
REFORM WITHIN EXISTING STRUCTURES

Efforts to revise a criminal code, to a degree short of wholesale overhaul, face the challenge of reconciling the gaps that emerge between the old structures, often motivated by anachronistic values, and the contemporary sentiments that drive the revision. Even when wholesale law reform occurs, the framework within which those laws will be executed—whether the pragmatic rules of criminal procedure or evidence or broader systemic features such as the structure of the criminal justice system—cast a shadow over any efforts at revision. This section illustrates some of the kinds of challenges that can arise in each context.

A. The Constraint of Existing Substantive Law

When criminal law reform occurs piecemeal, modifying only parts of existing substantive legal doctrine, it can be difficult to achieve the ends desired without simultaneously causing unintended or controversial fissures or disruptions to existing law. What is more, targeted reforms can prompt calls to address other aspects of existing law that appear outdated or anachronistic, threatening to widen the scope of the effort beyond feasible management or subvert the project altogether. This can occur in a number of ways.

1. Existing Substantive Law Undermines or Expands Reform Efforts

The first manner in which existing substantive law may distort reform efforts pertains to the need to integrate the revised section into existing legal standards that remain untouched by the reform. By way of example, in the MPC reform process, constituents on all sides of the issue were very interested in how to handle allegations of sexual assault that arise in a context in which both parties are intoxicated. Unquestionably driven by recent popular attention to the issue of campus sexual assault,[16] many commenters expressed grave concerns about expanding the scope of liability in a situation in which questions of consent were clouded by intoxication. Specifically, observers were acutely aware of the question of whether a de-

16. *See, e.g.*, Vanessa Grigoriadis, *A Revolution Against Campus Sexual Assault: Meet the Women Who Are Leading the Charge*, THE CUT (Sept. 21, 2014), https://www.thecut.com/2014/09/emma-sulkowicz-campus-sexual-assault-activism.html#_ga=2.185954857.1612985719.1613153632-1207434238.1613065696 [https://perma.cc/5TDQ-7ZAY].

fendant should face charges in a situation where both the defendant and the accused were intoxicated.

Under the existing Model Penal Code, the intoxication of the defendant is directly addressed. In a general provision applicable to the entire Code, and outside of the purview of Article 213, the Model Penal Code provides:

> (1) [I]ntoxication of the actor is not a defense unless it negatives an element of the offense.
>
> (2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.[17]

This rule largely follows the common law practice, which is to accord a defense for acts requiring *specific intent*—in MPC parlance, a purposeful or knowledgeable mental state—while not exculpating actors who behave recklessly, but claim a failure to appreciate the risk of their conduct due to intoxication.[18] Under this principle, if the mental state of the elements of any sexual assault offenses can be satisfied by proof of recklessness—which also happens to be the presumptive mental state of the MPC overall[19]—then an intoxicated actor is liable regardless of intoxication.

The MPC rule on intoxication has been the subject of sharp scholarly criticism for its failure to attend to the important distinction between subjectively culpable and non-culpable mental states.[20] There are many adherents to the view that the MPC unjustifiably departed from its general posture of prioritizing subjective culpability when it adopted this rule, and those adherents have long advocated to strike it from the Code.

The conflict presents a quandary for the project of reform. Reform efforts could expand to tackle the problematic provision—but at the cost of side-tracking and delaying the process. This is the "just amend the MPC intoxication rule while you're at it" view. Alternatively, reform could simply embrace the problematic provision, and

---

17. MODEL PENAL CODE § 2.08(1) (AM. L. INST. 1962).

18. *See* MODEL PENAL CODE § 208 cmt. 1 (AM. L. INST. 1962) (describing the general rule prior to the MPC as harmonizing with the MPC's formulation).

19. *See* MODEL PENAL CODE § 2.02(3) (AM. L. INST. 1962).

20. Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL. PUB. POL'Y & L. 250, 254 (1998). The 1962 Code nonetheless chose to embrace the common law rule, chiefly because it is "fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk." MODEL PENAL CODE § 2.08 cmt. 3 at 9 (AM. LAW INST., Tentative Draft No. 9, 1959).

accept its application to the proposed revision, but by so doing, the reform effort itself may be undermined by those who abhor any perceived ratification of the existing provision, and especially as applied to these particular kinds of cases. Thus, either the impeding provision precludes passage of a statutory scheme around which there is otherwise consensus, because forces would rally against the consensus proposal in light of the way it interacts with the offensive provision (e.g., "I can't vote for this proposal because of how it will interact with the intoxication provision."); or the consensus proposal gets distorted into something different and less ideal in order to accommodate the offensive provision (e.g., "Although generally speaking, I agree the proper mental state is recklessness, we should change it to knowledge so as to avoid the intoxication issue."). A final option may be to simply craft an ugly workaround—to exempt application of the general provision in the context of the specific reform (e.g., "The MPC intoxication rule does not apply to Article 213."), but to do so may work an injustice, or, at the very least, such exceptionalism requires justification. Observers on all sides of the question of the provision's merits are likely to decry the carving out of a special exception removing application of a generally applicable provision, simply because the reform proposal happened to arise at another time.

Still more vexing, existing law proves extremely variable in its treatment of intoxication. A survey of current law revealed that very few jurisdictions followed the common law rule, but their reasons differ. Some jurisdictions define sexual assault as a general intent or strict liability crime, thereby obviating the applicability of a defense that was only ever available for specific intent offenses.[21] Other jurisdictions limit intoxication evidence to crimes requiring proof of purpose, rendering it inapplicable to sex offenses that per-

21. *See, e.g.*, People v. Newton, 867 N.E.2d 397, 399 (N.Y. 2007) (holding that as "a defendant's subjective mental state is not an element of the crime of third-degree sodomy, evidence of intoxication at the time of the sexual act is irrelevant"); Malone v. Commonwealth, 636 S.W.2d 647, 647 (Ky. 1982) (forcible rape and sodomy—which include intercourse with a "physically helpless" person—are strict-liability crimes as the acts "do not say that a mental state is required for their commission," and thus intoxication is no defense).

mit proof of knowledge for liability.[22] Still others forbade evidence of intoxication from negating any crime.[23]

In light of the tremendous variation in local practice, the revised Code explicitly deferred the resolution of the issue to generally applicable state law. In this respect, the lack of uniformity, and the nature of the project as a model code, provided an option unavailable to an actual legislator. The revision project was thus able to avoid direct confrontation with the contentious question of whether to amend the existing provision to conform to prevalent practice, leaving that debate to the adopting jurisdiction.

Another such conflict arose with regard to the mens rea—that is, the defendant's culpable state of mind—provisions of the MPC. The 1962 MPC mens rea provisions are widely considered its crowning achievement.[24] The MPC establishes a default mental state of recklessness, which it presumes applicable to every element of the offense unless a contrary mens rea is indicated.[25] Early drafts of the

22. *See, e.g.*, State v. Ramos, 648 P.2d 119, 121 (Ariz. 1982) (en banc) (stating that intoxication is not a defense to knowing mental state, only to "intentionality" or purpose); People v. Brown, 632 P.2d 1025, 1027–28 (Colo. 1981) (noting that "evidence of intoxication is relevant to negative the mens rea element of specific intent crimes . . . [but f]irst-degree sexual assault, which contains the culpable mental state of 'knowingly,' is a general intent crime).

23. *See, e.g.*, Payne v. State, 540 S.E.2d 191, 193 (Ga. 2001) (holding that "voluntary intoxication shall not be an excuse for any criminal act or omission"); White v. State, 717 S.W.2d 784, 786 (Ark. 1986) (affirming that the state statute eliminated all defenses of voluntary intoxication in all prosecutions, rather than just in cases involving a mens rea less than "purpose").

24. *See, e.g.*, Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 943, 952–53 (1999) ("The Code's mens rea proposals dissipated these clouds of confusion with an astute and perspicuous analysis that has been adopted in many states and has infused thinking about mens rea everywhere. . . . This is all old hat now, the standard stuff of the first-year criminal law class. But it was a breakthrough to articulate so lucidly and powerfully a conception of culpability requirements comprehending all crime definitions, and it has been transforming in its impact on the law and on legal education and scholarship."); Michael Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, 52 WAKE FOREST L. REV. 1201, 1201 (2017) ("[T]he centerpiece of the most influential criminal code reform project in recent history, the American Law Institute's Model Penal Code, is its general mens rea provisions, which define and more generally explicate the culpability requirement governing the individual offenses contained in the Code's Special Part."). Even critics of the Code acknowledge the universal acclaim for its mens rea provision. V.F. Nourse, *Heart and Minds: Understanding the New Culpability*, 6 BUFF. CRIM. L. REV. 361, 361 (2002) ("One of the central tenets of late twentieth century criminal law scholarship is that the thin, descriptive ideas of culpability of the Model Penal Code are the essence of goodness and wisdom and clarity.").

25. MODEL PENAL CODE § 2.02 (AM. L. INST., Proposed Official Draft 1962).

revision, therefore, relied on this principle and omitted any mention of mens rea, unless a higher mens rea was warranted and thus explicitly indicated. However, it quickly became apparent that those unfamiliar with the MPC structure, including outsiders (such as journalists or legislators) approaching the material for the first time, read this absence of explicit text as having left room either to interpolate their own imagined mens rea (for instance, assuming that negligence was the standard) or to indicate that no mens rea applied at all. It was decided, therefore, that although it was at odds with the MPC scheme, it was preferable to include the explicit language regarding the applicable mental state.

However, even that decision gave rise to disagreement. "Reckless" is a term of art defined at length in the Code itself.[26] It requires proof of the actor's subjective awareness—and disregard—of a substantial and unjustifiable risk.[27] But the word reckless, when read in the black letter statute, seemed to impart different meanings to different people. And, indeed, it turned out that in the civil law, the word reckless carries a broader meaning than in criminal law—tort law recklessness can encompass actors who are not subjectively aware of a risk, so long as the risk is sufficiently serious or large.[28]

So, despite several proposed alternative formulations, none could satisfy every constituency. MPC purists preferred to leave out mens rea entirely, consistent with the Code's underlying architecture—even at the expense of confusion or misinterpretation by outsiders. Others proposed to explicitly write in "reckless," even though that invited the ire of readers who understood that word to allow liability broader than the MPC definition would have permitted. Compromisers sought to substitute an abbreviated version of the MPC's lengthy "reckless" definition, but that grievously offended MPC purists and textualists who thought that providing a new formulation of an established concept implied difference from

26. MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1962) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.").

27. *See id.*

28. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 842–45 (1994) (comparing a civil law "recklessness" approach, which would permit liability based on objective unreasonableness, with the subjective recklessness approach of criminal law, which it defined as "knowledge of a substantial risk of serious harm").

the original. No conclusion could satisfy all constituents, and thus the decision rested more on pragmatic rather than substantive considerations: the revision uses the word "recklessly," but reproduces the pertinent definition from the original 1962 Code. The commentary also underscores its distinctions from the civil standard.

In the case of the MPC, the irritating preexisting provisions pertained to intoxication and the definition of recklessness, but it is easy to see that such an issue could arise in any number of situations, such as where a general mens rea scheme fails to supply a mental state desired for the revision, or a generally applicable principle of accessorial or vicarious liability widens or thwarts the scope of liability, or when a term defined elsewhere in the code is at odds with its intended meaning for the reform effort.

2. Existing Punishments Influence Optimal Sanction Setting

Existing substantive law also constrains the extent to which criminal law reforms can effectuate their optimal goals in terms of punishment-setting. At this time, it seems fair to say that there is broad consensus that American penal law is too harsh. The statutory sanctions authorized by law were largely set during a period when parole operated to blunt some of their force, but sentencing reforms have eliminated that discretion. In addition, judges and prosecutors have veered toward pursuing more serious charges and imposing lengthier punishments,[29] resulting in the crisis of mass incarceration that we now face. Fortunately, the tides have slowly been turning, and there is recent bipartisan agreement about the need to mitigate the harshness of penal sanctions.

Partial reform efforts undertaken in such a climate, however, can meet with vexing challenges. These challenges are augmented by what is the essentially arbitrary task of fixing criminal punishments. Even if one subscribes to a particular penal theory, it is difficult to defend one specific term of years versus another—at least within a reasonable range—as unambiguously justified. Moreover, existing law may prove incoherent, leaving the ultimate judgments about appropriate sentence length wholly within the discretion of the drafters and voting membership with little to anchor the debate.

29. *See generally* Nat'l Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014); JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM (2017).

By way of example, revised Article 213 defines a wide spectrum of criminal conduct. At one extreme, it penalizes egregious violations of another person (such as a forcible rape causing serious bodily injury); at the other extreme, it punishes offensive but far less intrusive sexual acts (such as unwanted groping or fondling). In between are offenses of varying severity, with only loose consensus about how serious one particular act is over another. How should one rank nominally consensual sex between a prison guard and inmate versus sex with a person who has a severe intellectual disability? Still more complex are questions of sex that occurs without even nominal consent; should there be a difference in punishment between a person who engages in sexual penetration with another person who is actively resisting or saying no, versus a person who is frozen in fear? How seriously should the law treat sexual acts with children or youth, and how much should it matter whether the *child or youth* viewed the act as "consensual"? These are the kinds of questions that are raised in any criminal law drafting process, but they take on a special urgency in the context of reform.

A lack of clear consensus in existing law can further compound the difficulty of affixing penalties. Take an offense such as engaging in sexual intercourse with an adult who is unconscious. The lowest maximum punishment found in existing law is five years' incarceration;[30] the highest is life without parole.[31] Even an offense as seemingly straightforward as using aggravated physical force to compel an adult to engage in sexual intercourse exhibits tremendous variety in sentencing. The lowest maximum sentence for that offense in existing law is eight years;[32] the highest is life without parole.[33] Looking to existing law thus offers little guidance, and instead simply widens the scope of debate further.

What is more, even if existing law revealed consensus, it arguably ought *not* be the touchstone for affixing punishments in an era in which there is widespread agreement that punishments are altogether too harsh. But a revision that focuses on only one subset of criminal offenses has to balance between setting punishments that are justified in absolute terms and setting punishments that can be defended comparatively.

30. *See, e.g.*, OHIO REV. CODE ANN. §§ 2907.03(A)(2)–(3), 2929.14(A)(3)(a) (West 2019).

31. *See, e.g.*, WASH. REV. CODE ANN. §§ 9A.44.050(1)(b)–(2); 9A.20.021(1)(a) (West 2019).

32. *See, e.g.*, CAL. PENAL CODE §§ 261(a)(2), 264 (West 2013).

33. *See, e.g.*, GA. CODE ANN. § 16-6-1 (2011).

That is, assume that, in an absolute sense, we could agree that a low-level sanction is appropriate for nonconsensual sex in the absence of force. How should the precise maximum penalty be set, when it will be nested within the existing punishment scheme of the MPC? The MPC punishes recklessly subjecting an animal to cruel mistreatment as a misdemeanor,[34] and revising that penalty provision is not within the scope of the project revision. It would thus seem absurd to set a punishment that would equate animal cruelty with penetrating another person without consent. Similarly, in the current Code, theft of goods over $500 is a third-degree felony,[35] and recklessly causing serious bodily injury is a second-degree felony.[36] A revision that endeavors to lower punishments across the board, in response to contemporary views of penal excess, must thus attempt to square those preexisting harsh punishments with a revision that imposes lower sanctions for sexual violations.

Conversely, if the revision project is aimed at ensuring that penal law embraces changed mores about the propriety of certain behaviors, then the revision may seek to impose harsher punishments in a climate generally averse to them. For example, many advocates of the revision of Article 213 felt that existing law treated sexual offenses—both as a matter of law and practice—*too* leniently. Although many of those advocates may generally agree that mass incarceration is a pressing social problem or that punishments for many offenses (such as drugs or weapons offenses) are indefensibly harsh, those criticisms stop short when it comes to sex crimes.[37] Indeed, recent popular sentiment seems to tilt in the direction of preferring harsher sanctions for sexual offenses, even as it also calls for reduced reliance on incarceration overall—a sort of sex-offense exceptionalism.[38]

In such a context, how should a reformer determine the proper punishment for a revised provision of a penal code, both in relative and absolute terms? Is exceptionalism justified in either di-

34. MODEL PENAL Code § 250.11 (AM. L. AW INST. 1962).

35. MODEL PENAL CODE § 223.1(2)(a) (AM. L. INST. 1962).

36. MODEL PENAL CODE § 211.1 (AM. L. INST. 1962).

37. *See, e.g.*, Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007) (critiquing the appeal of penal punitiveness to feminist activists).

38. One article recently compiled a list of judges who gave lenient sentences to persons convicted of sex offenses, which includes a judge recalled for giving a sentence perceived to be too lenient. *See* Lili Loofbourow, *Why Society Goes Easy on Rapists*, SLATE (May 30, 2019, 5:45 AM), https://slate.com/news-and-politics/2019/05/sexual-assault-rape-sympathy-no-prison.html [https://perma.cc/Z8RH-BEEK].

rection—either to impose harsh sentences notwithstanding a general belief that American sentences are too harsh already, or to impose a sentence less severe than those found for less serious offenses, as perhaps justified in an absolute sense even if not in a relative sense, given American penal excess? Any attempt at revision within only one subsection of the penal code risks creating bad optics, if not outright injustice. In stark, illustrative terms: how can a reform project defend a maximum sentence (even if defensible in absolute sense) that is half the length of a crime universally acknowledged to be much less serious (however that is measured)? Or can a project defend the imposition of harshly punitive sentences while also criticizing the severity of sentences allowed for *other* offenses not subject to revision? Creating anachronistic punishments—whether they reflect shifts in penal philosophy or application of the same philosophy to less (or more) punitive ends—may undermine the reform effort's perceived legitimacy. Further, it may cause outside observers to question the legitimacy of the revision altogether.

3. The Distorting Effects of Collateral Consequences

A related problem arises with respect to the existence within a penal scheme of an array of collateral consequences. In the American legal system, the full scope of the collateral effects of conviction are staggering and breathtaking.[39] Sweeping in topics as wide ranging as housing, voting, and licensing to registration and immigration consequences, these collateral consequences often impose more serious penalties upon conviction than any term of incarceration. The area of sexual offending, in particular, is notorious for the harsh and expansive collateral consequences, including registration requirements and restrictions on residence and workplace locations. In the especially punitive and far-reaching context of American collateral consequences, the result can be an especially high bar for inflicting any punishment at all. Notwithstanding a shared sense that collateral consequences have spun far out of hand, the fact that such consequences endure prevents some persons who might otherwise agree with a particular reform from offering their support. And, even if the need to define some scope of liability is generally accepted, the existence of collateral consequences influences the scope and terms of liability.

39. *See National Inventory of Collateral Consequences of Conviction*, JUSTICE CTR., https://niccc.csgjusticecenter.org [https://perma.cc/5CM4-5TZQ] (last visited Nov. 18, 2019) (listing consequences of conviction by jurisdiction and type of consequence, as compiled by the American Bar Association).

That is, basic decisions such as, "should this conduct be criminal" or "what is the appropriate mens rea" or "what defenses should be available" were inevitably refracted through the lens of the consequences of conviction of the offense, not just the anticipated period of maximum incarceration. For example, consider a debate about whether sex between a therapist and a patient in the therapist's care ought to be criminally punished. Such a debate obviously invites differing views of the proper scope and subjects of penal law, and how far it should extend. But the debate also grapples with the inability of the reform effort to prevent low-level offenses from spiraling into crimes with crippling consequences. To be convicted as a sex offender in contemporary society—even at the lowest levels—is to face the prospect of permanently losing the ability to live in large swathes of the country, to work, to get a license, to obtain loans, and so on. Thus, debates over the proper scope of penal law inevitably had to account for the likelihood that even the lowest levels of undesirable conduct, if substantively outlawed and assigned minimal penalties, nonetheless would invoke severe collateral consequences.

Thus, any reform effort nested within a larger body of law that remains untouched must account for whether and how much to embrace the parameters of existing law—whether in terms of the range in severity of sentences or the availability of collateral consequences. And, if the reform departs from those existing judgments, it must defend the exceptionalism of the reformed section either on its own terms or as a form of protest or critique of existing law.

And still more pertinently, and perhaps unexpectedly, the existence of a known and extensive body of collateral consequences inherently informed the drafting of the *substantive* scope of liability, as well. In the context of the MPC revision, that pressure led to arguments to constrict liability. But it is easy to imagine, in another context, that the existence of collateral consequences will drive decision-making toward the opposite direction. If the desired outcome of the revision project is to sweep certain offenders within the ambit of certain consequences, then that may affect drafting or other such decisions. For instance, a domestic assault conviction can trigger a presumption that a person is not fit for custody of their children, stop the convicted person from receiving spousal support, or strip away the person's Second Amendment rights.[40] Misdemeanor domestic assault also makes a non-citizen eligible for

40. *See, e.g.*, Nancy K.D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601, 614 (2001); Tiffany Sala, *What Do You Get When You Abuse Your Spouse? Spousal Support.*,

removal in certain circumstances.[41] If reformers specifically seek a particular collateral consequence of an offense, then they must ensure inclusion of the triggering language in the proposed statute, even if it otherwise ill fits the overall scheme. In both cases—whether unwanted or desirable collateral consequences—the key observation is that ancillary punishments end up shaping and distorting both the decision to penalize at all, as well as the manner in which the elements of the crime are defined.

B. The Constraint of Institutions and Procedures

1. Institutions

Shared knowledge about the institutions and systems that execute substantive criminal law in a particular jurisdiction also affects any efforts at undertaking meaningful criminal law reform. In particular, two effects are notable: first, constituents and advisers to the reform will be freighted with their own expectations—often divergent—as to how the law plays out "on the ground;" and second, the architects of the reforms must determine how much consideration should be given to those ground-truths, assuming they can even be reliably assessed.

Interestingly, one might imagine that the project of reforming a *model* penal code would be free from such concerns. As law students have long lamented, the Model Penal Code is just a *model*: it isn't itself the governing law in any jurisdiction. But because the aim of the project is, of course, to inform actual legislation—and indeed, because so many states wholesale adopted the Code's provisions when first drafted—such concerns rightly take center stage.

These "reality" checks regularly intruded on antiseptic discussions of the best choice among substantive standards. Conversations about the substantive terms of the statutes contended with the universally recognized conditions of current criminal justice processing. For instance, there were concerns about the ways in which prosecutors regularly exercise discretion to thwart substantive law (e.g., choosing not to prosecute certain kinds of cases, pursuing prosecutions based on discriminatory criteria, and filing unduly harsh charges for bargaining purposes); the low quality of counsel for most defendants; the high rate of plea bargaining; the ines-

50 U. PAC. L. REV. 735 (2019); Carolyn B. Ramsay, *Firearms in the Family*, 78 OHIO ST. L. J. 1257 (2017).

41. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(E) (2019) (making a person eligible for removal upon conviction of certain domestic offenses); *id.* at § 1229b(c)(4) (making a person ineligible for cancellation of removal if they were convicted of a domestic offense).

capable pressure to plea bargain; and so on. A provision with multiple grades of offense was not just considered in isolation—or in "punishment-fits-the-crime" terms—but as a part of a larger scheme in which prosecutors would engage in strategic charging and defendants would bargain for reduced liability. Would one crime be a "lesser included offense" of another crime, such that conviction for both merged at sentencing? Or would the elements support multiple charges, thereby dramatically extending the scope of actual punishment to which a defendant was exposed and stripping the defendant's capacity to plea bargain effectively?

Of course, not all "ground-truths" that surfaced about criminal justice were shared. Whereas some participants in the process felt that police routinely disbelieve certain complainants, others felt that policing of sexual offenses had become too aggressive. Some participants felt that police and prosecutors were too punitive in pursuing and seeking punishment for sex offenders, whereas others felt that sex offenses had been largely ignored or minimized by the criminal justice system. Some of these observations took on a political character, which is discussed separately below, but often they also represented fundamental divergences in the perception of what "really happens" in criminal cases from complaint to post-conviction.

In undertaking substantive reforms, therefore, those attuned to the actual climate of criminal adjudication must consider arguments about the proper scope and shape of criminal law that go beyond the abstract substantive merits, and instead reflect on these kinds of operational realities. A lesser charge is no longer simply a lesser; it is a bargaining chip that will enable or thwart justice. An element is no longer simply an element; it is a piece of the offense that will make the crime unprovable, and thus unchargeable, because, practically speaking, sufficient evidence is too hard or too easy for a party to adduce.

The deep knowledge held by institutional actors—even and perhaps especially when such knowledge diverges sharply as a result of regional differences—undoubtedly affects the progress and merit of reforms, both as a matter of successful passage and in actual implementation.

2. Procedures

Attempts to revise substantive criminal law must also reckon with attendant procedural or evidentiary rules that affect the actualization of those substantive provisions. As any seasoned litigator will tell you, the rules of evidence and procedure often play a far

greater role in the adjudication of a complaint than the underlying substantive rules, particularly when those rules turn on fine-grained distinctions (such as the difference between mental states) that lay jurors may find hard to operationalize. Substantive reform therefore often occurs against the backdrop of an underlying belief in what kinds of evidence or procedures will apply in any particular case.

Of course, in the criminal law there are some basic procedural guarantees that are universal across jurisdictions. The right to counsel, the right to a jury in serious cases, the presumption of innocence, the government's burden of proof, and the standard of proof beyond a reasonable doubt apply nationwide. To the extent that these rights may affect decisions about substantive rules, they do so more in the "institutions" sense described above (in terms of how they play out on the ground). But other procedural rules may influence the choice among substantive standards.

For instance, in the sexual assault context, proof of the offense was historically laden with procedural doctrines intended to pose an obstacle to prosecution. Article 213 enshrined some of those procedures within the substantive code. Sections 213.6(4) and (5) embraced the "prompt complaint" and "corroboration" requirements of the common law, albeit in a relaxed form, and thus interposed a significant obstacle to conviction under any substantive standard.[42] Outside of the sexual assault context, it is easy to imagine other rules of procedure that might dramatically undermine or upset an intention guiding a substantive reform. Indeed, commentators have noted that the Model Penal Code itself is "littered with procedural provisions," notwithstanding that it is, ostensibly, a substantive code.[43]

42. MODEL PENAL CODE § 213.6(4) (AM. L. INST. 1962) ("PROMPT COMPLAINT. No prosecution may be instituted or maintained under this Article unless the alleged offense was brought to the notice of public authority within [3] months of its occurrence or, where the alleged victim was less than [16] years old or otherwise incompetent to make complaint, within [3] months after a parent, guardian or other competent person specially interested in the victim learns of the offense."); *id.* at § 213.6(5) ("TESTIMONY OF COMPLAINANTS. No person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.").

43. Robinson & Dubber, *supra* note 1, at 324.

The same problem arises in the context of evidentiary rules. Of the three pillars of adjudication— the definition of the substantive offense, the procedural rules of decision, and the rules of evidence that guide the admission of proof—it may be the last that is most decisive in determining the outcome in the majority of cases. Drawing again from the sexual assault context, the rules of evidence have played a contested and convoluted role in the history of sex prosecutions. For many years, evidence rules not only permitted admission of evidence that unjustly tainted or prejudiced the jury against the complainant, but also interposed significant hurdles to conviction on the part of the prosecution—specifically, the use of evidence rules to allow in general information about a victim's sexual history, and the use of cautionary instructions that warned jurors that sexual assault complainants were uniquely unreliable.

The original MPC contained provisions that reinforced both of these traditions. Section 213.6(3) of the original Code sought to limit the impact of a complainant's sexual history on the adjudication of a claim, but it did so by codifying a version of the rule that allowed a defense based on the complainant's "sexual promiscuity." Similarly, Section 213.6(5) endorsed the notorious "Lord Hale instruction," providing that "the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private."[44]

Across American jurisdictions, there is wide variety in the continued operation of these procedural and evidentiary provisions. What is more, a wave of reform inspired by feminists in the 1970s and '80s led to enactment of "rape shield" statutes, which sought to better protect victims from the trauma of testifying, as well as to improve the factfinders' decision basis. These rules dramatically curtail the evidence that the defense may offer in a rape case.[45] The federal template upon which many states based their rules is extremely restrictive, arguably unconstitutionally so.[46] Across the states, however, equivalent provisions vary markedly. Some states permit a very narrow class of proof, whereas others are much more

44. MODEL PENAL CODE § 213.6(5) (AM. L. INST. 1962).

45. *See generally* Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 80 (2002).

46. The Supreme Court has nodded in that direction by holding that a similar statute had to yield to the defendant's constitutional right to probe bias in *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam).

wide-ranging. Writing a substantive law on such an indeterminate evidentiary landscape poses real obstacles, as the drafters' intention may be undermined by rules that bias the proceedings in one direction or another.

Any effort at reform, therefore, must pay scrupulous attention to the potential application of procedural or evidentiary provisions and their likely impact on the substantive aims of the revision. In some cases, provisions specific to one class or category of crimes may be easily identified, and perhaps even subsumed within the larger reform project. In the MPC project, the procedural and evidentiary rules' specific applicability to sexual offenses was already nested within Article 213 of the 1962 Code and applied only to that article. Thus, it was both logistically feasible and logically defensible to strike those provisions and propose revised rules applicable only to sexual assault.

But where procedural or evidentiary rules are generally applicable to all criminal (or even criminal and civil) law, rather than specific to the area under review, they may be much more impermeable to reform. The example given earlier regarding the intoxication provision offers one example of a substantive rule that has general applicability, yet directly impacts any effort to revise a single offense. Similarly, the existence of generally applicable rules about the introduction of character evidence or the scope of discovery may influence discussions about the proper terms of substantive penal law. That certain forms of evidence may or may not be available, whether through discovery or as proof at trial, exerts a powerful influence over the degree to which liability ought to be defined expansively or narrowly. And, whereas addressing such provisions may fall clearly outside a reform project—indeed, even one that entails a wholesale revision of a substantive code—glossing over the impact of evidence or procedural law risks subverting or distorting the very goals of the substantive reform.

III.
POLITICAL CHALLENGES

In addition to the challenges of achieving substantive criminal justice reform while working within an existing framework of other substantive, procedural, and evidentiary law—as well as the operational realities of those laws—the political dimensions to criminal justice reform inescapably shape the course of progress. It is widely known that, at least within the United States, criminal law reform is a freighted topic. Criminal justice has been politicized, in varying degrees and in varying ways, over time. It has both unified and po-

larized the nation, as policies whipsaw between the draconian (e.g., mandatory minimums, three strikes) and progressive (e.g., legalization of marijuana, alternatives to incarceration, specialized courts).

Perhaps few areas of criminal law could lay better claim to the mantle of "most contentious" than the area of sexual assault. Sexual intimacy is a cherished part of our basic humanity, and thus efforts to regulate the permissible bounds of such intimacy inevitably engender great controversy. What is more, because sexual behavior tends to occur in private, individual expectations about what is "common" or "normal" may in fact vary dramatically. Sexual regulation is also bound up in deeper questions of female power and autonomy; the differences between the sexes; sexual orientation; domestic violence; religion and the value of chastity; and other social movements and debates that bring heavy baggage to the discussion. It is significant that the underlying mores upon which sexual assault law rests have changed dramatically in a relatively short period of time; indeed, whereas the MPC provisions on homicide have stood the test of time relatively well, Article 213 is commonly not even taught in first year law classes because it is already so outdated.

This section aims to tease out a handful of the ways in which criminal law reform must grapple with political reality. In other words, it explains why the project of reform has to take place within, and embrace, the highly charged and political context in which all criminal justice conversations occur (at least in the United States), rather than endeavor to take a more antiseptic or academic approach.

A. The Politicization of the Debate

Criminal justice is an area of law that many observers have strong intuitive feelings about, even if they do not themselves have any personal expertise. The news and entertainment media are rife with criminal justice stories, and it is easy to develop armchair opinions about how the system works or its optimal rules. Most importantly for the project of reform, constituents may have "sticky" ideas of precisely whom the criminal laws are apt to affect, and those views may color and shade their reactions to proposals for reform in ways that are less than constructive.

For instance, in the context of the MPC reform, the make-up of the "legislative" body unquestionably affects discussions about the wisdom of certain choices. The ALI skews heavily white, male, and older—largely because it is an elected body of elites in the profession and for much of recent history the legal profession itself was

white and male.[47] What is more, as a body of lawyers, the membership has attained a degree of education far beyond that of the ordinary citizen. The membership also by and large inhabits a socioeconomic class significantly higher than most subjects of criminal law, and may possess other qualities shared among lawyerly elites but not found as readily in society writ large (for instance, an affection for rules and a penchant for argument).

In light of these demographic characteristics, as well as the heavy press coverage given to the issues surrounding campus sexual assault, it is perhaps not surprising that ALI discussions often veered toward the campus context when testing out the application of various rules. To be clear: the reform project is entirely centered on a *penal* code, not a campus disciplinary code. The penal law applies in a far broader array of factual circumstances than a typical campus code, and the due process that attends criminal adjudication is not only clear, but completely distinct from that which is typical on a college campus.

Perhaps most importantly, the kind of cases that populate the criminal courts are at a far remove from the often-discussed college "he said, she said."[48] Penal law often addresses situations of domestic violence, and so the disputed sex occurs in the context of a violent relationship. Typical cases also tend to involve vulnerable victims, such as children, sex workers, consumers of certain professional services (like massages), young adults (like an 18 or 19-year-old assaulted by an uncle or family friend), or the involvement of drugs or multiple actors.

Nevertheless, despite the texture of the actual case law, the mental image seemingly held by many constituents in the reform process was that of their educated son at college, or of two young

47. *Membership*, AM. L. INST., https://www.ali.org/members/ [https://perma.cc/T45T-Y8BB] (last visited Jan. 11, 2021) (The ALI is a highly select, invitation-only body, whose "membership consists of eminent judges, lawyers, and law professors from all areas of the United States and from many foreign countries, selected on the basis of professional achievement and demonstrated interest in improving the law.").

48. *See*, e.g., Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL'Y REV. 461, 488 (2005) (citing data and past research that indicate that prosecutors are most likely to charge sexual offenses involving weapons or injury and when the victim has no questionable moral character or behavior and engaged in no risk-taking actions such as "accompanying the suspect to his residence"); *id.* at 480, tbl. 3 (noting that the vast majority of cases involve either intimate partners or non-strangers). *See generally* CASSIA SPOHN & KATHARINE TELLIS, POLICING & PROSECUTING SEXUAL ASSAULT: INSIDE THE CRIMINAL JUSTICE SYSTEM (2014) (reporting on allegation and prosecution characteristics).

"co-eds" engaging in sexual intimacy in a state of extreme intoxication. As a result, conversations about some of the core pillars of the offense—the meaning of consent, liability for unconscious or sleeping persons, the definition of penetration, the effects of intoxication, etc.—were often refracted through the lens of the campus experience. The need arose to deliberately anchor the conversation by reminding constituents of the actual types of cases that arise regularly in criminal court. For instance, some constituents bristled at a definition of penetration that had longstanding and wide support in existing law, because that included any intrusion "however slight." In such conversations, it was important to remind them that a more demanding standard, rather than ensnaring hapless young freshmen, would instead serve to exculpate actors in two regularly occurring situations: when the actor attempts to force a flaccid penis inside another person, or when the actor has trouble fully penetrating a very young child.

The debate over choices among rules can also become so heavily burdened by political ideologies that it threatens to undermine the entire project of reform. For instance, persons opposed to mass incarceration might determine that no criminal law reform—even if intended to rationalize or make sensible otherwise outdated provisions—should proceed if the punishments are to be too harsh. Rather than fight individual battles about the reach and scope of law, those sympathetic to this view might instead determine that an outdated, inoperable criminal law is preferable to a functioning one.

Or, to take another example, specific topics may become too charged even to address. Again, drawing from the MPC process, the debate over the evidentiary treatment of false accusation evidence suffered from this problem. The mere mention of "false accusations" rings alarm bells for people on both sides of the debate. To some, the history of sexual assault is littered with instances in which complainants were dismissed as liars or scheming shrews; to others, the history of sexual assault law is tainted by false accusations, including those intended to excuse racial violence (e.g., against Emmett Till)[49] or perpetrate other discriminatory acts (e.g., against LGBTQ persons).[50] In such an atmosphere, mere mention of a scheme to regulate the admission of false accusation evidence pro-

49. *See, e.g.*, PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA (2003).

50. *See, e.g.*, David Alan Sklansky, *"One Train May Hide Another": Katz, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 900–17 (2010) (recounting history of hostility and hysteria in America during the midcentury,

vokes ire from all sides, and the obvious course becomes to simply ignore it. To regulate it is, after all, to validate the idea that false accusations exist (and in significant enough numbers to warrant a special rule). Notwithstanding the need to collate this especially sloppy and multiplicitous area of doctrine, those efforts fell flat when met by political resistance to even broaching the topic.

In sum, the politically charged atmosphere in which reform takes place, coupled with strongly held, pre-existing beliefs about the nature and target of any reform effort, must be taken into account and managed for those efforts to meet with success.

B. Evolving, and Divergent, Social and Cultural Understandings

Because criminal law is tasked with condemning or deterring socially undesirable behaviors, it inherently depends to some degree on shared acceptance of what is in fact socially undesirable. I do not, in this subsection, intend to take on the larger debate over the proper purpose of criminal law, and whether it should hew tightly to the descriptive reality of individual behavior versus undertake a more normative project of social change. Instead, I mean only to underscore that there are areas of criminal justice reform in which divergent social mores may play a greater or lesser role. Specifically, sexual assault reform is burdened by significant generational shifts in understandings about sex, gender, and sexuality; the difficulty of talking about uncomfortable topics; and socio-economic and educational gaps in the messages transmitted through formal sex education.

First, the norms and expectations surrounding certain kinds of unlawful activity are particularly susceptible to generational shifts. Some categories of crime may remain relatively impervious to demographic influence; for instance, what constitutes homicide or motor vehicle theft may be more or less shared among large swathes of the population. But other offenses exhibit greater variation among demographic groups. Older people may consider it stealing to infringe a copyright by downloading a movie without permission, whereas young people consider it morally inoffensive. Older generations may think regulatory offenses, like driving while intoxicated or failing to wear a seatbelt, should be treated less seriously than those in younger generations steeped in risk-minimization.

Most pertinently, debates about the scope of sexual assault laws are deeply affected by both normative and descriptive accounts of

including the "Lavender Scare" period and Hoover's "Sex Deviates" program, exemplified by "gay-baiting").

what constitutes "consent." But less salient, yet equally important, divergences in basic premises about sex are also evident. How "normal" or "acceptable" are bondage and sadomasochism? Is male sexual drive so unrelenting that its nearly unthinkable to conceive of a man as unwilling to have sex? Should acts of oral, vaginal, and anal sexual penetration be treated as equivalently serious or intrusive, or is vaginal penetration the paramount offense? Should group sex be perceived as presumptively suspect? Is sexual intimacy in certain circumstances inherently coercive, such as between employers and employees, therapists and patients, or teachers and students? The intuitions about sex that underpin one's answers to those questions both explicitly and implicitly affect larger debates about the proper scope of liability.

Sexual intimacy is one area in which a broad spectrum of deeply felt views may be found, on everything from the propriety or frequency of particular sexual acts to the nature of consent. Much has been written about the differences between men and women in this regard, but there are also stories to tell about other demographic differences. Dramatic changes have occurred in a wide range of areas that influence individual views about sexual intimacy, including with regard to: coeducation; sex and gender equality; gender identity; the acceptance of cohabitation outside of marriage (whether with a sexual partner or friend of the opposite sex); interracial and same-sex relationships and marriage; and the availability of pornography, contraception, or abortion services. Indeed, basic understandings about the essential qualities of sex and gender identity have undergone dramatic shifts in recent generations, as the right to same-sex marriage has won constitutional protection,[51] gender identity has become increasingly fluid,[52] and even the essential durability of the sexual impulse has received scrutiny.[53] What is obvious to one generation may be shocking to another, yet reform efforts must seek to find common ground.

Second, the act of legislating may require frank and explicit conversations that participants may be unaccustomed to and find uncomfortable. Debates about whether it is worse to kill with a

51. Obergefell v. Hodges, 574 U.S. 1118 (2015).

52. Mark Joseph Stern et al., *The Judicial and Generational Dispute Over Transgender Rights*, 29 STAN. L. & POL'Y REV. 159, 170 (2018) (reporting results from multi-prong assessment of high school students' views of gender identity and sexual orientation).

53. Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 303 (2014) (describing an "emerging identity category" of "asexuality," or people who do not feel sexual attraction).

knife or a gun may be relatively anodyne (if gruesome), but probing the details of a particular sexual act may cause discussants to talk in an evasive, rather than straightforward, manner. Out of politeness, respect, fear, shame, or privacy, divergent experiences may not always be shared openly. Those who do speak frankly—for instance, about the pleasures of bondage—may risk mockery, dismissal, or even professional and personal consequences. And to be clear, though these kinds of reservations may especially arise in an area of reform like sexual assault, other aspects of criminal justice reform that also carry the weight of social shame or embarrassment—such as the laws governing vice or narcotics crimes—may likewise encounter the problem of hard conversations.

Conversely, it also may be the case that reform efforts are stymied or shaped by the particular context in which they occur. In a room full of people with similar life experiences or perspectives, some norms of behavior or descriptive truths may be wholly unrepresented. For instance, as noted earlier, the members of the American Law Institute are by definition highly-educated elites in the later stages of their careers. Members have a legal degree; in contrast, two-thirds of the U.S. adult population do not have a bachelor's degree.[54] Educational differences may be particularly important in areas where norms are disputed or in flux. For instance, a recent study showed that only two of the eighteen states examined explicitly mention the concept of sexual consent in their K-12 health education programs.[55] In contrast, colleges and universities have increasingly emphasized sexual education, and particularly education about consent.[56] The challenge of criminal law reform in such a context is to try to bridge the divides of variable and divergent life experiences, whether they arise within the immediate constituent group or outside of it.

These challenges are particularly acute with regard to reform efforts likely to take place in the public arena. For instance, with regard to the MPC reform, even an act as simple as the titling of an offense—"rape" versus "sexual assault"—evoked reactions tied more to generational difference than substantive merits. When me-

54. Press Release, U.S. Census Bureau, Highest Educational Levels Reached by Adults in the U.S. Since 1940 (Mar. 30, 2017), https://www.census.gov/newsroom/press-releases/2017/cb17-51.html [https://perma.cc/D9ZK-TZXM].

55. Malachi Willis, Kristen N. Jozkowski & Julia Read, *Sexual Consent in K-12 Sex Education: An Analysis of Current Health Education Standards in the United States*, 19 SEX EDUC. 2 (2018), https://doi.org/10.1080/14681811.2018.1510769 [https://perma.cc/PA2S-QHTE].

56. *Id.*

dia become involved, they add another dimension to deliberations that require attention. Because criminal law reform is often of great interest to the general public, reporters may seek to write about areas of dispute or debate. The understanding that media take from those conversations, and the kind of messaging that they choose to engage in through their reporting, can likewise impact the success of the project. Apart from the decision to pursue particular paths of liability, considerations of this kind may affect drafting decisions—with perhaps the ancillary benefit of clarity for expressive purposes as well.

IV.
CONCLUSION

Efforts at penal law reform—whether a total overhaul of a jurisdiction's substantive law, or a strategic intervention in trouble spots—face numerous hurdles. Yet America's criminal law is desperately in need of attention. Drawing upon recent experience with one such reform, this chapter aims to elucidate some of the problems that such efforts may encounter, in the hopes of smoothing the road for future fellow travelers on this important journey.

AMICI CURIAE IN THE FISA COURTS: A CIVIL LIBERTIES IMPACT ASSESSMENT

FAIZA PATEL AND RAYA KOREH***

Table of Contents

* Senior Director, Brennan Center for Justice at NYU School of Law, Liberty & National Security Program.

** J.D. Candidate, Harvard Law School, 2023; Brennan Center for Justice at NYU School of Law, Liberty & National Security Program, Research & Program Associate, 2018-2020; A.B., Harvard College, 2018.

INTRODUCTION

Whistleblower Edward Snowden's 2013 public disclosure of constitutionally suspect surveillance programs being carried out by the National Security Agency (NSA) prompted Congress to consider a range of reforms. While many of these were focused on the substance of the NSA's authorities, others targeted the ex parte operation of the Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review (FISCR) (together the FISA Courts). Both courts were established by the 1978 Foreign Intelligence Surveillance Act (FISA) and play a pivotal part in overseeing foreign intelligence surveillance programs.[1] The lack of any adversarial process in these courts, critics argued, meant that judges were not sufficiently informed of the privacy and civil liberties concerns raised by the NSA's programs. As President Barack Obama explained, "One of the concerns that people raise is that a judge reviewing a request from the government to conduct programmatic surveillance only hears one side of the story, may tilt it too far in favor of security, may not pay enough attention to liberty."[2] To address this problem, the USA Freedom Act of 2015: (1) required the FISA Courts to appoint an amicus in any case involving "novel or significant interpretation of the law," unless the court hearing the case determined that it was not appropriate to do so; and (2) explicitly gave the courts the authority to appoint amicus curiae in any instance they deemed appropriate.[3] The law also required the Director of National Intelligence, acting in consultation with the Attorney General, to conduct declassification reviews of

1. Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified in scattered sections of 50 U.S.C.) [hereinafter Foreign Intelligence Surveillance Act of 1978].

2. Washington Post Staff, *Transcript: President Obama's August 9, 2013, News Conference at the White House*, WASH. POST (Aug. 9, 2013), http://wapo.st/15kwbZP [https://perma.cc/2TNC-K9MU].

3. Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015, Pub. L. No. 114–23, sec. 401(i)(2)(A), 50 U.S.C. § 1803(i)(2)(A)), 129 Stat. 268 (2015) [hereinafter USA FREEDOM Act of 2015].

court decisions that include a significant construction or interpretation of law.[4]

This Article analyzes the amicus record of the FISA Courts over the past five years with an eye towards evaluating whether the concerns that prompted the reforms—i.e., that civil liberties were being shortchanged—have been ameliorated. Based on the decisions that have thus far been declassified, the Article concludes that the record is mixed at best. No amici have been appointed in several cases that seem to present obviously novel or significant issues of law. In cases where amici have been appointed, their influence has been limited. Amici's legal arguments, often based on decisions made by regular federal courts, have mostly been rejected by the FISA Courts, which have instead tended to agree with the government's position. Only where there has been overwhelming evidence of non-compliance have the FISA Courts forced the government to make changes, mostly relatively modest procedural requirements.[5] At the same time, the inclusion of amici has forced the FISA Courts to grapple substantively with civil liberties and transparency arguments and, because at least some of their decisions have been made public, subjected those decisions to ongoing scrutiny from policymakers, the press, and the public. And, although amici were not involved, over the last couple of years the NSA has curtailed programs where it was unable to comply with legal safeguards and in March 2020 Congress allowed the legal authority for the agency's chronically troubled call-detail record program to expire without reauthorization.[6]

---

4. *Id.* sec. 402(a), § 1872(a).

5. *See infra* text accompanying notes 139–???? and 236–288.

6. *Reauthorizing the USA Freedom Act of 2015*: *Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2019) (questions for the record for Hon. Adam Klein, Chairman and Member, Privacy and Civil Liberties Oversight Board); Press Release, Nat'l Sec. Agency, *NSA Stops Certain Section 702 'Upstream' Activities* (Apr. 28, 2017), https://www.nsa.gov/news-features/press-room/Article/1618699/nsa-stops-certain-section-702-upstream-activities/ [https://perma.cc/SKZ6-NBPH]. *See also* Charlie Savage, *Disputed N.S.A. Phone Program Is Shut Down, Aide Says*, N.Y. Times (Mar. 4, 2019), https://nyti.ms/2Vy3gDW [https://perma.cc/5ZP4-JZLJ]; Ellen Nakashima, *Repeated Mistakes in Phone Record Collection Led NSA to Shutter Controversial Program*, Wash.Post (June 26, 2019), https://wapo.st/31TDBK4?tid=SS_mail&utm_term=.29b5bed90d23 [https://perma.cc/9ZKS-LYL9]; Charlie Savage, *House Departs Without Vote to Extend Expired F.B.I. Spy Tools*, N.Y. Times (Mar. 27, 2020), https://www.nytimes.com/2020/03/27/us/politics/house-fisa-bill.html [https://perma.cc/FA36-S6PA]. For further discussion of the problems leading to the discontinuation of these programs, see *infra* text accompanying notes 90–94 and 272-276, and 349.

Part I of this Article reviews the establishment and evolution of the FISA Courts from their starting point of issuing a few hundred warrant-like orders for surveilling specific individuals to their more recent role in authorizing sweeping surveillance programs that impact the privacy of millions of people. It then turns in Part II to the effort to reform the courts, explaining how robust proposals for introducing an adversarial element into the courts' proceedings were replaced by a narrower provision requiring the courts to appoint amici in cases presenting "novel or significant interpretation of the law" unless they believed it was "not appropriate" to do so and providing a statutory basis for the court's inherent authority to appoint amici when they believed it was appropriate.[7] In Part III, we assess the impact of the amicus provision, focusing on whether amici were appointed in all critical cases and the extent to which their participation influenced the courts' willingness to accept civil liberties arguments. We find that some FISA Court judges seem reluctant to engage amici in the first place. On substantive issues, national security imperatives continue to have the greatest sway over judges. In this Part, we also explore the role of precedent in limiting the impact of civil liberties arguments and the different strategies employed by amici in fulfilling their mandate. We ultimately conclude that the hope of reformers that amici could convince the FISA Courts to impose serious constraints on the NSA's surveillance programs have mostly not been met. Despite this limited impact, the amicus provisions of the USA Freedom Act, together with other reforms, have increased transparency and public understanding of some aspects of the NSA's programs and the FISA Courts' jurisprudence. This provides a starting point for Congress and the public to hold these institutions accountable.

Based on our analysis of the five years of experience with the operation of the amicus provision, we propose changes that Congress and the FISA Courts themselves could make to allow amici to play a bigger and better role in the courts' proceedings and increase public confidence in their operation. The discovery of serious misrepresentations in the government's FISA application to surveil President Trump's former campaign aide Carter Page, as well as in other applications, has triggered renewed interest in reforming FISA, including by re-imagining the role and authorities of amici. Some of our suggestions are reflected in legislation overwhelmingly passed by the Senate as part of the USA Freedom

7. USA FREEDOM Act of 2015, sec. 401, §§ 1803(i)(2)(A)-(B).

Reauthorization Act of 2020.[8] As of this writing, however, the fate of this legislation is unclear.

I.
THE FISA COURTS: ORIGINS AND EVOLUTION

Established in 1978, the FISC is made up of 11 federal trial judges[9] appointed by the Chief Justice of the U.S. Supreme Court for a single seven-year term.[10] The government can appeal any FISC decision to the Foreign Intelligence Surveillance Court of Review (FISCR), which is composed of three federal trial judges, also designated by the Chief Justice.[11] The Supreme Court may grant a writ of certiorari for review of a decision by the FISCR.[12]

The FISC's original mandate was to review the government's applications for orders to collect the electronic communications of individuals for "foreign intelligence" purposes. To obtain an order, the government had to certify that the purpose of the surveillance was to obtain foreign intelligence, broadly defined to include information relating to "the conduct of the foreign affairs of the United States" or national security.[13] And it had to satisfy the court that

8. S. Amend. 1584 to H.R. 6172, 116th Cong., 166 CONG. REC. S2427–8 (May 13, 2020); USA FREEDOM Reauthorization Act of 2020, H.R. 6172, 116th Cong. (2020).

9. The initial number of FISA Court judges was seven. Foreign Intelligence Surveillance Act of 1978 § 103 (current version at 50 U.S.C. § 1803). This was increased to 11 by the Patriot Act of 2001, which also added a requirement that at least three of the judges reside within 20 miles of the District of Columbia. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, sec. 208 (codified as amended at 50 U.S.C. § 1803) (2001) [hereinafter Patriot Act].

10. 50 U.S.C. §§ 1803(a)(1), 1803(d).

11. Foreign Intelligence Surveillance Act of 1978 § 103(b) (codified at 50 U.S.C. § 1803(b)).

12. 50 U.S.C. § 1803(b). In reviewing a FISCR decision, the Supreme Court "may" appoint one of the designated amicus curiae or another individual to provide briefing or other assistance. 50 U.S.C. § 1803(k)(2).

13. 50 U.S.C. §§ 1801(c)(2), 1804(a)(6). The Patriot Act of 2001 made a significant change to this requirement. Instead of certifying that acquiring foreign intelligence was "the purpose" of the surveillance, under the Patriot Act, the government need only certify that acquiring foreign intelligence was "a significant purpose" of the surveillance. Patriot Act, sec. 218 (codified as amended at 50 U.S.C §§ 1804(a)(6)(B), 1823(a)(6)(B)). By specifying that acquiring foreign intelligence need not be the sole or primary purpose of surveillance, the Patriot Act enabled the government to obtain an order from the FISA Court even when the government's primary purpose was to obtain evidence for ordinary criminal prosecutions. For more on the history underlying this shift, see Elizabeth Goitein, Faiza Patel, and Fritz Schwarz, *Lessons from the History of National Security Surveillance*, *in*

there was probable cause to believe that a particular target was a foreign power or agent of a foreign power (such as a foreign government or an international terrorist group),[14] and the telephone number or other communication facility to be monitored was used, or was about to be used, by a foreign power or one of its agents.[15] At the time the court's establishment was debated in Congress, many lawmakers warned of constitutional problems with a court that operated in total secrecy, without all parties present, and outside the normal "adversarial" process.[16] But stricter limits on when Americans[17] could be targeted for "foreign intelligence" purposes mitigated concerns that the court would be used to validate spying on political activity in the U.S. or to avoid the regular warrant requirement in criminal cases.[18] Moreover, the majority of

---

THE CAMBRIDGE HANDBOOK ON SURVEILLANCE 533, 547–48 (David Gray & Stephen E. Henderson eds., 2017).

14. Foreign power is broadly defined to include foreign governments; factions of foreign nations; entities that foreign governments control; international terrorist groups; foreign-based political organizations; and foreign entities engaged in the proliferation of weapons of mass destruction. 50 U.S.C. § 1801(a).

15. 50 U.S.C. § 1805(a)(2).

16. *See, e.g.*, *Foreign Intelligence Surveillance Act: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice on the Comm. on the Judiciary*, 95th Cong. 115 (1978) (statement of Rep. George E. Danielson, Member, H. Comm. on the Judiciary) ("Who is the counter-advocate when the Executive comes before the court to ask for this warrant? Is the court itself to play the role of advocate? Who is coming in for the Soviet Union to decide whether or not this alleged espionage agent should be surveilled? I respectfully submit we have none."); *Foreign Intelligence Surveillance Act of 1978: Hearing Before the Subcomm. on Intelligence and the Rights of Americans of the S. Select Comm. on Intelligence*, 95th Cong. 2d Sess. 39 (1978) (statement of Sen. William D. Hathaway, Member, S. Select Comm. on Intelligence) ("[I]t seems to me it's extremely important that we protect the rights of people, particularly of our own citizens, from being tapped . . . . [W]e could have someone designated to protect the rights of the individual who is going to be tapped, so it wouldn't be strictly an ex parte proceedings, so you would have some adversarial aspect to it."); 124 CONG. REC. 28145 (1978) (statement of Rep. Allen Ertel, Member, H. Comm. on the Judiciary) ("We are compromising our Constitution . . . . Decisions will be made in secret . . . . There will be no exposure to the public, no way to review them."); *Id.* at 28143 (statement of Rep. Robert Drinan, Member, H. Comm on the Judiciary) ("If the application for a warrant is conducted in secret and without the presence of any opposing party . . . how can this constitute a 'case or controversy' within the meaning of the Constitution?").

17. FISA defines "U.S. persons" as citizens or legal permanent residents of the United States. 50 U.S.C. § 1801(i). In this article, the terms "Americans" and "U.S. persons" will be used interchangeably.

18. The term "agent of a foreign power" is more narrowly defined for U.S. persons—U.S. citizens or legal permanent residents—than for non-U.S. persons, requiring a showing of probable cause that the target's activities "involve or may involve" a violation of U.S. criminal law. 50 U.S.C. § 1801(b)(2). U.S. persons must

Congress was reassured by similarities between FISC proceedings and the traditionally ex parte hearings that take place when the government seeks a search warrant in a criminal investigation.[19]

The warrant analogy was never perfect,[20] but it became entirely unconvincing when the court shifted from just issuing individualized, warrant-like orders to also signing off on broad surveillance programs. For example, Section 215 of the Patriot Act of 2001 permitted the government to gather records—such as logs of Americans' telephone calls—so long as they were "relevant" to an authorized foreign terrorism investigation.[21] The FISC interpreted this already expansive provision extremely broadly, ruling that because call records *could* reveal individuals linked to such an investigation, the NSA had the authority to gather all of them, allowing the agency to accumulate a huge database of Americans' information.[22] The NSA was only permitted to search the records if it had

"knowingly" aid and abet foreign powers in order to be considered an agent of a foreign power and cannot be designated an agent of a foreign power "solely upon the basis of activities protected by the First Amendment to the Constitution of the United States." 50 U.S.C. § 1805(a)(2)(A). The legislative history shows that Congress intentionally employed this narrower definition to prevent FISA from ensnaring Americans exercising their First Amendment rights. *See* S. REP. NO. 95-701, at 13, 28 (1978).

19. For instance, ex parte proceedings are a standard feature for both traditional warrant applications. S. REP. NO. 95-701, at 8 (1978). *See also Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intelligence*, 95th Cong. 2d Sess. 224 (1978) (statement of Hon. Laurence Silberman).

20. For instance, while "probable cause" is used in both FISA and warrant applications, it refers to very different things. A regular warrant requires probable cause to believe that a crime has been or is being committed. By contrast, for a FISA order, the government's probable cause showing relates to whether the surveillance target is a foreign power or an agent of a foreign power. 50 U.S.C. § 1805(a)(2). In addition to a showing of probable cause, the Fourth Amendment requires the identification of the object of the search or seizure with particularity and ex ante approval by a neutral magistrate. The target of a traditional warrant must be given notice and has an opportunity to challenge the validity of the warrant either in a criminal trial or in stand-alone proceedings. FED. R. CRIM. P. 41. In contrast, FISA orders are mostly used to collect intelligence and notice is not required except in the rare cases where they are used for prosecutions. 50 U.S.C. § 1806(c). For more on the differences between traditional warrants and FISA warrants, see ELIZABETH GOITEIN & FAIZA PATEL, BRENNAN CTR. FOR JUSTICE , WHAT WENT WRONG WITH THE FISA COURT, 8–18 (2015), https://www.brennancenter.org/sites/default/files/publications/What_Went_%20Wrong_With_The_FISA_Court.pdf [https://perma.cc/NZ74-WH28].

21. Patriot Act, sec. 215 (codified as amended at 50 U.S.C. §§ 1861–2).

22. Amended Memorandum Opinion, *In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 13-109, at 20-22 (FISA Ct. 2013) (Eagan, J.), https://

reasonable articulable suspicion to believe that its search terms (e.g., phone numbers) were associated with a terrorist group, but the agency itself got to decide when that standard was met—an outcome far removed from traditional FISC ex parte proceedings for obtaining a surveillance order based on individualized suspicion.[23] Under another law enacted after 9/11, Section 702 of the 2008 FISA Amendments Act (FAA), the NSA was authorized to undertake warrantless surveillance of foreigners overseas, inevitably gathering the communications of Americans along the way.[24] The program is overseen by the FISC, but the court's role is limited to reviewing generic rules for how targeting decisions are made and how data is handled after collection. As Judge James Robertson, who served on the FISC from 2002 to 2005, explained: by requiring the FISA Court to review and approve entire surveillance programs ex parte, the FAA "turned the FISA Court into something like an

www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20Order-1.pdf [https://perma.cc/G2MR-AWMG]. This interpretation was first revealed as part of the Snowden disclosures. Ellen Nakashima & Sari Horwitz, *Newly Declassified Documents on Phone Records Program Released*, WASH. POST (July 31, 2013), http://wapo.st/1cnzEhH [https://perma.cc/63H3-AD3T].

23. The Patriot Act also allowed the government to obtain more types of business records and made them easier to obtain. Previously, the authority to collect business records was set out in the Intelligence Authorization Act for Fiscal Year 1999, which only allowed the government to collect business records from common carriers, public accommodation facilities, storage facilities, and rental car companies. Notably, records held by phone companies were not among those that the government could access. In addition, the government's applications to obtain business records had to identify the subject of the records and show "specific and articulable facts giving reason to believe the person to whom the records pertain is a foreign power or an agent of a foreign power." *See* Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, § 602, 112 Stat. 2396, 2411 (1998). The Patriot Act permitted the government to acquire records held by phone companies and dispensed with the requirements to identify the subject and to demonstrate the subject's connection to a foreign power, replacing them with a requirement that the records be relevant to an authorized investigation. Prominent constitutional scholars have argued that by untethering the government's request from a particular subject or target, this change arguably eviscerated the "adversity in fact"—the existence of specific parties with adverse interests—that Article III requires. For more on this aspect of the Article III adversity requirement, see Marty Lederman & Steve Vladeck, *The Constitutionality of a FISA 'Special Advocate,'* JUST SEC. (Nov. 4, 2013), http://justsecurity.org/2873/fisa-special-advocate-constitution [https://perma.cc/7K3X-2RJN]; Steve Vladeck, *Why a "Drone Court" Won't Work—But (Nominal) Damages Might. . .*, LAWFARE (Feb. 10, 2013, 5:12 PM), http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work/ [https://perma.cc/527Q-PMR9].

24. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2435 (2008), § 101(a)(2) (codified as amended at 50 U.S.C. § 1881a) (creating Section 702 of FISA).

administrative agency which makes and approves rules for others to follow."[25] The gulf between the original mandate of the court and its new role in approving vast surveillance programs that impact hundreds of millions dramatically increased the civil liberties impacts of its rulings.

II.
PROPOSALS FOR REFORMING THE FISA COURTS

There are serious questions about whether the FISA Courts' role overseeing broad, programmatic surveillance comports with Article III of the Constitution, which mandates that courts adjudicate concrete disputes rather than abstract questions.[26] But wholesale reform to bring the FISA Courts' role back in line with Article III[27] was not on the table when Congress began to consider ways to

25. Transcript of Privacy and Civil Liberties Oversight Board Public Workshop at 36, *Workshop Regarding Surveillance Programs Operated Pursuant to Section 215 of the USA PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act 109* (July 9, 2013) (statement of James Robertson, former U.S. District Court Judge who served on the FISA Court).

26. *See, e.g.*, Walter F. Mondale, Robert A. Stein & Caitlinrose Fisher, *No Longer a Neutral Magistrate: The Foreign Intelligence Surveillance Court in the Wake of the War on Terror*, 100 MINN. L. REV. 2251, 2278 (2016); Stephen I. Vladeck, *The FISA Court and Article III*, 72 WASH. & LEE L. REV. 1161 (2015); GOITEIN & PATEL, *supra* note 20, at 4.

27. For example, one of the authors has suggested replacing Section 702 with a regime requiring an individualized court order for the interception of communications involving U.S. persons, regardless of whether they are the identified target of the surveillance. GOITEIN & PATEL, *supra* note 20, at 4, 45. *See also* Mondale, Stein & Fisher, *supra* note 26, at 2297–98. Congress could also shore up the Article III soundness of the FISA Courts by facilitating collateral challenges by imposing notice requirements on the government and prohibiting the practice of "parallel construction," in which the government builds a criminal case based on FISA-derived evidence but then reconstructs the evidence using other means. GOITEIN & PATEL, *supra* note 20, at 46. *See also* Letter from Advocacy for Principled Action in Government, American-Arab Anti-Discrimination Committee, et al., to Hon. James R. Clapper, Director, Office of the Director of National Intelligence (Oct. 29, 2015), https://www.aclu.org/sites/default/files/field_document/coalition_letter_dni_clapper_102915.pdf [https://perma.cc/XKT5-E4AJ]; *Today's NSA-Related Orwellianism: "Derived From,"* EMPTYWHEEL (Feb. 14, 2014), http://www.emptywheel.net/2014/02/14/todays-nsa-related-orwellianism-derived-from/ [https://perma.cc/H28V-GVJF]; Patrick C. Toomey, *Why Aren't Criminal Defendants Getting Notice of Section 702 Surveillance – Again?*, JUST SEC. (Dec. 11, 2015), www.justsecurity.org/28256/arent-criminal-defendants-notice-section-702-surveillance-again [https://perma.cc/6Z6K-ZLG7]; Dan Novack, *DOJ Still Ducking Scrutiny After Misleading Supreme Court on Surveillance*, INTERCEPT (Feb. 26, 2014), https://theintercept.com/2014/02/26/doj-still-ducking-scrutiny/ [https://perma.cc/2BV9-M9T4]; Beryl A. Howell & Dana J. Lesemann, *FISA's Fruits in Criminal Cases:*

improve them. Instead, reform efforts focused on finding ways to ensure that the courts did not hear only a one-sided presentation of cases, especially those involving issues of statutory and constitutional construction that had broad implications.

