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TABLE OF CONTENTS

SPECIAL TRIBUTE ISSUE THE TASLITZ GALAXY SYMPOSIUM

FOREWORD

THE TASLITZ GALAXY SYMPOSIUM	<i>Josephine Ross and Lenese C. Herbert</i>	vii
--	---	-----

LETTER FROM THE EDITOR-IN-CHIEF

SPECIAL TRIBUTE ISSUE TO PROFESSOR ANDREW ERIC TASLITZ	<i>Cadene A. Russell</i>	xiii
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ARTICLES & ESSAYS

HOW CHANGES IN AMERICAN CULTURE TRIGGERED HYPER-INCARCERATION: VARIATIONS ON THE TAZIAN VIEW	<i>Christopher Slobogin</i>	305
AT WHAT COST? BLIND TESTING, EYEWITNESS IDENTIFICATION, AND WHAT CAN AND CANNOT BE COUNTED AS A COST OF REDUCING INFORMATION AVAILABLE FOR DECISION . . .	<i>D. Michael Risinger</i>	333
PERNICIOUS INFERENCES: DOUBLE COUNTING AND PERCEPTION AND EVALUATION BIASES IN CRIMINAL CASES	<i>Robert P. Mosteller</i>	365
TAZ AND EMPATHY	<i>Susan A. Bandes</i>	397
THE SEDUCTIVE POWER OF PATRIARCHAL STORIES	<i>Aviva Orenstein</i>	411
FAIRLY PRICING GUILTY PLEAS	<i>Anne R. Traum</i>	437
HITS, MISSES, AND FALSE ALARMS IN SIMULTANEOUS AND SEQUENTIAL LINEUPS	<i>Roger C. Park</i>	459
UNWRAPPING THE BOX THE SUPREME COURT JUSTICES HAVE GOTTEN THEMSELVES INTO: INTERNAL CONFRONTATIONS OVER CONFRONTING THE CONFRONTATION CLAUSE	<i>Paul F. Rothstein</i>	479

CHALLENGING POLICE DISCRETION	<i>Eric J. Miller</i>	521
THE STAR TREK ENRICHMENT SERIES:		
AN EXPLORATION IN TEACHING AND LEARNING ...	<i>Okianer Christian Dark and Atiba R. Ellis</i>	557
THE HIDDEN LIFE OF ANDREW TASLITZ	<i>Frank H. Wu</i>	569
THE TAZ I KNEW.....	<i>Arnold H. Loewy</i>	573
TAZ: THE LEGAL ACADEMY’S HAPPY (AND ERUDITE) WARRIOR	<i>Wayne A. Logan</i>	577
A TRIBUTE TO ANDREW ERIC TASLITZ.....	<i>Nareissa Smith</i>	585
JAMES RYAN CRITIQUE.....	<i>Maria Blaeuer</i>	589

NOTES & COMMENTS

QUIET SABOTAGE OF THE QUEER CHILD: WHY THE LAW MUST BE REFRAMED TO APPRECIATE THE DANGERS OF OUTING GAY YOUTH	<i>Aisha Schafer</i>	597
COURTS AND THE POLITICAL PROCESS – HOW ACTIVISTS CAN IMPLEMENT SOCIAL CHANGE.....	<i>Brittany Williams</i>	637

BIBLIOGRAPHY		671
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FOREWORD

The Taslitz Galaxy Symposium

JOSEPHINE ROSS AND LENESE C. HERBERT
PROFESSORS OF LAW
HOWARD UNIVERSITY SCHOOL OF LAW

Andrew Taslitz was an exceptional scholar and a warm, caring person. He taught at Howard University School of Law for over twenty-five years and his booming laugh often filled a classroom, office or faculty meeting. When he died, we thought about what Taz would have wanted. The answer was a conference where the friends he cherished would come together to discuss the ideas he cherished. To this end, we created The Taslitz Galaxy, a conference held at Howard University School of Law in September of 2014 that brought together 50 scholars from 36 law schools. If you are wondering why it was called the Taslitz “Galaxy” turn to “The Star Trek Enrichment Series: An Exploration in Teaching and Learning,” that reveals Professor Taslitz to be a confirmed “Trekkie.” Not only did Taz “absolutely love Star Trek” but the creators of the Symposium, including Stetson Law Professor Ellen Podgor, wanted people to know that this was a big tent that included scholars new and accomplished, people writing in a range of disciplines, and all those that he mentored. The conference was buoyed by the enthusiasm and generous support of the law school’s new dean, Danielle Holley-Walker, its outgoing interim dean Okianer Christian Dark, and the generous support of the most important industry publishers of law school casebooks, Carolina Academic Press, LexisNexis, and WestAcademic Publishing and Foundation Press.

Our task was simple, yet daunting. How to celebrate the intellectual heft and outsized humanity that Taz represented? Additionally, we pondered over numerous conference calls (and one delicious Greek meal) how to do it in one, dynamic fell swoop and without excessive fawning, repetition, omission, and circuitousness? Somehow, thanks to our personal experiences with Taz’s work ethic, as well as the enthusiasm of other, fellow keepers of the Taslitz flame (who held our feet to the proverbial fire), the conference managed to pay a most nuanced and splendid homage to the

extensive Taslitz corpus. Taz would have loved the conference – which attracted 85 attendees, scholars, and students. For those who made it to the Taslitz Galaxy, you probably met our remarkable student volunteers as they guided you around the law school; they remain our finest ambassadors, bar none. Although they did not know Taslitz as a professor, the student editors of this volume worked tirelessly for this special edition.

Taz was a workhorse when it came to ideas that would improve criminal justice’s ability to eradicate unfair bias. Every presenter wove Professor Taslitz into their talk, be it via “Tazisms” (he left us with so many notable quotables!), an article he wrote, or a memory. This volume continues where the conference left off. When asked to describe Taslitz for the Howard University School of Law scholarship in his honor, we wrote *Teacher, Mentor & Mensch*. Some of this Symposium focuses on these aspects of Taz while others focus on his prodigious scholarship and wealth of ideas. Like the conference, some writers have harnessed his evidence and criminal procedure scholarship, some have written about the practice of law, while other articles focus on legal theory such as the law and empathy. Through it all, a picture of his scholarly portfolio begins to emerge. Professor Rhea Ballard-Thrower, our head librarian, and her staff assembled the extensive bibliography at the end of this volume. Hopefully, these articles will encourage all readers to go back and read some more of Taz’s work.

Prodigious Scholar

Let us borrow from Chris Slobogin who coined the term “Tazian” as in “an article is ‘quintessentially Tazian’.” What makes an article Tazian? For Professor Slobogin, it is one that marshals “eclectic evidence” in support of his arguments, plumbing “the work of scholars who have studied international economies, domestic political structures, local racial politics, deliberative decision-making and the origins of happiness to make his case.” The focus of Slobogin’s article is also Tazian, for he examines the causes of mass incarceration in the United States, a concern that appears in much of Taslitz’s scholarship. And like Taslitz, the connection between mass incarceration and race is made explicit. As Risinger states, “Taz has probably written more about the relationship of race to the criminal justice system than any other Caucasian law professor.” Like Taslitz, Slobogin recognizes the role of empathy in creating a better justice system and he ponders the connection between forms of government and the ability “for any one social group to use criminal justice as a way to wage war on another such group.” By recognizing the harm caused by the unprecedented level of punishment and by considering whether the political structure is responsible for the drastic differences between incarceration in Europe and the United States, Slobogin continues Taz’s legacy.

Michael Risinger was the first to make this Symposium edition a reality. As soon as the call came out for a Taslitz volume, he pulled his latest article from *Scholastica* and gave it to this law journal edition. This Symposium would not be truly representative of Taslitz's interests if it did not address wrongful convictions. Fortunately, both Risinger and Robert Mosteller tackle this difficult subject. Risinger examines the claim that there are costs to blind identification procedures and costs to permitting only sequential photo arrays. Concluding that there are no meritorious costs associated with blind identifications, Risinger allows that the analysis is different when it comes to distinguishing between non-sequential and sequential photo arrays. Like Taslitz, Risinger has plumbed the data of DNA exonerations and recognizes the significant role of mistaken identifications. His call to alter the way investigations take place is a critical effort to prevent as many future false convictions as possible. Like Taslitz, he turns to scientific methods to encourage accuracy rather than relying on common sense judgments. This article is also Tazian in the way Risinger takes complicated information and makes it comprehensible through examples, analogies and cogent writing.

Robert Mosteller's article fits well with Risinger's piece, although Mosteller does not confine his analysis to eye witness identifications, but rather considers multiple situations that give rise to false convictions. While Taz came at the issue of false convictions as a former prosecutor and Mosteller as a former defense attorney, they agreed wholeheartedly on many criminal justice issues including the necessity of proposing legal changes to reduce the likelihood of convicting the innocent. Three aspects of Mosteller's article seem particularly Tazian. First, he discusses his personal growth, writing "As I wrote that article, I intellectually understood the danger of the fabricating jailhouse informant, but I didn't really appreciate the magnitude of the threat until I learned that I had encountered an informant who was a master in deception." Second, Mosteller turns to social science to understand what is happening, always the first place Taz looked. Here, Mosteller uses heuristics, a psychological construct that explains how "humans simplify perception and analysis" when the facts appear uncertain and complicated. Third, Mosteller, like Taz, really understands the workings of the criminal justice system including how juries make decisions, and this allows him to report what others cannot see. "Every defender must work efficiently given heavy caseloads and a triage process is virtually inevitable," explains Mosteller, arguing that when a new case appears to be strong, it can reduce the ardor with which defense counsel approaches the case, thereby revealing that there are real harms when police and prosecutors double count evidence, making the case appear stronger than it really is. Like Taslitz, Mosteller and Risinger recognize the urgency of their mission, namely reigning in the unardonable number of wrongful convictions.

Perhaps it is Susan Bandes' article that really brings Taz's magic alive. She writes about reading work by Andy and momentarily forgetting he is dead, thinking "I can't believe how deeply Andy has thought about this topic. I'd love to talk to him about it." This is how everyone in this Symposium thought when Taz was alive. Bandes captures why we created this Symposium when she writes:

"These feelings confirmed for me the wisdom of what this Symposium is doing. In grieving for all these missed opportunities, I also get to celebrate Andy as a scholar, a colleague, and a friend. I get to continue some of our ongoing conversations, albeit not in the way I would have chosen."

Bandes' article must also be labeled quintessentially Tazian in its interdisciplinary approach, bringing in "among other fields, cognitive psychology, neuroscience, sociology, and philosophy." In addition, Bandes celebrates and meets Taslitz's zeal as a reformer. "Andy had a passionate commitment to exposing and reforming unjust and unequal legal practices, doctrines, and institutions," wrote Bandes, and "cognitive empathy does not amount to much without the will to exercise it across difficult and challenging divides." While Bandes' piece is a scholarly exploration of the role of empathy in decision-making, she comes back to Taslitz often, calling him "a shining example of what it means to take empathy seriously" not only in the way he viewed law, but "as a way of approaching life."

In *The Seductive Power of Patriarchal Stories*, Aviva Orenstein references Taslitz's book on rape and applies his insights to recent litigation surrounding rape shield. Orenstein takes the dissent to task for their acceptance of rape myths. "Taz observed how cultural tropes, the adversary system, and the language of courtroom discourse serve to subvert the victim's ability to tell her story and be heard," she explains. "Taz's scholarship is clearly essential reading . . . for those who share the dissenters' mindset." Both Orenstein and Bandes celebrate how feminism runs through Taslitz's work. Like Orenstein, Maria Blaeuer is concerned with how law affects those living in the margins of society. Taz would have celebrated Blaeuer's concern for her clients who live in the poorer areas within the District of Columbia.

Anne Traum joins Taslitz in criticizing "what he called the Guilty Plea State." Like Taz, she argues that there should be more protections to criminal defendants and that judges should be involved in ensuring fair process and fair results. Traum takes a Tazian approach by using economic theory to advance these ends. In particular, Traum harnesses price theory, arguing that the fairness of the results is as important to the parties as the fairness of the process. The current "free market capitalist model" gives prosecutors monopoly power that leads to unjust and unmonitored results. By tying her article to Taslitz's essay on the Jena Six, Traum reminds the reader of the costs associated with this monopoly model of plea negotiations (we can only imagine the wry smile that would have come to Taz's face, had he

been alive to hear that one of the accused Jena Six has just been awarded a full scholarship to attend—wait for it—law school)¹.

While Aisha Schafer’s law note does not specifically reference Taslitz’s work, he would be delighted to learn that this volume included a call to protect “the queer child” from being outed against his or her will. Taz’s interest in privacy, dignity and self-definition float through the piece. In his Criminal Procedure textbook, Taslitz wrote that one reason privacy rights are necessary in the Fourth Amendment context is that people have an inherent need to present themselves differently depending upon the situation.² In addition, we know from firsthand experience that Taslitz was always 110 percent supportive of the openly gay person on our faculty.

In her law note, Brittany Williams cites Taz’s work on subconscious biases, writing that in the stop and frisk context, “an officer could be more likely to stop and frisk minorities because the officer finds minorities inherently more suspicious, simply due to stereotypes and preconceived notions regarding minorities.” Her article examines whether the worst aspects of New York City stop and frisk were ended because of litigation, organizing, politics or some combination of all three. Her interest in looking beyond Supreme Court case law to advance civil rights echoes Taslitz’s broad conception of law and his own commitment to using the bar associations, rules committees and other vehicles to advance a fairer criminal justice system.

Teacher, Mentor & Mensch

Frank Wu was a colleague of Taslitz at Howard for several years before leaving to become a dean. He wrote about the connection between scholarship and family life, focusing on Taslitz’s love of dogs. Taz’s dog sniff article critiqued the mythic stature given to dogs’ sense of smell, noting that one shortcoming for this evidence is that “effective cross-examination is difficult.” “It is easy to overlook the humanity of such persons,” such as Taz, Frank Wu writes, “because their accomplishments are so impressive.”

Let us add our perspective to the article by former Howard Law School interim dean Okianer Christian Dark and former Howard Law Professor Atiba Ellis about teaching Star Trek as an elective for first year students. They write: “We met immediately following each class to debrief and critique it especially seeking to identify ways in which we could improve the learning experience for our students.” Having come upon these meetings, we believe that they were having way too much fun. In fact, the energy level was so high that it even made other professors consider watch-

1. See Jarvis DeBerry, “Jena 6” Defendant Theo Shaw Wins Full Scholarship to Law School, *The Times-Picayune* (Apr. 10, 2015) (detailing a formerly charged attempted murder criminal defendant’s full scholarship to attend law school at the University of Washington in Seattle).

2. See ANDREW E. TASLITZ, MARGARET L. PARIS & LENESE HERBERT, *CONSTITUTIONAL CRIMINAL PROCEDURE* (5th ed. 2015).

ing the television show. It definitely paved the way for other less-traditional courses at the law school such as a seminar on *The Wire* and a one-credit course on infamous trials. In the authors own words, “This was the genius of Taz. His was always a multi-disciplinary, multi-goal, and multi-approach to teaching and learning. And if he could achieve his goals by using a subject that he clearly loved, i.e. *Star Trek*, all the better.”

Arnold Loewy remembers Taz as an inspirational speaker at symposiums, “a very tough act to follow.” Loewy also has the distinction of publishing the article with Taslitz’s most incendiary title: *Bullshitting the People: The Criminal Procedure Implications of a Scatological Term*.³ As Loewy wrote, “the reason for holding this conference is not just . . . to honor Taz as a scholar, but to remember him as a human being.”

The writers of this introduction worked extensively with Taz over the years. Professor Herbert, who admired Taz’s work from her earliest years of law teaching, co-authored two works with Taz: *Constitutional Criminal Procedure* (along with Oregon School of Law’s Professor Margaret “Margie” Paris who, despite heavy hearts, managed to publish the case book’s Fifth Edition shortly after Taz’s passing) and *Lexis/Nexis Skills and Values: Criminal Law* (along with Benjamin N. Cardozo School of Law’s Professor Eda Katherine “Katie” Tinto). For Professor Ross, Taz was an amazing mentor and friend. Although she joined the faculty in 2005, Professor Ross’ first memory of Taz was in 2004, when she gratefully saw him nod vigorously during her job talk as she waded into an area where he had written extensively.

We loved Taz. We stood with his wife, Patty, his family, and closest of friends to say our last “goodbye” at his deathbed. Accordingly, it is with deep gratitude to every author in this volume that we attest that this is one way Taz would have liked to be remembered—through his friends, through his work, through the work of others. By honoring his memory, body of work, and dedication to criminal justice for all, we hope that we have revalorized his sociogenic perspective that is sorely lacking in today’s anemic discussions of policing, rights, privacy, and humanity as our society continues to struggle with its embattled history of governmental and individual relationships. With a Vulcan Salute,⁴ may this volume of scholarly tributes allow the memories and importance of Professor Andrew E. Taslitz to live long and prosper.

3. Andrew E. Taslitz, *Bullshitting the People: The Criminal Procedure Implications of a Scatological Term*, 39 TEX. TECH L. REV. 1383 (2007).

4. See Abby Ohlheiser, *The Jewish Roots of Leonard Nimoy and “Live Long and Prosper,”* (Feb. 27, 2015), available at <http://www.washingtonpost.com/blogs/style-blog/wp/2015/02/27/the-jewish-roots-of-leonard-nimoy-and-live-long-and-prosper/> (discussing the Yiddish origins of actor Leonard Nimoy’s iconic greeting and gesture, which came to symbolize both a welcome and galaxies-wide blessing).

SPECIAL TRIBUTE ISSUE TO PROFESSOR ANDREW E. TASLITZ

Letter From the Editor-in-Chief

CADENE A. RUSSELL

Issue 2 of Volume 58 pays special tribute to a pillar of the Howard University School of Law and *Howard Law Journal* communities: Professor Andrew E. Taslitz. Professor Taslitz was an educator at Howard for over 20 years. He was instrumental in the advancement of academia at the law school, and served as an advisor to the *Howard Law Journal*. Professor Taslitz taught courses in criminal procedure, evidence and criminal law. He has been named one of the best law professors in the nation in “What the Best Law Teachers Do,” and has published numerous scholarly articles and books. He touched the lives of thousands of law students and prepared them for success both inside and outside of Howard University School of Law. His career did not solely extend to his academic scholarship. Professor Taslitz also served as a mentor and friend to so many law students, academicians, faculty colleagues, and practicing attorneys.

Because of Professor Taslitz’s tremendous impact on our law school community, and the *Howard Law Journal* in particular, this issue highlights the work of many of Professor Taslitz’s peers and former students, who reminisce on his impact on their lives and who publish work of their own that continues to contribute to legal discourse on issues which Professor Taslitz held dear.

Professors Josephine Ross and Lenese Herbert have already discussed the articles written by many great legal scholars who were also friends of Professor Taslitz. Many of these professors participated in “The Taslitz Galaxy Symposium,” held in the fall of 2014 that honored the life of Andrew Taslitz and brought to the forefront many issues of criminal procedure, evidence and criminal law. I strongly encourage you to read each article.

I would like to thank each author personally and on behalf of the *Howard Law Journal* for entrusting us with their scholarly contributions and for their patience as we published this edition.

An important part of the work the *Journal* does is publishing the work of current *Journal* members. Two pieces in this issue are from Senior Notes & Comments Editors Aisha Schafer and Brittany Williams. In Aisha Schafer's Comment, *Quiet Sabotage of the Queer Child: Why the Law Must Be Reframed to Appreciate the Dangers of Outing Gay Youth*, Ms. Schafer notes that Courts have historically failed lesbian, gay, and bisexual ("LGB") youth by refusing to appreciate the dangers that they face when their sexual orientation is disclosed without their consent. With attention to this pattern of judicial behavior, she explores the negative consequences that can arise when a school official is permitted to disclose the sexual orientation of a LGB youth, without the youth's consent, to the youth's parents. Schafer illuminates the vulnerability of LGB youth under the law by exposing the present gap in common law interpretations of minors' right to privacy in information related to their sexual orientation. The argument for heightened protection of LGB youths' right to privacy is developed through a progressive analysis of adolescent identity formation, parental rights, family rejection, queer theory, and an intersectional study of race, gender, and sexuality. In the final analysis, Ms. Schafer urges courts to individually assess a particular LGB youth's privacy interests when considering the constitutionality of a school officials forced disclosure of the youth's sexual orientation to his or her parents.

In Brittany Williams' Comment, *Courts and the Political Process—How Activists Can Implement Social Change*, she highlights a significant debate regarding the most effective ways to implement social change and whether recent social movements, such as the civil rights movement and the women's rights movement, have over-relied on the courts. Ms. Williams addresses this very debate by analyzing New York's recent Stop and Frisk reform. New York's Stop and Frisk was a great example of where affected parties tried to use the courts to effectuate social change. Ms. Williams argued that a combination of the courts and the political process were needed in order to effectuate social change. I am extremely excited and proud that my colleagues and friends have discussed and published these ideas here.

Finally, this publication marks just over one year since Professor Taslitz's passing. His memory still lingers through the halls of Howard University School of Law and will continue to leave an indelible mark on his peers, as well as on the lives of Howard faculty, staff, alumni, and law students for many years to come. We thank you, Professor Taslitz, for teaching us, for mentoring us, and for being a phenomenal professor of law. You will be missed.

Cadene A. Russell
Editor-in-Chief
2014-2015

How Changes in American Culture Triggered Hyper-Incarceration: Variations on the Tazian View

CHRISTOPHER SLOBOGIN*

INTRODUCTION	306
I. THE HYPER-INCARCERATION PROBLEM.....	307
II. TAZIAN INSIGHTS ON HYPER- INCARCERATION	312
III. AMERICAN CULTURE AND CRIMINAL PUNISHMENT.....	317
A. American Populism	318
B. American Conservatism: Capitalism, Individualism and Religiosity	322
C. American Racial Attitudes	326
D. American Proceduralism.....	328
CONCLUSION	330

American imprisonment rates are far higher than the rates in virtually every Western country, even after taking into account differing rates of crime. The late Professor Andrew Taslitz suggested that at least one explanation for this puzzle is the relative lack of “populist, deliberative democracy” in the United States. This article examines that thesis from a comparative perspective, looking in particular at how differences between American and European attitudes toward populism, capitalism, religiosity, racial attitudes and proceduralism may have led to increased incarceration rates. It also tries to explain another puzzle that has received little attention: why these cultural differences, which have existed for some time, only had an impact on incarceration rates after the 1960s.

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INTRODUCTION

One of the last articles written by the late Andrew Taslitz (known as Taz to his friends) was entitled *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*.¹ The piece is quintessentially Tazian. It brings together Taz' concern for racial minorities and criminal defendants, his belief in the reformist potency of democracy, and his fascination with social scientific findings (including research on “happiness”!), in a provocative effort to tackle the single biggest problem in our criminal justice system today: mass incarceration. His prescriptions in the article—in particular his assertion that “populist, deliberative democracy” can be a way of softening the harshness of American criminal justice—are worth taking seriously. So that is what this article does, as part of this symposium's effort to honor Professor Taslitz' work.

As Taz describes it, populist, deliberative democracy (or PDD) is not regular old democracy. Rather, in the criminal justice context it involves all “social groups,” including convicted offenders, in deliberations that take place in multiple venues, with the expectation that “compromise rather than domination” will occur.² He contrasts this type of democracy with “raw populism” that is not deliberative and that tends to be based on less information about competing interests.³ Although Taz does not think PDD will by itself result in less reliance on incarceration,⁴ he does marshal some strong evidence that it could move the country in that direction.

I think Taz was on to something. At the same time, as he willingly admitted, PDD is not a panacea, and many other causes contribute to “mass incarceration” (or what I prefer to call “hyper-incarceration,” given the rapid increase in our use of imprisonment). In this brief piece, I first compare America's incarceration policies to those in Western Europe in order to get a better sense of the hyper-incarceration phenomenon, then summarize Taz' suggestions as to why our incarceration rates are so different, and end with some of my own thoughts about cultural reasons that might explain our hyper-incarceration. In particular, following the lead of others, I assess

1. Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133 (2011).

2. *Id.* at 135.

3. *Id.* at 136.

4. *Id.* at 163 (“I am always skeptical of reductionist theories, so I do not claim that political inclusiveness alone explains criminal justice system policies.”).

whether our unique approaches to democracy, economics, religion, race and procedure have anything to do with hyper-incarceration. Additionally, and in contrast to most other writers, I address why these intrinsic differences with Europe did not have a significant effect on incarceration rates prior to their huge increase during the 1970s. Although much of what I say on this score is speculative, it provides hypotheses worth testing. As usual, Taz has written a piece that spurs deep thought about a crucial criminal justice issue.

I. THE HYPER-INCARCERATION PROBLEM

Taz relegates his description of hyper-incarceration to a footnote, presumably because this penal development has been so well-documented. In the note, he quotes Michelle Alexander for the proposition that “the United States now boasts an incarceration rate that is six to ten times greater than that of other industrialized nations,” and pretty much leaves it at that.⁵ Here I want to recite a few more facts about hyper-incarceration, particularly from a comparative perspective, because it helps set up some of the social science data that Taz uses to make the case for PDD as a partial solution.

It is well-known that our incarceration rate has skyrocketed since the late 1960s, from the neighborhood of 100 people per 100,000 to somewhere between 500 and 600 people per 100,000.⁶ We are not only sentencing more people but putting them in prison for longer periods of time. For instance, the average time spent in prison for non-capital murder before the 1970s was never over 25 years; now the average duration of murder sentences is upwards of 80 years.⁷ One in nine prisoners are serving life sentences and a third of these, or about 50,000, are saddled with life without parole.⁸ Only about 65% of the prisoners serving life were convicted of homicide; about 10,000, or

5. *Id.* at 133 (citing Michelle Alexander, *The New Jim Crow* 7–8 (2010)).

6. Frank E. Zimring, *Is There a Remedy for the Irrelevance of Academic Criminal Law?*, 64 J. LEG. ED. 5, 7 (2014) (citing U.S. Census Bureau publications from 1975, 1995 and 2011). Some estimates put the American rate above 700. ROY WALMSLEY, WORLD PRISON POPULATION LIST, CENTRE FOR INT’L STUD. (10th ed. 2013), available at <http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf> (stating that the U.S. rate is 743 per 100,000). The incarceration rate has declined recently, but only slightly. See DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE U.S. 2013 (2014) available at www.bjs.gov/content/pub/pdf/cpus13.pdf (noting that the rate of decline has slowed appreciably since 2010, from 2.1% to .6%).

7. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 237 (2011).

8. THE SENTENCING PROJECT, *LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA* 7 (2013), available at http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf.

about 6% of the total, committed nonviolent offenses, predominantly drug-and property-related offenses.⁹

Furthermore, this severity in sentencing is not a trend that has come and gone. Since 2008, the number of convicted criminals serving life sentences has increased by nearly 12 percent, and the number serving life sentences without the option of parole by 22.2 percent.¹⁰ In 1986, the average incarceration period for a drug offender was 22 months; by 2004, drug offender prison terms had nearly tripled — to 62 months — and by 2011 there were nearly 12 times as many drug offenders in prison as there were in 1980.¹¹ Particularly troubling is the fact that this hyper-incarceration does not appear to have had an impact on crime rates.¹²

How do these developments compare to the imprisonment rates of other countries? The statistic that gets the most play is that, while the United States only accounts for about 5% of the world's crime, it has 25% of its prisoners.¹³ Another eye-opening set of numbers: We have one-quarter of China's population but three-quarter million more people in prison than China does.¹⁴

The most relevant data, however, come from Western Europe, which demographically and politically is the polity most comparable to the United States. As Alexander noted, our overall imprisonment rate is at least six times that of Western Europe's.¹⁵ The imprisonment

9. *Id.*

10. *Id.*

11. THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS 3 (2012), available at http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.

12. Holgar Spamann, *The U.S. Crime Puzzle: A Comparative Perspective on U.S. Crime and Punishment*, <http://ssrn.com/abstract=2463720> (2014) (concluding, based on regression analysis, that “either residual US punishment is not working, or some omitted factor, such as segregation, pushes up the latent US crime rate”); Justin McCrary & Sarath Sanga, *General Equilibrium Effects of Prison on Crime: Evidence from International Comparisons*, 13 CATO PAPERS ON PUB. POL'Y 165 (2012) (concluding that the five-fold increase in incarceration since the 1970s has had, at best, a modest impact on crime.). While crime levels decreased during the recent upswing in punishment, particularly during the 1990s, the reasons are multifold. See Andromachi Tseloni et al., *Exploring the International Decline in Crime Rates*, 7 EUR. J. CRIMINOLOGY 375, 389 (2010) (concluding that “severe punishment” in the U.S. probably had little to do with its crime drop, given analogous drops in many European countries); OLIVER ROEDER, LAUREN-BROOKE EISEN & JULIA BOWLING, *WHAT CAUSED THE CRIME DECLINE?* (2015) (noting that incarceration has had a limited, diminishing effect on crime).