The Snowden disclosures triggered a wave of proposals to find ways to include a person or entity to advocate for Americans' privacy rights in the FISA Courts. The proposals varied considerably in terms of the standing that the advocate or amicus would have, the materials available to them, and whether they could appeal a FISC decision to the Foreign Intelligence Surveillance Court of Review. The most ambitious options envisioned an independent office in either the executive[28] or judicial branch,[29] which would be headed by a special advocate who would serve in opposition to the government in proceedings before the FISA Courts,[30] and would have broad authorities such as the ability to intervene in ongoing cases,[31]

An Opportunity for Improved Accountability, 12 UCLA J. INT'L L. & FOREIGN AFF. 145, 155–62 (2007).

28. *See* FISA Court Reform Act of 2013, S. 1467, 113th Cong. § 3(a) (2013); *see also* Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. § 901(a) (2013).

29. *See* Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. § 402(a) (2013); Geoffrey R. Stone, *Reflections on the FISA Court*, HUFFINGTON POST (July 5, 2013, 4:50 PM), http://www.huffingtonpost.com/geoffrey-r-stone/reflections-on-the-fisa-c_b_3552159.html [https://perma.cc/F6XB-Y28K] (suggesting creating an office analogous to a public defender's office for FISA proceedings).

30. *See, e.g.*, Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. § 901(c)(1) (2013), https://www.congress.gov/bill/113th-congress/house-bill/2849/text [https://perma.cc/3C2J-PBAF] ("[The Privacy Advocate General] shall serve as the opposing counsel with respect to any application by the Federal Government . . . ."); Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b)(i)(1) (2013), https://www.congress.gov/bill/113th-congress/house-bill/3159/text [https://perma.cc/5NEP-96U6] (envisioning the public advocate's role as "represent[ing] the privacy and civil liberties interests of the people of the United States in the matter before the court."); FISA Court Reform Act of 2013, S. 1467, 113th Cong. § 3(d)(2) (2013), https://www.congress.gov/bill/113th-congress/senate-bill/1467/text [https://perma.cc/8WNJ-PMZN] (the advocate would advance "legal interpretations that minimize the scope of surveillance and the extent of data collection and retention.").

31. *See* LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGY 204 (2013), https://obamawhitehouse.archives.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf [https://perma.cc/YRV4-JL8V].

conduct some forms of discovery,[32] move the court to reconsider past orders,[33] and appeal adverse rulings.[34]

A March 2014 report from the Congressional Research Service (CRS Report) analyzing several key proposals raised constitutional issues with the creation of a permanent adversarial advocate.[35] In particular, the report argued that proposals to enable amici to act in a way that generally requires standing, for example by giving them the right to appeal FISC decisions, could violate Article III.[36]

---

32. *See* Ensuring Adversarial Process in the FISA Court Act, H.R. 3159, 113th Cong. § 2(b)(3)(C) (2013).

33. *See* FISA Court Reform Act of 2013, S. 1467, 113th Cong. §4(b) (2013).

34. *See* Privacy Advocate General Act of 2013, H.R. 2849, 113th Cong. § 901(d) (2013); *see also* FISA Court Reform Act of 2013, S. 1467, 113th Cong. § 5(a)(1) (2013); Intelligence Oversight and Surveillance Reform Act, S. 1551, 113th Cong. § 402(d)(1)(I) (2013). For an overview of the various proposals on the public advocate issue, see ANDREW NOLAN, RICHARD M. THOMPSON II & VIVIAN S. CHU, CONG. RESEARCH SERV., REFORM OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS: INTRODUCING A PUBLIC ADVOCATE 4–7 (2014), https://fas.org/sgp/crs/intel/R43260.pdf [https://perma.cc/LPS2-VNZF]. In addition to these Congressional proposals, there were a multitude of other suggestions for introducing an adversarial element into the FISA Courts made in newspapers, blogs, and other fora. *See*, *e.g.*, James G. Carr, *A Better Secret Court*, N.Y. TIMES (July 22, 2013), http://www.nytimes.com/2013/07/23/opinion/a-better-secret-court.html [https://perma.cc/J3KC-L767] (former FISC judge proposing that Congress authorize FISA judges to appoint independent lawyers to challenge the government when an application for a FISA order raises new legal issues); Editorial, *Privacy and the FISA Court*, L.A. TIMES (July 10, 2013, 12:00 AM), http://articles.latimes.com/2013/jul/10/opinion/la-ed-fisacourt-20130710 [https://perma.cc/B367-HGSC] (suggesting that government lawyers should be appointed to oppose cases that raise novel legal questions); Orin Kerr, *A Proposal to Reform FISA Court Decision Making*, VOLOKH CONSPIRACY (July 8, 2013, 1:12 AM), http://volokh.com/2013/07/08/a-proposal-to-reform-fisa-court-decisionmaking/ [https://perma.cc/Q8KR-BXUA] (proposing that Congress amend the FISA statute to allow the Oversight Section of the Department of Justice's National Security Division to file a motion to oppose any application before the FISC); Steve Vladeck, *Making FISC More Adversarial: A Brief Response to Orin Kerr*, LAWFARE (July 8, 2013, 11:46 PM), https://www.lawfareblog.com/making-fisc-more-adversarial-brief-response-orin-kerr [https://perma.cc/AUQ9-7UZ8] (suggesting that private lawyers serve as adversarial "special advocates" in the FISC to avoid "the difficulties inherent in expecting government lawyers zealously to critique the government's legal position in ongoing litigation"); Benjamin Wittes, *My Statement Today Before the Senate Intelligence Committee*, LAWFARE (Sept. 26, 2013, 2:00 PM), https://www.lawfareblog.com/my-statement-today-senate-intelligence-committee [https://perma.cc/AKP2-MJ88] (arguing that "the FISA judges [should] have the option—at their discretion—of appointing cleared counsel to argue against the government's submissions").

35. *See* NOLAN, THOMPSON & CHU, *supra* note 34, at 9–10, 17–19, 44–45. For a contrary view, see Lederman & Vladeck, *supra* note 23.

36. *See* NOLAN, THOMPSON & CHU, *supra* note 34, at 22–35, 46–49; ANDREW NOLAN & RICHARD M. THOMPSON II, CONG. RESEARCH SERV., REFORM OF THE FOR-

Around the same time, John D. Bates, Director of the Administrative Office of the United States Courts and former Presiding Judge of the FISC, wrote to the Senate Intelligence and Judiciary Committees—purportedly on behalf of his fellow FISA judges—arguing that Congressional proposals for making the courts more adversarial were both unnecessary and counterproductive.[37] Judge Bates particularly took issue with proposals that gave the FISA judges no discretion regarding the appointment of "special advocates" to serve as amicus curiae. He argued that introducing an adversarial element to proceedings would impede the courts' ability to obtain "complete and accurate information . . . in a timely fashion" because—as compared to ex parte proceedings during which Executive Branch representatives have a "heightened duty of candor"[38]—the government would be more reluctant to disclose information to the courts if doing so would also disclose the information to an independent adversary.[39] In the wake of the CRS Report and Judge

---

EIGN INTELLIGENCE SURVEILLANCE COURTS: PROCEDURAL AND OPERATIONAL CHANGES 14–17 (2014), https://fas.org/sgp/crs/intel/R43362.pdf [https://perma.cc/6MRU-RRHU]; *see also In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Prod. of Tangible Things, No. BR 13-158, 2013 WL 12335411, at *2 (FISA Ct. Dec. 18, 2013) ("Regardless of whether the role of an amicus curiae is to act as an impartial advisor or as an advocate, most courts have recognized that the role of an amicus curiae is limited, and does not rise to the level of a party to the litigation.").

37. *See* Letter from John D. Bates, Dir., Admin. Office of the U.S. Courts, to the Hon. Dianne Feinstein, Chairman, Select Comm. on Intelligence, U.S. Senate (Jan. 13, 2014), https://www.hsdl.org/?view&did=749880 [https://perma.cc/X5FZ-W3BH]; Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act, John D. Bates, Dir. , Admin. Office of the U.S. Courts (Jan. 10, 2014) (on file with the Homeland Security Digital Library), https://www.hsdl.org/?view&did=749882 [https://perma.cc/CRA4-49FS]. In a subsequent letter in August 2014, Judge Bates specifically opposed the Senate's USA FREEDOM Act of 2014 which contained a more robust amicus provision and stated his preference for the model of amicus participation outlined in the USA FREEDOM Act proposed in the House of Representatives. *See* Letter from John D. Bates, Dir., Admin. Office of the U.S. Courts, to the Hon. Patrick Leahy, Chairman, Comm. on the Judiciary, U.S. Senate (Aug. 5, 2014), http://online.wsj.com/public/resources/documents/Leahyletter.pdf [https://perma.cc/6687-PKES]. The amicus provisions of the latter were largely adopted in the USA Freedom Act of 2015. *See* USA FREEDOM Act of 2015, sec. 401; USA FREEDOM Act, H.R. 3361, 113th Cong. § 401 (2013).

38. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3(d) (AM. BAR ASS'N, 1983) ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.").

39. *See* Letter from Bates to Leahy, *supra* note 37, at 2–3.

Bates' controversial judicial lobbying,[40] the more far-reaching proposals to add an adversarial element to the FISA Courts process lost momentum and lawmakers focused instead on a more traditional amicus model, which vested considerable discretion in the courts.[41]

The statute and rules that originally established the FISA Courts in 1978 made no mention of the possibility of amicus participation.[42] However, the courts occasionally used their inherent authority to allow the filing of amicus briefs.[43] From 1979 until Snowden made his first revelations in 2013, the FISA Courts are known to have allowed two amicus briefs, both in a single case.[44]

40. The Chief Judge of the Ninth Circuit wrote to Congress expressing his disapproval of Judge Bates's actions. *See* Letter from Alex Kozinski, Chief Judge, Ninth Circuit Court of Appeals, to the Hon. Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary (Aug. 14, 2014), https://www.fjc.gov/sites/default/files/2015/TRFISC05.pdf [https://perma.cc/N567-Q843]. *See also* J. Jonas Anderson, *Judicial Lobbying*, 91 WASH. L. REV. 401, 402–03 (2016); Stephen I. Vladeck, *The Wars of the Judges*, 92 WASH. L. REV. 1, 1 (2017); Steve Vladeck, *Judge Bates and a FISA "Special Advocate,"* LAWFARE (Feb. 4., 2014, 9:24 AM), https://www.lawfareblog.com/judge-bates-and-fisa-special-advocate [https://perma.cc/QNX3-CGZU].

41. Already in mid-2014, the version of the USA FREEDOM Act passed by the House had replaced the independent advocate position with an amicus provision similar to the one that eventually passed. *Compare* USA FREEDOM Act, S. 2685, 113th Cong. § 401 (2014), *with* USA FREEDOM Act of 2015, sec. 401 (2015).

42. *See* Foreign Intelligence Surveillance Act of 1978, 92 Stat.

43. *See In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Prod. of Tangible Things, No. BR 13-158, at *2 (FISA Ct. Dec. 18, 2013) (concluding that allowing amicus participation is "within the sound discretion" of the FISC).

44. *See* Brief for ACLU et al. as Amici Curiae Supporting Affirmance, *In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. Nov. 18, 2002) (No. 02-001); Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Affirmance, *In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. Nov. 18, 2002) (No. 02-001). In this case, the FISCR reviewed the FISC's decision in *In re All Matters Submitted to Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611 (FISA Ct. May 17, 2002) (No. 02-429), which was the first FISA Court decision released publicly in over 20 years. The publication of *In re All Matters* in the Federal Supplement enabled the public to be aware of the case and gave interested parties the opportunity to file motions to intervene in the matter. In the decision, the first ever issued by the FISCR, the court did not say much about why it had decided to solicit amicus briefs other than to note that otherwise the government would be the only party to the case. *See In re* Sealed Case, 310 F.3d at 719. In any event, the FISCR did not accept amici's arguments, instead holding that search or surveillance applications should be approved under FISA if the government articulated any "measurable" foreign intelligence purpose for the investigation, even if the primary purpose of the investigation was for a criminal prosecution. After the review court handed down its decision, the amici moved to intervene so that they could petition for a writ of certiorari. *See* Press Release, ACLU, In Legal First, Groups Urge High Court To Review Secret Court Ruling On Government Spying (Feb. 18, 2013), https://

The small number is hardly surprising given that the courts operated in almost absolute secrecy; during this period only six of their decisions were made public.[45] The pressure from the 2013 Snowden disclosures prompted some improvements. In the approximately two years before the passage of the amicus provisions of the USA Freedom Act in 2015, the courts appointed amici on an additional seven occasions,[46] six of which were in cases related to access to court decisions, and the public was able to obtain a glimpse into

www.aclu.org/press-releases/legal-first-groups-urge-high-court-review-secret-court-ruling-government-spying [https://perma.cc/RRR6-DWB9]. The Supreme Court denied the motion. *See* ACLU v. United States, No. 02M69, 2003 WL 1447870 (Mar. 24, 2003) (mem.).

45. The six decisions released before the Snowden revelations are: *In re* Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property (FISA Ct. June 11, 1981), *as reprinted in* S. REP. NO. 97-280, at 16–19 (1981); *In re* All Matters Submitted to Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611 (FISA Ct. 2002); *In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. Nov. 18, 2002); *In re* Motion for Release of Court Records, 526 F. Supp. 2d 484 (FISA Ct. Dec. 1, 2007); *In re* Proceedings Required by Section 702(i) of the FISA Amendments Act of 2008, No. Misc. 08-01 (FISA Ct. Aug. 27, 2008); *In re* Directives [REDACTED] Pursuant to Section 105B of Foreign Intelligence Surveillance Act, 551 F.3d 1004 (FISA Ct. Rev. Aug. 22, 2008).

46. The seven amicus briefs filed in the FISA Courts between the Snowden revelations and the passage of the USA Freedom Act are: Brief for Center for National Security Studies as Amicus Curiae Opposing Authorization, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things, No. Misc. 14-01 (FISA Ct. Apr. 3, 2014); Brief for U.S. Representatives Amash et al. as Amici Curiae Supporting Release of Records, *In re* Orders Issued by This Court Interpreting Section 215 of the Patriot Act, No. Misc. 13-02 (FISA Ct. June 28, 2013); Brief for Reporters Committee for Freedom of the Press, et al. as Amici Curiae Supporting Release of Records, *In re* Orders Issued by This Court Interpreting Section 215 of the Patriot Act, No. Misc. 13-02, *In re* Motion for Declaratory Judgment of a First Amendment Right to Publish Aggregate Information about FISA Orders, No. Misc. 13-03, *In re* Motion to Disclose Aggregate Data Regarding FISA Orders, No. Misc. 13-04 (FISA Ct. July 15, 2013); Brief for First Amendment Coalition, et al. as Amici Curiae Supporting Declaratory Judgment, *In re* Motion for Declaratory Judgment of Google Inc.'s First Amendment Right to Publish Aggregate Information about FISA Orders, No. Misc. 13-03, *In re* Motion to Disclose Aggregate Data Regarding FISA Orders, No. Misc. 13-04 (FISA Ct. July 8, 2013); Brief for Dropbox, Inc. as Amicus Curiae Supporting Service Providers, *In re* Motions To Disclose Aggregate Data Regarding FISA Orders and Directives, Nos. Misc. 13-03, 13-04, 13-05, 13-06 (FISA Ct. Sept. 23, 2013); Brief for Apple, Inc. as Amicus Curiae Supporting Declaratory Judgment, *In re* Motions for Declaratory Judgment to Disclose Aggregate Data Regarding FISA Orders and Directives, Nos. Misc. 13-03, 13-04, 13-05, 13-06, 13-07 (FISA Ct. Nov. 5, 2013); Brief for Reporters Committee for Freedom of the Press and 25 Media Organizations, et al. as Amici Curiae Supporting Release of Records, *In re* Opinions and Orders of This Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, Misc. 13-02, *In re* Motion for the Release of Court Records, Misc. 13-08, *In re*

the FISA Courts' jurisprudence because 27 of their decisions were declassified and released—15 of these decisions related to cases decided before the Snowden revelations, and 12 to cases decided after.[47]

The final reform package passed as the USA Freedom Act of 2015 sought to improve on the system in two ways. First, it required the Director of National Intelligence, acting in consultation with the Attorney General, to conduct declassification reviews and make publicly available "to the greatest extent practicable" all decisions, orders, and opinions issued by the FISA Courts that include significant constructions or interpretations of law.[48] The enhanced transparency presaged by this provision opened the door to greater public engagement with the courts' decisions and allowed analyses such as this Article. Second, the law included a new two-part amicus provision. The FISA Courts:

> (A) shall appoint an individual who has been designated under paragraph (1) to serve as amicus curiae to assist such court in the consideration of any application for an order or review that, in the opinion of the court, *presents a novel or significant interpretation of the law, unless the court issues a finding that such appointment is not appropriate*; and
>
> (B) may appoint an individual or organization to serve as amicus curiae, including to provide technical expertise, in any instance as such court deems appropriate or, upon motion,

Motion of ProPublica, Inc. for the Release of Court Records, Misc. 13-09 (FISA Ct. Nov. 26, 2013).

47. There is no publicly available list of released FISC and FISCR decisions. Amicus Laura Donohue included a list in her brief in a case before the FISCR and an updated listing of these decisions can now be found on a website that she maintains. *See* Brief for Laura K. Donohue as Amicus Curiae App. at 1–17, *In re* Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, No. 18-01 (FISA Ct. Rev. Feb. 23, 2018), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2018-01%20Amicus%20Appendix%20-%20Part%201.pdf [https://perma.cc/F43U-TNB8]; *FISC/FISCR Opinions*, GEO. L. LIBR., FOREIGN INTELLIGENCE L. COLLECTION, https://repository.library.georgetown.edu/handle/10822/1052699 [https://perma.cc/P4K6-MKD2].

48. USA FREEDOM Act of 2015, sec. 402(a), § 1872(a). The Director of National Intelligence (DNI) and the Attorney General (AG) are permitted to waive the requirement to conduct declassification reviews and make decisions, orders, and opinions "publicly available to the greatest extent practicable" if they determine that such as waiver is "necessary to protect the national security of the United States or properly classified intelligence sources or methods," but in that case they must publish an unclassified statement "summarizing the significant construction or interpretation of any provision of law." *Id.* sec. 402(c), §1872(c).

permit an individual or organization leave to file an amicus curiae brief.[49]

The statute thus both added a new provision that weighed in favor of appointing amici in cases involving new or significant interpretations of the law (hereinafter referred to as the "novel/significant amicus provision") and codified the inherent authority of the courts to appoint amici (hereinafter referred to as the "general amicus provision"). The former overlapped considerably with the types of cases for which the new law required a declassification review.

The general amicus provision and the novel/significant provision operate somewhat differently and the FISA Courts have availed themselves of both mechanisms.

The general amicus law simply reiterates the courts' authority to appoint individuals and organizations as amici at their discretion and specifies only that they may be appointed to provide "technical expertise," among other things. It also provides statutory authorization for the court to allow amicus curiae briefs by individuals or organizations upon motion. Since the FISA Courts' proceedings are secret, however, it is difficult for an individual or organization to file a motion unless specifically solicited by the court.[50]

The novel/significant amicus provision is differently structured. It begins with mandatory-sounding language (the court "shall appoint"), but then gives the FISA Courts significant latitude to decide not to appoint amici so long as they make a specific finding that doing so would be inappropriate (although not an explanation of why).[51] Amici can only be appointed to assist the court "in the consideration of any application for an order or review," a limi-

49. *Id.* sec. 401, §§ 1803(2)(A)-(B) (emphasis added).

50. For an example of the FISA Courts appointing an amicus upon motion, *see infra* discussion accompanying notes 180–186.

51. This decision was in keeping with traditional amicus practice and perhaps in recognition of the national security stakes at issue in FISA cases. *See, e.g.*, PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., RECOMMENDATIONS ASSESSMENT REPORT 7 (2016), https://www.pclob.gov/library/Recommendations_Assessment_Report_20160205.pdf [https://perma.cc/AUQ4-XWMF] (noting that amicus appointments are left to the discretion of the FISA Court judges, and encouraging greater amicus participation "where it is feasible to do so consistent with national security"); Mondale, Stein & Fisher, *supra* note 26, at 2296–97; NOLAN & THOMPSON, *supra* note 36, at 11–14. The discretion left to judges may also reflect separation of powers concerns with Congressional attempts to make the FISA Courts more adversarial. *See* Nolan & Thompson, *supra* note 36, at 14; Ben Cook, *The New FISA Court Amicus Should Be Able to Ignore Its Congressionally Imposed Duty*, 66 AM. U. L. REV. 539 (2017) ("While Congress retains total authority to control the jurisdiction and procedures of the FISC, the judicial power inherent in any court includes the authority to decide the law, administer justice, and control the amicus process.").

tation not found in the general amicus provision. This type of amicus can only be appointed from a pool of individuals (no organizations) designated by the FISA Courts who are required to "possess expertise in privacy and civil liberties, intelligence collection, communications, technology, or any other area that may lend legal or technical expertise."[52]

While the novel/significant amicus provision does not constrain the type of amici the FISA Courts may appoint, there is little doubt that they were envisioned as robust advocates for Americans' civil liberties. The sentiment was encapsulated by Senator Richard Blumenthal (D-CT), a leading advocate for the amicus provision, who explained that amici would "present[ ] the side opposing the government," "protect[ ] public constitutional rights, and . . . help safeguard essential liberties not just for the individuals who might be subjects of surveillance . . . but for all of us."[53] To a certain extent, the text of the provision reflects this understanding. While the FISA Courts are permitted to consider for amici individuals recommended by any source they deem appropriate, the Privacy and Civil Liberties Oversight Board, an expert body established by Congress to review the impact of counterterrorism efforts on Americans' privacy and civil liberties, is singled out as a potential advisor.[54] And

52. USA FREEDOM Act of 2015, sec. 401, § 1803(i)(3)(A).

53. 161 CONG. REC. S3396–97 (daily ed. June 1, 2015) (statement of Sen. Blumenthal), https://www.congress.gov/114/crec/2015/06/01/CREC-2015-06-01-pt1-PgS3385.pdf [https://perma.cc/6WJQ-WMBS]. Rep. Sensenbrenner similarly described an earlier proposal for an adversarial addition to the FISA process as aiming to "represent the public and privacy interests in particular" and "would allow a judge to be a judge rather than hearing one side of the argument and making a guesstimate of what the law and the regulations require." Andrea Peterson, *Patriot Act Author: "There Has Been a Failure of Oversight,"* WASH. POST (Oct. 11, 2013, 11:57 AM), https://www.washingtonpost.com/news/theswitch/wp/2013/10/11/patriot-act-author-there-has-been-a-failure-of-oversight [https://perma.cc/PF58-MDRZ].

54. *See* 50 U.S.C. § 1803(i)(1) (2018). The PCLOB is an independent agency within the Executive Branch established in 2007 by the Implementing Recommendations of the 9/11 Commission Act. The Board continually reviews proposed legislation, regulations, and policies related to efforts to protect the nation from terrorism, and oversees the implementation of such terrorism-related Executive Branch policies, procedures, regulations, and information-sharing practices in order to ensure that privacy and civil liberties are protected. *History and Mission*, PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, https://www.pclob.gov/about/ [https://perma.cc/FL8C-GJ2U]. An earlier version of the USA FREEDOM Act was even stronger. The language proposed by Sen. Leahy in the unenacted USA FREEDOM Act of 2014 required that "special advocates" be appointed "in consultation with the Privacy and Civil Liberties Oversight Board" and those appointed "shall advocate, as appropriate, in support of legal interpretations that advance individ-

although the statute allows the FISA Courts to appoint amici to present all relevant legal arguments, it singles out "legal arguments that advance the protection of individual privacy and civil liberties privacy and civil liberties."[55] As discussed later in this Article, however, the FISA Courts have not always prioritized civil liberties expertise in appointing amici under this provision.

III.
ASSESSING THE IMPACT OF AMICI

Any assessment of the impact of amici is necessarily preliminary because the USA Freedom Act has only been in effect for a few years and many of the courts' activities are not public. As noted earlier, compared to the pre-Snowden era, the FISA Courts' decisions are being released far more frequently.[56] But there are likely decisions covering issues of public interest that have not been declassified, either because the Director of National Intelligence and the Attorney General have decided that they do not meet the "significant construction or interpretation" standard set out in the USA Freedom Act for declassification or because their continued classification is considered by the executive branch to be "necessary to protect the national security of the United States or properly classified intelligence sources or methods."[57] Even where decisions have been declassified, they often have significant redactions that prevent a full evaluation of the court's conclusions. Moreover, amicus briefs are not always made public, so the full extent of amici's arguments to the court are not visible to the public. Thus far, of the 13 post-USA Freedom Act cases[58] in which amicus briefs are known to

---

ual privacy and civil liberties." USA FREEDOM Act of 2014, S. 2685, 113th Cong. §§ 401(i)(1), (4)(A)(i) (2014).

55. USA FREEDOM Act of 2015, sec. 401, § 1803(i)(4) (Amici appointed under section 401 of the USA Freedom Act are required to provide to the court: "(A) legal arguments that advance the protection of individual privacy and civil liberties; (B) information related to intelligence collection or communications technology; or (C) legal arguments or information regarding any other area relevant to the issue presented to the court.")

56. *See supra* text accompanying notes 45–47. Since the USA Freedom Act became law in 2015, the FISA Courts have released 45 decisions. *See FISC/FISCR Opinions*, *supra* note 47.

57. USA FREEDOM Act of 2015, sec. 402(a), §§1872(a)-(c).

58. *See infra* note 172. There were two amicus appointments in 2019 and for the purposes of this Article they are counted as separate cases. However, since court documents related to those appointments are not publicly available, it is not clear whether the appointments occurred in one case or two. If both appointments were in a single case, the actual number of post-USA Freedom Act cases in which amicus briefs are known to have been filed would be 12 rather than 13. *See* FOR-

have been filed, briefs from only six have been released.[59] In sum, while we certainly know more about the FISA Courts' decision-making than we did prior to 2013, our information is far from complete.

Then there is the question of what criteria should be used to make this impact assessment. This Article adopts the perspective of those pushing for reform of the FISA Courts and focuses on two criteria: whether amici have been appointed in all critical cases, and whether as a result of their participation, the FISA Courts have been less likely to endorse all or part of the government's position. Measured against these criteria, the amicus experiment seems to have met with limited success so far. At least some judges are skeptical of the value of amicus participation and in a number of cases that seem to fit the criteria identified by Congress, judges have either not considered appointing amici or have concluded that doing so was unnecessary. Where amici have been called upon, their arguments have impacted the decisions of the FISA Courts in some instances, but for the most part have not changed the courts' extreme deference to the government's national security arguments.

A. Extent of amicus participation

At the time that the USA Freedom Act was being debated, many reformers worried that the FISA Courts simply would not appoint amici. The courts had only availed themselves of this option twice in the 35 years of their existence prior to the Snowden disclosures.[60] Amici appointments picked up after the Snowden leaks (six appointments in the two years following),[61] a trend that has continued since the passage of the USA Freedom Act (17 appointments in 13 cases over roughly five years).[62]

EIGN INTELLIGENCE SURVEILLANCE COURTS, REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ON ACTIVITIES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS FOR 2019, at 4 (Apr. 2020) [hereinafter 2019 FISC ANNUAL REPORT], https://www.uscourts.gov/sites/default/files/fisc_annual_report_2019_0.pdf [https://perma.cc/7B23-6JCG].

59. For more on the six cases for which amicus briefs are publicly available, see *infra* text accompanying notes 139–148, 180–191, 213–235, 293–320.

60. *See supra* note 44.

61. *See supra* note 46.

62. *See infra* note 172 and *supra* note 58. The number of amici appointments saw a noticeable jump in 2018, but this is attributable primarily to the repeated appointment of amici in two cases that were heard by both the FISC and the FISCR. In the case concerning the 2018 Section 702 certifications, the FISC appointed Jonathan Cedarbaum, John Cella, and Amy Jeffress as amicus curiae. All three were then appointed to serve again when the case was certified by the FISCR. *See infra* text accompanying notes 236–292. Similarly, Laura Donohue was ap-

But these numbers only tell part of the story since we do not know the universe of cases in which the courts would have been expected to appoint amici under the novel/significant provision of the USA Freedom Act, but did not do so.[63] John D. Cline, a prominent criminal defense lawyer who was appointed to the amicus pool in November 2015, did not believe that the courts were appointing amici to the extent that Congress had intended. He resigned from his position as part of the pool because in the over two years that he had been part of the amici panel, he had not been asked to handle a case in either of the FISA Courts, noting that his "fellow amici have been assigned only a small handful of matters among them, and some have had no cases at all."[64]

While it is not possible to come to a firm assessment of whether the FISA Courts have appropriately involved amici, three publicly available FISC decisions discussed below suggest resistance to involving amici. There is also no publicly released decision which involves the appointment of an amicus in relation to an application for an individual surveillance order. However, the FISC recently appointed David Kris (a member of the amicus pool) under the general amicus provision to review FBI procedures in light of the DOJ Inspector General's finding of factual deficiencies in the FISA applications to surveil Carter Page.[65]

It also bears mention that the amicus pool for novel/significant cases appointed by the FISA Courts is weighted considerably towards lawyers who previously worked in high-level national security and prosecutorial positions in the government. These attorneys come with sterling credentials and undoubtedly have the skills and knowledge to present civil liberties arguments. Nonetheless, their predominance in the amicus pool feeds the perception that the FISA Courts are resistant to the representation of civil liberties concerns.[66]

---

pointed once in the FISCR and again when the case was remanded to the FISC. *See infra* text accompanying notes 293–320.

63. USA FREEDOM Act of 2015, sec. 401, § 1803(i)(2).

64. Letter from John D. Cline to Hon. Rosemary M. Collyer, Presiding Judge, Foreign Intelligence Surveillance Court, and Honorable William C. Bryce, Presiding Judge, Foreign Intelligence Surveillance Court of Review (Dec. 19, 2017), https://www.emptywheel.net/wp-content/uploads/2018/02/2017-12-19-FISC-resignation-letter-1.pdf [https://perma.cc/79AL-XG8H].

65. *See supra* text accompanying notes 136–148.

66. *See supra* text accompanying notes 37–40.

1. The Three Cases of Missing Amici

a. Lapse in Authority for Bulk Collection

The court's reluctance to call upon amici is apparent in the very first post-USA Freedom Act FISC decision.[67] The case involved Section 215 of the Patriot Act, which authorized the FBI to obtain an order from the FISC for records "relevant to an authorized investigation . . . to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities."[68] Snowden's most dramatic disclosure showed that the court had taken an expansive view of relevance, allowing the NSA to accumulate a database of Americans' call detail records (sometimes described as metadata, such as the date and time of a call, its duration, and the participating telephone numbers).[69] The aggregation of such records, as the Privacy and Civil Liberties Oversight Board explained, "paint[s] a clear picture of an individual's personal relationships and patterns of behavior [which] can be at least as revealing . . . as the contents of individual conversations – if not more so."[70] The goal of the USA Freedom Act was to put in place a more restrictive regime for collecting information about Americans' phone calls before June 1, 2015, the date on which this authority automatically expired unless renewed by Congress.[71] But the new law was not enacted until two days *after* the sunset date. In theory then, Section 215 expired and the law reverted back to its pre-Patriot Act incarnation. This would

67. *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things, Nos. BR 15-77, 15-78 (FISA Ct. June 17, 2015).

68. Patriot Act, sec. 215.

69. *See* Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 6, 2013), www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order [https://perma.cc/NW2N-Y9ZV]; PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 1, 8 (Jan. 23, 2014) [hereinafter PCLOB SECTION 215 REPORT], https://www.pclob.gov/library/215-Report_on_the_Telephone_Records_Program.pdf [https://perma.cc/A2VA-HLA8]. Metadata is data that describes and gives information about other data. Communication metadata is information about the communication, including session identifying information (*e.g.*, originating and terminating telephone number or e-mail address, communications device identifiers like IP addresses, etc.), routing information, time and duration of calls, and similar non-content information.

70. PCLOB SECTION 215 REPORT, *supra* note 42, at 157.

71. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 102(b)(1), 120 Stat. 192, 194-95 (2006), as amended by PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112- 14, § 2(a), 125 Stat. 216.

have prevented the NSA from collecting phone records maintained by phone companies.[72]

The government took the position that this lapse should be ignored, and the 180-day phase-out provision included in the USA Freedom Act applied. In June 2015, it asked the FISC for an order to continue collecting information under the Patriot Act version of Section 215. Judge F. Dennis Saylor IV agreed with the government that the USA Freedom Act intended for Section 215 collection to continue uninterrupted until the phase-out period was complete.[73] Judge Saylor's opinion displayed a fairly dismissive attitude towards amicus participation. The judge acknowledged that the case presented the type of "novel or significant" legal issues that would normally trigger appointment of an amicus but decided that he simply did not need one because the proper result was obvious. According to Judge Saylor, amicus participation was "not appropriate" in cases where the court "does not need the assistance or advice of amicus curiae because the legal question is relatively simple, or is capable of only a single reasonable or rational outcome."[74] As commentators have noted, this analysis conflates the concepts of "unnecessary" and "not appropriate."[75] Congress had identified the types of cases where an amicus would be necessary. Within this universe of cases, the court could decide that *other* concerns made participation inappropriate, but the statute did not envision the use of inappropriateness as a way to conduct a necessity analysis.

---

72. *See supra* text accompanying note 23.

73. *See In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things, Nos. BR 15-77, 15–8, at 12–13.

74. *Id.* at 5. In a footnote, Judge Saylor went even further, suggesting that factors such as expense or delay could render it inappropriate to call on amici. While the statute itself provides that amicus appointments must be consistent with any "requirement that the court act expeditiously or within a stated time," that requirement was not at play in this case. *Id.* at 5 n.7. *See also* Steve Vladeck, *'Expense,' 'Delay,' and the Inauspicious Debut of the USA FREEDOM Act's Amicus Provision*, JUST SEC. (June 23, 2015), https://www.justsecurity.org/24152/expense-delayinauspicious-debut-usa-freedom-acts-amicus-provision [https://perma.cc/Y5RP-EZ7N].

75. Elizabeth Goitein, *The FISC's Newest Opinion: Proof of the Need for an Amicus*, JUST SEC. (June 23, 2015), https://www.justsecurity.org/24134/fiscs-newest-opinion-proof-amicus [https://perma.cc/MQF3-QLTU]; Vladeck, *supra* note 74; Julian Sanchez, *The Hidden Meaning (Maybe) of the New FISC Opinion*, JUST SEC. (June 19, 2015), https://www.justsecurity.org/24053/hidden-meaning-maybe-fisc-opinion/ [https://perma.cc/Q52S-N6ZU].

b. Application of New USA Freedom Act Provisions

A similar reluctance to invite amicus participation is evident in the FISC's first decision applying the new system set up by the USA Freedom Act to a government application to acquire certain call detail records. Under the new law, the government could only obtain call records if they included a "specific selection term," defined as a term that "specifically identifies a person, account, address or personal device" in a way that "limit[s], to the greatest extent reasonably practicable, the scope of tangible things sought consistent with the purpose for seeking the tangible things."[76]

Based on the redacted opinion, which was made public in April 2016, it appears that Judge Thomas F. Hogan did not even consider appointing an amicus to weigh in on the government's first use of "specific selection term[s]" in an application.[77] This was surprising given that in the months leading up to the enactment of the new system for accessing call records, this provision was the subject of much public debate. Civil liberties groups expressed concerns that "specific selection term" could be interpreted broadly to allow the collection of swaths of records, as the definition is expansive enough to allow collection of the "records of everyone who used a particular Internet protocol address, records of everyone who stayed at a hotel in Las Vegas on a particular date, or records concerning a business corporation or other entity considered a 'person' under the law."[78] The issue was sufficiently important that the USA Freedom Act required the declassification review of decisions to specifically consider cases involving "any novel or significant construction or interpretation of the term 'specific selection

76. USA FREEDOM Act of 2015, sec. 107, § 1861(k)(4)(A)(i)(II). The same rule applies to pen registers and trap and trace devices and national security letters.

77. *In re* Application of the Federal Bureau of Investigation for Orders Requiring the Production of Call Detail Records [REDACTED], at 3 (FISA Ct. Dec. 31, 2015).

78. Jennifer Granick, *Sen. Leahy's Latest NSA Bill: The Good, The Bad, and The Ugly*, JUST SEC. (July 29, 2014), https://www.justsecurity.org/13378/sen-leahys-latest-nsa-bill-good-bad-ugly/ [https://perma.cc/6KXL-NLT6] (discussing an earlier version of the bill, which shares the same language as the USA Freedom Act of 2015). *See also* Neema Singh Guliani, *It's Congress' Turn: What Meaningful Surveillance Reform Looks Like*, ACLU: NEWS & COMMENTARY (May 11, 2015), https://www.aclu.org/blog/national-security/privacy-and-surveillance/its-congress-turn-what-meaningful-surveillance [https://perma.cc/SX5P-EYPP]; Elizabeth Goitein, *How the Second Circuit's Decision Changes the Legislative Game*, LAWFARE (May 8, 2015), https://www.lawfareblog.com/how-second-circuits-decision-changes-legislative-game [https://perma.cc/H67H-JTWL].

term.'"[79] Indeed, the decision was declassified four months after issuance, suggesting that—in the view of the Director of National Intelligence and the Attorney General—the case involved a "significant construction or interpretation" of "specific selection term" making it all the more difficult to understand why the FISC did not appoint an amicus.[80]

Judge Hogan also did not consider appointing an amicus with respect to another important issue raised by the application: how far beyond the initial target could the government's acquisition of call records extend? In addition to obtaining the call records of an individual it believed was linked to a foreign terror group, the NSA also acquired records relating to people far removed from the target. The FISC had authorized "contact chaining" whereby analysts could "retrieve not only the numbers directly in contact with the seed number (the 'first hop'), but also numbers in contact with all first hop numbers (the 'second hop'), as well as all numbers in contact with all second hop numbers (the 'third hop')."[81] The Privacy and Civil Liberties Oversight Board's report on the Section 215 program estimated that, assuming an average person was in contact with about 75 other numbers over a five year period, the NSA could use an initial seed number to review the calling history of over 400,000 people.[82] The PCLOB also reported that according to the NSA, the program used 300 numbers as seeds to query its database in 2012. Based on those 300 seeds, a three-hop analysis could allow the agency to acquire the full calling records of an estimated 1.5

79. USA FREEDOM Act of 2015, sec. 402(a), § 1872(a).

80. *Id.*

81. PCLOB SECTION 215 REPORT, *supra* note 42, at 9, 44–45. *See, e.g.*, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 06-05 (FISA Ct. May 24, 2006), https://assets.documentcloud.org/documents/785206/pub-may-24-2006-order-from-fisc.pdf [https://perma.cc/3TAT-QEDR]; *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 13-80, at 6 (FISA Ct. July 19, 2013). *See also* Memorandum of Law in Support of Application for Certain Tangible Things for Investigations to Protect Against International Terrorism at 15, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things, No. BR 06-05 (FISA Ct. May 23, 2006), https://www.clearinghouse.net/chDocs/public/NS-DC-0009-0004.pdf [https://perma.cc/AZM8-85Z4]; Memorandum for the Attorney General, from Kenneth L. Wainstein, Assistant Att'y Gen., at 2 (Nov. 20, 2007), http://www.guardian.co.uk/world/interactive/2013/jun/27/nsa-data-collection-justice-department [https://perma.cc/CSR6-TMD7].

82. *See* PCLOB SECTION 215 REPORT, *supra* note 42, at 29, 165. *See also* Jonathan Mayer, Patrick Mutchler, and John C. Mitchell, *Evaluating the Privacy Properties of Telephone Metadata*, 113 PROC. OF THE NAT'L ACAD. OF SCI. 5536 (2016).

million telephone numbers.[83] The calling records of those 1.5 million numbers, could, in turn, give the NSA access to the records of telephone calls made between those numbers and all the numbers they contacted, an estimated 100 million additional numbers. In other words, contact chaining allows the government access to the phone records of millions of individuals who are not suspected of any wrongdoing.[84]

The USA Freedom Act modified this procedure in several significant ways: (1) the government had to identify a "specific selection term"—"a term that specifically identifies an individual, account, or personal device"—to identify the records it seeks; (2) a FISC judge had to determine that there was "reasonable articulable suspicion" that the selection term was in fact connected to a foreign terror group; and (3) the NSA could only look at records two "hops" removed from the original seed selector. Judge Hogan concluded, consistent with the FISC's prior decisions, that the USA Freedom Act only required him to decide whether there was reasonable articulable suspicion with respect to the original seed number and not numbers that were in second-degree contact (i.e., two hops removed).[85]

But the FISC did not consider potential issues about *how* the NSA designated the numbers that qualify as connected, which could have been raised by an amicus. The NSA's transparency report from 2016 shows that the agency exercises virtually unrestricted discretion in identifying this broader universe of records.[86] The process is initiated when the NSA sends the seed selector to phone carriers, which then send back a list of numbers that have been in direct contact with the seed (the first hop). The

83. *See* PCLOB Section 215 Report, *supra* note 42, at 165.

84. *See id*.

85. *See In re* Application of the Federal Bureau of Investigation for Orders Requiring the Production of Call Detail Records [REDACTED], *supra* note 77, at 12–16; 50 U.S.C. 1861(c)(2)(F); Sharon Bradford Franklin, *Fulfilling the Promise of the USA Freedom Act: Time to Truly End Bulk Collection of Americans' Calling Records*, Just Sec. (Mar. 28, 2019), https://www.justsecurity.org/63399/fulfilling-the-promise-of-the-usa-freedom-act-time-to-truly-end-bulk-collection-of-americans-calling-records/ [https://perma.cc/X3L4-77VP]. For earlier FISA Court findings that reasonable articulable suspicion is only needed for the original sees number, see, e.g., *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 13-80, *supra* note 81, at 11.

86. NSA Civil Liberties and Privacy Office, Transparency Report: THE USA FREEDOM Act Business Records FISA Implementation 5–6 (2016), https://www.nsa.gov/Portals/70/documents/about/civil-liberties/reports/UFA_Civil_Liberties_and_Privacy_Report.pdf [https://perma.cc/9Y9K-ZSFJ].

NSA decides which numbers have been in contact with this list of numbers using the information at its disposal and then submits a second list of selectors (second hop) to phone carriers to obtain their call records. As one expert pointed out, the discretion left to the agency to determine which records are connected

> makes the process of generating the list of one-hop selectors to be used by carriers as the basis for production of second-hop Call Detail Records effectively a black box under NSA's control. The first list of "specific selectors" will consist of phone numbers or other identifiers that the Foreign Intelligence Surveillance Court has verified are linked to a foreign power (or agent thereof) engaged in international terrorism. But the second list — the basis for production of those second-hop Call Detail Records — will be generated by NSA itself, using its massive array of internal databases and its own definition of what it means for two numbers (or other identifiers) to be in "direct contact."[87]

Both these issues seem important for the FISC to consider but were not raised in the case.

In the same decision though, the FISC did consider appointing amici on another issue: whether a provision of the USA Freedom Act requiring prompt destruction of records that did not contain foreign intelligence information conflicted with an already existing provision that authorized the retention of records that were reasonably believed to contain evidence of a crime. But the court thought this question was easily resolved by allowing the government to retain the information for a six-month period (renewable) prior to destruction and therefore the assistance of amici was not needed.[88] As noted earlier, the USA Freedom Act requirement for appointing amici is not triggered by the complexity or difficulty of an issue, but its novelty or significance.[89]

---

87. Julian Sanchez, *USA Freedom: The Rubber Meets the Road*, JUST SEC. (Jan. 15, 2016), https://www.justsecurity.org/28830/usa-freedom-rubber-meets-road/ [https://perma.cc/DML2-ZB3K]. *See also USA F-Redux: Chaining On "Session Identifying Information" That Is Not Call Detail Records*, EMPTYWHEEL (Apr. 28, 2015), https://www.emptywheel.net/2015/04/28/usa-f-redux-session-identifying-information-that-is-not-call-detail-records/ [https://perma.cc/E628-A5M9] (suggesting that for the "second hop," the NSA might use cell site location, cookies and permacookies, or other "session-identifying information" that would not normally fall under the definition of call detail records).

88. *See In re* Application of the Federal Bureau of Investigation for Orders Requiring the Production of Call Detail Records [REDACTED], *supra* note 77, at 23–24.

89. *See supra* text accompanying notes 74–75.

In sum, in its first decision applying the new system set up by the USA Freedom Act in the wake of heated public and Congressional debates, the FISC did not consider appointing an amicus on two novel and significant legal questions and found that it did not need an amicus on an issue that it conceded was novel.

Deeper problems with the call records program soon emerged. In June 2018, the NSA revealed that it had been regularly receiving call-detail records that exceeded the bounds of what had been authorized by the FISC under the USA Freedom Act reforms and announced that all call-detail records acquired since 2015 would be deleted.[90] These problems persisted even after the NSA announced in June 2018 that the "root cause of the problem" had been resolved.[91] In March 2019, the National Security Advisor to the House Minority Leader disclosed that the program had been halted for the previous six months due to the technical issues and raised doubts about whether the administration would restart the collection.[92] Ultimately, the NSA suspended the program in 2019[93] and the statutory authority for the program expired in March 2020.[94]

c. Section 702 Approval: 2016-2017

Amicus curiae were also surprisingly not appointed in the FISC's April 2017 approval of the government's annual request for authorization of its Section 702 surveillance program.[95] The review

90. Press Release, NSA, NSA Reports Data Deletion, Release No: PA-010-18 (June 28, 2018), https://www.nsa.gov/news-features/press-room/Article/1618691/nsa-reports-data-deletion/ [https://perma.cc/WZ5S-GRJX].

91. Letter from Ronald Newman, Nat'l Pol. Director, ACLU, and Neema Singh Guliani, Senior Legis. Couns., ACLU, to the Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, and the Hon. Doug Collins, Ranking Member, H. Comm. on the Judiciary (June 25, 2019), https://www.aclu.org/letter/aclu-letter-house-judiciary-committee-regarding-section-215-call-detail-record-program [https://perma.cc/2EBR-XSGL].

92. *See* Savage, *Disputed N.S.A. Phone Program Is Shut Down, Aide Says*, *supra* note 6.

93. Letter from Daniel Coats, Director of National Intelligence, to Senators Richard Burr, Lindsey Graham, Mark Warner, and Dianne Feinstein (Aug. 14, 2019), https://int.nyt.com/data/documenthelper/1640-odni-letter-to-congress-about/20bfc7d1223dba027e55/optimized/full.pdf [https://perma.cc/R56X-B3HP]; Privacy & Civil Liberties Oversight Bd., Report on the Government's Use of the Call Detail Records Program Under the USA Freedom Act at 1–3, 68–69 (Feb. 2020), https://www.pclob.gov/library/PCLOB%20USA%20Freedom%20Act%20Report%20(Unclassified).pdf [https://perma.cc/C49K-4JKQ].

94. Savage, *House Departs Without Vote to Extend Expired F.B.I. Spy Tools*, *supra* note 6.

95. *See* [REDACTED] (FISA Ct. Apr. 26, 2017) [hereinafter April 2017 Opinion], https://assets.documentcloud.org/documents/3718776/2016-Cert-FISC-

related to the government's 2016 application and had been extended for several months because the NSA had failed to abide by court-imposed rules designed to protect Americans' privacy. In order to understand the significance of the FISC's failure to appoint amici in this case, some background about the long and troubled history of the program is necessary.

i. Legal Framework for Section 702

Under Section 702, the NSA collects private electronic communications (e.g., emails and phone calls) without a warrant. Although in general the Fourth Amendment requires a warrant before the government can tap an American's phone, the FISA Courts have held that there is an exception to the warrant requirement "when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States."[96] In these cases, the surveillance must pass muster under the Fourth Amendment's "reasonableness" requirement, which is assessed by balancing the government's interests in conducting the search with the privacy interests at stake.[97] Under this lower standard, in almost all cases decided by the FISA Courts, Americans' privacy interests are almost inevitably overwhelmed by the national security interests put forward by the government.[98]

Even though Section 702 surveillance is ostensibly targeted at foreigners overseas, it scoops up vast amounts of the communica-

Memo-Opin-Order-Apr-2017-1.pdf [https://perma.cc/3DDV-6VAG]. Each year, the FISA Courts review and approve the government's Section 702 certifications for the following year. However, the court approved the Section 702 certifications for 2016 in April 2017. This occurred because in 2016, the FISC refused to approve the government's Section 702 application until it addressed its ongoing compliance violations. Instead, the court extended the previous year's application for several months. [REDACTED] (FISA Ct. Oct. 26, 2016) [hereinafter October 2016 Order], https://assets.documentcloud.org/documents/3718779/2016-Certification-FISC-Extension-Order-Oct-26.pdf [https://perma.cc/D2G3-LD3B]. For more on the Section 702 certifications from 2016, see *infra* notes 120–129. For further discussion of the Section 702 program, see *infra* text accompanying notes 211–292.

96. *In re* Directives [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1012 (FISA Ct. Rev. Aug. 22, 2008).

97. *Id.*

98. *See* Emily Berman, *When Database Queries Are Fourth Amendment Searches*, 102 MINN. L. REV. 577, 599–603 (2017). For a discussion of government assertions that this warrantless surveillance passes "reasonableness" standards, see Elizabeth Goitein, *Another Bite Out Of Katz: Foreign Intelligence Surveillance And The "Incidental Overhear" Doctrine*, 55 AM. CRIM. L. REV. 105, 107, 110–11 (2018).

tions of Americans who are on the receiving end of phone calls and emails from their friends and family overseas.[99] This collection is described by the NSA as "incidental," although part of the point of the program is to identify individuals in the U.S., and its impact on Americans' privacy is extensive.[100] To ameliorate the domestic impact of Section 702 surveillance, Congress has required the NSA to develop targeting procedures that limit its surveillance to foreigners overseas and for foreign intelligence purposes, as well as procedures to "minimize" the sharing, retention and use of information about Americans.[101] Both sets of procedures are presented annually to the FISC for approval along with certifications by the Attorney General and the Director of National Intelligence attesting that obtaining foreign intelligence information is a "significant purpose" of the collection.[102]

---

99. *See, e.g.*, PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT at 6, 82–83, 87, 114–116 (2014) [hereinafter PCLOB 702 Report], https://www.pclob.gov/library/702-Report.pdf [https://perma.cc/DJZ8-FHCF].

100. *See* Allyson Scher, *Stop Calling It "Incidental" Collection of Americans' Emails: The Gov't's Renewed Surveillance Powers*, JUST SEC. (Jan. 22, 2018), https://www.justsecurity.org/51272/stop-calling-incidental-collection-americans-emails-govts-renewed-surveillance-powers/ [https://perma.cc/P6V5-RFWN] ("'[I]ncidental' collection has become so vast and significant that it appears to be an objective of Section 702. You can tell because when reformers wanted to shut off warrantless access to that data, proponents said it would kill or disable the program. From these revealing moments in the recent reauthorization debates, one can conclude that getting Americans' messages without a warrant is the point, or a significant point, of the program, and not a side effect."); Elizabeth Goitein, *The NSA's Backdoor Search Loophole*, BOSTON REV. (Nov. 14, 2013), http://www.bostonreview.net/blog/elizabeth-goitein-nsa-backdoor-search-loophole-freedom-act [https://perma.cc/EAG3-Z2GB] ("The NSA refers to this as 'incidental' collection, but there is nothing 'incidental' about it. As officials made clear during the debates leading up to the enactment of section 702, communications involving Americans were 'the most important to us.'"); *FISA for the 21st Century: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 9 (2006) (statement of General Michael V. Hayden, Director, CIA), https://fas.org/irp/congress/2006_hr/072606hayden.html [https://perma.cc/6VF2-V78A] ("[T]here are no communications more important to the safety of the Homeland than those affiliated with al Qa'ida with one end in the United States. And so why should our laws make it more difficult to target the al Qa'ida communications that are most important to us—those entering or leaving the United States!").

101. 50 U.S.C. §§ 1881a(d)(1)(A), (e)(1).

102. 50 U.S.C. §§ 1881a(a), (h)(2)(v). These certifications, which are made by the Attorney General and the Director of National Intelligence, identify the categories of foreign intelligence information to be gathered; contain the targeting and minimization procedures that the agencies will follow; attest that the targeting and minimization procedures and additional guidelines adopted to en-

ii. Downstream and Upstream Collection

The NSA's Section 702 program encompasses at least two publicly-known parts: "Downstream," which collects communications to and from a target stored by companies such as Internet service and telecommunications providers; and "Upstream," which collects communications as they transit the Internet backbone by scanning Internet traffic looking for communications sent to and from a target as well as the communications of third parties that include the selectors used to track the target.[103] According to the NSA, these selectors are normally e-mail addresses or telephone numbers,[104] but the legal justification used by the agency is broad enough to encompass communications that merely include the target's name.[105] In other words, if the intelligence target was Osama bin

---

sure compliance are consistent with the Fourth Amendment; attest that a "significant purpose" of the program is to obtain foreign intelligence information; attest that the program uses a U.S. electronic communications service provider; and attest that the program complies with the limitations spelled out by the statute.

103. *See, e.g.,* PCLOB 702 Report, *supra* note 99, at 7, 33–41; NSA Director of Civil Liberties and Privacy Office, NSA's Implementation of Foreign Intelligence Surveillance Act Section 702, 5 (2014), https://www.nsa.gov/Portals/70/documents/about/civil-liberties/reports/nsa_report_on_section_702_program.pdf [https://perma.cc/X4UB-W5PY]; *Upstream vs. PRISM*, Electronic Frontier Foundation, https://www.eff.org/pages/upstream-prism [https://perma.cc/6JSV-Q6K5].

104. *See* National Security Agency, United States Signals Intelligence Directive SP0018: Legal Compliance and U.S Personas Minimization Procedures § 9.14 (Jan. 25, 2011), https://www.dni.gov/files/documents/1118/CLEANEDFinal%20USSID%20SP0018.pdf [https://perma.cc/VN8N-3UPN] (defining "selection" as the "insertion of a REDACTED, telephone number, email address, REDACTED into a computer scan dictionary or manual scan guide for the purpose of identifying messages of interest and isolating them for further processing"). In 2011, the FISC approved minimization procedures for the NSA's Upstream program, such that "communications . . . that are to, from, or about a targeted selector . . . may be used and disseminated subject to the other applicable provisions of the NSA minimization procedures." *See also* [REDACTED], 2011 WL 10947772, at *6 (FISA Ct. Nov. 30, 2011); FISA Amendments Reauthorization Act of 2017, Pub. L. No. 115118, §103(b)(1)(a), 132 Stat. 3, 10 (2018) (defining an "about" communication as "a communication that contains a reference to, but is not to or from, a target of an acquisition authorized under section 702(a) of the Foreign Intelligence Surveillance Act of 1978").

105. *See* Nat'l Sec. Agency, Exhibit A: Procedures Used By The National Security Agency For Targeting Non-United States Persons Reasonably Believed To Be Located Outside The United States To Acquire Foreign Intelligence Information Pursuant To Section 702 Of The Foreign Intelligence Surveillance Act Of 1978, As Amended 1–2 (July 28, 2009), https://s3.amazonaws.com/s3.documentcloud.org/documents/716633/exhibit-a.pdf [https://perma.cc/4J9R-GTEU] (stating that the NSA may seek "to acquire com-

Laden, the NSA's legal position (although perhaps not its practice) would allow it to pick up not only communications to and from bin Laden but also every communication that mentioned him.[106]

Given the breadth of this claimed authority, the collection of communications about targets as part of the Upstream program—termed "abouts" collection —has long been one of the aspects of Section 702 surveillance that civil libertarians find most objectionable.[107] As the FISC itself conceded, it is "more likely than other forms of Section 702 collection to contain information of or concerning United States persons with no foreign intelligence value."[108]

Concerns about the Upstream program are exacerbated by certain aspects of the mechanics of the NSA's collection of internet communications. Information is transmitted over the Internet in packets of data, which can contain multiple communications—

---

munications about the target that are not to or from the target."); NAT'L SEC. AGENCY, EXHIBIT B: MINIMIZATION PROCEDURES USED BY THE NATIONAL SECURITY AGENCY IN CONNECTION WITH ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED, at §3(b)(4), (2009), https://www.dni.gov/files/documents/Minimization%20Procedures%20used%20by%20NSA%20in%20Connection%20with%20FISA%20SECT%20702.pdf [http://perma.cc/F226-ASQ3] ("As communication is reviewed, NSA analyst(s) will determine whether it is a domestic or foreign communication to, from, or about a target and is reasonably believed to contain foreign intelligence information or evidence of a crime."); *see also Section 702 of the FISA Amendments Act: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. 2–3 (2017) (statement of Elizabeth Goitein, Co-Director, Liberty and National Security Program, Brennan Center for Justice); Laura K. Donohue, *Section 702 and the Collection of International Telephone and Section 702 and the Collection of International Telephone and Internet Content Internet Content*, 38 HARV. J.L. & PUB. POL'Y 117, 159–161 (2015).

106. *See Section 702 of the FISA Amendments Act: Hearing Before the H. Comm. on the Judiciary*, *supra* note 105 at 2–3 (statement of Elizabeth Goitein).

107. *See*, *e.g.*, PCLOB 702 Report, *supra* note 99, at 37; BRENNAN CTR. FOR JUST., ACLU, CDT ET AL., NATIONAL SECURITY SURVEILLANCE AND HUMAN RIGHTS IN A DIGITAL AGE, Joint Submission to the United Nations Twenty Second Session of the Universal Periodic Review Working Group Human Rights Council 6–9 (2015), https://cdt.org/files/2014/09/BCJ-ACCESS-ACLU-CDT-EFF-EPIC-HRW-PEN-Joint-UPR-Submission-United-States-Of-America-April-2015.pdf [https://perma.cc/43RN-H3MT]; *All About "About" Collection*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/pages/about-collection [https://perma.cc/X8ZB-UD3D]; Julian Sanchez, *All About "About" Collection*, JUST SEC. (Apr. 28, 2017), https://www.justsecurity.org/40384/ado-about/ [https://perma.cc/7FFE-GZBC].

108. Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications [REDACTED], at 13 (FISA Ct. Oct. 18, 2018), https://www.intel.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opin_18Oct18.pdf [https://perma.cc/6M3Z-UUP8].

called Multi-Communication Transactions (MCTs)— or single, discrete communications. Each MCT contains bits of various people's communications, which are joined back together when they reach their destination.[109] Thus, an email from an individual in New York to their friend in Los Angeles would likely be split up into a number of MCTs during transit and rejoined before reaching the intended recipient.[110] The Upstream program acquires MCTs, but according to the government, technical limitations prevent it from filtering MCTs to find just those communications that are to, from, or about the targeted selector.[111] When the NSA collects "abouts" MCTs—MCTs that included a reference to the selector somewhere in the transaction—the other communications in the MCT, including purely domestic communications that did not reference the selector and to which no target was a party, are swept up.[112]

iii. FISC Review of Upstream Collection

The FISC first learned of issues with MCTs in 2011, when Judge John D. Bates conducted the annual review of the NSA's Section 702 programs. In a decision issued in October 2011, he found that the NSA's targeting and minimization procedures did not sufficiently protect American's communications, emphasizing the capture of purely domestic communications.[113] He concluded that the procedures submitted by the NSA were statutorily and constitutionally deficient and directed the agency to correct the deficiencies by submitting amended procedures within 30 days or else cease Upstream collection.[114] The government subsequently submitted amended NSA procedures that included a sequestration regime for different kinds of MCTs, which the FISC approved.[115]

The same October 2011 decision involved another highly contentious aspect of Section 702 collection, "backdoor searches," which involve intelligence agencies searching for information about Americans in the large pool of information collected without a war-

109. PCLOB 702 Report, *supra* note 99, at 39–41, 125.

110. *See id*. at 125.

111. *See* [REDACTED], 2011 WL 10945618, at *31 (FISA Ct. Oct. 3, 2011) [hereinafter October 2011 Opinion]; *see also* PCLOB 702 Report, *supra* note 99, at 39–41.

112. October 2011 Opinion, *supra* note 111, at 42–43; PCLOB 702 Report, *supra* note 99, at 7, 40, 143–44.

113. *See* October 2011 Opinion, *supra* note 111, at 78–80.

114. *See id*.; [REDACTED], 2011 WL 10945618, at *30 (FISA Ct. Oct. 3, 2011).

115. *See* [REDACTED], 2011 WL 10947772, at *6 (FISA Ct. Nov. 30, 2011); April 2017 Opinion, *supra* note 95, at 17–18.

rant under Section 702.[116] Civil liberties advocates and members of Congress have argued that these searches are a "backdoor" allowing the government to circumvent the requirements of the Fourth Amendment.[117] Judge Bates permitted the NSA and Central Intelligence Agency (CIA) to conduct backdoor searches on Section 702 data, but given the issues with the collection of MCTs and particularly "abouts" MCTs, he restricted those searches to non-Upstream sources.[118] These rules brought the NSA and CIA's backdoor search authorities in line with those of the FBI, in place since at least 2009, which are discussed later in this Article.[119]

These issues again came before the court after the passage of the USA Freedom Act when the government submitted its 2016 authorization request for the Section 702 program. The FISC learned for the first time that the NSA had been systematically violating the rules on segregating, storing, retaining, and accessing communications obtained through Upstream collection, most notably by searching information collected via Upstream "abouts" collection using improper queries using U.S. person identifiers.[120] The rules

116. Goitein, *supra* note 100; *Warrantless Surveillance Under Section 702 of FISA*, ACLU, https://www.aclu.org/issues/national-security/privacy-and-surveillance/warrantless-surveillance-under-section-702-fisa [https://perma.cc/Q4AR-DXJV].

117. Berman, *supra* note 98, at 629–32; David Ruiz, *58 Human Rights and Civil Liberties Organizations Demand an End to the Backdoor Search Loophole*, ELECTRONIC FRONTIER FOUND. (Oct. 6, 2017), https://www.eff.org/deeplinks/2017/10/coalition-58-human-rights-and-civil-liberties-organizations-demands-end-backdoor [https://perma.cc/F38M-8UGV]; Ron Wyden, *Responding to the Myths About Reforming FISA's Section 702*, JUST SEC. (Dec. 4, 2017), https://www.justsecurity.org/47543/responding-myths-reforming-fisas-section-702/ [https://perma.cc/7T8C-XMZF]; Press Release, Congresswoman Zoe Lofgren, Bipartisan Coalition Introduces USA RIGHTS Act to Reform Secretive Warrantless Spy Program (Oct. 24, 2017), https://lofgren.house.gov/media/press-releases/bipartisan-coalition-introduces-usa-rights-act-reform-secretive-warrantless-spy [https://perma.cc/PPE2-4ANZ]; Goitein, *supra* note 100; Neema Singh Guliani, *Congress Just Passed a Terrible Surveillance Law. Now What?*, ACLU (Jan. 18, 2018), https://www.aclu.org/blog/national-security/privacy-and-surveillance/congress-just-passed-terrible-surveillance-law-now [https://perma.cc/T6M4-FX8C]; Elizabeth Goitein, *Americans' Privacy at Stake as Second Circuit Hears Hasbajrami FISA Case*, JUST SEC. (Aug. 24, 2018), https://www.justsecurity.org/60439/americans-privacy-stake-circuit-hears-hasbajrami-fisa-case/ [https://perma.cc/JV9P-MD3J].

118. *See* October 2011 Opinion, *supra* note 111, at 22–23, 25, 66 n.60. This decision reversed earlier prohibitions on such searches in the agencies' minimization procedures. *See* ERIC HOLDER, MINIMIZATION PROCEDURES USED BY THE NATIONAL SECURITY AGENCY IN CONNECTION WITH ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702, AS AMENDED § 3(b)(5) (July 29, 2009).

119. *See infra* text accompanying notes 231–233 and *infra* note 232.

120. *See* April 2017 Opinion, *supra* note 95, at 4, 19.

at issue had been crafted in response to Judge Bates' 2011 ruling finding constitutional deficiencies in the agency's handling of Upstream data, so the violations showed that the program had been operating unconstitutionally for years.[121]

FISC Judge Rosemary M. Collyer reprimanded the government for "serious Fourth Amendment issue[s]" and institutional "lack of candor" for its years-long failure to disclose the scope of non-compliance.[122] She refused to approve the government's Section 702 application until it addressed ongoing issues, but she did not reject the application. Instead, she allowed the program to continue—extending the previous year's Section 702 authorization past the November 2016 expiration date by several months—to allow the government more time to bring itself into compliance rather than deny the government's application for reauthorization of the program.[123]

Despite the seriousness of the issues raised by the NSA's failures, and the extended time to review the certifications, Judge Collyer did not consider whether an amicus should be appointed to weigh in on the novel and significant legal issues raised for the FISC in deciding on the appropriate response to the government's noncompliance.

The certifications came before Judge Collyer again in April 2017, by which time the government had proposed remedying the issues identified the previous year by simply ending "abouts" collection as part of the Upstream program. However, it wanted to expand its backdoor search authority to Upstream collection.[124] The judge found that ending "abouts" collection would eliminate the acquisition of "the more problematic forms of MCTs," such as those that contain a reference to a selector but were mainly or entirely domestic communications between non-targets located within the U.S.[125] At the same time, she acknowledged that even without "abouts" collection, the NSA will continue to collect domestic communications in MCTs.[126] But she found that the prohibition on using U.S. person identifiers to query Upstream data was no longer necessary to comport with the statute or with the Fourth Amendment because eliminating "abouts" collection "should substantially

121. *See id*. at 81.

122. *Id*. at 19 (quoting October 26, 2016 Transcript at 5–6).

123. *See id.* at 19–20; October 2016 Order, at 1.

124. *See* April 2017 Opinion, *supra* note 95, at 23.

125. *Id*. at 29.

126. *Id*. at 27.

reduce the acquisition of nonpertinent information concerning U.S. persons."[127]

The decision to allow the NSA to use U.S. person query terms to search Upstream data, including wholly domestic communications, seems like the type of case where the USA Freedom Act's novel/significant criteria for tapping an amicus were met, but no amicus was appointed.[128] Nor did the judge, as required under the USA Freedom Act, issue "a finding that such an appointment is not appropriate."[129]

As the discussion above illustrates, even with respect to a chronically troubled program that presented a host of novel and significant issues of law impacting Americans' privacy, the FISC did not consider whether an amicus should be appointed.

2. Individual Surveillance Orders under Title I of FISA

The public record also indicates that the courts have not appointed an amicus in any case involving surveillance targeted at particular individuals or entities under Title I of FISA, even though these too presumably can raise novel and significant issues of law.[130] For example, in 2014—before the USA Freedom Act was passed—it was reported that the government had obtained FISA orders authorizing surveillance of five Muslim American men, including the head of the largest Muslim civil rights organization in the U.S. and a candidate for political office who had held a top-secret security clearance and served in the Department of Homeland Security under President George W. Bush.[131] It is possible that the NSA had cause to believe that these men were agents of foreign powers, but their profiles clearly raise significant questions about whether FISA authorities were being used to target political activities protected by the First Amendment. It is not known whether similar cases have come before the courts since the amicus provision was enacted.

---

127. *Id*. at 23, 58 n.48.

128. *See id*. at 28–29, 95.

129. *Id*. *See also*, *The Problems With Rosemary Collyer's Shitty Upstream 702 Opinion*, EMPTYWHEEL (May 30, 2017), https://www.emptywheel.net/2017/05/30/the-problems-with-rosemary-collyers-shitty-upstream-702-opinion/ [https://perma.cc/D3RD-B5QE].

130. For a discussion of the standards for obtaining this type of FISA surveillance order, see *supra* text accompanying notes 13-15.

131. Glenn Greenwald and Murtaza Hussain, *Meet The Muslim-American Leaders The FBI And NSA Have Been Spying On*, INTERCEPT (July 9, 2014), https://theintercept.com/2014/07/09/under-surveillance/ [https://perma.cc/7XYX-ABSV].

Serious problems relating to individual FISA surveillance orders emerged as a result of the DOJ Inspector General's review of the FBI's Russia investigation, released in December 2019.[132] These problems relate primarily to glaring deficiencies in the Bureau's presentation of the factual predicates for the FISA surveillance orders issued (and renewed) with respect to Carter Page (Page warrant), a former Trump campaign official.[133] The DOJ now admits that, on account of "material misstatements and omissions," at least two of the four orders to surveil Page were not supported by probable cause to believe that Page was acting as an agent of a foreign power.[134] While the reported problems in the Page applications may not necessarily raise novel or significant issues of law, they point to the need for more robust oversight of this process.

Shortly after the issuance of the Inspector General's report, Judge Collyer, the presiding judge of the FISC, issued an order

132. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI'S CROSSFIRE HURRICANE INVESTIGATION (2019).

133. *See id.* at ii. The Carter Page FISA surveillance order is at the center of a political firestorm. The FBI, in making the case to judges that Page might be a Russian agent, had used some claims drawn from a Democratic-funded dossier compiled by Christopher Steele, a former British intelligence agent, spurring Republican concerns that the surveillance was for political rather than national security reasons. The controversy about these FISA applications first arose in February 2018 when a memorandum written by House Intelligence Committee Chairman Rep. Devin Nunes was released, accusing, with little evidence, the FISA Court and DOJ of enabling the surveillance of Page for political reasons. The main complaint in the Nunes memo was that FBI's applications whitewashed the Steele dossier, a source of information in the FISA applications, by not "disclos[ing] or referenc[ing] the role of the DNC, Clinton campaign, or any party/campaign in funding Steele's efforts, even though the political origins of the Steele dossier were then known to senior and FBI officials." Aaron Blake, *The Full Nunes Memo, Annotated*, WASH. POST (Feb. 2, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/02/02/the-full-nunes-memo-annotated/ [https://perma.cc/UFV9-7BV8]. *See also* Julian Sanchez, *The Crossfire Hurricane Report's Inconvenient Findings*, JUST SEC. (Dec. 11, 2019), https://www.justsecurity.org/67691/the-crossfire-hurricane-reports-inconvenient-findings/ [https://perma.cc/K6DC-W8DW]; Bob Bauer and Jack Goldsmith, *The FBI Needs to Be Reformed*, ATLANTIC (Dec. 16, 2019), https://www.theatlantic.com/ideas/archive/2019/12/fisa-process-broken/603688/ [https://perma.cc/WJV5-N2F8].

134. Order Regarding the Handling and Disposition of Information, *In re* Carter W. Page, Nos. 16-1182, 17-52, 17-375, 17-679, at 1 (FISA Ct. Jan. 7, 2020), https://www.fisc.uscourts.gov/sites/default/files/FISC%20Declassifed%20Order%2016-1182%2017-52%2017-375%2017-679%20%20200123.pdf [https://perma.cc/6BV3-35UX] ("The Court understands the government to have concluded, in view of the material misstatements and omissions, that the Court's authorizations in Docket Numbers 17-375 and 17-679 were not valid.").

which set out the instances in which FBI agents had misled the National Security Division of the Department of Justice, which presents surveillance applications to the court. The FISC found that:

> The FBI's handling of the Carter Page applications, as portrayed in the OIG report, was antithetical to the heightened duty of candor [required of the government in ex parte proceedings]. The frequency with which representations made by FBI personnel turned out to be unsupported or contradicted by information in their possession, and with which they withheld information detrimental to their case, calls into question whether information contained in other FBI applications is reliable. The FISC expects the government to provide complete and accurate information in every filing with the Court. Without it, the FISC cannot properly ensure that the government conducts electronic surveillance for foreign intelligence purposes only when there is a sufficient factual basis.[135]

The court ordered the government to inform it, no later than January 10, 2020 of "what it has done, and plans to do, to ensure that the statement of facts in each FBI application accurately and completely reflects information possessed by the FBI that is material to any issue presented by the application."[136]

Complying with Judge Collyer's order, Attorney General Christopher A. Wray submitted a list of 12 steps that the FBI intended to take to ensure the accuracy of information submitted to the FISC, including measures aimed at ensuring that the court was apprised of information that undercut the government's assertions such as concerns about the veracity or reliability of a source.[137] The list included expanding verification forms and checklists that agents must complete to capture mitigating information, as well as enhanced training and auditing.[138]

To assist the court in assessing the government's response, the FISC appointed David S. Kris, an amicus from the pool and the

135. *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-02, at 3–4 (FISA Ct. Dec. 17, 2019), https://www.fisc.uscourts.gov/sites/default/files/MIsc%2019%2002%20191217.pdf [https://perma.cc/WN3B-4WKX].

136. *Id.*

137. Response to the Court's Order Dated December 17, 2019, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-02, at 2–4 (FISA Ct. Jan. 10, 2020), https://assets.documentcloud.org/documents/6616955/Misc-19-02-Response-to-the-Court-s-Order-Dated.pdf [https://perma.cc/NRF8-SWRW].

138. *Id.*

former Assistant Attorney General for the National Security Division of the DOJ.[139] Kris was appointed under the general amicus provision of the USA Freedom Act, which authorizes the court to "appoint an individual or organization to serve as amicus curiae, including to provide technical expertise, in any instance as such court deems appropriate."[140]

In his January 15, 2020 filing with the court, Kris argued that the changes made by the FBI, while pointing in the right direction, did "not go far enough to provide the Court with the necessary assurance of accuracy, and therefore must be expanded and improved."[141] He suggested three key improvements. First, the FBI field agent running the investigation for which surveillance was sought should sign the affidavit submitted to the court, not a supervisor at FBI Headquarters in Washington.[142] This would change the Bureau's system for making an application for FISA surveillance which relies on multiple layers of review and instead place responsibility on field agents closer to the underlying investigation who would in principle be more likely to identify factual mistakes and significant omissions in the documents prepared by the investigating agent. Second, the government should brief the FISA Courts on any disciplinary reviews of personnel involved in submitting surveillance applications.[143] Third, the Justice Department should undertake a greater number of audits to ensure accuracy, completeness, and compliance with the FBI's procedures, particularly in cases involving U.S. persons, certain definitions of "agent of a foreign power," or sensitive investigative matters.[144]

The government agreed to the first recommendation but demurred with respect to the second and third.[145] FISC Presiding

139. Order Appointing an Amicus Curiae, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-02 (FISA Ct. Jan. 10, 2020), https://www.fisc.uscourts.gov/sites/default/files/Misc%2019%2002%20Order%20Appointing%20Amicus%20Curiae%20200110.pdf [https://perma.cc/G9FE-7JK7].

140. *Id.*; USA FREEDOM Act of 2015, sec. 401, § 1803(i)(2)(B).

141. Letter Brief for David Kris as Amicus Curiae at 3, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-02 (FISA Ct. Jan. 15, 2020), https://www.fisc.uscourts.gov/sites/default/files/FISC%20Misc%2019%2002%20Amicus%20Curiae%20letter%20brief%20January%2015%202020%20200115.pdf [https://perma.cc/96EA-N9BY].

142. *Id.* at 8.

143. *Id.* at 14.

144. *Id.* at 12.

145. Response to the Amicus's Letter Brief Dated January 15, 2020, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-02, at 9, 13, 16 (FISA Ct. Jan. 31, 2020), https://www.fisc.uscourts.gov/sites/default/files/

Judge James E. Boasberg split the difference. In his March 2020 order, he directed that all applications brought on behalf of the FBI must include an attestation by the FBI field agent that "all information that might reasonably call into question the accuracy of the information or reasonableness of any FBI assessment in the application, or otherwise raise doubts about the requested probable cause findings" had been disclosed to supervisors.[146]

Judge Boasberg also ordered that misconduct relating to the handling of FISA be reported to the court and that DOJ and FBI personnel under disciplinary review relating to FISA be barred from involvement in surveillance applications to the FISC.[147] But he did not require additional accuracy reviews, instead ordering the DOJ to report on its current practices regarding accuracy reviews and the results of such reviews.[148]

The FISC's refusal to require further accuracy reviews is surprising because the court relies heavily on the information presented by the FBI in support of surveillance applications. Not only are these applications reviewed in a secret, ex parte process with no opposition, they also are almost never tested in regular court proceedings.[149] In fact, systemic issues relating to the accuracy of DOJ submissions had already arisen in 2000, when the Department reported to the FISC that it had submitted over 75 surveillance applications containing significant errors.[150] The following year, the DOJ adopted procedures to prevent a recurrence of these mistakes. Named after their drafter, a senior FBI lawyer,

FISC%2019%2002%20Response%20to%20the%20Amicus%27s%20Letter%20Brief%20Dated%20January%2015%202020%20200203.pdf [https://perma.cc/KGE6-ZJBE]. While the government agreed to a narrow expansion of its audits to include additional reviews to assess the completeness of facts included in FISA applications, the government did not respond to the amicus's suggestion to increase the overall number of the DOJ's audits of applications. *Id.* at 13.

146. Corrected Opinion and Order, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-02, at 13, 19 (FISA Ct. Mar. 4, 2020), https://www.fisc.uscourts.gov/sites/default/files/Misc%2019%2002%20Corrected%20Opinion%20and%20Order%20JEB%20200305.pdf [https://perma.cc/MYK8-5T9G]. This Opinion and Order, issued on March 5, 2020, corrected an Opinion and Order that had been issued on March 4, 2020.

147. *Id.* at 18.

148. *Id.* at 16.

149. *See, e.g.*, GOITEIN & PATEL, WHAT WENT WRONG WITH THE FISA COURT, *supra* note 20, at 18.

150. *See In re* All Matters Submitted to Foreign Intelligence Surveillance Court, 218 F. Supp. 2d at 620–21; Senators Patrick Leahy, Charles Grassley and Arlen Specter, *FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures* 22 (February 2002), https://www.hsdl.org/?view&did=439999 [https://perma.cc/8CAF-66CZ].

the so-called "Woods Procedures" require that the basis of every factual assertion in a FISC surveillance applications is documented in a "Woods File."[151] The multiple deficiencies in the Carter Page surveillance application triggered a broader audit of surveillance applications by the DOJ's Inspector General. The review of a sample of 29 applications for U.S.-person targets found that Woods Files were missing for four and the others were rife with errors and inadequate support for facts.[152]

Judge Boasberg asked the DOJ to provide information about these applications and instructed them to assess whether the misstatements and omissions in them invalidated the surveillance orders that had been based on them.[153] According to the government, the FBI's review of 14 of the 29 applications audited by the Inspector General identified "[o]nly sixty-four errors," only one of which was material.[154] In its view, none of these errors invali-

151. Michael J. Woods, *Foreign Intelligence Surveillance Act Procedures to Ensure Accuracy, Electronic Communication from Office of the General Counsel to all Field Offices* (Apr. 5, 2001), https://fas.org/irp/agency/doj/fisa/woods.pdf [https://perma.cc/UQF9-YVHQ]. Michael J. Woods served as head of the FBI Office of General Counsel's National Security Law Unit. *See also* Response to the Court's Corrected Opinion and Order Dated March 5, 2020 and Update to the Government's January 10, 2020 Response, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-02, at 4–7 (FISA Ct. Apr. 3, 2020), https://www.justice.gov/nsd/page/file/1267686/download [https://perma.cc/DW3T-CY6N].

152. Management Advisory Memorandum from Michael E. Horowitz, Inspector Gen., to Christopher Wray, Director, FBI, regarding the Audit of the Federal Bureau of Investigation's Execution of its Woods Procedures for Application Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons (Mar. 30, 2020), https://oig.justice.gov/reports/2020/a20047.pdf [https://perma.cc/BFA3-67XB]. Four out of the sample of 29 FISA applications were missing Woods Files, and for three of those four, the Inspector General could not determine whether a Woods File ever existed. In all the remaining 25 applications, the Inspector General "identified apparent errors or inadequately supported facts," with an average of 20 issues per application reviewed, and a high of about 65 issues in one application. *Id.* at 7.

153. Order, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-02, at 2–4 (FISA Ct. Apr. 3, 2020), https://www.fisc.uscourts.gov/sites/default/files/Misc%2019%2002%20Order%20PJ%20JEB%20200403.pdf [https://perma.cc/PK5R-7FAU]. Judge Boasberg also ordered the government to report every two months on the progress of efforts to ensure proper maintenance of Woods Files and to describe how the government would use the results of accuracy reviews to identify patterns or trends so that the FBI can enhance training to improve compliance with the Woods Procedures and ensure accuracy of FISA applications. *Id.* at 4.

154. Declaration of Dana Boente, General Counsel, Federal Bureau of Investigation, In Support of the Government's Supplemental Response to the Court's Order Dated April 3, 2020, *In re* Accuracy Concerns Regarding FBI Matters Sub-

dated any authorizations granted by the FISC.[155] The DOJ also commenced its own accuracy review, which it reported to the court had covered thirty 2019 applications and found two with material errors and omissions but claimed that these did not undermine the surveillance applications.[156] As of this writing, it is not known what—if any—further action the FISC has or will take.

These repeated and significant compliance issues illustrate the need for stronger oversight of Title I surveillance, including involving amici in some cases. The systemic deficiencies in the handling of Title I surveillance, which affords greater protections to targets and is more closely overseen by the FISA Courts than broad surveillance programs affecting tens of millions of people under Section 702, suggests that there are likely even deeper problems with those programs than the serious ones that have already come to light.

3. The Amicus Pool

In evaluating the impact of the amicus provision, it is also worth noting that three out of the five attorneys in the current amici pool designated by the FISA Courts are former high-level government lawyers who dealt with national security issues, which may indicate a reluctance on the part of the judges to hear from civil liberties advocates. The pool includes Amy Jeffress, who served as Chief of the National Security Section in the US Attorney's Office for the District of Columbia and as Counselor to Attorney General

---

mitted to the FISC, No. Misc. 19-02, at 2, 25 (FISA Ct. June 15, 2020), https://www.justice.gov/nsd/page/file/1287351/download [https://perma.cc/DX9Z-SWKR].The government explained that the FBI's findings differed from the results of the Inspector General's audit because the latter was "focused solely on whether the [Woods files] for the twenty-nine FISA applications contained support for each of the factual assertions in those applications." *Id.* at 4. By contrast, the government claimed the FBI "was able to resolve many of the [Inspector General's] concerns or potential issues by identifying documentation that supported the factual assertion" located in additional sources, including investigative case files and other files and databases otherwise available to the FBI. Supplemental Response to the Court's Order Dated April 3, 2020, and Motion for Extension of Time, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-02, at 8 (FISA Ct. June 15, 2020), https://www.justice.gov/nsd/page/file/1287351/download [https://perma.cc/DX9Z-SWKR].

155. Supplemental Response to the Court's Order Dated April 3, 2020, and Motion for Extension of Time, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, *supra* note 154, at 9.

156. Response to the Court's Corrected Opinion and Order Dated March 5, 2020 and Update to the Government's January 10, 2020 Response, *supra* note 151, at 45.

Eric Holder on National Security and International Matters;[157] Jonathan G. Cedarbaum, the former Acting Assistant Attorney General in charge of the Department of Justice's Office of Legal Counsel, who handled the surveillance docket for the office;[158] and David S. Kris, the former Assistant Attorney General for the National Security Division of the Department of Justice.[159]

In addition, two of the three technical experts designated as amici by the courts in October 2018 have strong connections to the intelligence community.[160] One of these experts, Robert T. Lee, previously served as a government witness in *Wikimedia v. NSA*, a case challenging the constitutionality of the NSA's mass interception and searching of Americans' international Internet communications.[161] Another technical amicus, Ben Johnson, a former NSA computer scientist, was appointed to serve in two cases, one in 2018 and one in 2019, though no information is publicly available about either matter.[162]

The selection of Kris in particular became a flashpoint when he was appointed to assist the FISC in evaluating the procedures developed by the FBI in the wake of the DOJ Inspector General's uncovering of serious misrepresentations in the Carter Page surveillance applications and has generated intense criticism from the

157. *Former Justice Department Prosecutor and National Security Official Amy Jeffress Joins Arnold & Porter*, Arnold & Porter (Apr. 16, 2014), https://www.arnoldporter.com/en/perspectives/news/2014/04/former-justice-department-prosecutor-and-nationa [https://perma.cc/ZX4K-D8MS]; *Amy Jeffress*, Global Investigations Review, https://globalinvestigationsreview.com/author/profile/1016746/amy-jeffress [https://perma.cc/5M9W-G46M].

158. *Jonathan G. Cedarbaum*, WilmerHale, https://www.wilmerhale.com/en/people/jonathan-cedarbaum [https://perma.cc/5T7A-HLHL].

159. *David Kris*, National Security Institute, https://nationalsecurity.gmu.edu/david-kris/ [https://perma.cc/S3UP-VTLN]. The other two members of the pool are Marc Zwillinger and Laura Donohue. *See infra* text accompanying notes 195–207 and 293–320.

160. *Amici Curiae*, Foreign Intelligence Surveillance Court, https://www.fisc.uscourts.gov/amici-curiae [https://perma.cc/K64T-3CA5].

161. Declaration of Robert T. Lee, Wikimedia Found. v. NSA, 143 F. Supp. 3d 344 (D. Md. 2015) (No. 15-cv-00662-TSE).

162. *Ben Johnson*, LA Cyber Lab, https://www.lacyberlab.org/summit_speakers/ben-johnson/ [https://perma.cc/PY4M-NRC9]; Report of the Director of the Administrative Office of the U.S. Courts on Activities of the Foreign Intelligence Surveillance Courts for 2018, at 4 (Apr. 25, 2019) [hereinafter 2018 FISC Annual Report], https://www.uscourts.gov/sites/default/files/fisc_annual_report_2018_0.pdf [https://perma.cc/8NE8-NB85]; 2019 FISC Annual Report, *supra* note 58, at 4. The annual reports do not specify whether Johnson was appointed under the novel/significant amicus provision or the general provision.

President and his allies in Congress. President Trump tweeted, "You can't make this up! David Kris, a highly controversial former DOJ official, was just appointed by the FISA Court to oversee reforms to the FBI's surveillance procedures. Zero credibility. THE SWAMP!"[163] On January 16, 2020, Rep. Jim Jordan (R-OH), the ranking member of the House Committee on Oversight and Reform, and Rep. Mark Meadows (R-NC), the ranking member of the Subcommittee on Government Operations, wrote to FISC Presiding Judge Boasberg protesting the selection of Kris. They argued that he was "too personally invested on the side of the FBI to ensure it effectuates meaningful reform,"[164] pointing to his previous defense of the FBI's electronic surveillance practices, including with respect to the Page warrant at the center of the DOJ Inspector General's report, and that he had publicly expressed the view that the FBI's errors were not the result of political bias, a conclusion with which Jordan and Meadows emphatically disagreed.[165]

The sharp criticism of Kris was clearly part of the highly partisan conflict about FBI surveillance of the Trump campaign and the investigation of Russian interference in the 2016 election. But it does underscore the need for the FISC to tread carefully in choosing amici. Although one of the country's foremost experts on NSA surveillance, Kris served as a senior Department of Justice lawyer at the time when key NSA programs were approved, defended them in Congressional hearings, and presented the government's position in cases before both the FISC and the FISCR.[166] According to

163. Donald J. Trump, TWITTER (Jan. 12, 2020, 1:41 PM), https://twitter.com/realDonaldTrump/status/1216429943925723139?s=20 [https://perma.cc/M8DL-RQ5K].

164. Letter from Jim Jordan, Ranking Member, Comm. on Oversight and Reform, and Mark Meadows, Ranking Member, Subcomm. on Gov't Operations, to James E. Boasberg, Presiding Judge, U.S. Foreign Intelligence Surveillance Court 2 (Jan. 16, 2020), https://www.scribd.com/document/443200862/Republican-FISC-Letter [https://perma.cc/42X4-BPQ5].

165. *Id*. These criticisms were echoed in a Wall Street Journal editorial, which went so far as to call for the dissolution of the FISA Court. Editorial Board, Editorial, *Another FISA Fiasco*, WALL ST. J. (Jan. 13, 2020), https://www.wsj.com/articles/another-fisa-fiasco-11578958028 [https://perma.cc/B54B-D466].

166. *See In re* Sealed Case, 310 F.3d at 719; *In re* All Matters Submitted to Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 613 (FISA Ct. May 17, 2002), *abrogated by In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002). *The USA PATRIOT Act in Practice: Shedding Light on the FISA Process, Before S. Comm. on the Judiciary* (Sept. 10, 2002) (statement of Associate Deputy Att'y Gen. David S. Kris), https://fas.org/irp/congress/2002_hr/091002kris.html [https://perma.cc/26DN-KJWH]; *Implementation of the USA PATRIOT Act: Section 218—Foreign Intelligence Information ("The Wall"): Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the S. Comm. on the Judiciary*, 109th Cong. (Apr. 28, 2005) (written

his professional biography, Kris also "currently advises two elements of the U.S. Intelligence Community."[167]

We do not suggest that the individuals appointed by the courts, or former government lawyers more broadly, have not or would not serve well as amici. Nonetheless, their background suggests that they likely have the baseline assumption—not shared by many civil liberties advocates and now seemingly some members of Congress—that all or most of foreign surveillance under FISA complies with the Constitution. There may be practical reasons for appointing former government lawyers (e.g., security clearances[168] and their understanding of how the agencies work) as amici. But the FISA Courts should work to overcome them or risk creating the impression that they are reluctant to hear voices from outside the national security establishment.

Overall, as the discussion above demonstrates, even without knowing the full extent of the FISA Courts' docket, there is enough information in the public record to suggest that the courts, or at least certain judges, may be somewhat reluctant to involve amici, particularly those who challenge fundamental aspects of the legality of foreign intelligence surveillance.[169]

---

testimony of David S. Kris), https://web.archive.org/web/20050523231125/http://judiciary.house.gov/media/pdfs/kris042805.pdf [https://perma.cc/48P2-P5VJ]; *USA PATRIOT Act: Hearing Before the S. Select Comm. on Intelligence*, 109th Cong. (2005) (written testimony of David S. Kris), https://fas.org/irp/congress/2005_hr/052405kris.pdf [https://perma.cc/WB8R-QEA7].

167. *See, e.g.*, *David Kris,* NATIONAL SECURITY INSTITUTE, *supra* note 159; *Biographies of Committee Members*, *in* NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, DECRYPTING THE ENCRYPTION DEBATE: A FRAMEWORK FOR DECISION MAKERS 81 (The National Academies Press 2018).

168. Anyone designated to the amici pool must be "eligible for access to classified information necessary to participate in matters before the courts," which likely weights the pool towards government lawyers who have already been granted such clearances. USA FREEDOM Act of 2015, sec. 401, § 1803(i)(3)(B). In other contexts, however, the government has had to grant security clearances to private lawyers. Terrorism cases and Guantanamo are examples where attorneys have received security clearances. *See, e.g.*, Neil A. Lewis, *In Rising Numbers, Lawyers Head for Guantánamo Bay*, N.Y. TIMES, May 30, 2005, at A10; Noor Zafar, *My Visit With One of the Forgotten Prisoners of Guantánamo*, MOTHER JONES (July 14, 2017), https://www.motherjones.com/politics/2017/07/my-visit-with-one-of-the-forgotten-prisoners-of-guantanamo [https://perma.cc/93XA-D6AV]; THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW (Mark P. Denbeaux, Jonathan Hafetz, eds. NYU Press, 2009).

169. FISC CT. R. P. 11. Only one filing pursuant to Rule 11 is publicly available, which is part of the government's application to continue bulk acquisition of call detail records under Section 215 during the 180-day period before the USA Freedom Act took effect. *See* Memorandum of Law, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible

The FISA Courts' apparent reluctance to engage amici may change over time, as judges assess the usefulness of their submissions and arguments and adapt to the new system. Moreover, because judges only serve on the FISA Courts for seven years, the courts will soon be made up of judges who have only been on the courts since amicus participation has been mandated by law, and a new slate of judges may be more receptive to a broader range of viewpoints.[170]

B. Protecting Privacy and Individual Liberties

Since the USA Freedom Act became law in 2015, the FISA Courts have released 45 decisions[171] and ten people are known to have been appointed to serve as amicus curiae in a total of 13 cases.[172] Court decisions are publicly available for nine of the cases

Things, Nos. BR 15-75/Misc. 15-01, 2015 WL 5637562 (FISA Ct. June 2, 2015). Kenneth T. Cuccinelli was appointed amicus in the case. For more on this case, see *supra* text accompanying notes 180–186.

170. Many of the judges who were on the FISA Courts in June 2015 when the USA Freedom Act became law, including those who opposed involving amici in FISA proceedings, have or will soon rotate off the court. Three out of the 11 FISC judges who were serving in June 2015 are still currently on the court. After May 18, 2022, none of those 11 judges will still be serving on the FISC. By January 2021, none of the three FISCR judges who were on the court in 2015 will still be serving.

171. *See FISC/FISCR Opinions*, *supra* note 47.

172. The number of reported appointments (17) is somewhat higher than the number of cases (13) because four of the appointments were for continuations of the same matter (e.g., an appeal or remand). The 2015 annual report on the FISA Courts, mandated by the USA Freedom Act, indicates that three amici—Preston Burton, Kenneth T. Cuccinelli II, and Amy Jeffress—were appointed under the law's general amicus provision on four occasions in 2015. FOREIGN INTELLIGENCE SURVEILLANCE COURTS, REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ON ACTIVITIES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS FOR 2015, 4 (Apr. 2016) [hereinafter 2015 FISC ANNUAL REPORT], https://www.uscourts.gov/sites/default/files/fisc_annual_report_2015.pdf [https://perma.cc/9SPR-T3FN]. These first post-USA Freedom Act amici were appointed under the general amicus provision—even though the court recognized that the cases presented novel or significant interpretations—because the amicus pool, from which amici must be drawn for appointments under the novel/significant amicus provision, had yet to be designated. *See infra* notes 182 and 213; *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things, Nos. BR 15-75/Misc. 15-01, 2015 WL 5637562 (appointing Kenneth T. Cuccinelli as amicus); Order Appointing an Amicus Curiae, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 15-99, at 2–3 (FISA Ct. Sept. 17, 2015); Order Appointing an Amicus Curiae, [REDACTED] (FISA Ct. Aug. 13, 2015), https://www.dni.gov/files/documents/icotr/51117/Doc%204%20%E2%80%93%20Aug.%202015%20FISC%20Order%20Appointing%20an%20Amicus%20Curiae.pdf [https://perma.cc/R36B-R6R2]. The amicus

pool was constituted on November 25, 2015. *Amici Curiae*, FOREIGN INTELLIGENCE SURVEILLANCE COURT, *supra* note 160; *see also infra* text accompanying notes 180–191 and 213–235. In 2016, Marc Zwillinger, a member of the amicus pool, was appointed to serve as amicus curiae. REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ON ACTIVITIES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS FOR 2016, 4 (Apr. 20, 2017) [hereinafter 2016 FISC ANNUAL REPORT], https://www.uscourts.gov/sites/default/files/ao_foreign_int_surveillance_court_annual_report_2016_final.pdf [https://perma.cc/A35K-FJNV]. The provision under which Zwillinger was appointed is unspecified. However, seeing as the FISCR determined that the case presented a significant interpretation of law, Zwillinger was likely appointed under the novel/significant amicus provision. IC ON THE RECORD, *Release of FISC Question of Law & FISCR Opinion* (Aug. 22, 2016), https://icontherecord.tumblr.com/post/149331352323/release-of-fisc-question-of-law-fiscr-opinion [https://perma.cc/68Z6-M6EX]. In 2017, no individual was appointed to serve as amicus curiae by the FISA courts. REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ON ACTIVITIES OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS FOR 2017 (Apr. 25, 2018) [hereinafter 2017 FISC ANNUAL REPORT], https://www.uscourts.gov/sites/default/files/ao_foreign_int_surveillance_court_annual_report_2017.pdf [https://perma.cc/4HGE-PYG5]. In 2018, Laura Donohue, Amy Jeffress, Jonathan Cedarbaum, and John Cella were each appointed on two occasions, and Ben Johnson was appointed on one occasion. 2018 FISC ANNUAL REPORT, *supra* note 162, at 4. There is no publicly available information about Johnson's appointment. Jeffress, Cedarbaum, and Cella were each appointed to the FISC and FISCR in cases concerning the 2018 Section 702 certifications, but the provisions under which each amicus was appointed is not explicitly specified. However, seeing as the FISC identified "novel or significant interpretations of law," Jeffress and Cedarbaum were likely appointed under the novel/significant provision and Cella, who is not a member of the amicus pool, was appointed under the general amicus provision. *See* Order, [REDACTED], at 2 (FISA Ct. Apr. 5, 2018), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Order_05Apr18.pdf [https://perma.cc/J7E4-XYYA]. Laura Donohue was appointed to serve in the FISC and FISCR in cases concerning public access to FISA Court documents. Her appointment in the FISC was under the novel/significant amicus provision, and her appointment in the FISCR was unspecified. *See* Appointment of Amicus Curiae and Briefing Order, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. Misc. 13-08 (May 1, 2018), https://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Opinions%20and%20Orders.pdf [https://perma.cc/29YS-F23J]. In 2019, David Kris and Ben Johnson were each appointed as amici, though court documents related to those appointments are not publicly available. 2019 FISC ANNUAL REPORT, *supra* note 58, at 4. In January 2020, David Kris was appointed under the general amicus provision to assist the Court in assessing the government's submission on its plans to ensure accuracy in FBI applications. *See* Order Appointing an Amicus Curiae, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, *supra* note 139.

where amici were appointed.[173] A total of 11 amicus briefs (covering six of these cases) are publicly available.[174]

While this record is far from complete, it provides a basis for assessing—at least on a provisional basis—whether the hope of many reformers that adding an amicus to proceedings in the FISA Courts would lead to decisions where the courts did not so readily accede to the government's surveillance requests and became more protective of individual rights. The record thus far suggests that these types of changes are hard to come by. A large portion of the cases coming before the FISA Courts involve issues on which they have already ruled, sometimes on many occasions, and it seems difficult to convince judges that they were wrong the first time around. The judges treat foreign intelligence matters as fundamentally different from the cases typically considered by the federal courts and generally reject amici's arguments based on case law outside the FISA system. For the most part, the FISA Courts seem disinclined to give much weight to civil liberties risks until presented with actual evidence of abuse. Such information is generally in the hands of the government, however, and barring exceptional circumstances such as the Carter Page surveillance orders, the government must faithfully report those issues in order for them to come to light.

Amici themselves seem to have different conceptions of their roles, with some making maximal civil liberties arguments while others taking a more incremental approach. This may be attributable to a particular amici's background (as noted earlier, several have served in high-level government positions and may bring baseline assumptions about the legitimacy and legality of the government's foreign intelligence surveillance programs) but also could reflect a strategic calculation about the best way to improve the

173. *See supra* text accompanying notes 139–148 and *infra* text accompanying notes 180–320. The 2015 annual report disclosed that amici were appointed on four occasions that year, but only three of those cases are publicly available, which may mean that although the Court determined that the appointment of an amicus was appropriate, the Director of National Intelligence and the Attorney General decided not to make any part of the case publicly available. 2015 FISC ANNUAL REPORT, *supra* note 172, at 4. Similarly, in 2018, amici were appointed on nine occasions in a total of five FISC and FISCR cases, though court decisions are only publicly available thus far for four of those cases. 2018 FISC ANNUAL REPORT, *supra* note 162, at 4.

174. The publicly available amicus briefs were submitted to the FISC in 2015 by Amy Jeffress, Preston Burton, Kenneth T. Cuccinelli, to the FISCR and FISC in 2018 by Laura Donohue, and to the FISC in 2020 by David Kris. *See supra* text accompanying notes 139–148, and *infra* text accompanying notes 180–191, 213–235, and 293–320. In February 2018, the Reporters Committee for the Freedom of the Press submitted an amicus brief to the FISCR. *See infra* note 301.

FISA system. In some cases, amici may be limited in the arguments that they can make because the court circumscribed their mandate to particular issues. And it is sometimes difficult to get a full picture of the arguments made by amici because about half of their briefs are not publicly available and, for those cases, their views can only be gleaned when they are mentioned in declassified court decisions, which themselves are redacted.

Finally, in an interesting twist, in a handful of cases the government has withdrawn or modified surveillance applications when informed by the FISC that it was considering appointing an amicus. While not much is known about these cases, they illustrate one of the less obvious ways in which amici impact the FISA system.

1. Transition to the USA Freedom Act

In addition to promoting amicus participation, the USA Freedom Act substantially reformed Section 215 of the Patriot Act. To recap, that law, which was passed shortly after the 9/11 attacks and had been interpreted by the FISC to allow the government to accumulate a database of information about Americans' phone calls on the theory that because call records *could* reveal individuals linked to such an investigation, all Americans' phone records could be considered relevant.[175]

In May 2015, in the first case where the Section 215 bulk collection program was subjected to adversarial challenge, the Second Circuit Court of Appeals rejected this theory of relevance in a landmark decision, *ACLU v. Clapper*. The court explained that:

> something is "relevant" or not in relation to a particular subject . . . . § 215 does not permit an investigative demand for any

175. *See supra* text accompanying notes 21–23 and 67–70; Amended Memorandum Opinion, *In re* Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED], *supra* note 22, at 22; Memorandum Opinion, *In re* Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED], No. BR 14-96 (FISA Ct. June 19, 2014), http://www.fisc.uscourts.gov/sites/default/files/BR%2014-96%20Opinion-1.pdf [https://perma.cc/RJ5T-GZNF] (authorizing collection of bulk telephone metadata under Section 215). While the program had been approved by the FISA Courts since 2006, the court only publicly set out its rationale in 2013 after the Snowden disclosures. *See* ADMINISTRATION WHITE PAPER: BULK COLLECTION OF TELEPHONY METADATA UNDER SECTION 215 OF THE USA PATRIOT ACT 1 (2013), https://www.documentcloud.org/documents/750211-administration-white-paper-section-215.html [https://perma.cc/9826-RTRP]; Amended Memorandum Opinion, *In re* Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED], *supra* note 22, at 20–22; PCLOB SECTION 215 REPORT, *supra* note 42, at 55–56.

> information relevant to fighting the war on terror, or anything relevant to whatever the government might want to know. It permits demands for documents "relevant to an authorized investigation."[176]

As the Second Circuit read the Patriot Act, it did not permit bulk collection of the type that had been authorized by the FISA Courts.[177] This view was in line with the views of many in Congress, including Rep. James F. Sensenbrenner Jr. (R.-WI), one of the principal architects of the Patriot Act.[178]

Shortly after the Second Circuit's ruling, the USA Freedom Act became law and prohibited the government from collecting phone records in bulk without any suspicion. Instead, the government had to get an order from the FISC to access phone records and was only allowed to obtain records up to the second hop.[179]

In June 2015, the FISC considered the government's request to continue the bulk acquisition of call detail records under Section 215 of the Patriot Act during the 180-day period before the USA Freedom Act took effect and banned such collection.[180] The government's request was filed just days after the passage of the law and at a time when the pool of amici had not yet been selected. However, Kenneth T. Cuccinelli, II, former Attorney General of Virginia, had filed a motion to intervene in the case on behalf of Freedom Works, Inc., a libertarian group, or alternatively to be appointed as amicus curiae pursuant to the newly enacted provisions of the USA Freedom Act.[181] Judge Michael W. Mosman dis-

176. Am. Civil Liberties Union v. Clapper, 785 F.3d 787, 815 (2d Cir. 2015).

177. *Id.*

178. *Oversight of the Administration's Use of FISA Authorities: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Rep. James Sensenbrenner); James Sensenbrenner, *How Secrecy Erodes Democracy*, POLITICO (July 22, 2013), http://politi.co/1baupnm [https://perma.cc/A8B8-XNKX].

179. USA FREEDOM Act of 2015, sec. 501(c)(2), § 1861(c)(2)(F)). For a discussion of hops, see *supra* text accompanying notes 81–87.

180. *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things, Nos. BR 15-75/Misc. 15-01, 2015 WL 5637562.

181. Motion in Opposition to Government's Imminent or Recently-Made Request to Resume Bulk Data Collection Under Patriot Act §215, Misc. 15-01 (FISA Ct. June 5, 2015). Cuccinelli served as Attorney General of Virginia from 2010 to 2014. He was appointed to serve as Acting Director of the U.S. Citizenship and Immigration Services in June 2019 and to serve as Acting Deputy Secretary of the Department of Homeland Security in November 2019. *Kenneth T. (Ken) Cuccinelli, Senior Official Performing the Duties of the Director, U.S. Citizenship and Immigration Services*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Dec. 30, 2019, https://www.uscis.gov/about-us/leadership/kenneth-t-ken-cuccinelli-senior-official-per-

missed the motion to intervene, but granted Cuccinelli's request to appear as amicus under the general amicus provision.[182]

Based on the Second Circuit's decision in *ACLU v. Clapper*,[183] Cuccinelli argued in his brief that bulk collection was not authorized by Section 215 of the Patriot Act and that storing and searching that information violated the Fourth Amendment.[184] Judge Mosman rejected Cuccinelli's arguments and the Second Circuit's decision in *ACLU v. Clapper*, which he ruled was not binding on the FISC and was superseded by the intervening enactment of the USA Freedom Act. He reasoned that:

> Congress could have prohibited bulk data collection under Title V of FISA effective immediately upon enactment of the USA Freedom Act, as it did under Title IV. Instead, after lengthy public debate, and with crystal clear knowledge of the fact of ongoing bulk collection of call detail records . . . it chose to allow a 180-day transitional period.[185]
>
> He therefore approved the continued collection of bulk telephone metadata under Section 215 for 180 days.[186]

Preston Burton, a white collar defense attorney at the firm of Buckley Sandler, was appointed amicus in another case dealing

---

forming-duties-director-us-citizenship-and-immigration-services-director-vacant [https://perma.cc/KK4F-YZGE].

182. The Court determined that the government's application "presents a novel or significant interpretation of the law," triggering the appointment of an amicus under Section 401(i)(2)(A) of the USA Freedom Act. However, that provision requires that the appointed amicus be in the designated pool of at least five amici, which had not yet been selected. For that reason, the amicus was appointed under Section 401(i)(2)(B), which does not require that an amicus be part of the pool. *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things, Nos. BR 15-75/Misc. 15-01, 2015 WL 5637562, at *4.

183. Am. Civil Liberties Union v. Clapper, 785 F.3d 787 (2d Cir. 2015).

184. Motion in Opposition to Government's Imminent or Recently-Made Request to Resume Bulk Data Collection Under Patriot Act §215, Misc. 15-01, *supra* note 181, at 7, 40.

185. *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things, Nos. BR 15-75/Misc. 15-01, 2015 WL 5637562, at *4.

186. This is the longest known FISA Court order authorizing bulk metadata collection. The court orders authorizing the Section 215 program traditionally have a 90-day duration, after which the government would need to apply for renewal for another 90 days. *See* PCLOB SECTION 215 REPORT, *supra* note 42, at 23–24, 114 n.441.

with the transition, also under the general amicus provision.[187] On August 27, 2015, the government filed a request with the FISC to allow it to retain and use metadata that it had previously collected under Section 215 for three months after the 180-day transition. According to the government, the extension was needed for two purposes, which it described as "non-analytic", to "verify the completeness and accuracy of call detail records" obtained under the new collection process mandated by the USA Freedom Act, and to comply with preservation orders in litigation challenging the program.[188] In his amicus brief, Burton took the position that the provisions and legislative history of the USA Freedom Act could not be read to require destruction of the database immediately at the end of the 180-day transition period. Nonetheless, he argued, the FISC had the authority to ask questions about how the data was being stored, its security, who had access to it, and what exactly was involved in the government's plan to make "non-analytic" use of the data.[189] On the government's argument that ongoing litigation required preservation of the database, Burton highlighted the government's intransigence in the lawsuits challenging the program, asking the court to consider why the government had not been able to reach a stipulation with the plaintiffs on preservation and "whether it is appropriate for the government to retain billions of irrelevant call detail records involving millions of people based on . . . the government's stubborn procedural challenges."[190] The FISC opinion did not engage with Burton's arguments and simply authorized the retention of previously collected metadata for both liti-

187. Order Appointing an Amicus Curiae, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 15-99, *supra* note 172.

188. Response of the United States to the Memorandum of Law by Amicus Curiae at 1, 12, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 15-99 (FISA Ct. Nov. 6, 2015), https://www.fisc.uscourts.gov/sites/default/files/BR%2015-99%20Response%20of%20the%20United%20States%20to%20the%20Memorandum%20of%20Law%20by%20Amicus%20Curiae.pdf [https://perma.cc/N2G4-DY6E].

189. Memorandum of Law by Amicus Curiae Regarding Government's August 27, 2015 Application to Retain and Use Certain Telephony Metadata after November 28, 2015 at 28, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 15-99 (FISA Ct. Oct. 29, 2015), https://www.fisc.uscourts.gov/sites/default/files/BR%2015-99%20Memorandum%20of%20Law%20by%20Amicus%20Curiae_0.pdf [https://perma.cc/Z7ZJ-WBVX].

190. *Id.* at 27.

gation and technical purposes for three months past the transition period.[191]

It seems that these early post-USA Freedom Act amici had barely any impact on the FISC's decisions, a trend that continued in a later case concerning the NSA's use of its pen register authority discussed next.

2. Pen Register Authority

In April 2016, the FISCR accepted a certified question from the FISC regarding the government's use of a pen register, a device that records the digits entered when initiating a phone call. Pen registers had long been permitted without a warrant based on the U.S. Supreme Court's decisions in pair of 1970s cases, *U.S. v. Miller* and *Smith v. Maryland*, which established the "third-party doctrine"— i.e., that individuals do not have a reasonable expectation of privacy in information voluntarily provided to a third party, such as the digits dialed in a phone call, so this information falls outside the Fourth Amendment's warrant requirement.[192] This type of information (often called "metadata") has become increasingly important because government agencies can accumulate records in quantities unimaginable in the 1970s and analyze them in ways that are enormously revealing of individuals' private lives.[193] It has also become more difficult to distinguish clearly between metadata (which generally does not require a warrant) and content (which generally does require a warrant).[194]

---

191. *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things [REDACTED], No. BR 15-99, at 8–9 (FISA Ct. Nov. 24, 2015), https://www.fisc.uscourts.gov/sites/default/files/BR%2015-99%20Opinion%20and%20Order.pdf [https://perma.cc/VG27-88RM].

192. United States v. Miller, 425 U.S. 435, 443 (1976); Smith v. Maryland, 442 U.S. 735 (1979).

193. The third-party doctrine has come under increasing pressure in recent years as courts grapple with the implications of surveillance technologies that use seemingly public information in ways that intrude on privacy. As Justice Sonia Sotomayor noted in her concurring opinion in *United States v. Jones,* which examined the scope of the government's authority to engage in long-term warrantless GPS tracking, the accumulation of such a "precise, comprehensive record of a person's public movements" exposes "a wealth of detail about [that person's] familial, political, professional, religious, and sexual associations," such that it violates a reasonable expectation of privacy and should therefore be considered a search. United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring).

194. *Id.*; Riley v. California, 134 S.Ct. 2473, 2488 (2014) (observing that the government's argument that "a search of all data is 'materially indistinguishable'

In this case, the FISCR appointed an amicus from the newly designated amicus pool, Marc Zwillinger—a privacy and data security lawyer who is the only private attorney known to have appeared before the FISCR prior to the USA Freedom Act.[195] At issue was whether Title IV of FISA, which authorized the use of pen registers to collect metadata, extended to "post-cut-through digits"—i.e., the digits entered after a call is established, such as passcodes, extensions, bank account information, or credit card numbers.[196] The collection of post-cut-through digits had been authorized by the FISC since 2006 on the basis that there were no technical means by which the government could isolate only dialing information, although the court generally prohibited the government from making affirmative investigative use of post-cut-through digits other than dialing information.[197]

The FISCR decided to revisit the issue because in the "parallel setting of criminal investigations," federal courts had uniformly held that post-cut-through digits could not be regarded as metadata, and therefore did not fall within the scope of the third-party doctrine.[198]

---

from searches of" physical containers such as wallets is "like saying that a ride on horseback is materially indistinguishable from a flight to the moon"). *See also* Steven M. Bellovin et al., *It's Too Complicated: How The Internet Upends Katz, Smith, and Electronic Surveillance Law*, 30 HARV. J.L. & TECH. 1, 52–91 (2016); Chris Conley, *Non-Content is Not Non-Sensitive: Moving Beyond the Content/Non-Content Distinction*, 54 SANTA CLARA L. REV. 821 (2015); Joseph D. Mornin, *NSA Metadata Collection and the Fourth Amendment*, 29 BERKELEY TECH. L.J. 985, 999–1006 (2014).

195. Zwillinger previously appeared before the FISCR when he represented Yahoo in 2008 in its challenge to directives under the Protect America Act, the precursor to the FISA Amendments Act. *Marc Zwillinger*, ZWILLGEN PLLC, https://www.zwillgen.com/crb_team/marc-zwillinger/ [https://perma.cc/TAP7-AXVQ]; Cyrus Farivar, *America's Super-secret Court Names Five Lawyers as Public Advocates*, ARS TECHNICA (Nov. 28, 2015), https://arstechnica.com/tech-policy/2015/11/americas-super-secret-court-names-five-lawyers-as-public-advocates/ [https://perma.cc/25Y3-3TQU].

196. *In re* Certified Question of Law, No. 16-01, 858 F.3d 591 (FISA Ct. Rev. Apr. 14, 2016); Certification of Question of Law to the Foreign Intelligence Surveillance Court, In [REDACTED] A U.S. Person, No. PR/TT 2016 [REDACTED] (FISA Ct. Feb. 12, 2016).

197. *In re* Certified Question of Law, No. 16-01, 858 F.3d at 594. Since at least 2006, FISC judges have issued pen register/trap and-trace orders under 50 U.S.C. § 1842 that have authorized the acquisition of all post-cut-through digits, permitting the use of digits that constitute dialing information and generally prohibiting the use of those digits that do not constitute dialing information. *See* Order, [REDACTED], (FISA Ct. 2006), https://www.documentcloud.org/documents/4060813-EFF-FOIA-Sep-25-Doc-10.html [https://perma.cc/PV6L-YTLG].

198. *In re* Certified Question of Law, No. 16-01, 858 F.3d at 595. *See also* Smith v. Maryland, 442 U.S. 735, 745–46 (1979). The FISC certified this question to the

While Zwillinger's brief is not available, the FISCR's opinion indicates that he argued that *all* post-cut-through digits—dialing information as well as passcodes and account numbers dialed—constituted "content information" requiring a probable cause warrant.[199] The definition of pen registers in FISA ends with a clause which reads: "provided, however, that such information shall not include the contents of any communication."[200] Zwillinger argued that this definition "plainly forecloses the conclusion that a pen register may lawfully intercept content under any circumstances."[201]

The FISCR rejected this argument, finding that secondary dialing information did not constitute "content information," and that the collection of other post-cut-through digits was incidental to the collection of dialing information, which was both contemplated by the statute and reasonable under the Fourth Amendment.[202] It countered Zwillinger's statutory argument by relying on the pen register provision in Title 18 of the U.S. Code governing the use of such devices in criminal investigations which, although not directly applicable to FISA, suggested that Congress anticipated that these devices would inevitably pick up some content information and therefore only required the NSA to use "reasonably available technology" to minimize the collection of content.[203] The court buttressed this argument by citing to the legislative history of the FISA pen register provision, which it found showed that Congress was aware that "the government's ability to avoid the collection of content information was subject to the limitations of 'reasonably availa-

FISCR because it found that further consideration of "the weight of contrary authority" from federal courts on the issue of post-cut-through digits would "serve the interests of justice" and present a "significant interpretation of the law." Certification of Question of Law to the Foreign Intelligence Surveillance Court, In [REDACTED] A U.S. Person, *supra* note 196, at 12-13. The FISC did not attempt to resolve the question itself, however. The government submitted its request of pen register authorization on January 21, 2016, just one day before the prior authorization was set to expire. *Id.* Given the short time frame, the FISC approved the government's request to continue to acquire post-cut-through digits, and found the appointment of an amicus under Section 401(i)(2)(a) of the USA Freedom Act inappropriate as there would have been insufficient time for the "formulation and presentation of an amicus's views, and consideration of those views by the Court." *Id.*

199. *In re Certified Question of Law*, No. 16-01, 858 F.3d at 597 n.6.

200. 18 U.S.C. § 3127(3).

201. *In re Certified Question of Law*, No. 16-01, 858 F.3d at 599.

202. *Id.* at 593, 604–605.

203. *Id.* at 599–600. *See also* 18 U.S.C. § 3121 (2018).

ble technology.'"[204] Turning to potential Fourth Amendment constraints, the FISCR noted that it had previously held that there is a special needs exception to the warrant requirement for foreign intelligence investigations, which "virtually controls this case."[205] Since a warrant was not required, the court conducted a reasonableness inquiry, which concluded that the government's heavy national security interest clearly outweighed the small privacy intrusion at issue, especially in light of the court's supervision of the surveillance and its prohibition on the use of content information for investigative purposes.[206]

In sum, Zwillinger's direct challenge to the court's interpretation of post-cut-through digits was unsuccessful in moving the court away from its past precedent on the singular nature and objectives of foreign intelligence investigations, which, according to the court, "would be seriously hampered by the requirement of a warrant."[207] As discussed in the next section, when Amy Jeffress was appointed to serve as amicus for the reauthorization of Section 702, she took a different, mostly incremental approach. Over the course of several years, and with the revelation of obvious abuse of authorities by the FBI in accessing Section 702 data, she was successful in convincing the FISC to require changes to the FBI's rules that the FISA Courts have described as "modest."[208]

3. Section 702 Collection and FBI Searches of Section 702 Information

Section 702 of the FISA Amendments Act authorizes the government to collect private electronic communications (e.g., emails and phone calls) without a warrant. By 2011, the NSA's Section 702 programs acquired more than 250 million Internet communications each year; the total number is almost certainly higher if you add in telephone communications and has undoubtedly grown substantially in the intervening years.[209] Even at the 2011 rate, the agency's authority to retain Section 702 data for at least five years means that government databases contain at least 1.25 billion communications obtained from Section 702 programs at any one

204. *In re Certified Question of Law*, No. 16-01, 858 F.3d at 599, 602–604, 610.
205. *Id.* at 607. *See also In re* Directives, 551 F.3d at 1011–12.
206. *In re Certified Question of Law*, No. 16-01, 858 F.3d at 598.
207. *Id.* at 606 (quoting *In re* Directives, 551 F.3d at 1011).
208. *See infra* note 255.
209. October 2011 Opinion, *supra* note 111, at 29; PCLOB 702 Report, *supra* note 99, at 116 ("By 2011 . . . the government was annually acquiring over 250 million Internet communications, in addition to telephone conversations. The current number is significantly higher.").

time.[210] The FISC's yearly reauthorizations of the Section 702 program provide a window into the dynamics between the courts, the government, and amici, and the struggle to impose even minimal restrictions on this sprawling surveillance program.

Since 2015, Amy Jeffress, who worked as a federal prosecutor for 20 years, including as Chief of the National Security Section in the D.C. U.S. Attorney's Office and as Counselor to Attorney General Eric Holder on National Security and International Matters,[211] has been appointed amici in three major publicly available decisions of the FISA Courts about the scope and parameters of Section 702 surveillance. In her first appearance before the FISC in 2015, Jeffress stated that she did not intend to serve "as a privacy and civil liberties advocate, broadly speaking," but rather understood her role as an "advisor" to the court "to evaluate the program and to determine whether there were any aspects of the certifications and the procedures submitted to the Court that did not comply with the statutory and constitutional requirements . . . with respect to the two specific issues that the Court noted in the order."[212] Indeed, as discussed below, it appears that Jeffress has not made the most expansive civil liberties arguments but has instead adopted a more incremental approach which has—over time—met with some success.

a. 2015 Decision

In August 2015, the FISC appointed Jeffress as amicus for the government's annual request for authorization of its certifications and procedures for the Section 702 surveillance program for the upcoming year.[213] Members of Congress and civil liberties advo-

210. *Section 702 of the FISA Amendments Act: Hearing Before the H. Comm. on the Judiciary*, *supra* note 105 at 4–5 (statement of Elizabeth Goitein).

211. *See* ARNOLD & PORTER, *supra* note 157.

212. Transcript of Proceedings Held Before the Honorable Thomas F. Hogan at 5, [REDACTED] (FISA Ct. Oct. 20, 2015) [hereinafter Transcript of Proceedings before Judge Hogan], https://www.dni.gov/files/documents/icotr/51117/Doc%2010%20%E2%80%93%20Oct.%202015%20FISC%20Hearing%20Transcript.pdf [https://perma.cc/W92N-QYWQ].

213. The FISC determined "that this matter is likely to present one or more novel or significant interpretations of the law, which would require the Court to consider appointment of an amicus curiae." Memorandum Opinion and Order regarding the 2015 FISA Section 702 Certifications [REDACTED] at 5 (FISA Ct. Nov. 6, 2015), https://www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf [https://perma.cc/R6WL-VJF6]. Since the amicus pool had not yet been designated, Jeffress was appointed under Section 401(i)(2)(B) of the USA Freedom Act. Order Appointing an Amicus Curiae, [REDACTED], *supra* note 172. *See also* Brief for Amicus Curiae at 1–2,

cates have long raised serious concerns about the FBI procedures that were part of the authorization request, which allowed the Bureau to search for information about Americans in the large pool of information collected without a warrant under Section 702, arguing that these searches were a "backdoor" for avoiding the requirements of the Fourth Amendment.[214] Indeed, many members of Congress introduced—and garnered considerable support, although not passage—for bills to either end backdoor searches by cutting funding or to require a warrant for these searches.[215]

In her brief and in oral argument, Jeffress fully set out the concerns raised by backdoor searches and the FBI's "virtually unrestricted" querying of Section 702 information, which "strays well beyond the foreign intelligence purpose of the Section 702 program."[216] But her proposal for fixing the deficiency fell short of the stronger protections of a warrant requirement suggested by civil liberties advocates and scholars.[217] Instead, she recommended that

[REDACTED] (FISA Ct. Oct. 15, 2015) [hereinafter Jeffress Amicus Brief], https://www.dni.gov/files/documents/icotr/51117/Doc%208%20%E2%80%93%20Oct.%202015%20Brief%20of%20Amicus%20Curiae.pdf [https://perma.cc/F3FJ-HBF5].

214. *See supra* note 117.

215. In both 2014 and 2015, a majority of the House approved amendments to the Defense Appropriations bill to cut funding for backdoor searches by the NSA, CIA, and FBI, which were stripped out in the omnibus spending bills at the end of the year. Dep't Def. Appropriations Act, H. Amend. 935 to H.R. 4870, 113th Cong., 160 CONG. REC. H5514 (June 19, 2014); Dep't Def. Appropriations Act, H. Amend. 503 to H.R. 2685, 114th Cong., 161 CONG. REC. H4130 (June 10, 2015); Steven Nelson, *NSA Reform That Passed House Reportedly Cut From 'CRomnibus,'* US NEWS (Dec. 4, 2014), https://www.usnews.com/news/articles/2014/12/04/nsa-reform-that-passed-house-reportedly-chopped-in-leaders-cromnibus-deal [https://perma.cc/6S2D-482L]; Cory Bennett, *House Defeats Privacy Measure in Wake of Orlando Shootings*, POLITICO (June 16, 2016, 1:05PM), https://www.politico.com/story/2016/06/house-encryption-amendment-blocked-224444 [https://perma.cc/5DQ3-725Q]. Rep. Zoe Lofgren and Rep. Thomas Massie co-sponsored a similar amendment in 2016, which also failed to pass. *Id.* And in October 2017, a bipartisan group of House Judiciary Committee members introduced the USA Liberty Act, which would have required the FBI to obtain a warrant in order to access the content of any queried Section 702 data. USA Liberty Act of 2017, H.R. 3989, 115th Cong. (2017). The bill was reported out of the House Judiciary Committee, but did not receive a vote in the House. David Ruiz, *House Judiciary Committee Forced Into Difficult Compromise On Surveillance Reform*, ELECTRONIC FRONTIER FOUNDATION (Nov. 9, 2017), https://www.eff.org/deeplinks/2017/11/house-judiciary-committee-forced-difficult-compromise-surveillance-reform [https://perma.cc/HK4Y-FMH6].

216. Jeffress Amicus Brief, *supra* note 213, at 19.

217. *See e.g.*, Orin Kerr, *The Fourth Amendment and Querying the 702 Database for Evidence of Crimes*, WASHINGTON POST (Oct. 20, 2017), https://

the Bureau be required to adopt procedures similar to those in place at the NSA and CIA, which require a written statement explaining why a search using a U.S. person identifier was likely to return foreign intelligence information.[218]

In support of her proposal, Jeffress argued that this requirement was necessary because while the collection of information under Section 702 satisfies the Fourth Amendment's reasonableness requirement, the FBI's subsequent queries of Section 702 data must be "treated as a separate action subject to the Fourth Amendment reasonableness test."[219] The principle articulated by Jeffress is potentially far-reaching. Civil liberties advocates and some legal scholars have supported the approach of separating the initial collection from the querying of Section 702 information, arguing that the latter is a separate Fourth Amendment event far removed from the foreign intelligence purpose of the collection and thus requires a warrant.[220] Two members of the Privacy and Civil Liberties Over-

---

www.washingtonpost.com/news/volokh-conspiracy/wp/2017/10/20/the-fourth-amendment-and-querying-the-702-database-for-evidence-of-crimes/ [https://perma.cc/HJ87-5CUS]; Elizabeth Goitein, *Americans' Privacy at Stake as Second Circuit Hears Hasbajrami FISA Case*, JUST SEC. (Aug. 24, 2018), https://www.justsecurity.org/60439/americans-privacy-stake-circuit-hears-hasbajrami-fisa-case/ [https://perma.cc/3KR5-TTU3].

218. Transcript of Proceedings before Judge Hogan, *supra* note 212, at 8; Jeffress Amicus Brief, *supra* note 213, at 11–13. *See* Loretta Lynch, Exhibit B: Minimization Procedures Used by the National Security Agency in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended, § 3(b)(5), [REDACTED], No. [REDACTED] (FISA Ct. July 15, 2015) ("Any use of United States person identifiers as terms to identify and select communications must first be approved in accordance with NSA procedures, which must require a statement of facts establishing that the use of any such identifier as a selection term is reasonably likely to return foreign intelligence information, as defined in FISA."); Loretta Lynch, Exhibit E: Minimization Procedures Used by the Central Intelligence Agency in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended, § 4, [REDACTED], No. [REDACTED] (FISA Ct. July 15, 2015) ("Any United States person identity used to query the content of communications must be accompanied by a statement of facts showing that the use of any such identity as a query term is reasonably likely to return foreign intelligence information, as defined in FISA.").

219. Transcript of Proceedings before Judge Hogan, *supra* note 212, at 6. *See also* Jeffress Amicus Brief, *supra* note 213, at 24–5.

220. Prominent Fourth Amendment scholar Orin Kerr has explained: "[T]he mere copying of data without human observation is a seizure but not a search . . . . If the data has been copied but not searched, querying it is a search . . . the query through the raw 702 database requires its own Fourth Amendment justification." Kerr, *supra* note 217. *See also* Berman, *supra* note 98, at 623–626 n.218 (discussing

sight Board have also taken this position.[221] Jeffress did not, however, argue for a warrant but rather that documentation was necessary to meet the Fourth Amendment's reasonableness requirement for querying.

The FISC was unwilling to accept even the more limited version of the argument articulated by Jeffress and instead continued to rely on the approach adopted in a 2008 FISCR decision that "the proper analytical approach to Fourth Amendment reasonableness involves 'balanc[ing] the interests at stake' under the 'totality of the circumstances' presented."[222] The court also did not adopt amici's recommendation that FBI personnel be required to record their foreign intelligence rationale for searches of Section 702 information on the grounds that FISA does not require searches of Section 702 information to have any foreign intelligence-related purpose.[223] The court noted that the statutory requirements for mini-

how "seizing or copying digital storage devices and then searching its contents later is routine," and merely imposing post-collection use rules for investigators to follow when searching through that content is insufficient. Instead, "we must recognize those uses themselves as searches entitled to their own independent Fourth Amendment analysis, regardless of how the underlying information was collected."); Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 HARV. J.L. & PUB. POL'Y 117, 240–41 (2015) (discussing "a distinction between [the] search of such information [in Section 702 databases] and the seizure of the data in the first place," and concluding that "it is difficult to deny that the query of a database comprised of non-publicly available information (obtained without the targets' consent), to try to find evidence of criminal activity, constitutes a search in the most basic sense of the term. Even though the government might have legally obtained the information at the front end, it could not search the information for evidence of criminal activity absent a warrant, supported by probable cause.").

221. David Medine and Patricia M. Wald, *Reform Surveillance, Don't End It*, WALL ST. J. (Oct. 29, 2017), https://www.wsj.com/articles/reform-surveillance-dont-end-it-1509301958 [https://perma.cc/6AVQ-WAQH].

222. Memorandum Opinion and Order Regarding the 2015 FISA Section 702 Certifications, *supra* note 213, at 41 (quoting *In re* Directives 551 F.3d at 20). The court defined such a "totality of circumstances" analysis as "requir[ing] the Court to weigh the degree to which the government's implementation of the applicable targeting and minimization procedures, viewed as whole, serves its important national security interests against the degree of intrusion on Fourth Amendment-protected interests." *Id.* at 41.

223. Memorandum Opinion and Order Regarding the 2015 FISA Section 702 Certifications, *supra* note 213, at 31-33; 50 U.S.C. § 1801(h)(1)-(3). The statutory requirement for minimization procedures in Title I of FISA was applied to Section 702 upon the passage of the 2008 FISA Amendments Act. *See* 50 U.S.C. § 1881a(e)(1) ("The Attorney General, in consultation with the Director of National Intelligence, shall adopt minimization procedures that meet the definition of minimization procedures under section 1801(h)").

mization procedures expressly "allow for the retention and dissemination of information that is evidence of a crime,"[224] and that it would be a "strained reading" of the statute to allow such retention and dissemination but prohibit querying that information to identify evidence of crimes.[225] The court added that FBI queries that are designed to find evidence of crimes unrelated to foreign intelligence "rarely, if ever" elicit Section 702-acquired foreign intelligence information.[226] For these rare instances, however, the court found that "the foreign intelligence value of the information obtained could be substantial."[227] Thus, in evaluating the overall reasonableness of the program, the court weighed the government's "highest order of magnitude"[228] national security interests against individual privacy interests, which the court found were adequately protected by the FBI's procedures limiting the use and retention of Americans' incidentally collected information.[229] The FISC approved the procedures as presented.[230]

As commentators have pointed out, the ruling rested on the possibility that supposedly rare non-foreign intelligence related queries by the FBI would turn up such critical foreign intelligence information that the government had an overriding national security interest in having the option to access the information.[231] But the result was perhaps unsurprising given that the FISC had approved these FBI querying practices since at least 2009.[232] Jeffress

224. 50 U.S.C. § l801(h)(1)-(3).