13. International Centre for Prison Studies, *Entire World, Prison Population Rates per 100,000*, available at www.prisonstudies.org/info/worldbrief/wpb_stats/php?area=area&category=WB_poprate.

14. Adam Liptak, *U.S. Prison Population Dwarfs that of Other Nations*, N.Y. TIMES, Apr. 23, 2008, available at http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?pagewanted=all&_r=0.

15. See *supra* note 5.

rate per 100,000 of countries like Germany, France and the Netherlands is in the seventies, and in the United Kingdom in the low one-hundreds.¹⁶ Even the rates of most eastern European countries are less than half of ours.¹⁷

Our penalty structure is also much harsher than that of most Western European countries. In countries like Germany and the Netherlands, only between 20 and 30% of convicted offenders receive a prison sentence and the average sentence is less than 12 months, while in the U.S. roughly 70% of offenders are sent to prison for an average of three years.¹⁸ We have the death penalty in 32 states,¹⁹ while European countries have banned capital punishment.²⁰ We still allow life sentences for juveniles, often without parole.²¹ Europe does not permit such sentences, with or without parole.²² As noted above, over 10% of our adult prisoners are serving life sentences. In contrast, a few European countries—Portugal, Spain and Norway—do not allow life sentences even for adults.²³ In most other European countries the percentage of life sentences is much lower than 10%—for instance, in France it is about .8%, in Germany 3%, and in Italy 5%.²⁴ Moreover, in those European countries that have life sentences, virtually

16. See Stuntz, *supra* note 7, at 50.

17. *Id.*

18. VERA INSTITUTE OF JUSTICE, SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES 9–10 (2013).

19. DEATH PENALTY INFORMATION CTR., STATES WITH AND WITHOUT THE DEATH PENALTY, available at <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Aug. 31, 2014).

20. Charter of Fundamental Rights of the European Union, art. 2, available at www.europa.eu/charter/pdf/text_en.pdf (banning the death penalty in member states).

21. *Graham v. Florida*, 130 S.Ct. 2011, 2015 (2010) (noting seven jurisdictions permit life without parole for juvenile offenders for homicide crimes and 37 states, the District of Columbia, and the Federal Government permit sentences of life without parole for a juvenile non-homicide offender in some circumstances). *Miller v. Alabama*, 132 S.Ct. 2455 (2012), declared *mandatory* life without parole sentences unconstitutional, but life sentences with and without parole for that group are still permissible, and roughly 7000 juveniles are serving such sentences. Ashley Nellis & Ryan S. King, *No Exit: The Expanding Use of Life Sentences in America* 3, 17–25 (2009), available at www.sentencingproject.org/doc/publications/publications/inc_noexitseptember2009.pdf.

22. Connie de la Vega & Michelle Leighton, *Sentencing our Children to Die in Prison: Global Law and Practice*, 42 U. SAN FRAN. L. REV. 983, 989 (2008) (reporting that 135 countries, including every country in Europe, has expressly rejected life sentences for juveniles).

23. Frieder Dünkel, Dirk van Zyl Smit & Nicola Padfield, *Concluding Thoughts*, in RELEASE FROM PRISON: EUROPEAN POL'Y AND PRACTICE 395, 420 (Nicola Padfield, Dirk van Zyl Smit & Frieder Dünkel, eds. 2010) (hereafter EUROPEAN POL'Y AND PRACTICE).

24. Kim Reufler, *France*, in EUROPEAN POL'Y AND PRACTICE, *supra* note 23, at 177 (indicating that “about 500 prisoners are serving life sentences” out of a prison population of 62,700); Frieder Dünkel & Ineke Pruin, *Germany*, in EUROPEAN POL'Y AND PRACTICE, *supra* note 23, at 192–93, 198 (noting 1,973 prisoners serving a life sentence in a prison population of approximately 74,000); Alessandra Gualazzi & Chiara Mancuso, *Italy*, in EUROPEAN POL'Y AND PRACTICE,

none recognizes life without parole. Judicial reconsideration of a life sentence is usually required after a period of time—10 years in Belgium, 12 years in Denmark, 15 years in Austria, Germany, and Switzerland, and 18 years in France, although in most of these countries judges individualize the minimum sentence, so it varies from case to case.²⁵ In practice, most prisoners are released well ahead of the full life sentence. In Austria for instance, 75% of those who receive a life sentence are released at 15 years;²⁶ similarly, in Ireland a “mandatory” life sentence usually amounts to 15 years even for the worst offenders.²⁷

Our heightened crime rate is one explanation for these differences. But it is a weak one. As Nora Deimleitner has pointed out, “a number of sophisticated statistical studies have shattered the myth that the United States and European countries have dramatically different crime rates,” especially with respect to property crime.²⁸ In any event, our crime rate is nowhere near six times that of European countries, the current differential in imprisonment rates. A more plausible theory is that, compared to European countries, we suffer proportionately more very-serious crimes than other types of crimes, which might justify a greater proportion of longer sentences. For instance, comparing U.S. rates to 23 other states within the European Union, our homicide rate is nearly twice that of the nearest country and our rape rate is second only to Sweden’s and far above the rape rate of most other countries; at the same time, we are barely in the upper third of the pack in terms of robberies, assaults, burglaries and thefts.²⁹ That means that the ratio of very-serious to serious crimes is significantly higher in the United States than in other countries. Even so, our combined homicide and rape rate expressed as a ratio of the

TICE, *supra* note 23, at 266, 275 tbl. 11.2 (1,408 serving a life sentence out of a population of 26,587).

25. Dünkel, Zyl Smit & Padfield, *supra* note 23, at 408.

26. Karin Brickmüller & Veronika Hofinger, *Austria*, in EUROPEAN POL’Y AND PRACTICE, *supra* note 23, at 55, 69 tbl. 3.1.

27. Thomas O’Malley, *Ireland*, in EUROPEAN POL’Y AND PRACTICE, *supra* note 23, at 238, 258.

28. Nora V. Deimleitner, *Is There a Future for Leniency in the United States Criminal Justice System?*, 103 U. MICH. L. REV. 1231, 1264 (2005).

29. CIVITAS, COMPARISONS OF CRIME IN OECD COUNTRIES 1–10 (2012) (showing data for homicide, rape, assault, burglary and car theft for the 36 countries in the Organization for Economic Cooperation and Development), available at www.civitas.org.uk/crime/crime_stats_oecdjan2012.pdf. The text refers only to data from the 23 European Union countries on the list.

rate of all index crimes is still only about 2%, far below the 10%-plus life-sentence rate.

These numbers suggest another key difference between the United States and Europe. In most states in the United States sentence lengths are essentially fixed at the front-end. These states have abolished parole or at least abide by the “truth-in-sentencing” rule that prisoners serve a minimum of 85% of their sentence.³⁰ American legislatures have also eagerly adopted three-strikes laws and mandatory sentencing provisions that leave no discretion to judges, even for relatively minor crimes.³¹ All of these practices have led to longer sentences and more people in prison (without, unfortunately, a concomitant reduction in crime).³² In Europe, in contrast, in-

30. Office of Justice Programs, *Forty-two Percent of State Parole Discharges Were Successful* (Oct. 3, 2001), <http://www.ojp.gov/archives/pressreleases/2001/bjs01181.html> (“By the end of [2000] 15 states had abolished parole board authority for releasing all offenders, and an additional 5 states had abolished parole board authority for releasing certain violent offenders.”); Paula M. Ditton & Doris J. Wilson, *Truth in Sentencing in State Prisons* 3 (1999), available at <http://bjs.gov/content/pub/pdf/tssp.pdf> (noting that 28 jurisdictions implemented truth-in-sentencing policies partially funded by federal grants).

31. U.S. Dep’t of Justice, National Institute of Justice, *“Three Strikes and You’re Out”: A Review of State Legislation* 1 (Sept.1997), available at <https://ncjrs.gov/pdffiles/165369.pdf> (stating that between 1993 and 1995, 24 states and the federal Government enacted three strikes laws); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 101 (2007) (describing the proliferation of mandatory penalties and noting that it was part of a broader shift toward a “zero tolerance” approach that applied to both severe and low-level crimes).

32. William Spelman, *Crime, Cash, and Limited Options: Explaining the Prison Boom*, 8 *CRIMINOLOGY & PUB. POL’Y* 29, 57 (2009) (study examining over 30 variables in multiple states during the period 1977 to 2005 finding that truth-in-sentencing policies (for example, no discretionary parole) were positively correlated with prison population); Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 *STAN. L. & POL’Y REV.* 75, 75–76, 79 (1999) (finding that implementation of the Truth-in-Sentencing and three strikes laws increased correctional spending but did not appear to reduce violent crime); Mark Osier, *Amoral Numbers and Narcotics Sentencing*, 47 *VAL. U. L. REV.* 755, 755 (2013) (“[T]he arbitrary mandatory minimums and sentencing guidelines that rank-order the severity of crimes . . . have too often created broad and often tragic outcomes in our society.”). Kevin Reitz has argued that determinate sentencing has not increased sentences. Keith Reitz, *Don’t Blame Determinacy: U.S. Incarceration Rates Have Been Driven by Other Forces*, 84 *TEX. L. REV.* 1787, 1787 (2006). But his analysis, even if correct, does not address the impact of mandatory sentences, three-strikes laws, and truth-in-sentencing. John Pfaff has conducted research suggesting that prosecutors are primarily to blame for the increased numbers of people in prison, given the huge increase in felony filings beginning in the 1990s. John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 *GA. ST. U. L. REV.* 1239, 1253 (2012). But one reason prosecutors have been able to exert such power is because mandatory sentencing and other punitive measures enacted by legislatures have moved discretion from judges to prosecutors. See, e.g., Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors and the Exercise of Discretion*, 117 *YALE L.J.* 1240, 1494 (2008) (“the most significant consequence” of the federal sentencing guidelines was “the transfer of power over punishment from judges to line prosecutors” and the Department of Justice). Our adversarial system has probable exacerbated these tendencies. See *infra* text accompanying notes 128–37.

determinancy reigns. European countries have resisted mandatory sentences except with respect to the most severe crimes, have rejected stringent sentencing guidelines systems, and have retained numerous early release mechanisms.³³

In short, the United States is much more willing to resort to imprisonment and long sentences than Western Europe. Why? Of course, there are many reasons, perhaps dozens, some of which I'll canvass in Part IV. But at this point I'll turn to Taz' contention that one potent cause of hyper-incarceration is the absence of populist-deliberative democracy.

II. TAZIAN INSIGHTS ON HYPER-INCARCERATION

One of the delights of Taz' work is the eclectic evidence he marshals in support of his arguments. In *Democratic Breakdown*, he plumbs the work of scholars who have studied international economies, domestic political structures, local racial politics, deliberative decision-making and the origins of happiness to make his case that PDD can have a palliative effect on a polity's reaction to crime. Here I'll summarize his description of this work and the insights he draws from it. Since this is only a summary, I skip over many of the nuances.

Most relevant to the U.S.-Europe comparison is Taz' description of the contrast between what comparativists call "liberal market economies"—of which the U.S. is a prime example—and "coordinated market economies," which predominate in Europe.³⁴ As developed by Michael Cavadino and James Dignan³⁵ and elaborated on by Nicola Lacey,³⁶ a liberal market economy aims at a free-market "characterized by vibrant economic and political competition in a relatively regulatory-free world," and thus tends to generate a distrust of government intervention and produce adversarial and polarized legislatures and bureaucracies.³⁷ A coordinated market economy, in contrast, is more heavily regulated, in an effort to please a wide array

33. Ely Aharanson, *Determinate Sentencing and American Exceptionalism: The Underpinnings and Effects of Cross-National Differences in the Regulation of Sentencing Discretion*, 76 L. & CONTEMP. PROBS. 161, 166–75 (2013) (describing difference between the U.S. and Europe in these three areas).

34. Taslitz, *supra* note 1, at 153–64.

35. *See generally*, MICHAEL CAVADINO & JAMES DIGNAN, *PENAL SYSTEMS: A COMPARATIVE APPROACH* (2006).

36. *See generally*, NICOLA LACEY, *THE PRISONER'S DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (2008).

37. Taslitz, *supra* note 1, at 157–58, 160 (noting that a "winner-take-all attitude leads the winning party to seek to dominate all levels of policymaking while it has control, including the

of groups; it tends to be associated with proportional representation and multi-party governance.³⁸ The cacophony of parties in the latter type of system requires significant compromise and consensus building and usually results in center-left governments with generous welfare policies, because the center is controlled by a middle class interested in robust social services.³⁹

According to Taz, the impact of a coordinated economy and more diffuse democratic process on criminal justice policies is at least three-fold. First, “[t]he broad-based, coalitional nature of the electoral system . . . makes it harder for any one social group to use criminal justice as a way to wage war on another such group.”⁴⁰ Second, the same coalition-seeking reduces the ability of any given party to control policymaking, which, together with a greater trust in government generally, increases deference to relatively lenient criminal justice experts.⁴¹ Third, “[t]he more generous welfare state . . . reduces poverty, social isolation, and other arguably criminogenic social situations,” reducing the necessity of harsh punishment policies.⁴² The result, borne out by data comparing criminal justice systems in liberal market and coordinated market economies, is less severe punishment.⁴³

Taz also delves into the research political scientist Vanessa Barker has conducted comparing contrasting democratic proclivities *within* the United States.⁴⁴ Barker looked at the criminal justice and associated politics of three states: California, Washington and New York.⁴⁵ As Taz notes, Barker found that, while Californians’ easy access to the referenda process is highly populist, their democracy is not “deliberative” in the PDD sense, but rather captured by relatively powerful (and white) social groups that tend to favor punitive policies such as

appointment of bureaucrats, who are “seen as less an independent stable, professional source of policy input than servants of the governing party’s will”).

38. *Id.* at 153–54 (“Even right-leaning CME governments are more likely to be left of what constitutes the center in the United States.”).

39. *Id.* at 154.

40. *Id.* at 156.

41. *Id.*

42. *Id.*

43. *Id.* (citing LACEY, *supra* note 36, and Michael Tonry, *Punishment Policies and Patterns in Western Countries*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 3, 3–28 Michael Tonry & Richard S. Frase eds., 2001).

44. *Id.* at 138–53.

45. VANESSA BARKER, *THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS* (2009).

three-strikes laws.⁴⁶ In contrast to this “raw populism,” Washington’s use of town-hall meetings and hybrid state-citizen commissions has led to government endorsement of diversion programs, community-based alternatives to prison, and shorter sentences.⁴⁷ In-between in terms of punitiveness is New York, which eschewed grass-roots input like Washington’s but also avoided the raw populism of California. Instead, New York relied heavily on the deliberations of experts who generally carried out the crime control agenda favored by politicians, but mediated it with their empirically-based knowledge that non-violent offenders usually do not require imprisonment.⁴⁸ To Taz, Barker’s work reinforces the conclusion that PDD has moderating effects on punishment policy.

The third area Taz examines—the study of local politics and criminal justice—picks up the same themes. Here Taz relies on the work of another political scientist, Lisa Miller, who looked at data from Pennsylvania, and in particular Philadelphia and Pittsburgh.⁴⁹ According to Taz, Miller found that anti-incarceration groups tend to come from the most heavily-policed and most crime-ridden neighborhoods (which also tend to be populated mostly by minority groups), because “their experience teaches them that crime is a multi-faceted problem that requires multi-faceted solutions.”⁵⁰ Drawing from this insight, but also relying on the work of cognitive psychologist Michael Wenzel and his colleagues,⁵¹ Taz claims that inner city groups are more likely to favor restorative justice efforts, aimed at re-integrating offenders and reconciling them with their victims, over retribution-based dispositions.⁵² Unfortunately, Taz notes (here again relying on Miller’s data), these groups tend to be more diffuse and less focused on a single policy prescription than pro-incarceration groups, and for this and other reasons get short shrift at the levels of government

46. *Id.* at 140–43.

47. *Id.* at 148–51.

48. *Id.* at 143–48.

49. LISA MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY AND THE POLITICS OF CRIME CONTROL* 15 (2008).

50. Taslitz, *supra* note 1, at 167.

51. Michael Wenzel et al., *Retributive and Restorative Justice*, 32 *LAW & HUM. BEHAV.* 375 (2008).

52. Taslitz, *supra* note 1, at 172 (noting that Wenzel’s work indicates that the choice of a retributive or restorative response to crime depends in part on whether the offender and victim are from the same social group).

where most criminal justice policy is made.⁵³ At the same time, these local groups are relatively more effective at exerting pressure at the municipal level, where councilpersons feel compelled to listen to their constituents.⁵⁴ These findings lead Taz to conclude that “giving local urban racial communities in heavily-policed areas more of an ‘effective’ voice in state and federal legislatures—a voice prompting serious deliberation and having the prospect of altering criminal justice policy—should serve as an anti-incarceration counter-force.”⁵⁵

Taz then turns to the results of what he calls “democratic social science.”⁵⁶ The primary finding here is that people become much less punitive and much less focused on retributive dispositions when they are given detailed information about a perpetrator and his or her crime and allowed to deliberate on a just result.⁵⁷ Thus, for example, Taz reports a study that found that respondents were much tougher on burglars in the abstract than when told about specific cases involving burglary.⁵⁸ “Deliberative polling” that informs respondents about the many alternatives to imprisonment or that makes clear that the survey respondents will be held “accountable” for their views also tends to produce more lenient punishments.⁵⁹ Taz argues that incorporation of vignettes and deliberative polling into decisions about criminal justice is another way in which democracy could reduce hyper-incarceration.⁶⁰

Finally, Taz gleans what he can from “happiness jurisprudence,” a diffuse body of research which he claims supports the conclusion, “with little to challenge it,” that PDD promotes happiness.⁶¹ That state of mind in turn reduces both criminality and “the emotional need to strike back at perceived threats to safety by means of severe

53. *Id.* at 165–66 (“[F]ederal and state legislatures as a whole represent majorities—meaning middle class whites—and many legislators cannot win reelection by catering to minority rather than majority needs.”).

54. *Id.* at 169–70.

55. *Id.* at 173.

56. *Id.* at 173–78.

57. *Id.* at 174 (“when ordinary persons are confronted with vignettes asking them to make sentencing judgments in specific cases, their sentencing judgments are far less harsh.”).

58. *Id.* (citing MIKE MAGUIRE & TREVOR BENNETT, *BURGLARY IN A DWELLING: THE OFFENCE, THE OFFENDER AND THE VICTIM* 139, 141, 170 (1982)).

59. *Id.* at 176–77.

60. *Id.* at 178 (“In addition to adding support to the idea that PDD lowers reliance on incarceration as a sentence, this data suggests another route for expanding democracy in the realm of criminal justice: incorporate vignettes and deliberative polling results into public policy decisions.”).

61. *Id.*

sentences of incarceration.”⁶² The primary manner in which PDD produces these results is, once again, through providing a means of giving people effective voice. Voice promotes esteem-building perceptions of autonomy and competence, and thus counters crime-inducing factors.⁶³ More importantly in terms of affecting attitudes toward incarceration, Taz argues that, because PDD requires listening and acquiring information, it promotes empathy, which is a key requisite for compassion and the willingness to mitigate in cases involving people from “outside” groups.⁶⁴

In his conclusion, Taz stresses that he is not contending that the reins of criminal justice should be handed over to the general public. Instead, he argues, PDD should increase deference to criminal justice experts:

Deliberative citizens apparently become informed enough about criminal justice problems to allay their baseless fears. Moreover, deliberation likely increases their willingness to consider alternatives and to see the wisdom of deferring to experts. At a minimum, deliberation seemingly causes the political grip of politician-manipulated crime fears to fade sufficiently so that the politicians no longer see a benefit in raw-populist policies, preferring to let the experts rule to a great degree.⁶⁵

At the same time, Taz expresses concern that, unless lay people are heavily involved through a deliberative process, as occurred in Washington, experts will be over-influenced by the most powerful, best organized groups, which tend to be obsessed with crime control.⁶⁶

Taz makes a convincing case for PDD as a mechanism for rethinking hyper-incarceration policies. American democracy—Taz’ raw populism—is not incapable of changing incarceration-friendly policies; in recent years several states, reacting primarily to fiscal concerns or judicial mandates, have enacted laws that have the effect of reducing the prison population.⁶⁷ But our criminal justice system is still

62. *Id.*

63. *Id.* at 180.

64. *Id.* at 184 (“[E]mpathy is a prerequisite to compassion, which in turn fosters the impulse to mitigate punishment.”).

65. *Id.* at 187.

66. *Id.* at 186–87 (“The more direct, non-inclusive, winner-take-all, raw-populist forms of American government . . . create incentives for politicians to manipulate the people by distorting criminal justice policy for political gain . . . Even in states like New York, where . . . political elites rule relatively insulated from many direct populist pressures [politicians] still seek ‘tough-on-crime’ poses as a way of getting votes.”).

67. THE SENTENCING PROJECT: FEWER PRISONERS, LESS CRIME: A TALE OF THREE STATES 2, n.3 (July 2014), available at http://sentencingproject.org/doc/publications/inc_Fewer_Prison-

more punitive by several orders of magnitude than Europe's. If dramatic change is to occur, something more fundamental than an economic downturn is required.⁶⁸ In that regard, local deliberations by informed citizens from all walks of life, informed by experts, could be part of the recipe for a more empathetic, less prison-heavy regime.

As Taz recognized, however, instituting PDD throughout the country—even at the level experienced in Washington state, much less to the ideal extent he envisions—is a “daunting” task.⁶⁹ He does not flesh out his thoughts on that subject. Below I outline some aspects of our culture that might explain why, in contrast to European culture, American culture is particularly infertile ground for PDD.

III. AMERICAN CULTURE AND CRIMINAL PUNISHMENT

Numerous scholars have discussed “American exceptionalism” as it applies to criminal justice, and in particular the death penalty.⁷⁰ Taz and others have characterized American culture as more populist, capitalist, religious, racist, and proceduralist than European culture, in ways that increase societal punitiveness.⁷¹ Without exhausting the possibilities, these explanations all seem, on the surface at least, to be plausible candidates for America's willingness to impose harsh punishments.

Yet at least one possible problem confronts all of these explanations: the phenomena they describe all pre-existed the huge increase in imprisonment rates since the 1960s, when our incarceration prac-

ers_Less_Crime.pdf (stating that “29 states have adopted reforms designed to scale back the scope and severity of their mandatory sentencing policies over the past decade,” although also noting that “the overall scale of change has been quite modest” at less than 2% annually nationally, with a disproportionate amount of that reduction due to California's “Realignment” policy that to a large extent amounted to moving prisoners to jails). *But see* Kay Whitlock, “Bipartisan” Criminal Justice Reform: A Misguided Merger, TRUTHOUT, Feb. 25, 2015, available at <http://truth-out.org/news/item/29272-bipartisan-criminal-justice-reform-pushes-privatization> (arguing that much of the reform effort is driven by entities interested in privatization)

68. Cf. Graham Cates, *Can Justice Reform Survive the Next Election?*, THE CRIME REPORT, July 16, 2014, available at www.thecrimereport.org/news/inside-criminal-justice/2014-07-can-justice-reform-survive-the-next-election (quoting criminologist Alfred Blumstein as saying “there's no guarantee that progress in changing the policies that made America the world leader in incarceration will last through a different administration”).

69. Taslitz, *supra* note 1, at 193.

70. See David Garland, *Capital Punishment and American Culture*, 7 PUNISHMENT & SOC'Y, 347–76 (2005); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003); FRANKLIN E. ZIMRING, THE CONTRADICTION OF AMERICAN CAPITAL PUNISHMENT (2003); Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97 (2002).

71. See e.g., Carol S. Steiker, *Why We're So Tough on Crime*, BOSTON REVIEW BOOKS (2003), available at <http://new.bostonreview.net/BR28.5/steiker.html>.

tices were not that different from Europe's.⁷² If these factors helped trigger hyper-incarceration, why didn't hyper-incarceration begin much earlier? After detailing how these memes might, in theory, lead to a tendency to favor severe penalties for crime, I will suggest an answer to that question. In short, the answer is that all of these cultural traits not only describe American society but have noticeably intensified their influence on American politics in the last five decades, precisely the period of hyper-incarceration. As a result, PDD has more of an uphill battle now than it did four decades ago.

A. American Populism

Taz' article lays the groundwork here, in particular by noting the correlation of punitive policies with relatively polarized market economies and California's raw populism. But a nay-sayer might point out that we had a two-party, highly populist system before 1960, and yet our incarceration rates at that time were European-like. So how, precisely, do the findings of Cavadino and Dignan, Lacey and Barker explain our current state of affairs?

A possible answer to that question combines Taz' insights with rising crime rates in the 1960s and 1970s. Due to the huge influx of baby boomers, the expansion of drug markets, and various other factors, the number of index crimes in the United States more than doubled between 1960 and 1972.⁷³ Not surprisingly, crime became more salient to the American public during that time.⁷⁴ The media added fuel to the fire, reporting not only increases in crime but exag-

72. Bruce Western & Christopher Wildeman, *Punishment, Inequality and the Future of Mass Incarceration*, 57 U. KAN. L. REV. 851, 858 (2009) (presenting data showing that "between 1925 and 1973, the fraction of the U.S. population in state and federal prison varied in a narrow range around 100 per 100,000—close to the total incarceration rates in Western Europe").

73. In 1960, the FBI reported 2,019,600 index crimes; by 1972 the number was 5,891,924. FBI, U.S. DEP'T OF JUSTICE, *Crime in the United States 1972: Uniform Crime Reports 61 tbl.1* (1973). Satoshi Kanasawa, *When Crime Rates Go Down, Recidivism Rates Go Up*, PSYCHOLOGY TODAY (Aug. 24, 2008), available at www.psychologytoday.com/blog/the-scientific-fundamentalist/200808 ("Crime rates increased in the 1970s . . . as the baby boomers became young adults."); Lawrence Rosenthal, *Pragmatism, Originalism, Race and the Case against Terry v. Ohio*, 43 TEX. TECH. L. REV. 299, 304 (2010) ("There is something approaching a consensus among criminologists that the crime spike of the late 1980s and early 1990s was a function of the introduction of crack cocaine into major cities.").

74. *Search of Gallup Poll Public Opinion Database*, Scholarly Resources, Wilmington, Del. available at <http://brain.gallup.com/home.aspx> (noting that in October 1951 one percent of respondents thought crime was the most important issue facing the United States, while in January 1994, 49 percent of respondents ranked crime the most important noneconomic problem facing the United States).

generating its impact.⁷⁵ Even today, with crime rates receding, Americans perceive offending to be on the upswing because of what they see and hear on TV, radio, newspapers and the Internet.⁷⁶ The way in which our political system parlays this state of affairs into higher incarceration rates is well-known. In the United States at both the federal and state levels, tough-on-crime rhetoric is seen as an electoral no-brainer, with candidates vying to outdo one another in convincing the public how outraged they are by criminal conduct.⁷⁷

But it is in comparing our experience with Europe's reaction to influxes of crime that the impact of our unique political culture during the past half-century becomes apparent, in the ways that Taz outlines. Interestingly, crime rates during the 1960s and 70s increased even more rapidly in Europe than they did in the U.S.⁷⁸ And Europeans too are assaulted by media reports about crime, reports that leave them feeling as insecure as Americans.⁷⁹ Yet crime has not become the political football it did in the United States, where it was a central theme in the 1968 elections that presaged hyper-incarceration and has often figured prominently in subsequent federal and state campaigns

75. *Crime on the Rise?: Public Perception of Crime Out of Sync with Reality*, *The Crime Report*, Nov. 10, 2008, available at www.utexas.edu/features/2008/11/10/crime/ (noting that, while today "crime is a staple topic of media coverage and political campaigns," prior to the 1960s it was not, and quoting a criminologist to the effect that "mass media" was a principal, and misleading, source of the public's information about crime).