225. Memorandum Opinion and Order Regarding the 2015 FISA Section 702 Certifications, *supra* note 213, at 32-33.

226. *Id*. at 44.

227. *Id*. at 42. The FISC cited the government's failure to identify and appropriately distribute information that could have been used to disrupt the 9/11 attacks as proof of the FBI's need to be able to search Section 702 data for even non-foreign intelligence-related crimes. *Id.*

228. *Id*. at 37 (quoting *In re* Directives, 551 F.3d at 1012).

229. Memorandum Opinion and Order regarding the 2015 FISA Section 702 Certifications, *supra* note 213, at 41-44.

230. *Id*. at 38–39, 44.

231. *Id*. at 42; Transcript of Proceedings before Judge Hogan, *supra* note 212, at 25-26; *see also* Elizabeth Goitein, *The FBI's Warrantless Surveillance Back Door Just Opened a Little Wider*, JUST SEC. (Apr. 21, 2016), https://www.justsecurity.org/30699/fbis-warrantless-surveillance-door-opened-wider/ [https://perma.cc/SK4W-GG6Z]; Charlie Savage, *Judge Rejects Challenge to Searches of Emails Gathered Without a Warrant*, N.Y. TIMES, (Apr. 19, 2016), https://nyti.ms/20VEBGm [https://perma.cc/576W-DEG2].

232. Memorandum Opinion and Order Regarding the 2015 FISA Section 702 Certifications, *supra* note 213, at 26–27, 27 n.24, 27–28 n.25 (queries of Section 702-acquired data reasonably designed to find and extract foreign intelligence information and evidence of a crime "have been explicitly permitted by the FBI Min-

had argued that these earlier decisions did not control the application because of new information available to the FISC and intervening legal developments, but was not able to convince the court to take a different view.[233]

The FISC did, however, require the Bureau to report to the court each instance in which FBI personnel receive and review Section 702 acquired information concerning a U.S. person in response to a query that is not designed to find and extract foreign intelligence information.[234] This requirement turned out to be critical when the court considered amici's arguments in the government's 2018 application for Section 702, as discussed below.[235]

b. 2018 Decision

Jeffress was appointed to serve as amicus in 2018 in another annual Section 702 application,[236] alongside John Cella, an associate at her law firm and a former judge advocate in the United States Navy Judge Advocate General's Corps[237] and Jonathan Cedarbaum,

imization Procedures since 2009 . . . regardless of whether the querying term includes information concerning a United States person"). The FBI's "Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted Under the Foreign Intelligence Surveillance Act," which allowed for backdoor searches, were approved by the Attorney General on October 22, 2008 and by the FISC on April 7, 2009. U.S. DEP'T OF JUSTICE, STANDARD MINIMIZATION PROCEDURES FOR FBI ELECTRONIC SURVEILLANCE AND PHYSICAL SEARCH CONDUCTED UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (Oct. 22, 2008); Memorandum Opinion and Order, [REDACTED] (FISA Ct. Apr. 7, 2009), https://www.dni.gov/files/documents/icotr/702/Bates%20549-579.pdf [https://perma.cc/EV64-5K3C]; *See FBI's Back Door Searches: Explicit Permission . . . And Before That*, EMPTY WHEEL (Apr. 20, 2016), https://www.emptywheel.net/2016/04/20/fbis-back-door-searches-explicit-permission-and-before-that/ [https://perma.cc/46XP-32CR]. The FISC approved NSA and CIA authority to conduct backdoor searches in October 2011. October 2011 Opinion, *supra* note 111, at 22–23, 25. *See supra* text accompanying notes 116–119. An earlier decision by the FISCR, holding that FISA surveillance need not be limited exclusively to foreign intelligence purposes, opened the door to its use for law enforcement purposes. *In re* Sealed Case No. 02-001, 310 F.3d. 717, 731 (FISA Ct. Rev. 2002) (per curiam).

233. Jeffress Amicus Brief, *supra* note 213, at 22–23.

234. The FISC noted that it was not prepared to find a constitutional deficiency based on a hypothetical problem but was imposing the requirement "to reassure itself that [the government's] risk assessment is valid." Memorandum Opinion and Order regarding the 2015 FISA Section 702 Certifications, *supra* note 213, at 44.

235. *See infra* text accompanying notes 239–254.

236. Memorandum Opinion and Order regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 4.

237. *John Cella*, ARNOLD & PORTER (Apr. 16, 2014), https://www.arnoldporter.com/en/people/c/cella-john [https://perma.cc/N5NE-LB4S].

the former Acting Assistant Attorney General in charge of the Department of Justice's Office of Legal Counsel.[238] The case addressed several important issues and shows both the potential positive impact of amici and the limits to their influence.

i. Backdoor Searches

In the 2018 case, the FISC—presented with incontrovertible evidence that the FBI was in fact abusing its authority to search Section 702 data—finally acted to constrain the Bureau.

The decision revealed that the FBI runs millions of queries using identifiers associated with Americans against databases which contain Section 702 data along with other information.[239] It also showed that the Bureau had systemically failed to comply with the requirement that its searches of Section 702 data must be reasonably likely to return foreign intelligence information or evidence of a crime, fundamental conditions for allowing these searches in the first place. Between 2017 and 2018, the FBI conducted at least 78,475 queries using identifiers that did not meet this requirement.[240] These included a March 2017 search, undertaken against

---

As Cella is not part of the amicus pool, he was appointed under the less restrictive portion of the USA Freedom Act amicus provision, Section 401(i)(2)(B).

238. *Elected Member: Jonathan G. Cedarbaum*, AMERICAN LAW INSTITUTE, https://www.ali.org/members/member/212657/ [https://perma.cc/73V4-A9Q8] (last visited Feb. 20, 2020).

239. In 2017, the FBI undertook over 3 million queries on a single system. While these covered both U.S. persons and non-U.S. persons, "given the FBI's domestic focus it seems likely that a significant percentage . . . involve U.S.-person query terms." Memorandum Opinion and Order regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 65–66.

240. *See id*. at 68–69. This disclosure of so many non-compliant queries was in part surprising because the government had, in other contexts, indicated that the FBI rarely reviewed Section 702-acquired information concerning a U.S. person in response to non-foreign intelligence related queries. According to the Office of the Director of National Intelligence's (ODNI) annual Statistical Transparency Report, between 2016 and 2019, the FBI reviewed non-foreign intelligence information on eight occasions. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, STATISTICAL TRANSPARENCY REPORT REGARDING THE USE OF NATIONAL SECURITY AUTHORITIES CALENDAR YEAR 2019, 17 (Apr. 30, 2020). Six of those eight instances occurred in December 2018 and were not disclosed until April 2020, after a DOJ audit in 2019. *Id*. Whereas the reporting requirement stemming from the FISC's 2015 decision approving Section 702 certifications required the reporting of all instances in which FBI personnel reviewed Section 702-acquired information concerning a U.S. person in response to a query that was not designed to find and extract foreign intelligence information, it appears that the ODNI has been using a narrow interpretation to determine which compliance incidents to report to the public, only disclosing the number of instances in which FBI personnel received and reviewed "Section 702-acquired information that the FBI identified as concerning a U.S.

the advice of the Bureau's general counsel, using 70,000 identifiers "associated with" people who had access to FBI facilities and systems, and numerous instances of queries aimed at gathering information about potential informants.[241] Moreover, as the FISC pointed out, these instances did not reflect the full extent of the problem because the Justice Department's audits are so limited that improper queries could easily escape notice.[242]

As reported by the FISC, amici again argued that the FBI's queries of raw Section 702 data should be treated as "a separate Fourth Amendment event subject to its own reasonableness analysis," pointing to new statutory language and recent trends in case law.[243] This position was supported by the reasoning of the Supreme Court in a pair of decisions that did not involve foreign intelligence surveillance, but distinguished between an initial lawful seizure and subsequent search.[244] Subsequent to the proceedings relating to

person in response to a query *that was designed to return evidence of a crime unrelated to foreign intelligence*." *Id*. Accordingly, it appears that the ODNI only reported queries that had no relevance to the broadly defined term "foreign intelligence information" but *were* designed to return evidence of a crime. *See also* Memorandum Opinion and Order regarding the 2015 FISA Section 702 Certifications, *supra* note 213, at 78. This narrower category of queries that the ODNI discloses in its report is the same subset of backdoor searches that the FISA Amendments Reauthorization Act identified as requiring a warrant before the FBI could review any contents of communications. FISA Amendments Reauthorization Act of 2017 §101(f)(2)(a).

241. Memorandum Opinion and Order regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 68–69.

242. The FISC identified several oversight issues that contribute to the FBI's continued non-compliance including the prolonged periods between oversight visits for some FBI field offices, the lack of documentation for overseers to review, and the small number of queries reviewed by overseers. For those reasons, the court observed that "it appears entirely possible that further querying violations involving large numbers of U.S.-person query terms have escaped the attention of overseers and have not been reported to the Court." *Id*. at 74. *See also* Elizabeth Goitein, *The FISA Court's Section 702 Opinions, Part II: Improper Queries and Echoes of "Bulk Collection,"* JUST SEC. (Oct. 16, 2019), https://www.justsecurity.org/66605/the-fisa-courts-section-702-opinions-part-ii-improper-queries-and-echoes-of-bulk-collection/ [https://perma.cc/LN9H-7LXD].

243. Memorandum Opinion and Order regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 85. Amici noted that the 2018 FISA Amendments Reauthorization Act mandated that Section 702 querying procedures comport with the Fourth Amendment, and that Section 702(f)(2) requires the FBI in some narrow circumstances to get a FISC order before examining the results of a Section 702 search. *See id.*

244. Riley v. California, 573 U.S. 373, 386 (2014) (holding that police needed a warrant to access the contents of a cell phone, even when the officer lawfully seized the phone in a search incident to arrest); Carpenter v. United States, 138 S.Ct. 2206, 2217 (2018) (holding that a warrant was required to acquire cell-site records, even though, under the third-party doctrine, a cellphone user would not

the government's 2018 Section 702 certifications, the Second Circuit Court of Appeals issued a decision that directly supports amici's position in the foreign intelligence context. Evidence derived from Section 702 surveillance had been used to obtain a terrorism conviction against Agron Hasbajrami, enabling him to mount a rare challenge to the warrantless surveillance and collection of his communications.[245] The lower court held that the targeting and minimization procedures in place sufficiently protected the privacy interests of U.S. persons allowing the government to freely query lawfully acquired Section 702 information without further Fourth Amendment inquiry.[246] The Second Circuit reversed. It found that querying stored data constitutes a separate Fourth Amendment event, requiring a separate Fourth Amendment analysis, which "provides a backstop to protect the privacy interests of United States persons and ensure that they are not being improperly targeted."[247]

The FISC resisted treating querying as a separate Fourth Amendment event but arrived at the same conclusion as amici under the FISA Courts' traditional "totality-of-circumstances" test. Judge Boasberg concluded that the FBI's procedures, as implemented, violated both Section 702 and the applicable Fourth

have an expectation of privacy in such information.). *See also* ACLU v. Clapper, 785 F.3d 787, 801 (2d Cir. 2015) (distinguishing between acquisition and retention in finding that storing data in a database constitutes a seizure); Kyllo v. United States, 533 U.S. 27, 35 (2001) (finding that a search occurred not where the government used heat-sensing technology, but when they observed the data emanating from that technology); United States v. Carey, 172 F.3d 1268, 1272–74 (10th Cir. 1999) (allowing the government to seize the entire hard drive but limiting the government's subsequent access to that data).

245. United States v. Hasbajrami, 945 F.3d 641, 647–49 (2d Cir. 2019).

246. *Id*. at 669; *see also* Memorandum Denying Motion to Suppress, United States v. Hasbajrami, No. 11-CR-623 (JG), 2016 WL 1029500, at *14 (E.D.N.Y. Mar. 8, 2016) (order denying motion to suppress the fruits of Section 702 surveillance).

247. United States v. Hasbajrami, 945 F.3d at 672. *Cf.* United States v. Muhtorov, 187 F. Supp. 3d 1240, 1256–57 (D. Colo. 2015) (holding that there is no reasonable expectation of privacy in information the government has already collected); United States v. Mohamud, No. 3:10-CR-00475-KI-1, 2014 WL 2866749, at *26 (D. Or. June 24, 2014), aff'd, 843 F.3d 420 (9th Cir. 2016) (holding that subsequent querying of Section 702-acquired data, without obtaining an additional search warrant, would also be constitutional, though it was "a very close question"); *cf.* United States v. Mohamud, 843 F.3d 420 (9th Cir. 2016) (holding that a foreigner overseas has "no Fourth Amendment right" and therefore no warrant is required to collect a foreign target's communications, regardless of whether Americans in contact with the target are "incidentally" monitored).

Amendment reasonableness standard.[248] Nonetheless, by choosing this path, the FISC foreclosed the possibility of a warrant requirement for FBI searches of Section 702 information.[249] Moreover, as discussed below, a separate Fourth Amendment analysis of querying procedures could have had an impact on the FBI's practice of conducting batch queries, potentially leading to their invalidation.

According to the FISC decision, amici once again proposed as a remedy that FBI personnel be required to document in writing their justifications for believing that each search of Section 702 data using U.S.-person identifiers is reasonably likely to return foreign intelligence information or evidence of a crime before reviewing Section 702 acquired content information resulting from such queries.[250] This time, the court agreed.[251] The opinion indicates that amici had initially proposed a somewhat broader restriction: that FBI personnel justify their searches *before* they run queries.[252] This would have placed a bigger burden on the Bureau because the number of queries that return information is far smaller than the number of queries run by the FBI. But it would also have been more privacy-protective because FBI agents would not be able to view the highly revealing metadata associated with their queries without writing down their justifications.[253] Judge Boasberg's decision states that amici noted at the September 28, 2018 argument that the narrower post-querying documentation requirement "would be adequate," but he did not explain the considerations that led to this accommodation.[254]

The documentation requirement is unlikely to fully address the problems identified by the FISC. Both the FISC, and the FISCR, which addressed the issue on appeal as discussed further below, concluded that it would facilitate oversight by providing a record for DOJ personnel reviewing the FBI's querying practices and moti-

248. Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 80, 92.

249. *See supra* text accompanying notes 219-235.

250. Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 92. The procedures used by the CIA, NSA, and NCTC already include such a documentation requirement.

251. *Id*. at 96–97.

252. *Id*. at 92.

253. *In re* DNI/AG 702(h) Certifications [REDACTED], No. [REDACTED], 41 (FISA Ct. Rev. July 12, 2019), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISCR_Opinion_12Jul19.pdf [https://perma.cc/RY2H-9KFU].

254. Memorandum Opinion and Order regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 92.

vate FBI personnel to think more carefully about the applicable standard so that they would be discouraged from running unnecessary queries.[255] At the same time, both courts went out of their way to emphasize that the requirement was "minimal" and "modest," with the FISCR describing it as a "ministerial procedure," which would require FBI personnel to explain their reasoning "perhaps in no more than a single sentence or by making a check-mark next to one of several pre-written options."[256] If the documentation requirement does turn out to be as minimal as the FISCR suggested, it is difficult to see how it would add appreciably to oversight or encourage FBI agents to think carefully about their queries rather than simply turning into a box checking exercise. It certainly would not address other issues identified by the FISC, such as the lack of understanding among FBI personnel about the standard for Section 702 queries, the long spans of time between audits and small sample size of FBI Section 702 queries audited, and the Bureau's encouragement of its personnel to make "maximal use of such queries, even at the earliest investigative stages."[257]

In sum, while the documentation requirement is certainly an improvement, it hardly addresses the host of issues raised by the FBI's backdoor searches. While Jeffress was able to persuade the court to accept her recommendation, she did not trigger any serious reconsideration of the FISA Court's entrenched views on backdoor searches, which the FBI's record clearly warrants.

ii. Batch Queries

The record before Judge Boasberg also revealed a previously unknown FBI practice: "categorical batch queries," i.e., searches of Section 702 data using multiple query terms at once, some of which may not be reasonably likely to return foreign intelligence information.[258]

255. *In re* DNI/AG 702(h) Certifications, at 41; Memorandum Opinion and Order regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 92. The FISC noted that oversight of the FBI's querying practices is deficient in part because "the documentation available to [oversight personnel from the DOJ National Security Division's Office of Intelligence] lacks basic information that would assist in identifying problematic queries." *Id.* at 74.

256. Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 95, 97; *In re* DNI/AG 702(h) Certifications, at 42.

257. Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 72–75. *See also* Goitein, *The FISA Court's Section 702 Opinions, Part II*, *supra* note 242.

258. Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 79–82.

It is not known how long the FBI has used batch queries. However, in 2018, the FBI promulgated supplemental procedures to address the illegal querying of Section 702 databases described above, most of which were batch queries.[259] These procedures, which were submitted to the FISC, allow batch queries—i.e., "an aggregation of individual queries"—to meet this standard even if an individual query within that batch would not.[260]

By using batch queries, the FBI can circumvent the requirements imposed by the FISC. As our colleague and FISA expert Liza Goitein has explained:

> [F]or instance, if the FBI has information that an employee at a particular company is planning illegal actions, but the FBI has no knowledge of who the employee is, the Bureau would be justified (the government argues) in running queries for *every employee at that company*. This is presumably the theory on which the FBI ran the massive numbers of queries . . . [including] 70,000 queries on individuals with access to FBI systems and facilities.[261]

At the same time, batch queries can also be used for as few as two persons.[262] This suggests that if the FBI narrows down a group of American associates or an American family for whom a query of just one of its members may yield foreign intelligence information, but the FBI is not sure which person it is, the Bureau could make up a batch by searching for information on all members, even if individually, the searches would fail to meet the querying standard. The rationale here is similar to that underlying the government's accumulation of a database of Americans' telephone records, which was ended by the USA Freedom Act.[263]

Unfortunately, Judge Boasberg did not take any particular action relating to batch queries, other than to suggest that they appeared to conflict with the FBI's own procedures, which require that "[e]ach query" that FBI agents perform on Section 702 data "must be reasonably likely to retrieve foreign intelligence information . . . or evidence of a crime."[264] The judge's refusal to treat

259. *Id.* at 7, 82.

260. *Id.* at 78.

261. Goitein, *The FISA Court's Section 702 Opinions, Part II*, *supra* note 242.

262. *See* Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 80.

263. *See supra* text accompanying notes 67–70, 81–84, and 175–179.

264. *See* WILLIAM P. BARR, EXHIBIT I: QUERYING PROCEDURES USED BY THE FEDERAL BUREAU OF INVESTIGATION IN CONNECTION WITH ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE

querying as a separate Fourth Amendment event—as advocated by amici—may have had some impact on the court's failure to address batch queries. A separate Fourth Amendment analysis of this type of querying would have required the FISC to reckon with difficult questions about whether this practice complied with the Fourth Amendment. It is, however, difficult to judge where amici stood on this issue because their briefs for the 2018 case are not publicly available.

Unfortunately, under the current statutory regime, amici are not permitted to either appeal Judge Boasberg's decision or even bring these issues to the attention of the FISCR.

iii. Tracking Queries of Americans' Information

Judge Boasberg also considered the related issue of whether the FBI was complying with the 2018 FISA Amendments Reauthorization Act requirement that a "record is kept of each United States person query term used for a query."[265] Such tracking would reveal the extent to which the Bureau was targeting Americans for warrantless searches, a key concern with respect to backdoor searches.[266] Instead, the FBI had been keeping a record of *all* Section 702 queries, essentially hiding its usage of U.S.-person query terms.[267] While the text of the statute is quite clear, the government argued that Section 112 of the law, which directed the Inspector General of the DOJ to report to Congress on operational, technical, or policy impediments for the FBI to count U.S. person queries, showed that Congress recognized "the limitations of FBI systems' technical record-keeping function" and "did not intend to impose any new obligation on the FBI to differentiate queries based on United States person status."[268] Amici, on the other hand, maintained that Congress did not accept the current FBI practice, but rather imposed new recordkeeping requirements while at the same time directing the Inspector General to scrutinize how the FBI im-

SURVEILLANCE ACT OF 1978, AS AMENDED (Aug. 6, 2019) [hereinafter FBI 2019 Querying Procedures] at 3.

265. FISA Amendments Reauthorization Act of 2017 §101(f)(1)(b).

266. *See supra* text accompanying notes 239–257.

267. *See* Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 53.

268. FISA Amendments Reauthorization Act of 2017 § 112(b)(8); Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 55–56. The government argued that Section 702(f)(1)(B) "does not include any other terms, such as 'separately' or 'segregated,' specifying that United States person query terms must be retained apart from other queries." *Id.* at 53.

plements them.[269] Judge Boasberg found that amici had "the better of the exchange."[270] The court held that the FBI's procedure "misse[d] the essential aim of the recordkeeping requirement, which is to memorialize when a United States-person query term is used to query Section 702 information," and ordered the FBI to correct this deficiency.[271]

iv. "Abouts" Collection

As discussed previously, under Section 702, the NSA collects electronic communications in two ways: "Downstream," by acquiring stored communications held by the companies that process these communications such as internet service providers, and "Upstream" by obtaining communications straight from the Internet backbone.[272] The NSA looks for electronic communications to, from, or about targeted selectors, and the breadth of "abouts" collection has made it one of the most controversial parts of Section 702 collection.[273] In April 2017, the FISC found that the NSA's technical and legal problems with "abouts" collection were even more pervasive than previously disclosed, and that the agency was not in compliance with the rules imposed by the court.[274] In response, the NSA announced later that month that it would no longer conduct this type of surveillance because it could not meet FISC-imposed privacy protections, although it subsequently indicated that it wanted to keep open the option of restarting the program at a future date.[275] When Congress reauthorized Section 702 in 2018, it explicitly authorized "abouts" collection, but imposed, with narrow exceptions, a requirement of congressional notification and a 30-day congressional-review period before the government could restart the program.[276]

269. Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 56.

270. *Id*.

271. *Id*. at 53, 114.

272. *See supra* text accompanying notes 103–112.

273. *See supra* text accompanying notes 103–112.

274. *See supra* text accompanying notes 120–129.

275. Press Release, Nat'l Sec. Agency, *supra* note 6. Two months later, however, in response to a question from the Senate Select Committee on Intelligence about the ending of "abouts" collection, NSA Admiral Michael Rogers stated that "if we can work that technical solution in a way it generates greater reliability, I would potentially come back to the Department of Justice and the court to recommend that we reinstitute it." *Open Hearing on FISA Legislation*, S. Select Comm. on Intelligence, 115th Cong. 46 (2017).

276. FISA Amendments Reauthorization Act of 2017 § 103.

"Abouts" collection was understood to be something that the NSA undertook only as part of its Upstream programs.[277] However, a heavily-redacted portion of the FISC decision suggests that the NSA is now engaged in a new form of Downstream collection which bears resemblance to "abouts" collection.[278] The FISC decision reflects Judge Boasberg's agreement with amici that the notice requirement for "abouts" collection imposed by Congress in 2018 applied also to Downstream programs. Though the legislative history could be read to suggest that Congress intended the statutory limitation on "abouts" collection to apply only to the Upstream program, amici argued that this was simply because Congress did not know about the form of Downstream acquisition at issue in the case when the law was passed.[279] Indeed, as Judge Boasberg noted, the text of the provision "does not distinguish between upstream and downstream collection or otherwise refer to how acquisition is conducted," and thus he found "no absurdity in applying the abouts limitation, by its terms, to downstream collection."[280]

Based on the FISC opinion, it appears that amici also argued that at least some of the acquisitions in the government's Section 702 certifications constitute "abouts" collection and do not comport with the notice requirement.[281] The FISC disagreed, taking the view that the government's acquisition of communications at issue did not constitute "abouts" collection, but was in fact "limited to acquisitions of communications to or from targets" and that the NSA had safeguards to avoid the "intentional acquisition of abouts communication."[282]

While heavy redactions make this section of the opinion difficult to parse, amici's recommendations for greater transparency

277. *See, e.g.*, PCLOB 702 Report, *supra* note 99, at 84 ("Collection of 'about' communications occurs only in upstream collection, not in PRISM."); NSA, PRISM/US-984XN Overview, IC OFF THE RECORD (Apr. 2013), https://nsa.gov1.info/dni/prism.html [https://perma.cc/VBF2-SWHC]; Classified Decl. of Miriam P., National Security Agency *Ex Parte, In Camera* Submission ¶ 12-13, Jewel. v. NSA, No. 4:08-cv-4873-JSW (Nov. 7, 2014) ("unlike 702 PRISM collection. 702 Upstream is a valuable source of 'abouts' collection in which the targeted identifier (e.g., an e-mail address) is contained in the content of the communication. . . . 'Abouts' communications are a valuable source of foreign intelligence information that cannot be obtained through other FISA collection techniques currently used, including PRISM collection.").

278. Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 18–45.

279. *See id.* at 29–30.

280. *Id.* at 30.

281. *See id.* at 43–44.

282. *Id.* at 18–19.

surrounding "abouts" collection suggest that their concerns likely centered on the selectors the government uses to identify the communications to be collected.[283] Amici proposed that the government "be required to report on how it will comply with the abouts limitation when it tasks any new type of selector to upstream collection."[284] They also seem to have proposed similar requirements for Downstream collection, though that section of the opinion is too redacted to get a full sense of the scope of the amici's suggestions.[285] Civil liberties advocates have long been concerned the selectors used by the NSA were too broad to ensure that only communications to and from intended targets are swept up.[286] For

283. *See id*. at 28, 44, 137.

284. Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 28.

285. *See id*. at 44 (in the highly-redacted section of the opinion concerning Downstream collection, the FISC noted that "amici suggest that the government should be required to provide more information with regard to [REDACTED] obtained under Section 702. See, e.g., Amici Brief at 37; Amici Reply at 2-3. The Court agrees with amici that a fuller accounting of [REDACTED] acquired pursuant to Section 702 will inform future assessments of whether particular acquisitions may be subject to the abouts limitation and are otherwise properly authorized."). Further, it seems that the disagreement over whether the "abouts" limitation applies was at least in part a disagreement over what, under the FISA Amendments Reauthorization Act, "acquisitions under Section 702 can and do include." Memorandum Opinion and Order regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 31–32, 137.

286. *See, e.g.*, Mark Rumold, *What It Means to Be An NSA "Target": New Information Shows Why We Need Immediate FISA Amendments Act Reform*, Elec. Frontier Found. (Aug. 8, 2013), https://www.eff.org/deeplinks/2013/07/what-it-means-be-target-or-why-we-once-again-stopped-believing-government-and-once [https://perma.cc/D5Q9-JGXC]; Center for Democracy and Democracy, Comments to the Privacy And Civil Liberties Oversight Board Regarding Reforms to Surveillance Conducted Pursuant to Section 702 of FISA, 6-8 (2014); Julian Sanchez, *All The Pieces Matter: Bulk(y) Collection Under §702*, Just Sec. (July 25, 2014), https://www.justsecurity.org/13227/pieces-matter-bulky-collection-%C2%A7702/ [https://perma.cc/V35Z-RDHJ]; Ashley Gorski and Patrick C. Toomey, *Unprecedented and Unlawful: The NSA's "Upstream" Surveillance*, Just Sec. (Sept. 19, 2016), https://www.justsecurity.org/33044/unprecedented-unlawful-nsas-upstream-surveillance/ [https://perma.cc/9JA5-G85B]; *Section 702 of the FISA Amendments Act: Hearing Before the H. Comm. on the Judiciary*, *supra* note 105 at 2–3 (statement of Elizabeth Goitein); Elizabeth Goitein, *The FISA Court's 702 Opinions, Part I: A History of Non-Compliance Repeats Itself*, Just Sec. (Oct. 15, 2019), https://www.justsecurity.org/66595/the-fisa-courts-702-opinions-part-i-a-history-of-non-compliance-repeats-itself/ [https://perma.cc/8DH2-3LTP]. Following the release of the October 2018 FISC decision on the Section 702 certifications, a coalition of civil society groups warned that the government may be engaging in a new form of "abouts" collection that Congress did not authorize. Letter from Access Now, et. al., to House Judiciary and Intelligence Committees (Oct. 17, 2019), https://

example, if the government used IP addresses rather than email addresses as selectors, it would sweep up communications far removed from individual targets.

In sum, while Judge Boasberg was willing to recognize that the "abouts" label could *theoretically* apply to Downstream acquisitions, he was seemingly unwilling to apply the label to whatever new type of collection the NSA has started. Indeed, a finding that the NSA was engaged in abouts collection when it had publicly declared that it had stopped doing so would have been highly significant because it would have triggered the Congressional notice requirement,[287] ignited public debate and, given the highly intrusive nature of this type of surveillance, potentially required the FISC to weigh additional safeguards.

Judge Boasberg did, however, adopt two of amici's recommendations: the government was required to explain to the court why its new program would only acquire communications to and from a target; and to report on the methods it used to "monitor compliance with the abouts limitation . . . and [to] report on the results of such monitoring."[288] As with the backdoor queries discussed above, this reporting requirement could provide information that would support amici's position the next time that Section 702 certifications and procedures are submitted to the FISC for approval.

c. 2019 Appeal

The government appealed the FISC's conclusions that: (1) the FBI was required to keep records "in a manner that differentiates between query terms related to United States persons and those related to non-United States persons" and (2) that the FBI's procedures for searching Section 702 data violated both FISA and the Fourth Amendment.[289] The same three amici were appointed by the FISCR. The appellate court agreed with the FISC that the FBI was required to keep track of searches of Section 702 data relating to Americans.[290] Because this conclusion required the Bureau to revamp its procedures, the FISCR declined to reach the second issue raised by the government. It did, however, provide some guidance to the government as it revised its querying procedures,

www.aclu.org/letter/coalition-letter-urging-reforms-section-702-fisa [https://perma.cc/PH6X-XKYW].

287. FISA Amendments Reauthorization Act of 2017 § 103(b).

288. Memorandum Opinion and Order regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 137.

289. *In re* DNI/AG 702(h) Certifications, at 4.

290. *Id.* at 19.

including endorsing the remedy proposed by amici and adopted by the FISC—that FBI personnel document in writing their justification for running a query using a U.S. person query term before examining the contents of Section 702 information returned by such queries.[291] Shortly thereafter, the FBI submitted and the FISC approved amended Querying Procedures incorporating the documentation requirement.[292]

Amici, however, could not appeal the very significant issues on which Judge Boasberg disagreed with them: whether querying constitutes a separate Fourth Amendment event requiring separate analysis by the court, which could have led to additional restrictions on the FBI's ability to sift through warrantlessly-acquired information (such as by conducting batch queries); and whether the NSA's new collection program constituted "abouts" collection requiring Congressional notification and potentially additional safeguards. As a result, the decision of a single judge impacting the privacy of millions of Americans remains the final word on these issues.

4. Public Right of Access to Decisions of the FISA Courts

Another amicus from the pool, Laura Donohue, a professor at Georgetown Law School and Director of its Center on National Security and the Law and its Center on Privacy and Technology,[293] was appointed on two occasions, once in the FISC and once in the FISCR, to address questions regarding the public's right of access to court decisions.

a. 2017 FISC Decisions

The issue was raised as part of a longstanding effort by the ACLU and Yale's Media Freedom and Information Access Clinic to obtain access to four previously released, highly redacted FISC opinions concerning the legal basis for bulk data collection.[294] The

291. *Id.* at 41.

292. FBI 2019 Querying Procedures, *supra* note 264; Memorandum Opinion and Order, [REDACTED], [REDACTED] 9 (FISA Ct. Sept. 4, 2019), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opinion_04Sep19.pdf [https://perma.cc/RS2W-228Y].

293. *Laura Donohue*, GEORGETOWN LAW, https://www.law.georgetown.edu/faculty/laura-donohue/ [https://perma.cc/3DAX-LXLB].

294. The four decisions at issue are: Amended Memorandum Opinion, *In re* Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED], No. BR 13-109, *supra* note 22; *In re* Application of the FBI for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 13-158 (FISA Ct. Oct. 11, 2013), https://www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Memorandum-1.pdf

ACLU and the Yale clinic filed a Notice of Supplemental Authority in support of their motion asking the FISA to review the redactions in light of the public's First Amendment right of access. They argued that the provisions of the USA Freedom Act requiring a declassification review[295] demonstrated "Congress's judgement that significant FISC opinions should be published to the greatest extent possible, and that public access to FISC opinions supports the proper functioning of the court," strengthening their claim asserting a First Amendment right of access to these decisions.[296] In January 2017, the FISC ruled that the ACLU and the clinic lacked standing because there is no such right of access.[297] That decision created an intra-court split with a 2013 FISC decision finding that

[https://perma.cc/9QDK-BH6N]; Opinion and Order, [REDACTED], No. PR/TT [REDACTED] (FISA Ct. [REDACTED]), https://www.odni.gov/files/documents/1118/CLEANEDPRTT%201.pdf [https://perma.cc/6XNV-CDR4]; Memorandum Opinion, [REDACTED], No. PR/TT [REDACTED], (FISA Ct. [REDACTED]), https://www.dni.gov/files/documents/1118/CLEANEDPRTT%202.pdf [https://perma.cc/3J43-8VFK].

295. USA FREEDOM Act of 2015, sec. 402(a), § 1872. The DNI and AG are required to conduct declassification reviews of the FISA Courts' decisions, orders, and opinions that include "significant construction[s] or interpretation[s] of any provision of law" unless they determine "that a waiver of such requirement is necessary to protect the national security of the United States or properly classified intelligence sources or methods." *Id.* § 1872(c)(1). If the DNI and AG make such a determination, they must publish an unclassified statement "summarizing the significant construction or interpretation of any provision of law." *Id.* § 1872(c)(2)(A).

296. Notice of Supplemental Authority at 2, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. Misc. 13-08 (FISA Ct. Dec. 4, 2015), https://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Notice%20of%20Supplemental%20Authority_0.pdf [https://perma.cc/578K-PG8C]. *See also* Motion, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. Misc. 13-08 (FISA Ct. Nov. 7, 2013), https://www.clearinghouse.net/chDocs/public/NS-DC-0026-0001.pdf [https://perma.cc/3W4Z-L3C6]. The Reporters Committee for Freedom of the Press and a group of 25 media organizations filed a motion for leave to file an amicus brief in this case in November 2013, which was granted. *See* Brief for the Reporters Committee for Freedom of the Press and 25 Media Organizations as Amici Curiae, *supra* note 46.

297. *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. Misc. 13-08, 2017 WL 427591, at *23 (FISA Ct. Jan. 25, 2017), https://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Opinion%20and%20Order_0.pdf [https://perma.cc/LA3E-8DYJ].

the same plaintiffs had standing to assert their right of access claim.[298]

The FISC *sua sponte* granted en banc review. In November 2017, sitting en banc for the first time in its history, the majority of the FISC found that the plaintiffs did have standing to proceed.[299] Ten of the eleven FISC judges subsequently agreed that the question of standing should be certified to the FISCR for its review.[300]

b. 2018 FISCR Decision

In January 2018, the FISCR accepted the certified question and appointed Donohue as amicus.[301] Donohue made several arguments in support of the movants' standing to seek access to judicial records. She explained why the court's potential failure to find standing mattered, using the example of Snowden's revelations about bulk collection of phone records under Section 215:

---

298. *Cf. In re* Orders of this Court Interpreting Section 215 of the Patriot Act, No. Misc. 13-02 (FISA Ct. Sept. 13, 2013), https://www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-2.pdf [https://perma.cc/6RFT-PVUB].

299. *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. Misc. 13-08, 2017 WL 5983865 (FISA Ct. Nov. 9, 2017) (en banc), https://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Opinion%20November%209%202017.pdf [https://perma.cc/65G9-LBFY].

300. Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. Misc. 13-08 (FISA Ct. Jan. 5, 2018), https://www.fisc.uscourts.gov/sites/default/files/Misc%2013%2008%20Certification%20Order%20with%20Attached%20En%20Banc%20Decision.pdf [https://perma.cc/PN4K-L6VH].

301. *In re* Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, No. 18-01, 2018 WL 2709456, at *2 (FISA Ct. Rev. Jan. 9, 2018), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2018%2001%20WCB%20Order%20180109_0.pdf [https://perma.cc/3FEN-2URA]; In February 2018, the Reporters Committee for the Freedom of the Press filed a motion for leave to file an amicus brief in this FISCR case, which was granted. *See* Motion of the Reporters Committee for Freedom of the Press for Leave to File Brief as Amicus Curiae Supporting Movants, *In re* Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, No. 18-01 (FISA Ct. Rev. Feb. 23, 2018), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2018%2001%20Motion%20of%20the%20Reporters%20Committee%20for%20Freedom%20of%20the%20Press%20for%20Leave%20to%20File.pdf [https://perma.cc/RS82-VN7E]. *See also* [Proposed] Brief for The Reporters Committee For Freedom of the Press as Amicus Curiae Supporting Movants, *In re* Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, No. 18-01 (FISA Ct. Rev. Feb. 26, 2018), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2018-01%20Brief%20of%20Amicus%20Curiae%20The%20Reporters%20Committee%20for%20Freedom%20of%20the%20Press%20in%20Support%20of%20Movants_0.pdf [https://perma.cc/Y5S4-F9EZ].

> For years, the telephony metadata program operated in secret. When it became public, it generated a backlash in all three branches. On August 12, 2013, President Obama responded to the outcry by constituting a Review Group. The group sharply criticized the telephony metadata program and recommended its immediate cessation . . . . In the courts, the Second Circuit referred to the government's interpretation of Section 215 as "unprecedented and unwarranted," holding the program unlawful. *ACLU v. Clapper*, 785 F.3d 787, 812 (2d Cir. 2015) . . . . Congress, for its part, held hearings and passed a new law, outlawing bulk collection under section 215 *and* PR/TT. The fact that FISC already knew about the program mattered little. It was public access and the disapproval of the People, that drove reform.[302]

On the threshold issue of standing, the government argued that the motion should be dismissed for lack of standing as movants failed to make the necessary "colorable claim" of legal injury.[303] In response, Donohue pointed out that movants did not only seek access to any set of particular, sensitive facts but rather to judicial opinions that have the force of law, so whether a claim to any factual information "ultimately proves non-colorable" was irrelevant to standing.[304] Instead, she argued that standing depended on the fact that the information sought involves "constitutional and statutory analysis, impact[s] rights, and reveal[s] government misbehavior—all matters of law."[305] Accordingly, because the right of access to "matters of law" such as judicial records is a "legally- and judicially-cognizable interest," Donohue argued, the movants had standing

302. Brief for Laura K. Donohue as Amicus Curiae at 27–29, *In re* Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, No. 18-01 (FISA Ct. Rev. Feb. 23, 2018), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2018-01%20Amicus%20Brief.pdf [https://perma.cc/EES2-5CGL].

303. United States' Reply Brief at 2, *In re* Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, No. 18-01 (FISA Ct. Rev. Mar. 16, 2018), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2018%2001%20United%20States%27%20Reply%20Brief.pdf [https://perma.cc/JTM8-BZYP].

304. Reply Brief for Laura K. Donohue as Amicus Curiae at 14–15, *In re* Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, No. 18-01, 2018 WL 2709456 (FISA Ct. Rev. Mar. 16, 2018), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2018%2001%20Reply%20Brief%20of%20Amicus%20Curiae.pdf [https://perma.cc/SZ2U-4HMJ]; Brief for Laura K. Donohue, *supra* note 302, at 2–3, 27.

305. Brief for Laura K. Donohue, *supra* note 302, at 9; Reply Brief for Laura K. Donohue, *supra* note 304, at 14–15.

and the right to be heard on the scope of their First Amendment rights.[306] When the FISCR addressed the government's argument on whether movants met the colorable claim standard, the court implicitly adopted Donohue's position, stating that "the courts have generally focused not on the merits of the party's claim, but on whether the claim is of the type that is cognizable by a court."[307]

The FISCR ultimately agreed with Donohue on the standing issue, finding that "the movants have standing to seek disclosure of the classified portions of the opinions at issue."[308] The court reached this conclusion by determining that denial of access to the FISC opinions is a "legally protected interest that is concrete, particularized, and actual," and therefore satisfied the requirements for standing.[309]

While the court did not specifically refer to Donohue's arguments in its decision, its ruling can be viewed as an example where the presence of amici had an impact. In fact, when the case was remanded back to the FISC, the court appointed Donohue as amicus again for the subject-matter jurisdiction and merits portions of the case.[310]

c. 2020 FISC Decision

On remand, Judge Collyer agreed with amicus Donohue that, contrary to the government's position, the FISC had subject matter over the motion.[311] But she denied the ACLU and Yale clinic's motion for a declassification review of redacted FISC opinions.[312]

306. Reply Brief for Laura K. Donohue, *supra* note 304, at 2, 14–15.

307. *In re* Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, No. 18-01, 2018 WL 2709456, at *6 (FISA Ct. Rev. Mar. 16, 2018), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2018-01%20Opinion%20March%2016%202018.pdf [https://perma.cc/JTM8-BZYP].

308. *In re* Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review, 2018 WL 2709456, at *1.

309. *Id.* at *4.

310. Appointment of Amicus Curiae and Briefing Order, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, *supra* note 172.

311. *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. Misc. 13-08, at 4 (FISA Ct. Feb. 11, 2020), https://www.fisc.uscourts.gov/sites/default/files/FISC%20Misc%2013%2008%20Opinion%20RMC%20200211.pdf [https://perma.cc/9TDQ-FT5K]. Judge Collyer found subject matter jurisdiction based on the FISC's "continuing obligation to maintain the records of those proceedings" sought by movants, including "those portions of the requested opinions that are still classified and not available to the public." *Id.* at 10–11.

312. *Id.* at 4.

In evaluating the movants' claim that the public had a First Amendment right to view the records of the FISA Courts, Judge Collyer applied the "experience-and-logic" test articulated in *Press-Enterprise Co. v. Superior Court* (1986). The crux of the test is whether a record or proceeding has "historically been open to the press and general public," and "whether public access plays a significant positive role" in the judicial process.[313] Amicus Donohue had argued that in applying this test, the FISC should look broadly at the FISA Courts' record, common law practices, and comparable practices in other courts.[314] The court disagreed, finding that such a broad assessment "would lose focus on the distinctive characteristics of FISC opinions and proceedings,"[315] and instead focused narrowly on FISC opinions.[316]

Amicus Donohue submitted a chart cataloguing previously released FISC cases to demonstrate that the FISA Courts have become more open.[317] Judge Collyer drew the opposite conclusion from the chart: that the recent uptick in releases in recent years was the exception, not the rule, and there was "no history of openness" in the court's first 30 years.[318]

On the issue of whether public access plays a significant positive role in the judicial process, Donohue argued for the release of FISC opinions based on "their overwhelming importance for constitutional doctrine, their direct impact on citizens' rights, [and] their revelation of government failure to comply with the law."[319] Judge

313. *Id.* at 10–11 (citing *In re* Certification of Questions of Law to FISCR, 2018 WL 2709456 at *3 (quoting *Press-Enterprise Co. v. Superior Court,* 478 U.S. 1, 8 (1986))).

314. Reply Brief for Amicus Curiae, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. Misc. 13-08, at 47 (FISA Ct. Aug. 2, 2018), https://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Reply%20Brief%20of%20Amicus%20Curiae%20180802.pdf [https://perma.cc/KV26-AFAC].

315. *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, *supra* note 311, at 16.

316. *Id.* at 18.

317. Brief for Laura K. Donohue as Amicus Curiae App. at 1–17, *supra* note 47. The chart was originally submitted to the FISCR in 2018 and referenced extensively by Judge Collyer. *See also* Reply Brief for Amicus Curiae, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, at 50.

318. *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, at 19, 22.

319. Reply Brief for Amicus Curiae, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, at 63.

Collyer, however, determined that this interest was outweighed by the concern that releasing classified documents could damage national security and "chill the government's interaction with the Court," undermining the FISA Court's oversight.[320] The court declined to direct a second declassification review, and dismissed the motion.

While Judge Collyer's substantial engagement with Donohue's arguments is a step forward, her vision of the FISC as a fundamentally secretive court, which almost reflexively defers to claims of national security over transparency, is discouraging. It suggests deep-seated resistance to efforts to make the FISA system more open and respectful of Americans' rights and liberties. And, as discussed below, the appellate court was unwilling to intervene.

d. 2020 Appeal

The ACLU and the Yale clinic asked the FISCR to review the FISC's ruling.[321] They argued that the appellate court had the authority to entertain their petition because it was authorized to review the denial of any application, and their motion qualified as an "application" within the ordinary meaning of the term.[322] The FISCR dismissed the petition for lack of jurisdiction.[323] The court concluded that the "application" it was authorized to review re-

320. *In re* Motion for Release of Court Records, 526 F. Supp. 2d at 496.

321. Petition for Review or in the Alternative for a Writ of Mandamus, *In re* Opinions & Orders by the FISC Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. 20-01 (FISA Ct. Rev. Mar. 11, 2020), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2020%2001%20Petition%20for%20Review%20or%20in%20the%20Alternative%20for%20a%20Writ%20of%20Mandamus%20200311.pdf [https://perma.cc/PPP4-3TD8]. The FISCR ordered movants to show why the FISCR has authority to entertain their petition. Order to Show Cause, *In re* Opinions & Orders by the FISC Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. 20-01 (FISA Ct. Rev. Mar. 13, 2020), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2020%2001%20Order%20to%20Show%20Cause%20PJ%20JAC%20200313.pdf [https://perma.cc/F2C4-39SN].

322. Movants' Response to the Court's Order to Show Cause at 1, *In re* Opinions & Orders by the FISC Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. 20-01 (FISA Ct. Rev. Apr. 17, 2020), https://www.fisc.uscourts.gov/sites/default/files/Movants%27%20Response%20to%20the%20Court%27s%20Order%20to%20Show%20Cause%20200417.pdf [https://perma.cc/KRL6-8FLG]. Movants also argued that the issue of whether the FISCR's jurisdiction extended to their application concerned "a novel or significant interpretation of the law," requiring the court to appoint an amicus curiae. *Id.* at 2 n.1; *see also* 50 U.S.C. § 1803(b).

323. *In re* Opinions & Orders by the FISC Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. 20-01 (FISA Ct. Rev. Apr. 24,

ferred more narrowly "to an application made by the Government ex parte and in camera for foreign intelligence surveillance."[324] The FISCR understood its jurisdiction as limited by FISA and not extending to constitutional questions, such as the First Amendment claim at issue.[325] The court also declined to appoint an amicus because the novel/significant amicus provision only governs the court's consideration of an "application for an order or review," not a motion.[326] The court's position was a departure from its record of appointing amici to provide critical privacy and civil liberties perspectives in other cases. For example, in a previous proceeding in the same case, the FISC named Donohue as amicus under the novel/significant provision even though there was no "application" at issue, an appointment that the FISCR characterized as "inadvertent."[327] But the FISCR had appointed amicus Marc Zwillinger to assist in its consideration of a certified question regarding pen registers because, even though the matter at issue was not an "application," the court determined that the question presented a "significant interpretation of law."[328] The FISC had also, on at least three occasions, appointed amici for the purpose of providing civil liberties perspectives under the general amicus provision (which does not require a connection with an "application").[329]

2020), https://www.fisc.uscourts.gov/sites/default/files/FISCR%2020%2001%20Opinion%20200424.pdf [https://perma.cc/H4TK-7NTG].

324. *Id.* at 13.

325. *Id.* at 12.

326. *Id.* at 16; 50 U.S.C. § 1803(2)(A).

327. *See supra* discussion accompanying notes 301–320. The FISCR acknowledged that the FISC had appointed Donohue under the novel/significant amicus provision in 2018, but argued that Donohue's appointment by the FISC under that provision rather than under the general amicus provision was "likely inadvertent" and "does not undermine our foregoing analysis of the text and structure of the FISA." *In re* Opinions & Orders by the FISC Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, *supra* note 323, at 17 n.53; Appointment of Amicus Curiae and Briefing Order, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, *supra* note 172.

328. IC On The Record, *Release of FISC Question of Law & FISCR Opinion*, *supra* note 172 ("Upon receiving the certified question of law, the FISCR appointed an amicus curiae, pursuant to 50 U.S.C. Section 1803(i), to assist the FISCR in consideration of what it deemed a significant interpretation of the law."). The provision under which Zwillinger was appointed is unspecified. *See infra* discussion accompanying notes 192–207.

329. *See infra* discussion accompanying notes 180–191 and 213–234. These three appointments occurred under the general amicus provision because the amicus pool had not yet been designated.

These cases suggest that there has been some flexibility in the FISA Courts' approach, and the FISCR may have decided to pull back from this approach and revert to a strict reading of the statute. It is difficult to know, however, whether the decision portends a trend or is restricted to the facts of this long-running case.

5. Withdrawals and Modifications

While amici have thus far had only a limited impact on the FISA Courts' decisions, the *prospect* of amicus involvement seems to have played a role in discouraging the government from seeking authorization for some surveillance. According to the FISA Courts' annual reports, in a total of six instances between 2017 and 2019 where the government was informed that the courts were considering appointing an amicus curiae to address novel or significant issues, the government withdrew or revised those applications to omit "novel or significant" issues rather than submit them to the scrutiny of an amicus.[330] In 2018, the government also belatedly reported that it had withdrawn or modified "a similarly small number" of applications in 2015 and 2016.[331] It is not known whether these applications involved programmatic surveillance or applications for individual surveillance orders or whether the government submitted revised applications at a later point in time.

It is difficult to know whether these withdrawals and modifications are a net positive for civil liberties. They may effectively reduce surveillance, but the government's ability to modify and resubmit the applications undercuts that benefit. Indeed, the government's ability to withdraw or modify FISA applications highlights the way in which the court cooperates with the government to create acceptable surveillance applications, which is quite different from arms-length proceedings in regular courts, and insulates the government from constraining precedent.[332] Well before Snowden

330. 2017 FISC ANNUAL REPORT, *supra* note 172, at 4–5; 2018 FISC ANNUAL REPORT, *supra* note 162, at 5; 2019 FISC ANNUAL REPORT, *supra* note 58, at 4–5; *In 2017, the Government Withdrew Three FISA Collection Requests Rather than Face an Amicus Review*, EMPTYWHEEL (Apr. 26, 2018), https://www.emptywheel.net/2018/04/26/in-2017-the-government-withdrew-three-fisa-collection-requests-rather-than-face-an-amicus-review/ [https://perma.cc/T3WP-D5PC].

331. 2017 FISC ANNUAL REPORT, *supra* note 172, at 4–5.

332. *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 14, 35, 214, 247 (1st ed. 2003) (noting that, in the American legal tradition, adversarial proceedings are a central facet of ensuring government accountability and maintaining a check on government authority). *See also* LAURA K. DONOHUE, THE FUTURE OF FOREIGN INTELLIGENCE: PRIVACY AND SURVEILLANCE IN A DIGITAL AGE 139 (2016) (noting that the envisioned role of a FISA Court judge was "to enter an

burst onto the scene, critics argued that the FISC was a rubber stamp: from its founding in 1979 to 2012, it rejected just 11 out of more than 33,900 surveillance requests by the government.[333] The court's defenders responded that these numbers did not reflect that fact that in many instances, the court had required the government to revise its surveillance applications.[334] But the back-and-forth between the Department of Justice staff who file FISA applications and the staff serving the FISC judges (as described in a letter from the court's presiding judge to Senator Patrick Leahy) is equally troublesome because it suggests that the Department of Justice and the FISA Courts collaborate to create acceptable surveillance applications.[335] Not only is this a far cry from how courts normally work, it also means that the government has the ability to avoid decisions that go against its position, leaving the FISA Courts' jurisprudence devoid of any articulation of what surveillance activities the law does *not* permit.

It is unclear whether the addition of amici has disrupted this practice.[336] The annual report of the FISA Courts required by the

---

order as requested or to modify it accordingly," not to deny government applications.). In contrast to other courts, central issues associated with the FISA Courts "ste[m] from the design and evolution of the FISC . . . . In particular, the court's deference to the executive and the absence of either technology experts or adversarial counsel have weakened the rigor of the court's review . . . the success rate for applications under traditional FISA is 'unparalleled in any other American court.'"). *Id.* at 139. DAVID RUDENSTINE, THE AGE OF DEFERENCE: THE SUPREME COURT, NATIONAL SECURITY, AND THE CONSTITUTIONAL ORDER 139–40 (2016) (comparing the American adversarial legal tradition to the typically non-adversarial nature of FISC proceedings).

333. Evan Perez, *Secret Court's Oversight Gets Scrutiny*, WALL ST. J. (June 9, 2013, 7:11 PM), https://www.wsj.com/articles/SB10001424127887324904004578535670310514616 [https://perma.cc/WJZ8-WLLQ].

334. *See, e.g.*, Letter from Reggie B. Walton, Presiding Judge, U.S. Foreign Intelligence Surveillance Ct., to the Hon. Patrick Leahy, Chairman, Comm. On the Judiciary, U.S. Senate (July 29, 2013), http://fas.org/irp/news/2013/07/fisc-leahy.pdf [https://perma.cc/89AM-NV5D]; Dina Temple-Raston, *FISA Court Appears to Be Rubber Stamp for Government Requests*, NPR (June 13, 2013) https://www.npr.org/2013/06/13/191226106/fisa-court-appears-to-be-rubberstamp-for-government-requests [https://perma.cc/5JHN-R48V].

335. Greg Nojeim, *Letter Outlines Extensive Collaboration Between FISA Court and DOJ*, CTR. FOR DEMOCRACY & TECH. (July 31, 2013), https://cdt.org/blog/letter-outlines-extensive-collaboration-between-fisa-court-and-doj/ [https://perma.cc/AKM2-SRJJ]; Letter from Walton to Leahy, *supra* note 334.

336. It may appear that the FISC's rejection rate is going up. According to the FISA Courts' own reports, which only started in 2015 as required by the USA Freedom Act, there were more applications rejected in 2017 than all the earlier years of the courts' functioning starting in 1979 to 2015 combined. However, as the annual reports from prior to the USA Freedom Act were issued by the Department of

USA Freedom Act indicates that out of 1,614 applications in 2017, the court denied only 26 in full but modified 391.[337] For 2018 the court reported that out of 1,318 FISA applications, the court denied only 30 in full but modified 261.[338] Similarly, in 2019, the court reported that out of 1,010 FISA applications, the court denied only 20 in full but modified 264.[339] However, the origin of the modifications—i.e., whether they resulted from negotiations between staff and the DOJ, the judges' demands, or amici recommendations—is not known.

IV.
CONCLUSION AND RECOMMENDATIONS

As the above analysis shows, the impact of amici on the decisions of the FISA Courts has been limited. There appears to be a lingering reluctance on the part of some judges to appoint amici, which is reflected in two publicly available decisions where FISC judges have decided that, even though the case they were considering involved novel or significant interpretation of law, they simply did not need assistance from amici.[340] In addition, based on publicly available decisions, we have identified two instances which appear to meet the statutory requirements for appointing amici where the FISA Courts did not even consider doing so.[341] And the courts appear not to have appointed amici in any requests for individual surveillance applications under Title I of FISA, which may also raise important civil liberties questions.[342]

The current amicus pool is weighted towards former high-level government national security attorneys and technical experts. While these individuals have sterling qualifications and reputations, they also have had long careers defending, and in some cases developing, surveillance programs. This experience undoubtedly gives them valuable insights into the operation of government programs,

---

Justice (DOJ) and there are significant methodological differences between the FISA Courts' and the DOJ's reports, it is difficult to compare the earlier DOJ rejection rates to the more recent ones released by the FISA Courts. *See* 2017 FISC ANNUAL REPORT, *supra* note 172, at 4. *Cf.* U.S. DEP'T. OF JUSTICE, ANNUAL FOREIGN INTELLIGENCE SURVEILLANCE ACT REPORT TO CONGRESS (Apr. 30, 2018), https://www.justice.gov/nsd/nsd-foia-library/2017fisa/download [https://perma.cc/47PV-RGXS].

337. 2017 FISC ANNUAL REPORT, *supra* note 172, at 3.

338. 2018 FISC ANNUAL REPORT, *supra* note 162, at 3.

339. 2019 FISC ANNUAL REPORT, *supra* note 58, at 3.

340. *See supra* text accompanying notes 67–75 and 88–89.

341. *See supra* text accompanying notes 76–87 and 120–129.

342. OFF. OF THE INSPECTOR GEN., *supra* note 132.

but also feeds into the perception that the FISA Courts are reluctant to let civil liberties advocates into their long-insulated and secretive world.

Reformers who hoped that the inclusion of amici would result in more rights-respecting decisions from the FISA Courts will likely be disappointed. The influence of amici's views on the courts is apparent only in two sets of cases. The first set involved the 2015 and 2018 annual approvals of the Section 702 program, and in particular, the rules governing the FBI's searches of this warrantlessly-collected information.[343] Amici's argument for requiring the Bureau to document the foreign intelligence rationale for such searches, first raised in 2015, was eventually adopted by the FISC in 2018 in the face of flagrant FBI abuses of this controversial search authority. This remedy, while certainly a step in the right direction, is hardly a full response to the issues that the FISC itself had identified with FBI backdoor searches, which it had described as a violation of both the statute and the Fourth Amendment. Both the FISC and FISCR are likely correct in describing the recommendation as no more than a modest procedural hurdle, but its impact will only be known when (and if) information about its implementation becomes public.[344] The FISC did side with amici that clear statutory language required the Bureau to keep track of the number of Americans it searched for in Section 702 databases. Again, this is a step forward, but given the clear text of the provision at issue and its well-known history, a contrary conclusion would have been difficult to justify.

The second set of cases in which the amicus may have made a difference relates to the public's right of access to the opinions of the FISA Courts, where the FISCR in 2018 agreed with amicus Laura Donohue's position on the threshold issue of standing, although it did not explicitly adopt or reference her arguments.[345] When the case was remanded to the FISC, Judge Collyer engaged extensively with Donohue's arguments. While she agreed with Donohue's jurisdictional arguments, she disagreed sharply with her on substance. Donohue had argued that the FISA Courts were moving towards greater transparency by releasing more opinions, which serve a vital public function by "address[ing] weighty and important matters of constitutional and statutory law, which daily impact citi-

343. *See supra* text accompanying notes 211–292.

344. Memorandum Opinion and Order regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 95; *In re* DNI/AG 702(h) Certifications, at 42.

345. *See supra* text accompanying notes 293–310.

zens' rights."[346] Judge Collyer, however, fell back on the FISC's even longer history of secrecy and the risk of inadvertently releasing national security information as reflecting the court's essentially secret nature. She therefore denied the movants' claimed First Amendment right of public access.[347] The FISCR too refused to take up their appeal, taking the position that it did not relate to a pending "application" before the courts and fell outside the FISCR's jurisdiction.[348]

The presence of amici does seem to have led the FISA Courts to explicitly address civil liberties and transparency arguments. For the most part though, the courts have remained committed to their foundational decisions on statutory construction and constitutional parameters that validated expansive NSA surveillance programs. In the realm of foreign intelligence surveillance, the imperative of national security continues to weigh heavily and privacy concerns lightly, if at all, even when the persons impacted are Americans.

At the same time, the amicus provisions are nested within a broader set of efforts to increase transparency and confidence in the work of the FISA Courts. Their decisions are being declassified at a rate unimaginable in the years before the Snowden revelations, giving the policymakers and the public some insight into the operations of both the NSA and the courts, and allowing the type of robust analysis and critique typically accompanying the rulings issued by other courts. The NSA's retrenchment on two major programs that it previously claimed were absolutely essential to national security—"abouts" collection under Section 702 and bulk collection under Section 215[349]—may be attributable in part to the increased scrutiny of the agency's activities after Snowden, by the FISA Courts, Congress, and the public.

These positive trends should be built upon, especially since there is a risk that the public's window into NSA surveillance programs will narrow as the agency moves away from the programs disclosed by Snowden to newer ventures. The controversy surrounding the surveillance of Carter Page has triggered renewed interest in reforming FISA, including by re-imagining the role and authorities of amici. The Safeguarding Americans' Private Records Act (SAPRA), introduced by Sen. Ron Wyden (D-OR) and Rep. Zoe

346. Reply Brief for Amicus Curiae, *In re* Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, at 52.

347. *See supra* text accompanying notes 311–320.

348. *See supra* text accompanying notes 321–329.

349. *See supra* text accompanying notes 90–92.

Lofgren (D-CA) in January 2020 would give amici access to every opinion, transcript, pleading or other document of the FISC and FISCR.[350] With this information, amici would be able and are authorized to "raise any issue with the Court at any time," "whether or not such input was formally requested by the court."[351] Another option, proposed by Rep. Chris Stewart (R-UT), which would require an amicus "to assist such court in the consideration of any initial application for an order that seeks to target an identifiable United States person pursuant to sections 104, 303, 703, or 704" of FISA.[352]

Many of these ideas, including several of the recommendations that we developed in the course of our research, are reflected in the USA Freedom Reauthorization Act of 2020.[353] The House version of this law, which was adopted on a bipartisan basis in March 2020, included a handful of improvements. The Senate version of the bill, which was adopted overwhelmingly in May 2020, went much further in expanding the role and access of amici in FISA proceedings.[354]

---

350. The Safeguarding Americans' Private Records Act, H.R. 5675, 116th Cong. § 301(a)(4)(c) (2020) (Amici appointed by the FISA Courts "shall have access to unredacted copies of each opinion, order, transcript, pleading, or other document of the Court and the Court of Review.").

351. *Id.* § 301(a)(1)-(3). Similarly, the amendment to the USA Freedom Reauthorization Act of 2020 that was introduced in the Senate by Senators Mike Lee (R-Utah) and Patrick Leahy (D-Vt.) would empower amici to "raise any issue with the court at any time, regardless of whether the court has requested assistance on that issue. S. Amend. 1584 to H.R. 6172, § 302 (b)(1)(e), 116th Cong., 166 CONG. REC. S2427–8 (May 13, 2020).

352. FISA Improvements Act of 2019, H.R. 5396, 116th Cong. § 2(a)(1)(c) (2019). Section 104 (50 U.S.C. § 1804) and Section 303 (50 U.S.C. § 1823) concern FISC orders authorizing electronic surveillances and physical searches, respectively, to gather foreign intelligence information. Section 703 (50 U.S.C. § 1881b) allows the FISC to authorize an application for the collection of electronic communications of a U.S. person located outside the U.S. when the collection is conducted inside the U.S. Section 704 (50 U.S.C. § 1881c) provides additional protection for electronic communication collection activities directed against U.S. persons located outside of the U.S., including that the government must obtain an order from the FISC in situations where the U.S. person target has "a reasonable expectation of privacy and a warrant would be required if the acquisition were conducted inside the United States for law enforcement purposes." 50 U.S.C. § 1881c(a)(2) (2008).

353. Some of these recommendations were summarized by the authors in a post for *Just Security* in February 2020. Faiza Patel and Raya Koreh, *Improve FISA on Civil Liberties by Strengthening Amici*, JUST SEC. (Feb. 26, 2020), https://www.justsecurity.org/68825/improve-fisa-on-civil-liberties-by-strengthening-amici/ [https://perma.cc/P4RJ-489V].

354. USA FREEDOM Reauthorization Act of 2020, H.R. 6172, 116th Cong. § 302(a) (2020); S. Amend. 1584 to H.R. 6172, 116th Cong., 166 CONG. REC. S2427–8 (May 13, 2020).

This version has been met by resistance on the part of the Department of Justice, which argues that it would give amici access to too much information in FBI files and court records and "would put at risk our productive relationships with foreign partners and their willingness to share information with us."[355] President Trump, who remains convinced that his campaign was illegally targeted for surveillance under FISA, has threatened to veto the reauthorization bill altogether.[356] Nonetheless, for the amici to add value to the proceedings of the FISA courts, reforms must be undertaken—by Congress or the FISA Courts—along the lines set out below.

Recommendation: Increase amicus participation in FISA Court proceedings

Congress should broaden the range of situations meriting the appointment of amici in five ways.

First, the NSA is continually developing new technologies and programs and their impact on privacy and civil liberties should be subject to amicus input. These initiatives may raise novel or significant interpretations of law but could also be treated by the courts as applications of existing precedent, putting them outside the scope of the USA Freedom Act's amicus provision. Accordingly, Congress should mandate amicus participation where the FISA Courts are being asked to approve new technologies or programs and new applications of existing technologies.

Second, there may be instances in which the FISA Courts are asked to consider issues that may not fall precisely under standards focused on novelty or significance, but nonetheless have serious civil liberties implications.[357] For example, as far as the public re-

355. Betsy Woodruff Swan, *Trump officials detail opposition to federal surveillance bill*, POLITICO (May 27, 2020), https://www.politico.com/news/2020/05/27/trump-officials-fisa-bill-285387 [https://perma.cc/N2CR-VK8B]; Press Release, Statement by Assistant Attorney General Stephen E. Boyd on the House of Representative's Consideration of Legislation to Reauthorize the U.S.A. Freedom Act (May 27, 2020), https://www.justice.gov/opa/pr/statement-assistant-attorney-general-stephen-e-boyd-house-representative-s-consideration [https://perma.cc/HS9G-ZFXP] ("Although that legislation was approved with a large, bipartisan House majority, the Senate thereafter made significant changes that the Department opposed because they would unacceptably impair our ability to pursue terrorists and spies."). *See also* Steven T. Dennis, *Senate Backs Revival of Lapsed Surveillance Authorities*, BLOOMBERG (May 14, 2020), https://www.bloomberg.com/news/articles/2020-05-14/senate-backs-revival-of-lapsed-surveillance-authorities [https://perma.cc/6D36-55DL].

356. Donald J. Trump, TWITTER (May 27, 2020, 6:16 PM), https://twitter.com/realDonaldTrump/status/1265768877427851265?s=20 [https://perma.cc/7TJ9-ZFSA].

357. *See* PCLOB SECTION 215 REPORT, *supra* note 42, at 189.

cord reflects, the courts have not appointed amici in any case involving a FISA Title I order. 2014 media reports that FISA surveillance orders had been issued for the communications of Muslim American leaders suggest that these concerns raise civil liberties issues.[358] More recently, President Trump and his supporters have argued that the surveillance of Carter Page was political motivated. And although the DOJ Inspector General did not find evidence of political bias in that investigation, he documented serious flaws in the handling of the case,[359] and the DOJ conceded that at least two of the Page surveillance orders did not meet the legal standard.[360] This is not an isolated instance. The Inspector General's review of additional files uncovered errors and a failure to follow internal rules in a number of applications submitted to the FISC.[361] To address these types of concerns, Congress should strengthen the role of amici in Title I proceedings by mandating the appointment of amici for individual surveillance applications that involve political or religious activities.[362]

There is strong bipartisan support in Congress for such an expansion. The House version of the USA Freedom Reauthorization Act of 2020, which passed by a bipartisan vote of 278-136, would require an amicus appointment in any case that presents "exceptional concerns about the protection of the rights of a United States person under the first amendment to the Constitution," unless the court finds such an appointment inappropriate.[363] The Senate version further expands the situations where amicus should be appointed to include: any case that presents or involves a sensitive

358. Greenwald & Hussain, *supra* note 131.

359. *See supra* text accompanying notes 132–142; *see also supra* note 133.

360. Order Regarding the Handling and Disposition of Information, *In Re* Carter W. Page, A U.S. Person, *supra* note 134.

361. *See* Management Advisory Memorandum from Horowitz to Wray, regarding the Audit of the Federal Bureau of Investigation's Execution of its Woods Procedures for Application Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons, *supra* note 152.

362. The bill introduced by Sen. Ron Wyden (D-OR) and Rep. Zoe Lofgren (D-CA) also identifies targeting based on these types of factors as a potential problem and requires the DOJ Inspector General to submit a report to Congressional committees on the use of "activities and expression protected by the first amendment to the Constitution of the United States" and "[r]ace, ethnicity, national origin, religious affiliation, and such other protected classes as the Inspector General considers appropriate" in applications for orders under Section 215 and "investigations for which such orders are sought." The Safeguarding Americans' Private Records Act, H.R. 5675, 116th Cong. § 112(b) (2020).

363. USA FREEDOM Reauthorization Act of 2020, H.R. 6172, 116th Cong. § 302(a) (2020).

investigative matter, including those involving the activities of domestic public officials, political candidates, or their staffers; domestic religious or political organizations, or individuals prominent in such organizations; or the domestic news media.[364]

Third, Congress should mandate amicus participation in the FISA Courts' reviews of the government's requests for authorizations relating to programmatic surveillance, i.e., for Section 702, the Section 215 call records program if it is restarted, and any future form of programmatic surveillance.[365] These programs affect at least thousands of Americans and the public record shows they present significant and repeated compliance problems. For example, the FISC's decisions discussed above show how the FBI has misused its Section 702 backdoor search authority,[366] as well as the repeated failure of the NSA to comply with court-imposed rules for Upstream "abouts" collection which eventually led to the discontinuation of the program.[367] Similarly, the government has misused the Section 215 call detail records program. In 2009, the DOJ disclosed to the FISC that the NSA had been automatically querying an "alert list" of about 18,000 phone numbers against its phone records database, even though about ninety percent of the numbers on the list did not meet the FISC-mandated standard of "reasonable, articulable suspicion" of being associated with terrorism.[368] And in 2018, the NSA reported that it had acquired records not authorized by the FISC, eventually suspending the program.[369] The evidence shows that these programs require the ongoing check that an amicus provides.[370] The Senate's version of the

364. S. Amend. 1584 to H.R. 6172, §§ 302 (a)(1)-(2). Like the House version and the current novel/significant amicus provision, the Senate version allows to the court to avoid appointing an amicus if it issues a finding that such appointment is inappropriate.

365. *Reauthorizing the USA Freedom Act of 2015: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 28–29 (2019) (statement of Elizabeth Goitein, Co-Director, Liberty and National Security Program, Brennan Center for Justice).

366. *See supra* text accompanying notes 213–257.

367. *See supra* text accompanying notes 120–129.

368. *See* Order Regarding Preliminary Notice of Compliance Incident Dated January 15, 2009, *In re* Production of Tangible Things from [REDACTED], No. BR 08-13 (FISA Ct. Jan. 28, 2009), https://www.eff.org/sites/default/files/filenode/br_08-13_alert_list_order_1-28-09_final_redacted1.ex_-_ocr_0.pdf [https://perma.cc/NNG4-JDUL]; PCLOB SECTION 215 REPORT, *supra* note 42, at 47–48.

369. *See supra* text accompanying notes 90–92.

370. Another option, as proposed in SAPRA, is to require the FISA Courts to "randomly select an amicus curiae" from the amicus pool to assist with each Section 702 certification. The Safeguarding Americans' Private Records Act, H.R. 5675, 116th Cong. § 301(b)(1)(d) (2020).

USA Freedom Reauthorization Act of 2020 includes this mandate, requiring the FISA Courts to appoint an amicus whenever a case "presents a request for reauthorization of programmatic surveillance, unless the court issues a finding that such appointment is not appropriate."[371]

Fourth, Congress should expand the mandatory amicus appointment provision beyond "application[s] for an order or review."[372] As demonstrated in the recent denial of the ACLU and Yale clinic's petition for review in the public right of access case, the FISCR has defined "application" in the amicus provision narrowly to refer solely "to an application made by the Government *ex parte* and *in camera* for foreign intelligence surveillance."[373] The benefit of an amicus's privacy and civil liberties expertise should not be limited to the court's consideration of applications. Publicly available documents show that amici have provided critical expertise in situations not involving an application by the government, such as the above-mentioned motion involving the public's right to access court records and the FISCR's consideration of questions related to the use of pen registers and to movants' standing to seek access to judicial records.[374] The Senate version of the USA Freedom Reauthorization Act would address this issue by requiring amicus appointments in specified instances to assist "in the consideration of any application *or motion* for an order or review."[375] Congress should further strengthen this provision by clarifying that amici should assist in the consideration of certified questions as well.

Fifth, Congress should clarify that amici are permitted to provide the court with their views on any topic raised by the order or review for which they have been selected. This seems to have been the intention behind the provision, which provides that amici should be appointed "to assist in the consideration of any application for an order or review" that meets the standard of presenting a novel or significant interpretation. It does not limit amici to addressing *just* those novel or significant interpretations.[376] Nonetheless, at least in the Section 702 certification cases, amici were only appointed with respect to specific issues rather than the full set of

371. S. Amend. 1584 to H.R. 6172, § 302 (a)(1)(A).

372. 50 U.S.C. § 1803(i)(2)(A).

373. *In re* Opinions & Orders by the FISC Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, *supra* note 323, at 13; *See supra* discussion accompanying notes 321–326.

374. *See supra* discussion accompanying notes 192–207 and 301–320.

375. S. Amend. 1584 to H.R. 6172, § 302(a)(1) (emphasis added).

376. USA FREEDOM Act of 2015, sec. 401, § 1803(i)(2)(A).

issues before the FISC. During the FISC's review of the government's annual Section 702 certifications for 2018, the FISC appointed amici to address two questions relating to "abouts" collection.[377] But the case also raised the issue of whether the FBI's practice of conducting "batch queries" comports with Fourth Amendment and its statutory authority. Amici's views could have resulted in a more thorough analysis by the FISC of the serious legal issues raised by these queries.[378] The Senate version of the USA Freedom Reauthorization Act of 2020 addresses this as well, stating that the amicus "may seek leave to raise any novel or significant privacy or civil liberties issue relevant to the application or motion or other issue directly impacting the legality of the proposed electronic surveillance with the court, regardless of whether the court has requested assistance on that issue."[379]

The FISA Courts do not need to wait on Congress to increase amicus participation. They could broaden their interpretation of what constitutes a novel or significant legal issue requiring amicus participation, including in Title I cases. Moreover, the courts have always been free to appoint amici under their inherent authority, which was reiterated in the USA Freedom Act.[380] In the early days after the passage of the law, the FISC used this general amicus provision to appoint amici because the novel/significant provision required the selection of amici from a pool, which had not yet been designated.[381] They also used this provision to appoint John Cella as amicus to assist in the proceedings relating to 2018 Section 702 certifications.[382] Most recently, the FISC used this provision to appoint David Kris to assist in evaluating changes to FBI procedures after the Justice Department's Inspector General's report showed that the court was not being provided complete information.[383] The FISC and the FISCR should continue and expand their use of this mechanism but should widen the pool of individuals they con-

377. *See* Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 4.

378. *See supra* text accompanying notes 243–247. Since there is no reference to amici's views on batch queries in the FISC opinion and the issue was not among those on which they were asked to opine, we assume they did not weigh in on batch queries. However, amici's briefs are not publicly available, so it is impossible to know for certain whether they provided the FISC with any input on batch queries.

379. S. Amend. 1584 to H.R. 6172, § 302(b)(1)(E).

380. USA FREEDOM Act of 2015, sec. 401, § 1803(i)(2)(B).

381. *Id.* §§ 1803(i)(1)-(2), § 401(i)(2); *see also supra* note 172.

382. *See supra* note 237; *see also supra* text accompanying notes 236–288.

383. *See supra* text accompanying notes 133–142.

sider for these appointments to include more people who do not have a record of government service as discussed below.

Recommendation: Prioritize Privacy and Civil Liberties Interests

In the USA Freedom Act of 2015, Congress made it clear that amici appointed in cases involving novel or significant legal issues should advocate for individual privacy and civil liberties, while allowing for other types of arguments and expertise from amici that the FISA Courts would find useful.[384] The FISA Courts, however, have a mixed record of receptivity to civil liberties amici. Congress should require the FISA Courts to appoint at least one amicus with expertise in civil liberties in every case meriting the appointment of amici, a proposal included in the Senate version of the USA Freedom Reauthorization Act of 2020.[385] Another way of increasing civil liberties voices in FISA Court proceedings is to give groups and individuals not designated by the court sufficient notice that they can move to participate. SAPRA, the bill introduced by Sen. Wyden and Rep. Lofgren, for example, includes a provision that requires the FISA Courts to publish novel questions of law it is considering in order to obtain briefs from third parties.[386] Such publication must take place to the greatest extent practicable without "disclosing classified information, sources, or methods."[387] This type of publication would both increase transparency about the court's docket and allow a range of voices to provide their views to the courts.[388]

The FISA Courts themselves are well positioned to enhance the perception of their commitment to protecting civil liberties by recalibrating the amicus pool to include more individuals who have not served in national security positions in the government. Given that the amicus structure will be an ongoing feature of the courts'

384. USA FREEDOM Act of 2015, sec. 401, § 1803(i)(4).

385. S. Amend. 1584 to H.R. 6172, § 302(a)(1)(A) (requiring the FISA Courts to appoint one or more individuals in particular circumstances, "not less than one of whom possesses privacy and civil liberties expertise, unless the court finds that such a qualification is inappropriate").

386. The Safeguarding Americans' Private Records Act, H.R. 5675, 116th Cong. § 301(a)(5) (2020). The bill also includes a provision requiring the of publication of certified questions of law for review by the FISCR. *Id.* § 301(c)(1).

387. *Id.*

388. The FISA Courts have already accepted briefs from third parties in some instances, including granting the Reporters Committee for the Freedom of the Press's motion for leave to file an amicus brief during the FISCR's review of the public right of access case. *See* Motion of the Reporters Committee for Freedom of the Press for Leave to File Brief as Amicus Curiae Supporting Movants, *supra* note 301.

work, they have time to vet and appoint amici with civil liberties backgrounds who can obtain the security clearances necessary to allow them to participate in future cases. Defense counsel appearing before the Guantanamo military commissions, for example, provide a precedent for doing so.[389] The courts should also refrain from appointing individuals involved in approving or implementing a surveillance program or defending it before Congress or in judicial proceedings to serve as amicus in cases involving those programs. The FISCR Rules of Procedure already includes a rule to avoid conflicts of interest in amicus appointments, which could be expanded to cover these types of situations.[390]

Recommendation: Enhance the Effectiveness of Amici

For amici to be able to provide their critical perspective and participate in FISA Court proceedings to the fullest extent, Congress should ensure that amici have access to all necessary materials and provide a pathway for amici to appeal. These types of provisions were suggested during the reform debate that led to the passage of the USA Freedom Act, and versions also appear in SAPRA and both the House and Senate versions of the USA Freedom Reauthorization Act of 2020.

First, Congress should ensure that amici have available all relevant documents and information that would allow them to make the best arguments. The USA Freedom Act left it up to the appointing court to decide on an amicus' access on a case by case basis.[391] The documents made available to amici have only been publicly identified in two instances. The FISC order appointing Preston Burton as amicus curiae in the case concerning the retention of Section 215 data for litigation and technical purposes, notes that the court determined that the government's application (including exhibits and attachments) and the full, unredacted Primary Order in the docket were relevant to the duties of the amicus, and those materials were provided to him.[392] The FISC order ap-

389. *See* THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW 42–43, 141–42 (Mark P. Denbeaux et al. eds., 2009).

390. FISA CT. REV. R. 15(d).

391. Amici assigned to a case in the FISA Courts "shall have access to any legal precedent, application, certification, petition, motion, or such other materials *that the court determines are relevant* to the duties of the amicus curiae." USA FREEDOM Act of 2015, sec. 401, § 1803(i)(6)(A)(i) (emphasis added).

392. Order Appointing an Amicus Curiae, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], No. BR 15-99, *supra* note 172, at 4. Burton also noted in his amicus brief that he requested and received access to the unredacted, classified version of the Department of Justice Office of the Inspector General's May 2015

pointing Amy Jeffress as amicus in the 2015 Section 702 case listed the materials she received, which included the government's submissions and certifications, and relevant previous decisions of the FISA Courts.[393] Jeffress' amicus brief mentions that she also received the full report of the PCLOB on the Section 702 program.[394] She reported receiving a "briefing from Judge Hogan and the staff of the Foreign Intelligence Surveillance Court ("FISC") concerning the questions presented."[395] However, Jeffress also noted that she lacked access to the FBI's 2011 Minimization Procedures, which were relevant to her analysis of the court's precedent and the 2011 FISC decision approving the government's Section 702 application.[396] Since several amicus briefs are not publicly available, it is difficult to assess if other amici were hindered in their mandate by a lack of information.

Moreover, given the repeated compliance issues with Title I surveillance applications uncovered by the DOJ Inspector General, the supporting documentation underlying applications for electronic surveillance or physical search under FISA, including accuracy reviews and any exculpatory evidence, should be made available to both the FISA Court and amici appointed in those cases.

The Senate version of the USA Freedom Reauthorization Act of 2020 includes provisions requiring the government to provide the court and amici such supporting documentation. It also mandates that amici be provided access to a broad range of materials, including unredacted copies of each opinion, order, transcript, pleading, or other document, and any relevant legal precedent, including any such precedent that is cited by the government.[397] These provisions are a significant shift from the current law, which requires that amici be provided with materials only "to the extent consistent with the national security of the United States" and determined by the court to be "relevant to the duties of the amicus curiae."[398] The Department of Justice has opposed the Senate bill

report, *A Review of the FBI's Use of Section 215 Orders*. *See* Memorandum of Law by Amicus Curiae Regarding Government's August 27, 2015 Application to Retain and Use Certain Telephony Metadata after November 28, 2015, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED], *supra* note 189, at 4 n.4.

393. Order Appointing an Amicus Curiae, [REDACTED], *supra* note 172.

394. Jeffress Amicus Brief, *supra* note 213, at 2–3.

395. *Id*. at 2.

396. *Id*. at 22 n.6.

397. *See* S. Amend. 1584 to H.R. 6172, §§ 207(a), 302(c)(1).

398. USA FREEDOM Act of 2015, sec. 401, § 1803(i)(6).

in part because of the lack of national security exception to the amicus's access to materials, arguing that it would jeopardize relationships with foreign partners.[399] This position suggests an unwarranted lack of trust in both the FISA Courts and amici who are cleared for access to classified information and could be construed as born of an impulse to hide problems of the sort that have recently come to light in the reviews triggered by the Carter Page surveillance applications.

Second, Congress should provide amici with a path to requesting appellate review from the FISCR. As the discussions above demonstrate, a single FISC judge is often charged with deciding cases that shape surveillance programs affecting the privacy of hundreds of millions of people around the world. If the government disagrees with the judge's decision, it can appeal, but amici have no way of even bringing the issue to the attention of the FISCR. As a result, "erroneous decisions against the government will be corrected, but erroneous decisions in the government's favor will remain on the books, undermining the integrity and quality of the case law."[400]

While standing concerns have often been cited as a reason for preventing a traditional right of appeal for amici,[401] they should not stand in the way of allowing amici to bring to the attention of the FISCR issues that it believes were wrongly decided by a FISC judge. The FISCR has in the past decided to consider issues that were not appealed by the government (the pen register case),[402] so there is a path for it to decide on taking up an issue raised by amici. Both the House and Senate versions of the USA Freedom Reauthorization Act of 2020 include a mechanism to ensure that amici have the ability to raise issues without triggering standing concerns.[403] Amici would be permitted to petition the FISC to cer-

399. Woodruff Swan, *Trump officials detail opposition to federal surveillance bill*, *supra* note 355; Press Release, Statement by Assistant Attorney General Stephen E. Boyd, *supra* note 355.

400. *Reauthorizing the USA Freedom Act of 2015*: *Hearing Before the* S. *Comm. on the Judiciary*, *supra* note 365, at 29 (statement of Elizabeth Goitein).

401. *See* NOLAN, THOMPSON & CHU, *supra* note 34, at 26.

402. *See supra* text accompanying notes 192–207.

403. USA FREEDOM Reauthorization Act of 2020, H.R. 6172, 116th Cong. § 302(b)(2) (2020); Similarly, SAPRA's appeal provision would have allowed amici appointed under the novel/significant amicus provision to apply to the FISC to refer the matter for en banc review or to the FISCR as the court "considers appropriate" and would permit amici appointed to assist the FISCR can apply to the court to refer the decision to the Supreme Court for review as the court "considers appropriate." The Safeguarding Americans' Private Records Act, H.R. 5675, 116th Cong. § 301(a)(2)(b) (2020).

tify a question of law to the FISCR, and if the petition is refused, the FISC "shall provide for the record a written statement of the reasons for such denial."[404] If a question is taken up by the FISCR following a petition, the bill requires the FISCR to appoint the amicus in its consideration of the question, unless the court issues a finding that such appointment is inappropriate.[405] A similar process would be available to amici to petition the FISCR to certify a question of law to the Supreme Court, but the FISCR would not be required to provide the reasons for any denial.[406]

Even absent Congressional action, the FISA Courts could act to improve amici's access to information by finding ways to permit sharing of information among amici. Amici tend to have a narrow window into the programs or issues for which they are appointed and cannot consider them in the context of the government's other programs, even those that are intimately related. Amici also operate mostly in isolation, unable to discuss the difficult issues they must address with colleagues, not even other amici who have security clearance. These issues could be addressed by appointing several amici for a single matter. Such appointments are permitted by Section 401 of the USA Freedom Act, upon application by amici,[407] and the FISC used this mechanism for the 2018 Section 702 certifications.[408] This is not a perfect solution because amici would have no window into other programs that might inform their assessment and arguments, but would nonetheless be helpful.

Recommendation: Increase Transparency

While transparency is one of the areas in which there has been progress, three changes would greatly improve the public's understanding of, and confidence in, the FISA Courts' work.

First, the lack of a complete docket makes it difficult for the public to assess the extent to which amici are involved in pending cases, especially given variations in the timing of declassification decisions (anywhere from same-day release to over twelve years delay).[409] It is telling that when the FISC recently evaluated its history

404. USA FREEDOM Reauthorization Act of 2020, H.R. 6172, 116th Cong. § 302(b)(2) (2020).

405. *Id.*

406. *Id.*

407. 50 U.S.C. §1803(i)(5) (2009).

408. *See* Memorandum Opinion and Order Regarding the 2018 FISA Section 702 Certifications, *supra* note 108, at 4; *supra* text accompanying notes 236–238.

409. For instance, an opinion issued by FISC Judge Michael J. Davis was released on August 20, 2018, but its date of issuance is redacted. Judge Davis served on the FISC from 1999 to 2006, so the time period between issuance and release of this opinion was at least twelve years. Order and Opinion, [REDACTED], No. [RE-

of releasing court documents, it turned to a chart submitted to the court by amicus Laura Donohue cataloging released orders and opinions not the court's own website or records.[410] Congress should remedy this lacuna by requiring the courts to publish a redacted annual docket indicating their caseload and showing the cases in which amici have been appointed and by setting guidelines (or better yet, deadlines of the sort included in the 2020 reform bills[411]) for the declassification of decisions.[412] Alternatively, the courts could publish such a docket at their own initiative, consulting with the Department of Justice and other agencies as necessary on redactions.

Second, to further build public confidence in the FISA Courts, Congress should formalize the procedure for the declassification of amicus briefs. Thus far, of the 13 publicly known cases[413] following the USA Freedom Act in which amici have been appointed, briefs from only six have been declassified.[414] Without the briefs, the public is unaware of the full extent of the arguments put forward by amici and instead must rely on the courts' recap of the parts of

---

DACTED] (FISA Ct. [REDACTED]) (Davis, J.), https://www.dni.gov/files/documents/icotr/08202018/0820218_Document-5.pdf [https://perma.cc/M4QD-CR9K]; FOREIGN INTELLIGENCE SURVEILLANCE COURT, FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW: CURRENT AND PAST MEMBERS (2013), https://assets.documentcloud.org/documents/727664/fisc-fiscr-members-1978-2013.pdf [https://perma.cc/WTK5-7JD8]. Our analysis of published data shows that about half of the decisions that have been declassified since the USA Freedom Act became law took over three years from the date of issuance to be released to the public. Decisions issued post-USA Freedom were released, on average, within three months of issuance. Note that the dates of issuance for several released decisions have been fully redacted. Those decisions were excluded from these calculations.

410. *See supra* text accompanying notes 311–320; *see also FISC/FISCR Opinions*, *supra* note 47.

411. For instance, the USA Freedom Reauthorization Act of 2020 would require declassification reviews to be completed within 180 days. USA FREEDOM Reauthorization Act of 2020, H.R. 6172, 116th Cong. § 301(a) (2020).

412. The USA Freedom Act does provide for more timely notification to Congress. The Attorney General is required to provide Congress with copies of FISA Court decisions, orders, opinion, etc. that include a "significant construction or interpretation of any provision of law" within 45 days after it is issued. In addition, every 6 months as part of a semi-annual report, the Attorney General is required to "submit to the Permanent Select Committee on Intelligence of the House of Representatives, the Select Committee on Intelligence of the Senate, and the Committees on the Judiciary of the House of Representatives and the Senate, in a manner consistent with the protection of the national security . . . copies of all decisions, orders, or opinions . . . that include significant construction or interpretation of the provisions of this chapter." 50 U.S.C. § 1871(c) (2009).

413. *See supra* note 58.

414. *See supra* text accompanying notes 174.

amici's briefs they consider in their decision-making. The procedure could be modeled on the one used for court decisions and orders,[415] but modified to take account of the fact that amici will likely only be appointed in a subset of cases which will almost certainly be of public interest. Thus, Congress should require the Director of National Intelligence, acting in consultation with the Attorney General, to expeditiously conduct declassification reviews of all amicus briefs submitted to the FISA Courts, with the aim of making these publicly available to the greatest extent possible. As with FISA Court decisions, the DNI should be permitted to withhold briefs if "necessary to protect the national security of the United States or properly classified intelligence sources or methods," but in that case they must publish an unclassified statement summarizing the legal arguments made by amici.

Third, Congress should mandate transparency around the interactions between the Department of Justice and the staff of the FISA Court. As discussed above, the extensive consultations between DOJ staff and the staff serving the FISC judges creates the perception that the court is assisting the government in crafting acceptable surveillance requests.[416]

* * * * *

The history of foreign intelligence surveillance in the U.S. illustrates how weak limits on surveillance and insufficient oversight lead to abuse. This Article details the impact of one aspect of the reform efforts relating to the NSA's surveillance programs—the USA Freedom Act's amicus provisions—which, for the first time, aimed to inject an explicitly civil liberties and privacy-minded perspective into the FISA Courts' processes. Based on our analysis, the involvement of amici in the FISA Courts has not yet led to any substantial constraints on surveillance, in part due to the judges' hesitance to appoint amici and deference to the government's national security arguments. While the positive influence of amici can be seen in a few FISA Court decisions, the statutory and institutional

415. USA FREEDOM Act of 2015, sec. 402(a). *See also supra* notes 48 and 295.

416. *See supra* text accompanying notes 334–338. The bill proposed by Rep. Chris Stewart bill includes a requirement that the Attorney General maintain records of all written or oral communications between the DOJ and the FISA Courts. FISA Improvements Act of 2019, H.R. 5396, 116th Cong. § 2(d) (2019). Neither the House nor Senate versions of the USA Freedom Reauthorization Act of 2020 contain a provision for transparency regarding the interactions between the DOJ and the staff of the FISA Court. USA FREEDOM Reauthorization Act of 2020, H.R. 6172.

limits on the impact of amici are significant. This Article proposes reforms for Congress and the FISA Courts themselves to maximize the potential for amici to effect change from within the FISA Court system. These changes will improve the functioning of amici in the FISA Courts and contribute to greater public confidence in a system that—despite recent progress in transparency—continues to operate in secret.

THE NSA, THE METADATA PROGRAM, AND THE FISC

*GEOFFREY R. STONE**

In the fall of 2013, after Edward Snowden's leaks of classified information, President Obama appointed me to serve on a five-person Review Group charged with evaluating the National Security Agency's (NSA) foreign intelligence surveillance programs. This was an extraordinary experience, and I thought I would reflect a bit on that experience this afternoon.

In our first meeting in the situation room, President Obama told us that he wanted the Review Group to serve as an independent body that would advise him about how best to strike an appropriate balance between protecting national security and preserving civil liberties. He made it very clear that he wanted us to be rigorous, tough-minded, and honest in every way.

We were a diverse group in terms of our professional backgrounds, experiences, and ways of thinking about these issues. There was Michael Morell, who had spent his career with the Central Intelligence Agency (CIA), including two stints as acting director; Richard Clarke, a veteran of the State and Defense Departments in four presidential administrations and an expert in cybersecurity; Peter Swire, a professor at Georgia Tech who had served in both the Clinton and Obama administrations as an expert on issues of privacy and information technology; and Cass Sunstein, one of our nation's most distinguished legal scholars who had just finished a stint in the Office of Management and Budget during the Obama administration. And then there was me, a constitutional law professor at the University of Chicago and a self-professed civil libertarian. It was quite clear, given the makeup of the Review Group, that we would agree on nothing. As Susan Rice later commented to us, we were "five highly egotistical, high-testosterone guys" who were being "thrown in a room together, with nobody in charge, and expected to solve a set of intractable problems."

But as we spent five months together, working three or four days each week in a secure facility in our nation's capital, we came to trust, respect, and learn from one other so much that, to our amazement, we eventually produced a 300-page report including

* Edward H. Levi Distinguished Service Professor of Law, The University of Chicago.

forty-six *unanimous* recommendations.[1] None of us would have imagined that that was possible when we began.

Before turning to specific recommendations, I should offer two general observations. The first concerns the NSA. From the very outset, I approached my responsibilities as a member of the Review Group with great skepticism about the NSA. I assumed that the most problematic surveillance programs that Edward Snowden had brought to light were the result of an NSA run amok. I could not have been more wrong. In the end, I came away with a view of the NSA that I found quite surprising.

Not only did I find that the NSA had helped to thwart numerous terrorist plots against the United States and its allies in the years since 9/11, I also found that it was an organization that operated with a high degree of integrity and a deep commitment to the rule of law. The Review Group found no evidence that the NSA had knowingly or intentionally engaged in unlawful or unauthorized activity. To the contrary, it worked hard to ensure that it operated within the bounds of its authority.

This is not to say that the NSA should have had all of the authorities it was given. As I discuss in more detail below, the Review Group found that many of the programs undertaken by the NSA, such as the Section 215 Metadata Program, were highly problematic. But the responsibility for directing the NSA to carry out those programs rested not with the NSA itself, but with the Executive Branch, the Congress, and the Foreign Intelligence Surveillance Court (FISC), which expressly authorized those programs.

To be clear, I am not saying that we should trust the NSA. We should not. The NSA, like the Federal Bureau of Investigation (FBI), the CIA, and similar agencies of government, necessarily has broad powers of surveillance and investigation. There is always the risk that such agencies will abuse those powers to the detriment of the nation. The NSA should therefore be subject to constant and rigorous review and oversight. The work it does, although important to the safety of our nation, poses great dangers to core American values. Careful and ongoing oversight of the NSA and its programs is therefore imperative.

My second general observation concerns the issue of oversight. As a member of the Review Group, I had a rare opportunity to ob-

1. *See* RICHARD A. CLARKE, MICHAEL J. MORELL, GEOFFREY R. STONE, CASS R. SUNSTEIN & PETER SWIRE, THE NSA REPORT: LIBERTY AND SECURITY IN A CHANGING WORLD: THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES (2014).

serve and evaluate the various mechanisms our government uses to oversee the activities of our nation's intelligence agencies. At the structural level, I was surprised by the variety and range of oversight mechanisms in place. The NSA's activities, for example, are overseen by the NSA's Inspector General, the Director of National Intelligence, the FISC, the Department of Justice, the Privacy and Civil Liberties Oversight Board, and the Senate and House Intelligence Committees. Cumulatively, we found that these oversight mechanisms worked reasonably well when it came to ensuring that the NSA properly implemented the authorities it had been given.

We were less impressed, though, with oversight of a different sort. Once the government, whether the Executive Branch, the Congress, or the FISC, authorized the intelligence agencies to undertake certain types of surveillance, there was insufficient attention to whether the programs instituted under those authorities could or should be refined and improved over time. This sort of retrospective oversight—constantly evaluating and re-evaluating programs to ensure that they are properly designed to respect fundamental interests in individual privacy and civil liberties—is absolutely essential. The issue here is not whether the intelligence agencies are violating the rules, but whether the rules themselves should constantly be re-examined.

This is so, because with experience over time it is often possible to identify ways in which programs can be refined and narrowed in order to strike a better balance between the interests of national security and individual liberty. That, indeed, was the central theme of the Review Group's recommendations. What we found, in program after program, was that significant refinements could and should be made that would better protect personal privacy and individual freedom without unduly interfering with the capacity of these programs to keep our nation safe. That an extraordinary and ad hoc institution like the Review Group was necessary to bring these recommendations to light suggested, quite strongly, that existing oversight mechanisms were not performing this function adequately.

Let me turn now to two of the Review Group's specific recommendations. The report contains forty-six recommendations, but that understates the number of issues addressed. Many of our recommendations had multiple subparts, so there were about 200 recommendations in all. The recommendations addressed a broad range of issues, but I will focus, for illustrative purposes, on two areas: the collection of telephone metadata and the role of the FISC.

Before 1978, when the government engaged in foreign intelligence surveillance, whether in the United States or abroad, it was subject only to the discretion of the President as commander in chief. There were no legislative restrictions, and there was no judicial involvement or oversight of anything the President did in the name of foreign intelligence surveillance. In the 1970s, grave abuses by the FBI, the CIA, the NSA, and Army Intelligence under the auspices of J. Edgar Hoover, Lyndon Johnson, and Richard Nixon came to light. For various, though mostly political, reasons, they had engaged in surveillance of American citizens that was understood to be inappropriate—and in some instances illegal—and often highly invasive of privacy beyond the scope of any agency's authority.[2]

Congress decided to do something to rein this in, ultimately resulting in the Foreign Intelligence Surveillance Act of 1978.[3] That legislation did many things, but most importantly, it brought various elements of foreign intelligence surveillance under the rule of law through the creation of the FISC, which for the first time empowered judges to oversee foreign intelligence surveillance that took place inside the United States.

Ordinary federal courts do not have security clearances, and a great deal of foreign intelligence information is classified. Therefore, you could not have an ordinary federal judge deciding whether the executive branch could undertake a foreign intelligence wiretap. The FISC enabled judges to play their traditional role in overseeing what the executive branch did in the classified realm. The court was authorized to deal with foreign intelligence surveillance that took place inside the United States. What the President did outside the United States was regarded as beyond the scope of even Congress's business at that time.

From the late 1970s until 9/11, that process worked reasonably well. There was a wake-up call after 9/11, though, and public support grew for granting the intelligence agencies much greater capacity in order to prevent such attacks in the future. Congress made a number of modifications to the Foreign Intelligence Surveillance Act in the wake of 9/11 to strengthen the agencies' ability to ferret out information about possible terrorist plots.

2. *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 496–97 (2004).

3. 50 U.S.C. §§ 1801–1885.

One of the provisions of the new legislation was Section 215 of the Foreign Intelligence Surveillance Act,[4] which authorized the agencies to go to the FISC to obtain an order based on reasonable and articulable suspicion that a suspect was engaged in international terrorist activity.

If the agencies made such a showing, the FISC could then issue an order that authorized them to go to banks, credit card companies, telephone companies, internet companies, etc., and serve the equivalent of a subpoena demanding records about the individual in question.

In 2006, as technology changed, the NSA came to the FISC and proposed a new program to gather telephone metadata from huge numbers of phone calls that took place in the United States—and to hold that data for five years. That metadata consists of phone numbers: every phone number covered by the order, every number called by every phone number covered by the order, and every number that calls every phone number covered by the order. It doesn't include names, it doesn't include geographical locations, and it doesn't include content, but it includes huge amounts of numbers, typically covering tens if not hundreds of millions of Americans each year.

The intelligence agencies wanted this information because they now had the technological capability to manage a database of that magnitude. The FISC, the Senate and House intelligence committees, and the Department of Justice approved the program.[5] It enabled the NSA, when it had reasonable and articulable suspicion that a particular telephone number—almost invariably a number outside the United States—was associated with a person suspected of terrorist activity, to query the database. That is, an NSA analyst could type in the phone number of the suspected terrorist and the database would return information about the numbers with which the suspect's number was in contact.

The idea was to connect the dots. Although the program collected massive amounts of data, it was designed not to reveal that

4. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act") of 2001, Pub. L. 107-56, § 215, 115 Stat. 272, 287 (2001) (codified as amended at 50 U.S.C. § 1861(a)(1) (2006 & Supp. V 2011)).

5. *See In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Telecommunications Providers] Relating to [Redacted version], Order No. BR-05 (FISA Ct. May 24, 2006). The government explained the rationale for the program in FEDERATION OF AMERICAN SCIENTISTS, BULK COLLECTION OF TELEPHONY META-DATA UNDER SECTION 215 OF THE USA PATRIOT ACT 35 (Aug. 9, 2013).

data to the NSA indiscriminately. When the analysts queried a suspected number, the information they received reflected only the numbers associated with other suspected terrorists that the queried number had been in contact with. The goal, in other words, was to determine whether a suspected terrorist outside the United States was speaking, directly or indirectly, to a suspected terrorist inside the United States.[6]

In 2012, the most recent year for which full data was available, the NSA queried the database for 288 numbers. Those 288 numbers yielded twelve tips.

That is, in twelve instances based on those 288 queries, agents discovered that the suspected terrorists outside the United States were communicating, directly or indirectly, with numbers associated with terrorist suspects in the United States.

In those twelve instances, the NSA turned the information over to the FBI for further investigation.

None of the twelve tips in 2012 produced information that was useful in preventing a planned terrorist attack. In fact, in the seven years during which the program had existed up to that point, there had not been a single instance in which the metadata program had led directly to the prevention of a terrorist attack. Many other programs employed by the NSA have had very productive results, but not this one.[7]

Defenders of the program argued, not unreasonably, that the fact that the program had yet to turn up information that prevented a terrorist attack did not represent a failure. An effort to prevent attacks on the scale of 9/11—including possible nuclear, chemical, or biological attacks—might yield meaningful information only once in a decade. Failing to prevent such an attack, though, would be catastrophic. Thus, the program was analogous to a fire alarm in one's home. It might save your life only once a decade, but that doesn't mean you toss it out or don't replace the batteries.

After evaluating the program, we concluded that, although it was not as draconian as the public had been led to believe, it was not sufficiently limited to protect the legitimate privacy interests of Americans. With that in mind, we made three fundamental recommendations with regard to the program:

First, the government itself should not hold the database. As historical experience teaches, one of the grave dangers of aggres-

6. *See* CLARKE ET AL., *supra* note 1, at 48–55.

7. *See id.* at 56–57.

sive surveillance is that some misguided public official—whether a J. Edgar Hoover or a Richard Nixon—will use this extraordinary pool of data to do harm. To learn information, for example, about free speech, about political associations, about political enemies. Although the metadata consists only of phone numbers, if you look at the pattern of a person's calls over an extended period of time, you can learn an awful lot that can be put to nefarious use. Therefore, we recommended that the information should remain in the hands of the telephone service providers, who already have it for billing purposes. But the government itself should not hold the data.[8] Recognizing that it might prove difficult to implement the program efficiently if the data remains in the possession of individual telephone service providers, we recommended that, if that proves to be the case, "the government might authorize a specially designated private organization to collect and store the bulk telephony meta-data."[9]

Second, we recommended that the NSA should not be able to query the database without a court order. Human nature being what it is, the people engaged in the enterprise of finding bad guys are likely to err on the side of suspicion where a neutral or detached observer might not. That's why we ordinarily require search warrants issued by neutral and detached judges in criminal investigations. We therefore recommended that the NSA should not be allowed to query the database on the basis of its own analysts' judgment. The FISC should have to determine independently in each instance whether the standard of reasonable and articulable suspicion is met. This requirement would also reduce substantially the risk of unlawful access to the database.

Third, we recommended that the data should not be held for more than two years. We concluded that five years is unnecessary. The data gets stale, its value depreciates, and the risks of misuse increase as the information accumulates.[10]

These recommendations, I'm pleased to say, were all incorporated into the USA Freedom Act, which was adopted by Congress and signed into law by President Obama on June 2, 2015.[11]

---

8. *See id.* at 67–71 (Recommendation 5).

9. *See id.* at 71.

10. *See id.* at 70 n.118.

11. *See* Pub. L. No. 114-23, 129 Stat. 268 (2015); Jennifer Steinhauer & Jonathan Weisman, *U.S. Surveillance in Place Since 9/11 Is Sharply Limited*, N.Y. TIMES (June 2, 2015), https://www.nytimes.com/2015/06/03/us/politics/senate-surveillance-bill-passes-hurdle-but-showdown-looms.html [https://perma.cc/8397-7KQY].

Interestingly, the media have recently reported that the NSA has now recommended that the Section 215 metadata program should be abandoned.[12] This is not surprising. The program is very expensive and it has not yielded any significant results. Indeed, the NSA had a similar program for emails, but it voluntarily abandoned that program before the Snowden disclosures for these reasons. It might well have done the same as far back as 2014 with the telephone metadata program, but once Snowden leaked the existence of the program, I suspect that the NSA could not terminate the program because it would have been seen, mistakenly, as a "victory" for Edward Snowden.

A second issue worth noting involves the operations of the FISC. The FISC was initially designed primarily to issue search warrants and to limit the ability of Presidents to authorize foreign intelligence surveillance in the United States without judicial oversight. What became evident over time, though, was that at least on some occasions the FISC would have to decide not only whether the government could show probable cause or reasonable suspicion for a particular investigation but whether and how certain novel methods of surveillance were governed by the law. Sometimes these involved complex questions of statutory or constitutional interpretation. This was illustrated, for example, by the FISC's decision to permit the Section 215 metadata program.[13]

The Review Group's judgment was that when such issues arise, the FISC judges should hear arguments not only from the government, but also from advocates on the other side, just as would any other court. We therefore recommended the creation of a privacy and civil liberties advocate to represent the other side when these sorts of complex legal and constitutional issues arise.[14] The FISC judges objected to this recommendation. They argued that they were responsible jurists who could sort through the legal issues on their own. President Obama compromised on this. He adopted the recommendation that there should be a privacy and civil liberties advocate, but he concluded that this advocate should be authorized to participate in the proceedings of the FISC only if the judges of

12. *See* Dustin Volz & Warren P. Strobel, *NSA Recommends Dropping Phone-Surveillance Program*, WALL ST. J. (Apr. 24, 2019).

13. *See In re* Application of the Federal Bureau of Investigation for an Order Requiring the Prod. of Tangible Things from [Telecommunications Providers] Relating to [Redacted version], Order No. BR-05 (FISA Ct. May 24, 2006); CLARKE ET AL., *supra* note 1, at 48.

14. *See* CLARKE ET AL., *supra* note 1, at 146–153 (Recommendation 28).

that court invited such participation. This recommendation, too, was enacted into law in the USA Freedom Act.[15]

Of course, not everything the Review Group recommended was enacted into law. But perhaps the most important lesson of this experience is that regular outside reviews conducted by independent experts charged with the task of rigorously evaluating existing programs and making recommendations designed to improve them are essential both to our national security and to the protection of our individual liberties. This should be a model for the future.

15. *See* 129 Stat. 268 (2015).

SEXUAL VIOLATION WITHOUT LAW

*DEBORAH TUERKHEIMER**

This Essay, written for a conference held in honor of Stephen Schulhofer, considers #MeToo era evidence that the spectrum of sexual violation remains mostly untouched by criminal law. In addition to highlighting the endurance of pronounced gaps in legal protection, I argue that #MeToo stories should catalyze needed reform.

INTRODUCTION

It is a tremendous honor to celebrate Stephen Schulhofer. I am especially delighted to salute his pioneering work theorizing rape law and his continuing efforts to align criminal law with feminist understandings of sexual assault.[1] I greatly admire these achievements and, even more, Professor Schulhofer himself. My aim in this Essay is to revisit his core insights about sexual consent from the vantage of the #MeToo era, and to articulate a new set of insights that emerges from this analysis.

#MeToo—which in its current iteration[2] can be traced to publication of sexual misconduct allegations against Harvey Weinstein

* Class of 1940 Research Professor, Northwestern University Pritzker School of Law. For helpful comments on an earlier draft, I am grateful to Kimberly Kessler Ferzan, Jennifer Long, Lesley Wexler, participants at the University of Illinois faculty workshop, and participants in the "Sexual Assault & Gender Justice" panel at NYU's Criminal Justice and National Security Symposium. Tom Gaylord, Faculty Services and Scholarly Communications Librarian, contributed outstanding research assistance, and the Northwestern University Pritzker School of Law Faculty Research Program furnished generous support.

1. *Unwanted Sex* remains a seminal work. STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998). For purposes of this essay, Schulhofer's conceptual development of sexual consent in relation to the legal definition of rape is of particular importance.

2. The "Me Too" campaign originated in 2007, when activist Tarana Burke founded a nonprofit to assist victims of sexual harassment and assault. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20,

in the *New York Times*[3] and the *New Yorker*[4]—reflects a significant break from the past. What began as a #MeToo moment has lasted far longer than anyone might reasonably have expected when the hashtag first went viral, thus generating a ground-up movement,[5] albeit one whose aims are diffuse. Many of the movement's participants would likely disagree about priorities, tactics, and even end goals. Yet a unifying thread—perhaps the cohering thread—is the view that sharing one's account of abuse is a powerful act, one that can help to reshape societal conceptions of sexual misconduct.[6] What most distinguishes #MeToo is the rise of informal accusation, or what I call "unofficial reporting"—that is, disclosing sexual violation through channels other than those established to process such claims and mete out an appropriate sanction.[7] Accusations leveled in the court of public opinion[8] are often accompanied by detailed narratives, which provide a rich source of data for anyone interested in identifying persistent gaps between practices of sexual misconduct and the laws that purport to prohibit them.[9] Here I will

2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html [https://perma.cc/XUB2-KKGG].

3. *See* Jodi Kantor & Meghan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html [https://perma.cc/M47J-3XFQ].

4. *See* Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories [https://perma.cc/9DEY-SXH3].

5. For thoughts on when a protest campaign like #MeToo becomes a movement, see Beverly Gage, *When Does a Moment Turn Into a 'Movement'?*, N.Y. TIMES MAG. (May 15, 2018), https://www.nytimes.com/2018/05/15/magazine/when-does-a-moment-turn-into-a-movement.html [perma.cc/8SH2-4UQ8].

6. "Sexual misconduct" encompasses sexual assault, sexual harassment, and non-actionable sexual abuse. *See* Kathryn Casteel & Andrea Jones-Rooy, *We Need a Better Way to Talk About 'Sexual Misconduct'*, FIVETHIRTYEIGHT (Apr. 17, 2018, 6:01 AM), https://fivethirtyeight.com/features/we-need-a-better-way-to-talk-about-sexual-misconduct/ [https://permaret.cc/EKA8-W7WX] (explaining the importance of distinguishing between various types of sexual misconduct).

7. *See generally* Deborah Tuerkheimer, *Unofficial Reporting in the #MeToo Era*, 2019 U. CHI. LEGAL F. 273 (2019).

8. While this raises several concerns, the public circulation of sexual misconduct narratives can also advance important interests, including victim empowerment, group member protection, epistemic justice, norm evolution, institutional change, and offender accountability. *See* Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1174-88 (2019).

9. Admittedly, the methodological advantages to be gained from mining #MeToo accounts are not without limitation. First (and relevant to a broader critique of the movement itself), these accounts may not be representative since more

focus on gaps between the substantive criminal law and practices of sexual assault.

The stories of sexual violation that have surfaced in the past three years—like those that, in far more piecemeal fashion, emerged before—fall on a spectrum. Here, I characterize this spectrum by reference to a trio of admittedly fuzzy categories, each defined in relation to consent: "no consent,"[10] "coerced consent,"[11] and what I will call "pressured consent."[12] On inspection, we see that, across the board, current criminal law definitions of sexual assault reach only a sliver of conduct that is harmful.[13] That lawful conduct may nevertheless be harmful is a fundamental lesson of #MeToo.

The question that is particularly pressing for reformers is the extent to which the law should be expanded to prohibit more categories of sexual harm. This, of course, is an inquiry that has preoc-

---

privileged survivors have far greater media access than their marginalized counterparts. *See* Jamillah Bowman Williams, *Big Data Insights: #MeToo, Law, and Social Change*, 2020 U. CHI. LEGAL FORUM (forthcoming 2021). A second worry—especially for legal scholars—is that descriptions of misconduct reported in the court of public opinion lack the adversarial testing that attends formal proceedings. One response to this latter concern is that many of the accused men have acknowledged wrongdoing or been credibly accused by multiple individuals. More globally, journalistic norms and standards dictate that, with rare exception, an accuser's account will not be published absent corroboration. While not failsafe, this approach tends to assure greater reliability to mainstream media stories, as compared to allegations appearing only on social media platforms like Twitter and Facebook.

10. *See infra* Part I.

11. *See infra* Part II. As a legal matter, coerced consent is the functional equivalent of no consent. *See* Kimberly Ferzan, *Consent and Coercion*, 50 ARIZ. ST. L. J. 951, 954 ("Consent waives a right one has against interference with one's person or property, rendering something that was previously impermissible, permissible. But when coercion is present, it renders this act of consenting null and void."). Like coercion, exploitation and deception (which I do not separately discuss here) may also invalidate consent. *See id.* at 960 n.38.

12. *See infra* Part III.

13. Definitions of sexual assault vary widely across the states. For a helpful synopsis, see Schulhofer, *infra* note 29, at 343-44 ("In almost half the states, sexual penetration is not a crime unless there is *both* non-consent *and* some sort of force. PENETRATION WITHOUT CONSENT IS NOT, IN ITSELF, A CRIME . . . . In all these jurisdictions, some sort of force is required, *in addition* to non-consent, to make out a crime. . . . That leaves two important issues where the trend is *not* clear and where reform still faces formidable opposition. First, what counts as consent? What is the minimum requirement? And second, when that minimum requirement is met—for example, when you have explicit permission—what circumstances nullify that *apparent* consent? When does yes *not* mean yes? These are the places where the key battles for reform are now being fought.").

cupied Professor Schulhofer for decades—and one that continues to motivate his efforts to revise the Model Penal Code.[14] Without defending the theoretical underpinnings of my normative claims here,[15] I will use the occasion to gesture at the regulatory framework that would be generated by centering what we have come to know about consent.[16]

Part I of this Essay examines several high profile "no consent" cases from the #MeToo era,[17] showing how a surviving force requirement[18] functions to legalize nonconsensual sex that, outside the law, has come to be understood as sexual assault. Broadly speaking, if we care about sexual autonomy[19] or sexual agency,[20] the "no consent" category is an easy case for prohibition. In a similar vein, these cases illustrate why passivity should not be legally equated with consent.[21]

Part II describes the adjacent category of "coerced consent," in which a range of forces can negate what might otherwise appear to be consensual conduct.[22] To be sure, locating borders between this

14. I am one of many consultants to the Project.

15. *See, e.g.*, Deborah Tuerkheimer, *Sexual Agency and the Unfinished Work of Rape Law Reform*, *in* RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 166 (Robin West & Cynthia G. Bowman, eds., 2018) (theorizing sexual agency in relation to rape and rape law); Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1478–1506 (2014) (same).

16. For a contrary view of the worth of consent, see Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 465 (2016) ("Consent is a pathetic standard of equal sex for a free people."). For the proposed statutory language that emerges from this analysis, see *infra* note 88.

17. Criminal law definitions of consent vary considerably. As Schulhofer explains, "Even among states that treat absence of consent as sufficient (together with sexual penetration) to establish the offense, there is wide and consequential disagreement about what 'consent' means. There are three options in play. The first option says that to prove unwillingness, there must be some verbal protest. The second option says we should assume *non*-consent unless there is clear affirmative permission. In the first option, silence and passivity always imply consent; in the second option, silence and passivity always mean *no* consent. In the third option, silence and passivity can imply *either* consent or non-consent, depending on all the circumstances." Schulhofer, *infra* note 29, at 344.

18. *See infra* note 29 and accompanying text.

19. *See* SCHULHOFER, *supra* note 1, at 99-114.

20. *See supra* note 15 and accompanying text.

21. This is a distinct minority view. *See* Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 451 (2016).

22. For present purposes, we need not choose between an understanding of consent as "an internal act of acquiescence or a communicative act, or somewhere in between." Ferzan, *supra* note 11, at 966. As Professor Ferzan explains, "The focus on both the consenter's acquiescence, as well as the consentee's uptake, yields that we care about the actions and choices of both the consenter and the con-

category and the others is a contestable endeavor. Under the framework advanced here, defining the upper end of the spectrum is not especially consequential since both adjacent categories would be considered unlawful.[23] (For instance, at the boundary of what I am calling "coerced consent" and "no consent," we might place apparent consent at gunpoint[24]). But identifying the lower boundary between "coerced consent" and "pressured consent" is more fraught. Both categories squarely implicate social hierarchies—gender chief among them[25]—that are not readily recognized by criminal law.[26] Nor is it always clear when the coercive forces at play suffice to invalidate consent.[27] Against the backdrop of steep and pervasive social inequalities, a complete absence of coercion is uncommon as the influx of women's stories into public spaces has made far more evident. Criminal law, however, mostly overlooks this reality.

As I discuss in Part III, #MeToo has unearthed the widespread phenomenon of consented-to conduct that is harmful even absent the hallmarks of coercion that rise to (or *should* rise to) the level of criminality.[28] Yet there is a notable relationship between this type of misconduct—misconduct resulting in "pressured consent"—and the criminal law. Outlawing egregious sexual violations tends to foster female sexual agency, which, in turn, diminishes the power of pressure to consent.

In conclusion, I suggest that in order to make inroads on the problem of pressured consent, reform should bring the "no consent" and "coerced consent" cases more fully within the ambit of

---

sentee. Indeed, even where there is subjective acquiescence or communication, that acquiescence can be defeated by force, fraud, or incapacity. . . . To some scholars and courts, *assent* (the mental act or communication) does not become *consent* if there is force, fraud, or incapacity. To others, this is *consent* but not *valid consent*." *Id.* at 967. For a philosophical treatment, see Scott A. Anderson, *Conceptualizing Rape as Coerced Sex*, 127 ETHICS 50, 52 (2016).

23. *But see* sources cited *infra* note 88 and accompanying text (describing holes in the law of coerced consent). *See also* Ferzan, supra note 11, at 957-58 (identifying the question of coercer wrongdoing as conceptually and legally distinct from whether a coercee's choice is unacceptably constrained).

24. The law has long recognized that physical threats can negate consent. *See, e.g.*, MODEL PENAL CODE § 213.1(1) (1962) (stating that "a male who has sexual intercourse with a female not his wife is guilty of rape if . . . he compels her to submit by force *or by threat of imminent death, serious bodily injury, extreme pain or kidnapping*, to be inflicted on anyone.") (emphasis added).

25. *See generally* KATE MANNE, DOWN GIRL: THE LOGIC OF MISOGYNY (2018).

26. This is a problem that transcends the redress of sexual violence. *See* Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151 (1995).

27. *See infra* Part II.

28. *See infra* note 123 and accompanying text.

the law. It is important to underscore that criminal law reform is by no means a panacea. Quite the contrary—a range of mechanisms, legal and extra-legal, are essential to the process of cultural change. But the criminal law undoubtedly exerts a significant influence on social norms, including those that govern sex and gender relations. From this perspective, work to harmonize the criminal law with contemporary understandings of sexual violation is one facet of a much larger project—one that seeks to upend an entrenched system of male sexual entitlement.

I.
NO CONSENT

A central teaching of #MeToo is that nonconsensual sexual penetration and contact can result even without the use of excessive physical force. Yet excessive physical force continues to preoccupy the criminal law. In just under half the states, this preoccupation manifests as an enduring force requirement.[29]

The force requirement exists in stark tension with the typical realities of nonconsensual penetration by an acquaintance or intimate.[30] As feminist legal scholars have long insisted, defining sexual assault by reference to the use of physical force rather than the absence of consent *simpliciter* elides the harm of sexual assault.[31] My objective here is not to retread this ground, but to show how emerging accounts provide new support for a longstanding critique, and

29. Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 L. & INEQ. 335, 342-43 (2017) ("In almost half the states, sexual penetration is not a crime unless there is *both* non-consent *and* some sort of force. *Penetration without consent is not, in itself, a crime.*").

30. Of women victimized by rape, half are raped by an intimate partner, and 40% by an acquaintance. MICHELE C. BLACK ET AL., NAT'L CTR. FOR INJ. PREVENTION & CONTROL CNTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 21 (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [https://perma.cc/TM2E-XW96]. For a taxonomy of common scenarios involving non-forcible, nonconsensual penetration, see Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L. J. 1, 16-38 (2015).

31. A venerable line of feminist legal scholarship has argued for redefinition of the crime of rape as sex without consent. *See, e.g.*, SCHULHOFER, *supra* note 1, at 254 ("Under most existing criminal codes, the absence of consent does not by itself make intercourse illegal. Criminal penalties apply only when the sexual aggressor uses too much physical force. But respect for sexual autonomy requires a different view. Intercourse without consent should always be considered a serious offense."). *See also* David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 322 (2000) ("Virtually all modern rape scholars want to modify or abolish the force requirement as an element of rape.").

then to suggest that—for this very reason—the #MeToo movement is well positioned to propel a next wave of reform that abolishes the law's regressive fixation with physical force.[32]

* * *

We can begin with former film producer Harvey Weinstein, whose abuse has become synonymous with extreme sexual predation. In a blockbuster *New Yorker* piece by Ronan Farrow that helped to ignite the #MeToo movement,[33] actress Lucia Evans depicted an encounter in which she was "forced . . . to perform oral sex" on Weinstein.[34] During a meeting ostensibly related to the possibility of casting Evans for several roles, Weinstein indicated that someone from his film company would follow up.[35] According to Farrow's report:

> "At that point, after that, is when he assaulted me," Evans said. "He forced me to perform oral sex on him." As she objected, Weinstein took his penis out of his pants and pulled her head down onto it. "I said, over and over, 'I don't want to do this, stop, don't,'" she recalled. "I tried to get away, but maybe I didn't try hard enough. I didn't want to kick him or fight him." In the end, she said, "he's a big guy. He overpowered me." She added, "I just sort of gave up. That's the most horrible part of it, and that's why he's been able to do this to so many people: people give up, and then they feel like it's their fault."[36]

My interest here is not whether a prosecutor could prove these allegations (which Weinstein denied) beyond a reasonable doubt.[37]

---

32. *See infra* note 56.

33. *See supra* notes 2-4 and accompanying text.

34. Farrow, *supra* note 4.

35. *Id.*

36. *Id.*

37. The office of the New York County District Attorney (disclosure: my former office) presented this incident to the grand jury, which returned an indictment, although the Evans count was later dismissed on the prosecutor's consent. *See* Jan Ransom & Alan Feuer, *Harvey Weinstein Gets One Sexual Assault Charge Dismissed*, N.Y. TIMES (Oct. 11, 2018), https://www.nytimes.com/2018/10/11/nyregion/harvey-weinstein-lucia-evans-charge-dismissed.html [https://perma.cc/C8KY-LM24]; Letter from District Attorney Cyrus Vance to Benjamin Brafman (Sept. 12, 2018) (on file with author) (disclosing that a witness had come forward to describe an account by Evans that was "at odds with the factual account" previously provided, and that the case detective had failed to inform the prosecution of this conflicting account despite having known of it). In response, the *New Yorker* issued a statement "standing by our reporting and fact-checking process, which was assiduous and thorough." Anna North, *One Woman's Sexual Assault Charge Against Harvey Weinstein Has Been Dropped*, VOX (Oct. 11, 2018, 3:17 PM), https://

Rather, I am concerned with whether the conduct Evans described satisfies the legal definition of sexual assault.[38] Because most states have formally abolished a formal resistance requirement,[39] one might well conclude that the allegations constitute sexual assault. According to widespread if not universal consensus,[40] the fact that Evans "sort of gave up" should have no bearing whatsoever on whether Weinstein committed sexual assault if indeed he "pulled her head down onto [his penis]" and "overpowered" her.

Notwithstanding this apparent consensus, applying the law of force to Evans's account is potentially problematic. The New York statute with which Weinstein was charged requires proof of "forcible compulsion," meaning, "to compel by . . . use of physical force."[41] While the relevant case law is varied on the quantum of force necessary to satisfy the definition, some courts have set the bar quite high.[42] Predictably, citing these cases, Weinstein moved to dismiss the Evans count of his indictment on the ground that the grand jury presentation was insufficient with regard to the requisite force.

---

www.vox.com/identities/2018/10/11/17963758/harvey-weinstein-charges-lucia-evans-benjamin-brafman [https://perma.cc/AA95-SHUP].

38. *See supra* note 29.

39. *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.1 Reporters' Notes 26-27 (AM. LAW INST., Tentative Draft No. 3, 2017) (summarizing statutory law of resistance); *see also* Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953 (1998) (recounting history of rape law's resistance requirement and describing its partial endurance in judicial decision making around force and nonconsent).

40. To my knowledge, none of the abundant public commentary surrounding the allegations suggested that, if true, what Evans described was anything other than sexual assault.

41. N.Y. PENAL LAW § 130.00(8)(a). The definition of forcible compulsion also includes "a threat, express or implied, which places a person in fear of immediate death or physical injury to injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped." *See supra* note 24. With regard to the Evans incident, Weinstein was indicted for criminal sexual act in the first degree, which prohibits "oral sexual conduct by forcible compulsion." N.Y. PENAL LAW § 130.50(1). A lesser charge of criminal sexual act in the third degree prohibits oral sexual contact without consent. N.Y. PENAL LAW § 130.50(1).

42. *See* Tuerkheimer, *supra* note 30, at 15-38 (discussing cases where non-consent and force diverge); MacKinnon, *supra* note 16, at 465-69 (criticizing the physical force frame); *see also* State v. Mirabal, 278 A.D.2d 526, 527 (N.Y. App. Div. 2000) (notwithstanding complainant's testimony that "defendant placed his penis in her mouth and had his hands on the back of her head . . . [and] that she unsuccessfully attempted to stop the act," holding that the element of forcible compulsion was not satisfied) (cited in support of Weinstein's motion to dismiss the indictment for lack of legally sufficient evidence of force).

To be clear, I am not convinced that—had the Evans count not been dismissed by the prosecutor for other reasons[43]—Weinstein ultimately would have prevailed on his insufficiency claim, or that a properly charged jury would have acquitted, or that a reviewing court would have reversed a hypothetical conviction on insufficiency grounds. But regardless, these questions would have been much closer than commentators and the public realized. Subsequent developments in the Weinstein prosecution lend support to this view.

In early 2020, Weinstein went to trial on sexual assault charges involving two main witnesses, Miriam Haleyi and Jessica Mann. After weeks of testimony and days of deliberations, the jury reached a split verdict—Weinstein was found guilty of forcibly assaulting Haleyi, not guilty of forcibly assaulting Mann (but guilty of a lesser charge), and not guilty of two counts of predatory assault that also involved an older allegation by Annabella Sciorra.[44] As commentators puzzled over the verdict, the controlling legal definitions went largely unremarked.

The force requirement can explain the jury's decision to acquit Weinstein of rape in the first degree for the assault on Mann. The problem for the prosecution was not that the jury disbelieved her. Based on her testimony, they convicted him of third-degree rape, a less serious felony that prohibits nonconsensual intercourse. But the prosecution was unable to satisfy the "forcible compulsion" requirement for first degree rape.[45] A close look at Mann's description of the assault shows how nonconsensual intercourse can be accomplished without the kind of physical force that many rape statutes continue to demand.

The incident in question took place in a hotel room where Mann had been hectored into accompanying Weinstein.[46] Mann told jurors that she repeatedly tried to open the door to leave, but each time Weinstein blocked her escape. Mann's testimony at trial continued:

---

43. *See supra* note 37.

44. Shayna Jacobs, *Harvey Weinstein Guilty on Two Charges, Acquitted on Others in New York Assault Case*, WASH. POST (Feb. 24, 2020, 5:25 PM), https://www.washingtonpost.com/lifestyle/harvey-weinstein-trial-verdict/2020/02/24/057b9f36-5284-11ea-b119-4faabac6674f_story.html [https://perma.cc/9U8D-E55Q].

45. *See supra* note 41 (defining New York's "forcible compulsion" standard).

46. Transcript of Testimony of Jessica Mann, People v. Harvey Weinstein, Nos. 2335-18 & 2673-19, 2256 (N.Y. Sup. Ct. Jan. 31, 2020) (on file with author).

> I kind of shut down a little bit and then he told me to undress and I still was not undressing. And then he comes at me and grabs my hand to try to force me to start undressing myself as he held my hand to do it, and . . . I gave up at that point, and I undressed and he stood over me until I was completely naked, then he told me to lay on the bed. And once I was naked and laying on the bed, he walked into the bathroom and sort of closed the door behind him. He was gone for not very long at all, and the door is still kind of open a little bit. And then he came out naked and he got on top of me and that is when he put himself inside of me, his penis inside of me.[47]

Mann described herself as "panicked." "He would have commanding type statements such as you know, undress now," she explained, adding that his tone of voice was "like a drill sergeant and sharp and angry."[48]

The direct examination continued:

> Q: When he was putting his penis in your vagina, where was your body and where was his?
>
> A: I was laying completely on my back the whole time, and he was completely laying on top of me, which is not very comfortable.
>
> Q: Were you able to move or get up?
>
> A: No, you can't under him.[49]

While apparently crediting this testimony, the jury concluded that this attack did not qualify as first degree rape. Mann's will was overborne, but not by enough physical force to satisfy the applicable definition.[50] This outcome suggests that even if we bracket the difficulties of proof that invariably arise in sexual assault cases,[51] the force requirement makes the viability of charges in many—even most—cases of non-stranger rape far less obvious than it ought to be.

---

47. *Id.* at 2258-59.

48. *Id.* at 2258-60.

49. *Id.* at 2260.

50. Rape in the third degree is punishable by up to four years in prison. *New York Rape Laws*, FINDLAW, https://statelaws.findlaw.com/new-york-law/new-york-rape-laws.html [https://perma.cc/4MWG-LNBA] (last visited March 2, 2020). By contrast, rape in the first degree is punishable by five to twenty-five years in prison. *Id.*

51. *See* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 27-41 (2017) (documenting the systemic underenforcement of sexual assault laws).