76. Lydia Saad, *Most Americans Believe Crime in U.S. is Worsening*, Gallup (Oct. 31, 2011), available at www.gallup.com/poll/150464/americans-believe-crime-worsening.aspx ("Despite a sharp decline in the United States' violent crime rate since the mid-1990s, the majority of Americans continue to believe the nation's crime problem is getting worse, as they have for most of the past decade. Currently, 68% say there is more crime in the U.S. than there was a year ago.").

77. Katherine Beckett & Theodore Sasson, *The Origins of the Current Conservative Discourse on Law and Order* 44, 50, in *DEFENDING JUSTICE, THE RISE OF THE MODERN "TOUGH ON CRIME" MOVEMENT* (2005), available at www.publiceye.org/defendingjustice/pdfs/chapters/toughcrime.pdf (arguing that, beginning in the 1960s, conservative politicians have "worked . . . to alter popular perceptions of crime . . . and to promote policies that involve 'getting tough' and 'cracking down,'" as part of a larger effort to increase votes, and documenting how, observing the success of this move, Democrats jumped on "the law-and-order bandwagon"); Garland, *supra* note 70, at 133 ("Many of the laws passed in the 1990s—Megan's law, Three Strikes, sexual predator statutes, the reintroduction of children's prisons, paedophile registers, and mandatory sentences . . . are designed to be expressive, cathartic actions, undertaken to denounce the crime and reassure the public.").

78. Paolo Buonnano, Francesco Drago, Roberto Galbiati & Giulio Zanella, *Crime in Europe and in the U.S.: Dissecting the "Reversal of Misfortunes,"* 26 *ECONOMIC POL'Y* 347, 349–51 (2011) (showing tables of faster crime increase in Europe than in the U.S., both overall and with respect to property crimes, between 1970 and 2000).

79. See generally, GORADZ MEŠKO ET AL., *CRIME, MEDIA AND FEAR OF CRIME* (2009), available at www.academia.edu/1470327/Crime_media_and_fear_of_crime (discussing media coverage of crime in several European countries and noting, inter alia, that reporting on crime in Germany doubled between the early 1950s and the mid-1990s).

as well.⁸⁰ In contrast, in Europe, as James Whitman has observed, politicians are as likely to debate prison reform and the rights and dignity of convicts as they are to inveigh against the criminal element.⁸¹ I had a similar experience; I took a class of American students I taught in Dublin, Ireland in 2000 on a field trip to the national Parliament, where the leader of the Tory party (the “conservative” party) expressed amazement that the United States still had the death penalty and three-strikes laws, and emphasized that his party favored rehabilitative programs for prisoners (“otherwise, what’s the point?”).

The differences between the relatively adversarial nature of our system and the more coalitional, inclusive nature of European governments helps explain these different political repercussions of the rise in crime since the 1960s. In part because of Europe’s less populist background, politicians are less likely to have a knee-jerk reaction to the latest crime or crime wave, whether or not exaggerated by the media.⁸² Furthermore, as Taz points out, coordinated economies are more likely to rely on experts in criminal justice matters.⁸³ Indeed, in some European countries criminal statutes are drafted not by legislators or their aides but by unelected scholars, who are less likely to be influenced by the public’s moods.⁸⁴ Our adversarial political system, in contrast, tends to magnify the crime problem and feed punitive attitudes.

Excessive punitiveness is also likely to accompany a second aspect of American-style democracy. Most American states have carried populism to its logical end by requiring the election of judges and prosecutors,⁸⁵ a phenomenon that is largely unheard of in Western

80. See Beckett & Sasson, *supra* note 77.

81. See Whitman, *supra* note 70, at 76 (recounting the French response to a prison scandal, in which “French politicians of all major tendencies, and in every branch of French government, vied with each other over the issue of prison reform [and] entered into a contest to show who had the deeper commitment to making punishment more *humane*.”).

82. *Id.* at 15 (“For the most part, . . . American-style politics has failed to exert an American-style influence on German or French criminal justice,” in large part because of the “success of bureaucratic control.”).

83. Taslitz, *supra* note 1, at 186–87.

84. Markus Dirk Dubber, *The Promise of German Criminal Law: A Science of Crime and Punishment*, 6 GERMAN L. J. 1049, 1051 (2005) (noting that the German system of criminal law has been “assembled by generations of scholars and their stables of assistants”).

85. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM L. REV. 265, 266 (2008) (noting that “roughly 90 percent of state general jurisdiction judges are currently selected or retained” through an election process); see also Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMIN. 717, 734 (1996) (95% of state prosecutors are elected).

Europe.⁸⁶ Unfortunately, considerable research shows that both judges and prosecutors change their behavior, in a more punitive direction, near election time.⁸⁷ In Europe, in contrast, professional bureaucracies are insulated from retributive demands from the public because they are not subject to the beck and call of the populace, which may be uninformed or reacting to the most recent media-driven crisis.⁸⁸

Of course, we have been electing judges and prosecutors for some time, well before the punitive upsurge. But, here again, times have changed. Our willingness to subject the justice system to popular vote has grown appreciably in the last quarter-century. As Matthew Streib notes, since the mid-1980s,

Judicial elections have changed immensely, perhaps more so than elections for any other office. Once compared to playing a game of checkers by mail, many of today's judicial races are as rough and tumble as any congressional election. As one observer famously remarked, judicial elections are getting "noisier, nastier, and costlier." Candidate spending in judicial elections, both at the supreme court and intermediate appellate levels, has skyrocketed. Interest groups and political parties, recognizing the extreme importance of electing judges who support their views, are becoming more active.⁸⁹

86. Mary L. Vulcansek, *Appointing Judges the European Way*, 34 *FORD. URB. L. J.* 363, 368 (2007) (noting that "continental Europe" has "three models for naming judges: civil service, shared appointment, and shared appointment with partisan quotas"); Micah S. Myers, *Prosecuting Human Rights Violations in Europe and America: How Legal Structure Affects Compliance International Obligations*, 25 *MICH. J. INT'L L.* 211, 238 (2003) ("European prosecutors are selected largely on the basis of competitive examinations, which helps "insulate [them] from political influence.").

87. Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When it Runs for Office?*, 48 *AM. J. POL. SCI.* 247, 261 (2004) (finding that "judges become significantly more punitive the closer they are to standing for reelection"); Jason J. Czarnecki, *Voting and Electoral Politics in the Wisconsin Supreme Court*, 87 *MARQ. L. REV.* 323 (2003) (finding that justices are less likely to protect defendant and prisoner rights once they have experienced elective politics); Melissa Bann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 *AM. POL. Q.* 485, 495–97 (1995) (finding that state judges are more likely to uphold death sentences in last two years of their term); Siddhartha Bandyopadhyay & Bryan C. McCannon, *The Effect of the Election of Prosecutors on Criminal Trials* 161 *PUBLIC CHOICE* 141, 155 (2014) (finding that "when reelection pressures are strong, prosecutors increase the number of cases taken to trial and plea bargain less").

88. See Myers, *supra* note 86. Cf. JOEL D. ABERBACH, ROBERT D. PUTNAM & BERT A. ROCKMAN, *BUREAUCRATS AND POLITICIANS IN WESTERN DEMOCRACIES* 94–95 (1981) (noting the "startling" difference between American bureaucrats, who see their role as furthering political aims and European bureaucrats, who do not).

89. Matthew J. Streib, *The Study of Judicial Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 2 (Matthew J. Streib, ed. 2007).

The pace described by Streib has accelerated in the past decade and a half. In 2000, contested campaigns figured in only four of 18 supreme court elections; by 2006, they occurred in ten out of 11.⁹⁰ Negative campaign ads and attacks on candidates by opposing candidates increased significantly during that period.⁹¹ The Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*⁹² undoubtedly stoked the flames, as evidenced by the fact that spending on state judicial elections more than doubled between 2007-2008 and 2011-2012.⁹³ Prosecutorial elections are not likely to be as fiery, but they too hardly reflect the deliberative democracy that Taz describes. According to Ronald Wright, "when it comes to the prosecutor, one of the most ubiquitous and powerful figures to appear regularly on the ballot, we rely most on anecdotes."⁹⁴ PDD does not have much of a chance under these circumstances.

B. American Conservatism: Capitalism, Individualism and Religiosity

The term "liberal market economy" is, of course, another way of describing relatively uncabined capitalism. As Taz indicates, this type of economic regime is epitomized by lower welfare levels and a lack of effort to ensure economic equality.⁹⁵ It also tends to be associated with a dog-eat-dog, laissez-faire, winner-or-loser ethos.⁹⁶ More positively, it can be characterized as a commitment to rugged individualism, where people can make of their lives what they want without dependence on or interference by others.⁹⁷ Translated to the criminal justice context, one can imagine how people immersed in this political

90. James Sample et al., *The New Politics of Judicial Elections* vi (2006), available at www.followthemoney.org/press/Reports/200705171.pdf.

91. *Id.*

92. 558 U.S. 310 (2010) (holding that a federal statute barring independent corporate expenditures for electioneering violated the First Amendment).

93. BRENNAN CTR. FOR JUSTICE, *NEW POLITICS OF JUDICIAL ELECTIONS, 2012-2012* (Oct. 23, 2013), available at www.brennancenter.org/publication/new-politics-judicial-elections-2011-12.

94. Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 590 (2009).

95. Taslitz, *supra* note 1, at 159 (stating that LMEs tend to be associated with "a relatively weaker welfare state and a less coordinated state commitment to maintain worker skills," as well as "more poverty and life-course economic instability . . .").

96. *Id.* at 160 (describing the "winner-take-all attitude").

97. JOHN MICKELTHWAIT & ADRIAN WOOLDRIDGE, *THE RIGHT NATION* 304 (2004) (citing a Pew survey showing that Americans are much more likely than Europeans to say that it is more important "to allow individuals to be free to pursue their goals" than "for the government to ensure that nobody is in need").

economy are more likely to attribute crime and its close associate—poverty—to individual choice rather than to mitigating circumstance;⁹⁸ likewise, they would be more likely to see a person who offends as an “outsider” not worthy of empathy, especially if they are not given the type of detailed personal stories Taz reports are more likely to induce leniency.⁹⁹ Retributivism—the idea that offenders should get what they deserve—is a perfect fit in such a society, as are determinate sentences based on just desert.¹⁰⁰

Again, however, this homo economicus mindset¹⁰¹ would seem to describe the United States throughout its history. It must also be noted that retributivist dispositions do not have to be harsh. Deserved punishment can be short.¹⁰² Before drawing a connection between our individualist tendencies and hyper-incarceration, some explanation of why it blossomed only after the 1960s is needed.

That something else was the resurgence of conservatism in the 1970s, a movement that parlayed a number of traditional American values into a concerted campaign against the “criminal element.” The adversarial American political system was the perfect vehicle for bringing this campaign to fruition. As Thomas and Mary Edsall demonstrate, “[c]onservatives, mostly Republicans, recognized in the 1960s that ‘tough on crime’ policies could be used as ‘wedge issues’ to separate white and working class Americans from their traditional support of liberal politicians.”¹⁰³ A key avenue for creating this

98. *Id.* at 312 (reporting survey results showing that Europeans are much more likely than Americans to believe that “success is determined by forces outside their control”).

99. Incheol Choi & Richard E. Nisbett, *Situational Salience and Cultural Differences in the Correspondence Bias and Actor-Observer Bias*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 949 (1998) (describing a cognitive bias known as “fundamental attribution error” or “observer bias” that attributes behavior to internal rather than external causes and is more likely to be found among Americans); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1329 (1998) (arguing that discrimination is “at its core” the result of fundamental attribution error).

100. For a description of retributivism and determinate sentencing, see Robert Pugsley, *Retributivism: A Just Basis for Determinate Sentences*, 7 HOFSTRA L. REV. 379, 398 (1979) (“Retributivism affirmatively supports determinate sentencing schemes because articulable, narrowly drawn sentencing ranges can be derived from ascertaining what an offender deserves for committing a particular type of offense.”).

101. See Wikipedia, at http://en.wikipedia.org/wiki/Homo_economicus (“[H]omo economicus, or economic human, is the concept in many economic theories of humans as rational and narrowly self-interested actors who have the ability to make judgments toward their subjectively defined ends.”).

102. For instance, Andrew Von Hirsch, one of the progenitors of modern retributivism, proposed a maximum sentence of five years for homicide and a maximum of three years for all other serious crimes. ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 36–46 (1993).

103. THOMAS EDSALL & MARY EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS AND TAXES ON AMERICAN POLITICS* 4 (1991); see generally KATHERINE BECKET, *MAKING*

wedge was the rejuvenation of American individualism, or rather the glorification of a “ruthless individualism” that is consistent with laissez faire economics.¹⁰⁴ Various studies indicate that focus on the “self” increased significantly after the 1960s.¹⁰⁵

Religion was another avenue the conservative movement exploited. There is no doubt that the United States is more religious than Europe. In most European countries, even heavily Catholic ones like Spain, less than 25% of the population says that religion is important to them.¹⁰⁶ The percentage of Europeans who say they never or practically never go to church hovers around 45%.¹⁰⁷ In the U.S., in contrast, more than half say a belief in God is important to them and less than 18% never attend church.¹⁰⁸ Although Christianity certainly has its forgiving elements, many American Christians, especially those of the evangelical stripe, believe strongly in the concept of evil, the need to exact vengeance, and importance of expressing moral outrage at criminals.¹⁰⁹ Fundamentalist Christians “equate criminal behavior with sinful behavior,” leading them to endorse “the view that crime

CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 4 (1999) (noting how “tough-on-crime” issues separate rural white men from many minorities and women).

104. See Claire Andre & Manuel Velasquez, *Creating the Good Society*, 5 ISSUES IN ETHICS 1 (1992), available at <http://www.scu.edu/ethics/publications/iie/v5n1/> (reviewing Robert Bellah et al.’s book, *The Good Society*, stating “a ruthless individualism, expressed primarily through a market mentality, has invaded every sphere of our lives, undermining those institutions, such as the family or the university, that have traditionally functioned as foci of collective purposes, history, and culture”).

105. Jean M. Twenge, W. Keith Campbell, & Brittany Gentile, *Increases in Individualistic Words and Phrases in American Books, 1960-2008*, 7 PLOS ONE 1371 (2012), available at <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0040181> (finding, based on a Google scan, “increasing individualism” reflected in books and other works since 1960 and reporting other research finding “increases in individualistic traits such as narcissism, surgency, and positive self-views” in the period); MICKELTHWAIT & WOOLDRIDGE, *supra* note 97, at 312 (describing a 2003 poll indicating that the percentage of Americans who believed that success is determined by forces outside their control had fallen from 41 percent in 1988 to 32 percent by the time of the poll, whereas the opposite trend was found in Germany). Since the 2008 economic crash, Americans’ willingness to attribute poverty to moral fault rather than devastating events has lessened considerably. Patrick O’Connor, *Attitudes Toward Poverty Show Dramatic Change*, WALL ST. J. (June 24, 2014) (description of poll showing that 46% of Americans today attribute poverty to circumstances rather than attitude, and that the increase occurs among Republicans and independents as well as Democrats), available at <http://blogs.wsj.com/washwire/2014/06/20/attitudes-toward-poverty-show-dramatic-change-wsjnbc-poll/>. Perhaps that change in attitude presages a more lenient attitude toward crime

106. Pew Research Report, *The American-Western European Values*, Feb. 29, 2012, available at www.pewglobal.org/2011/11/17/the-american-western-european-values-gap/.

107. Noelle Knox, *Religion Takes a Back Seat in Western Europe*, USA TODAY, Aug. 8, 2005 (chart), available at http://usatoday30.usatoday.com/news/world/2005-08-10-europe-religion-cover_x.htm.

108. Pew Research Report, *supra* note 106; Knox, *supra* note 107.

109. MICKELTHWAIT & WOOLDRIDGE, *supra* note 97, at 326 (“America’s religiosity has encouraged Americans to see problems in terms of individual virtues and vices.”).

results from the defendant's character and not from unfortunate or unjust circumstances."¹¹⁰ Rather than an attitude of "There but for the Grace of God go I," their reaction to crime, especially if they see God as angry or judgmental, is an "eye for an eye."¹¹¹ This view is consonant with both the adversarialism of American populism and the individualistic aspects of a liberal market economy.

Most important to the thesis of this article, this conservative brand of religion has mushroomed over the past four decades, precisely the period of hyper-incarceration. With the advent of the New Religious right, the United States is more religiously conservative now than it was in the 1960s by a large margin.¹¹² These conservative religious groups have been extremely effective at raising money, using the media and lobbying elected officials.¹¹³ There is no analogously strong political force in largely secular Europe.

Before leaving the liberal market economy theme, there is another, more prosaic way capitalism may lead to harsher punishments. Because the U.S. is a bastion of free enterprise, many Americans prefer private solutions to government ones, even in arenas, like health care and education, which are seen as quintessentially governmental endeavors in Europe. It has only been in the past several decades, however, that we've begun privatizing prison and jails, with imprisonment-enhancing consequences. Companies like the Corrections Corporation of America are taking over state prison systems, with the aim of expanding them.¹¹⁴ As one spokesperson for the company said in explaining its construction of three, at-the-time unnecessary, prisons in California: "If you build it in the right place, the prisoners will

110. James D. Unnever & Frances T. Cullen, *Christian Fundamentalism and Support for Capital Punishment*, 43 J. RES. CRIME & DELINQ. 169, 171 (2006).

111. Christopher D. Bader et al., *Divine Justice: The Relationship between Images of God and Attitudes Toward Criminal Punishment*, 35 CRIM. J. REV. 90, 91 (2012) (noting these attitudes); JAMES A. MORONE, *HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY* 463 (2003) ("fears of rampant immorality obscure concerns about common sense or fairness. . . . Every new sermon about bad behavior carries this melancholy dark side").

112. Michael Hout, Andrew Greeley & Melissa Wilde, *The Demographic Imperative in Religious Change in the United States*, 107 AM. J. SOCIOLOGY 468, 468 (2001) ("The decline of the 'mainline' religious denominations and concomitant growth of more conservative denominations and sects has been among the major U.S. religious trends of the past 60 years or so.").

113. *See generally*, WILLIAM MARTIN, *WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT* (2004) (describing the increasing power of evangelical Christians, particularly from the 1960s through 2004).

114. CTR. FOR LAW AND GLOBAL JUSTICE, *CRUEL AND UNUSUAL PUNISHMENT, U.S. SENTENCING PRACTICES IN GLOBAL CONTEXT* 16 (2012) (noting that "private facilities currently house about 6% of state prisoners and 16% of federal prisoners" and that "[t]he rise of private prisons [has] contributed to the increase in lengthy prison terms," in part because their owners fund "campaigns and policies seeking longer criminal sentences and mandatory sentences").

come.”¹¹⁵ One stunning consequence of this development is that a number of states have agreed to produce a certain number of prisoners per year or pay the private facility for the empty beds, a sure-fire method of encouraging unnecessary incarceration.¹¹⁶ Again, this relatively recent development could explain some of the American-European divergence in punishment, because relatively socialist Europe has for the most part maintained prisons as public entities.¹¹⁷

C. American Racial Attitudes

Taz has probably written more about the relationship of race to the criminal justice system than any other Caucasian law professor. He was passionate about the issue, and firmly believed that the criminal justice system had a disproportionately negative effect on people of color, especially African-Americans.¹¹⁸ As he and others have pointed out, there is no doubt that the percentage of African-Ameri-

115. Marc Lipsher, *Corrections Corporation of America Casts Longing Eyes on California*, WALL ST. J., May 27, 1998.

116. Andy Kroll, *This is How Private Prison Companies Make Money Even When Crime Rates Fall*, MOTHER JONES, Sept. 19, 2013, available at www.motherjones.com/mojol/2013/09/private-prisons-occupancy-quota-cca-crime/ (“In the Public Interest found that 41 of the [contracts that states have with private prison companies] included occupancy requirements mandating that local or state government keep those facilities between 80 and 100 percent full. In other words, whether crime is rising or falling, the state must keep those beds full.”); see also Andrea Nill Sanchez, *Private Prisons Spend Millions on Lobbying to Put More People in Jail*, THINK PROGRESS, June 24, 2011, available at <http://thinkprogress.org/justice/2011/06/23/251363/cca-geo-group-prison-industry/> (describing millions of dollars of lobbying expenditures by the private prison industry and noting that, since 1997, “while the total number of people in prison increased less than 16 percent, the number of people held in private federal and state facilities increased by 120 and 33 percent, correspondingly”).

117. Cody Mason, *International Growth Trends in Prison Privatization 2* (2013), available at http://sentencingproject.org/doc/publications/inc_International%20Growth%20Trends%20in%20Prison%20Privatization.pdf (noting that most private prison growth has taken place in English-speaking countries).

118. Even sampling only the most obvious titles from the previous ten years produces a long list. See, e.g., Andrew E. Taslitz, *Racial Threat Versus Racial Empathy in Sentencing*, 41 AM. J. CRIM. L. 1 (2013); Andrew S. Taslitz, *Curing Own Race Bias: What Cognitive Science and the Henderson Case Teach about Improving Jurors Ability to Identify Race-Tainted Identification Error*, 16 N.Y.U. J. LEG. & PUB. POL’Y 1049 (2013); Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado’s Rotten Social Background*, 2 ALA. CIV. RTS. & CIV. LIB. REV. 79 (2011); Andrew E. Taslitz, *Judging Jena’s D.A.: The Prosecutor and Racial Esteem*, 44 HARV. CIV. RTS. & CIV. LIB. REV. 329 (2009); Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent—The Informants Example*, 37 S.W. L. REV. 1091 (2008); Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1 (2007); Andrew E. Taslitz, *Racial Profiling, Terrorism and Time*, 109 PENN ST. L. REV. 1181 (2005).

cans in prison far outpaces their representation in the general population and that the percentage has increased since the 1960s.¹¹⁹

Not all of this can be attributed to racism of course. African-Americans migrated to urban areas in huge numbers after War World II, and the resulting ghettoization and poverty inflated their crime rate.¹²⁰ But in *Democratic Breakdown* Taz suggests that the political economy of the United States once again exacerbated the situation by facilitating a punitive stance toward minority crime. He argues that, compared to coalitional societies, liberal market economies tend to shut out minority groups that do not “play by the rules,” at the same time demonizing them as prime causes of most social ills, including crime.¹²¹ As already noted, he also points out that urban minority groups have a hard time exerting their influence at the state or federal level, where “legislators from farm country, small towns, and white middle-class neighborhoods” predominate.¹²²

Yet our country has been afflicted by racism since its birth, and the political attributes described by Taz have also been with us for some time. What racialized practices changed in a way that can help explain the hyper-incarceration of the past 45 years? Here the work of Michelle Alexander, whom Taz cites frequently, comes to the fore. Professor Alexander notes that the rise in black incarceration rates from the late 1970s through the 1980s parallels the hyper-criminalization of conduct associated with drug possession, and that most of our drug crime policies came during the Nixon and Reagan presidencies when Republicans were developing their Southern strategy.¹²³ From these types of observations, she argues that our “war on drugs” was, and still is, a cover for a continuation of the racially-tinged criminal justice practices of yesteryear, when blacks suspected of crime used to be lynched or beaten rather than prosecuted in court. In other words,

119. See Andrew E. Taslitz, *The Political Geography of Race Data in the Criminal Justice System*, 66 L. & CONTEMP. PROBL. 1, 1 (2003) (noting “the reality that racial and ethnic minorities, especially African Americans, make up a far larger percentage of those arrested and incarcerated than should be expected from their percentage of the country’s total population”); see also MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* vii (1995) (“[B]y 1990 a quarter of young black males were in jail or prison, on probation or parole [and t]he chance that a black male was in jail or prison was seven times that of a white male.”).

120. Stuntz, *supra* note 7, at 20–21 (noting, inter alia, that murder rates went up as the percentage of the urban black population increased).

121. Taslitz, *supra* note 1, at 161–62.

122. See *supra* text accompanying notes 49–55.

123. MICHELLE ALEXANDER, *THE NEW JIM CROW* 43–44 (rev. ed. 2012); see also TONRY, *supra* note 119, at 31–35 (arguing that the War on Drugs was probably planned, or at least predicted, to be a war on poor racial minorities, particularly African Americans).

she argues, incarceration for drug-related crimes has taken the place of Jim Crow.¹²⁴

The story of race and hyper-incarceration is undoubtedly more complicated than simple unalloyed racism. For instance, both progressives and blacks themselves lobbied for increased drug penalties during the last quintile of the twentieth century, as a way of supporting struggling minority neighborhoods.¹²⁵ The important point for present purposes is that, for a host of reasons, changes in the way racial themes influenced formal policy since the 1960s fed directly into harsh imprisonment policies.¹²⁶ Europe, with less of a racial history, simply could not emulate this pattern.

D. American Proceduralism

Taz states at the outset of *Democratic Breakdown* that PDD requires “a strong commitment to individual liberties,” but does not expand on what he means by “individual liberties.”¹²⁷ William Stuntz has made the counter-intuitive argument that one cause of our increased imprisonment rate and longer sentences has been our commitment to strong procedural protections for criminal defendants, including allegiance to the Fourth Amendment’s prohibition against unreasonable searches and seizures, the Fifth Amendment’s privilege against self-incrimination, the right to a (racially-balanced) jury, the right to confront, face-to-face, all accusers, and the requirement that the prosecution prove every element of the crime beyond a reasonable doubt.¹²⁸ According to Stuntz, these procedural rights make trial so time-consuming that, given their increasing caseloads, prosecutors have had to resort to plea bargaining and guilty pleas as the main method of adjudicating criminal cases.¹²⁹ Needing bargaining lever-

124. ALEXANDER, *supra* note, at 11 (“This book argues that mass incarceration is, metaphorically, the New Jim Crow.”).

125. See James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21, 36–44 (2012) (describing “black support for punitive crime policy”); Anders Walker, *The New Jim Crow? Recovering the Progressive Origins of Mass Incarceration*, 41 HASTINGS L. Q. 845, 862–67 (2014) (describing the “liberal war on drugs”).

126. Walker, *supra* note 124, at 866 (“[T]he War on Drugs contributed directly to the evil of mass incarceration. However, the origins of that war stemmed not simply from a conservative conspiracy, as Alexander implies, but a complex set of concerns, including a liberal desire to help minorities trapped in high-crime neighborhoods.”).

127. Taslitz, *supra* note 1, at 135.

128. Stuntz, *supra* note 7, at 257–74.

129. *Id.* at 235–36 (noting the huge decrease in criminal trials in the 1970s and stating that the Warren Court’s “law of criminal procedure raised the cost of policing and prosecution when that cost was already too high”).

age to sustain this system, Stuntz continued, prosecutors have lobbied for easy-to-prove crimes and heavy penalties, which legislators, for reasons already alluded to, have been only too happy to enact.¹³⁰

As a result, modern criminal codes have become bloated. For instance, in many states proof that the defendant is anywhere near illicit drugs can result in a very stiff sentence.¹³¹ These drug possession laws can also be used to prosecute people for suspected, but harder-to-prove, more serious crimes like robbery and homicide.¹³² The reach of rape, theft and fraud law has also expanded.¹³³

If Stuntz' diagnosis about the pathology of American crime definition and prosecutorial-legislative interaction is correct,¹³⁴ then our commitment to defendant-oriented procedural protections as a method of ensuring fair punishment has backfired. In most European countries, in contrast, there are no all-lay juries, rules of evidence are minimal, and the right to silence and prevent disclosure of information to the court is much reduced.¹³⁵ As a result, trials are a much cheaper proposition and take place in virtually all serious cases, the most importance consequence of which, for present purposes, is that judges have much more control over the adjudication and sentencing pro-

130. *Id.* at 264–67 (describing how “criminal liability rules grew broader, the number of overlapping criminal offenses mushroomed, and the definition of crimes grew more specific” (and thus easier to prove), in part because these moves allowed legislators to look tough on crime and in part because “broader and more specific substantive law was a means of inducing guilty pleas”); see also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533–39 (2001) (explaining why prosecutors lobby legislators for more and easier-to-prove crimes and stating that the “single most important feature of the existing system for defining criminal law” is that “legislators have good reason to listen when prosecutors urge some statutory change”).

131. *Id.* at 267–68 (providing examples, including a case holding that conviction for possession with intent to distribute and conspiracy to do the same is proven by “some nexus between the defendant and the drugs”).

132. *Id.* at 269.

133. *Id.* at 263–64.

134. For an article providing empirical support for Stuntz' position, see Daniel P. Kessler & Anne Morrison Piehl, *The Role of Discretion in the Criminal Justice System*, 14 J. L. ECON. & ORG. 256 (1998) (finding, based on a study of prosecutorial behavior after the passage of California's three-strikes laws, that prosecutors not only sought longer sentences for those charged with a third strike but also sought longer sentences for those charged with “similar crimes,” in a process the authors call “prosecutorial maximization”); see also Paul J. Hofer, *Has Booker Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 23 FED. SENT'G REP. 326, 329 (2011) (stating that the Department of Justice “has sought more and harsher mandatory sentencing laws ‘not because the enhancements are inherently just or required for adequate deterrence, but precisely because higher sentences provide increased plea bargaining leverage’”).

135. For a description of European models of criminal justice and recent trends toward “convergence” of the inquisitorial/inquest and adversarial/contest traditions, see John D. Jackson, *The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?*, 68 MOD. L. REV. 737, 740–43 (2005).

cess.¹³⁶ While some sort of plea bargaining system exists in most European countries,¹³⁷ it does not create the up-ratcheting of punishment that Stuntz describes in the United States because judges, not prosecutors, are the primary power-brokers.¹³⁸

One counter to Stuntz' thesis that heightened procedure causes heightened punishment is that our Constitution has provided for an adversarial rather than inquisitorial process from its inception. But the obvious rejoinder is that those adversarial rights were not applied to the states, where most criminal cases are tried, until the 1960s. That is when the Warren Court's incorporation of the guarantees found in the Fourth, Fifth and Sixth amendments changed the face of American criminal trials.¹³⁹ That is when plea bargaining took off.¹⁴⁰ And, of course, that is when hyper-incarceration began.

CONCLUSION

The causes of American hyper-incarceration are manifold. Professor Taslitz's suggestion that our political economy is one of the primary culprits behind this debacle is hard to dismiss, especially when one looks at how its interaction with increases in crime compares to the reaction of differently constructed European political systems to crime upsurges. There is also abundant evidence, once put in compar-

136. Mar Jimeno-Bulnes, *American Criminal Procedure in a European Context*, 21 CARDOZO J. INT'L & COMP. L. 409, 453 (2013) (noting that "a common aspect" of the plea bargaining process that occurs in France, Germany, Italy, and Spain is that judges control the process, and that such control "usually takes place at the appropriate hearing").

137. See Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L. L. J. 1, 27, 63 (2004) (noting that numerous countries now allow plea bargaining, but concluding, based on a survey of four continental and Latin American criminal justice systems, that criminal procedure is "still overwhelmingly conceptualized around the model of the official investigation," which eschews guilty pleas and requires trial in most cases).

138. Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 215-17 (2006) (describing the high degree of control German judges have over charging, adjudication and sentencing decisions, and noting that the German approach is representative of the "civil-law, inquisitorial criminal justice system" prevalent in Europe).

139. See CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 2-4* (5th ed. 2008) (noting that the Warren Court found "virtually every Bill of Rights guarantee pertaining to the criminal process. . . to be inherent in the due process of law and . . . thus imposed on the states through incorporation into the Fourteenth Amendment").

140. Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 38-39 (1979) (noting that, while guilty pleas have been a predominant aspect of the American system for decades, "[a] major effect of the 'due process revolution' was to augment the pressures for plea negotiation" and produce "more intense plea negotiation," with the result that guilty pleas increased significantly).

ative perspective, that the post-1960s rise of contested criminal justice elections, robust individualism, religious conservatism, prison privatization, racialized anti-urbanite sentencing practices, and procedural protections has contributed to American incarceration rates.

Because these forces are all on the upswing, or at least holding steady, Taz' call for a populist, deliberative democratic antidote to hyper-incarceration is bound to run into resistance as a structural matter. Localized, deliberative conversations about criminal justice have not typically been organized or attended by the two major political parties, or by state and federal politicians. But that does not mean these types of sessions cannot occur. The fact that the state of Washington was able to pull off something like them is cause for hope.¹⁴¹ And Taz is probably right that, if they do occur, adversarialism will decrease, empathy will increase, coalitions will build, experts and outsiders will be heard, and, when all is said and done, incarceration will be viewed differently by a large segment of the populace.¹⁴² It would be a terrific way of honoring Taz to establish "Taslitz talks" around the country, designed to implement a grand PDD experiment aimed at reforming our criminal justice system.

141. *See supra* text accompanying note 47.

142. One note of caution, however. Research suggests that local governments, especially those in smaller cities, are more likely to cater to property owners within the jurisdiction. *See* WILLIAM A. FISCHER, *THE HOMEOWNER HYPOTHESIS* 80–94 (2001). That group might tend to be more punitive and fearful of "outsiders" than those who rent, a group that often comprises the bulk of racial minorities that Taz thinks will be less punitive. *See* Stuntz, *supra* note 7, at 191–94 (stating that beginning in the 1960s "white suburbanites' power grew at the expense of black city-dwellers," a fact which "changed the justice system almost entirely for the worse").

At What Cost? Blind Testing, Eyewitness Identification, and What Can and Cannot Be Counted as a Cost of Reducing Information Available for Decision

D. MICHAEL RISINGER*

INTRODUCTION

One of the great and more recent advances in the methodology of science is the adoption of blinding protocols to insure that experimental inquiries using humans as participants in various capacities yield results that are not affected by the expectations, desires, hopes, or other characteristics of the humans involved.¹ These methods have become fixtures in scientific research across a wide range of scientific disciplines because they add epistemic strength to results by filtering out confounding information that can influence results.² The lessons

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1. See D. Michael Risinger, Michael J. Saks, William C. Thompson & Robert Rosenthal, *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CALIF. L. REV. 1, 6 (2002) (tracing development of awareness of observer effects and adoption of blinding methodologies in modern scientific practice); see also JOEL G. HEINRICH, BENEFITS OF BLIND ANALYSIS TECHNIQUES 1 (2003), available at http://www-cdf.fnal.gov/physics/statistics/notes/cdf6576_blind.pdf (tracing the first formal use of blinding protocols in research to the 1930s).

2. The most well-known context in which blinding is routinely deployed is the double-blind methodology used in determining the efficacy of drugs. See Michael D. Green, D. Michael Freedman & Leon Gordis, *Reference Guide on Epidemiology*, in REFERENCE MANUAL ON SCI-

of this methodological advance have applications beyond the core scientific settings in which they were developed and in which they are routinely deployed. Currently there are movements to adopt such blinding protocols in forensic science,³ and in eyewitness identification procedures.⁴ But there is often resistance to adopting such methods in

ENTIFIC EVIDENCE 333, 338 (2d ed. 2000). However, blinding may be used in any setting in which humans are used as raters or interpreters of raw data, even in physics. See Joshua R. Klein & Aaron Roodman, *Blind Analysis in Nuclear and Particle Physics*, 55 ANN. REV. NUCLEAR & PARTICLE SCI. 141, 141 (2005).

3. See Dan R. Krane et al., letter to the editor: *Sequential Unmasking: A Means of Minimizing Observer Effects in Forensic DNA Interpretation*, 2008 J. FORENSIC SCI. 1006 (with Ford, Gilder, Inman, Jamieson, Koppl, Kornfield, Risinger, Rudin, Taylor, and Thompson); D. Michael Risinger, *The NAS/NRC Report on Forensic Science: A Glass Nine-Tenths Full (This Is About the Other Tenth)*, 50 JURIMETRICS 21, 21 (2009) (criticizing the NAS REPORT, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), for calling for more research on the issue of blinding in forensic science rather than simply calling for such blinding to be done); Jennifer L. Mnookin et al., *The Need for a Research Culture in Forensic Science*, 58 UCLA L. REV. 725, 770 (2011) (supporting the adoption of “sequential unmasking” protocols in forensic science practice). Sequential unmasking differs from simple blinding in that it recognizes that in forensic practice, there can be two kinds of biasing circumstances to be avoided: exposure to domain-irrelevant biasing information, and exposure to domain-relevant information in an order that may create bias. For example, there is never any need for a DNA analyst characterizing the DNA profile reflected by an electropherogram to know that some particular person has confessed to the crime. That is irrelevant to the expert task or “domain.” On the other hand, at some point the analyst will have to know the characteristics of a suspect’s DNA profile, but should not be exposed to it until the DNA profile of any crime scene material has been characterized. This is recognized by the FBI Laboratory as best practice. See *SWGDM Interpretation Guidelines for Autosomal STR Typing by Forensic DNA Testing Laboratories*, F.B.I., <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/swgdam-interpretation-guidelines> (last visited Feb. 15, 2015). The suspect profile is domain-relevant information that should nevertheless be exposed to the analyst in the least biasing order; hence the name “sequential unmasking.” In eyewitness identification procedures, on the other hand, simple blinding is all that is necessary.

4. The desirability of having all identification procedures administered by persons not themselves aware of who the suspect in the photo array or corporeal line-up is seems to have been first raised in the legal literature in Jack B. Weinstein, Book Review, 81 COLUM. L. REV. 441, 444 (1980) (reviewing ELIZABETH LOFTUS, *EYEWITNESS TESTIMONY* (1979)). Interestingly, Dr. Loftus did not discuss the issue specifically in the section on identification procedures in the book under review, though Judge Weinstein made it clear that such blinding was then being used in England, at least for corporeal line-ups. Calls in the United States for double-blind identification procedures, as a part of a constellation of suggestions for improved eyewitness identification procedures, were put forth by a variety of experimental psychologists working on eyewitness identification problems. See generally Gary L. Wells et al., *Recommendations for Properly Conducted Lineup Identification Tasks*, in *ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS* 223 (David F. Ross et al. eds., 1994). Perhaps the most notable is Gary Wells, who, through his placing of special attention on what he called “system variables” (variables that can be controlled by redesign of the procedures used for identification), seems to have been most responsible for the realization that trying to correct for inaccurate identifications at trial was by far the second best strategy, and that it is much better to foster more accurate identification initially through better designed processes. See Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546, 1548 (1978). These various suggestions resulted in the promulgation of recommendations for improved eyewitness identification procedures issued by the United States Department of Justice in 1999, among which was the double-blind administration of both photo spreads and

these new settings based on a variety of asserted grounds.⁵ One such ground is that proper blinding protocols will lead to the loss of some results of the process, which the current participants fear will interfere in their ability to use the process as effectively as they have in the past. The fear is that blinding will cause some results to be lost that would prove useful, and that might also be “accurate.” Such concerns are sometimes voiced, rarely with much extended analysis.⁶

But a recent article by the prominent eyewitness identification researcher Steven E. Clark⁷ goes well beyond the usual in reflection and sophistication, even though I believe that his ultimate conclusion regarding the supposed “costs” of blind administration of such procedures is simply wrong. Professor Clark appears to hold that in evaluating reforms in eyewitness identification procedures, *all* losses of selections that are in fact true perpetrator selections must be counted as costs of the proposed reform in evaluating the wisdom of the reform. In this article, I assert that this is clearly not true in regard to the administration of identification lineups “double blind,” that is, their administration in such a way that the person conducting the procedure has no knowledge of the target of the lineup (or at least of the

corporeal line-ups. See TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, DOJ, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 1 (1999). To date, only a limited number of jurisdictions have adopted those recommendations, in part because in most jurisdictions, local control prevents system-wide change absent a statute. New Jersey, where the attorney general has statewide supervisory power, adopted the recommendations in 2000. See Gina Kalata & Iver Peterson, *New Way to Insure Eyewitnesses Can Identify the Right Bad Guy*, N.Y. TIMES, July 21, 2001, at A1. North Carolina and Wisconsin have commissions that have adopted the recommendations, but their authority over local procedures is merely advisory (although a significant number of local jurisdictions are cooperating). See Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 641–42 (2006) [hereinafter Wells, *Systemic Reforms*]. A few important local jurisdictions in other states have adopted the guidelines, including Hennepin County and the Minneapolis Police Department and Northampton, Massachusetts. *Id.* at 642–43. But given the fact that there are more than 13,000 separate police jurisdictions in the United States, the vast majority of which are autonomous in regard to such procedures, *id.* at 634, the departments adopting the guidelines represent a tiny percentage of all police departments.

5. Among the reasons sometimes given are that such blinding reduces the job satisfaction involved in forensic science, see Risinger et al., *supra* note 1, at 52; Leonard Butt, *The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions: Commentary by a Forensic Examiner*, 2 J. APPLIED RESEARCH IN MEMORY & COGNITION 59, 60 (2013), and that the training of forensic scientists teaches them to avoid bias effectively, see Risinger et al., *supra* note 1, at 51; Brent Ostrum, letter to the editor, 54 J. FORENSIC SCI. 1498 (2009) (commenting on Krane et al., *supra* note 3); Butt, *supra*, at 59.

6. For a particularly extreme argument, see *People v. Dean*, New York County, New York Indictment No. 4555/2007 (transcript of 1/12/2012, p. 87, on file with author) (testimony of forensic odontologist David Senn embracing the propriety of using domain-irrelevant information during a hearing on the admissibility of such expert conclusions).

7. Steven E. Clark, *Costs and Benefits of Eyewitness Identification Reform: Psychological Science and Public Policy*, 7 PERSPECTIVES PSYCHOL. SCI. 238 (2012).

target's position in the lineup array), and therefore cannot cue the witness, consciously or unconsciously, about the hoped-for selection.⁸

This is clearly not a new position for me.⁹ Indeed, I am probably one of the crowd that Professor Clark has in mind when he criticizes people for making claims that such reforms are “cost free.”¹⁰ Others have already responded.¹¹ However, perhaps the expanded form in which the “cost” issue is developed here still has something important to contribute to the debates surrounding such proposed reforms. Ultimately, I will support Professor Clark's position that losses of accurate identifications may properly be counted as costs in evaluating some other proposed reforms of eyewitness identification procedures, particularly sequential presentation. However, I will conclude that in that case, based on the knowledge currently available, the epistemic and moral benefits of sequential presentation outweigh such costs. Finally, I will warn the defense bar about the dangers of linking attacks on non-blind administration with attacks on non-sequential presentation in litigating a proposed due process right to have all such identification procedures done in a rational manner. In a nutshell, the danger

8. The term “double blind” is the one used in most technical writing on such lineup presentation by analogy to “double blind” procedures in various research contexts, such as pharmaceutical effectiveness studies. But in the context of eyewitness identification procedures, the initial condition of witness blindness (as opposed to administrator blindness) is a part of the essence of the notion of a lineup. As I have written elsewhere,

This terminology is adopted by virtue of an analogy to “double blind” study design in various research contexts. In a double blind study, the test subjects do not know if the “treatment” they are subjected to is the actual test variable or a placebo (single blind) and the people interacting with the test subjects in the administration of the test do not know either (double blind). The term “double blind” in the eyewitness context is a bit out of kilter, since the notion of the original blind (the fact that the witness does not know specifically which person is the actual suspect) is entailed in the notion of a lineup style procedure (whether photo or corporeal) to begin with, so it seems in some ways that the term “blind administration” would be more natural in capturing the proposed reform (and is often encountered outside the eyewitness literature), but “double blind administration” has become fairly standard in that literature.

D. Michael Risinger, *Inquiry, Relevance, Rules of Exclusion and Evidentiary Reform*, 75 BROOK. L. REV. 1349, 1365 n.43 (2010).

9. I have indeed said that at least double blind administration is cost free. See Risinger, *supra* note 8, at 1365; D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 796–97 (2007); D. Michael Risinger et al., *supra* note 1, at 27–30, 41 (2002).

10. I say this because I supplied Professor Clark with the relevant parts of the articles cited in footnote nine when I commented on his draft prior to its publication, and because I have taken the “cost free” position in regard to double blind lineup administration in the cited articles.

11. The bulk of the issue of *Perspectives on Psychological Science* in which Dr. Clark's article appears is a kind of print symposium devoted to his ideas, pro and con (mostly con), and may safely be taken as typical of the positions of most researchers on the issue of costs. For this reason, it is appropriate to summarize each of the articles in that collection. However, the summaries have been placed in an appendix to avoid yet another even lengthier footnote.

is that by linking the two, you diminish the likelihood of obtaining a requirement of blind administration, which is by far the most important reform to be accomplished in the area of eyewitness identification.

I. BASICS—INFORMATION AND RANDOM CORRESPONDENCES

Some initial postulates: We are going to be considering what counts as “information”¹² and its use in a legal system adhering to the minima of a system of justice under law. Those minima include a commitment to resolving cases brought to the justice system by a process that tries to accurately reconstruct by rational means the material details of the human episode that gave rise to the controversy, in order to apply pre-existing legal norms to the particular material facts of the episode. This is an especially central commitment when dealing with external (as opposed to mental state) historical fact details of such an episode.

To start, it is easy to show that not every “accurate” output of a process generating an answer to a question of historical fact counts as a proper rational resolution of that issue, or even generates a defensible piece of “information” to be considered on the issue along with other information. It follows that the loss of such an output cannot properly be counted as a “cost,” given the commitments of the system just set out.

12. The term “information” is more problematical in many areas of modern discourse than the casual observer might realize. For instance, one not uncommonly runs into assertions that the universe is composed of information. In this view, most associated with Claude Shannon (sometimes referred to as the “father of information theory”), any non-random relationship (and perhaps any random relationship) in the factual world is information. See JAMES GLEIK, *THE INFORMATION 3-12* (2011). I believe this fails to make the important distinction between potential and actual information, and confuses many issues. I have addressed the concept of information elsewhere, and for this article, this short excerpt will suffice:

Information is something that interacts with a decisionmaker (processor), broadly defined, which increases the rational warrant for some decision or group of decisions over potential rivals. Again, in approaching the concept of information in this way, I am emphasizing that the status of a stimulus as “information” is not inherent solely in the stimulus. It is dependent upon the way the stimulus interacts with the decisionmaker. Thus, whether a stimulus counts as information is a characterization of its interaction with and effect on a decisionmaker. No decisionmaker, no information, although some things in the world that are stimuli that potentially could affect some decisionmaker under conditions not now prevailing might be called “potential” information. Not only does the status of something as information depend on its interaction with a decisionmaker, it must interact in a specified way. To count as information, it must both affect a decision, and affect it in an accuracy-improving way.

Risinger, *supra* note 8, at 1355. See generally LUCIANO FLORIDI, *THE PHILOSOPHY OF INFORMATION* (2011).

Perhaps the best place to start is with coin flips, and other random means of making decisions under uncertainty. Even in regard to a truly binary choice, such as whether a particular person was the person who pulled the trigger to the gun that shot the bullet into the deceased person's head, a coin flip is a decision strategy that is out-of-bounds so far as the legal system is concerned, given the system's commitment to rational means of fact reconstruction, broadly conceived.

First, even though the choice is truly binary, the result of the flip simply tells you what you already knew, which is that the likelihood that the coin flip hits the historical truth mirrors the probability of guilt for a random draw from the perpetrator candidate set—an undefined reference class specified at least in part and as a minimum by the necessity that both the perpetrator and the person to whom the coin flip is applied must be a member of it. If you cannot further specify the referenced perpetrator candidate set, the coin flip tells you nothing. If you can, it tells you nothing you did not know, that is, nothing that was not already entailed in specifying the candidate set along with its entailed base rates of the condition in question (which in this case would be 1 over the size of the perpetrator candidate set, since perpetrator status under the conditions of the hypothetical can only be true of one member of the set). The coin flip yields, in Bayesian terms—or in any terms of any other approach to rationality—no information at all, if what we mean by information is something that can properly be seen as changing the probabilities of a hypothesis under examination, or at least our confidence in those probabilities. So any apparent information that is revealed to be no more than a random result of some characteristic of a process is not actual information—that is, something with an epistemic warrant beyond random.

So why start with random processes? No one defends them as a part of adjudication, and particularly not as a part of criminal adjudication.¹³ Even our ancestors had to account for what we now consider their odd processes, such as trial by ordeal or trial by combat, by claiming that God, who is omniscient and omnipotent, would prevent an unjust outcome. In that way, they domesticated such apparently non-rational (and perhaps in some sense random) processes to a sys-

13. It was apparently to take advantage of this general principle that Newman and Loftus raised the analogical specter of lucky guesses in their response to Clark: "Defense attorney: What about lucky guesses? Should somebody be convicted on a lucky guess? Stark: Well, probably not." Eryn J. Newman & Elizabeth F. Loftus, *Clarkian Logic on Trial*, 7 PERSPECTIVES ON PSYCH. SCI. 260, 261 (2012).

tem of claimed rationality, and therefore a system of justice. But the vices of random processes may be present in a process that is not so clearly or explicitly random as a coin flip. It is not only a coin flip or a lottery that gives little or no rational information beyond the known conditions that give rise to the process, or invites a factfinder to double count base rate information. When such characteristics are shown, and steps are taken to remove the preconditions underlying such results, any results that are thereby lost are also properly characterized as if they were random, and without epistemic warrant, and hence not costs of the removal of the underlying conditions.

II. TASK-IRRELEVANT INFORMATION, COINCIDENCE, AND THE ALLEGED “COSTS” OF BLINDING—WHY DOUBLE BLIND ADMINISTRATION OF IDENTIFICATION PROCEDURES IS COST-FREE DESPITE THE LOSS OF SELECTIONS BY WITNESSES.

The clearest example of a procedure that meets the criteria set out at the end of the last section is blinding or masking to exclude task-irrelevant information. By “task-irrelevant,” I mean information that would be inconsistent with the epistemic claim being made for the reliability of that particular witness’s information.¹⁴ This concept has been most fully developed in the context of expert witnesses. Here is an example I like to use:

Consider a hypothetical bitemark examiner who claims to be able to determine if marks on human skin were left by human dentition, and if so, to compare the bitemarks and attribute their origin to a particular set of dentition. What would we say to such an examiner who would not make an attribution until he learned of the results of DNA tests run on swabbings of the bitemark in question? The

14. Professor William C. Thompson has a very nice article in draft showing through Bayesian network modeling why task-irrelevant information undermines the epistemic usefulness for the trier of fact of expert conclusions based on such task-irrelevant information, even if it in some sense raises the accuracy or “hit rate” of the conclusion based on it. See William C. Thompson, *Modeling Domain-Irrelevance: What Facts Should Experts Ignore?* (draft, Sept 1, 2013, on file with author), presented at a symposium on Blinding as a Solution to Institutional Corruption: When Does Less Information Result in Better Decisions?, Edmond J. Safra Center for Ethics, Harvard Law School, November 1, 2013, subsequently presented *sub nom.* “Blind to What: Criteria for Domain-Irrelevance” at Workshop, Bias in Forensics, American Academy of Forensic Sciences annual meeting, Seattle, Washington, Feb. 17, 2014. A version of this paper will be included as a chapter in a book based on contributions to the Safra symposium. The current article was also presented at that symposium, but I elected to publish it here rather than as a book chapter.

bitemark examiner might be said to be virtually always right under those circumstances, but not, at least very clearly, as the result of any claimed bitemark identification expertise. One might argue that the marginal effect of the contaminating information is too small to care about, that is, that exposure to it changes few results (though mountains of overwhelmingly consistent research suggests the contrary in most circumstances of subjective judgment and hard calls),¹⁵ but not that the set of results that *were* changed from what they would have been without the DNA information are made better (and not worse) as the products of the claimed expertise by the use of, or exposure to, such domain-irrelevant information. While it is true that an ultimate factfinder might consider both the bitemark examiner's opinion and the DNA results in coming to a conclusion on the issue of whether a particular person was the origin of the marks in question, it is not within the function or the special expertise of the bitemark examiner to combine those two pieces of information. There is no reason to believe he can do that combining any better than an average juror, or anyone else.

Even though the information from the DNA results would raise the accuracy of his ultimate attribution, perhaps dramatically, we

15. For a discussion of that research generally, see Risinger et al., *supra* note 3. For a discussion of that research as it applies specifically to forensic identification disciplines such as bitemarks, see D. Michael Risinger, *supra* note 3, at 23–33, and Saul M. Kassin, Itiel E. Dror & Jeff Kukucka, *The Forensic Confirmation Bias: Problems, Perspectives and Proposed Solutions*, 2 J. APPLIED RESEARCH IN MEMORY & COGNITION 42, 42–52 (2013). The hypothetical in the text is not so unrealistic as one might suppose, as seen in the testimony of David Senn, *supra* note 6.

On the reliability of bitemark identification in general, see Mary A. Bush, Raymond G. Miller, Peter J. Bush & Robert B. J. Dorion, *Biomechanical Factors in Human Dermal Bitemarks in a Cadaver Model*, 54 J. FORENSIC SCI. 167, 167 (2009); Raymond G. Miller, Peter J. Bush, Robert B. J. Dorion & Mary A. Bush, *Uniqueness of the Dentition as Impressed in Human Skin: A Cadaver Model*, 54 J. FORENSIC SCI. 909 (2009); Mary A. Bush, K. Thorsrud, Raymond G. Miller, Robert B. J. Dorion & Peter J. Bush, *The Response of Skin to Applied Stress: Investigation of Bitemark Distortion in a Cadaver Model*, 55 J. FORENSIC SCI. 71 (2010); Mary A. Bush, H.I. Cooper & Robert B. J. Dorion, *Inquiry into the Scientific Basis for Bitemark Profiling and Arbitrary Distortion Compensation*, 55 J. FORENSIC SCI. 976 (2010); Mary A. Bush, Peter J. Bush & H. David Sheets, *Similarity and Match Rates of the Human Dentition in Three Dimensions: Relevance to Bitemark Analysis*, 125 INT'L. J. LEGAL MED. 779 (2011); Mary A. Bush & H. David Sheets, *Mathematical Matching of a Dentition to Bitemarks: Use and Evaluation of Affine Methods*, 201 FORENSIC SCI. INT'L 33, 33 (2010); Mary A. Bush, Peter J. Bush & H. David Sheets, *Statistical Evidence for the Similarity of the Human Dentition*, 56 J. FORENSIC SCI. 118 (2011); H. David Sheets, Peter J. Bush, Cynthia Brzozowski, Lillian A. Nawrocki, Phyllis Ho & Mary A. Bush, *Dental Shape Match Rates in Selected and Orthodontically Treated Populations in New York State: A Two-dimensional Study*, 56 J. FORENSIC SCI. 1, 1 (2011); Mary A. Bush, Peter J. Bush & H. David Sheets, *A Study of Multiple Bitemarks Inflicted in Human Skin by a Single Dentition Using Geometric Morphometric Analysis*, 211 FORENSIC SCI. INT'L 1, 1 (2011). These studies show the exquisite unreliability of the attribution of the source of bitemarks on human skin under most conditions that will be met within practice.

should not allow him to consider the DNA results because to do so would obscure what his claimed expert judgment actually contributed to the conclusion. In addition, in regard to attributions that would not have been made without the biasing information, it invites the ultimate finder of fact to double count that information in their final decision, by giving credence to the biasing information directly when it is testified to directly, and also indirectly by giving credence to the asserted expert bitemark examiner's conclusion. So, given the necessarily circumscribed role of the expert, the losses in ultimate expert opinion accuracy that result from depriving the bitemark expert (or any other expert) of information not relevant to the exercise of that expertise within its properly bounded domain, cannot properly count as "costs" of the adoption of such masking, even when some percentage of those "lost" opinions would be coincidentally accurate. What we want from experts are results that are the product of their expertise, not the echo of domain-irrelevant information. Far from being an epistemic cost, getting rid of such echoes by masking is an epistemic benefit.

At this point, before moving on to the eyewitness identification context explicitly, it is important to step back and separate two questions that may be conflated, leading to potential confusion about costs. I will call them the *ex post* and *ex ante* questions.

If one has the results of selections that have already been made under non-blind conditions, the choice of whether to discard them or to attempt to utilize them as is (if those are the only options) presents the prospect of true costs. This is because, under these circumstances, there is no way to identify which individual conclusions were the marginal ones that would not have been made absent task-irrelevant information, and those that would have been made regardless of exposure to such information. As long as the process is allowed to continue to be undertaken non-blind, the system facing the product *ex post* must face this cost/benefit choice, and will predictably elect to admit every result of the process, and throw the responsibility for separating the wheat from the chaff into the lap of the jury, which is at least as qualified (or unqualified) as the judge to make such a determination. However, a proper masking regime undertaken *ex ante* automatically removes the epistemically unjustifiable results, and only those results (that is, the marginal group of selections, however small or large, that would not have been made absent the domain-irrelevant information). Thus, deciding to blind and suffer that resulting loss is

in fact cost-free downstream (and in fact a benefit), because all the identifications lost as the result of blinding are a fortiori the ones that would not have been made but for the effect of the task-irrelevant information.¹⁶ This form of argument, at least the part about the cost-free nature of adopting blind administration upstream from the trial, has been raised in the past in the expert context, and it has never really drawn any effective rebuttal. I believe that is because there is none. Does the same hold true when we move the context from the expert function to eyewitness identification? I believe that it does.