It is worth noting that the proposed changes to the Model Penal Code also include a force standard that is designedly high.[52] While the revisions under consideration would designate nonconsensual (non-forcible) conduct as a lesser crime,[53] it is nonetheless striking that the kind of force allegedly deployed by Weinstein against Evans might not qualify as such under the proposed definition, which requires force that causes physical injury, inflicts significant physical pain, or significantly impedes mobility.[54] If this outcome seems undesirable, one possible response would be to ratchet down the requisite level of force so that it becomes simply a proxy for non-consent.[55] But this solution misses the point. The very framework of physicality detracts attention from the gravamen of the sexual assault—namely, the absence of consent.[56] Only by abolishing the force requirement do we turn our attention where it ought to be trained.

Before moving on, let us consider one more example of how the force requirement is inaptly applied to a fairly typical incident of sexual assault.[57] Ileana Douglas is a former actress and writer who came forward in July 2018 with public accusations against Les

52. *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES, *supra* note 39, at § 213.1 (defining forcible rape as requiring the use or threatened use of "physical force or restraint." According to the Reporters' Notes, "the fact that an actor's larger size or weight limits the other person's movements in an act of sexual penetration or oral sex does not itself constitute the use of physical force or restraint"). *Id.* Subsequent drafts reiterate this commitment to a high force threshold, but—because these later iterations are not yet publicly available—an earlier version is cited.

53. *See id.* at § 213.4 (defining sexual penetration or oral sex without consent as a felony in the fifth degree).

54. *See supra* note 52 and accompanying text. Again, it might be argued either way; the question would be close.

55. *See, e.g.*, State *ex rel.* M.T.S., 609 A.2d 1266 (N.J. 1992); *see also supra* notes 30-31 and accompanying text.

56. While the use of physical force arguably aggravates the harm of nonconsensual sex acts and the moral culpability surrounding their infliction, grading by reference to the use of weapons, threats, or injury provides alternatives to deeming physical force itself the penalty enhancer. Regardless of whether physical force (or some tangible manifestation of it) is treated as a factor that aggravates nonconsensual sex acts, for conceptual reasons, I maintain that non-consent itself should lie at the core of the definition. *See supra* note 15.

57. Notably, the most commonplace kind of sexual assault—again, by a nonstranger—is becoming increasingly visible in the #MeToo era. *See, e.g.*, Samantha Schmidt, Fenit Nirappil & Laura Vazzella, *Professor Who Accused Virginia Lt. Gov. Justin Fairfax of 2004 Sexual Assault Issues Statement Detailing Alleged Incident*, WASH. POST (Feb. 6, 2019), https://www.washingtonpost.com/local/virginia-politics/2019/02/06/daed33aa-2a30-11e9-b2fc-721718903bfc_story.html [https://perma.cc/ANN7-2622].

Moonves, the former head of CBS.[58] The event in question allegedly occurred in March 1997, around the time Douglas was cast in a comedy called *Queens*, which prompted a meeting called by Moonves in his office.[59] The two were alone at the time.[60] When Moonves turned the conversation from work to whether Douglas was single and then asked to kiss her, Douglas tried to return to the subject of *Queens*.[61] At this point, she alleged, he grabbed her.[62] Douglas described her version of events as follows:

> In a millisecond, he's got one arm over me, pinning me," she said. Moonves was "violently kissing" her, holding her down on the couch with her arms above her head. "What it feels like to have someone hold you down—you can't breathe, you can't move," she said. "The physicality of it was horrendous." She recalled lying limp and unresponsive beneath him. "You sort of black out," she told me. "You think, How long is this going to go on? I was just looking at this nice picture of his family and his kids. I couldn't get him off me." She said it was only when Moonves, aroused, pulled up her skirt and began to thrust against her that her fear overcame her paralysis. She told herself that she had to do something to stop him. "At that point, you're a trapped animal," she told me. "Your life is flashing before your eyes."[63]

According to Douglas, Moonves stood up after Douglas made a remark aimed at stopping him.[64] Although she escaped the room without further harm, the damage done was lasting. As she related more than two decades later, "[i]t has stayed with me the rest of my life, that terror."[65]

Douglas did not make a report to police—"it was obvious that it would be career suicide," a friend later explained.[66] But even if

58. *See* Ronan Farrow, *Les Moonves and CBS Face Allegations of Sexual Misconduct*, NEW YORKER (July 27, 2018), https://www.newyorker.com/magazine/2018/08/06/les-moonves-and-cbs-face-allegations-of-sexual-misconduct [https://perma.cc/54H2-AMUQ]. Moonves resigned from CBS shortly after the allegations were first reported.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *See* Farrow, *supra* note 58.

64. *Id.*

65. *Id.* Douglas said that, the next day, she described the assault to a friend, who apparently corroborated her account. *Id.*

66. *Id.* According to recent Justice Department estimates, the population most vulnerable to sexual assault—females ages 18-24—report to police at rates of only twenty percent for college students and thirty-two percent for non-college

Douglas had chosen to report, the force involved in the alleged incident may well have been deemed insufficient to constitute an attempted sexual assault, and likewise insufficient to constitute a sexual assault had penetration been accomplished. Despite Douglas's perceptions—the kissing was "violent"; the "physicality of it was horrendous"; "you're a trapped animal"—the force involved in the attack described was arguably not enough to constitute force under law in states like New York,[67] where the CBS offices are located. Although the sufficiency of evidence to support a finding of "forcible compulsion" demands a highly fact dependent inquiry, the force alleged might well fall short in a hypothetical Moonves prosecution.[68]

A more generalizable inquiry is whether this force would qualify under the Model Penal Code definition now under consideration.[69] On my reading, it would not.[70] This result runs counter to a widespread and growing consensus around what constitutes the essence of sexual assault. The #MeToo stories have affirmed the importance of centering consent rather than force in our definition of sexual assault. This reform should by now be fairly uncontroversial.[71] Yet, across the states, much work remains.[72]

---

students. *See* SOFI SINOZICH & LYNN LANGTON, U.S. DEP'T JUST. BUREAU OF JUST. STATS., RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995-2013, 9 (2014), https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf [https://perma.cc/A2RZ-MFY2]. Women of color, both on and off campus, may be even less likely to report sexual assault than their white counterparts. *Id.* One reason is the predictability of a non-response. Among non-students, nearly one in five surveyed did not report because "police would not or could not do anything to help." *Id.*

67. *See supra* note 41.

68. *See supra* notes 41-42 and accompanying text. Moonves responded to the initial allegations against him by stating, "I always understood and respected—and abided by the principle—that 'no' means 'no.'" Even if we take this assertion as true, it reflects the traditionally crabbed understanding of consent. *See infra* notes 73-79 and accompanying text (discussing the importance of affirmative consent); *see also* Peggy Orenstein, *It's Not that Men Don't Know What Consent Is*, N.Y. TIMES (Feb. 23, 2019), https://www.nytimes.com/2019/02/23/opinion/sunday/sexual-consent-college.html [https://perma.cc/P7HD-MM96].

69. *See supra* notes 52-55 and accompanying text; *but see supra* note 53 and accompanying text (noting proposed lesser crime of nonconsensual penetration or oral sex).

70. Douglas was not physically injured, nor did she suffer "significant physical pain." Whether Moonves "significantly impeded" her ability to move freely (per the applicable force definition) is perhaps a closer question, but these allegations might well fall short.

71. *See* Schulhofer, *supra* note 29, at 342.

72. *See supra* note 29 and accompanying text.

Work to dislodge force from the crime of sexual assault will surely place greater pressure on the meaning of consent, about which there is considerable disagreement.[73] Professor Schulhofer, among others, has argued for a standard that requires some external indication of a willingness to engage in the sexual conduct at issue.[74] The main alternative is a rule that effectively presumes that silence and passivity constitute consent to sexual contact,[75] or even penetration, and requires the complainant to demonstrate unwillingness to engage in the activity.[76]

Without rehashing the arguments for and against an affirmative consent standard in the abstract, I turn now to consider how the #MeToo stories inform this debate. My contention is that the criminal law's extant failure to adopt an affirmative consent standard reifies a view of passive female sexuality—that is, a view of women as sexual subjects who exist for the touching and the taking.[77]

---

73. *Id.* at 343; *see also* Stephen J. Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. PAC. L. REV. 665, 674-80 (2017) (cataloguing objections to codifying affirmative consent); Tuerkheimer, *supra* note 21, at 444-47 (summarizing the bases of opposition to affirmative consent).

74. *See* Schulhofer, *supra* note 29, at 341 ("For practical and theoretical reasons, willingness should never be assumed.").

75. For an understanding of consent as "willed acquiescence," see Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 404-07 (2016).

76. In essence, these laws reinstate the traditional resistance requirement in a formulation that allows verbal resistance to suffice. *See, e.g.*, NEB. REV. STAT. ANN. § 28-318(8), 319(1) (West 2010) (criminalizing penetration without consent and defining without consent as "express[ing] a lack of consent through words . . . or conduct" and requiring the victim to "make known to the actor the victim's refusal to consent"); N.H. REV. STAT. ANN. § 632-A:2(I)(m) (2010) (prohibiting penetration "[w]hen at the time of the sexual assault the victim indicates by speech or conduct that there is not freely given consent to performance of the sexual act"); N.Y. PENAL LAW § 130.05(2)(d) (McKinney 2013) (defining consent to require that "the victim clearly expressed that he or she did not consent to engage in [a sexual] act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances"); UTAH CODE ANN. § 76-5-402(1), 406(2) (West 2015) (criminalizing sexual intercourse without consent and defining consent as the victim "express[ing] lack of consent through words or conduct").

77. A handful of states incorporate an affirmative consent standard in the criminal code. *See, e.g.*, WIS. STAT. ANN. § 940.225(4) (West 2011) (requiring "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact"); VT. STAT. ANN. tit. 13, § 3251(3) (West 2011) (defining consent as "words or actions by a person indicating a voluntary agreement to engage in a sexual act"); *see also* State *ex rel.* M.T.S., 609 A.2d 1266 (N.J. 1992) (holding that consent requires "permission to engage in sexual penetration [that] must be affirmative and it must be given freely").

This retrograde understanding sits uneasily with agency norms that have become increasingly salient with the rise of #MeToo.

Apart from the element of surprise that is present in many of the allegations, it is typical for an accuser to describe significant power differentials between herself and her abuser and to recount how this imbalance undermined her ability to express a lack of consent to the (mis)conduct. In jurisdictions with resistance-based consent definitions, as we might call them,[78] these accusers would likely be deemed to have consented. The opposite is true in states that require affirmative consent.[79]

To see what is at stake in how we define consent, consider one of dozens of sexual misconduct allegations against Charlie Rose, who was once among the nation's most influential television journalists.[80] Like so many others, the accuser, a young woman whose name has not been reported, was attempting to "break into" an industry dominated by men. Rose offered her the prospect of a job as executive producer for global content, which the woman was "[e]ager to land."[81] To "see how they travelled together," she says the two drove to Rose's home about sixty miles outside of Manhattan, stopping to eat en route and arriving after midnight to an empty residence. The woman gave the following account of what then transpired:

> At the pool, Rose dangled his legs in the water and then said that he needed to change because his pant legs were wet. He returned wearing a white bathrobe, which was open; he wore nothing underneath.
>
> "I thought, I'm doomed," she said. "I was completely panicked. In retrospect, I thought of a million things I could have done."

78. *See supra* note 76 and accompanying text.

79. The draft of the revised Model Penal Code defines consent as "a person's willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact;" "consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances." *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0(4)(a), (b) (AM. LAW INST., Tentative Draft No. 3, 2017).

80. *See* Claire Atkinson, *Charlie Rose Accused by 27 Women of Sexual Harassment*, NBC NEWS (May 3, 2018), https://www.nbcnews.com/news/amp/ncna871021 [https://perma.cc/P5KF-EB4T]; Irin Carmon & Amy Brittain, *Eight Women Say Charlie Rose Sexually Harassed Them—With Nudity, Groping and Lewd Calls*, WASH. POST (Nov. 20, 2017), https://www.washingtonpost.com/investigations/eight-women-say-charlie-rose-sexuallyharassed-them–with-nudity-groping-and-lewd-calls/2017/11/20/9b168de8-caec-11e7-8321-481fd63f174d_story.html [https://perma.cc/622F-S5PQ].

81. Carmon & Brittain, *supra* note 80.

> She said she was not intoxicated — Rose had drunk his wine and then hers at the restaurant — but said he appeared to be. It was nearly 2 a.m. and she was exhausted, she said. She also said she felt alone and powerless. It was the middle of the night, they were on his secluded property, and she did not know how to drive.
>
> "I started talking in this feeble and compulsive way," she said. "I started talking about power, how the abuse of power can be. He completely lost it. 'What are you talking about? That's certainly not the case.' "
>
> She said he then tried to put a hand down her pants.
>
> "By the time he touched me the first time, he was already very angry," she said. "I was scared, and I was also kind of frozen."[82]

The woman's understandable sense of powerlessness and fright not only explains her behavior, it makes her "frozen" reaction seem almost inevitable.[83] But because she did not demonstrate her *un*willingness to be touched, the majority rule would count this as consent. If this result is at odds with a developing normative consensus, it means that the criminal law is trailing cultural progress.

#MeToo has laid bare a set of social inequalities that should impact the legal framing of consent.[84] Again and again, we have seen how power can be deployed to inhibit resistance to conduct that is, by any reasonable measure, unconsented-to. Put differently, resistance-based consent definitions, physical and verbal alike, are incompatible with extremely hierarchical interactions. These are the very interactions that #MeToo is continuing to uncover.

---

82. *Id.*

83. After that, the woman says her memory became "hazy," but she somehow ended up in Rose's bedroom, "crying the entire time," as he "reached down her pants" and she "pushed his hands away." *Id.* According to her account, the "encounter ended when he appeared to be asleep and she felt she could leave the room." *Id.*

84. *See* Melena Ryzik, Cara Buckley & Jodi Kantor, *Louis C.K. is Accused by 5 Women of Sexual Misconduct*, N.Y. TIMES (Nov. 9, 2017), https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html [https://perma.cc/V2VM-2NHQ]; *see also Louis C.K. Responds to Accusations: "These Stories are True"*, N.Y. TIMES (Nov. 10, 2017), https://www.nytimes.com/2017/11/10/arts/television/louis-ck-statement.html [https://perma.cc/3SEX-Y87D] (admitting to misconduct and explaining, "At the time, I said to myself that what I did was okay because I never showed a woman my dick without asking first.").

II.
COERCED CONSENT

Affirmative consent definitions are by no means a complete solution to the problem of unequal power. Coercive forces, structural and otherwise, are often harnessed in service of generating an apparent willingness to engage in conduct that is, by any meaningful measure, nonconsensual.[85] While the law recognizes that physical threats render consent invalid,[86] the same cannot be said for other types of coercive forces, which may include not only conduct on the part of the coercing party, but also surrounding conditions that enhance the conduct's coercive effects.[87] Although statutory prohibitions are varied, they generally fall short of protecting against nonphysical coercion.[88]

To better see these shortcomings, consider the allegations against singer R. Kelly that were published by *Rolling Stone* around the time the Weinstein story broke. Unlike the teenage accusers who had already come forward against Kelly (and many others who would later do so),[89] Kitti Jones was, at the time of the alleged

85. *See supra* note 22 and accompanying text.

86. *See supra* notes 22-24 and accompanying text.

87. There are rare exceptions. *See, e.g.*, 18 PA. STAT. AND CONST. STAT. ANN. § 3101 (West 2014) (defining forcible compulsion as "compulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied").

88. *See* Schulhofer, *supra* note 29, at 345 ("The issue we are fighting over today is the same one that has been unresolved since the 1960s: what things other than physical violence make consent inauthentic? Broadly speaking, the major disagreement on this issue is between those who wanted the list to be very short—limited to things that are almost as coercive as physical violence—and on the other side, those who want that list to include many or all the other circumstances that limit a completely free choice."). *See also* MacKinnon, *supra* note 16, at 474 (recognizing "psychological, economic, and other hierarchical forms of force—including age, mental and physical disability, and other inequalities, including sex, gender, race, class, and caste when deployed as forms of force or coercion in the sexual setting).

89. *See* Jacey Fortin, *R. Kelly's Two-Decade Trail of Sexual Abuse Accusations*, N.Y. TIMES (May 10, 2018), https://www.nytimes.com/2019/07/12/arts/music/rkelly-accusations-sexual-assault-history.html [https://perma.cc/TKJ5-2XYE]. In the wake of the #MuteRKelly campaign and the release of *Surviving R. Kelly* (Netflix 2019), a documentary series first aired in January 2019, Kelly was indicted on a range of sex offenses by offices in both Chicago and New York. *See* Jason Meisner, Madeline Buckley & Megan Crepeau, *R. Kelly Hit with Federal Indictments in New York, Chicago; Faces New Racketeering, Sex Crime Charges, Allegations He Paid to Recover Sex Tapes and Cover Up Conduct*, CHI. TRIB. (July 12, 2019), https://www.chicagotribune.com/news/criminal-justice/ct-r-kelly-arrested-federal-charges-20190712-6ghntysw3zf3lpncn4owcfzyje-story.html [https://perma.cc/Z5KC-GZDD] (summarizing the criminal charges pending against R. Kelly).

abuse, a grown woman with a career in radio, an ex-husband, and a child.[90] According to her account, Jones met Kelly at a party in 2011 and began a "two-year relationship . . . rife with alleged physical abuse, sexual coercion, emotional manipulation and a slew of draconian rules that dictated nearly every aspect of her life . . . [including] what and when to eat, how to dress, when to go to the bathroom and how to perform for the singer sexually."[91] When Jones moved from Dallas to Kelly's Chicago apartment, he "began governing" her behavior, "starting with the requirement that she wear baggy sweatpants whenever she went out and text near-constant updates on her whereabouts . . . Jones says she was forced to text with the singer or one of his employees for even the slightest request. (Sample text message: 'Daddy, I need to go to the restroom.')."[92]

Jones alleges that Kelly began physically abusing her less than a month after she moved in with him.[93] When he later "moved Jones" from his Trump Tower residence to his nearby recording studio, she became even more isolated. Jones says Kelly would "frequently take away [her] phone as punishment—sometimes as long as two months—cutting off her ability to request food or perform basic functions."[94] Jones recalls that Kelly also "began using starvation on her as punishment for not following his orders."[95] Among the perceived infractions that could allegedly trigger "punishment" was "looking at" a man or laughing "if a male would say something funny."[96]

In March 2013, Jones was introduced to another of Kelly's girlfriends, who was brought in naked and "told [ ] to crawl toward Jones and perform oral sex on her."[97] Jones recounts, "[Kelly] told me, 'I raised her. I've trained this bitch. This is my pet.' "[98] This was

90. *See* Jason Newman, *Surviving R. Kelly*, ROLLING STONE (Oct. 23, 2017), https://www.rollingstone.com/culture/culture-features/surviving-r-kelly-118608/ [https://perma.cc/VG3G-EP32].

91. *Id.*

92. *Id.*

93. *Id.* (stating that the first incident of physical abuse allegedly involved kicking and slaps to Jones's face; in the first year she lived with Kelly, Jones says he "physically abused her approximately 10 times, with the frequency increasing the following year.").

94. Newman, *supra* note 90.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

the beginning of "a new, darker chapter."[99] For purposes of analysis, we can posit that, at least on some occasions, Jones acquiesced to Kelly's desires, performing a willingness to do just what he wanted. Yet we need not—and indeed should not—equate this with valid consent. As Jones explains, "'You can't say no because you're going to get punished,' she says. 'You just become numb to what's happening. It's so traumatic the things that he makes you do to other people and to him.'. . . 'You have to actually be there to know exactly what it felt like for a person to overpower you and make you feel like there's nothing for you outside of him.'"[100]

This conception of what it means to be overpowered is dramatically different from what the law recognizes.[101] Notice that Jones's description encompasses not simply physical force or threats, although these mechanisms are often integral to an abuser's efforts to control his victim.[102] Kelly's power over Jones extended well beyond the physical to dimensions not adequately captured by most existing definitions of coercion.[103] The feeling she had that "there's nothing . . . outside of him" reflects a profound loss of agency.[104] Regardless of whether Jones's compelled performance exhibited a

99. Newman, *supra* note 90 ("Kelly would frequently fly girls in for sex, says Jones, and order her and his other girlfriends to hook up with them. 'You can't say no because you're going to get punished,' she says. 'You just become numb to what's happening. It's so traumatic the things that he makes you do to other people and to him.'").

100. *Id.*

101. *See, e.g.*, State v. Alston, 312 S.E.2d 470, 476 (N.C. 1984) (holding that, while the alleged victim's "general fear of the defendant may have been justified by his conduct on prior occasions," there was insufficient evidence of force or threats of force at the time of the intercourse to sustain the rape conviction). Prosecutors can certainly attempt to introduce prior acts of violence on the part of the defendant in order to show the complainant's fear on the occasion in question, but this would not necessarily overcome the law's (unduly) narrow fixation on force or threats that occur close in time to the sex act in question.

102. *See* Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 962-69 (2004).

103. *See supra* note 88 and accompanying text; 18 PA. STAT. AND CONST. STAT. ANN. § 3101 (WEST 2014); *see also supra* text accompanying note 39.

104. Newman, *supra* note 90. As Jones later described her state of mind at her lowest moment, shortly before leaving Kelly, "I can either kill myself or kill him. What use am I when I walk out of here?" *Id.*

superficial veneer of consent,[105] the sexual acts that she described were deeply violative—even those that were lawful.[106]

The #MeToo movement is unmasking an array of forces that can vitiate outward manifestations of willingness.[107] Because the most powerful constraints are imposed on the most marginalized members of society, their accounts—when they manage to surface[108]—tend to vividly illustrate coerced consent.[109]

Many examples are found in Bernice Yeung's documentation of sexual violence against immigrant women in low-paying industries.[110] For instance, Georgina Hernández recalls that her supervisor started flirting with her soon after she began working as a hotel cleaner.[111] Early on, "her supervisor flirted with her and tried to convince her to have sex with him. She rebuffed him, and he retaliated by giving her more work."[112] Hernández says that less than a week later,

---

105. In his statement denying Jones's allegations, Kelly's representative remarked, "It is unfortunate that Ms. Jones, after public statements to the contrary, is now attempting to portray a relationship history with Mr. Kelly as anything other than consensual involvement between two adults. As stated previously, Mr. Kelly does not control the decision-making or force the actions of any other human being, including Ms. Jones. . . ." *See* Newman, *supra* note 90.

106. *See supra* notes 86-87 and accompanying text.

107. *See* MacKinnon, *supra* note 16, at 465 ("Under unequal conditions, many women acquiesce in or tolerate sex they cannot as a practical matter avoid or evade. Many initiate sex to stop other abuse and do their best to make it sexy so it will end quickly. That does not make the sex wanted. It certainly does not make it equal. It does make it legally consensual in most jurisdictions.").

108. Because the most vulnerable accusers also face the strongest reporting disincentives, their victimization remains largely invisible to outside observers. In the #MeToo era, however, exceptional reporting has begun to probe the workings of coerced consent. *See, e.g.*, Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html [https://perma.cc/GYY3-6WHW] (detailing the accounts of female employees whose supervisors "traded better assignments for sex and punished [workers] who refused").

109. *See* Collier Myerson, *Sexual Assault When You're On the Margins: Can We All Say #MeToo?*, THE NATION (Oct. 9, 2017), https://www.thenation.com/article/archive/sexual-assault-when-youre-on-the-margins-can-we-all-say-metoo/ [https://perma.cc/UR8W-TRN3]; Lia Russell, *Saying #MeToo is Harder for Low-Wage Workers*, AM. PROSPECT (May 3, 2018), https://prospect.org/economy/saying-metoo-harder-low-wage-workers/ [https://perma.cc/BA47-NCKY].

110. BERNICE YEUNG, IN A DAY'S WORK: THE FIGHT TO END SEXUAL VIOLENCE AGAINST AMERICA'S MOST VULNERABLE WORKERS (2018) (chronicling sexual abuse throughout the agricultural, domestic, hospitality, and janitorial industries).

111. *Id.* at 18.

112. *Id.*

> [he] told her that he needed to talk to her privately about her work in his car. This made [her] uncomfortable, but he said, "You need this job, don't you?" He instructed Hernández to meet him in the parking garage. Worried about losing her job, she went to see him. When she got [there], he told her to get into his car. She hesitated, but he was the boss. She did what she was told. The supervisor drove them to a higher floor of the garage, where it was darker. . . . After he parked, [he] began to touch her legs. . . . She told him she didn't want to go on, and he replied that he'd give her more days off and better pay. Hernández told him that she didn't want more days off; she had taken the job because she wanted to work for her paycheck. When he began touching her breasts, she became afraid. Then . . . he took off her pants. As he forced himself on her, she panicked and her body froze.[113]

Hernández returned to work without telling anyone what had happened. As she explains, "[t]he shame of it was too much, and she knew it would be a challenge to quickly find a new job as an undocumented worker who couldn't read or write."[114] Her travails continued:

> About a week later, Hernández's supervisor told her to meet him again. When she said no and tried to quit, he threatened to hurt [her] and her daughter, and added that if she wanted to stay in the country, she needed to keep him happy. This time he drove them to a motel.[115]

What happened at the motel is not described.[116] It is quite possible that Hernández once again panicked and froze. But we could also suppose (as seems quite plausible) that because she had no viable options, Hernández behaved in a manner that—under diametrically different circumstances—might appear as if she was willingly participating in the sexual conduct. Regardless, what transpired at the motel cannot be considered consensual.[117] The array of forces deployed by her supervisor was overwhelming, and it resulted in sexual violation—violation that most criminal law definitions would exclude.[118] As Hernández put it, "There's no way to say

113. *Id.* If passivity is understood to signify *the absence of* consent, as I have argued it should, this episode falls squarely within the no-consent category.

114. YEUNG, *supra* note 110, at 19.

115. *Id.*

116. A third incident alleged includes more detail. *Id.*

117. *See supra* note 22 and accompanying text.

118. A broader understanding of coercion than what the law typically employs would prohibit this conduct. *See supra* notes 86-87 (noting competing proposals to

no. When you need the job, you become the victim of others. That's why you deal with everything, all the harassment, the discrimination, everything. You deal with it—because you need the job."[119]

By assigning totemic significance to the performance of consent in sexual interactions, we ignore the influence of steep and pervasive hierarchies that, like physical threats, can erode the will.[120] The #MeToo stories of the most marginalized assault survivors are amplifying the ways in which coercion invalidates consent. In time, we may come to more fully realize the harm inflicted by this kind of violation. But for now, the criminal law continues to lag behind better understandings.

III.
PRESSURED CONSENT

Adjacent to the category of coerced consent, but distinct in important ways from it, are the "pressured consent" cases, which involve sexual contact that I will describe as unwanted but consensual.[121] The problem of pressured or extracted consent has become far more discernible with the rise of the #MeToo movement. Without delving into how best to demarcate the line between coercion that invalidates consent and pressure that generates it,[122] I contend that the latter dynamic is also harmful. Although my view is that the pressured consent cases should remain outside the pur-

---

reform the criminal law of coerced penetration). For analysis of the differing approaches in relation to sexual agency, see Tuerkheimer, *Sexual Agency*, *supra* note 15, at 182-83.

119. YEUNG, *supra* note 110, at 20.

120. Other scholars have noted that the law's failure to recognize the impact of coercion on consent "ultimately resurrects a form of the resistance requirement." Kimberly Kessler Ferzan & Peter K. Westen, *How To Think (Like a Lawyer) About Rape*, 11 CRIM. L. & PHIL. 759 (2017). For a statutory proposal to address this gap, see MacKinnon, *supra* note 16.

121. For a fuller discussion, see Tuerkheimer, *Sexual Agency*, *supra* note 15, at 180-83.

122. Constraining forces—including what I am calling pressure and coercion—exist on a spectrum. *See supra* note 88 (noting competing approaches to defining prohibited coercion). As Deborah Denno has aptly observed, "There are many line-drawing dilemmas throughout the criminal law." Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 274 (2002).

view of criminal law,[123] this ought not to immunize them from feminist critique.[124]

To see why, it is helpful to elaborate on the nature of the violation. Over a decade ago, Robin West observed that "consensual sex, when it is *unwanted and unwelcome*, often carries harms to the personhood, autonomy, integrity and identity of the person who consents to it—and that these harms are unreckoned by law and more or less unnoticed by the rest of us."[125] At the time West wrote, the harms to women and girls of participating in unwanted consensual sex and certainly the ubiquity of this kind of sex were "largely *unrecognized*."[126] But #MeToo has begun to fill this epistemic void by shining a light on unwanted sex—even the kind that is consented-to.

The public conversation around this kind of sex was catalyzed by the published recounting of a woman known as Grace of her sexual encounter with comedian Aziz Ansari.[127] Grace, a woman in

123. My intuition is based on considerations of moral blameworthiness, degrees of harm, and rule administrability, which all seem to militate against outlawing pressured sex.

124. A feminist critique of pressured consent extends beyond the recognition that most (or even all) of our choices are made under conditions of constraint. Feminists have long identified sexual violation, whether within or without law, as a major contributor to enduring gender inequality. For this reason alone, sexual consent that results from the deployment of any structural hierarchy—gender in particular, but certainly not alone—is of special concern. (I thank Heidi Hurd for prompting me to articulate this point.)

125. Robin West, *Sex, Law, and Consent*, *in* THE ETHICS OF CONSENT: THEORY AND PRACTICE 221, 224, 236 (Franklin G. Miller & Alan Wertheimer eds., 2010) (emphasis added). As Professor West elaborates:

> Heterosexual women and girls, married or not, consent to a good bit of unwanted sex with men that they patently don't desire, from hook-ups to dates to boyfriends to cohabitators, to avoid a hassle or a foul mood the endurance of which wouldn't be worth the effort, to ensure their own or their children's financial security, to lessen the risk of future physical attacks, to garner their peers' approval, to win the approval of a high status man or boy, to earn a paycheck or a promotion or an undeserved A on a college paper, to feed a drug habit, to survive, or to smooth troubled domestic waters. Women and girls do so from motives of self-aggrandizement, from an instinct for survival, out of concern for their children, from simple altruism, friendship or love, or because they have been taught to do so. But whatever the reason, some women and girls have a good bit of sex a good bit of the time that they patently do not desire.

Id. Some of these constraints would lead to coerced consent, while others would lead to pressured consent.

126. *Id.* at 237.

127. *See* Katie Way, *I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life*, BABE (Jan. 13, 2018), https://babe.net/2018/01/13/aziz-ansari-

her early 20's, was, by her own account, excited to be on a first date with Ansari. According to her account,[128] after dinner the two went back to his apartment, where he quickly began kissing, touching, and undressing her, to Grace's discomfort.[129] As she describes,

> When Ansari told her he was going to grab a condom within minutes of their first kiss, Grace voiced her hesitation explicitly. "I said something like, 'Whoa, let's relax for a sec, let's chill.'" She says he then resumed kissing her, briefly performed oral sex on her, and asked her to do the same thing to him. She did, but not for long. "It was really quick. Everything was pretty much touched and done within ten minutes of hooking up, except for actual sex."[130]

As the night proceeded, Grace says that a similar pattern repeated itself. Ansari persistently attempted, both verbally and physically, to pressure Grace to engage in more sex.[131] At one point, she told him, "I'd rather not feel forced because then I'll hate you, and I don't want to hate you."[132] Even after hearing this, Ansari allegedly continued his efforts to wear her down.[133] As she explains, in the midst of these interactions, "It really hit me that I was violated. I felt really emotional all at once when we sat down there. That that

---

28355 [https://perma.cc/P2ZL-EVNL]; *see also* Julianne Escobedo Shepard, *The Next Step for #MeToo Is Into the Gray Areas*, JEZEBEL (Sept. 24, 2018), https://jezebel.com/the-next-step-for-metoo-is-into-the-gray-areas-1829269384 [https://perma.cc/UB4N-KU7H] (describing multiple allegations of sexual abuse resulting from "emotional abuse, manipulation, and gaslighting" by journalist Jack Smith IV).

128. Way, *supra* note 127. Ansari acknowledged that he had engaged in "sexual activity" with the accuser, adding that "by all indications [it] was completely consensual." *See* Halle Kiefer, *Aziz Ansari Issues Statement After Sexual-Misconduct Allegation: "I Took Her Words to Heart"*, VULTURE (Jan. 14, 2018), https://www.vulture.com/2018/01/aziz-ansari-issues-statement-on-sexual-misconduct-accusation.html [https://perma.cc/8NPH-FGTG]. For a discussion of how Ansari addressed the incident involving Grace (and sexual abuse more generally) on his first major comedy tour since the allegations arose, see Anna North, *Aziz Ansari's New Standup Set, and its Complicated, Necessary Role in #MeToo*, VOX (March 20, 2019, 7:00 AM), https://www.vox.com/2019/3/20/18263783/aziz-ansari-tour-2019-sexual-misconduct-allegations [https://perma.cc/PY3F-LAKT].

129. As Grace described, "In a second, his hand was on my breast." Way, *supra* note 127. Then, according to her account, "he was undressing her, then he undressed himself. She remembers feeling uncomfortable at how quickly things escalated." *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Way, *supra* note 127.

whole experience was actually horrible."[134] Grace recalls crying the whole way home. As she told Ansari the next night when he texted that it was fun meeting her, "Last night might've been fun for you, but it wasn't for me."[135]

Limitations in the reporting on Grace's allegations[136] make it difficult to parse critical details of what happened that night. But with regard to some of the sexual activities at issue, at the very least, it seems that Grace engaged in conduct that she did not in fact want to engage in. We could say that the sexual acts she consented to were lawful but unwanted.

Under other circumstances, this episode might well have passed with little notice. In the midst of the #MeToo movement, however, it catapulted a national conversation about pressured consent. Grace's story—a "Rorschach test" of sexual normativity[137]—came to stand in for a commonplace experience that had rarely been discussed.[138] Even the appropriate vernacular to describe the encounter with Ansari was confusing.[139] Surveying this muddled frontier, one commentator observed that "[t]here is a sizable chasm between an 'awkward sexual experience' and sexual assault and its topography is largely unmapped."[140]

Amidst a rather chaotic collective effort to begin charting this terrain, what emerged was a nearly universal consensus that Grace's

---

134. *Id.*

135. *Id.*

136. *See* Jill Filipovic, *The Poorly Reported Aziz Ansari Exposé Was a Missed Opportunity*, GUARDIAN (Jan. 16, 2018), https://www.theguardian.com/commentisfree/2018/jan/16/aziz-ansari-story-missed-opportunity [https://perma.cc/7CC4-P7BD].

137. *See* James Hamblin, *This is Not a Sex Panic*, ATLANTIC (Jan. 17, 2018), https://www.theatlantic.com/entertainment/archive/2018/01/this-is-not-a-sex-panic/550547/ [https://perma.cc/2DQC-UFCW] ("The story of Aziz Ansari and 'Grace' is playing out as a sort of Rorschach test.").

138. Rather suddenly, a public in the throes of grappling with sexual assault and harassment was confronted with untold "stories of gray areas." *See id.* (summarizing Grace's account and its aftershocks).

139. *See, e.g.*, Jenny Hollander, *You're Right, Everything Aziz Ansari Did Was Legal*, BUSTLE (Jan. 17, 2018), https://www.bustle.com/p/youre-right-everything-aziz-ansari-did-was-legal-7923237 [https://perma.cc/6GTU-35UM] (puzzling, "What do we call it when a man repeatedly pressures a woman to engage in sexual acts? What do we call it when someone says 'no,' but then appears to change their mind? What do we call it when someone feels violated after a sexual encounter?").

140. Stassa Edwards, *It's Time to Map the Wilderness of Bad Sex*, JEZEBEL (Jan. 19, 2018, 3:20 PM), https://jezebel.com/its-time-to-map-the-wilderness-of-bad-sex-1822171954 [https://perma.cc/7MVR-VY97].

account was one with which women were exceedingly familiar.[141] As Jessica Valenti tweeted in the story's immediate wake, "A lot of men will read that post about Aziz Ansari and see an everyday, reasonable sexual interaction. But part of what women are saying right now is that what the culture considers 'normal' sexual encounters are not working for us, and oftentimes [are] harmful."[142] A reckoning with sexual assault and harassment grew to indict "our broken sexual culture."[143]

We now realize that, while consent can be extracted in many ways,[144] a familiar pattern involves men badgering women into reluctant submission.[145] Male treatment of female sexuality as passive is not an outlier, but rather a commonplace dynamic.[146] When women are seen as vessels for male sexual pleasure—objects, not subjects—their actual desires are unimportant.[147] What matters, at most, is securing their permission to be acted upon.[148]

Because the promise of female sexual agency is unrealized, gender is often bound up in pressured consent (it is worth emphasizing that many other forces can be brought to bear on consent, and gender is not always implicated). At the same time, extracted consent can diminish the consenting party's agency. In other words, the very inequalities that tend to produce unwanted sex are exacerbated by unwanted sex.

---

141. *See, e.g.*, Anna North, *The Aziz Ansari Story is Ordinary. That's Why We Have to Talk About It*, VOX (Jan. 16, 2018), https://www.vox.com/identities/2018/1/16/16894722/aziz-ansari-grace-babe-me-too [https://perma.cc/U4TD-ZHXE] (suggesting that "the sheer commonness of Grace's experience . . . makes it so important to talk about."). Even commentators unsympathetic to Grace's plight acknowledged the normality of the incident. *See, e.g.*, Bari Weiss, *Aziz Ansari is Guilty. Of Not Being a Mind Reader*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-sexual-harassment.html [https://perma.cc/7GBE-VMA6] (remarking, "every adult woman I know" has had similar "lousy romantic encounters.").

142. Caitlin Flanagan, *The Humiliation of Aziz Ansari*, ATLANTIC (January 14, 2018), https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541/ [https://perma.cc/VS73-MKL9].

143. Weiss, *supra* note 141.

144. *See* West, *supra* note 125 and accompanying text.

145. *See supra* notes 129-134 and accompanying text.

146. *See supra* notes 138-143 and accompanying text.

147. We live in a society that "still sees sex as primarily about male pleasure; that continues to position women's bodies as sexual objects, receptacles and stand-ins for sex itself; and that encourages sexual aggressiveness in men and congeniality and passivity in women." Filipovic, *supra* note 136.

148. For a philosophical examination of ethical sexual negotiation and how it advances sexual agency, see Rebecca Kukla, *That's What She Said: The Language of Sexual Negotiation*, 129 ETHICS 70 (2018).

CONCLUSION

The #MeToo stories highlight a significant legal gap—women experience a range of sexual violation that the criminal law does not prohibit. By considering cases involving no consent, coerced consent, and pressured consent, we can better discern the types of harm that are currently overlooked in many, if not most, jurisdictions.

I have aimed in these pages to explore the space between criminal definitions of sexual violation and sexual violation as it is experienced in the world. But I have also suggested that the law should capture more than it currently does and begun to sketch what this might look like statutorily. Without purporting to draw every line, I have argued that no-consent cases and coerced (invalid) consent cases should be more effectively outlawed. The pursuit of gender equality makes it necessary for women to possess a full measure of sexual agency, which requires *at bare minimum* protection from nonconsensual sex.

In a similar vein, pressured consent is harmful because it reinforces constraints on the exercise of agency. Circa 2020, these constraints—particularly on women's agency, sexual and otherwise—have become widely discernible. The pressured consent cases should not be outlawed. But they nevertheless undermine sexual agency. Unwanted sex will remain rampant as long as nonconsensual sex absent abundant physical force is deemed lawful.

Statutory reform is surely not everything.[149] Indeed, as the path of #MeToo unfolds, it brings into clearer focus the danger of rape myopathy.[150] But it would be a terrible mistake to leave intact the vestiges of an archaic body of law designed to maintain men's control of women's sexuality. Women's sexual violations, unlawful and lawful, sparked #MeToo, perfectly positioning this movement to drive needed legal reform.

149. *See* Tuerkheimer, *supra* note 51, at 27.

150. *See* Megan Garber, *Aziz Ansari and the Paradox of 'No'*, ATLANTIC, (Jan. 16, 2018), https://www.theatlantic.com/entertainment/archive/2018/01/aziz-ansari-and-the-paradox-of-no/550556/ [https://perma.cc/LF2U-3B7D] (decrying the "awful irony" that "[w]omen spent so much of their time and energy and capital reminding the world of their right not to be raped, that the next obvious step in their sexual liberation—discussions about what makes sex good, in every sense, for all involved—got obstructed.").

REVISITING BROKEN WINDOWS: THE ROLE OF THE COMMUNITY AND THE POLICE IN PROMOTING COMMUNITY ENGAGEMENT

TOM TYLER
TRACEY MEARES
YALE LAW SCHOOL

"You cannot arrest your way out of crime"
– Theron Bowman, Former Arlington Texas Police Chief

In *American Policing at a Crossroads*, Schulhofer, Tyler and Huq[1] highlight the opportunity to fundamentally alter the policies of American policing during the current era of low crime. This article argues that this change should be made through a pivot toward procedurally just policing.[2] This argument is supported by the results of our empirical study, which explores the relationship between New York City residents' judgments about the police and their beliefs about, and activities within, their communities.

Our study uses this survey to test the viability of the procedurally just policing model as a strategy for helping to build vibrant communities. Our study supports the procedurally just policing model by showing that when people in the community view the police as fair and just actors, their faith in the police is promoted. That perception of efficacy both promotes community cohesion and leads to higher levels of economic, political, and social engagement by community members. In addition, the results support, in part, the idea set forth by the broken windows theory, as they indicate that reducing disorder builds cohesion and promotes desirable community behavior.[3] However, as a whole, between the procedur-

1. Stephen J. Schulhofer, Tom R. Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335 (2011).

2. Tom R. Tyler, Phillip Atiba Goff & Robert J. MacCoun, *The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement,* 16 PSYCHOL. SCI. PUB. INT. 75 (2015).

3. The broken windows theory, outlined by George Kelling and James Q. Wilson in 1982, argues that neighborhood disorder undermines communities, encouraging undesirable behavior such as leaving the community, rather than working to make it better. *See generally* George Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29.

ally just policing model and the broken windows theory, the former has a stronger impact.

CHANGING THE GOALS OF POLICING

Currently, police practices focus on concentrating power and control within individual police departments. Police then create and implement policies that they believe will lower crime within local communities. Guided by the broken windows model, the police believe that by lowering crime rates they are promoting the development of those communities, or at least lessening community disintegration.[4] This policing approach has led to problems, including public distrust and a lack of cooperation with the police.[5] And, as will be detailed later, evidence is unclear about whether it has actually promoted community development, an outcome predicted by broken windows models.

A shift in the policies and practices of the police through procedurally just policing is needed to open up opportunities for greater police cooperation with the community, which in turn may lead to lower crime levels.[6] By treating members of the community fairly, the police build their legitimacy and receive higher levels of help from people in the community. This leads to lower levels of crime because people who believe the police are legitimate commit fewer crimes,[7] and it also leads to a higher rate of solving crimes because people who believe the police are legitimate are more willing to report crimes, identify criminals, testify in trials, and act as jurors.[8] Procedurally just policing also promotes co-policing with community members attending community meetings and otherwise playing a role in policing their communities.[9]

Although procedurally just policing is an important change in police practices, as it emphasizes how the police are evaluated by

4. *See generally id.*

5. Tom. R. Tyler, Jonathan Jackson, & Avital Mentovich, *The Consequences of Being an Object of Suspicion: Potential Pitfalls of Proactive Police Contact,* 12 J. EMPIRICAL LEGAL STUD., 602, 602-36 (2015); Tom Tyler, *Police Discretion in the 21st Century Surveillance State*, UNIV. OF CHI. LEGAL F. 579, 579–614 (2016) (discussing the influence of broken windows theory on strategies of policing).

6. Tyler et al., *supra* note 2, at 75.

7. Tom R. Tyler, Jeffrey Fagan & Amanda Geller, *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization*, 11 J. EMPIRICAL L. STUD. 751, 774 (2014).

8. Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 PSYCH., PUB. POL'Y, & L. 78, 89 (2014).

9. *Id.*

the public, this approach continues to embrace the traditional role of police as limited to their role in crime control. In the last several decades, the police have viewed their primary task as harm reduction through tactics designed to lower the number and severity of the crimes that occur in their communities.[10] This does not mean that the police have ignored issues of community development. The broken windows model of policing argues that suppressing disorder is an important prerequisite to building strong communities.[11] As a consequence, the police have believed that by focusing on harm reduction through crime control they are addressing the issues that must underlie meaningful community development.[12]

In this article we argue for a further shift in policing that puts community well-being at the center of the discussion. This new perspective asks how communities can move forward in their social, economic, and political growth, and it considers the role of both community disorder and police procedural justice/legitimacy in facilitating this process. This effort recognizes that while traditional police policies may have been enacted in good faith, with the belief that managing crime was a key community development strategy, research has not supported that view.[13] In their efforts, the police have lowered crime, but they have not built trust with the community at the same time.[14] This is primarily a consequence of community members' viewing the police as agents who use force to compel adherence to rules, rather than as champions of community development. In order to facilitate proactive community development, it is first necessary to rethink how the police behave within the community.

THE GROWTH OF PROCEDURALLY JUST POLICING

In the last decade, there has been a rapid increase in support for procedurally just policing.[15] This support has emerged as people have come to recognize the necessity of public trust in the police.[16] The emergence of legitimacy as an issue in policing began with the 2004 National Academy of Sciences report on policing,[17]

10. Tyler, *supra* note 5, at 580.
11. *Id.* at 593.
12. *Id.* at 594–97.
13. *Id.* at 582.
14. *Id.*
15. Tyler et al., *supra* note 2.
16. *Id.*
17. National Research Council, Fairness and Effectiveness in Policing: The Evidence 8 (Wesley Skogan & Kathleen Frydl eds., 2004).

which recommended more attention by police chiefs, local political authorities, and the federal government to issues of popular legitimacy—the belief by the public that the police in their community should be trusted. This initial report culminated in the President Obama Task Force Report on 21st Century Policing that described legitimacy as the first pillar of policing.[18] These reports established an emphasis on legitimacy in policing, which continues to be a key influence in police practices. For example, the recent campaign for a "New Era of Public Safety"[19] points to the importance of popular legitimacy, framing a focus on popular legitimacy as an element of community policing. Consistent with this ongoing emphasis, detailed frameworks have emerged for changes in policing to promote procedural justice and legitimacy.[20]

RESISTANCE TO PROCEDURALLY JUST POLICING

However, at the same time that policing has increasingly adopted the message of procedurally just policing, there have been critiques of this approach. In her discussion of the opinions of residents of low income neighborhoods, Monica Bell argues that the broader framework of "estrangement," which considers the general alienation of the poor and minorities from local political and legal authorities, better captures the perception within poor communities that law operates to generally exclude them from society.[21] The key to change through a procedurally just policing approach is to broaden the goals of policing to think about how the legal system can also function as a tool for creating a cohesive and inclusive society.[22] In other words, procedurally just policing can address the issue identified by Bell as important precursors of estrangement. Building on this point, Brie McLemore argues that the way to "challenge anomie [is] by situating the marginalized as actors who affect change."[23] This argument is consistent with recent research sug-

18. Off. of Cmty. Oriented Policing Servs, The President's Task Force on 21st Century Policing 1 (U.S. Dep't of Just., 2015).

19. The Leadership Conference Educ. Fund, The Leadership Conference on Civil and Human Rights, *New Era of Public Safety: A Guide to Fair, Safe, and Effective Community Policing* (2019), https://policing.civilrights.org/report/Policing_Full_Report.pdf [https://perma.cc/Q9QF-T3C6].

20. Megan Quattlebaum, Tracey Meares & Tom Tyler, Just. Collaboratory at Yale L. Sch., *Principles of Procedurally Just Policing* (2018).

21. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 Yale L.J. 2054 (2017).

22. *Id.* at 2084.

23. Brie McLemore, *Procedural Justice, Legal Estrangement, and the Black People's Grand Jury*, 105 Va. L. Rev. 371, 395 (2019).

gesting that social connections within communities are central to the ability of those communities to develop, and these connections impact a community's economic and political vibrancy.[24]

DEFINING A NEW MODEL OF POLICING

We believe in the importance of moving beyond a police-centric view of how to address community problems and of placing communities at the center of the discussion. We need to move beyond a focus on managing crime and disorder, and towards a more holistic focus on procedurally just policing. It is of course important to manage crime; however, finding ways to do that which involve support from and partnership with the people in the community is also important.

Forming strong partnerships with people in the community focuses on social order, which is only one indicator of community well-being. In addition to social aspects, other important indicators of well-being include economic and political engagement with the community. Social elements of the community refer to the relationship among community members.[25] This includes their shared identification with a community, their commitment to help it solve shared problems, and the belief that neighbors can and will work together to address such problems.[26] Economic development refers to having robust restaurants, stores, and other engines of jobs within the community.[27] Finally, political well-being consists of a polity which engages with government to address community concerns, as well as organizing and voting in elections.[28]

These goals are important in building vibrant, flourishing, cohesive, and inclusive communities. A parallel concern is with enhancing the well-being of the people within those communities. A problem for promoting community well-being is that on their own the people in communities can lack the social and other types of

24. Robert J. Sampson, Great American City: Chicago and the Enduring Neighborhood Effect (2012).

25. Specifying the dimensions of community development has been an important topic, particularly within the international literature on development. *See* Katherine Scrivens & Conal Smith, *Four Interpretations of Social Capital: An Agenda for Measurement* (OECD Stat., Working Paper No. 55, 2013), https://www.oecd-ilibrary.org/docserver/5jzbcx010wmt-en.pdf?expires=1604946155&id=ID&accname=Guest&checksum=FE686C41A61403CA3F3F5254B8D5C76B [https://perma.cc/EEG8-SF8L]; *see also* Michael Trebilcock & Mariana Prado, Advanced introduction to Law and Development (Edward Elgar Publ'g 2014).

26. Scrivens & Smith, *supra* note 25; Trebilcock & Prado, *supra* note 25.

27. Scrivens & Smith, *supra* note 25; Trebilcock & Prado, *supra* note 25.

28. Scrivens & Smith, *supra* note 25; Trebilcock & Prado, *supra* note 25.

resources to sustain social, economic, and political growth.[29] In those situations, focusing on the community, however desirable, is not an effective approach. The purpose of procedurally just policing is to encourage the type of attitudes and values among the people in the community which would support these forms of development.

CAN THE POLICE HELP TO PROMOTE COMMUNITY DEVELOPMENT?

In this section, we discuss the empirical study we conducted to test our theory arguing for a shift in policing practice towards procedural justice-based policing. The goal of this analysis is to test empirically whether police tactics can aid in efforts at social, economic, and political development in the community. The underlying assumption in this approach is that an important goal of the police is to promote the social, economic, and political growth within communities, and thus policing practices that further the realization of these goals should be preferred. Our central question is whether the police can influence social, economic, and/or political growth, and if so, what can the police do to promote communities beyond providing security by harm reduction?

This issue was addressed in the recent National Academy of Sciences report on Proactive Policing. The report considered one subset of this general question: whether policing could impact collective efficacy—the shared belief that people in the community will work together to solve local problems and have the capacity to be successful in such efforts—within communities.[30] Researchers particularly focused on whether policing could help communities to "invest residents with the necessary skills, resources, and sense of empowerment to mobilize against neighborhood problems."[31]

The currently available evidence is largely based upon cross-sectional studies similar to the study reported here.[32] One exception is a study conducted in the United Kingdom, which compared

29. STEVE HERBERT, CITIZENS, COPS, AND POWER: RECOGNIZING THE LIMITS OF COMMUNITY (2009).

30. NAT'L ACADS. OF SCIS., ENG'G, & MED., PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES (David Weisburd & Malay K. Majmundar eds., 2018) [hereinafter PROACTIVE POLICING].

31. PROACTIVE POLICING, *supra* note 30, at 219.

32. These studies are presented in the National Academy of Sciences 2018 report in Chapter 6, "Community-Based Proactive Strategies: Implications for Community Perceptions and Cooperation." PROACTIVE POLICING, *supra* note 30, at 211–50.

a program of community policing to communities without such programs. The study did not find any relationship between the type of policing and measures of social cohesion, trust in other members of the community, collective efficacy, or involvement in voluntary community activities.[33]

One concern with empirical studies is that the goal of policing is to build, improve, or sustain communities, which is something that is unlikely to occur within the short time frame considered by most studies. One study that considers impact over time is a study of Chicago.[34] This study found mixed effects. At this time, evidence is unclear about whether policing approaches can significantly impact people's attitudes about and behaviors within their communities in ways which promote community growth. Further, these studies did not test the use of procedural justice as a policing model, something that we believe should heighten impact.[35]

COMMUNITY DEVELOPMENT

The key to any long-term solution to crime is community growth. What factors advance and inhibit the possibilities for growth? Our central argument is that the police can facilitate community growth, but they have not optimized their ability to do so because they have adopted an incorrect "broken windows" model for the relationship between policing and the community. The dominant model suggested by the broken windows perspective is that disorder in the community influences perceptions of police effectiveness in maintaining social order.[36] These views about whether the police can shape social order then shape resident's

33. RACHEL TUFFIN, JULIA MORRIS & ALEXIS POOLE, AN EVALUATION OF THE IMPACT OF THE NATIONAL REASSURANCE POLICING PROGRAMME 56–61 (Home Office Research, Development and Statistics Directorate, 2006), http://library.college.police.uk/docs/hors/hors296.pdf [https://perma.cc/EC8S-NTKB].

34. WESLEY G. SKOGAN, POLICE AND COMMUNITY IN CHICAGO: A TALE OF THREE CITIES 305–26 (2006).

35. PROACTIVE POLICING, *supra* note 30 (reviewing the literature on procedural justice in policing); Tammy Rinehart Kochel, *Can Police Legitimacy Promote Collective Efficacy?*, 29 JUST. Q. 384 (2012) (showing that legitimacy impacts on the belief that community residents will work to solve community problems); Tyler & Jackson, *supra* note 8 (showing that police legitimacy is linked to engagement in one's community); Justin Nix, Scott Wolfe, Jeff Rojek & Robert Kaminski, *Trust in the Police: The Influence of Procedural Justice and Perceived Collective Efficacy,* 61 CRIME & DELINQ. 610 (2015) (demonstrating a link between procedural justice and the belief that community residents will work to solve community problems).

36. *See generally* Wilson & Kelling, *supra* note 3.

views of the community, which in turn influences the ways in which the community can grow and flourish.[37]

We suggest that while the broken windows model is correct, the use of this model to develop policing strategies has led the police to think of the relationship between the police and the community in a limited way. The model is correct in emphasizing the importance of police in reassuring people in the community that crime is under control and they are safe. This stops community decline.

However, the broken windows model stops short. For communities to develop sustainably, there is a further need for people to be willing to be involved in economic activities, such as working, shopping, eating, and going to entertainment events within the community. They also need social cohesion, *i.e.*, they need to feel that they can work with and trust their neighbors. Furthermore, people need to be engaged politically—they need to vote and otherwise involve themselves in local politics to help determine how the community should be managed. We argue that procedurally just policing models can facilitate this growth, directed at building communities beyond the impact of lowering the crime rate.

BROKEN WINDOWS

Kelling and Wilson's classic paper outlining a theory of "broken windows" argues in favor of the centrality of police actions to community development.[38] The paper hypothesizes that when the public sees signs of disorder in their neighborhood they will disengage from the community, thereby undermining the social, economic, and political development of the neighborhood. Kelling and Wilson argue that the police can promote community cohesion, and by extension community development, by proactively addressing crime and disorder in the community and showing signs of effectiveness in maintaining social order. In particular, they advocate that police should be proactive in addressing signs of disorder in the community by managing deviant groups.[39]

The broken windows model focuses on "enhanc[ing] the ability of the community to exercise informal social controls presumed to play a central role in the nature and extent of community order and safety."[40] Such order is important to prevent the decline of

37. *Id.*
38. *Id.*
39. *Id.*
40. PROACTIVE POLICING, *supra* note 30, at 224.

communities, and "reducing disorder [ ] is expected to reverse the decline of collective efficacy in communities, thereby preventing a breakdown in community social controls."[41] Although this model focused on preventing decline, the reverse is equally true: building order promotes collective efficacy and promotes community development. Despite this framing of the model, most existing research has not focused upon the impact of policing on disorder and the relationship is unclear.[42]

The proactive policing strategy that Kelling and Wilson promote in their piece is not the only way the police or municipal agencies could be involved in facilitating community cohesion in a neighborhood that could lead to an important and positive role in community development and vitality. Nonetheless, their proactive policing model emphasizing law enforcement tactics has had a powerful impact upon subsequent policing. These tactics have sometimes been justified as leading to the promotion of community development, although they have more typically been promoted as facilitating crime reduction as an end in and of itself.[43]

While the broken windows paradigm has provided the police with a set of policies and practices that were theorized to facilitate community development, the focus on the police as agents of development has overshadowed the role that the community itself plays in its own development.[44] Fortunately, recent scholarship has emphasized that the characteristics of the community can directly influence development.[45] In particular, the recent literature on communities suggests that ruptures in the social bonds that connect individuals to their community undermine development.[46] This is the case because social cohesion in communities promotes their development. Sampson, Raudenbush and Earls, for example, argue that collective efficacy—*i.e.*, the collective willingness of

41. *Id.* at 225.

42. David Weisburd, Michael Davis, & Charlotte Gill, *Increasing Collective Efficacy and Social Capital at Crime Hot Spots: New Crime Control Tools for Police*, 9 POLICING: J. POL'Y & PRAC., 265 (2015) (examining the influence of concentrating the police upon the strength of the connections among neighbors).

43. Tyler et al., *supra* note 2.

44. PATRICK SHARKEY, UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE (2018) (arguing that an important component of community development is the vitality of community groups, distinct from what the police do).

45. *Id.*; *sell also* Bell, *supra* note 21.

46. Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance*: *The Neighborhood Context of Racial Differences*, 32 L. & SOC'Y REV. 777 (1998).

neighbors to intervene for the common good—supports community development.[47] Herbert suggests the importance of this perceived ability to rely upon neighbors for assistance and argues that having a community with the type of social bonds that promote a shared commitment to the neighborhood is important to development.[48] Two aspects of the community are potentially valuable: perceptions of collective efficacy and the existence of shared commitment to the community.

The goal of this paper is to examine the intersection of these two sources of influence on social, economic and political engagement. There are several plausible models of influence. One is that community cohesion shapes development and is unaffected or even undermined by police efforts. A large literature suggests that the policies and practices of the police—zero tolerance for misdemeanors, widespread stop-question-and-frisk tactics, mass incarceration, etc . . .—have undermined the legitimacy of the police within minority communities,[49] increased legal cynicism,[50] contributed to the rate of crime,[51] and increased the prevalence of stress and trauma within those communities.[52]

An alternative view is that feelings of collective efficacy within the community are encouraged by police legitimacy,[53] suggesting that the police can supplement community development efforts. In particular, community efforts are faulted for being difficult to sustain and under-resourced, leading to the suggestion that govern-

47. Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhood and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCI. 918 (1997) (discussing the role of people's beliefs about what their neighbors will do to address community problems on community well-being).

48. Herbert, *supra* note 29.

49. Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC'Y REV. 555 (2003); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW (2002).

50. Matthew Desmond et al., *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOC. REV. 857 (2016); David S. Kirk & Andrew V. Papachristos, *Cultural Mechanisms and the Persistence of Neighborhood Violence*, 116 AM. J. SOC. 1190 (2011).

51. Tyler et al., *supra* note 7.

52. Amanda Geller et al. *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321 (2014).

53. Kochel, *supra* note 35; Elise Sargeant et al., *Policing Community Problems: Exploring the Role of Formal Social Control in Shaping Collective Efficacy*, 46 AUSTL. & N.Z. J. CRIM. 70 (2013).

ment needs to be an important component of any development efforts in poor communities.[54]

If the police affect community development, there are two ways that influence can occur. First, the cohesion of the community and the legitimacy of the police can shape community development directly. Second, the legitimacy of the police can shape community development indirectly by shaping community cohesion.

This paper considers the validity of the original broken windows argument and what that model captures and misses about how the community and the police shape community development. The results of our survey of the residents of New York City support the argument that perceived disorder influences perceived police effectiveness, shapes community cohesion, and influences the extent to which residents stay within their communities and engage in them economically, socially and politically. Our findings suggest that public perceptions of police effectiveness are only secondarily about perceptions of their ability to manage perceived neighborhood disorder. Instead, perceived effectiveness is more centrally impacted by whether the police are perceived as exercising their authority fairly—i.e. by procedural justice.

The results of this study suggest that the judgments that people in the community make about police are important in two ways. First, they have a strong direct influence on perceived police effectiveness. The judgments of community members about the degree to which the police are effective in managing crime and disorder shapes community cohesion. Second, procedural justice shapes legitimacy, which also influences community cohesion. Finally, the police gain from working within more cohesive communities because such communities are more likely to view the police as legitimate and cooperate with them to address disorder.

PARTICIPANTS AND PROCEDURES

Our survey respondents include a diverse sampling of respondents from various age groups, races, educational backgrounds, and political ideologies. Survey data were collected by Abt SRBI via telephone using random digit-dialing of numbers in the five boroughs of New York City. Participants were offered $10 to take a survey, and they were told the survey would last approximately 25 minutes. Upon consenting to the survey, participants were asked in which of the five boroughs they currently live; if they answered that

54. Herbert, *supra* note 29.

they did not live in one of the five boroughs, they were thanked and told that they could not participate.

A total of 2501 people were interviewed, including 1268 females and 1233 males, ranging in age from 18 to 99, (*M* of age= 49.18, *SD* = 19.65). Varying degrees of freedom reflect participants with missing data. Participants identified as White non-Hispanic (945, or 38%); Black or African American non-Hispanic (595 or 24%); Black Hispanic (90; 4%); White Hispanic (236; 9%); Hispanic Latino (223, or 9%); other or multiple racial groups and non-Hispanic (182, or 7%); Asian non-Hispanic (149, or 6%); and 81 (8%) "no response" or "do not know." In terms of education, 200 people (7%) had less than a high school degree; 441 (18%) were high school graduates; 35 (1%) were technical school graduates; 542 (22%) had some college education; 702 (28%) were college graduates; and 526 (21%) had some post-college education. On a scale of political ideology, most identified as liberal or extremely liberal (941, or 37.6%); the next largest proportion identified as moderate (839, or 33.5%), and the third largest proportion identified as conservative or extremely conservative (533, or 21.3%).

FACTORS MEASURED

The items used in the survey are outlined in Appendix A. The goal of the study is to explain people's economic, political, and social behavior. Our analysis identified two types of engagement: economic engagement (shopping or eating in the community) and political/social engagement (going to community meetings; getting together with friends). A separate scale measured willingness to cooperate with the police (reporting crime; being a witness or juror). One potential antecedent of behavior is cohesion. Cohesion was measured by asking respondents about their identification with the community, their social ties, and their beliefs about social cohesion.

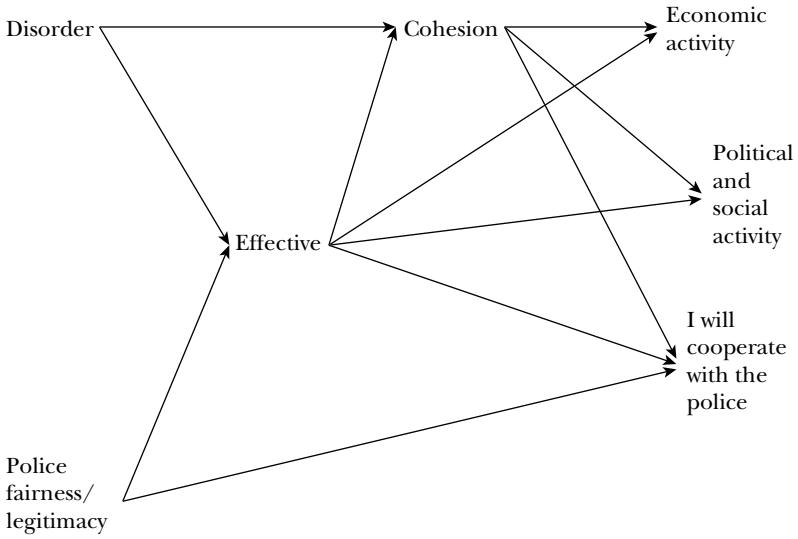
Central to the broken windows argument is that perceived police effectiveness flows from the judgment that the police are managing disorder. Thus, we included questions that measured both perceived police effectiveness and perceived degree of neighborhood disorder.

Distinct from this is the measurement of the fairness of police actions in the community, otherwise phrased as "police legitimacy." Three aspects of police behavior were measured: (1) overall procedural fairness, (2) perceived bias, and (3) the degree of public input into police policy. In the analysis, these three aspects of policing are linked to police legitimacy: (1) obligation to obey, (2) trust and confidence, and (3) normative alignment. Prior research

suggests that procedural justice and legitimacy will be linked and that both will shape cooperative behavior.[55] That anticipation is supported in this study. Procedural justice and legitimacy are found to be highly correlated (r = 0.54). Consequently, these two variables are treated as a single construct in the analysis.

A MODEL OF COMMUNITY ENGAGEMENT

Figure 1 shows two potential paths toward the type of activities which promote the economic, political, and social development of the community. The first reflects the original broken windows model. Disorder in the community undermines the belief that the police can manage crime, which in turn shapes community cohesion. Community cohesion reflects people's willingness to stay in the community, their identification with the community, their views about the quality of their relationship with others in the community, and their beliefs about whether people in the community will work together to address neighborhood problems. These beliefs are expected to shape economic, social, and political behavioral engagement in the community. Community cohesion and engagement are positively associated with beliefs that the police can manage crime.[56]



55. Tyler & Jackson, *supra* note 8, at 81–82.

56. *Id.* at 89.

The second path is through police procedural justice/police legitimacy.[57] This model links procedural justice and legitimacy to willingness to cooperate with the police. This suggests that the police can gain community cooperation through the manner in which they police.

How do the police impact community development? One way is through being seen by the public as effectively managing disorder. Another way is through influences linked to the degree the police are viewed as acting in procedurally just ways and thereby building legitimacy.[58] This may also be associated with their perceived effectiveness. Finally, the police can influence community development directly because their degree of procedural justice/legitimacy influences police effectiveness and community cohesion.[59] Either or both of these paths could promote economic, political, and social development and/or crime management behavior on the part of community residents.

PERCEIVED EFFECTIVENESS, COMMUNITY COHESION, AND POLICE LEGITIMACY

We used regression analysis to address the factors that shape perceived effectiveness and community cohesion. The results are shown in Table 1. They support the argument that perceived disorder is linked to perceived police effectiveness (high disorder is linked to low perceived effectiveness; Beta = -.22) and perceived community cohesion (high disorder is linked to low cohesion; Beta = -.25). Perceived police effectiveness is also associated with perceived community cohesion (high effectiveness is linked to high cohesion; Beta = 0.38). Separately, police fairness/legitimacy is linked to higher perceived police effectiveness (high legitimacy is linked to high effectiveness; Beta = 0.63) and to higher community cohesion (high legitimacy is linked to high perceived cohesion; Beta = 0.23).

These findings suggest two paths to community cohesion: one through reducing the perception of disorder in one's community and another through improving perceived police fairness/legitimacy. Both paths are linked to perceived police effectiveness, as well as to community cohesion and police fairness/legitimacy.

---

57. Schulhofer et al., *supra* note 1.

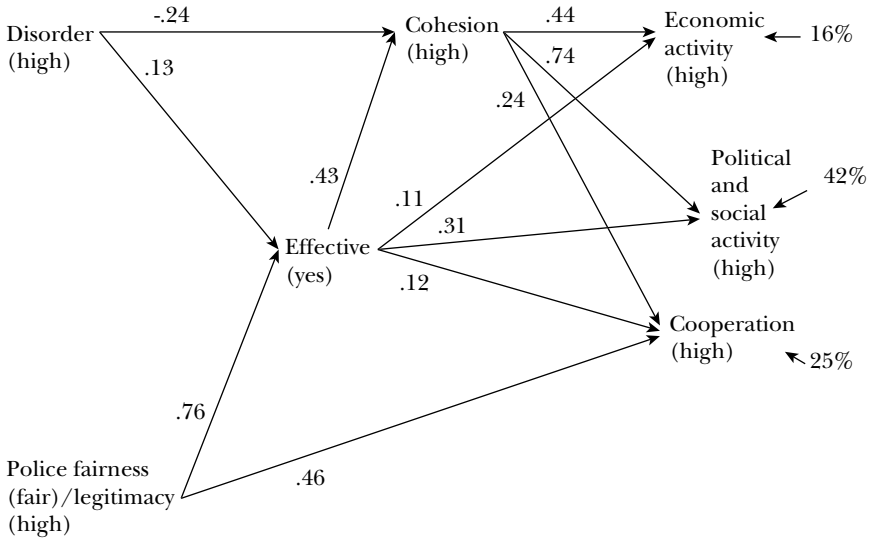
58. In a strategy of procedurally just policing, the police focus on treating community members fairly to enhance police legitimacy and motivate compliance, cooperation and engagement. *See* Tyler et al., *supra* note 2.

59. *Id.*

Interestingly, perceived fairness/legitimacy is more strongly connected to perceived effectiveness than is the perceived extent of disorder. We have observed through discussions with police leaders that it has been an article of faith among police leaders that reducing disorder through proactive policing leads the public to view the police as effective in managing crime. These results suggest that what matters the most as the primary antecedent of perceived effectiveness is how the police act, i.e., whether they are viewed as acting fairly when dealing with the community.

ENGAGEMENT

Regression analysis was also used to show the connection between effectiveness, cohesion, and procedural justice/legitimacy and the economic, social, and political behaviors we have associated with community development. The results are shown in Table 2. They support the suggestion that community cohesion shapes economic, social, and political behavior. Separately, the community cohesion impacts policing because cohesion is associated with the willingness to cooperate with the police. This influence is distinct from the association of procedural justice/legitimacy with the willingness to cooperate with the police.



An overall model is presented in Figure 2. Because this data is collected at one point in time, it is important to recognize that what is being displayed are associations and not a true causal model. The

reasonableness of the causal model underlying this discussion is tested in other experimental and longitudinal studies, but not in this dataset.

The findings in this model support the conclusion that both disorder and police fairness/legitimacy are important factors that shape people's behaviors within their community. Perhaps the most striking finding is that police effectiveness is primarily a consequence of police fairness/legitimacy. As expected, perceived effectiveness then shapes perceived cohesion, which is strongly associated with economic, social, and political activity. The police can aid community development and do so primarily through the influence of their perceived fairness and legitimacy.

DISCUSSION

These findings tell us a lot about what Kelling and Wilson's interpretation of broken windows got right and what that model missed. The data shows that when the level of perceived disorder in a neighborhood or community is lower people perceive the police to be more effective. This perceived effectiveness joins with perceptions of less disorder to heighten community cohesion. This study demonstrates that community cohesion is related to the degree to which people in different neighborhoods involve themselves in the types of community engagement behaviors that promote community development. These connections support the basic broken windows framework and point to the potential value of having the police address issues of community disorder. However, they also make clear that this is only valuable when the police take such actions in ways the community sees as reflecting procedural justice.

These findings highlight that the broken windows model missed the importance of how the police deal with the public. It is striking that the degree to which the police are viewed as effective is more strongly associated with their fairness than the perceived level of disorder in the community. By focusing upon the outcome of police actions (reducing disorder) as opposed to the manner in which the police engage the public (procedural justice), the model created a conceptual framework that led to zero tolerance and stop and frisk.

The first take-home message is that there needs to be a change away from the current command and control model in which the police use force to compel compliance, and toward procedurally just policing. The good news is that such a change not only promotes public cooperation in managing crime but also enhances the community cohesion which promotes behaviors that develop com-

munities. Thus, police should rely on reducing crime by supporting the types of behavior by community members that support community growth and development, not by increasing arrests or by sanctioning real or perceived deviants.

The second take-home message is that the community plays an important role in development in and of itself. Cohesive communities grow economically, socially, and politically. Hence, there is an important need to focus directly upon the community, independent of any actions taken by the police.

QUESTIONNAIRE

Perceived police effectiveness was assessed using two items: (1) "The NYPD are good at preventing crime in this neighborhood," and (2) "The NYPD are able to maintain order on the streets of this neighborhood."

Neighborhood disorder. All respondents were asked: "Is gang violence a problem in the neighborhood" and "Do people in your neighborhood feel it is dangerous to go out at night." In addition, a random subsample of 247 were asked: "In your neighborhood, how much of a problem is": "litter, broken glass or trash on the sidewalks"; "drinking in public"; "people selling or using drugs"; "groups of teenagers hanging out in the neighborhood"; and "different social groups who do not get along." Both aspects of disorder were considered separately and, since results were similar, they were combined.

Community Cohesion

Respondents were asked: Do you agree or disagree that: "People in this neighborhood can be trusted" (64% agree)"; "People act with courtesy to each other in public spaces in this neighborhood" (79% agree)"; "You can see from the public space here that people take pride in the neighborhood" (72% yes)"; "If you sensed trouble you could get help from your neighbors" (78% agree)"; "If children were creating problems local people will tell them to stop" (69% agree)"; "You care what happens to other people in your neighborhood" (93% agree)"; "You feel close to others in your neighborhood" (62% agree)"; "There are people in your neighborhood that you think of as friends" (75% yes)"; "You think you can count on others in your neighborhood to help you" (74% yes)"; "You feel close to others in your neighborhood" (62% yes)."

Police fairness

Procedural justice of police in neighborhood. Participants were asked how often NYPD do the following in their neighborhood, based

upon what they had seen or heard: "Use fair procedures when making decisions about what to do"; "Treat people with courtesy and respect"; and "Treat people fairly".

Police are biased. Respondents were asked: "Do people of your ethnic or racial background receive higher quality of service than you deserve; the quality of service that you deserve; or less service than you deserve?"

Police allow input into policies. Two items were used to assess input. The items were: "How often do the NYPD consider your views and the views of people like yourself when deciding" (1) "what crimes are most important to deal with?" and (2) "how to police your neighborhood?"

Popular legitimacy

This analysis measures the popular legitimacy of the police using three distinct elements.[60] For the analysis these are combined into an overall index.

Obligation. The Obligation scale included the following two items: (1) "Overall, the NYPD officers in your neighborhood are legitimate authorities and people should obey the decisions they make" and (2) "You should do what the NYPD in your neighborhood tell you to do even when you disagree with their decisions."

Trust and Confidence. Three items were used to index trust and confidence: (1) "You have confidence that the NYPD in your neighborhood can do their job well"; (2) "You trust the NYPD in your neighborhood to make decisions that are good for everyone in the neighborhood"; and (3) "You and the NYPD in your neighborhood want the same things for your community."

Normative alignment. Four items were used to index normative alignment: (1) "Your own feelings about right and wrong usually agree with the laws that are enforced by the NYPD in your neighborhood"; (2) "The NYPD in your neighborhood generally have the same sense of right and wrong that you do"; (3) "The NYPD in your neighborhood stand up for values that are important to you' "; and (4) "The NYPD in your neighborhood usually act in ways consistent with your own ideas about what is right and wrong."

Community engagement

A factor analysis of the engagement items suggested two factors: economic and political/social engagement.

Economic engagement. Respondents were asked: "How often do you shop in your neighborhood?" (73% frequently) and "How often do you eat out or go to a movie?" (32% frequently).

60. Tyler & Jackson, *supra* note 8, at 79.

Political/social engagement. Voting is the most obvious example of political participation. Respondents were also asked: "How often do you" (1) "attend neighborhood meetings with local officials to discuss neighborhood problems" (25% sometimes or frequently); (2) "Vote in local elections" (62% sometimes or frequently); (3) "Communicate views to officials" (30% sometimes or frequently); (4) "Talk with your neighbors about problems in your neighborhood" (58% sometimes or frequently); and (5) "How often do you get together with friends from your neighborhood" (61% sometimes or frequently).

Cooperate with the police to address crime issues. Respondent were asked how likely they would be to: (1) "Answer questions from the police about someone suspected of a crime" (58% very likely); (2) "Report suspicious activity" (69% very likely); (3) "Volunteer to attend neighborhood meetings to discuss crime" (28% very likely); (4) "Report a crime of which [they] were a victim" (83% very likely); (5) "Report for jury duty" (65% very likely); (6) "Report a non-violent crime" (50% very likely); (7) "Report a violent crime" (82% very likely); and (8) "Report illegal drugs being sold" (53% very likely).

TABLE 1. THE ANTECEDENTS OF PERCEIVED POLICE EFFECTIVENESS

	Perceived police effectiveness	Perceived community cohesion	
Perceived police effectiveness	—	—	0.38***
Community disorder	-.22***	-.25***	—
Procedural justice/ Legitimacy of the police	0.63***	0.23***	—
African-American	0.02	-.02	0.01
Hispanic	0.01	0.04	0.05
Income	0.02	-.03	-.10***
Gender	-.05	0.00	0.04
Age	-.05	-.05	-.05*
Ideology	0.01	0.07	0.07***
Education	0.01	0.00	-.01
Citizenship	-.01	-.08	-.05*
Adjusted R.-sq	48%***	13%***	18%***

The table shows the results of a multiple regression equation. The numbers are the standardized regression coefficients (Beta weights). The stars reflect levels of significance: *p<.05; **p < .01; ***p < .001.

TABLE 2. THE ANTECEDENTS OF PUBLIC BEHAVIORS.

	Economic engagement		Political-social engagement		Cooperation with the police	
Police effectiveness	0.07**	—	0.01	—	0.30***	—
Community cohesion	—	0.22***	—	0.32***	—	0.14***
Procedural justice/ Legitimacy	—	0.02	—	0.05**	—	0.36***
African-American	0.02	0.02	0.05*	0.07**	0.04	0.03
Hispanic	-.03	-.02	-.04	-.01	0.03	0.01
Income	0.16***	0.15***	0.02	-.01	-.10***	-.09***
Gender	-.03	-.02	-.02	-.01	0.07***	0.07***
Age	-.05*	-.06**	0.28***	0.26***	-.13***	-.12***
Ideology	-.03	-.01	-.04*	-.02	-.04	-.01
Education	0.08***	0.08**	0.12***	0.13***	-.04	-.04
Citizen	0.08**	0.07**	0.27***	0.25***	0.08***	0.08***
Adjusted R.-sq.	7%***	11%***	23%***	32%***	15%***	22%***

The table shows the results of a multiple regression equation. The numbers are the standardized regression coefficients (Beta weights). The stars reflect levels of significance: *p<.05; **p < .01; ***p < .001.

THE VICTIM IMPACT STATEMENTS: SKEWING CRIMINAL JUSTICE AWAY FROM FIRST PRINCIPLES

*MICHAEL VITIELLO**

Participation in this symposium to recognize Professor Stephen Schulhofer's impact on the criminal law is an especial honor for me. I was his law student at the University of Pennsylvania Law School during his second year as a professor there. His class on Criminal Law, his scholarship, and his friendship have had a profound and positive influence on my career.

Professor Schulhofer and members of our generation of criminal justice scholars came of age during a remarkable period of optimism for liberal reformers.[1] The American Law Institute had only recently completed the Model Penal Code, which attempted to bring coherence to the criminal law and to advance principles of proportionality and culpability.[2] The 1970s witnessed widespread legislative reforms based on the Code.[3] Professor Schulhofer graduated from Harvard towards the end of the Warren Court criminal procedure revolution and, as a law clerk to Justice Hugo Black, saw that process from inside the sausage factory.[4] Many Warren Court

* Distinguished Professor of Law, the University of Pacific, McGeorge School of Law; University of Pennsylvania, J.D. 1974; Swarthmore College, B.A., 1969. I want to extend my thanks to Professors Joshua Dressler and Michael Hoffheimer for their helpful comments on an earlier draft of this paper. I also want to thank my several colleagues who gave me helpful feedback on this article, including Associate Dean for Scholarship Rachael Salcido and Professors Omar Dajani, Julie Davies, Frank Gevurtz, Leslie Jacobs, Brian Landsberg, Dorothy Landsberg, Courtney Lee, and Jay Mootz. Finally, I offer a special thank you to my research assistants Amy Nicole Seilliere and MaryJo Smart for their excellent work on this article.

1. *Stephen J. Schulhofer*, NYU LAW, https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.biography&personid=20270 [https://perma.cc/KS3K-Y99P].

2. *See* MODEL PENAL CODE (AM. LAW INST. , Official Draft 1962). "The Model Penal Code took 300 years of American criminal law and distilled a coherent and philosophically justifiable statement of the bounds and details of the criminal sanction." Robina Inst. of Criminal Law & Criminal Justice, *Model Penal Code*, U. MINN. (2019) (quoting *Model Penal Code: Sentencing*, AM. LAW INST.), https://robinainstitute.umn.edu/areas-expertise/model-penal-code [https://perma.cc/24CQ-EZ55].

3. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 320 (2007).

4. *Schulhofer*, *supra* note 1.

decisions held promise for a more just system.[5] But by the time he entered the legal academy, there were already signs of challenges to progressive reforms.

The Warren Court's revolution produced powerful resistance from the right, leading in part to Richard Nixon's presidential victory in the 1968 election.[6] Nixon's four Supreme Court selections within the first two-plus years of his presidency started a process of retrenchment that has lasted for years.[7] In part as a reaction to the Warren Court, victims' rights advocates began organizing and attempting to unravel Warren Court reforms.[8]

Due to concern about crime rates, politicians from across a broad political spectrum began efforts to "rationalize" criminal sentences, a process that would eventually lead to increased punishment, including reduced good time credits,[9] long minimum sentences,[10] and prison as the default option for convicted offenders.[11] The threat of long prison sentences led to increased bargaining power on the part of prosecutors who could compel even innocent offenders to accept plea deals in lieu of trials.[12] That process has led to a system that now has eliminated trials in well over 90% of all criminal cases.[13]

Several developments made in recent years offer hope for liberal criminal justice reformers. Several states have enacted sentencing reforms that have reduced criminal sentences and adopted programs designed to rehabilitate offenders and to reduce recidivism.[14] Some states have reduced their prison populations without

5. *See generally* U.S. v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

6. Michael Vitiello, *Reflections on an Extraordinary Career: Thoughts about Gerald Caplan's Retirement*, 46 McGeorge L. Rev. 459, 471 (2014).

7. *Id*. at 474.

8. Raphael Ginsberg, *Victims Deserve the Best: Victims' Rights and the Decline of the Liberal Consensus* 1, 60 (Aug. 2013) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill) (on file with the Carolina Digital Repository).

9. *See* Nicolette Parisi & Joseph A. Zillo, *Good Time: The Forgotten Issue*, 29 Crime and Delinquency 228, 232–33 (1983).

10. Michael H. Tonry, Sentencing Reform Impacts 29 (1987).

11. Bernard J. McCarthy, *Responding to the Prison Crowding Crisis: The Restructuring of a Prison System*, 2 Crim. Just. Pol'y Rev. 3, 8–9 (1987).

12. *See* Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining,* 57 Wm. & Mary L. Rev. 1343, 1358–60 (2016).

13. *See* William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy,* 25 Mich. J. Int'l L. 429, 445 (2004).

14. *See* Jon Wool & Don Stemen, *Changing Fortunes or Changing Attitudes? Sentencing and Corrections Reforms in 2003,* Fed. Sent'g Rep. 1, 7 (2004).

endangering public safety.[15] Even California, which incarcerated too many offenders for too long,[16] has cobbled together sentencing reform, largely compelled by the Supreme Court.[17] Reformers are winning the fight to abandon mandatory minimum sentences.[18] Some states are experimenting with bail reform.[19] Recent passage of the First Step Act is another example of the consensus across the political spectrum, leading to reform.[20] Recent years have shown a sharp decline in newly imposed death penalties and few executions.[21] After years of presenting themselves as tough on crime, a number of reform-minded prosecutors have run on progressive platforms and won elections, opposing police abuse and mass incarceration.[22]

Despite some progress towards meaningful reform, sustained reform efforts face significant challenges. No one would confuse the current Supreme Court with the reform-minded Warren Court. The American criminal justice system remains addicted to plea-bar-

15. *See* Dennis Schrantz, Stephen DeBor, and Marc Mauer, *Decarceration Strategies: How 5 States Achieved Substantial Prison Population Reductions*, SENTENCING PROJECT (Sept. 5, 2009), https://www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions/#:~:text=this%20report%20examines%20the%20experience%20of%20five%20states,prison%20with%20no%20adverse%20effects%20on%20public%20safety [https://perma.cc/2934-E7SW].

16. *See* Franklin E. Zimring & Gordon Hawkins, *The Growth of Imprisonment in California*, 34 BRIT. J. CRIMINOLOGY 83, 83 (1994).

17. *See* Brown v. Plata, 563 U.S. 493, 543–45 (2011).

18. *Mandatory Minimums and Sentencing Reform*, CRIM. JUSTICE POLICY FOUNDATION, https://www.cjpf.org/mandatory-minimums/ [https://perma.cc/7T5L-U25L].

19. Lauren Sudeall Lucas, Darcy Meals, & Jobena Hill, *Misdemeanor Bail Reform and Litigation: An Overview*, GA. STATE UNIV. COLL. OF LAW CTR. FOR ACCESS TO JUSTICE 2–9 (2017), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=D935d1e1-80a9-3314-bf2a-bbefde49285f&forceDialog=0 [https://perma.cc/MQ73-5FN4]; Kyle Harrison, *SB 10: Punishment Before Conviction? Alleviating Economic Injustice in California with Bail Reform*, 49 U. PAC. L. REV. 533, 542 (2018).

20. H.R. 5682, 115th Cong. (2018).

21. Brandon Garrett et al., *Capital Jurors in an Era of Death Penalty Decline*, 126 YALE L.J. F. 417, 421 (2017).

22. *See* Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, NEW YORKER (Oct. 29, 2018), https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration [https://perma.cc/WMA8-VTR7]; Victoria Law, *When Former Prosecutors Rebrand Themselves as Progressives to Win Elections*, IN THESE TIMES (Mar. 14, 2019), http://inthesetimes.com/article/21794/prosecutor-kamala-harris-lori-lightfoot-sally-yates-police-elections [https://perma.cc/UXA7-M2T8].

gaining.[23] Many states have inadequately funded public defender offices or other programs to provide indigent defendants with meaningful access to counsel.[24] In addition to these examples, other challenges remain.

My focus, however, is on one particular challenge: the victims' rights movement. As I develop in this paper, even in places like California where liberal reforms seem possible, the victims' rights movement remains potent.[25] Such groups have been able to oppose reforms aimed at providing protection for criminal defendants. In every state, victims' rights advocates have succeeded in passing victim's rights legislation, with some even placing victims' rights protections into state constitutions.[26] Nationwide, the movement hopes to add a victims' rights amendment to the United States Constitution.[27]

One might ask what, if anything, is wrong with such a movement. Indeed, much of what the movement has accomplished is more than laudable: for example, attention to the shameful treatment of rape victims has led to important reforms in many police departments and prosecutors' offices.[28] But as developed below, victim impact statements, a major policy success of the movement, skew the way in which the public thinks about the purpose of punishment by conflating the harm to the state with the harm to the victim.[29] Indeed, as suggested by the title of this article, the efforts

23. *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, NAT'L ASSN. OF CRIMINAL DEF. LAWYERS 5 (2018) https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf [https://perma.cc/3MU3-7HDG] ("[T]rial by jury has declined at an ever-increasing rate to the point that this institution now occurs in less than 3% of state and federal criminal cases.").

24. *See* Irene O. Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 391 (2016) (discussing the issue of under-resourced public defenders who are forced to prioritize certain clients); Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time,* N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html ?action=click&module=top %20Stories& pgtype=Homepage [https://perma.cc/Q8QA-BFPA].

25. *See infra* Part I.

26. *See* ACLU FACT SHEET ON THE PROPOSED VICTIMS' RIGHTS AMENDMENT, https://www.aclu.org/other/aclu-fact-sheet-proposed-victims-rights-amendment [https://perma.cc/6SXU-VGSZ] (last visited Mar. 15, 2020).

27. *See id.*

28. *See infra* Part III.

29. *See infra* Part IV.

to expand the victims' rights agenda have skewed some critical first principles of our criminal justice system.[30]

This paper focuses on the threat to criminal justice reform presented by victim impact statements. Initially, it provides a short history of the ascendency of the victims' rights movement and then a look at some of the reasons why liberal reformers have hope for the future.[31] It then discusses the theoretical problem created by victim impact statements, which conflate harm to society and harm to victims.[32] Specifically, they shift the focus of criminal sentencing from basic principles of the criminal law to a focus akin to that of the tort system.[33] The victim impact statements focus on repairing victims, not on principles of liberty and just deserts of the offender.[34] Thereafter, it turns to some anecdotes to demonstrate the power of such stories and the ability of such stories to overwhelm a more nuanced discussion about the criminal law.[35] This is because victims' stories are immediately accessible; the ability to explain the workings of our criminal justice system pales by comparison.[36]

I.
THE SELF-INFLICTED WOUND

While many of us supported the Warren Court criminal procedure revolution, the revolution may have come too quickly.[37] As journalist Fred Graham characterized the process, the Court imposed a "self-inflicted wound," planting seeds of its own unraveling.[38]

Graham and others have written about the public backlash against, for example, *Miranda v. Arizona*.[39] Indeed, some argue that *Miranda*, more than any other case, resulted in Richard Nixon's 1968 presidential victory.[40] Nixon cleverly used law and order as a

30. *See id.*

31. *See infra* Part I.

32. *See infra* Part III.

33. *See infra* Part IV.

34. *See id.*

35. *See infra* Part V–VI.

36. *See id.*

37. *See* Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1362 (2004).

38. *See* FRED P. GRAHAM, THE SELF-INFLICTED WOUND 9 (1970).

39. *See id.* at 153.

40. *See* Paul G. Ulrich, *What Happened to Miranda: A Decision and Its Consequences*, 72 J. MO. B. 204, 204 (2016).

key campaign issue and targeted the Court as his foil.[41] As such, he was able to outmaneuver George Wallace, running as an avowed racist.[42] Candidate Hubert Humphrey made no effort to defend the Court from attacks from the right.[43]

Two years before the campaign, members of the right were organizing against the Court.[44] Frank Carrington, author of the 1975 book *The Victims*, founded the Americans for Effective Law Enforcement in 1966.[45] Carrington and other organizers wanted to create a counterbalance to the American Civil Liberties Union and other liberal organizations by supporting police and "law-abiding" citizens instead.[46] The Reagan administration supported his efforts, as Attorney General William French appointed Carrington to a Task Force on Violent Crime.[47] They were joined by many on the right, including members of the Heritage Foundation, in calling for "restoring the balance" in the criminal justice system, which, from their perspective, had tilted too far towards protecting criminals.[48] By restoring balance between victims and criminal defendants, they meant that the system needed to restore the rights of victims and the public.[49]

The move to the right on criminal justice matters was hardly the province of only the Republican Party.[50] Prominent Democrats also joined in. Senator Teddy Kennedy helped pass the law creating

41. JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 600, 647 (6th ed. 2017).

42. *Id.*

43. *Id.*

44. *See* Raphael Ginsberg, *Mighty Crime Victims: Victims' Rights and Neoliberalism in the American Conjuncture*, 28 CULTURAL STUD. 911, 918–19 (2014) (discussing victims' rights in the era of President Nixon).

45. FRANK CARRINGTON, THE VICTIMS (1975); *Frank Carrington, 55 Victims' Rights Lawyer*, N.Y. TIMES (Jan. 3, 1992), https://www.nytimes.com/1992/01/03/obituaries/frank-carrington-55-victims-rights-lawyer.html?mtrref=WWw.google.com&gwh=A05B8DC84E897092181DEC2B9D7895B0&gwt=pay [https://perma.cc/8K6A-7F9K].

46. *Americans For Effective Law Enforcement (AELE)*, LAW CROSSING https://www.lawcrossing.com/article/900045166/Americans-for-Effective-Law-Enforcement-AELE/ [https://perma.cc/62EY-DUMB] (last visited Mar. 15, 2020).

47. *See* Ginsberg, *supra* note 8, at 8.

48. WILLIAM T., HERITAGE FOUND., RESTORE THE BALANCE: FREEDOM OF INFORMATION AND NATIONAL SECURITY (1982), https://www.heritage.org/homeland-security/report/restore-the-balance-freedom-information-and-national-security [https://perma.cc/XB2B-K2LH].

49. *See* Ginsberg, *supra* note 44, at 919.

50. *See* Willard Gaylin & David J. Rothman, *Introduction to* ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS: REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION, at xxxvii (1976) (discussing how liberals have

the Federal Sentencing Commission and federal sentencing guidelines, viewed by many as a failed system leading to unnecessarily long sentences.[51] As evidenced by his stance on the death penalty and other criminal justice matters, President Bill Clinton courted law enforcement groups through his support of the 1994 Violent Crime Control and Law Enforcement Act[52] and the 1996 Antiterrorism and Effective Death Penalty Act.[53] Indeed, in 2016, Presidential Candidate Hillary Clinton lost support from some members of the African-American community because of her husband's support for a number of law and order measures.[54] As commentators have observed in other contexts, significant criminal justice reform often results only when consensus forms across the political spectrum.[55] Supporters of gun rights and of an invigorated Second Amendment also joined the victims' rights movement.[56]

Not only did law and order advocates support victims' rights, but so too did supporters of women and many on the left.[57] Liberal reformers found fault with police response to rape victims.[58] Beyond pushing for better treatment for victims, liberal reformers began pushing for a more modern approach to rape and sexual assault laws.[59]

---

moved towards joining the argument for abandonment of the rehabilitation model).

51. Edward M. Kennedy, *Introduction: Symposium on Sentencing, Part I*, 7 HOFSTRA L. REV. 1, 1 (1978).

52. Jessica Lussenhop, *Clinton Crime Bill: Why Is It So Controversial?*, BBC NEWS MAG. (Apr. 18, 2016), https://www.bbc.com/news/world-us-canada-36020717 [https://perma.cc/ABQ5-W7GG]. .

53. Press Release, William J. Clinton, Statement by the President (Apr. 24, 1996) (on file with Clinton White House Archive), https://clintonwhitehouse6.archives.gov/1996/04/1996-04-24-president-statement-on-antiterrorism-bill-signing.html [https://perma.cc/87Q3-4AE2]; *see also* Liliana Segura, *Gutting Habeas Corpus*, THE INTERCEPT (May 4, 2016), https://theintercept.com/2016/05/04/the-untold-story-of-bill-clintons-other-crime-bill/ [https://perma.cc/CZ7K-3FZ2].

54. Keeanga-Yamahtta Taylor, *Why Should We Trust You? Clinton's Big Problem with Young Black Americans*, THE GUARDIAN (Oct. 21, 2016), https://www.theguardian.com/us-news/2016/oct/21/hillary-clinton-black-millennial-voters [https://perma.cc/GPT8-W4KL]

55. *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU N. CAL. (Nov. 16, 2017), https://www.aclunc.org/news/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds [https://perma.cc/Q5VW-LCF6].

56. Libertarian National Committee, *Gun Ownership*, LIBERTARIAN, https://www.lp.org/issues/gun-ownership/ [https://perma.cc/P6S5-2K7Q] (last visited Mar. 15, 2020).

57. *See* Ginsberg, *supra* note 44, at 922–25.

58. *See id.*

59. *See id.*

The victims' rights movement and other law and order groups had remarkable success with these efforts in a short period of time. California made a series of changes to its laws, including victims' rights provisions added to its constitution.[60] In 1982, California approved Proposition 8, which amended its constitution to include the "Victims' Bill of Rights."[61] The provision did a number of things, with an overarching goal to give "crime victims a stronger voice within the criminal justice system."[62] It created a "Truth-in-Evidence" provision to expand the evidence admissible against defendants and to limit exclusionary rules.[63] It also created a victim's right to restitution from perpetrators or from public funds.[64]

The movement's momentum continued into the 1990s with the passage of Proposition 115. Proposition 115, the Crime Victims Justice Reform Act,[65] was aimed at limiting the ability of liberal judges to give an expansive reading of the state constitution to favor criminal defendants.[66]

A decade ago, California expanded victims' rights when it adopted Marsy's Law, also known as the Victims' Bill of Rights Act of 2008.[67] According to supporters, it provides victims with due process not available absent special legislation.[68] The 2008 initiative amended the state constitution.[69] Some of the rights now provided

60. *See* CAL. CONST. art. I, §§ 14.1, 24 (incorporating portions of another initiative called "The Crime Victims Justice Reform Act," or Proposition 115, in California); David Aram Kaiser & David A. Carillo, *California Constitutional Law: Reanimating Criminal Procedural Rights After the Other Proposition 8,* 56 SANTA CLARA L. REV. 33, 49 (2016) (discussing the addition of California's first victims' rights Constitutional amendment, commonly known as Proposition 8); *Victims' Bill of Rights Act of 2008: Marsy's Law*, STATE OF CAL. DEP'T OF JUST., https://oag.ca.gov/victim-services/marsys_law [https://perma.cc/A3TR-FW57] (noting that Marsy's Law in California is the most current California victims' rights law).

61. *See* CAL. CONST. art. I, §28. The California Victim's Bill of Rights was added by Proposition 8 in 1982.

62. Diana Friedland, *27 Years of "Truth-in-Evidence": The Expectations and Consequences of Proposition 8's Most Controversial Provision*, 14 BERKELEY J. CRIM. L. 1, 1 (2009).

63. *See id.*

64. CAL. CONST. art. I, § 28(a)(13).

65. Deborah Glynn, *Proposition 115: The Crime Victims Justice Reform Act*, 22 Pac. L.J. 1010, 1012 (1991).

66. *Id.* at 1011.

67. *Victims' Bill of Rights Act of 2008: Marsy's Law*, *supra* note 60.

68. Office of Victim and Survivor Rights & Services, *Marcy's Law*, CAL. DEP'T OF CORRECTIONS & REHABILITATION, https://www.cdcr.ca.gov/victim-services/marsys-law/ [https://perma.cc/7SK9-FQVL].

69. *Id.*; Marsy's Law was named after Marsy Nicholas, a UC Santa Barbara student who was stalked and killed by her ex-boyfriend in 1983. Just one week later,

to victims in that document include a victim's right to refuse an interview, deposition, or discovery request by the defense; the right to be informed of details regarding the defendant's sentence, including release date; and the right to have the safety of the victim and their family considered before any parole or post-judgment release decision is made.[70] It also lengthened the period between parole hearings for prisoners serving life sentences.[71]

Prison construction was another effect of many of the reforms that took place in California.[72] Even then, with massive prison construction, those reforms led to massive overcrowding in California's prisons.[73] Not coincidentally, the California Correctional Peace Officers Association (CCPOA), the union that represents prison guards, gained extraordinary political clout.[74] Often, the CCPOA worked hand-in-glove with victims' rights groups to advance their overlapping agenda.[75]

Several other states have adopted laws similar to Marsy's Law.[76] Much of the funding for the passage of such laws comes from Marsy

---

while Marsy's brother and mother were grocery shopping, they saw the accused murderer in the store, having had no idea that the man had been released on bail. Marsy's brother, Dr. Henry Nicholas, was the key proponent of Marsy's Law. California was the first to pass the law and in doing so put California at the forefront of the United States' victims' rights movement. *About Marsy's Law,* MARSY'S LAW (2020), https://marsyslaw.us/about-marsys-law/ [https://perma.cc/3PWS-48ES].

70. CAL. CONST. art. I, § 28(b).

71. *Id.*

72. *See* Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL'Y REV. 327, 350 (2014) (discussing funding from AB 900 resulting in the construction of jails).

73. *See* Andrew Cohen, *The Supreme Court Declares California's Prisons Overcrowded*, THE ATLANTIC (May 23, 2011), https://www.theatlantic.com/national/archive/2011/05/the-supreme-court-declares-californias-prisons-overcrowded/239313/ [https://perma.cc/U3SK-RF57] (discussing the *Brown v. Plata* ruling, which declared California's prisons overcrowded).

74. *See The California Sentencing Commission: Laying the Groundwork*, STAN. LAW SCH. CRIM. JUST. CTR. 3 (2007) https://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/266901/doc/slspublic/Stanford_Exec_Sessions_Report_Recommendations.pdf [https://perma.cc/DQ9L-QV4C] (listing the CCPOA's Executive VP as a member of Stanford Law School's Executive Sessions on Sentencing and Corrections).

75. JOSHUA PAGE, THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA 84 (2011).

76. Carter Coudriet, *Billionaire-Backed 'Marsy's Law' Ballot Measures Pass In Six States, Thanks To $72 Million Push*, FORBES (Nov. 7, 2018, 7:54 AM), https://www.forbes.com/sites/cartercoudriet/2018/11/07/billionaire-sponsored-marsys-law-for-victims-rights-passes-in-six-states-thanks-to-72-million-push/#5d715f945b7c [https://perma.cc/VYD7-YFQX].

Nicholas' billionaire brother Henry Nicholas.[77] He injected $72 million into recent elections, which contributed to the creation of similar laws in Florida, Georgia, Kentucky, Nevada, North Carolina, and Oklahoma.[78]

More broadly, thirty-two states have added victims' rights amendments to their state's constitution and all fifty states have passed some sort of victims' rights legislation.[79]

Victims' rights advocates' long-term goal is an amendment to the United States Constitution.[80] A proposed victims' rights amendment is currently before Congress.[81] It enumerates various rights for crime victims.[82] These would include the right for a victim to be notified of all legal proceedings, guaranteed admission of victims to these proceedings, and the right to speak during them.[83] The amendment would also guarantee that courts consider the interests of victims in their attempt to ensure that trials occur without "unreasonable delays" and looking at a victims' safety when determining whether to grant a defendant a conditional release.[84]

Victims' rights groups have gained political clout, often appealing to a broad political spectrum. But some of the groups' policies have troubled liberal justice reformers. Two of those developments are particularly noteworthy.

The first development occurred early, as the victims' rights movement gained credibility in reaction to the Warren Court criminal procedure revolution.[85] Candidate Nixon's not-so-subtle racist appeal to voters, including many traditional white working class voters fearful of increased crime rates and expanding civil rights for

77. *Marsy's Law Crime Victim Rights*, BALLOTPEDIA, https://ballotpedia.org/Marsy%27s_Law_crime_victim_rights [https://perma.cc/A24X-MCYR](last updated Apr. 2020).

78. Coudriet, *supra* note 76.

79. ACLU FACT SHEET, *supra* note 26. As of 2000, 32 states had amended their constitutions: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, North Carolina, Nebraska, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. S. REP. NO. 106–254, at n.1 (2000).

80. *See* ACLU FACT SHEET, *supra* note 26.

81. H.R.J. Res. 93, 115th Cong. (2017).

82. *See* ACLU FACT SHEET, *supra* note 26.

83. *Id.*

84. *Id.* The latest action on this resolution is that the House referred it to the Subcommittee on the Constitution and Civil Justice on April 12, 2017.

85. Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 528 (1985).

minorities, paid off.[86] In remarkably short order, Nixon got to reshape the Court with four appointments in two-plus years.[87] While the counter-revolution did not come as quickly and dramatically as some on the right might have hoped, it came nonetheless.[88] Over time, the Court frequently refused to expand or erode Warren Court precedent in matters of victims' rights.[89] The Burger and Rehnquist Courts cabined many Warren Court decisions. *Miranda* was the most notable example of that process. By the time the Court squarely addressed overruling *Miranda*, Chief Justice Rehnquist, appointed to the Court in part to overrule cases like *Miranda*, wrote the 2000 decision upholding *Miranda* from a frontal attack on its constitutional legitimacy.[90]

The second development that liberal criminal justice reformers and scholars have focused on is the expanded use of prison as the punishment of choice for offenders. Beginning with his first go-round as California's Governor, Jerry Brown endorsed the abandonment of indeterminate sentencing, in favor of fixed prison terms.[91] Initially, such reforms had broad political support.[92] Liberal reformers saw the back-end decisions made by parole boards as racially biased.[93] Many critics of indeterminate sentencing saw the system as arbitrary: judges viewing the same case file varied their proposed sentences wildly.[94] But by the time states and the federal government abandoned indeterminate sentencing, the nation had

86. Hugh Davis Graham, *Richard Nixon and Civil Rights: Explaining an Enigma*, 26 PRESIDENTIAL STUD. Q. 93, 93–94 (1996).

87. Yale Kamisar, *The Miranda Case Fifty Years Later*, 97 B.U. L. REV. 1293, 1295 (2017).

88. Kit Kinports, *The Supreme Court's Love-Hate Relationship with Miranda*, 101 J. CRIM L. & CRIMINOLOGY 375, 376–78 (2011).

89. Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court in* FRANCIS G. LEE, NEITHER CONSERVATIVE NOR LIBERAL: THE BURGER COURT IN CIVIL RIGHTS AND LIBERTIES 84–85 (F. G. Lee ed., 1983).

90. Dickerson v. United States, 530 U.S. 428, 444 (2000); *see* Kamisar, *supra* note 87, at 1294–95.

91. *See* Marisa Lagos, *Brown Sees Proposition 57 as Key to Ending Court's Oversight of Prisons*, NPR (Nov. 8, 2016), https://www.kvpr.org/post/brown-sees-proposition-57-key-ending-courts-oversight-prisons [https://perma.cc/PX36-4LVX].

92. *See* Jennifer Warren, *Jerry Brown Calls Sentence Law a Failure*, L.A. TIMES (Feb. 28, 2003, 12:00 AM), http://articles.latimes.com/2003/feb/28/local/me-prisoners28 [https://perma.cc/S3HQ-EFFV].

93. JEREMY TRAVIS, BUT THEY ALL COME BACK 17–18 (2005) ("Reliance on the exercise of discretion by judges, corrections administrators, parole boards, and parole officers was criticized as arbitrary, racially discriminatory, and fundamentally unfair.").

94. *See id.*

taken a hard turn to the right.[95] Retribution was back in vogue.[96] The trend would become part of a march towards increased incarceration, including a move towards mandatory minimum sentences.[97] Longer sentences,[98] court decisions legitimizing plea-bargaining,[99] longer criminal dockets,[100] the war on drugs,[101] and shrinking resources for public defenders (often leaving defense lawyers with little alternative other than pleading their clients)[102] were only some of the causes leading to mass incarceration. The critique of mass incarceration is now so widely disseminated that I need not dwell on its social costs at so many levels.[103]

Liberal criminal justice scholars and reformers like Professor Schulhofer have had plenty to rail against. For most of us who came of age in the late 1960s and early 1970s, the arc of history has not provided many opportunities for celebrating expansion of protections for criminal defendants. But that is changing. Or is it? That is the subject of the next section of this article.

II.
AN ERA OF REFORM

Clearly, no one expects the current Supreme Court to emulate the Warren Court by protecting criminal defendants. Indeed, Brett Kavanaugh, Justice Kennedy's replacement, may help undo a few of the hopeful Supreme Court cases in which Justice Kennedy pro-

95. *See* Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1012 (1991).

96. *See* WAYNE R. LAFAVE, CRIMINAL LAW 26 (2d. ed. 1986).

97. Dripps, *supra* note 12, at 1352.

98. *See* Marc Mauer, *Race to Incarcerate: The Causes and Consequences of Mass Incarceration*, 21 ROGER WILLIAMS U. L. REV. 447, 452 (2016).

99. *See* Bryan v. United States, 492 F.2d 775, 780 (5th Cir. 1974) ("Plea bargains have accompanied the whole history of this nation's criminal jurisprudence."); Shelton v. United States, 246 F.2d 571 (5th Cir. 1957), *rev'd per curiam on confession of error,* 356 U.S. 26 (1958).

100. *See* Mauer, *supra* note 98, at 448–49 (discussing how the criminal justice system has expanded overall at a fast rate since the 1970s).

101. *See id.* at 450.

102. *See* Faye Taxman et al., *Racial Disparity and the Legitimacy of the Criminal Justice System: Exploring Consequences for Deterrence*, 16 J. HEALTH CARE POOR & UNDERSERVED 57, 70 (2005) (discussing indigent defense systems operating outside of national standards).

103. *See generally* JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017); MICHELLE ALEXANDER, THE NEW JIM CROW (2010); IMPRISONING AMERICA (Mary Pattillo et al. eds., 2004).

vided a fifth vote.[104] But in recent years, this adversity aside, liberal criminal justice reformers have had cause for optimism.

Notably, many states have reformed their criminal sentencing systems to reduce prison populations.[105] That has occurred in both conservative and liberal leaning states.[106] Surprisingly to some, California was slow to reform its overcrowded prison system.[107] But with a healthy incentive from a three-judge panel of federal judges, whose decision to force prison reductions was affirmed by the Supreme Court,[108] California has followed suit.[109] Indeed, even in some jurisdictions, attorneys have campaigned to serve as district attorneys on platforms that oppose mass incarceration.[110] Some, including in Philadelphia, have won and seem poised to take on resis-

104. Justice Kennedy wrote a number of opinions for a closely divided Court in such cases. *See* Graham v. Florida, 560 U.S. 48 (2010); Kennedy v. Louisiana, 554 U.S. 407 (2008); Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002). He joined the more liberal wing of the Court in other instances. *See* Miller v. Alabama, 567 U.S. 460 (2012).

105. *See* Sean T. McAllister & Kenneth M. Plotz, *Criminal Sentencing Reform in Colorado*, 36 COLO. LAW. 23, 23 (2007) (discussing "ongoing efforts to evaluate incarceration policy in Colorado that seek to ease the fiscal burden of increased incarceration while maintaining public safety"); James B. Jacobs, *Sentencing By Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 224 (1982) (discussing states that have reformed their prisoner good time credits to reduce prison populations); Tim Arango, *In California, Criminal Justice Reform Offers a Lesson for the Nation*, N.Y. TIMES (Jan. 21, 2019), https://www.nytimes.com/2019/01/21/us/california-incarceration-reduction-penalties.html [https://perma.cc/7NGR-7A5C]; *Data Trends: South Carolina Criminal Justice Reform*, PEW CHARITABLE TR. (Sept. 2017), https://www.pewtrusts.org/~/media/data-visualizations/infographics/2017/data-trends-south-carolina-criminal-justice-reform.pdf [https://perma.cc/DP4V-X4TB].

106. *See* McAllister & Plotz, *supra* note 105 (discussing criminal sentencing reform in Colorado); Justin Wingerter, *How Tough-On-Crime Texas Lowered Its Prison Population and What Oklahoma Can Learn from It*, THE OKLAHOMAN (Aug. 12, 2018, 5:00 AM), https://oklahoman.com/article/5604318/how-tough-on-crime-texas-lowered-its-prison-population-and-what-oklahoma-can-learn-from-it [https://perma.cc/2FUD-2G55]; *State Reforms Reverse Decades of Incarceration Growth*, PEW CHARITABLE TR. (Mar. 21, 2017), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/03/state-reforms-reverse-decades-of-incarceration-growth [https://perma.cc/ML2W-K6FS].

107. *Dealing with California's Overcrowded Prisons* (NPR radio broadcast May 26, 2011).

108. *See* Brown v. Plata, 563 U.S. 493, 543–45 (2011).

109. *Safe Neighborhoods and Schools Act,* CAL. PROPOSITION 47 (2014) (codified as CAL. GOV'T §§ 7599–7599.2; CAL. PENAL CODE § 1170.1); Assemb. B. 109, 2011–12 Leg., Reg. Sess., (Cal. 2011).

110. *See* Taylor Pendergrass, *In District Attorney Races Across the Nation, Reform Is Still on the Agenda*, ACLU: SMART JUSTICE (Oct. 29, 2018), https://www.aclu.org/blog/smart-justice/mass-incarceration/district-attorney-races-across-nation-reform-still-agenda [https://perma.cc/M5XJ-FP3L].

tance from police and resistance within their own offices among assistant district attorneys.[111]

In the recent past, a coalition formed across a broad political spectrum, resulting in criminal justice reform in Congress.[112] Congress passed the First Step Act, which was signed into law by then-President Trump on December 21, 2018.[113] The First Step Act reduces prison sentences for many federal drug offenders.[114] It builds upon the experience in many states, which have reintroduced rehabilitative programs and achieved measurable success in reducing recidivism.[115] The Act adds provisions that allow inmates to amass good time credits to secure earlier release.[116]

Another example of recent reform is that the death penalty is on the decline. The Supreme Court has narrowed cases in which the death penalty satisfies the Eighth Amendment's proportionality principle.[117] Several states have abandoned the death penalty without increases in crime rates.[118] Juries are less and less likely to impose the death penalty.[119] In fact, district attorneys are less likely than in the past to seek the death penalty, outside of a few coun-

111. Gonnerman, *supra* note 22.

112. Patrick Gleason, *First Step Act Was This Past Year's Second Example of Federalism At Its Finest*, FORBES (Dec. 31, 2018, 8:57 PM), https://www.forbes.com/sites/patrickgleason/2018/12/31/enactment-of-the-first-step-act-was-the-past-years-second-example-of-federalism-at-its-finest/#3993fa3d184e [https://perma.cc/ULY3-GX3D].

113. John Malcolm & John-Michael Seibler, *Trump and Congress Earn a Conservative Victory with First Step Act*, HERITAGE FOUND. (Dec. 21, 2018), https://www.heritage.org/crime-and-justice/commentary/trump-and-congress-earn-conservative-victory-first-step-act [https://perma.cc/BM25-5TJB].

114. Gina Martinez, *The Bipartisan Criminal-Justice Bill Will Affect Thousands of Prisoners. Here's How Their Lives Will Change,* TIME (Dec. 20, 2018), http://time.com/5483066/congress-passes-bipartisan-criminal-justice-reform-effort/ [https://perma.cc/Y4W8-PG5H].

115. Gleason, *supra* note 112.

116. Martinez, *supra* note 114.

117. John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 899 (2011).

118. Beth Kassap, *Does Murder Rate Go Up Without the Death Penalty?*, ORLANDO SENTINEL (Mar. 23, 2017, 2:10 PM), https://www.orlandosentinel.com/news/os-does-death-penalty-deter-crime-20170321-story.html [https://perma.cc/3XJR-CTA9].

119. *See* BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE 8–9 (2017).

ties.[120] Only a handful of counties account for almost all of the few death penalties still imposed in the United States.[121]

Cases like the shooting of Michael Brown by a Ferguson, Missouri police officer have brought attention to an additional group of issues that result from the imposition of numerous fines for misdemeanors by the United States criminal justice system.[122] The Obama Justice Department brought attention to the vicious cycle whereby poor people end up in a never-ending trap.[123] Unable to pay their fines, they end up paying amounts that are many times more in costs and fees than their original fines.[124] Often, this cycle leads to incarceration or loss of employment and employability.[125] In response to this harmful cycle, some states have begun studying alternatives to such a disabling application of the law.[126]

Bail is another area of reform, and some states have reformed their bail systems.[127] Reformers have long argued that the cash bail

120. *See id.* at 4; Radley Balko, *In America's Leading Death-penalty County, Judges Routinely Outsource Their Written Opinions to Prosecutors*, WASH. POST (June 26, 2018, 4:21 PM), https://www.washingtonpost.com/news/the-watch/wp/2018/06/26/in-americas-leading-death-penalty-county-judges-routinely-outsource-their-written-opinions-to-prosecutors/?utm_term=.328f4c5496d0 [https://perma.cc/A8ER-L6KF]; *The Death Penalty in 2017: Year End Report*, DEATH PENALTY INFO. CTR. 2 (2017), https://files.deathpenaltyinfo.org/reports/year-end/2017YrEnd.f1560295940.pdf [https://perma.cc/R6RJ-NEM4].

121. *See* Richard Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, DEATH PENALTY INFO. CTR. (2013), https://files.deathpenaltyinfo.org/legacy/documents/TwoPercentReport.pdf [https://perma.cc/4WNU-WCZS].

122. *See* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 27–28 (2018); U.S. DEP'T OF JUST., REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf [https://perma.cc/RA3W-HY94].

123. *See* Vanita Gupta, Head of the Civil Rights Division, Dep't of Justice, Remarks at Southern Center for Human Rights Symposium on the Criminalization of Race and Poverty (Sept. 20, 2016) (transcript available at https://www.justice.gov/opa/speech/head-civil-rights-division-vanita-gupta-delivers-remarks-southern-center-human-rights [https://perma.cc/CR4Q-CSBP]).

124. *See id.*

125. *See id.*

126. Alexandra Bastien, *Ending the Debt Trap: Strategies to Stop the Abuse of Court-Imposed Fines and Fees*, POLICYLINK 8–9 (Mar. 2017), https://www.policylink.org/sites/default/files/ending-the-debt-trap-03-28-17.pdf [https://perma.cc/4HND-57GD] (discussing various state reforms in Colorado, Michigan, Ohio, Washington, Iowa, California, Georgia, and Missouri).

127. *See id.* at 10 ("In 2017, the New Orleans City Council voted unanimously to allow indigent defendants charged with minor offenses to be released without bail in its municipal court system.").

system is a failure.[128] It disadvantages poor defendants who, when unable to make bail, are more likely to be convicted or to plead guilty.[129] Indeed, numerous stories of innocent defendants pleading guilty to get out of jail have made headlines.[130] Not only is cash bail discriminatory against less affluent defendants, it also is not necessary in many cases to assure a defendant's appearance at trial.[131] Leading the efforts for this type of reform, in 2018 California became the first state to abolish—at least for many cases—cash bail.[132]

Reforms like these demonstrate new attitudes about the criminal justice system, again expanding protection for criminal defendants. Some commentators point to additional areas where the criminal justice system needs significant reform, including additional reductions in the use of prisons, greater efforts towards equality in criminal sentencing and renewed commitment to provide adequate resources for public defenders. But the arc of history seems to have turned back towards a more just criminal justice system, where the rights of criminal defendants matter again. Or has it? In the next section, I address one of the most meaningful challenges to criminal justice reform.

III.
A CLOSER LOOK AT THE VICTIM IMPACT STATEMENTS

One would have to be callous to suggest that all of the reforms advanced by victims' rights groups were inappropriate. Victims' rights advocates have brought important issues into the national dialogue. For example, Professor Susan Estrich highlighted the way in which police treated rape victims, initially in her Yale Law Journal

128. *See* Steven Duke, *Bail Reform for the Eighties: A Reply to Senator Kennedy*, 49 FORDHAM L. REV. 40, 40 (1980) (discussing the Bail Reform Act of 1966, recognizing that pretrial incarceration was unnecessary and frequently unjust and discriminatory).

129. *See* Udi Ofer, *We Can't End Mass Incarceration Without Ending Money Bail*, ACLU: SMART JUSTICE (Dec. 11, 2017), https://www.aclu.org/blog/smart-justice/we-cant-end-mass-incarceration-without-ending-money-bail [https://perma.cc/4T85-JZQD].

130. *See* John Rapling, *Plead Guilty, Go Home. Plead Not Guilty, Stay in Jail*, L.A. TIMES (May 17, 2017, 4:00 AM), https://www.latimes.com/opinion/op-ed/la-oe-raphling-bail-20170517-story.html [https://perma.cc/A7X7-547T].

131. *See* Duke, *supra* note 128.

132. *See* Thomas Fuller, *California Is the First State to Scrap Cash Bail*, N.Y. TIMES (Aug. 28, 2018), https://www.nytimes.com/2018/08/28/us/california-cash-bail.html [https://perma.cc/3Z3L-YYAS].

article *Rape*,[133] and then in her book *Real Rape*.[134] She was hardly the only feminist or women's rights supporter who brought such practices to light.[135]

Some other agenda items advanced by the victims' rights movement remain controversial. Victim impact statements have been the most controversial.[136] Notably, in death penalty cases, families of victims have been able to speak extensively about their trauma caused by the defendant.[137] Similar powerful evidence is admissible in many non-death penalty cases as well. During convicted sex offender Larry Nassar's sentencing, for example, over 150 women and girls presented horrifying stories about the harm that Nassar caused through his sexual abuse.[138]

The Supreme Court ruled twice that victim impact statements were unconstitutional in death penalty cases.[139] Their reasoning was that such statements created an unacceptable risk that jurors would focus on information unrelated to the offender's intent to kill.[140] It did so first in 1987[141] and again in 1989.[142] Two years later, after Justice Souter replaced Justice Brennan,[143] the Court reversed

133. Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

134. *See* SUSAN ESTRICH, REAL RAPE (1988).

135. *See* Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. COMTY. PSYCHOL. 263, 263 (2006).

136. *See generally* Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy*, 10 PSYCHOL., PUB. POL'Y, & L. 492 (2004) (discussing the danger of prejudice with victim impact statements); *see also* Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 467 (2005) (discussing the recent movement in the law seeking gender equality in sexual relations and its success in enacting rape shield laws).

137. *See* Payne v. Tennessee, 501 U.S. 808, 825–27 (1991) (holding that if the prosecution decides to introduce victim impact statements, the Eighth Amendment poses no per se bar prohibiting them). *See generally* Ray Paternoster & Jerome Deise, *A Heavy Thumb on the Scale: The Effect of Victim Impact Evidence on Capital Decision Making*, 49 CRIMINOLOGY 129 (2011) (discussing widespread usage of victim impact statements since *Payne* and results of an experiment that support the idea that VIS would arouse the emotions of jurors and bias them in favor of death).

138. *See* Benedict Carey, *More Than 150 Women Described Sexual Abuse by Lawrence Nassar. Will Their Testimony Help Them Heal?*, N.Y. TIMES (Jan. 26, 2018), https://www.nytimes.com/2018/01/26/health/nassar-victims-testimony.html [https://perma.cc/6DSD-8QBY].

139. *See* South Carolina v. Gathers, 490 U.S. 805, 811 (1989); Booth v. Maryland, 482 U.S. 496, 509 (1987).

140. Myers & Greene, *supra* note 136.

141. *See* Booth, 482 U.S. at 509.

142. *See* Gathers, 490 U.S. at 811.

143. PAUL FINKELMAN, THE SUPREME COURT: CONTROVERSIES, CASES, AND CHARACTERS FROM JOHN JAY TO JOHN ROBERTS 1148 (2014).

those decisions, typically an unusual event for that Court.[144] Seldom has the Supreme Court acted so quickly to overrule precedent, lest it appear that the overruling was simply a result of a change in Court personnel.[145]

The public supports the use of such statements.[146] In the minds of many members of the public, such statements give victims closure.[147] As prominent victims' rights advocate Professor Paul Cassell has explained: (1) they provide information to the judge and jury about the harm caused by the crime, which may be helpful in determining an appropriate sentence; (2) they help crime victims gain closure; (3) they educate the defendant about what their crime has done, which may aid their rehabilitation; and (4) they ensure fairness at sentencing because the State, the defendant, and the victim are all heard from.[148]

Listen to the language of the victims' rights movement to understand how their rhetoric conflates individual harm and broader social harm. For example, take a look at the debate surrounding Brock Turner, the Stanford student convicted of sexual assault.[149] Judge Aaron Persky sentenced Turner to six months in jail, largely consistent with the probation department's report, but far shorter than the prosecutor's recommended sentence.[150] Many of Persky's critics (and supporters of his recall) focused on the personal harm that Turner caused the victim, not on social harm generally.[151] Michele Dauber, the Stanford Law Professor who led the campaign

144. Mark Stevens, *Victim Impact Statements Considered in Sentencing: Constitutional Concerns*, 2 CAL. CRIM. L. REV. 3 ¶40 (2000).

145. James F. Spriggs, II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091, 1094 (2001).

146. Paul Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 611–12 (2008).

147. Susan A. Bandes, *Victims, "Closure," and the Sociology of Emotion*, 72 LAW & CONTEMP. PROBS. 1, 2 (2009) (critiquing the closure rationale for victim impact statements).

148. Cassell, *supra* note 146.

149. *See generally* Michael Vitiello, *Brock Turner: Sorting through the Noise,* 49 U. PAC. L. REV. 631 (2018).

150. Bridgette Dunlap, *How California's New Rape Law Could Be a Step Backward*, ROLLING STONE (Sept. 1, 2016), http://www.rollingstone.com/culture/news/how-californias-new-rapc-law-could-be-a-stepbackward-w437373 [https://perma.cc/4MEX-YURU]; Matt Hamilton, *Brock Turner To Be Released From Jail After Serving Half of Six-Month Sentence in Stanford Sexual Assault Case*, L.A. TIMES (Aug. 30, 2016, 12:05 AM), http://www.latimes. com/local/lanow/lame-In-brock-turner-release-jail-20160829-snap-story.html [https://perma.cc/2V4J-46TU].

151. *See* Julia Ioffe, *When the Punishment Feels Like a Crime*, HUFFINGTON POST: HIGHLINE (June 1, 2018), https://highline.huffingtonpost.com/articles/en/brock-turner-michele-dauber/ [https://perma.cc/ETF2-SFXR].

for Persky's recall, stated that Persky "'[s]ees himself almost like a social worker . . . like his job is to rehabilitate these people' and 'Rehabilitation is an important goal of punishment, but I don't think that what he's doing is the right way. Because without accountability and consequences, I think your chances for rehabilitation, particularly for sex offenses, is lower. I think there has to be both.'"[152] Similarly, Dauber argued that the victim in the Turner case was the "perfect victim" who did "everything right" and because she "didn't get justice," she felt "[t]he message this case is sending is 'Don't bother calling the police, you won't get justice.'"[153]

Personal harm to victims is not the same as social harm. A person may experience a great loss, for example, if a loved one dies in an auto accident. Society may experience a loss as well; for example, the deceased may have otherwise contributed to the good of society. But society may also be harmed by punishing the other person in the auto accident. That person may not be blameworthy; incarcerating that person may not be necessary to protect society in the future; that person's incarceration may remove that person from engagement in the workforce and from the person's loved ones. The equation of personal and social harm is simply incorrect. It confuses goals of the tort system with those of the criminal justice system.

In any number of stories about Turner, commentators focused largely on the harm to the victim.[154] That is often the case in situations when the public focuses on headline criminal cases.[155] Harm to the victim should produce empathy for the victim from all of us.

---

152. *Id.*

153. AFP, *Stanford assault puts the spotlight back on rape culture*, WION (June 11, 2016), https://www.wionews.com/world/stanford-assault-puts-the-spotlight-back-on-rape-culture-354 [https://perma.cc/9TLN-L9G3]

154. Katie Baker, *Here's the Powerful Letter the Stanford Victim Read to Her Attacker*, BUZZFEED NEWS (June 3, 2016, 4:17PM) (discussing the victim's disappointment with the "gentle" sentence and publishing her statement in full); Melissa Klein, *Stanford Assault Victim's Family Speaks: 'My heart's been broken'*, N.Y. POST, (June 12, 2016, 3:45 AM) (discussing the victim's family's feelings after the assault); Marina Koren, *Telling the Story of the Stanford Rape Case*, THE ATLANTIC, (June 6, 2016) (comparing the victim's experience to Brock Turner's father's).

155. *See Believed*: *Larry Nassar's Survivors Speak, And Finally The World Listens—And Believes*, MICHIGAN RADIO (Dec. 10, 2018), https://www.npr.org/2018/12/07/674525176/larry-nassars-survivors-speak-and-finally-the-world-listens-and-believes [https://perma.cc/XTJ2-SHC6]; Janine Rubenstein, *'It Was a Horrible Life': 8 Women Who Accuse R. Kelly of Painful Abuse Share Their Stories*, PEOPLE (Jan. 5, 2019), https://people.com/music/surviving-r-kelly-8-women-abuse-share-stories/ [https://perma.cc/P8Z6-YXH7].

One cannot debate that point. My concern focuses on the balance between culpability of an offender, personal harm to the victim, and the goals of punishment. The victims' rights movement has changed the focus of the theoretic framework of criminal law from the offender to the victim.[156] That is a shift away from basic principles towards a tort concept of the criminal law. As developed below, this shift has often led to unnecessarily long sentences and can lead to unequal treatment of criminal defendants.

IV.
BACK TO FIRST PRINCIPLES

Almost halfway into the semester of one of my recent Criminal Law classes, we turned to sexual assault. Class discussion focused on a provision of the Pennsylvania criminal code. Section 3124.1 provides that ". . . a person commits a felony of the second degree when that person engages in sexual intercourse with a complainant without the complainant's consent."[157] The discussion was far ranging, including a discussion of the relevant sentence for a felony of the second degree under Pennsylvania law (up to ten years in prison).[158] It then focused on the absence of a mens rea term in the statute and whether it should be read as a strict liability offense.[159] A student raised her hand and asked, "What would be wrong with making the offense strict liability?"

I suspect that many have the same question. After all, harm to a victim remains the same whether the defendant acted without a culpable frame of mind. This confusion has been propounded by the victims' rights movement. Focus on harm to a victim conflates tort concepts with first principles of the criminal law, as developed below.

Pick up any Criminal Law casebook, including Kadish, Schulhofer, et al.,[160] and look at the first few chapters.[161] They lay out the first principles of the criminal law. Among those essential

156. *Infra* Part IV.

157. 18 PA. CONS. STAT. § 3124.1 (2019).

158. *See id.* at §106(b)(2).

159. For example, what if a person did not signal the lack of consent in any manner and an act of intercourse took place? The harm occurred: the act of nonconsensual sex. But the offender had no reason to know that consent was not present.

160. SANFORD KADISH ET. AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS, (10th ed. 2017).

161. *Id.* at 1–349 (containing chapters on the institutions and processes of criminal law, the justification of punishment, and the elements of just punishment).

aspects of the criminal law are principles that focus on an offender's culpability,[162] on proportional punishment,[163] and on the reasons for standards like guilt beyond a reasonable doubt.[164] Some casebooks include a chapter on lenity,[165] which focuses on rules that favor defendants and their liberty when the meaning of a statute is unclear.[166] Casebooks raise questions about alternatives to criminal law, like tort law or other civil sanctions, to avoid imposing the weight of criminal law on some individuals.[167]

These are not transient notions, as the Supreme Court has observed.[168] For example, while analyzing whether a statute includes a mens rea element, courts recognize that an offender's culpability is essential to the criminal law.[169] Punishment is not measured by harm to the victim; instead, the major focus is on the offender's culpability.[170] Indeed, that notion has constitutional status: in assessing whether an offender's sentence is grossly disproportionate, the Court looks to the gravity of an offense, measured in terms of *social* harm and the offender's level of culpability.[171] Indeed, some commentators have questioned whether the law should even criminalize negligent offenders; after all, someone unable to achieve the standard of a reasonable person may be subject to punishment for their stupidity rather than for their individual fault.[172] As a result, the criminal law not only disfavors strict liability, it also shuns ordinary negligence, typically requiring more than the kind of risk that can lead to tort liability.[173]

---

162. *See id.* at 258.