There is a long tradition of analogizing the eyewitness identification function to at least some expert functions, because both have similar epistemic assumptions and limits.¹⁷ Both not only utilize special knowledge, but they utilize it in ways that are beyond the ordinary fact witness function. A fact witness recounts remembered details of an episode to the factfinder. An eyewitness identification witness, like an expert, goes beyond recounting, and uses specialized knowledge of the appearance of the perpetrator to translate the appearance of a candidate into an assertion of perpetrator status. In a sense, each identifying witness is by necessary implication claiming to be, and acting as, an expert in the appearance of the perpetrator when comparing him or her to other faces. It is no surprise then, that the restrictions we ought to impose on task-irrelevant information in the explicit expert context mirror similar restrictions that ought to be imposed in the analogous circumstances of eyewitness identification. This mainly involves insuring that similar masking protocols are in place to prevent biasing information not relevant to the identification task from affecting the witness during the process, that is to say, double blind practices for the administration of identification procedures (except in very limited circumstances).

Just as in the case of a drug trial or a social science experiment, test administrators are a potential source of powerful biasing information not relevant to the hypothesis under test. And proper exercises

16. It is incumbent on judges, in my opinion, to discipline the system by excluding all non-blind results, thus throwing the costs onto the prosecution in order to incentivize the authorities to move to the then-cost-free regime of blind administration. At some point, making the authorities bear the costs of the non-blind system, even if they are disproportionate to the benefits ex post, is the only way to insure a move to cost-free blind procedures ex ante. But that is a different discussion.

17. See Note, *Handwriting as Evidence*, 60 ALB. L. J. 45, 45 (1899) (analogizing the identification of handwriting to the identification of facial features); D. Michael Risinger, Mark P. Denbeaux & Michael J. Saks, *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Case of Handwriting Identification "Expertise,"* 137 U. PA. L. REV. 731, 774-76 (1989).

in eyewitness identification are analogous to such tests.¹⁸ Whether consciously or unconsciously, administrators of eyewitness identification processes who know a desired answer can sway results in the desired direction in an unspecified but not insignificant number of cases. Absent double blind procedures, we can say with some confidence that there will be a set of cases where a selection is made but where, absent the conscious or unconscious cuing of the witness by the administrator of the lineup, no selection would have been made. Just as in the bitemark example set out above, such identifications are virtually by definition not the product of the witness's special knowledge, that is, their knowledge of the face in question, but of the administrator cue. In addition, again, since there is no way to identify which cases fall into this set *post hoc*, the only way to eliminate the selections which are the result of cuing rather than witness knowledge is by blind administration of the identification procedures. But in so doing, we will lose some identifications that are, in some objective sense, accurate. Again, just as in the case of the expert function generally, such coincidentally accurate identifications are merely the echoes of the task-irrelevant information, that is, the administrator's knowledge of the identity of the target of the lineup (and opinion in regard to likely guilt), and not of the knowledge of the witness concerning the appearance of the perpetrator, and thus cannot be counted as costs. Once again, it is an epistemic benefit to filter out such hidden echoes, not an epistemic cost.

III. TWO THEORIES OF ERROR AND THE NOTION OF "COSTS": ONE EXPLANATION FOR PROFESSOR CLARK'S ERROR ABOUT COSTS

Having dealt with Professor Clark's claims that losses of such coincidentally accurate identifications should count as costs in regard to double-blind administration of line-ups, one wonders how Professor Clark ever came to the position that the lost coincidental selections could properly count as costs in the first place. I believe the answer lies in one particular approach to the concept of error in science, and

18. Gary L. Wells & C.A. Elizabeth Luus, *Police Lineups as Experiments: Social Methodology as a Framework for Properly Conducted Lineups*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 106 (1990); Gary L. Wells & John W. Turtle, *Eyewitness Identification: The Importance of Lineup Models*, 99 PSYCHOL. BULL. 320, 321 (1986); Steven E. Clark & Jennifer L. Tunnicliff, *Selecting Lineup Foils in Eyewitness Identification Experiments: Experimental Control and Real-World Simulation*, 25 LAW & HUM. BEHAV. 199, 212 (2001); Gary L. Wells et al., *The Selection of Distracters for Eyewitness Lineups*, 78 J. APPLIED PSYCHOL. 835, 842 (1993).

the equation of accurate results with lack of error, which one can see might be taken to imply that loss of accurate results of any kind should be counted as costs. This approach is not the only approach adopted in scientific contexts, by any means, but it may explain Professor Clark's virtually unique approach among eyewitness researchers to the concept of cost.

I was recently moved to explore the concept of error at some length in an attempt to understand the disconnect between the notion of error and the notion of fault. Here is a relevant passage from that exploration¹⁹:

First, as previously noted, we are dealing with beliefs or claims concerning empirical facts in the world. Both the grounds for justifying such beliefs and the grounds for attacking them are limited, in general, by notions of empirical evidence, either of the critical common sense variety, or of the formal variety which is the domain of science in the modern sense of the word.²⁰ So a charge of error in the normative sense is a charge that the person or group has beliefs that are unwarranted by empirical evidence, or undertakes various practices the results of which do not mean or deliver what is claimed for them.²¹ In this sense, a claim of error may be a profoundly serious moral claim, especially if the alleged errors are taken as truth by various social actors in a way that injures a human or a group of humans.

However, there is another way the term "error" is commonly used, especially in the setting of science,²² and most especially in the

19. The block quote is from D. Michael Risinger, *Whose Fault?—Daubert, the NAS Report, and the Notion of Error in Forensic Science*, 38 *FORDHAM URB. L. J.* 519, 524–27 (2010). In this and other block quotes used in this article, footnotes have been retained and renumbered to be in sequence with the rest of this article. In some cases, a footnote has been amended to insert the referenced source in order to deal with what was a jump cite in the original, or otherwise to clarify material set out earlier in the article from which the quotation was drawn.

20. See D. Michael Risinger, *The Irrelevance, and Central Relevance, of the Boundary Between Science and Non-Science in the Evaluation of Expert Witness Reliability*, 52 *VILL. L. REV.* 679, 705–06 (2007).

21. Normative theories of error have the most difficulty with inadvertent actions that result in unintended bad consequences. Theories of negligence are essentially attempts to bring a normative theory of error to bear on such actions.

22. The entire frame of reference for the error taxonomy set out in the leading error studies work, JAMES REASON, *HUMAN ERROR* (1990), is in general a version of the non-normative frame of science, although, since Reason is concerned not only with defining and understanding types of error, but also with designing systems with an eye to taking steps to prevent errors, normative judgments must be reimported at the system design level to determine the proper prescribed responses to errors necessary to minimize them. See *id.* at 194–95 (distinguishing between "errors" simpliciter and "violations"). In its modern cradle period, scientific thought did not always separate the objective and normative approaches to error. See, e.g., Francis Bacon's famous discussion of "idols" of the mind as sources of error in 1 FRANCIS BACON, *NOVUM*

science of testing (the most relevant scientific discipline for our purposes, as we shall see), where there is no normative charge at all, at least in the primary setting in which the word “error” is invoked. This approach to “error” only applies to results, and it is a purely post hoc judgment. In this context, a decision based upon a belief that something is the case, or even that it is most likely to be the case, is an error if it turns out wrong, no matter how strong the warrant for the belief. On the other hand, a decision that turns out right because the hoped-for result obtains, is generally not an error.²³ A set of four hypotheticals will illustrate the contrast between the two notions of error.

Assume that, in a basic five-card draw poker game, a player draws to an inside straight believing this to be a good strategy.²⁴ He does not fill the straight. Was the decision to draw an error? Clearly from the objective point of view the answer must be yes. The result was not the one intended or desired or hoped for, and it redounded to the player’s detriment in the player’s own terms. But what about the normative perspective? Here the answer is likely to be yes also. One of the first general rules one learns in regard to playing poker is that it is a bad gamble to draw to an inside straight. The chances of filling it are remote, and the hand without the fill is nearly worthless. So by the standards of intelligent poker play, assuming the object is to win, the belief that drawing to an inside straight is an intelligent strategy, whether based on ignorance or mistaken belief that could have been avoided by reflection or education, or on a belief in the special instinctive hunch powers of the player in spite of knowing the odds, is an error, and the act based on

ORGANUM, at pts. 1–68 (1620), *reprinted in* 30 GREAT BOOKS OF THE WESTERN WORLD 107–16 (Robert M. Hutchins ed. 1952). The primary initial locus for the objective concept of error appears to have been precipitated by contemplation of measurement error. See EDWARD G. BORING, *A HISTORY OF EXPERIMENTAL PSYCHOLOGY* 134–35 (1929). From there it expanded to cover statistical error in all sorts of settings, *see, e.g.*, YARDLEY BEERS, *INTRODUCTION TO THE THEORY OF ERROR* (1957) (observational and statistical errors in physics), including the standard empirical testing literature represented by Chapter 4 of the NAS Report. *See also*, Brad J. Bickerstaff, *Comparing Diagnostic Tests: A Simple Graphic Using Likelihood Ratios*, 19 *STAT. MED.* 649 (2000).

23. Theories of probability and counterfactual prediction can be brought to bear to characterize both intentional and negligent acts that turn out well as errors in an objective sense, but we need not pursue this for the purposes of this paper.

24. An “inside straight” hand is any hand with mixed suits having four out of five numbers for a straight (2, 3, 5, 6, for example), but missing a number, not on the end of the series (which could be completed by any card bearing the number on either end), but a number in the middle, which can thus be completed by drawing only a card with one specific number on it. As noted in the text, one of the first heuristic rules that a beginning poker player learns is “never draw to an inside straight,” and in fact this was a part of the tagline exchange upon parting between gambling brothers Bret and Bart Maverick in the original *Maverick* TV series. (“Never hold a kicker”; “Never draw to an inside straight.”) (Original memory on file with author).

that belief is an error. And this would be so whether the player filled the straight or not (which will happen a little more than once every twelve attempts).²⁵ A belief that this is a good strategy is still an error, and a lucky shot even knowing the odds doesn't change the arguments concerning the nature of the action (decision), since this is always analyzed *ex ante*. The "no harm, no foul" principle does not apply to the determination of normative error.

But in the objective framework, the filled straights would not count as "errors" at all, since this is always analyzed *ex post* merely by reference to desired results.

Now consider this further homely hypothetical. A person notices that the (donated) prize at a church lottery is worth more than the total cost of the one thousand lottery tickets to be sold. He has arrived after only one ticket has been sold. He buys the other 999 tickets. The only ticket he has not bought is the winner. Was it an error to buy the 999 tickets?

From the objective perspective, the ticket purchase would be an error, since the decision came out wrong, albeit against long odds. Again, the classification as error rests on comparing actual outcomes to desired outcomes *ex post*. But from the normative perspective the decision was not erroneous, since the belief that motivated the action was fully justified, and provided an adequate ground for the action based upon it.²⁶

As a general proposition, the objective approach to error is the approach most commonly adopted in the sciences, and particularly in regard to approaches to hypothesis testing and the design and evaluation of tests in scientific contexts, whereas the normative framework is the approach most commonly embraced in most other areas of endeavor.²⁷

It is important to note here that, while hypothesis testing and other settings use the objective theory of error in regard to the characterization of raw test results, at another level they are often concerned with the notion of randomness to the point of near obsession. The

25. Four cards out of the remaining forty-seven unknown cards will fill, so drawing one of the four will happen about every 11.75 attempts.

26. We are, of course, bypassing any discussion of the deeper normative question, the moral question about whether it is proper to take advantage of one's superior knowledge of the item donated (and thus not subject to the direct knowledge of the church authorities regarding value) in order to deprive the charity of the excess marginal value of the prize above the total realized by selling all the tickets.

27. In this way the concept of error tracks a usage pattern similar to that of the notion of "bias," one factor that can account for objective errors in the results of various processes. For a discussion of the normatively neutral concept of bias in psychology. See Risinger et al., *supra* note 1, at 10-12.

whole point of designating various conventional levels of significance is to rule out, to a designated degree of certainty, the counter-hypothesis that the “accurate” results obtained are merely an artifact of random correlation. So even in the science traditions most embracing an objective theory for the characterization of error and the accuracy of individual results, there is a realization that random results that are in some sense accurate are of no value in judging the hypothesis under the test.²⁸

Whether this account of what led Professor Clark astray in regard to double blind administration of lineups is completely accurate or not,²⁹ he was not necessarily wrong to say that other proposed reforms to eyewitness identification may involve losses of accurate selections that are more appropriately characterized as costs to be weighed against the benefits of the proposed change of practice. With that said, let us examine the other core proposal most often made for improvement of eyewitness identification procedures, sequential presentation of the lineup members to the witness instead of simultaneous presentation.

IV. SEQUENTIAL ADMINISTRATION OF EYEWITNESS IDENTIFICATION PROCEDURES AND “COSTS”

First, I will provide a primer on some basics about memory for faces. Humans are not cameras,³⁰ but they are actually pretty good at internalizing the subliminal indicators that separate one face from another and allow for very reliable identification under some circumstances (but not others).³¹ And even when we are relatively reliable identifiers, unless we are dealing with someone with whom we have had relatively long term social interaction (our children or spouses, for instance), our memories tend to be more generic and less individually diagnostic than we might assume, and this becomes even more true over time.³² In addition, since many of the cues relied on are either

28. See David H. Kaye and David A. Freedman, *Statistical Proof*, ch. 6 in 1 DAVID L. FAIGMAN, MICHAEL J. SAKS, JOSEPH SANDERS AND EDWARD K. CHENG, *MODERN SCIENTIFIC EVIDENCE* 357–59 (2009).

29. Clark, *supra* note 7, at 254 (explaining the embrace of the standard testing model, adopting the ex post, objective definition in which a hit is a hit, period, is especially clear in his response to the other papers in the PERSPECTIVE ON PSYCHOLOGICAL SCIENCE collection).

30. See generally ELIZABETH F. LOFTUS, JAMES M. DOYLE & JENNIFER E. DYSART, *EYEWITNESS TESTIMONY, CIVIL AND CRIMINAL* 88–89 (5th ed. 2013).

31. See generally *id.* at 83–112.

32. See generally IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 55–70, (Committee on Scientific Approaches to Understanding and Maximizing the Validity and

not explicitly conscious, or are not subject to well-standardized description (more like tastes than colors, although colors can share some of the same problems),³³ the word descriptors given by witnesses in describing a person tend to correspond to fairly general and fuzzy characteristics, like height, weight, hair color, perceived race, etc. It's not that these descriptors are useless. They certainly provide information that, within limits, can narrow the perpetrator candidate population. But they are generic. So our question is, given the general limits of descriptors provided by a witness, when if ever does giving the witness an explicit opportunity to make frankly relative comparisons of a number of faces simultaneously result in more epistemically warranted identifications, and when does it not? This question will in turn feed back upon: (1) the issue of the definition of a perpetrator candidate population; (2) the issue of how to estimate the size of that perpetrator candidate set; (3) the issue of defining the base rate of confusably similar faces within that set; (4) the issue of how to define the task being performed when a witness is making selections from a line-up; (5) and one final important issue that is often overlooked, how the target perpetrator candidate came to be a target candidate in the first place. Finally, what will be said about relative judgment must always be taken in the context of the centrality of comparison in any exercise in eyewitness identification, because at the very least, the candidate face is being compared to the details of the memory of the perpetrator face. It is not comparison per se that is the questioned variable, but relative comparison amongst a designated set of candidates.

Perhaps a good place to begin would be to discuss the ultimate non-lineup, that is, the show-up, where a single candidate is presented to a witness for identification (or not). Here, the danger is the inherently suggestive nature of the show-up encounter—it suggests good reason to believe that the displayed individual is a good perpetrator candidate independent of the memory of the witness. Again, the questions break down into *ex ante* and *ex post* questions. *Ex post*, many of the selections by witnesses in show-up conditions will be accurate, and many of the identifications would have been made in a proper lineup. But once again, it is impossible to separate the margi-

Reliability of Eyewitness Identification in Law Enforcement and the Courts, National Academy of Sciences, 2014) (hereinafter "Identifying the Culprit").

33. See generally Rob Nicholson, *Am I Blue?: In Pursuit of an Exotic Bloom a Botanist Falls Down the Rabbit Hole of Color Theory*, 121 NAT. HIST., no. 5, p. 18 (June 2013).

nal group of identifications that would not have been made but for the inherent suggestiveness of the show-up from the group that would have been selected independent of the suggestion, and would therefore presumably have been selected from a proper line-up. Therefore, rejecting all show-up identifications *ex post* involves costs. But again, if show-ups were outlawed *ex ante*, no epistemically defensible identifications would be lost, because only the subset that resulted from the suggestiveness of the context would be lost. The fact that show-up identifications may lead to exclusion except under limited circumstances³⁴ is a strong incentive to present witnesses with properly constructed line-ups. The practical contours of the issues involved in show-ups map on to those involved in blind administration pretty directly. From what has been said before in regard to blinding, it seems clear that the requirement of a line-up procedure would be properly characterized as cost-free *vis-à-vis* show-ups, even though some coincidental accurate selections may be lost. These would be merely echoes of the circumstances of suggestion, not of the witness's knowledge.

When we move from a show-up to a lineup, we eliminate the inherent suggestiveness of the single individual display by introducing other faces as candidates for selection beside the "target" of the identification process. But by doing this we necessarily introduce another variable. The witness not only compares the faces to their memory of the perpetrator, they compare them to each other, and this introduces a tendency to make selections based on relative judgment, that is, to select the person in the displayed group that is closest to the memory of the perpetrator.³⁵ The implications of this will be explored below, but for now, it is enough to say that some component of that relative judgment will be present in regard to *any* lineup, no matter how the display is achieved. The potential of such relative judgment selection is a cost (if I may use the term) of using multiple candidates in order to avoid the suggestiveness of the show-up. All that can be done by selecting one means of display over another is to reduce the impact of that relative judgment factor. The only way to eliminate it completely would be to return to a regime of show-ups.

34. See *Manson v. Brathwaite*, 432 U.S. 98, 111 (1977) (noting that such circumstances include purportedly "confirmatory" identifications and exigent circumstances, usually involving a search and pursuit in the immediate aftermath of a crime). The many variations are beyond the scope of this Article. Suffice it to say that the same dangers are often present in such situations.

35. See generally *LOFTUS*, *supra* note 30.

What the witness gets in a non-sequential presentation is an extended opportunity for direct comparison between the lineup members, targets and fillers alike. In sequential presentation, the opportunity for such extended comparison and its attendant enhanced relative judgment is not present. But here is the hard part. One can assume for present purposes that when the true perpetrator is present, the relative judgment raises the likelihood of selecting him, since by definition he will usually resemble the memory of the perpetrator better than the fillers.³⁶ When the true perpetrator is not present, then relative judgment will still raise the likelihood of picking someone, which, by chance (assuming a six unit lineup) will be the innocent target one time in six.³⁷ If we declared *ex ante* that all line-ups had to be done with sequential display, then we would lose some troubling picks of the innocent target, but we would also lose some accurate picks induced by relative judgment. Should relative judgment be classified as a task-irrelevant factor like administrator cuing, or is it in some sense task-relevant? If the former, then the issues in regard to sequential presentation are the same as for blind administration and for show-ups. If there is something of epistemic value going on in relative judgment, then arguably there is a cost to adopting sequential presentation, although the avoidance of relatively random innocent target picks when the true perpetrator is not in the lineup is still arguably worth the associated cost.

In approaching these questions, we will start on two ends of a spectrum and work toward the middle. The first situation we will consider will be one in which there is reason to believe that the rapist in a stranger rape came from the medium-height, mid-20s, white male population of Manhattan. That is all that is known at first. The police select a photograph at random from mugshots that meet those criteria, check to make sure the person was not in prison at the time of the

36. This does not mean that there will always be wide "trait distance" (as one might say) between members of the lineup. A large number of variables can affect the perception of such trait distance, including the notorious variable of cross-racial identification. See LOFTUS, DOYLE & DYSART, *supra* note 30, at 105–06. Nor does it mean that in real life such perpetrator-present line-ups will always generate selections, or that there will never be foil selections. What is given in the text models a theoretic optimum performance based on the isolation of the variables given.

37. This is the theoretic expected performance based on the assumptions given. In reality, there will probably be fewer innocent target selections than one for every six displays, due to a significant number of cases resulting in no selection at all when the target is not the perpetrator and there is no cueing. But the ratio given should hold relatively well in the set of cases where selections are in fact made, at least as a theoretic upper bound.

rape, and put it in a six-person photo spread with five other mugshots of persons meeting the same general criteria but who were in prison at the time of the rape, and they then show it to the victim witness.

At this point you are probably calling for a time out. This is totally unrealistic, you might say. Who would undertake such a process? Even without the issue of comparative judgment, the likelihood that you will have a target who resembles the witness's memory of the perpetrator, much less the actual perpetrator himself, is low, and with comparative judgment, each "foil" is just as likely to do so, which means that some unspecified member of the foil set is five times more likely to have such a resemblance than is the target. It would take a huge amount of time to get a positive result, and it would be unlikely to be reliable, and the relative judgment variable could easily render it even more unreliable.

I will say more on this in a minute, but first I would like to point out that we do actually do something like this in many investigations (if by "we," we include law enforcement). In fact, we do something arguably worse, because we do not use predetermined foils. I am referring to the common practice of having witnesses trawl through mugshot books or digitized mugshot databases to see if they recognize the perpetrator. Such a process is nothing more than a giant line-up, except it violates the general rule that line-up procedures should include known innocent foils. So what is the best that can be said of a selection from such a trawl? The best that can be said is that the witness will select the first person seen that resembles their memory of the perpetrator closely enough to be confusably similar. How likely is that to be the true perpetrator? It depends on the random match probability for a human face under such circumstances. And what is that? The short answer is, we don't know. This important question has not drawn much notice, and the applicable empirical evidence is sparse. However, on common sense grounds, it is not likely to be a truly tiny probability, and there are a number of DNA exonerations where the wrongfully convicted person was first brought into the case through such a process.³⁸ More to the point for our purposes, it seems likely that the effect of seeing many obviously wrong faces is not likely

38. See, e.g., Scott Fappiano, INNOCENCE PROJECT (Feb. 5, 2015, 10:04 AM), http://www.innocenceproject.org/Content/Scott_Fappiano.php; A.B. Butler, INNOCENCE PROJECT (Feb. 5, 2015, 10:04 AM), http://www.innocenceproject.org/Content/AB_Butler.php; Robert Clark, INNOCENCE PROJECT (Feb. 5, 2015, 10:04 AM), http://www.innocenceproject.org/Content/Robert_Clark.php; Alan Newton, INNOCENCE PROJECT (Feb. 5, 2015, 10:04 AM), http://www.innocenceproject.org/Content/Alan_Newton.php.

to make a person's "match window" smaller, but rather to expand it, and this is consistent with a lot of empirical research that does exist.

At the other end of the spectrum, consider the effect of comparative evaluation on the epistemic warrant for a selection in what is sometimes referred to as a "closed set" or "closed population."³⁹ First off, the terms "closed set" and "closed population" are misleading, because in actuality, all populations are closed, having an upper limit of the population of the earth at the relevant time. It is not closed-ness that defines these situations, but the fact that the perpetrator candidate number is small, and all the members of the perpetrator candidate set are known and individually examinable.⁴⁰ In such a situation, does comparative information derived from seeing the entire set together add epistemic strength to a selection? The answer here is yes, with an asterisk.

The "yes" part is obvious. Ordinarily, unless someone is dealing with a population of same-sex siblings of about the same age, the differences in appearance will often be wide, and confusable faces unlikely in such a constrained population. However, the problem with such a line-up is the problem of fillers, or rather, the lack of them. Under such circumstances, any selection will count as an accurate selection, with no way to tell if the witness is just making a selection to be cooperative, or for other reasons of their own. This kind of situation has come to be known as a "Duke Lacrosse" lineup, after the notorious case in which the identification procedures fit this model.⁴¹ What may be gained in epistemic warrant for a good and honest witness from comparison under such circumstances may be more than lost by the infallibility of the test (due to the lack of any foils) when the witness is not so good or not so honest.⁴²

Just as trawl searches through mugbooks present special dangers on one end of our spectrum, Duke Lacrosse lineups present special dangers on the other. But for present purposes, we can simply say that while comparative information makes an honest and competent

39. See Simon A. Cole, *Individualization Is Dead, Long Live Individualization!: Reforms of Reporting Practices for Fingerprint Analysis in the United States*, 13 *Law, Probability and Risk* 117, 130–31 (2014).

40. *Id.* at 131 n.9.

41. See Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identification: A Fundamental Failure to "Do Justice,"* 76 *FORDHAM L. REV.* 1337, 1377–79 (2007).

42. This is an especial problem when the perpetrator is inevitably in the examined set if a crime was committed, but it is not so obvious that a crime was even committed at all. This was the case with the original Duke Lacrosse lineup.

witness better in the “closed set” case, in the circumstances involved in the normal lineup, such comparison information plays no similar role. To think that it does is to assume the target in such a lineup is always and inevitably guilty. But if we knew that in any way that counted, we wouldn’t need the lineup in the first place.

To clarify this point, let us return to the oft-overlooked question of how a suspect put into a lineup came to be the target in that lineup to begin with.⁴³ There are three important possibilities here: The suspect became a suspect because of membership in a known closed set; the suspect became a suspect because of an alleged facial resemblance to the perpetrator; or the suspect became a suspect as the result of other information (a tip, a known grudge against the victim, etc.). The first kind of case may present a case where direct comparison aids reliable identification under some circumstances, but the situation must be handled with extreme care because of the problem already noted with the lack of foils. The second situation creates a terrible problem because, guilty or innocent, the suspect singled out in such a way will virtually always present the witness viewing the lineup with an obvious “most likely” choice, a circumstance only worsened by comparison and relative judgments.⁴⁴ But what about the third kind of case, which is presumably the most common situation in which eye-witnesses are exposed to lineups. Actually, we have already dealt with the realities of that situation above. Recall what was said about the effects of relative judgment under such a circumstance. Relative judgment raises the likelihood of a target pick if the target is the true perpetrator, but also raises the likelihood of a target pick if the target is in fact not the perpetrator. How does this affect the distribution of target selections between false positives and false negatives? It arguably makes selection of a true perpetrator when a true perpetrator is the target much more likely than the selection of an innocent target, because the true perpetrator will always resemble the true perpetrator most, but when the true perpetrator is not in the lineup because the target is innocent, the innocent target will resemble the true perpetrator most (instead of a filler doing so) only one time in six. This could still result in more innocents being selected by the marginal impact

43. See Wells, *Systemic Reforms*, *supra* note 4, at 635–39.

44. *People v. Maldonado*, 97 N.Y.2d 522, 527 (2002) (“[W]hen a sketch forms the basis for an arrest, one thing is certain: if the sketch is right it will resemble the person accused, and if the sketch is wrong it will resemble the person accused. Indeed, the accused—innocent or guilty—is *supposed* to look like the sketch.”).

than true perpetrators, but only if innocents were put in lineups as targets more than six times more often than true perpetrators (thus establishing a skewed base rate upon which to apply the test statistic). And since, by its impact on the diagnosticity of the test in internal terms, the marginal rate of selection influenced by direct comparison promotes the selection of true perpetrators more than the selection of innocents over the course of runs, one can argue that, unlike a random process which merely mimics base rates, the loss of such comparative information entails a true cost because the direct comparison renders the test more diagnostic.

But as we have seen in the bite-mark example above, sometimes information that renders the output of a process more “diagnostic” or accurate in the objective sense is still properly ruled out of bounds (and the lost positive results not counted as costs), because the information that results in the increased diagnosticity is not task-specific, that is, relevant to the task which we believe the human performing the process is undertaking, or should be seen as undertaking, or should be limited to. Assuming this to be the case, does this have any bearing on the “costs” issue in depriving eyewitnesses of direct comparison information by adopting sequential administration?

On the one hand, this is not a situation, like the situation involved in providing an expert with domain-irrelevant information, where a juror can perform the task of evaluating the epistemic weight of the challenged information as well as the expert. Here the witness has privileged access to information on the appearance of the perpetrator (the witness’s memory), so only the witness can perform any allowed comparison task. On the other hand, at least in the case of targets who have been selected only because of a claimed resemblance to the perpetrator, the dangers of relative judgment are so great that simultaneous presentation ought never to be undertaken. Indeed, there is a strong argument that a target brought into the case in this way ought never to be subjected to an ordinary lineup, and certainly not until after the further investigation develops more particularized evidence of guilt. The dangers of generating multiple, apparently independent, identifications that are nothing but an echo of the original selection are just too great. Here is what my wife and I wrote about this recently:

The problem is compounded when there is more than one witness. The witnesses are all put to work looking at the mugshots independently. When one witness makes a selection, the rest are often told

to stop, and the selection of the first witness is put in a photo spread, which is then administered to the other witnesses. Since the first witness selected their first-encountered similar photograph based on resemblance to the perpetrator, it is hardly surprising when some or all of the other witnesses pick the candidate out on that basis. Now the initial trawl search has become the hidden springboard to multiple identifications which superficially appear independent, but which no one can be confident are not merely unrecognized echoes of the original improperly terminated trawl search. . . .

Suspects whose photos are identified only through a trawl of mugshots should *never* be put in a standard photospread. Instead, each witness should be asked to go through the same large set of photos as the original selector, with the same instructions. If a photo selection is made by a witness, a strong argument can be made that the witness should not thereafter be involved in a corporeal lineup involving the same person, since the selection in the line-up is highly likely to merely be an echo of the photo selection, although there could arguably be some confirmatory or disconfirmatory value to the corporeal lineup. In any event, however, under no circumstances should the trier of fact be given the results of a corporeal lineup generated by virtue of a mugshot trawl without the knowledge of the way the person was originally selected, its weaknesses, and the likely high random match probability involved for the remembered face of a virtual stranger when performing such a mugshot viewing. Investigators should be trained in these weaknesses, and trained to resist the natural tendency to invest more in such a mugshot selection than rational reflection shows that it is worth.⁴⁵

One of the reasons we felt justified in taking such a strong position is that there seems no strong reason to believe that targets selected in this way are more likely than not to be the true perpetrator based on their selection alone, so that base rate arguments that might apply to ordinary lineups (and which I will address below) have little or no application in this context.

As for the other end of the spectrum (the limited and examinable perpetrator set situations), a stronger argument can be made that relative judgment is desirable. Even then, one should probably have as many fillers as candidates in the display, even if that results in a lineup population significantly larger than normal. In addition, perhaps even

45. D. Michael Risinger & Lesley C. Risinger, *Innocence Is Different: Taking Innocence into Account in Reforming Criminal Procedure*, 56 N.Y.L. SCH. L. REV. 869, 904–05 (2012).

in such a fully examinable perpetrator candidate population, sequential before simultaneous might clarify the strength of any resulting selection.

And finally, here is the hard issue. What, if anything, is lost that can fairly be counted as a cost when ordinary lineups are administered sequentially? As already noted, the very structure of the line-up, with its known target and its foils, even on the margin where explicit relative judgment makes a difference, seems to make the selection of a target who is the true perpetrator more likely than the selection of a target who is not the true perpetrator, all other things being equal. Thus it seems that the loss of this comparative information can rationally properly count as a cost. How much of a cost, and for what benefit? To answer that, we still have to deal with the effect of base rates.

Unlike the situation where a target is chosen to be put in a lineup merely on the basis of some judgment of physical resemblance to the perpetrator, the normal lineup situation involves putting the target into the lineup for other reasons bearing on a likelihood of guilt greater than a random draw from a large population, such as a tip, etc.⁴⁶ How often does such independent evidence result in the true perpetrator being in the lineup, and how often not? The answer is, we really don't know. There simply is no good empirical evidence on the issue.

This lack of good base rate evidence makes arguments about the relative costs and benefits of sequential presentation difficult to make with any clarity. Under the hypothetical conditions we assumed earlier, with an equal number of guilty and innocent targets in a hypothetical set of 120 lineups, and the best comparative selection always being made,⁴⁷ we would expect the ratio of guilty selections to innocent selections to be roughly 60 guilty to 10 innocent (all 60 guilty targets being selected, innocent targets being selected as "most resembling" one time in every six).⁴⁸ Given the power of eyewitness identi-

46. This can raise a real problem when the subject of the tip falls far outside the witness's previously given description. This makes the construction of a proper lineup a problem which is beyond the scope of the present piece to address. I will assume that the subject of the tip or other incriminating information is largely consistent with the descriptors of appearance already given which would be relevant to constructing a proper lineup.

47. In real life, witnesses fail to make *any* identifications in about half of all line-ups. See Gary L. Wells, Nancy K. Steblay & Jennifer E. Dysart, *A Test of the Simultaneous vs. Sequential Lineup Methods: An Initial Report of the AJS Eyewitness Identification Field Studies*, AM. JUDICATURE SOC., 2011 (graph, 12), available at AJS.org.

48. This mind experiment would yield an obvious filler selection in 50 out of 120 cases, around 42%. Archival studies of real cases generally yield a filler selection rate of around 20%.

fication in the minds of juries, that would suggest the potential of one conviction of an innocent for every six accurate convictions gained, but this analysis does not take into account the effect of other likely applicable subcategories. Some cases that rely solely on the identification of a single witness ought not, and perhaps would not, be taken by the jury as sufficient to convict in the context of the individual case, given the non-existence or weakness of any other evidence throwing suspicion on the target. Some lost identifications will occur in cases with strong enough other evidence to result in a conviction of the true perpetrator in spite of the lost identification. And I believe that most people's instinct is probably that police investigatory procedures are good enough to assume that more people placed in lineups as targets are true perpetrators than not, but we really have no strong empirical reason to believe this.

Finally, there is one way of approaching this problem, analogous to our approach to the set of losses in blind administration, which tends to undermine the epistemic value of the selections lost as the result of sequential presentation globally, although how much is again not clear. As I heard the distinguished eyewitness researcher Jennifer Dysart remark recently, "Identification is supposed to be about recognition, not about figuring things out."⁴⁹ The point of this is that the most reliable set of identifications are those that result from immediate recognition, and are not based on reflecting about a candidate's eyes, nose, hair, etc., as discrete components—"figuring out" whether the face is the face to be identified.⁵⁰ While both kinds of identification are based on comparison, they are based on different comparative processes. No immediate recognition identifications should be lost by adopting sequential presentation, so that the marginal set lost

LOFTUS, DOYLE & DYSART, *supra* note 30, at 10. One might argue that this showed a ratio of true perpetrator target line-ups to innocent target lineups of 2 to 1, but there are too many other factors in play to make such a simple extrapolation. For instance, it should be noted that this 20% rate may be for all lineups studied, not just the set where selections were made. As noted in the immediately preceding footnote, witnesses fail to make any selection about half the time. A recent study showed a filler selection rate in lineups where selections were made between 30 and 42% (30% for sequential presentation, 42% for non-sequential presentation), but there is no data table in the publication allowing one to derive a combined percentage. See Wells, Steblay and Dysart, *supra* note 47, graphs at 13.

49. Program, Harnessing Psychological Research to Reform the Criminal Justice Process, Association of American Law Schools Annual Meeting (Jan. 5, 2014) (author's notes).

50. See David Dunning & Scott Perretta, *Automaticity and Eyewitness Accuracy: A 10- to 12-Second Rule for Distinguishing Accurate from Inaccurate Positive Identifications*, 87 J. APPLIED PSYCHOL. 951 (2002). But see David F. Ross et al., *When Accurate and Inaccurate Eyewitnesses Look the Same: A Limitation of the 'Pop-Out' Effect and the 10- to 12-Second Rule*, 21 APPLIED COGNITIVE PSYCHOL. 677 (2007).

by forgoing simultaneous presentation and electing sequential presentation is largely comprised of the epistemically weaker results of “figuring it out.” But the epistemic status of the lost selections is not clear, diluting the application of the “coincidental match” argument that is so powerful in regard to selections lost by blind administration. So each lost selection may not be worthless, rendering the loss cost free, but it is difficult to say what the losses are worth compared to the unequivocal gain of not selecting innocents who are coincidentally the closest match to the memory. What does seem proper is to apply some discount factor to the absolute value of selections lost, although again, the proper size of that discount is not clear.

V. COSTS, BENEFITS, AND THE MORAL OBLIGATIONS OF REFORM

Given all this, and given all the base-rate and substructuring problems, perhaps the best way to approach a preliminary evaluation of the costs and benefits is to stick with the 6-1 figure, which seems a reasonable theoretic upper bound, with the understanding that some more particular accounting would probably yield a figure significantly below that. But accepting the upper bound for the sake of argument, would forgoing six convictions of the guilty to save one person from being convicted when innocent be the right thing to do? Clearly our jurisprudential traditions tell us that convictions of the innocent are worse than parallel acquittals of the guilty, but how much worse? I have addressed this issue before, in the last half of an article the first half of which was devoted to showing through good empirical data a 3-5% actual innocence rate in capital rape-murders in the 1980's, and by extension, in analogous crimes even when DNA is not relevant, not available, or not tested as part of the original trial. I then turned to the implications of such an innocence rate in those classes of cases to which it might be said to apply. After exploring a number of hypothetical situations that might precipitate differing moral intuitions on the subject, I concluded:

[H]ere is where I believe the moral rubber meets the road for every citizen, and especially every police officer, prosecutor, judge, or legislator. Even if we might not be horrified at a 3.3% factual wrongful conviction rate in the abstract, I take it we would all admit that if we could identify the wrongfully convicted cost-free, we

would be morally obliged to release them.⁵¹ And if there were reforms that could be made to the system that would better filter out the innocent to begin with, with no associated cost, we would be obliged to make those reforms. Beyond this, I take it we would also be morally obliged to take such actions if the costs were not prohibitive. How are we to approach the question of what constitutes a prohibitive cost? I will set aside issues of monetary cost, not because they might not be relevant under some circumstances, but because monetary costs and other social costs, primarily reduced efficiency in punishing the guilty, are incommensurate, and thus not easily discussed together. Instead, I will concentrate on actions that do not empty the prisons, but instead exonerate one factually innocent person at the cost of the release of, or failure to convict, some number of the guilty.

Here the perceptive reader will hear an echo of the Blackstone ratio [the famous quotation from Blackstone that it is better that ten guilty go free than that one innocent be convicted],⁵² but not a ratio to be used as an image to attempt to norm judges and jurors to a high decision threshold for individual cases. Rather, it is to be used as an approach to taking reformatory actions that will improve the performance of a system-in-being at the margins.

Let us go back to some of our earlier hypotheticals. Take the one that is probably the least morally compelling: the case of the thousand convicted burglars or drug dealers where thirty-three of the convicts are truly factually innocent of the crime they were convicted of, but had long records of similar crimes. Again, I take it as given that if we could identify the wrongly convicted thirty-three accurately, we would be morally obliged to release them. And, more importantly, I take it this would be true if the numbers were thirty-three out of a hundred thousand, even though the general performance of the system *en grosse* would probably strike one as very good . . .

51. See Daniel R. Williams, *The Futile Debate over the Morality of the Death Penalty: A Critical Commentary on the Steiker and Sunstein-Vermuele Debate*, 10 LEWIS & CLARK L. REV. 625, 626–29 (distinguishing approaches to moral argument). Here, of course, is the transition between eliciting responses and claiming that the facts and their associated responses suggest certain moral obligations. These suggestions do not assume that the reader is a consequentialist, a deontologist, or a pragmatic mix. Under virtually any approach to morality except one based on pure revelation, moral positions must be informed by human reality, and hence reasoning in the light of facts.

52. See Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 174–75 (1997) (noting a history of the ratio image and its many variants, including Blackstone's); Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65, 72 (2008) (providing an exposition of why the Blackstone ratio, or any other ratio image for moral certainty, cannot be operationalized in a mathematically literal sense).

Now assume that we cannot identify the 33 exactly, but we know of a criterion that can be applied (call it the “unsafe verdict” criterion⁵³) which will pretty certainly allow us to release 30 of the 33 if we release the 90 people to whom the criterion applies. In other words, we would have to release 60 guilty people (out of 965) in order to insure the release of 30 of the 33 factually innocent. Is the cost of releasing the 60 guilty too high to save the 30 factually innocent? What are the costs? The accelerated recidivism costs of the 60 guilty, plus any diminution in deterrence coming from the 6% reduction in the rate of punishing the guilty. There are of course, no good ways to measure those marginal effects, but it seems to me that at two to one, the taking of those steps (by reforming the system to allow judges to apply an unsafe verdict criterion to the results of cases, post-trial, perhaps) has a very strong moral claim. Perhaps the moral claim would be even stronger for the death sentence situations.

Hence I offer what I will call the Reform Ratio:

Any wrongful conviction that can be corrected or avoided without allowing more than one or two perpetrators of similar crimes to escape, ought to be corrected or avoided; in addition, system alterations (reforms, if you will) that there is good reason to believe will accomplish this ought to be embraced.

You will note that in setting out the first principle, I have been very conservative in my “Reform Ratio.” For reforms working a marginal saving in wrongful convictions, I only propose doing them when an innocent saved by the reform is counterbalanced by no more than one or two wrongful acquittals or reversals. However, in my second principle, I have placed a rather low standard of proof concerning the effects of reform onto the proponents, and a correspondingly high standard of proof for those opposing such reform. Reforms that are undertaken that have counterproductive effects can be undone when this becomes apparent from life. But reforms that are never undertaken based on remotely likely and conjectural effects invoked by opponents who simply are satisfied with the current way of doing things because it generates conviction rates they like, at costs they are currently perfectly happy with (since the costs don’t fall on them), are simply never undertaken.⁵⁴

I am still relatively satisfied with the general exposition here, but I would now qualify it in one important respect. I still think the re-

53. See D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1313–21 (2008) (explaining the concept of the “unsafe verdict”).

54. Risinger, *supra* note 9, at 794–96.

form ratio formulation given above is appropriate in gauging the minimum risks that should be run and the costs borne in regard to post-conviction procedures and results. However, I believe I was wrong to try to set up a reform ratio for both post-trial attempts at exoneration and for reforms upstream from the trial (ex post and ex ante issues again). While I think, as Judge Henry Friendly thought, that society's interest in the finality of criminal litigation is weak when serious questions of actual innocence are raised,⁵⁵ it would be feckless to think that post-conviction standards will not be driven by a stronger desire not to release those already convicted than would be the case when the decision is to forgo convictions in the first place, and in the post-trial context an innocence ratio of two or three to one would be an improvement over the current terms used in discussing the issue of post-conviction relief. Pre-trial reforms, on the other hand, ought arguably to proceed on a more generous valuation of the innocence protection of the changes, in light of the presumption of innocence and the standard of proof beyond reasonable doubt. In this way, I believe adoption of sequential display is fully justified as a matter of policy on the assumptions set out above, although I am sure that some of my good friends like Larry Laudan and Ron Allen might beg to differ.⁵⁶ But by my moral accounting, sequential presentation still presents a situation where less information leads to better results (the key word being the morally normative "better" in this context, not necessarily more accurate).

Be that as it may, Professor Clark is not wrong to call on all sides for a frank discussion of such issues. I would only add that I believe the discussion must take the substructuring of contexts and effects more specifically into account that has been done heretofore. Be that also as it may, however, I fear that Professor Clark's general overbroad approach to what can be fairly counted as a cost of reform, as illustrated by his position on blind administration of lineups, will obscure the more tenable parts of his message.

55. See Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 149–50 (1970).

56. See, e.g., Allen & Laudan, *supra* note 52; D. Michael Risinger, *Tragic Consequences of Deadly Dilemmas: A Response to Allen and Laudan*, 40 SETON HALL L. REV. 991 (2010). It is worth noting that the recent NAS report on eyewitness identification ("Identifying the Culprit," *supra* note 32) recommends "double-blind" administration of identification procedures, *id.* at 104, 106–107, but takes no position on the advisability of sequential presentation, *id.* at 104–105.

VI. CONCLUSION: A PRACTICAL TAKEAWAY FOR
CRIMINAL DEFENSE LAWYERS

Finally, there is a word of caution for practitioners. When raising a due process challenge to the fairness of current methods of conducting eyewitness identification procedures, the temptation is to go for broke, and to raise the failure of the procedure employed in the client's individual case to employ the whole panoply of recommended reforms. Sometimes such an approach can be successful.⁵⁷ But I believe that more often than not, this approach risks dragging down the virtually unassailable unfairness involved in non-blind administration of such procedures with the complications involved in the debate over sequential presentation and other aspects of such reform recommendations. Such combined attacks require huge resources to be done right,⁵⁸ and without such an investment of resources, run the risk of making bad law globally. Concentrating a challenge on blind administration raises both the likelihood of success for the individual client, and the likelihood of accomplishing the single most important eyewitness identification reform in the process.

57. *See generally* State v. Henderson, 208 N.J. 208 (2011); State v. Lawson, 352 Or. 724 (2012).

58. *Henderson*, 208 N.J. at 230, 273; *Lawson*, 352 Or. at 759–60 (involving elaborate attacks deploying multiple experts, supported in part by the Innocence Project and making an explicit decision to pour into the case whatever resources the effort demanded, in regard to both lawyer time and expert resources).

APPENDIX

Summary of the responses to Clark, Steven E. Clark, Costs and Benefits of Eyewitness Identification Reform: Psychological Science and Public Policy, 7 PERSPECTIVES PSYCHOL. SCI. 238 (2012) in the same issue of that journal.

As noted in footnote 11 in the main text, the bulk of the issue of *Perspectives on Psychological Science* in which Dr. Clark's article appears is a kind of print symposium devoted to his ideas, pro and con, and may safely be taken as typical of the positions of most researchers on the issue of costs.

Two articles by eminent researchers in the field pushed back hard on Clark's approach to costs in rhetorically different ways. Eryn Newman and Elizabeth Loftus adopted a satirical approach reflecting a hypothetical cross examination modeled on a 1909 article written by John Henry Wigmore in response to the criticisms of the trial from the perspective of psychological research put forth by Hugo Munsterberg. They focus almost exclusively on double blind administration, but the form of the article does not lend itself to fine-grained analysis, beyond characterizing some non-blind selections as "lucky guesses" and non-blind hits as "not genuine hits," "crummy hits," and "not legitimate." See Eryn J. Newman & Elizabeth F. Loftus, *Clarkian Logic on Trial*, 7 PERSPECTIVES ON PSYCH. SCI. 260, 261–62 (2012).

The article by Gary Wells, Nancy Steblay, and Jennifer Dysart is more orthodox in form, and much more extensive. See Gary L. Wells, Nancy K. Steblay & Jennifer E. Dysart, *Eyewitness Identification Reforms: Are Suggestiveness-Induced Hits and Guesses True Hits?*, 7 PERSPECTIVES ON PSYCH. SCI. 264 (2012). The authors resist the implication that most psychologists, including themselves (as opposed to media sources and others) have ever taken an unsophisticated approach to the notion of costs in regard to proposed eyewitness identification reforms, or made global claims concerning reforms being "cost free." They specifically ask the question: "Are all reductions in hit rates true costs?" But while the answer given by implication is "no," the article does not directly take on the task of defining the notion of costs very clearly, beyond saying that the identifications lost as the result of most reforms are not "legitimate" identifications. They assert that any identification that would not have been made but for "bias" is not legitimate, and therefore cannot be counted as an "unmitigated cost" if lost through the adoption of reforms reducing

such bias. *Id.* at 265. They then examine each major proposed reform to eyewitness identification procedures, and come to the conclusion in regard to double blind administration that all lost identifications would have been “illegitimate.” Thus they appear to take the position that this reform is cost free, but they eschew the term (though I do not). They arrive at a different and less clear result in regard to sequential administration, for reasons somewhat related to those set out in this article. Perhaps this paper may fairly be read as a reflection on their positions, and on the positions I have previously taken in my own work.

The eminent philosopher of science Larry Laudan, who has turned his attention in recent years to critiques of the way in which the legal system deals with information and standards of proof, supplies a bravo for Professor Clark’s emphasis on identifying the costs of reform as well as the benefits, without explicitly dealing with the criteria by which lost selections resulting from reforms can legitimately count as costs. *See generally* Larry Laudan, *Eyewitness Identifications: One More Lesson in the Costs of Excluding Relevant Evidence*, 7 *PERSPECTIVES ON PSYCH. SCI.* 272 (2012).

Dr. Clark responds to the assembled critics pretty much by doubling down on the notion that all lost identifications must be counted as costs, without very specifically addressing the differences in the arguments that might be made on the subject of costs in the context of each separate proposed reform. *See generally* Steven E. Clark, *Eyewitness Identification Reform: Data, Theory and Due Process*, 7 *PERSPECTIVES ON PSYCH. SCI.* 279 (2012).

One final note. One article in the suite of articles revolving around the initial Clark paper does not address the issue of costs and benefits except in passing, but suggests that the law should adopt receiver operating characteristic analysis as the official mode of interpreting lineup results. *See generally* John T. Wixted & Laura Mickes, *The Field of Eyewitness Memory Should Abandon Probative Value and Embrace Receiver Operating Characteristic Analysis*, 7 *PERSPECTIVES ON PSYCH. SCI.* 275 (2012).

Pernicious Inferences: Double Counting and Perception and Evaluation Biases in Criminal Cases

ROBERT P. MOSTELLER*

INTRODUCTION

As DNA exonerations and the innocence movement have brought attention to convictions of innocent defendants, I have been troubled by a case that I handled years ago as a defense attorney.¹ Although I did not notice it at the time, its features are paradigmatic of the problems in criminal investigations that convict the innocent.

My client, who was charged with armed robbery, had been arrested several weeks after the crime was committed as a result of photo identification by several witnesses. His case was dismissed and another individual was charged when the identifying witnesses, who had been called to the prosecutor's office in connection with grand jury proceedings, corrected their error. They each informed the prosecutor that the wrong man had been arrested and that the actual perpetrator was seated in the large witness area where they had waited. My client had a past arrest and conviction record for crimes similar to the charged offense, and I understood that record and his generally similar appearance to the perpetrator generated police interest in him.²

In his piece for this symposium, Professor Risinger notes the particular dangers of identification in simultaneous photo arrays using mug books or similarly large databases founded on nothing more than

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1. I worked for the Washington, D.C. Public Defender Service for seven years from 1976 until 1983.

2. See Robert P. Mosteller, *Why Defense Attorneys Cannot, but Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1, 23–26 (2010) (describing this case).

similar appearance to the perpetrator.³ Where the pictures are of perpetrators of recent robberies, which are reasonable for a robbery squad to use, what happened in my client's case is predictable. The array or mug book contains no single target and no clear fillers.⁴ If an identification is made of a person on the basis of appearance matching the witness's memory of the perpetrator and that person has no iron-clad disqualifier (such as confinement in prison when the crime occurred), he becomes not only a suspect but may become a defendant with two items supporting his prosecution. The identification is the first item of incriminating evidence against the suspect. When viewed without knowledge of the criterion used to select the photos shown to the witness, the identification appears to be corroborated by a second independent incriminating fact—the person selected on the basis of physical appearance has a prior record of like offenses. If that prior record includes a quite similar conviction, it may even be admissible at trial as “other crimes” evidence.⁵

Clearly these two pieces of evidence are not independent of each other but connected: the individual's prior record put him in the photo display. Indeed, each of those in the display shares the same incriminating characteristic. Anyone and everyone who might be selected from such photographs would have this second strike against them. However, witnesses and jurors will often effectively perceive the prior record as unique to that person.⁶ As described in Part I, this double counting or failure to appreciate the co-dependence of evidence arises in a number of different contexts. It may also be involved when informants, particularly “jail house” informants, provide fabricated incriminating statements that they claim were made by the suspect, and a

3. See D. Michael Risinger, *At What Cost?: Blind Testing, Eyewitness Identification, and What Can and Cannot Be Counted as a Cost of Reducing Information Available for Decision*, 58 *HOW. L.J.* (forthcoming 2015). See D. Michael Risinger & Lesley C. Risinger, *Innocence is Different: Taking Innocence into Account in Reforming Criminal Procedure*, 56 *N.Y.L. SCH. L. REV.* 869, 900–05 (2012), for a more complete description of the dangers of “trawl searches” among photos.

4. A “filler” or “foil” is an individual who has been effectively eliminated as a potential suspect and therefore whose selection will yield information that the witness was in error. See Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to “Do Justice,”* 76 *FORDHAM L. REV.* 1337, 1394–95 (2007) (discussing the role of fillers in providing information about the weakness of an inaccurate eyewitness).

5. See *FED. R. EVID.* 404(b) (permitting admission of “other crimes” evidence if a feature of that other event goes to prove a fact, such as identification, instead of showing only the perpetrator's bad character).

6. See James S. Liebman et al., *The Evidence of Things Not Seen: Non-Matches as Evidence of Innocence*, 98 *IOWA L. REV.* 577, 659 (2013) (discussing the representative and simulation bias and the uniqueness fallacy); see also *infra* note 103.

form of double counting is generally part of the story when false confessions are secured from defendants.

A number of processes operate to produce and exacerbate the misvaluation of evidence. One is contamination.⁷ For example, information about an identified suspect's prior criminal record can filter back to the eyewitnesses, which will generally increase their level of certainty in their identifications. It goes forward to other investigators and prosecutors, influencing their evaluation of other evidence.

Subtle psychological influences both contribute to the generation of these pieces of evidence and enhance their perceived strength with jurors.⁸ A number of heuristic devices operate on the actors in the process. Several come together under what is often termed "tunnel vision," which affects investigators and prosecutors causing them to focus attention on this suspect largely to the exclusion of others and of alternative scenarios besides his or her guilt.⁹ These pernicious inferences can even affect defense counsel's perceptions. Others impede accurate analysis of the evidence by jurors.

This paper highlights the importance of being sensitive to the potential co-dependence of the types of evidence that are frequently encountered in criminal cases. The impact of such evidence on investigators, prosecutors, and jurors is highlighted and the critical need to ensure independence of proof and proper evaluation is developed.

I. FREQUENTLY ENCOUNTERED FORMULAS FOR DEPENDENT EVIDENCE

In this part, I describe a group of common investigative scenarios where pieces of evidence that appear independent and therefore highly probative are instead co-dependent because of features such as their common origin. Four are examined: (A) eyewitness identifications, (B) informants, (C) feedback information leading to greater certainty, and (D) false confessions.

7. See *infra* Part I.C.1.

8. See *infra* Part III.

9. See *infra* note 106 and accompanying text.

A. Classic Unappreciated Double and Triple Count in Identification Evidence

A standard technique used in situations where the police have no lead that points to a particular suspect but the victim or victims observed the perpetrator is to have those who witnessed the crime look at a set of pictures of individuals who have been arrested or convicted for similar offenses.¹⁰ When this process is done with a large data set, Professor Risinger describes it a form of a “trawl search.”¹¹ In other contexts, researchers have found that with large databases, the number of individuals sharing a set of characteristics is predictable, and numerous individuals will possess the identified characteristics as simply a matter of chance.¹²

For the typical unanticipated crime committed against the victim by a stranger, witnesses generally observe the perpetrator for a relatively brief period under poor viewing conditions. When such witnesses are looking at photographs for a person who matches their memory of the perpetrator, we do not know how frequently they will make an erroneous selection because a picture of someone with sufficiently similar features is present among the photos.¹³ If the witness

10. See Risinger & Risinger, *supra* note 3 at 900 (describing the routine practice of having witnesses examine mugshot collections).

11. See *id.*; see also *id.* at 900–03 (describing nature of “trawl search” or “data dredging”).

12. See *id.* at 902. When the characteristics are relatively rare, possession of all of them is significant. See *id.* at 903. However, because these characteristics were not observed in an individual picked for unrelated reasons, and therefore effectively at random, but instead were methodically selected from a large population by a search directed specifically at them, their significance, if not understood properly, will be exaggerated. See *id.* at 902. While being picked as the result of a “trawl” search is significant to the extent the characteristic is rare, treating a pick as the equivalent of guilt would be to succumb in essence to the “prosecutor’s fallacy.” See William C. Thompson & Edward L. Schumann, *Interpretation of Statistical Evidence in Criminal Trials: The Prosecutor’s Fallacy and the Defense Attorney’s Fallacy*, 11 LAW & HUM. BEHAV. 167, 169–71 (1987); see also *McDaniel v. Brown*, 558 U.S. 120, 128 (2010) (“[I]f a juror is told the probability a member of the general population would share the same DNA is 1 in 10,000 (random match probability), and he takes that to mean there is only a 1 in 10,000 chance that someone other than the defendant is the source of the DNA found at the crime scene (source probability), then he has succumbed to the prosecutor’s fallacy.”).