163. *See id.* at 202.

164. *See id.* at 38.

165. JOSHUA DRESSLER & STEPHEN GARVEY, CASES AND MATERIALS ON CRIMINAL LAW 93–132 (7th ed. 2015).

166. *Id.* at 113.

167. *See* KADISH ET AL., *supra* note 160, at 87.

168. Staples v. United States, 511 U.S. 600, 605 (1994); Morissette v. United States, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion.").

169. *Staples*, 511 U.S. at 605 ("[W]e must construe the statute in light of the background rules of the common law . . . in which the requirement of some mens rea for a crime is firmly embedded.").

170. *See id.* at 616.

171. *See* Harmelin v. Michigan, 501 U.S. 957, 959–60 (1991) (Kennedy, J., concurring); Solem v. Helm, 463 U.S. 277, 292 (1983).

172. *See* Michael Vitiello, *Defining the Reasonable Person in the Criminal Law: Fighting the Lernaean Hydra*, LEWIS & CLARK L. REV., 1435, 1439–42 (2010).

173. *See id.*

The tort and criminal justice systems parted long ago. The two systems did so because they have different goals.[174] A tort system focuses on individual—not social—harm, allocates loss, and often looks to who is in a better position to guard against harm or spread risk among users of a product.[175] Hence, strict liability may be acceptable in tort because a manufacturer can spread the cost of its product's harm across a large number of consumers.[176] A driver may be liable to tort damages based on momentary inattention while driving. The tort law system can tolerate such a result because the driver is in a better position to insure herself against such a risk than an innocent person injured by the driver's activity.[177] By contrast, the criminal law system is about individual culpability and deserving punishment.[178]

Early in common law legal history, the law did not distinguish clearly between tort and criminal law actions.[179] Indeed, early on, in cases involving a breach of the King's peace, victims could choose among different actions, including a writ of trespass, an indictment of a felony, or an indictment of trespass.[180] The victim received compensation if she chose to pursue a writ of trespass; the other options led to criminal punishment.[181] But the conflation of criminal law and tort law ended hundreds of years ago.[182] As a result, the tort law system is about individual harm. The criminal law system is about social harm and offender culpability.

---

174. *Compare* DAN B. DOBBS ET AL., TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 5–6 (7th ed. 2013) (defining goals of tort law as including corrective justice, distributive justice, compensation, and risk distribution), *with* DRESSLER & GARVEY, *supra* note 165, at 157 (stating that doctrines regarding necessary criminal intent and a defendant's guilty mind are "deeply rooted in our legal tradition as one of our first principles of [criminal] law").

175. *See* DOBBS ET AL., *supra* note 174, at 6.

176. *See id.*

177. *See* Richard Lewis, *Insurance and the Tort System*, 25 LEGAL STUD. 85, 93 (2005) ("[I]nsurance in this context is fundamental to the general operation of the tort system.").

178. DRESSLER & GARVEY, *supra* note 165, at 157–58.

179. *See* Kenneth Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 719 (2008); David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. Rev. 59, 59 (1996).

180. *See* Seipp, *supra* note 179.

181. *See id.* at 59–60.

182. *See* Simons, *supra* note 179. Trying a criminal and civil case together can be problematic. *See* Danielle Lenth, *Life, Liberty, and the Pursuit of Justice: A Comparative Legal Study of the Amanda Knox Case*, MCGEORGE L. REV. 347, 355–67 (2013) (outlining the major criticisms of the Amanda Knox case).

Unlike tort law, criminal law is also concerned with liberty.[183] Hence, in acknowledging that the Constitution includes the requirement of a presumption of innocence and of guilt beyond a reasonable doubt, the Court recognizes the preference for liberty.[184] Thus, our criminal justice system has long recognized, if not literally then metaphorically, that we would rather acquit ten guilty offenders than convict one innocent offender.[185]

Liberty matters. Not only is the preference for liberty part of constitutional protections, it also explains the principle of lenity.[186] Thus, although a legislature is free to abandon the principle of lenity, the principle requires courts to interpret ambiguous statutes in favor of the defendant.[187] If the choice is between favoring the powerful state or the individual, the court should side with liberty; if necessary, the state can rewrite its laws.[188] In the interim, close calls go to accused individuals.[189]

The tort system focuses on allocation of risk between the parties.[190] A tort remedy focuses on compensating the victim.[191] Except in cases of punitive damages, a defendant's culpability is irrelevant to the amount of damages.[192]

Social harm still counts in criminal law. But the movement towards modern criminal law was the shift in focus from social harm to the offender's culpability.[193] *Regina v. Cunningham,* a classic case used by Professor Schulhofer in his casebook, captures this change in the criminal law.[194] There, the defendant stole a gas meter to extract the coins.[195] In doing so, he broke the gas line, leading to the asphyxiation of a resident of the other home in a duplex. He

183. *See* Lenth, *supra* note 182, at 9; *In re* Winship, 397 U.S. 358, 363–64 (1970).

184. *See Winship*, 397 U.S. at 363–64.

185. *See id.* at 372.

186. DRESSLER & GARVEY, *supra* note 165, at 113–14.

187. *Id.*

188. *Id.*

189. *Id.*

190. *See* DOBBS, *supra* note 174, at 6.

191. *See id.*

192. *See id.*

193. *See* MODEL PENAL CODE § 2.02(3) (AM. LAW INST. 1985) ("When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly."); Vitiello, *supra* note 172, at 1439 (discussing the Model Penal Code's reform of the criminal law to premise "criminal liability on an offender's culpable mental state").

194. Regina v. Cunningham [1957] 2 QB 396 (Eng.).

195. *See id.*

was charged with maliciously administering a noxious thing to another person, thereby endangering that person.[196] The trial court instructed the jury that it should find the defendant guilty as long as he did a wicked thing.[197] Of course, he did so by committing the theft. The appellate court construed the statutory term "maliciously" as the equivalent to recklessness.[198] It then parsed the statute to determine whether the mens rea term attached to the social harm.[199] In a compact way, the court signaled the change in modern criminal law: the social harm remains whether or not the offender was aware of the risk that he created. But an offender who was aware of the risk is more culpable than one who failed to recognize the risk.[200]

The Supreme Court has increasingly recognized the same principle through interpretation of modern criminal statutes. For example, in *United States v. Staples,* the Court inferred that Congress must have intended a malum prohibitum statute to include a mens rea term in light of the possible long prison term.[201] The majority ignored early precedent that was willing to find liability even absent a mens rea term for such public welfare statutes.[202] Similar examples abound.[203] Thus, in its death penalty case law, even in cases where the defendant has killed another person, the Court has required some significant level of culpable mens rea.[204]

---

196. *See id.*

197. *See id.*

198. *Id.*

199. *See id.*

200. MODEL PENAL CODE § 2.02 (AM. LAW INST. 1985) (providing that the Code's recklessness standard, awareness of risk, is a higher culpability standard than that of negligence). Of course, disconnecting the culpability of the offender from the social harm is why almost all commentators rejected the felony murder rule. *See* Note, *Felony Murder as a First Degree Offense: An Anachronism Retained*, 66 YALE L.J. 427, 432–33 (1957) (stating that the felony murder rule renders the existence of differing degrees of murder meaningless); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 680 (1994) (arguing the felony murder doctrine "does not serve the crime preventive purposes of the criminal law, and is not redeemed by any defensible normative principle").

201. *See* Staples v. U.S., 511 U.S. 600, 617 (1994).

202. *See id.* at 619.

203. *See, e.g.,* Elonis v. United States, 575 U.S. 723, 135 S. Ct. 2001, 2009 (2015) ("We have repeatedly held that 'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.' ").

204. *See* Tison v. Arizona, 481 U.S. 137, 157–58 (1987) (holding that reckless disregard for human life is the lowest mental state required before imposition of the death penalty).

The Model Penal Code offers even more examples of the modern trend. For instance, strict liability offenses are disfavored[205] and prison time is not suitable in such cases.[206] Absent a stated mens rea, under the Code's default provision, the court must read into the statute a minimum of recklessness.[207] While retaining negligence as a possible mens rea term, the Code's drafters rejected that level of culpability as generally acceptable.[208] Indeed, the drafters debated whether a negligent actor, one who lacks subjective awareness, is ever a suitable subject for punishment.[209]

Contrary to modern criminal law theory, victim impact evidence skews the criminal process away from an offender's culpability toward increased attention to the individual harm, not necessarily to societal harm. When the Court first addressed victim impact evidence in two cases in the 1980s, the Court rejected the evidence absent some showing that the offender acted with some awareness that family members would experience grave harm.[210] In *Payne v. Tennessee,* the Court granted broad authority for admission of victim impact evidence.[211] In doing so, not only did it overrule recent precedent (more rapidly than in almost any other instance), the Court introduced an arbitrariness into the criminal justice system with a special focus on harm to the victim's family.[212]

To demonstrate, imagine two homicide victims of a single crime: in one instance, that victim's family is vengeful; in the other, the victim's family believes in forgiveness.[213] The offender's conduct towards the two victims is otherwise identical. In one instance, the jury may impose the death penalty and not in the other based on factors relating only to social harm.[214] A host of other factors,

205. *See* MODEL PENAL CODE at § 2.05.

206. *See id.*

207. *See* MODEL PENAL CODE at § 2.02(3).

208. *See id.*; *id.* at § 2.02(2)(d) (requiring a gross deviation from the standard of care that a reasonable person would observe in the actor's situation); Vitiello, *supra* note 172, at 1439–42 (2010).

209. Vitiello, *supra* note 172, at 1439–41.

210. *See* Booth v. Maryland, 482 U.S. 496, 507–09 (1987) (concluding that victim impact statements at the sentencing phase of a defendant's trial violate the 8th Amendment); South Carolina v. Gathers, 490 U.S. 805, 811–12 (1989) (holding that the information contained in the victim impact statement was inadmissible because it did not relate directly to the circumstances of the crime and was unknown to the defendant).

211. *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991)

212. *See id.*; Michael Vitiello, *Payne v. Tennessee: A "Stunning IPSE Dixit,"* NOTRE DAME J.L. ETHICS & PUB. POL'Y, 165, 195, 211 (1991).

213. Vitiello, *supra* note 212, at 225 n.394.

214. *See id.* at 225.

unrelated to the offender's culpability might factor into the jury's decision as well, factors that reverse the modern emphasis on culpability.[215] For example, a family's religion and that religion's view of forgiveness may determine whether the family testifies in favor of the death penalty.[216] Whether family members are articulate, perhaps a result of educational advantages and wealth, can influence the jury's decision to impose the death penalty.[217] Indeed, while I pose this example as a hypothetical, one can find real life instances where a family's wishes have resulted in prosecutors seeking the death penalty.[218]

As mentioned above, the victims' rights movement focuses on individual harm, not the harm to society generally. This means that a victim's or her family's desire for a long prison term for an offender may make no sense from a societal point of view.[219] An offender may represent a very low risk to the public if he is released after a short prison term.[220] Private vengeance demanded by the victim may result in excessive punishment.[221] As a result, the center-

215. *See* Booth, 482 U.S. at 505 ("Allowing the jury to rely on a VIS could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill."); Stephen Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1498 (1974) (explaining that factors such as "[t]he precise location of a knife or gunshot wound, [or] the speed of intervention by neighbors or the police" may determine a case's result, even though the defendant had no knowledge or control of those factors).

216. *See, e.g.*, Lucy Pasha-Robinson, *Investigator Jailed After Refusing to Testify in Death Penalty Case for Religious Reasons*, THE INDEPENDENT (Feb. 28, 2018, 6:08 PM), https://www.independent.co.uk/news/world/americas/mennonite-investigator-jailed-death-penalty-colorado-not-testify-refuse-religious-capital-punishment-a8233336.html [https://perma.cc/KG3A-BD2R].

217. *See Booth*, 482 U.S. at 506 (finding the family members' statements in that case "articulate and persuasive in expressing their grief," yet recognizing that, in other cases, "the family members may be less articulate in describing their feelings even though their sense of loss is equally severe"—thus the "fact that the imposition of the death sentence may turn on such distinctions illustrates the danger of allowing juries to consider this information").

218. *See Death the Only Just Sentence in Taft's Murder, State Says*, WRAL.COM (June 7, 2012), https://www.wral.com/death-the-only-just-sentence-in-taft-s-murder-state-says/11177003/ (noting that the Wake County District Attorney's office sought the death penalty because the "sentence [would] help her family—and more importantly the community—put this heinous act behind [them]").

219. *See* Vitiello, *supra* note 149, at 658 (arguing long prison terms are costlier than potential alternatives, such as drug treatment or close parole supervision, and because criminality correlates with age, criminals in their thirties and older are "more likely to phase out of criminality").

220. *See id.* at 641.

221. *Id.*

piece of the victims' rights movement—the victim impact statement—is at odds with fundamental principles of our criminal law system.

V.
WHAT ABOUT ON CONSEQUENTIALIST GROUNDS?

One might respond to the concerns raised above by arguing that victims' participation in the criminal justice system is justified on consequentialist grounds. Thus, one might argue that, on balance, victim participation is justified because it benefits victims more than it harms offenders. That argument seems implicit in some of the language used by victims' advocates.[222] Proponents commonly state that a victim of a crime or her family experiences closure by participating in the process.[223] Thus, one might argue that even if an offender receives a longer sentence than the judge might otherwise impose absent powerful impact statements, the net benefit to society justifies the increased punishment. Here, the benefit would be helping the innocent victim recover more quickly than they otherwise might have, had they not participated in the process.

Victims' rights supporters can point to anecdotal evidence to support such claims. For example, after hearing one victim's statement, a judge reassured her that she was not to blame for the incident, thereby acknowledging her suffering.[224] The victim said, "Because of what the judge said, it was so easy just to walk out of that court and start my life".[225] One report noted that when judges make statements to the defendant in front of the victim, like "I can't believe how much damage you have caused here," it can help victims as well.[226]

---

222. *See* Bandes, *supra* note 147, at 11 n.62 (describing the argument in favor of victim impact statements as one which emphasizes the giving back of something to victims' families and friends that was previously taken by the defendant).

223. *See id.* at 2 (stating that victim impact statements "assist with healing and closure because they permit victims and survivors to give voice to their pain and sense of loss in a public setting").

224. Susan A. Bandes, *Share Your Grief but Not Your Anger: Victims and the Expression of Emotion in Criminal Justice*, in THE EXPRESSION OF EMOTION: PHILOSOPHICAL, PSYCHOLOGICAL AND LEGAL PERSPECTIVES 274 (Catherine Abell & Joel Smith, eds., 2016).

225. *Id.*

226. MARY LAY SCHUSTER & AMY D. PROPER, VICTIM ADVOCACY IN THE COURTROOM: PERSUASIVE PRACTICES IN DOMESTIC VIOLENCE AND CHILD PROTECTION CASES 86 (2011).

Elsewhere, one victim of the Boston Marathon attack wrote to the defendant that it aided her to deliver her statement even if he failed to make eye contact with her when she spoke.[227] As she stated, "Today I looked at you right in the face and realized I wasn't afraid anymore. And today I realized that sitting across from you was somehow the crazy kind of step forward that I needed all along."[228] This suggests that victims' impact statements may benefit victims by allowing them to confront defendants for the pain and suffering that the defendants have caused.[229]

The problem with that position is that consequentialist arguments rest on empirical claims. The support for the idea that victims benefit by participating in the process is thin. Marilyn Armour, director of the Institute for Restorative Justice and Restorative Dialogue has spent twenty years researching co-victims and writes that "[t]hey'll tell you over and over and over again that there's no such thing as closure."[230]

Further, psychological studies have found that executions do little to heal the victims' families.[231] A Marquette University study compared the effects of executions on victims' families in Minnesota and Texas. Minnesota has no death penalty; Texas leads the nation in executions. The study found that families of victims in Minnesota had higher levels of physical, psychological, and behavioral health and more satisfaction with the criminal justice system than families of victims in Texas.[232]

Victims' families have, in fact, formed a group, *Murder Victims Families for Reconciliation*, whose mission statement is to mobilize

---

227. Lindsey Bever, *'Dear Dzokhar Tsarnaev': A Survivor's Letter to Accused Boston Bomber*, WASH. POST (Mar. 5, 2015, 4:50 PM), https://www.washingtonpost.com/news/morning-mix/wp/2015/03/05/dear-dzhokhar-tsarnaev-a-boston-marathon-survivors-letter-to-the-man-who-maimed-her/?noredirect=ON&utm_term=.F057f374ebfa [https://perma.cc/EH5K-XSQ4].

228. *Id.*

229. Bandes, *supra* note 147.

230. Laura Santhanam, *Does the Death Penalty Bring Closure to a Victim's Family*, PBS NEWSHOUR, (Apr. 25, 2017, 3:02 PM), https://www.pbs.org/newshour/nation/death-penalty-bring-closure-victims-family [https://perma.cc/GYY6-6RFT].

231. Traci Pedersen, *Study Finds Executions Do Little to Heal Victims' Families*, PSYCHCENTRAL, https://psychcentral.com/news/2014/01/26/study-finds-executions-do-little-to-heal-victims-families/64973.html [https://perma.cc/TYB5-DQWJ].

232. *See* Marilyn P. Armour & Mark S. Umbreit, *Assessing the Impact of the Ultimate Penal Sanction on Homicide Survivors: A Two State Comparison*, 96 MARQ. L. REV. 1, 91–95 (2012); *see also* Scott Vollum & Dennis R. Longmire, *Covictims of Capital Murder: Statements of Victims' Family Members and Friends Made at the Time of Execution*, 22 VIOLENCE AND VICTIMS 601–19 (2007).

"victim families and help them tell their stories in ways that disrupt and dismantle the death penalty and create pathways for wholeness, reconciliation and restoration."[233] This all tends to suggest that executions do not in fact provide the alleged closure that many death penalty advocates have clung to for so long as justification for the practice.[234]

Absent compelling evidence to the contrary, one should be suspicious that expressing one's loss to the defendant on one instance in open court can provide closure, if by closure proponents mean psychological healing. Victims of violent crime often suffer major trauma, often post-traumatic stress disorder (PTSD).[235] The idea that venting one's emotions in court on a single occasion does much to heal victims is out of line with the reality that PTSD, while treatable, is a serious condition. It requires far more treatment than can be provided by a day in court.[236]

Absent empirical evidence to support the idea that a victim's participation provides meaningful psychological benefits, one is left to find some other justification to abandon traditional criminal law principles. Our system long ago abandoned private vengeance.[237] Yet, as some of the examples above indicate, the current use of victim impact statements may lead to a difference in an offender's sentence only because the family of the victim or the victim herself

233. Lisa Murtha, *These Families Lost Loved Ones to Violence. Now They Are Fighting the Death Penalty*, Am. Jesuit Rev. (Dec. 28, 2017), https://www.americamagazine.org/faith/2017/12/28/these-families-lost-loved-ones-violence-now-they-are-fighting-death-penalty [https://perma.cc/4GNU-5MFQ].

234. Pedersen, *supra* note 231.

235. Dean G. Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. Traumatic Stress 119, 125–26 (2003)(stating "[v]ictims of violence experience a variety of emotional problems [and] PTSD is among these," and finding 32% of rape victims had lifetime PTSD and 38.5% of physical assault victims had lifetime PTSD).

236. *See* James Herbie DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 Hous. L. Rev. 1205, 1273–75 (2004) (suggesting continuing symptoms of PTSD may be a result of inadequate coping strategies and "[a] criminal prosecution may provide a juristic ending to the victim's violation. But depending on the vagaries of the criminal justice system to provide psychological balm is to risk relying on other actors for the resolution of one's own trauma."); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 Stan. L. Rev 937, 998–99 (1985) (arguing the victim recovery process is more complicated than can be accomplished simply by participation in the defendant's sentencing, and "to say to a victim that after sentencing he or she can now put the experience to rest denies that any remaining questions of meaning, fears of death, or feelings of helplessness exist").

237. *See* Henderson, *supra* note 236, at 1000–01; *In re* Estrada, 408 P.2d 948, 951 (Cal. 1965) (stating a desire for vengeance is not permitted under modern theories of penology).

advocates for a longer or shorter sentence.[238] The added sentence may be entirely unnecessary to assure public safety and may not at all relate to the offender's culpability.[239]

VI.
WHAT ABOUT DEMOCRACY?

Anyone who listens to victims articulate the suffering caused by being criminal victims must feel their pain and outrage, as long as the listener has a modicum of empathy. Headline cases can be flash points for popular outrage.[240] That outrage moves members of the public to action, as it did when California enacted its draconian Three Strikes law in reaction to news about Richard Allen Davis' kidnap and murder of twelve-year-old Polly Klaas.[241]

Another example of the power of the victims' rights movement is the reaction in California after Brock Turner's criminal sentence.[242] Even at a time when the state had started to advance liberal sentencing reforms, California changed its law to mandate a minimum prison sentence for an offender convicted of sexual assault of an unconscious woman in reaction to the sentence imposed on Turner.[243] Turner's case also led to the sentencing judge's recall, despite the fact that Judge Aaron Persky, a well-regarded judge, followed the probation report's recommendation when he imposed Turner's sentence.[244]

Both the passage of Three Strikes and the recall of Judge Persky garnered broad public support. For example, Three Strikes

238. WRAL.COM, *supra* note 218.

239. *See* Booth v. Maryland, 482 U.S. 496, 509 (1987); Schulhofer, *supra* note 215.

240. *See* Michael Vitiello, *Three Strikes: Can We Return to Rationality,* 87 J. CRIM. L. & CRIMINOLOGY 395, 411–12 (1997); Michael Vitiello, *"Three Strikes" and the Romero Case: The Supreme Court Restores Democracy*, 30 LOY. L.A. L. REV. 1601 (1997).

241. Vitiello, *"Three Strikes" and the Romero Case: The Supreme Court Restores Democracy*, *supra* note 240, at 1602–03.

242. *See* Vitiello, *supra* note 149, at 634–38.

243. *See id.* at 639; *Sexual Assault Law—Judicial Recall—California Judge Recalled for Sentence in Sexual Assault Case*, 132 HARV. L. REV. 1369 (2019).

244. *See* Vitiello, *supra* note 149, at 637; Report of Probation Officer, People v. Brock Allen Turner, No. B1577162 (Cal. Super. Ct., June 2, 2016); Dunlap, *supra* note 150; Paul Elias, *Judge in Stanford Rape Case Often Follows Sentencing Reports*, ASSOCIATED PRESS (June 17, 2016), https://apnews.com/a01788e9c0374cf19a942625fde93174 [https://perma.cc/XC3Q-RS9Z] (stating Judge Persky followed the sentencing recommendation of the Santa Clara County Probation Department).

passed with support of 72% of the voters.[245] Almost 60% of the voters in Santa Clara County voted to oust Judge Persky.[246]

One might ask: what is wrong with democracy or, more particularly, what is wrong with voters determining sentencing policy? The answer is a great deal, in the area of criminal sentencing. Long ago, Jeremy Bentham argued that a criminal justice system should center on a government's properly developed penal code, not on public morals or outrage.[247] Scholars have demonstrated that Bentham was right and that public involvement in criminal sentences results in prison terms longer than needed for protecting public safety.[248]

The authors of *Punishment and Democracy* demonstrated the excesses of California's Three Strikes law.[249] The authors found at best a minor deterrent effect for future criminal activity.[250] Further, three strike offenders tended to be older and, in many instances, guilty of mid-level offenses.[251] The offenders who Three Strikes proponents claimed would be subject to the law (murderers, rapist, and child molesters)[252] were already subject to very long terms of imprisonment or even the death penalty.[253] The offenders tended to be older because they had already served prison sentences for their qualifying strikes.[254] Hence, the most common offenders given very long sentences under the law were mid-level offenders who were no longer in their prime criminal years age-wise: for most

245. BILL JONES, CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOV. 8, 1994 GEN. ELEC. xxv (1994).

246. Richard Gonzales & Camila Domonoske, *Voters Recall Aaron Persky, Judge Who Sentenced Brock Turner*, NPR (June 5, 2018, 1:58 PM), https://www.npr.org/sections/thetwo-way/2018/06/05/617071359/voters-are-deciding-whether-to-recall-aaron-persky-judge-who-sentenced-brock-tur [https://perma.cc/N56A-GNF5].

247. Guyora Binder, *Punishment Theory: Moral or Political*, 5 BUFF. CRIM. L. REV. 321, 338–48 (2002); *see also* Kent Greenwalt, *Punishment*, *in* 3 ENCYCLOPEDIA OF CRIME & JUSTICE 1282, 1286–87 (Joshua Dressler ed., 2d ed. 2002).

248. *See generally* FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001) (discussing the California legislature's enactment of the Three Strikes law and its implications for criminal sentencing).

249. *Id.*

250. *Id.* at 94–105.

251. *See id.* at 56.

252. *See id.* at 4–7.

253. *Id.* at 44.

254. *See* ZIMRING ET AL., *supra* note 248, at 56; *see also, e.g.*, FED. BUREAU OF INVESTIGATION, DEP'T OF JUSTICE, AGE-SPECIFIC ARREST RATES AND RACE-SPECIFIC ARREST RATES FOR SELECTED OFFENSES 1993–2001 (Nov. 2003), https://ucr.fbi.gov/additional-ucr-publications/age_race_arrest93-01.pdf, [https://perma.cc/8YG9-ERSP].

men, between nineteen and twenty-nine years old.[255] A 25-year-to-life sentence imposed on a 35-year-old mid-level offender results in many years of expensive incarceration that cannot be justified based on any resulting social protection.[256]

Similarly, many commentators who opposed Judge Persky's recall did so, in part, out of concern about judicial independence, especially relating to length of prison sentences.[257] Imagine, for a moment, another judge sentencing a defendant in a case like Brock Turner's case after witnessing the successful recall effort. Consciously or unconsciously, the judge would have to consider the risk to his or her career if the sentence seemed to the public to be inadequate.[258] While recall supporters downplayed the impact on judicial independence, empirical data supports the concern about judges imposing unnecessarily long sentences.[259]

In December 2015, the Brennan Center for Justice at New York University Law School published a study on state court judicial sentencing practices.[260] The report measured the effect of an upcoming re-election on a judge's sentencing practices and discussed the increased cost of judicial elections.[261] Much of the funding for election campaigns is from outside groups that typically fund negative ads.[262] Largely, those ads attack opposition candidates as soft on crime or tout candidates as tough on crime.[263] Relevant to this dis-

255. *See id.*

256. *Id.* at 60 ("The offense charged at the current arrest is less likely to be a crime of violence for a third-strike defendant than for a defendant with no strikes at all.").

257. *See* Tracey Kaplan, *Recall Aftermath: Will the Removal of Judge Aaron Persky Prompt a New Legal Battle?*, MERCURY NEWS (June 6, 2018), https://www.mercurynews.com/2018/06/06/judge-persky/ [https://perma.cc/6QTX-DD8M].

258. *Id.* ("Opponents [to the recall] said . . . independence from popular opinion is what has allowed judges to rule on civil rights, integrated schools, free speech, access to birth control and marriage equality."); *see* Vitiello, *supra* note 149, at 652–59.

259. *See* Julian V. Roberts, *Public Opinion and Mandatory Sentencing: A Review of International Findings*, 30 CRIM. JUST. & BEHAVIOR 483, 505 (2003) (concluding that members of the public are "sensitive to the principle of proportionality and recognize the threat to this principle created by laws that mandate the same sentence for all offenders regardless of their levels of culpability").

260. Kate Berry, *How Judicial Elections Impact Criminal Cases*, BRENNAN CTR. FOR JUST. (2015), https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf [https://perma.cc/REA9-GGPD].

261. *See id.* at 1

262. *See id.* at 8.

263. *See id.* at 3.

cussion, judges up for retention gave longer sentences as those judges got closer to reelection.[264] Keep in mind that in many states, victims' rights groups provide much of the money for judicial election ads.[265] In California, the prison guards' union, working closely with victims' rights groups, often provides funding to back tough-on-crime judges.[266] Not surprisingly, therefore, the political process ends up adding unnecessary years of confinement in many cases.[267]

While in recent years the public seems exhausted with mass incarceration,[268] the democratic process will almost inevitably result in sentences that are longer than necessary to protect public safety.[269]

Often lost in the reaction to Judge Persky's sentencing decision was his reliance on a detailed probation report.[270] That report, in turn, focused on the California legislature's criteria for determining the length of a criminal sentence.[271] Those criteria include a

---

264. *See id.* at 9.

265. Alicia Bannon et al., *Who Pays for Judicial Races? The Politics of Judicial Elections 2015-2016*, BRENNAN CTR. FOR JUST. 29, 36 (2017).

266. Sagar Jethani, *Union of the Snake: How California's Prison Guards Subvert Democracy*, MIC (Feb. 5, 2019), https://mic.com/articles/41531/union-of-the-snake-how-california-s-prison-guards-subvert-democracy#.P004fsUjN (stating that the California Correctional Peace Officers Association "has been one of the leading backers of tough sentencing laws," spending $100,000 in support of the Three Strikes law and $1 million on beating Proposition 66).

267. Berry, *supra* note 260, at 7.

268. *See, e.g.*, Lauren-Brooke Eisen & Inimai Chettiar, *39% of Prisoners Should Not Be in Prison*, TIME (Dec. 9, 2016) https://time.com/4596081/incarceration-report/ [https://perma.cc/UGM6-HDQC]; ACLU N. CAL., *supra* note 55; *see also* Peter K. Ennis, *The Public's Increasing Punitiveness and Its Influence on Mass Incarceration in the United States*, 58 AM. J. POL. SCI. 857 (2014) (examining punitive tendencies of the U.S. public since 1953 and revealing a significant decrease in public support for "tough on crime" policies since the mid 1990's).

269. *See generally* Berry, *supra* note 260; *see* Lauren-Brooke Eisen et al., *How Many Americans Are Unnecessarily Incarcerated*, BRENNAN CTR. FOR JUST. 42 (2016), https://www.brennancenter.org/publication/how-many-americans-are-unnecessarily-incarcerated [https://perma.cc/U27L-2XEZ] (suggesting that mass incarceration will continue to rise unless bold solutions are provided, including reducing minimum and maximum required sentencing, and eliminating prison terms for lower level crimes).

270. Elias, note 244; *see also Brock Turner Sentencing Packet*, N.Y. TIMES (Jun. 12, 2016), https://www.nytimes.com/interactive/2016/06/12/us/document-SentencingPacket.html [https://perma.cc/4QVK-6AAZ].

271. *See Brock Turner Sentencing Packet*, *supra* note 270; *see also* CAL. PENAL CODE § 1170 (West 2020). *Cf.* Nicole Knight, *Brock Turner Sentencing Prompts California Legislators to Expand Rape Definition*, REWIRE (Sept. 2, 2016, 1:40 PM), https://rewirenewsgroup.com/article/2016/09/02/brock-turner-sentencing-prompts-california-legislators-expand-rape-definition/ [https://perma.cc/E626-BGFC]; Matt Ford, *How Brock Turner Changed California's Rape Laws*, THE ATLANTIC (Oct. 1,

risk assessment instrument, which provides a reasonably accurate prediction of whether an offender will recidivate.[272] In light of his age and lack of prior criminal record, Turner's score indicated a low likelihood of reoffending.[273] The sentence imposed was not only lawful, but also based on that substantial probation report.[274]

Like many, I read the headlines about the light jail sentence and assumed that the sentence demonstrated the worst kind of bias, a light sentence imposed on a well-to-do athlete.[275] After reading the probation report, I was less certain about the sentence. In addition, I was not in the courtroom and did not see the defendant when he testified. As a result, like most people who have heard about the case, I have no idea whether he was credible. Apparently, the judge found the defendant's testimony about some of the events to be credible, including the defendant's belief that the victim was consenting.[276] Over time, I became increasingly agnostic about whether Turner's sentence was too lenient.

My experience with the Turner case is illustrative: even someone who has written about excessive punishment and urged greater attention to limiting prison sentences and focusing on rehabilitation was initially moved by news headlines.[277] Most voters are not criminal law scholars and have little time to read probation reports or to reflect on first principles of the criminal law. Many people learned about the case from headlines, often ones that misrepresented the facts of the case.[278]

2016), https://www.theatlantic.com/news/archive/2016/10/california-law-brock-turner/502562/ [https://perma.cc/2P45-YGDL]; Mollie Reilly, *California Closes Loophole That Allowed Brock Turner's Light Sentence*, HUFFPOST (Sept. 30, 2016, 3:26 PM ET), https://www.huffpost.com/entry/california-rape-sentencing-brock-turner_n_57c6f0a9e4b078581f10631c [https://perma.cc/B4FW-FA7Z].

272. *See Brock Turner Sentencing Packet*, *supra* note 270, at 8–9; *See* CAL. PENAL CODE § 290.04 (West).

273. *See Brock Turner Sentencing Packet*, *supra* note 270, at 9.

274. Elias, *supra* note 244.

275. Vitiello, *supra* note 149.

276. Marina Koren, *Why the Stanford Judge Gave Brock Turner Six Months*, THE ATLANTIC (June 17, 2016), https://www.theatlantic.com/news/archive/2016/06/stanford-rape-case-judge/487415/ (noting that Persky stated, "I mean, I take him at his word that, subjectively, that's his version of events.").

277. *See generally* Vitiello, *supra* note 95; Vitiello, *supra* note 172; Vitiello, *supra* note 212; Vitiello, *supra* note 240.

278. Vitiello, *supra* note 149, at 637–38; Kendall Fisher, *No Time Like the Present, Except the Past Fifty Years: Why California Should Finally Adopt the Model Penal Code Sentencing Provisions*, 49 U. PAC. L. REV. 661, 662–64 (2018); Wiemond Wu, *Crocodiles in the Judge's Bathtub? Why California Should End "Unregulated" Judicial Recall*, 49 U. PAC. L. REV. 699, 719–21 (2018); Justine McGrath, *Stanford Rapist Brock Turner Lost His Sexual Assault Conviction Appeal*, TEEN VOGUE (Aug. 9, 2018), https://

Even worse were reports on social media that distorted the facts of the case. So many false accusations were made on largely unregulated social media sites that a law professor set up a webpage to rebut misstatements or outright lies made about the case.[279]

The democratic process does not work in right-sizing criminal punishment. Anyone with empathy feels for victims. We may see ourselves or our loved ones as victims. Guilty defendants have done something wrong.[280] Getting past those realities to a position where one can assess appropriate punishment dispassionately is difficult. Explaining first principles of criminal law to members of the public takes one into a theoretical realm, which is harder to understand than the immediate pain of victims.

VII.
CONCLUDING THOUGHTS

For the first time in many years, liberal criminal justice advocates may have something to cheer about.[281] Americans have rejected many of the policies that led to mass incarceration.[282] Their politicians are enacting reform legislation in many states. Many

---

www.teenvogue.com/story/stanford-rapist-brock-turner-lost-his-sexual-assault-conviction-appeal [https://perma.cc/5BU8-YP2Y] (labeling defendant a "rapist" in the headline); Will Garbe, *Attorney Tells Judges Brock Turner Practiced 'Sexual Outercourse,'* THE ATLANTA J.-CONSTITUTION (July 25, 2018), https://www.ajc.com/news/national/brock-turner-stanford-student-convicted-rape-practiced-sexual-outercourse-attorney-says-appeal/b9bm0xCSSrHmrIzDmI5VvJ/ [https://perma.cc/Y93G-G3GW] (changing the headline of the article and concluding in an editor's note that the article headline previously misstated the facts and alleged Turner was convicted of rape).

279. *See* Elspeth Farmer & Ellen Kreitzberg, *Guest Opinion: We Need Reform, Not a Recall*, PALO ALTO ONLINE (May 11, 2018, 6:28 AM), https://www.paloaltoonline.com/news/2018/05/11/guest-opinion-we-need-reform-not-a-recall [https://perma.cc/9L4X-JCJD] (listing the website norecall2018.org/get-the-facts/ that claims to "debunk the distortions and false narrative of the recall campaign").

280. JAMES S. KUNEN, "HOW CAN YOU DEFEND THOSE PEOPLE?" THE MAKING OF A CRIMINAL LAWYER (1983).

281. *See* Garrett, *supra* note 21; Law, *supra* note 22; Jacobs, *supra* note 105; McAllister & Plotz, *supra* note 105; Arango, *supra* note 105.

282. *See* Law, *supra* note 22 (voting for politicians who brand themselves as "progressives"); Udi Ofer, *ACLU Poll Finds Americans Reject Trump's Tough-on-Crime Approach*, ACLU (Nov. 16, 2017, 1:45 PM), https://www.aclu.org/blog/smart-justice/aclu-poll-finds-americans-reject-trumps-tough-crime-approach [https://perma.cc/EF9W-4PCY] ("Seventy-one percent of respondents agreed that 'sending someone to prison for a long sentence increases the chances that he or she will commit another crime when they get out because prison doesn't do a good job of rehabilitating problems like drug addiction and mental illness.'").

states are reinstituting rehabilitation programs.[283] They are recalibrating their views of mandatory minimum sentences and of the war on drugs.[284]

At the same time, the victims' rights movement remains a powerful force in the criminal justice system, even in an era of sentencing reform.[285] The movement towards amending the Constitution to add a victims' rights provision remains strong.[286] Victims routinely testify at sentencing hearings and judges often give great deference to their views.[287]

As argued above, the main premises of the victims' rights movement are contrary to first principles of the criminal law.[288] The theoretical basis for the movement is about compensating the victims.[289] But that is the goal of the tort system in the United States.[290] Criminal justice is about offender culpability and is grounded in principles supportive of an offender's liberty.[291] This shift in focus is meaningful and often leads to punishment unjustified to guarantee public safety.[292]

Even in a more reform-minded era, the victims' rights movement can win the battle for hearts and minds. When I gave a work in progress to develop my thesis, I started out with the following observation: "I am going to convince very few of you that my central thesis is correct. But that is my point: the victims' rights narrative is far easier to understand than are the core values of the criminal law." Think about the optics of the debate: an injured sympathetic victim and an offender who has committed a crime. Why should we favor a wrongdoer over an innocent victim? One cannot explain those reasons in ways that are quickly digested by one's listeners. Ideas like "closure," balancing the system to put victims on an even playing field with criminal defendants, and restoring fairness to our system, are emotionally compelling. Arguing the nuances of crimi-

283. *See* Wool & Stemen, *supra* note 14.

284. *See id.*

285. *See supra* Part I; *see also* Jill Lepore, *The Rise of the Victims'-Rights Movement*, NEW YORKER (May 21, 2018), https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement [https://perma.cc/LXJ2-DD76].

286. *See* ACLU FACT SHEET, *supra* note 26.

287. *See* Carey, *supra* note 138; Paternoster & Deise, *supra* note 137; Vitiello, supra note 149, at 646 (stating judges are required to consider victims' statements as relevant to sentencing).

288. *See supra* Part IV.

289. *See id.*

290. *See id.*

291. *See id.*

292. *See id.*

nal law theory will lose out to the victims' rights narrative. In the end, though, through this skewed focus of the victims' rights movement we risk more unnecessary criminal sentences unjustified by the need for public safety and sacrifice important principles.

BACKWARDS: THE ALI ON CONSENT AND MENS REA FOR RAPE

*MICHELLE J. ANDERSON**

Stephen Schulhofer published his forward-thinking and important book *Unwanted Sex: The Culture of Intimidation and the Failure of Law* in 1998.[1] At least in part because of this groundbreaking work and his related scholarship, Schulhofer was asked to lead the project at the American Law Institute ("ALI") to reform its outdated 1962 Model Penal Code ("MPC") provisions on sexual offenses. The MPC has been widely criticized for too narrowly defining the crime of rape and other sexual offenses.[2] Many provisions of the MPC reflect traditional rape law—including an explicit marital rape exemption, corroboration requirement, prompt complaint rule, cautionary instructions, and an implicit resistance requirement. Scholars derided the MPC for making it too hard, and sometimes impossible, for sexual assault victims to obtain justice.[3] The ALI decided to commence a reform project of the sexual offense provisions of the MPC in 2012 with Schulhofer as its lead reporter,[4] a position that required him to "structure the project, prepare drafts, and present drafts . . . for discussion."

Two elements of the crime of rape, as Schulhofer conceptualized them in his own scholarship, contrast with their counterparts

* President of Brooklyn College. I have served as an Adviser to American Law Institute's project to reform the 1962 Model Penal Code on sexual offenses since its inception in 2012. Advisers are a "diverse group of subject matter experts [who make] a commitment to review the Drafts and provide input" on them to the ALI. *See How the Institute Works*, A.L.I., https://www.ali.org/about-ali/how-institute-works [https://perma.cc/QSM6-69KA].

1. STEPHEN SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998).

2. *Id.* at 20–29.

3. *See, e.g.*, Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 947–50 (2004) (detailing the prompt complaint requirement, corroboration requirement, and cautionary instructions in rape prosecutions in most jurisdictions); Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1477–85 (2003) (describing the history of the marital rape exception); Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 962 (discussing the resistance requirement).

4. *See How the Institute Works*, A.L.I., https://www.ali.org/about-ali/how-institute-works [https://perma.cc/QSM6-69KA].

in the 2020 draft of the ALI revisions of the MPC on sexual offenses. These two elements correspond to the following questions: (1) what is the meaning of consent in rape law? (2) With what mens rea, or mental state, must the defendant have committed the crime of rape or a related sexual offense in order to be convicted?

Though Schulhofer leads the ALI project, the proposed answers to these two questions in the current ALI draft are antithetical to much of his most important scholarly work in the area. If the ALI Council and the ALI membership adopts the current answers to these two questions in the final version of a revised MPC, those answers would hinder progress that states have been making through reform over the past few decades and take rape jurisprudence decidedly backwards.

Before I begin to develop that argument, though, I want to acknowledge that the ALI project has made positive strides in other areas of the law of sexual offenses. I hope these five meaningful changes in the current draft remain in some form in the final revised MPC:

The current draft would decrease punishments for sexual offenses, which have become too draconian as a result of a tough-on-crime movement over the past few decades;[5]

The current draft would curtail the application of sex offender registries, which are unsupported by data and counterproductive to public safety;[6]

The current draft would allow people with intellectual disabilities to have noncriminal sexual lives, when traditional rape law and the MPC afforded them no such possibility;[7]

The current draft would decriminalize ethical BDSM when sexual desires and boundaries are negotiated beforehand, a position advanced by the BDSM community itself;[8] and

The current draft would criminalize having sex with someone who is passing in and out of consciousness, thereby addressing a

5. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (AM. LAW INST., Tentative Draft No. 4 Aug. 18, 2020) [hereinafter Aug. 2020 Draft]. For an analysis of draconian rape punishments, *see* Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1954–59 (2016).

6. Aug. 2020 Draft, *supra* note 5, at 51. For an analysis of sex offender registries, *see* Anderson, *supra* note 5, at 1956.

7. Aug. 2020 Draft, *supra* note 5, at 138–41.

8. *Id.* at 325–29. *See also* Richard Cunningham, Chief Legal Advisor, Nat'l Coal. for Sexual Freedom, Comment on ALI Model Penal Code Project on Sexual Assault and Related Offenses (Oct. 16, 2019) (on file with author).

common and deeply harmful scenario that both traditional criminal law and the old MPC ignored.[9]

None of these five issues, however, is as foundational or contentious as the core elements of consent and mens rea for the crime of rape.

I.
CONSENT

Historically, the common law in England and the United States did not criminalize sex without consent. Traditional rape law defined the crime as "the carnal knowledge of a female, forcibly and against her will."[10] The 1962 MPC followed suit.[11] To be rape, an act of sexual intercourse had to be compelled by force, drugging, or threats of death or serious bodily injury.[12] Yelling "no" to sex did not have a legal meaning because sex without consent wasn't a transgression that the law recognized.[13] Against this backdrop, Schulhofer wrote his most pivotal work, advocating for a new right of sexual autonomy.

As Schulhofer wrote, "the right to sexual autonomy is simply missing from the list of essential rights that our society grants us as free and independent persons."[14] He explained, "criminal law still fails to guarantee a woman's right to determine for herself when she will become sexually intimate with another person."[15]

Schulhofer argued that consent should be the dividing line between legal and illegal sex,[16] and he defined consent as "actual words or conduct indicating affirmative, freely given permission."[17]

As Schulhofer saw it, "Sexual intimacy involves a profound intrusion on the physical and emotional integrity of the individual. For such intrusions, as for property transfers or surgery, consent cannot simply be the absence of . . . opposition. For such intrusions, actual permission—nothing less than positive willingness, clearly communicated—should ever count as consent."[18]

---

9. Aug. 2020 Draft, *supra* note 5, at 264.

10. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 210, 161 (1769).

11. MODEL PENAL CODE § 213.6 (AM. LAW INST. 1962).

12. Anderson, *supra* note 5, at 1946.

13. *Id.*

14. Schulhofer, *supra* note 1, at x.

15. *Id.* at 9.

16. *Id.* at 254–55.

17. *Id.* at 283.

18. *Id.* at 271.

Schulhofer clarified that "no" means "no," and should always be assigned the meaning of "no" when resolving legal disputes.[19] Moreover, equivocal behavior means "no;" only clear expressions of affirmative permission grant consent for sexual penetration.[20] As he put it, "ambivalence, passivity, or silence—are by themselves sufficient to establish an unambiguous offense against personal autonomy and an unambiguous basis for punishment."[21]

The ALI project has continued so far for seven years and it has evolved with time. The project began, as most do, with two Reporters and a group of Advisers assembled to support the development of a new recommended black letter law in the area and its associated commentary. Both the Reporters and Advisers were subject matter experts in sexual offenses or criminal law. Advisers included prosecutors, defense attorneys, federal and state judges, sexual assault victim advocates, and law professors with a range of different opinions on the issues. They had knowledge, research, and experience to bring to bear on the legal questions at hand.

Over the years, however, the ALI's sexual offenses project has attracted the sustained attention of those with no expertise in the form of knowledge, research, or experience, but with a keen interest in the subject matter nonetheless, including many who opposed reform in this area of the law on the principle that it is unfair to men.

Schulhofer himself has acknowledged the "strong and determined resistance"[22] to reform by "misogynists," whom he calls "low information opponents" or "those who do not make it a priority to assure the dignity and equal worth of people who happen to be women."[23] He has also acknowledged the strong and determined resistance by criminal defense attorneys, whom he calls "well informed, highly sophisticated people with decent values" who are

19. *Id.* at 264–67.

20. Schulhofer, *supra* note 1, at 271.

21. *Id.*

> But silence, ambiguous behavior, and the absence of clearly expressed *un*willingness are evidence that affirmative consent was absent; they should no longer suggest, as they do in present law, that a defendant did nothing wrong in forging ahead to intercourse. The significance of equivocal behavior would in effect be reversed, because equivocal behavior would reinforce prosecution claims that consent was absent, rather than serving (as under current law) to buttress defense claims that the woman had never signaled her *un*willingness.

Id.

22. Stephen Schulhofer, *Reforming the Law of Rape*, 35 L. & INEQ. 335, 336 (2017).

23. *Id.* at 348.

concerned, as he is, with abuses of prosecutorial discretion, racial disparities in the criminal justice system, overly punitive sentencing, sex offender registries, and mass incarceration.[24] As these two groups have worked together to influence the ALI's MPC project, however, they have formed a sexist/defense coalition of sorts to thwart adoption of the positions Schulhofer advocated in his scholarship, the very work that landed him as Reporter to the project.

As a result of the sexist/defense coalition's strong and determined resistance, the ALI draft is nowhere near Schulhofer's scholarly positions. For instance, consent is not defined as Schulhofer did in his book as "actual words or conduct indicating affirmative, freely given permission to the act of sexual penetration."[25] Rather, the current draft of the revised MPC defines consent as a complainant's "willingness" to engage in sexual penetration, express or inferred from "behavior—both action and inaction."[26]

Early in the project it became clear that the notion of affirmative consent was unacceptable to both the ALI membership and the Council. Despite support among many Advisers, the word *affirmative* was removed from the proposed code. Schulhofer's words "freely given" to describe consent were nowhere to be found.

In his scholarship, Schulhofer defined consent as a form of "permission." In terms of state law, however, *agreement* rather than *permission* probably best represents the status quo. Of those U.S. jurisdictions that define consent, a plurality use the term *agreement* or something stronger, such as "positive cooperation."[27]

Nevertheless, the word *agreement*, which defined consent for four years on the project without objection, was summarily removed at one point without discussion with the Advisers, and the word *willingness* appeared in its place. At an annual meeting thereafter, the membership ignored a motion to replace the word *willingness* with *assent*. Rather, both the ALI membership and its Council have de-

24. *Id.* at 350.

25. Schulhofer, *supra* note 1, at 283.

26. Aug. 2020 Draft, *supra* note 5, at 14.

27. *See, e.g.*, CAL. PENAL CODE § 261.6 (2019). *See also*, *e.g.*, State v. Adams, 880 P.2d 226, 234 (Haw. Ct. App. 1994) ("voluntary agreement"); State in the Interest of M.T.S., 609 A.2d 1266 (N.J. 1992) ("affirmative and freely-given permission"); VT. STAT. ANN. tit. 13, § 3251(3) (2019) ("voluntary agreement"); WIS. STAT. ANN. § 940.225 (West 2018) ("freely given agreement"); U.S.C.A. § 920 art. 120(g)(8) (2019) ("freely given agreement"); COLO. REV. STAT. § 18-3-401 (2019) ("cooperation in act or attitude"); D.C. CODE § 22-3001 (2009) ("freely given agreement); State v. Blount, 770 P.2d 852, 855 (Kan. Ct. App. 1989) ("voluntary agreement"); MINN. STAT. ANN. § 609.341 (West 2019) ("freely given present agreement").

fined consent as "willingness" to engage in sexual penetration, express or inferred from "behavior—both action and inaction."[28]

Willingness as a substitute for *agreement* undermines the principle of sexual equality. It suggests passivity, a retrograde and gendered notion of sexual acquiescence ("she let him"), rather than the equal engagement of a sexual participant, whatever their gender identity, which *agreement* would imply.

Worse still, in the current ALI draft, consent is not assessed against the objective behavior of the complainant. The Reporters and Advisers repeatedly discussed this very issue and agreed that consent should be measured by an objective assessment of the complainant's outwardly manifested behavior. Both the Advisers and Council rejected the notion that consent should be assessed in terms of the complainant's subjective state of mind. As Advisers, we repeatedly debated the choice between measuring consent by focusing on the complainant's outwardly manifested conduct or the complainant's subjective state of mind. The issue was at the center of numerous drafts and meetings. In particular, we discussed it in detail at the November 15, 2013, meeting of Advisers and Consultants. At that time, the attendees (though closely divided on a number of other issues) expressed an overwhelming preference for focusing on the complainant's conduct manifesting objective consent, rather than on the complainant's subjective willingness. The issue was also presented to the Council at its October 2015 meeting, and the Council likewise voted in favor of focusing on the complainant's objective conduct to determine consent.

Nevertheless, at the 2016 annual meeting, Kate Stith and Margaret Love advanced a written motion to revise the draft definition of consent that assessed it using the complainant's mental state of subjective willingness. With little public debate, the ALI membership passed the motion by voice vote.

The problem is that subjective willingness focuses critical inquiry in a rape case on the complainant rather than on what the defendant heard, saw, and therefore understood at the time of the sexual act. It asks the factfinder to divine the mental state of the complainant rather than the defendant. It thereby shifts inquiry from the person on trial to the person who reported having been harmed. *What did she really want, anyway? What did she expect would happen, given the circumstances? If she could have anticipated that he would want sex, and she didn't fight back, isn't it likely that she just wanted it, too?* This line of questioning is what folks have for more than fifty

28. Aug. 2020 Draft, *supra* note 5, at 14.

years called "putting the victim on trial" in a rape case. What is more, it opens the door to defendants arguing that the complainant was secretly willing to have sex with him, despite her words and actions, and despite objective indicia to the contrary.

The consent standard that Schulhofer advanced in his most important scholarship cannot be squared with this position in the current ALI draft, which rejects affirmative permission and defines consent as the complainant's subjective willingness.

II.
MENS REA

In his forward-thinking scholarship, Schulhofer argued that the minimum mens rea of sexual offenses should be criminal negligence, meaning that the actor should have known, but did not, of a substantial and unjustifiable risk that the sexual penetration was without consent.[29]

Importantly, criminal negligence is required if you believe that the legal system should assign "no" its natural meaning, as Schulhofer does. People may mean different things when they utter the word "no." However, Schulhofer argues, "the very fact that 'no' doesn't always mean no underscores the need to decide which meaning will be treated as controlling."[30] He lands on advocating for a per se rule that "no" means "no" as a legal matter because such a rule places the risk of misunderstanding on the actor who may harm someone, rather than placing it on the person who may be harmed.[31]

If an actor personally believes "no" means "yes," and penetrates someone in the face of "no," the criminal law has to characterize that actor's mental state. If the actor is culpable, it is because the complainant's "no" should have given the actor subjective awareness of a substantial and unjustifiable risk that sexual penetration lacked consent. What's more, if "no" means "no," uttering "no" would be sufficient to conclude that the actor was criminally negligent, regardless of the type of sexual offense.

In the current ALI draft, though, the mens rea for sexual offenses varies greatly by crime. Recklessness is a higher mental state of criminal liability than is negligence; it requires that the defendant was subjectively aware of a substantial and unjustifiable risk that the penetration was without consent. Knowledge is higher still

29. Schulhofer, *supra* note 1, at 258.
30. *Id.* at 264.
31. *Id.* at 264–67.

and requires that the defendant knew with a practical certainty that the penetration was without consent.

In the draft statute, the mens rea of offenses in the order in which they are presented is as follows. Sexual assault by aggravated physical force or restraint requires knowing behavior.[32] Sexual assault by physical force or restraint requires reckless behavior.[33] Sexual assault of a vulnerable person requires reckless behavior.[34] Sexual assault of a person subject to state-imposed restriction requires knowing behavior.[35] Sexual assault by extortion requires reckless behavior.[36] Sexual assault by exploitation requires knowing behavior.[37] Sexual penetration or oral sex without consent requires reckless behavior.[38] There are other sexual offenses, but the point is clear. The mental state of negligence is absent. The sexual offenses vary between requiring the more serious mental states of recklessness or even knowledge.

Requiring a more serious mental state before a defendant may be convicted of having violated a statute narrows the scope of that statute. The statutory variation in the current draft of the MPC on sexual offenses is incoherent, and it is evidence that that the sexist/defense coalition has successfully chipped away at the law's protection for victims.

This statutory variation that narrows the law's protection is at odds with even the traditional MPC on sexual offenses. Recklessness was designated a culpable mental state for rape and other sexual offenses by the ALI in 1962.[39] Purposeful, knowing, and reckless rape have been graded the same as a second-degree felony since that time.[40] Removing or downgrading reckless rape would make the Model Penal Code of 2020 even narrower in its coverage than the 1962 Code. This treatment of reckless rape would be retrograde, a step backward even from the 1962 MPC.

Moreover, removing or downgrading reckless rape would be a substantial departure from modern state rape law. Although states

32. Aug. 2020 Draft, *supra* note 5, at 351–52.
33. *Id.* at 352–53.
34. *Id.* at 354.
35. *Id.* at 354–55
36. *Id.* at 355–56.
37. *Id.* at 359.
38. Aug. 2020 Draft, *supra* note 5, at 357.
39. The 1962 Code defined rape under § 213.1(1) without explicit reference to mens rea; therefore, under § 2.02(3), the mens rea element "is established if a person acts purposely, knowingly, or recklessly." MODEL PENAL CODE §§ 213.1(1), 2.02(3) (AM. LAW. INST., Proposed Official Draft 1962).
40. *Id.* at § 213.1(1).

criminalize sexual offenses in many ways, if one focuses on behavior that corresponds to rape, 43 out of 50 states criminalize reckless behavior at the same level as knowing or intentional behavior.[41] Some even criminalize criminally negligent behavior at the same level.[42]

Early in the project, the ALI leadership rejected criminal negligence as an adequate mens rea for sexual offenses, thereby rejecting a key position Schulhofer had advanced in his scholarship. Since then, the sexist/defense coalition has taken aim against even more serious culpable mental states, such as recklessness, and it has frequently prevailed.

The removal of the mens rea of criminal recklessness for rape by aggravated physical force or restraint happened via an unwritten, verbal motion, spontaneously advanced from the floor at the May 2017 national meeting of the ALI membership.[43] It was a last-minute action that passed without thoughtful consideration. There was no written motion or document of position available prior to the meeting to consider, and dialogue on the verbal motion was shut down in favor of a quick vote. By contrast, written motions filed on time for the meeting were ignored by the ALI leadership. Since that time, the sexist/defense coalition continues a drum beat to remove recklessness from all other sexual offenses and require the mental state of at least knowing for all remaining offenses.

As a result, does "no" mean "no" in the current ALI draft? In the current draft, "no" is "a clear verbal refusal" that establishes a lack of consent or the subsequent withdrawal of consent.[44] But here's the hitch: if the statute requires recklessness, and an actor who believes that "no" means "yes" penetrates someone in the face of "no," the actor is not liable. Recklessness is a subjective, not objective, standard, and the actor would not have consciously disregarded a substantial and unjustifiable risk that the penetration lacked consent. So, the complainant's "no" would not actually mean "no" in that instance. "No" would mean whatever a defendant speculated that it meant at the time.

---

41. Aug. 2020 Draft, *supra* note 5, at 108–12.

42. *Id.*

43. The ALI website describes it as a "written motion" made "from the floor." *Model Penal Code, Sexual Assault and Related Offenses*, AMERICAN LAW INSTITUTE, https://www.ali.org/projects/show/sexual-assault-and-related-offenses/ [https://perma.cc/TT5Q-YA4W]. No other motions are described in this way, which suggests how unusual the procedural move was. It appears that the motion was written down after the fact.

44. Aug. 2020 Draft, *supra* note 5, at 350.

The negligence mens rea standard that Schulhofer advanced in his most important scholarship cannot be squared with the current ALI draft that requires reckless or knowing mens rea before a sexual offense is criminal.

III.
THE REAL TEST OF THE PROJECT

In his scholarly work on rape, especially in the 1998 book *Unwanted Sex*, Schulhofer's key agenda was to challenge the traditional, supposedly inherent link between rape and physical force. He thought that rape law should not primarily focus on freedom from forced sexual penetration but should instead focus on a person's sexual autonomy to decide whether and when to engage in sexual penetration. Criminalizing sex without consent was the key to sexual autonomy. He wrote, "Intercourse without consent should always be considered a serious offense."[45]

Schulhofer's focus on sexual autonomy was an outlier view at the time and was obviously contrary to the outdated 1962 MPC on sexual offenses. His scholarly goal was to establish sexual autonomy as the central value of rape law, to demonstrate that it is a workable, bounded concept, and to clarify that the law need not be tethered to force.

Today, Schulhofer's position is no longer an outlier, but the idea of criminalizing sex without consent hangs in balance. Although half the states do recognize sex without consent as a crime, half do not. In the current ALI draft, consent, for now, remains a dividing line between legal and illegal sexual penetration. Consent has become a thin reed of subjective willingness, but at least sex without consent is defined as a crime, though minor.

Unfortunately, the sexist/defense coalition in the ALI will likely move to eliminate the provision that criminalizes sex without consent. If it is challenged at a national meeting of the membership, that moment will be a real test of the overall value of the ALI project to revise the outdated MPC provisions on sexual offenses.

IV.
THE OLD ALI AND THE YOUNG STEPHEN SCHULHOFER

The average age among ALI members is advanced. In 2009, famed ALI Council member Bennett Boskey, then 92, wrote that

45. Schulhofer, *supra* note 1, at 254.

the ALI "is deliberately aiming to attract outstanding younger individuals."[46] He added optimistically: "It seems likely that the median age of the Institute's membership will be noticeably sliding downward."[47] Ten years later, it is hard to detect a downward slide. The membership remains overwhelmingly white, overwhelmingly male, overwhelmingly old. On those counts, the ALI members on this panel assembled to celebrate Schulhofer's work are unrepresentative of the larger membership.

Schulhofer is seventy-seven. No spring chicken, he. Despite this demographic similarity, Schulhofer's substantive position on the law of rape is much more feminist and progressive than that of most of his ALI colleagues. As a result, he has taken tremendous heat for his ideas throughout this project. The personal denunciations of Schulhofer from some ALI members have been striking. Opponents charge that Schulhofer has been "push[ing] to bring authoritarianism into the bedroom,"[48] with "an ideological goal and an apparent reluctance to accept the will of the [ALI] membership."[49] Further, the Reporters are alleged to be "biased," seeking "to regulate intimate private behavior in a fashion not even attempted by the worst totalitarian states."[50]

But maybe great conflict with changing sexual norms is to be expected on any project rewriting the MPC for sexual offenses, given the age of the ALI membership. There is a great generational divide on sexual mores. Support for a consent standard, for instance, is much stronger among those who are under thirty than among those who are over sixty.[51]

The larger society is changing to become more feminist, whether the ALI membership likes it or not. Since 2012, the Federal Bureau of Investigations has defined rape simply as sexual pen-

46. Bennett Boskey, *The American Law Institute, A Glimpse at Its Future*, 12 GREEN BAG 255, 262 (2009).

47. *Id.*

48. Ashe Schow, *Has the Federal Government Ever Had Sex?*, WASH. EXAM'R (June 15, 2015), https://www.washingtonexaminer.com/has-the-federal-government-ever-had-sex [https://perma.cc/VS23-W4C2].

49. *See* Letter from Philip Lacovara et al., ALI Members and Advisors, to ALI Director, et al. (Oct. 17, 2017) (on file with author).

50. *See* George Liebmann, Comment on the Council Draft on Sexual Assault (Jan. 18, 2017) (on file with author).

51. Stephen Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. PAC. L. REV. 665, 671 (2016) (discussing a study showing the relation between support for a consent standard and age group).

etration without consent.[52] States' laws are following suit. As Schulhofer puts it,

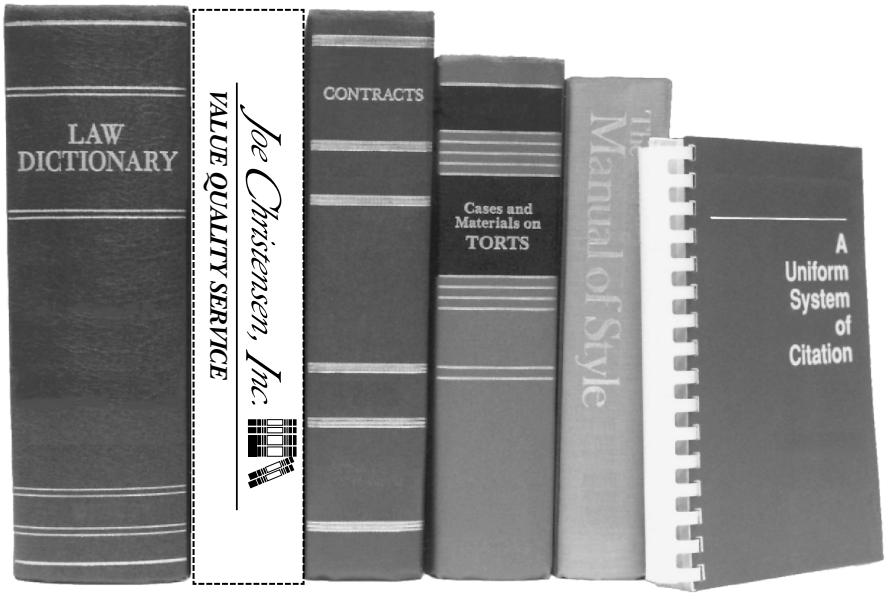
> The trend in criminal law, in codes of conduct in schools and colleges, and in social norms more generally – is one of steadily growing support for consent as a legal requirement. Although older generations recall social norms and sexual scripts in which male initiative and female reticence were taken for granted in mutually desired sexual interaction (an assumption at odds with a consent requirement), substantial segments of American society now consider expectation of consent perfectly realistic.[53]

The "unmistakable trend" in state criminal law is toward criminalizing nonconsensual sexual penetration.[54] Moreover, the widespread #MeToo movement is an expression that society is finally taking nonconsensual sexual acts seriously. If it is to be relevant, the ALI should be developing and announcing the best model statute for this important historical moment—and for our future. The current draft, however, threatens to place the ALI wildly out of step with both current social and legal norms on consent as well as longstanding legal doctrine on mens rea.

52. *An Updated Definition of Rape*, U.S. DEPT. OF JUST. BLOG (Jan. 6, 2012), https://www.justice.gov/archives/opa/blog/updated-definition-rape [https://perma.cc/E3L9-TZ7N].

53. Schulhofer, *supra* note 51, at 671.

54. *Id.* at 672.



We Complete the Picture.

In 1932, Joe Christensen founded a company based on Value, Quality and Service. Joe Christensen, Inc. remains the most experienced Law Review printer in the country.

Our printing services bridge the gap between your editorial skills and the production of a high-quality publication. We ease the demands of your assignment by offering you the basis of our business—customer service.

Joe Christensen, Inc.

1540 Adams Street
Lincoln, Nebraska 68521-1819
Phone: 1-800-228-5030
FAX: 402-476-3094
email: sales@christensen.com

Value

Quality

Service

Your Service Specialists