13. See Risinger, *supra* note 3. How often a selection of someone in the photos displayed is made depends on a number of factors including the circumstances in which the photos were shown—whether they are displayed in a small group shown simultaneously under circumstances that the witness might interpret indicated that the police believed a likely perpetrator was present or are presented in a large seemingly unlimited data set, which by its nature indicated no narrowing of the field. See Richard Gonzalez, *et al.*, *Response Bias in Lineups and Showups*, 64 J. PERSONALITY & SOC. PSYCHOL. 525, 536 (1993) (finding that witnesses see their task in a simultaneous lineup to be picking the person who most resembles the perpetrator and that real-world pressure from police to pick someone at later-stage lineup can be considerable); Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL’Y & L. 765, 769 (1995) (recounting the importance and effective-

views a sufficiently large number of photos, the witness should make a pick whether it results from chance resemblance of an uninvolved individual to the perpetrator or because the person picked is the perpetrator. Indeed, if the data set is large enough, multiple matches should be expected. However, as Risinger points out, a witness is typically allowed to stop the search after making a selection and may be asked to look at a corporeal lineup containing the person whose picture was picked, and if there are other witnesses, they may be shown the first witness's selection placed in a photo spread.¹⁴

Professor Risinger notes that two problems occur here. First, the initial witness has not been asked to examine the entire data set or a suitably large number to determine if others would be similarly identified as they predictably would be given the likelihood of random resemblance when large numbers of photos are shown.¹⁵ Second, identifications by other witnesses may be a reflection of the first witness's selection of a random individual who rather closely resembles the perpetrator, but these secondary picks are considered to be independent corroboration.¹⁶

With selections from large unscreened databases, the post-identification investigation of any individual whose photo was picked will exclude a substantial percentage because of disqualifying factors, such as height, age, location (alibi), physical disability, and changes in physical appearance that are either inconsistent with other information known about the perpetrator or make commission of the crime impossible or highly unlikely. Thus, the selection that is not otherwise disqualified in the subsequent police investigation has substantial evidentiary value—value that is independent of the prior record and the fact of the individual's rough resemblance to the perpetrator. However, the failure of the subsequent investigation to exclude the

ness of a cautionary instruction to the witnesses that the suspect might not be present in the lineup to reduce the tendency of a witness simply to pick the person looking most like the suspect); Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 627 (documenting that a sequential display of photos as compared with a simultaneous presentation produces somewhat lower number of identifications but the ones obtained are more accurate); Gary L. Wells & John W. Turtle, *Eyewitness Identification: The Importance of Lineup Models*, 99 PSYCHOL. BULL. 320, 328 (1986) (recognizing that at some point increasing the number of individuals in a lineup may produce a type of interference that negatively affects selection rates). See also *infra* note 20.

14. See Risinger & Risinger, *supra* note 3, at 904.

15. See *id.*

16. See *id.*

suspect as a possible perpetrator is only a partial protection and is not equivalent to positive proof.

The problem with this evidence given the “independent” value supplied by the post-selection investigation is not that the evidence has no evidentiary value but that such value will be over-valued. This over-valuation occurs for a number of reasons. One is that the resulting suspect is concrete for the jury while the existence of the possibility of the witness picking others who would also have not been excluded by further investigation is hypothetical and probabilistic.¹⁷ In addition, once the pick has been made, human memory processes involved in identification often enhance the power of any selection that was made. The face of the person picked can replace that of the perpetrator in the witness’s memory through processes of source confusion and/or unconscious transference.¹⁸ Also, the witness’s certainty of his or her pick is likely to increase in strength over time.¹⁹

When the photos shown are small in number and based on recent or similar crimes, the danger of a random pick should be less likely because the chance that a face in that smaller array would be close enough in appearance to be confused with the witness’s memory of the perpetrator is small. However, the witness is likely to feel greater pressure to pick someone in the circumstance of an apparently carefully selected small group of photos given the normal human response of wanting to accomplish the apparent task.²⁰ If the perpetrator is not

17. See Liebman, et al., *supra* note 6, at 629–30 (describing research that indicates concrete identification evidence is “vivid” or “representational,” which suggests a single reality, “narrative” by being linked to a relatively coherent story, “univocal” in pointing in a single direction, and “unconditional;” all of which help the identification evidence to be more powerfully received than the pallid effect of statistical evidence that is abstract and suggests multiple possibilities).

18. See Nancy K. Steblay, *Maintaining Reliability of Eyewitness Evidence: After the Lineup*, 42 CREIGHTON L. REV. 643, 648–49 (2009) (describing general operation of several common cognitive errors that affect memory in connection with viewing and picking pictures of suspects).

19. In general, witnesses tend to increase in certainty of their selections over time even without contamination that gives them information corroborating their pick as the correct one. See *infra* Part II.C.2.

20. The likelihood of the witness making a selection from the array even if the perpetrator is not present will depend on a number of factors, including whether it is presented simultaneously or sequentially and whether the administrator suggests that suspected perpetrator is present in the array or cautions the witness that the perpetrator may not be present. Sequential displays and providing a warning that the perpetrator may not be in the array are part of the widely recommended eyewitness identification procedures protocols to reduce erroneous selections. See, e.g., DEP’T OF LAW & PUB. SAFETY, OFFICE OF THE ATT’Y GEN. OF N.J., ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES (2001), available at <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf>; N.C. ACTUAL INNOCENCE COMM’N, RECOMMENDATIONS FOR EYEWITNESS IDENTIFICATION

in the array and photos have been selected to all match the descriptive information provided by the witness, the probability of a mistaken pick as to each individual should be evenly distributed across the array so that the prospect of the suspect being picked erroneously by chance in a six photo array is one-sixth multiplied by the percentage of the time any selection is made. If independent evidence linking the suspect to the crime is limited, the likelihood of an erroneous identification based on similar appearance to the perpetrator—even if only a few percentage points—is likely unreasonably high given the power the evidence produced will have on the jury.

Creating photo arrays from those who committed similar crimes and share the basic physical characteristics of the perpetrator is an appropriate investigative tool, but any resulting identification is only a lead. Without strong independent evidence, beyond photo selection and the past criminal activity, the latter being a characteristic of all those in the photo display, there is a substantial danger of an erroneous conviction resulting.

B. The Creation of Double Counting through Informants

Informant testimony, while apparently independent evidence, may be highly dependent on a similar “usual suspects” chain of events as operates with the selection of photographs for eyewitness identifications. Informants may provide confirming admissions allegedly made by the suspect if the informant learns that his police contact has focused on that particular individual as the likely perpetrator. The informant will often recognize that providing an incriminating statement from the target of suspicion item would be welcomed since it fits his police contact’s working theory of the investigation and will attempt to fashion a credible fabrication of such a statement.

In an earlier article, I focused on the dangers of informants, including describing the work of notorious “jail house” informants who fabricated false confessions.²¹ As I wrote that article, I intellectually understood the danger of the fabricating jailhouse informant, but I didn’t really appreciate the magnitude of the threat until I learned

(2003), available at http://www.innocenceproject.org/docs/NC_Innocence_Commission_Identification.html.

21. See Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing “First Drafts,” Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 OHIO ST. J. CRIM. L. 519, 550–51, 554 (2009) (describing “jail house” informants as a class and discussing the notorious case of Leslie Vernon White who falsely testified in numerous cases in Los Angeles).

that I had encountered an informant who was a master in deception. During the same period of time when this informant was providing information regarding one of my clients in one homicide case, he fabricated a confession that resulted in the erroneous conviction of an innocent man, Donald Gates, for an unrelated murder.

In December 2009, after 28 years in prison for a rape and murder in Washington D.C., Donald Gates was freed and declared innocent because of advances in DNA testing that demonstrated he was not the source of semen found in the victim's body.²² He had been convicted based on several items of evidence, including the significant role and testimony of Gerald Mack Smith, an informant.²³ Gates had in fact committed an attempted robbery of a young woman in the same part of Rock Creek Park where a little over two weeks later a young woman was murdered.²⁴ The earlier attempted robbery was admitted as "other crimes" evidence.²⁵ Gates was convicted on the basis of that evidence along with the testimony of Smith, the informant, regarding his confession to murder and flawed microscopic hair analysis.²⁶

Smith had been a paid informant for the police department's robbery squad for the better part of a year before his involvement in the *Gates* case.²⁷ He received over \$1,300 for his tip about Gates' incriminating statement to him regarding a murder he had committed, his identification of Gates at a lineup, and his testimony in the grand jury.²⁸ Smith, the informant, testified that Gates told him that he recently attempted to rob, raped, and then murdered a young woman in the park.²⁹ For his cooperation in the *Gates* case and in two other "serious cases" pending in the District of Columbia courts, the gov-

22. See Keith L. Alexander, *DNA Sets Free D.C. Man Imprisoned in 1981 Student Slaying*, WASH. POST, Dec. 16, 2009, at B01; Keith Alexander, *Man Imprisoned 28 Years Cleared in Death of College Student*, WASH. POST, Dec. 19, 2009, at B04; see also Robert P. Mosteller, *Failures of the Prosecutor's Duty to "Do Justice" in Extraordinary and Ordinary Miscarriages of Justice*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 408, 415-16 (Erik Luna & Marianne L. Wade, eds. 2012).

23. See *Gates v. United States*, 481 A.2d 120, 122 (D.C. 1984) (describing Smith's role in identifying Gates before and at trial and testifying as to Gates' statement that he tried to rob, raped, and shot "a young, pretty white girl" in a park).

24. See *id.* at 122-23.

25. *Id.*

26. *Id.* at 122-23, 125.

27. Motion to Vacate Convictions on the Grounds of Actual Innocence at 18, *United States v. Donald Eugene Gates*, Crim. No. F-6602-81 (D.C. Super. Ct. Dec. 8, 2009) [hereinafter *Gates* Motion to Vacate].

28. *Id.*

29. See *Gates*, 481 A.2d at 122.

ernment also agreed to dismiss a D.C. case as well as three other cases against Smith in Maryland.³⁰

Gates denied making any such statement.³¹ Indeed, he insisted both in conversations with his lawyer before trial and in a statement to the court at the time of sentencing that he did not know the informant³² and had never even seen him before the trial.³³ In his statement at sentencing, Gates proclaimed his total innocence of the charges.³⁴

Since the court determined, based on the DNA evidence, that Gates was innocent, the informant obviously lied about Gates' confession of murder to him. While I was interested in the Gates exoneration when it made the news and spent some time examining its facts, I did not recognize the name of the informant, Gerald Mack Smith. My memory was refreshed, however, when Gates' lawyer, Sandra Levick, contacted me some time later regarding Smith's testimony in the prosecution of Gregory Britt, one of my clients while I was in practice. In the *Gates* case, Smith testified he was cooperating with the prosecution in two other serious cases, and one of those was the homicide trial of Mr. Britt and his co-defendant for the shotgun murder of a neighborhood grocery operator that occurred during a robbery of the store.³⁵

As in the *Gates* case, Smith testified that he had a conversation with my client, albeit this time while the two men were confined in jail, in which Mr. Britt admitted his commission of the robbery and that he fired a shotgun into the victim's chest.³⁶ I recognized at the time that Smith was a special witness both in being the source of highly incriminating admissions from defendants in multiple homicide cases, which was unprecedented in my experience in the D.C. courts, and in his intelligence and skill as a witness.

He had impressed me on the stand by his performance in withstanding cross-examination. Through painstaking investigation, I had developed a list of fabrications he had made in a number of court appearances, including the current trial. I considered the examination

30. See Gates Motion to Vacate, *supra* note 27, at 18.

31. *Id.* at 19; see also Gates Motion to Vacate, *supra* note 27, app. 7 at 2.

32. See Gates Motion to Vacate, *supra* note 27, at 19; see also Gates Motion to Vacate, *supra* note 27, app. 7 at 2.

33. See Gates Motion to Vacate, *supra* note 27, at 20 (quoting from sentencing statement by Gates).

34. See *id.* ("I didn't kill her. I never saw her.")

35. See *Jones v. United States*, 483 A.2d 1149, 1151, 1157 n.8 (1984).

36. *Id.*

to have been among my most proficient technically, but it seemed to fall flat. Smith took the lies I confronted him with in stride, freely admitting many, deftly diminishing a few, and presenting it all in a way that contrasted those minor admitted falsehoods with his adherence to the certainty of the key facts regarding my client's incriminating admissions to him.

I had not easily assumed that Smith simply fabricated my client's confession to him out of whole cloth, as we now know he did in the *Gates* case. However, having seen the proof that he had invented Gates' confession, I wondered if he had done the same in the Britt case. In distinction to the *Gates* case, he and Britt had previously been in the same federal youth corrections facility together, and they were together in the D.C. jail when the alleged confession had occurred. Smith's precision on a few details and the understated brutality of what he described,³⁷ as in *Gates*,³⁸ gave the alleged confession a ring of verisimilitude to me.³⁹ Nothing has affirmatively demonstrated my former client's innocence. But the brush with an exposed fabricator has made me understand in a direct way the incredible danger posed by highly motivated and adept informants.

In the *Gates* case, where we know a clear falsification occurred, we can easily envision a scenario that resulted in multiple apparently independent items of incriminating evidence emanating from a single, corrupted source. Gates had committed a somewhat similar crime—an attempted robbery of another young woman—nearby. That placed him among the “likely suspects.” Smith was already a paid informant for the robbery division. An inquiry from a detective to Smith as to whether the informant had heard anything about Gates being involved in the recent murder of the female college student in the park and, if not, to be alert for talk about the crime on the street was all Smith would have needed. He would know how to fashion a plausible incriminating statement attributed to Gates. Shoddy, and potentially fabricated, hair comparison evidence provided additional erroneous

37. Although inadmissible because stated by the co-defendant to him rather than by my client, his description of the motivation for the shooting—annoyance that the cash register held only a small amount of money—had a chilling effect. Memory of author from discovery.

38. Similarly, in *Gates*, he described killing the victim “after reflection on the consequences of his actions.” *Gates v. United States*, 481 A.2d 120, 122 (D.C. 1984).

39. When Smith's falsification of the alleged confession by Gates came to light, it could do my former client no good. He had died in prison at the age of 43. See *Find an Inmate*, Fed. Bureau of Prisons, <http://www.bop.gov/inmateloc/> (select “BOP Register Number” from “Type of Number” drop down menu, then type “12546-083” and click “search”) (last visited Oct. 22, 2014) (indicating that Gregory A. Britt died in prison on December 9, 1999).

corroboration, and investigator and prosecution tunnel vision dismissed a mismatch with serology evidence.⁴⁰

With an informant who was given such strong incentives, the police and prosecution should be wary. However, research involving erroneous convictions has suggested that instead police and prosecutors rely on false informant testimony to obtain a conviction when they have weak facts,⁴¹ which usually means they lack the solid, independent proof it would take to verify the informant's claims. In such situations of need and lacking independent proof to refute or corroborate an informant's apparently critical testimony, one can anticipate the real possibility of a prosecutor, even fully recognizing the danger of being misled by the highly incentivized witness, being duped by a particularly skillful and persuasive informant.⁴²

We see from the examples of eyewitness identification and informant evidence that an erroneous sense of independence leading to double counting of evidence is a problem in different forms of proof. It is produced in a variety of ways. With eyewitness identification, discussed above, the errors are usually unintentional.⁴³ Informants also produce highly dependent evidence as a result of evidence distortion,⁴⁴ but for the informant, if not the police investigator, the improper linkage to other information is quite intentional.

40. See *Gates*, 481 A.2d at 125–27 (explaining mismatch by concept of “scrambling” of blood type by the action of bacteria). The phenomenon of false evidence biasing exculpatory, indeed exonerating, serology evidence that should have ended the prosecution is not unique to the prosecution of Donald Gates. In the prosecution of Barry Laughman, who confessed but was later proven innocent, the state forensic chemist proposed four unproven theories to explain away same type of serological evidence. See Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCHOLOGIST 431, 436, 438 (2012) (describing the effect of confessions to bias forensic results and illustrating the problem with this example).

41. See Jon B. Gould et al., *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471, 502 (2014).

42. See *id.*

43. See Jeffrey Chinn & Ashley Ratliff, “*I was put out the door with nothing*”—Addressing the Needs of the Exonerated under a Refugee Model, 45 CAL. W. L. REV. 405, 411 (2009) (recounting findings that identification error that is usually unintentional is the most common factor associated with wrongful convictions).

44. Michael and Lesley Risinger more broadly refer to this danger as witness “malleation.” See Risinger & Risinger, *supra* note 3, at 907.

C. The Feedback Loop: Co-Dependence through Increases in Witness Certainty

1. The Pernicious Inference from an Eyewitness Feedback Loop in Operation

A North Carolina death penalty case shows how identification and informant issues can potentially intertwine. Elrico Fowler was convicted and sentenced to death for murder during a robbery.⁴⁵ He challenged the identification procedures in his case.⁴⁶ On January 8, 1996, eight days after the crime, police investigators showed a witness an array of six color photographs, which included a two-month old photo of the defendant.⁴⁷ The witness was able to make no identification.⁴⁸ Six days later, the witness was shown another array of six photographs, which included an arrest photo of the defendant taken two days earlier.⁴⁹ The defendant was the only person appearing in both arrays. Nevertheless, the witness was unable to make a certain identification, telling the investigator only that the defendant “most closely resembled” the perpetrator.⁵⁰

An officer then told the witness that the man whose photograph he had selected had “admitted that he killed someone” and then “went to buy some drugs.”⁵¹ That information apparently came from a police informant.⁵² After this confirmation of his tentative selection, the witness then positively identified the defendant in an identification procedure that made selection incredibly easy. The witness picked out Fowler, who is black and wearing an orange jail jump suit, as the gunman, while he was seated at a table in the front of the courtroom between his two lawyers, who were both white.⁵³

45. See *State v. Fowler*, 548 S.E.2d 684, 684 (N.C. 2001) (affirming the conviction and death sentence).

46. The Fourth Circuit denied defendant’s habeas corpus challenge to admission of the identification evidence. See *Fowler v. Joyner*, 753 F.3d 446, 450 (4th Cir. 2014).

47. Brief of Petitioner-Appellant at 14, *Elrico Darnell Fowler v. Carlton Joyner*, 753 F.3d 446 (No. 13-4) (4th Cir. 2014).

48. *Id.*

49. *Id.* at 15.

50. *Id.*

51. Information regarding the investigator’s confirmation of the accuracy of the identification was not made available to the defense at trial and did not come to light until post-conviction proceedings. *Id.* at 16.

52. In his testimony, the eyewitness did not specifically identify who told the police of the defendant’s incriminating statement, but the only inculpatory statements allegedly made by the defendant were made to informants. See Brief of Petitioner-Appellant, *supra* note 48, at 33.

53. In addition to the features described in the text that made the in-court identification a simple proposition, at least as far as the eyewitness knowing who the defendant was, the prosecutor also told the eyewitness that he would be seated in the courtroom between his two defense

In identifying the defendant, the witness stated that he was “confident” that the defendant was the person he saw on the night of the murder in the hotel lobby after he heard a gunshot.⁵⁴ At trial he again asserted his certainty of the identification, and indeed, as he left the witness stand, he stated to the defendant: “I hope you fry man; I really do.”⁵⁵ The information regarding the investigator’s confirmation of the accuracy of the identification was not made available to the defense at trial and did not come to light until post-conviction proceedings.⁵⁶

In the case, the jury was presented with two apparently independent sources of incrimination—two pieces of “big” evidence: the defendant’s confession of guilt and the witness’s unequivocal identification of him as the perpetrator. The latter, however, was not independent of the former. The confession corroborated the witness’s uncertain identification, which as a matter of human experience likely made the witness more confident of the identification thereafter. Moreover, the tainting of the identification process by information regarding the confession was not known to the defense until after the trial was completed so it could not be presented to the jury to correct their view of the pieces of evidence being independent.

Although the corroborating incriminating evidence was not from an informant, feedback to identification witnesses has been documented in other cases. A similar pattern was discovered in the case of Carlos DeLuna after his execution for the murder of a female store clerk. In this case, a witness made a cross-racial identification of DeLuna as a single suspect at a show-up identification handcuffed in the back of a police car.⁵⁷ The witness indicated an inability to identify Latinos, DeLuna’s ethnicity, and stated that his seventy percent sure identification would have been only fifty-fifty if the police had not told him before the identification that they found DeLuna hiding under a pickup truck.⁵⁸ As in the *Fowler* case, the information about the corroborating feedback regarding other incriminating evidence

attorneys. See *Fowler*, 754 F.3d at 455. The difference between the race of the defendant and of his defense attorneys does not appear in the opinions but was provided to the author by habeas counsel.

54. Brief of Petitioner-Appellant Brief, *supra* note 47, at 17.

55. *Id.* at 42.

56. *Id.* at 27, 28 & n.8.

57. See Liebman et al., *supra* note 17 at 581–82, 652.

58. *Id.* at 652; see also James S. Liebman et al., *Los Tocayos Carlos*, 43 COLUM. HUM. RTS. L. REV. 711, 765 (2012) (describing in more detail the *DeLuna* case and its re-investigation).

being given to the identification witness was not unearthed until long after the trial.⁵⁹

2. Lessons from Eyewitness Identification Research

In the *Fowler* and *DeLuna* cases, the witnesses' identifications in fact became stronger after the improper feedback of investigative information. It would appear reasonable as a matter of common sense and an inference from these cases that the witnesses' stronger claims regarding the certainty of their initial identifications resulted from the feedback regarding other incriminating information, which confirmed the accuracy of those earlier identifications.

A substantial body of eyewitness identification research shows precisely this cause and effect.⁶⁰ The research documents that the feedback of confirming information has multiple pernicious effects on evidence through the operation of the malleable human memory of perception.⁶¹ A study by Professors Gary Wells and Amy Bradfield showed a number of notable effects from simple confirmation of the witness' selection.⁶² In this study, participants were first shown a grainy surveillance video of a crime being committed and then were asked to make a lineup identification.⁶³ Although the lineup did not contain the perpetrator, all the participants made an identification, which meant that all the identifications were mistaken. One randomly assigned group was given the simple feedback immediately after the identification, "Good, you identified the actual suspect."⁶⁴ Those in the control group were told nothing about the accuracy of the picks.⁶⁵

The results of the study showed that the confirming feedback affected a variety of measures. Those receiving this feedback were more certain of the accuracy of their identifications as compared with the control group. The group receiving the confirming feedback

59. See Liebman et al., *supra* note 6 at 652 (describing this information as having been discovered through investigation after the defendant's execution).

60. See Amy Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859 (2006) (describing meta-analysis of twenty experimental tests regarding the distorting impact of confirming feedback in eyewitness cases).

61. See Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 626 (1998).

62. See Gary L. Wells & Amy Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360, 360 (1998).

63. *Id.* at 363.

64. *Id.*

65. *Id.*

changed their reports of how certain they were at the time of the initial identification. It also increased the group's evaluation of the quality of their view of the culprit, the clarity of their memory, and the ease of making identification. A second study examined whether participants recognized the impact of the feedback on their responses and demonstrated that they were generally unaware of its impact.⁶⁶

These results have been replicated in additional studies.⁶⁷ The studies showed further that the feedback altered the memory beyond their level of certainty at the time of the identification.⁶⁸ It altered the memory of the circumstances of the identification process—a better basis for making the identification, better clarity of the perpetrator's remembered image, greater ease and speed of the identification. Also, participants who received the feedback expressed belief that they had a better than average memory for strangers, and trust eye-witnesses in situations like their own.⁶⁹

Between the time of the initial out-of-court identification and the witness's testimony, corroborating feedback can come in various forms in addition to purposeful statements by investigators. Over the course of appearances at pretrial proceedings witnesses may talk to each other and seek out information about the case. The corroboration may be more subtle. The very fact that there are additional witnesses and that the prosecution continues to proceed may give assurance to an identifying witness that the case is built on additional incriminating evidence beyond their identification. Direct confirming feedback likely has a more powerful effect, but less direct support should also have a similar albeit a likely lesser impact in increasing witness confidence. The operation of direct feedback is particularly troubling, but all sources of corroboration are troubling because as Professor Gary Wells has put it “[c]onvictions of the innocent occur when eyewitness are both mistaken and certain.”⁷⁰

66. *See id.* at 364–72.

67. *See* Douglass & Steblay, *supra* note 60.

68. *See id.* at 863, 864–65 (describing multiple additional effects of confirming feedback, including a significantly better basis for making the identification, greater clarity of the perpetrator's image in their mind, greater ease of identification, and a better memory for strangers' faces).

69. *Id.* at 863.

70. Report of the Special Master at 34, *New Jersey v. Henderson*, 27 A.3d 872 (N.J. 2011) (No. A-8-08).

D. Confession Double Counting: Turning an Initial Erroneous Categorization into Evidence

As a general matter, when dealing with issues of guilt or innocence and explaining why mistakes may be made in prosecuting the innocent, two types of judgments by investigators and prosecutors are particularly important. First, how did the suspect get classified as the suspect, which in the case of an innocent individual means being misclassified? Second, why did that initial misclassification persist, often in the face of substantial contrary evidence? The second issue, which will be examined in Part III, is often explained by psychological constructs called heuristics through which humans simplify perception and analysis of uncertain situations. They make life manageable but unfortunately do lead to errors in reasoning.

In his work on false confessions, Professor Richard Leo has identified a set of sources of misclassification error derived from examination of documented false confession cases. He puts at the top of the list the widely held belief by police interrogators that they are able to reliably determine when a suspect is lying by various behaviors and mannerisms.⁷¹ Unfortunately, that deeply held position is in error.⁷² Misclassifications also occur as a result of an assortment of other errors in evaluating information associated with criminal investigative work, such as over-reliance on a profile of the suspect generated from examination of reports and evidence in the case,⁷³ hunches, and erroneous assumptions.⁷⁴ Finally, they result from the operation of ordinary flawed human decision-making strategies.⁷⁵

A key point in police interchanges with a witness/suspect occurs when, in the investigator's view, it moves from an interview to an interrogation. An interview is part of the investigation process in which

71. See Richard A. Leo, *Why Interrogation Contamination Occurs*, 11 OHIO ST. J. CRIM. L. 193, 203 (2013).

("The most salient [misclassification error] is that American police interrogators are trained to believe that they can reliably infer whether a suspect is lying or telling the truth from his body language, demeanor, mannerisms, gestures, attitudes, styles of speech and other verbal and non-verbal behaviors. The ideology that detectives are, or can become, highly accurate human lie detectors—whether through training or their on-the-job experience—is deeply ingrained in police culture. Yet it has been shown to be false by extensive social science research")

72. See *Id.*

73. See Richard A. Leo & Steven A. Drizin, *The Three Errors: Pathways to False Confession and Wrongful Conviction*, in POLICE INTERROGATION AND FALSE CONFESSION: CURRENT RESEARCH, PRACTICE AND POLICY RECOMMENDATIONS 9, 16–17 (Daniel Lassiter & Christian A. Meissner eds., 2010).

74. *Id.*; Leo, *supra* note 72, at 203, 214.

75. See Leo & Drizin, *supra* note 73, at 13–16; Leo, *supra* note 72, at 203–04.

the police are trying to determine whether the suspect is guilty. By contrast, an interrogation assumes guilt and is designed to move the suspect from denial to acknowledgement.⁷⁶ The initial classification error by the police in which the investigator effectively judges the individual guilty—changing how he is categorized and the nature of the interchange with him—is thus critical.

Once that line is crossed, the purpose of the interchange is not to learn the facts that the suspect knows but rather to confront the suspect with the evidence of his guilt in order to convince him that a confession is his best course of action. Here we see the importance of independence, but in a different form. The protection against false confessions in this situation, beyond restrictions on excessively coercive techniques, is based on independence of proof. It is the suspect's knowledge of non-public information about the crime that should be available only to investigators and to the perpetrator. Whatever led the police to treat the individual as a suspect is theoretically separate from the case specific information he knows that the interrogators will seek to obtain from him during their questioning. Sometimes this case specific information is a single unique fact but often it is a series of small details that in combination show independently the guilt of the confessor.

The problem, however, is that in many cases where a false confession has been documented, the suspect, according to police accounts, provided non-public information that should have been known only by a guilty person. Police are warned against contamination of the confession by providing the suspect with details withheld from the public record, but examination of wrongful conviction cases involving confessions by innocent defendants show that it unfortunately often occurs.⁷⁷ Professor Leo contends the contamination takes place because of a confirmation bias that affects the perception and actions of the interrogators.⁷⁸ Earlier in the process, investigators have concluded that the suspect is guilty and misinterpret denials by the inno-

76. See Leo, *supra* note 72, at 198–99.

77. The most detailed study of documented false confessions has been conducted by Professor Brandon Garrett, who examined records from the forty confessions in the first 250 DNA exoneration cases. See generally Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010).

78. See Leo, *supra* note 72, at 203–04. See generally Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998) (providing overall review of academic literature and discussing its prevalence).

cent as resistance to telling the truth by the guilty. As a result, the denial of guilt results in redoubling the interrogation effort.⁷⁹

One of the key techniques to overcoming resistance is to confront the suspect with the incriminating facts the police have against him. When the suspect's resistance is worn down, and he moves in the direction of acknowledging some involvement in the crime, lack of full acknowledgment and inconsistencies with the facts known by investigators is countered by confronting the suspect with facts inconsistent with the suspect's story. In this confrontation, the non-public facts can be conveyed directly or inferentially to the suspect. However, the police, convinced of the suspect's guilt and using the confrontation technique in their minds only to overcome resistance to the suspect acknowledging his guilt, do not perceive themselves as improperly providing details. As Professor Leo puts it, this contamination, which is almost inevitable once the interrogator has become firm with his misclassification of an innocent suspect as guilty, "may be intentional, but not knowing."⁸⁰

The resulting confession obtained by the police is usually an extremely powerful item of incriminating evidence.⁸¹ Professor James Liebman terms this evidence "big" evidence because of its impact on jurors.⁸² It derives its power from the general belief of jurors that ordinary individuals (i.e., those not mentally ill) do not falsely incriminate themselves in serious criminal activity absent physical coercion or mental illness.⁸³ Its weight is augmented by the apparently indepen-

79. See Leo, *supra* note 72, at 206.

80. *Id.* at 207.

81. Because the credibility of the police is greater than that of informants, confessions obtained during police interrogation are generally considered substantially more powerful evidence than testimony by informants that the defendant made similarly incriminating statements to them.

82. Eyewitness identification evidence is another category of highly powerful "big" evidence. See discussion *infra* note 107.

83. 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, 774 (2013) (referring to this belief structure as the myth of psychological interrogation, citing RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 196 (2008)).

The act of confessing falsely is viewed as irrational (if not nonsensical), self-destructive, and contrary both to common sense and to the way that self-interested humans are presumed to act. Moreover people tend to believe that they could not be made to falsely confess to a crime they did not commit, especially a serious felony, regardless of the psychological pressure that was brought to bear on them.

Id. "Juries are often so unwilling to believe that anyone would confess to a crime that he did not commit that they are likely to convict on the basis of the confession alone, even if no significant or credible evidence confirms the confession and considerable evidence disconfirms it." Richard A. Leo, *False Confessions: Causes, Consequences, & Solutions*, in *WRONGLY CONVICTED: PER-*

dent proof of guilt provided by the suspect's knowledge of non-public details of the crime.

When the process has gone awry and a false confession has been obtained, the supposed protection that non-public facts should provide becomes a source of increased harm instead. The interrogators' assertion that they withheld those facts creates the unjustified perception of corroboration when those facts are disclosed to the suspect, find their way into the confession, and "contaminate" it. Indeed, in many of the DNA exoneration cases involving false confessions, the prosecutors made the non-public facts contained in the confession the centerpiece of the government's case in their argument to the jury.⁸⁴ In one case where multiple non-public facts were contained in the confession, the prosecutor argued that it was "mathematically impossible" for the defendant to have guessed correctly all those facts.⁸⁵

Once contamination has occurred, avoiding its harm appears quite challenging. As described above, the investigators may not have perceived that contamination occurred and therefore vigorously deny the contamination. In the documented cases studied, defense counsel had little evidence to support their claims.⁸⁶ Professors Leo, Taslitz, and others argue that the only effective curative action is electronic recording of the full interrogation from start to finish and that in its absence "there is simply no way for third parties such as prosecutors, judge, juries, and appellate courts to detect whether police interrogators have contaminated" a false confession.⁸⁷

SPECTIVES ON FAILED JUSTICE 36, 46 (Saundra D. Westervelt & John A. Humphrey eds., 2001) (citation omitted).

84. See Garrett, *supra* note 77, at 1057, 1078 (noting that in the majority of the cases studied, prosecutors emphasized the non-public or corroborated facts in their closing arguments, and in roughly one-fourth of them the prosecutor specifically denied that law enforcement disclosed any facts to the defendant).

85. See *id.* at 1078 (quoting from the closing argument in the prosecution of Bruce Godschalk in Pennsylvania).

86. See *id.* at 1092 (finding arguments made by defense counsel about contamination in one third of the cases where the defendant testified but noting the arguments had little evidentiary support).

87. See Leo et al., *supra* note 83, at 799. Additional evidence to support or reject the confession can also be found by determining whether the suspect's statement led to discovery of new evidence previously unknown to the police and whether the suspect's narrative "fits" the crime scene facts and existing objective evidence. See *id.* at 805.

E. The Constant Threat of “Manufactured Corroboration” of Frail and Malleable Testimonial Evidence through Biasing Feedback Loops

In avoiding and curing the pernicious impact of double counting and the false impression of corroboration, finding predictable patterns and particularly dangerous situations may be helpful. Centering on false confessions, Professor Saul Kassin examined the first 240 DNA exonerations looking for the presence of bogus corroboration, which he terms “corroboration inflation.”⁸⁸ This occurs with some frequency when additional incriminating evidence is developed by investigators or witnesses proceeding from an initial erroneous piece of evidence such as a false confession or a mistaken eyewitness identification.⁸⁹ Kassin limited his examination to four categories of evidence—confessions, eyewitness identification, informants, and forensic science, which have a powerful impact on jurors.⁹⁰ He found that over half—131 of 240 of these cases—exhibited such corroboration inflation with at least two of the errors within these classes of evidence.⁹¹

Among these 240 cases, where rape and murder cases predominate because DNA evidence is often present and can be dispositive, Kassin found a pattern that erroneous eyewitness identification and false confessions were most likely to be the first type of bogus evidence generated in the investigation.⁹² Erroneous corroboration by informants and forensic evidence typically followed.⁹³

Kassin’s research is a part of the growing understanding of the dangers of co-dependent evidence to produce what appears to be strong, often apparently overwhelming, evidence of guilt. He suggests multiple mechanisms for the production of bogus or manufactured corroboration. After the initial error, subsequent judgments may be inadvertently tainted by mere knowledge of the initial (erroneous) incriminating evidence, or that evidence may motivate witnesses to pro-

88. See Kassin, *supra* note 40, at 440–41.

89. See Kassin et al., *Confessions that Corrupt: Evidence from DNA Exoneration Case Files*, 23 PSYCHOL. SCI. 41, 44, 46 (2012).

90. See *id.* at 43; *infra* note 107 and accompanying text (describing big evidence that includes confessions, eyewitness identifications, and certain types of forensic evidence).

91. See Kassin et al., *supra* note 89, at 42.

92. See *id.* at 43 tbl.2.

93. See *id.* Kassin predicted that confessions would occur first and therefore taint other forms of evidence. That hypothesis was confirmed with an initial false confessions producing profound effect. See *id.* at 43.

vide helpful evidence, or it may bias subsequent investigative efforts.⁹⁴ While not all evidence is equally subject to manipulation, the types of evidence examined in this article—testimonial evidence—is particularly malleable, at the same time as Professor Liebman and others have shown, it is subject to over valuation by jurors.⁹⁵

II. THE LESSON FROM EXPLICITLY STATISTICAL EVIDENCE

The importance of independence is clearly seen in some areas, such as when explicit statistical evidence is used under the product rule to determine the significance of a match with DNA evidence. The fact that the DNA profile of the defendant matches the trace evidence left by the perpetrator supports the defendant's guilt, just as sharing the physical characteristic of being left-handed would. But the DNA match derives its incredible power from being comprised of multiple matches of genetic markers typically at thirteen different sites,⁹⁶ each of which is independent of the other. The lack of proof of independence is a clear basis for rejection and exclusion of likelihood computations.⁹⁷ Although still debated in some applications, there is substantial merit in Judge Richard Posner's perception: "All evidence is probabilistic—statistical evidence merely explicitly so."⁹⁸

94. See Kassir, *supra* note 40, at 440–41 (focusing solely on confession evidence). Kassir also recognizing that corroboration inflation also occurs with other types of evidence and may occur independently in some circumstances. See *id.* at 441.

95. See *infra* note 107 and accompanying text.

96. See Andrea Roth, *Safety in Numbers? Deciding When DNA Alone is Enough to Convict*, 85 N.Y.U. L. REV. 1130, 1136 (2010) (describing how state and federal laboratories typically test thirteen STR loci and seeks to declare a thirteen-loci "match" between the profiles).

97. In the well-known case of *People v. Collins*, 438 P.2d 33, 38–39 (Cal. 1968), the court noted the failure of the prosecution's expert to show that the factors identified (e.g., black man with a beard and man with a mustache) were independent and recognized that such independence was essential to valid statistical analysis using the "product rule" as employed by the expert. Whether under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), or *Frye v. United States*, 293 F. 1013 (1923), demonstration of the independence of the components of DNA analysis yielding the probability of a random match has been required. See, e.g., *United States v. Beasley*, 102 F.3d 1440, 1447 (8th Cir. 1996) (finding, under *Daubert*, the requirements of the product rule satisfied to compute the statistical significance of a match); *Commonwealth v. Rosier*, 685 N.E.2d 739, 744 & n.13 (Mass. 1997) (finding the requirement of statistical independence satisfied both in general because of the absence of population "substructures" (with appropriate adjustments) and in the database used).

98. *Riordan v. Kempiners*, 831 F.2d 690, 698 (7th Cir. 1987); see also Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1508 (1999) ("It is now generally recognized . . . that since all evidence is probabilistic—there are no metaphysical certainties—evidence should not be excluded merely because its accuracy can be expressed in explicitly probabilistic terms as in the case of . . . DNA evidence.").

Obviously, evidence that is not explicitly statistical need not meet the particular foundational tests required by the product rule. However, the accurate observation that ordinary evidence shares probabilistic characteristics with statistical evidence should make us sensitive to the logical principles applicable to both. The basic point is that separate and independent items of evidence have greater power to establish the accuracy of an uncertain proposition than co-dependent or jointly developed evidence. Unfortunately, recognition of the importance of independence and, perhaps more significant, the potential great loss in probative value are largely ignored when the evidence is not explicitly statistical. However, it is just as telling when multiple pieces of non-scientific evidence, which do not come with explicit probabilities of random match, are employed.⁹⁹ This observation is particularly important in cases where physical proof of guilt *or innocence* is absent and subtle perception and memory operations are involved, along with often unappreciated codependence of incriminating evidence.

Unfortunately, the human reasoning process that is thought to characterize jury decision-making may distort evidence evaluation beyond that of understanding and applying reasoning based on statistical independence principles. Heuristics, including juror reasoning process, are a focus of the next section. One barrier to individual examination of evidence is the tendency of decision-makers to respond to the coherence effect of multiple pieces of evidence, which makes significant how the pieces of evidence fit together.¹⁰⁰ This effect potentially interferes with accurately weighing the probative value of the evidence logically considered separately.¹⁰¹

Curative mechanisms that would help to ensure adequate protection of, and appreciation for, evidentiary independence present a challenge, but should involve reforms affecting various parts of the

99. Professor Liebman notes that the power of most direct evidence “is due not to its uniqueness but a concurrence of small bits of individually inconclusive evidence.” Liebman et al., *supra* note 6, at 602. He argues that eyewitness identification is powerful because it results from multiple matches of non-unique attributes of the perpetrator’s appearance and similarly confessions derive their great power from the fact that numerous details of the confessor’s version match so many details of the known events. *Id.* at 641.

100. See DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 33–34 (2012).

101. See *id.* at 34, 174–75 (describing how jurors tend to place pieces of evidence into clusters, often two, supporting different outcomes and over time the strength of one increases and the other wanes as pieces of evidence take their place in the coherent whole). See generally Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 *Geo. L.J.* 281 (2013) (discussing generally the role of narrative in trials).

investigative and adjudicative processes. A starting point for these measures include: explicit appreciation by investigative agents, prosecutors, and defense attorneys of the importance of identifying the source of the initial suspicion and the established or potential lack of independence of major elements of the incriminating evidence; experimentation with methods of communicating to the jury the weaknesses of non-independent evidence and dangers of giving it too much weight; and expansion of disclosure of non-privileged information regarding the process that led to the initial suspicion of the defendant, which may expose links between items of evidence.

III. SUBTLE PERCEPTION AND EVALUATION BIASES

Numerous pernicious inferences and forces operate in eyewitness identification, but the chief one involves the subtle operations of human memory in transforming remembered images of faces. In confessions, the initial misjudgment of investigators is the triggering cause. In both of these, the erroneous evidence is sometimes developed in good faith. For informants, while the investigative officer is often following a reasonable lead, the informant is acting malevolently. The result in each case is the creation of a major item of evidence. All these more concrete items of evidence are intertwined with subtle human perception and evaluation biases that affect how evidence is used by the investigators themselves, prosecutors and defense attorneys, and the jury to reach conclusions about proceeding with the prosecution, developing a defense, and deciding guilt or innocence.

- A. Dangerous Impact of Heuristic Strategies or Biases on the Persistence of Error
 - i. The Multiple Dangerous Consequences of a Prior Criminal Record

Having a prior record for a related offense can result in harm to a suspect in multiple different ways. One is by erroneous identification as a result of having a picture in the police department's mug book or having a picture placed in a photo array.¹⁰² The second route is similar in origin, but goes through an informant. Arrest for a similar crime can generate police suspicion, and when that suspicion is communi-

102. See Gould et al., *supra* note 41, at 498.

cated to a dishonest and motivated informant, it can produce a false claim by that informant of a confession by the person or persons of interest. Also, once the prior criminal record leads to apparently incriminating information, the record helps to ensure that the focus remains on this particular suspect through the operation of tunnel vision; and it tends to bias investigators and prosecutors into prematurely narrowing the investigation and ignoring the exculpatory nature of contrary evidence.¹⁰³

ii. Heuristic Biases that Perpetuate Mistaken Initial Assessments of Guilt

Even if we understand why an initial error was made that classified an innocent individual as the likely perpetrator, the question remains why that error persisted, often in the face of conflicting evidence, causing the investigation/prosecution to continue sometimes to the point of erroneous conviction. One of the chief culprits here is what is called “confirmation bias.” It is the widely observed phenomenon that once a person adopts a theory, he or she tends to search for and give special weight to evidence that confirms the position taken and discount new evidence or interpretations of evidence that contradict it.¹⁰⁴ Cognitive dissonance, which involves the resolution of tension between two inconsistent ideas, can lead talented and well-meaning investigators and prosecutors to resolve doubts in favor of guilt, which vindicate earlier decisions to charge and prosecute.¹⁰⁵ The overall tendency is one described as “tunnel vision.”¹⁰⁶

103. See *id.* Professor Liebman explains in different terms the pernicious inferences at work here. Having a prior record triggers, in his terminology, a number of burdens including the “representative bias,” the “simulation bias,” and the “uniqueness fallacy.” See Liebman et al., *supra* note 6, at 659. The upshot is that criminal justice actors and jurors are likely to be affected by deeply engrained human methods of analysis that over-value concrete embodiments of a concept, and succumb to the types of inferences offered by character evidence that have historically concerned evidence scholars and courts.

104. See Liebman et al., *supra* note 6, at 631; see also Leo, *supra* note 72, at 204 (discussing confirmation bias); Andrew E. Taslitz, *Trying Not to Be like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?* 45 TEX. TECH L. REV. 315, 361 (2012).

105. See Taslitz, *supra* note 104, at 362.

106. See Gould et al., *supra* note 41, at 504 (defining this frequently used term as involving social, organizational, and psychological factors that lead actors in the criminal justice system to focus on a particular suspect and that lead those actors to filter and select evidence that builds a case for conviction, while ignoring evidence that points toward innocence). See also Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 291 (2006); Dianne L. Martin, *Lessons about Justice from the “Laboratory” of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002).

iii. Pernicious Heuristic Biases Operating at Trial that Distort Juror Evaluation of Evidence

In trying to explain why innocent individuals were prosecuted and convicted despite substantial evidence arguably inconsistent with guilt, Professor Liebman identified as one of the causes the power of what he terms “big evidence,” which includes eyewitness identifications, confessions, fingerprint and DNA matches,¹⁰⁷ to overwhelm other types of proof. The first two of these, he argues, allow jurors to develop a scenario that supports the simulation bias and gives jurors the basis to form a coherent narrative of the crime¹⁰⁸ security in what the jurors may consider certainty the directness of proof the uniqueness of the evidence.¹⁰⁹ The latter two—fingerprint and DNA matches—lack the directness and simulation effects, but do suggest certainty and uniqueness.¹¹⁰

As part of his analysis, Professor Liebman describes what is termed “representativeness bias.”¹¹¹ This is the tendency of humans to intuitively place a higher likelihood than objectively merited based on objective probabilities that a person with a general characteristic, such as a prior robbery conviction, being the particular robber in the case at hand because that person possesses the general trait of being a robber.¹¹² The suspect has characteristics representative of the particular crime. Professor Liebman explains that humans appear “hardwired to use only resemblance—the seemingly more ‘individualized’ or ‘personalized’ evidence—and not base-rate information”—even when objective probabilities would show that the recent robbery was more likely committed by someone without such a criminal record.¹¹³

107. See Liebman *et al.*, *supra* note 6, at 636. Professor Liebman argues for a class of “big” evidence, contending that not only is direct evidence given special weight as compared with probabilistic evidence as argued by Kevin Heller, see Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 MICH. L. REV. 241, 283–85 (2006), but fingerprint and DNA evidence is similarly treated because fingerprint and DNA evidence also promise certainty, see Liebman *et al.*, *supra* note 6, at 636.

108. See *id.* at 629–33.

109. See *id.* at 636–38.

110. See *id.*

111. See *id.* at 624; see also Amos Tversky & Daniel Kahneman, *Judgments of and by Representativeness*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 84, 84–85 (Daniel Kahneman *et al.* eds., 1982) (describing the representative heuristic).

112. See Liebman *et al.*, *supra* note 6, at 624–25.

113. See *id.* at 625.

B. Impact on Defense Attorneys

The pernicious inferences from erroneously evaluating evidence affect all actors in the criminal justice system, including defense attorneys. Defense attorneys usually receive the evidence at the end of the investigative process. They get it in bits and pieces in early court proceedings but typically only receive anything approaching a comprehensive view in discovery with the prosecutor. The process that led investigators to focus on the suspect is generally not provided and is often not discernable. As a result, possible links between various evidence items and their resulting co-dependence are obscured.

For example, when the suspect's prior record is part of the chain of events that produced a photo array containing his picture, which in turn led to the initial identification, the two pieces of evidence—the criminal record and the identification—will often come to the defense attorney as completely separate items. To effectively challenge this evidence as co-dependent, the defense attorney must unearth those links and the interrelation of the evidence. That process takes insight, sufficient time and resources for investigating, and access to discovery materials and/or investigation resources to reveal what has been obscured—indeed, sometimes purposefully obscured.

A serious danger is that this process never gets accomplished. The reality of indigent defense in the many states is that it is woefully underfunded.¹¹⁴ Every defender must work efficiently given heavy caseloads and a triage process is virtually inevitable. Having a criminal record, for example, is so common among indigent defendants that a prior conviction record alone does not limit the ardor of defense counsel. But the strength of the prosecution's case could have a substantial impact. When a defense attorney encounters a new case with two major items of evidence supporting guilt—an apparently solid pretrial identification and a prior conviction for a similar offense—a standard triage process may assign it a lower order priority. Some cases on first glance appear to be guilty plea cases, and they may figuratively be moved to that track in the defense attorney's mind. Thus, the presence of two strong items of proof against a client may operate subconsciously on his attorney resulting in a lower emotional commit-

114. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1045 (2006) (stating that “[b]y every measure in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced”).

ment to a client who at the minimum has a difficult case and is apparently not innocent.

Moreover, even if this information becomes available to defense counsel in discovery, conveying its weakness at trial is problematic. Communicating to the jury that they should avoid convicting just because the defendant has a past record of similar crimes may require giving the jury otherwise inadmissible information about past convictions or arrests. At best, arguing this weakness of the independence of the evidence to the jury involves double-edged inferences in that while the jury may be persuaded it would be morally wrong to convict a person simply because he has a criminal record, their common sense tells them that such a record does show he is the kind of person who is more likely to commit the type of crime charged. A successful presentation will take either extraordinary skill or a carefully prepared presentation to convey convincingly why such evidence is likely to be seriously over-valued.

Professor Liebman notes that the premise of trials puts the defense attorneys at a disadvantage in terms of a set of heuristic biases.¹¹⁵ The issue in the trial is whether the charged defendant committed the offense, and the most satisfying result for the jury is to answer the “who-done-it” inquiry with a guilty verdict—a yes.¹¹⁶ The “yes” answer of “guilty” solves the question posed and enhances community safety, while a not guilty verdict means the investigative effort was a failure and the criminal remains at large. Liebman criticizes the “pallid” nature of the frequent defense strategy of raising reasonable doubts as opposed to mounting a more aggressive defense that, for example, presents an alternative scenario to the narrative developed by the prosecution with another suspect cast as the perpetrator and villain.¹¹⁷

115. See Liebman et al., *supra* note 6, at 628.

116. See *id.* at 656 (arguing that the “representativeness, simulation, and confirmation biases” all operate here).

117. See *id.* at 630, 656, 666 (arguing that abstract, rhetorical, and probabilistic arguments will not provide the compelling counter-narrative to overcome the impact of eyewitness, confession, and other “big” prosecution evidence); see also Taslitz *supra* note 104, at 337 (arguing generally for vigor in the defense counsel’s role to disrupt criminal justice tendencies to favor status quo narratives that are generally pro-prosecution and more specifically that imaginative and highly motivated efforts are required).

IV. REMEDIES

A. Searching for the Single Source of Infection

In the worst operation of pernicious inferences, an injustice results when a defendant is convicted on the basis of multiple items of apparently independent damning evidence, which in fact all flow from a single error or began at a single discernable point. The latter describes what apparently happened with the conviction of Donald Gates, *see* discussion *supra* Part I.B. There, the informant took advantage of Gates' prior arrest and invented Gates' confession. Bad scientific evidence, "other crimes" evidence, and tunnel vision completed the process of wrongful conviction.

Occasionally the epidemiological analysis seeking the source of the initial infection refers to that source of the contagion in a population as "patient zero."¹¹⁸ Smith, the master informant in the Gates case, certainly fits that role. If the defendant is not guilty, which should be a thought considered in all cases but seriously entertained in a substantial number, then this same type of analysis should be undertaken to figuratively search for the source of the error.

Another general line of inquiry should concern how interdependent the evidence is or may be. The prosecution will be in a better position to look at this issue because it will have directly available the investigators and likely notes regarding their work, but even for the prosecution, linkages may be purposefully hidden or unappreciated by the investigators. As part of this analysis, the accuracy of information from any uniquely important or critical source should be carefully scrutinized.

Professor Liebman calls for "devil's advocate mechanisms" within the police department before handing the case over to the prosecution and within the prosecution before it brings charges against the suspect to examine alternative scenarios and seriously consider inno-

118. Pamela A. Vesilind, *NAFTA's Trojan Horse and the Demise of the Mexican Hog Industry*, 43 U. MIAMI INTER-AM. L. REV. 143, 143 (2011) (describing how a five-year-old boy in Mexico who first came down with the flu, which soon had infected 800 people in a nearby town was labeled "patient zero" in the 2009-10 swine flu pandemic). The term, which is sometimes used in connection with epidemiology, is used analogously in the law. *See, e.g.*, Timothy E. Lynch, *The Challenge of Optimism and Complexity: Inadequately Addressed by the FDIC's Report*, 80 UMKC L. REV. 1127, 1136 (2012) (identifying one investment advisor with this term because such a great percentage of investors who made a significant amount of money shorting the housing market appeared to have done so only after interacting with him); James E. Evans, Note, *The "Flesh and Blood" Defense*, 53 WM. & MARY L. REV. 1361, 1369 (2012) (tracing a bizarre jurisdictional argument to a single pre-trial detainee in Baltimore, identified in this fashion).

cent explanations.¹¹⁹ For the defense, such analysis can provide the basis of a sophisticated attack on the government's case, often an apparently very strong case, which potentially is built on a single (or a couple) foundation piece that may be subject to effective challenge.

B. Discounting Co-Dependent Evidence

Often there is no “patient zero,” but rather items of evidence that, although linked, do have separate probative power. When a picture is selected from a large database, the person in the picture does have features that resemble the perpetrator. If he has a criminal record for similar crimes and otherwise was not disqualified, then the evidence, although being produced as a result of having a criminal record that put his picture among those shown to the eyewitness, has some independent power. The point is that its power is diminished. That reduced impact should be communicated to the jury. This task will sometimes be a daunting one since it involves effectively teaching jurors to use the reasoning of Bayes Theorem in evaluating the significance of the evidence.¹²⁰ Professor Liebman suggests there is hope despite the difficulty of getting lawyers and judges, let alone jurors to understand even simple formulas involved in such statistical analysis through the use of graphic representations, pictorial presentations, and concrete frequencies.¹²¹

Work should be conducted to develop effective cautionary instructions to warn of the dangers of giving too much weight to co-dependent evidence under the mistaken view that the two evidence items are truly independent. Given that whether independence exists will be a contested issue in most cases, the instruction should focus on the need of the jury entertaining alternative scenarios while evaluating the likelihood of each. Particular attention should be given to devel-

119. See Liebman et al., *supra* note 6, at 685; see also *id.* at 649 & n.323. With regard to finding a match of the suspect's DNA at the crime scene meaning he is guilty, the Supreme Court stated in *McDaniel v. Brown*, 558 U.S. 120, 128 (2010): “It is . . . error to equate source probability with probability of guilt, unless there is no explanation other than guilt for a person to be the source of crime-scene DNA.”

120. See, e.g., Richard Lempert, *The New Evidence Scholarship: Analyzing the Process of Proof*, 66 B.U. L. REV. 439 (1986) (describing ways that a probabilistic analysis based on Bayes Theorem may be applied in the analysis of evidence).

121. See Liebman et al., *supra* note 6, at 674–76 (citing in support of his optimistic view that Bayes reasoning can be understood by juries: Norman Fenton & Martin Neil, *Avoiding Probabilistic Reasoning Fallacies in Legal Practice Using Bayesian Networks*, 36 AUSTRALIAN J. LEGAL PHIL. 114, 122, 132 (2011)); see also Leda Cosmides & John Tooby, *Are Humans Good Intuitive Statisticians After All?: Rethinking Some Conclusions from the Literature on Judgment under Uncertainty*, 58 COGNITION 1, 25–37 (1996).

oping an effective instruction regarding the dangers of character evidence in the form of prior similar criminal involvement to the charged crime.

C. Disclosure and Recording Requirements

Given the importance of the linkages involved in the creation of evidence, attention should be given to expanding disclosure requirement regarding the ways evidence was generated. This task is facilitated by open-file discovery.¹²²

In jurisdictions without such open file rules, courts must be attentive to the importance of this information to accurate evaluation of the persuasive power of evidence. Absent legitimate concerns about investigative sources, it should be considered part of the materials subject to disclosure. Moreover, blanket claims that such information violates work product protections should be viewed skeptically.

In addition to disclosure, recording the entirety of the interrogation process provides a critical corrective. Professors Leo, Taslitz, and others have persuasively argued that required recording of all parts of interrogations is an essential ingredient to reforms that will protect against false confessions by the innocent.¹²³ Expanded practices for documenting and disclosing the contacts with informants would also be an important corrective step but encounters significant challenges in developing a practical set of practices acceptable to law enforcement interests.¹²⁴

D. Embracing Robust Innocence Presentations

In many situations, the most appropriate defense trial strategy is simply to test the government's case and argue that it has not sustained its burden of proof beyond a reasonable doubt. I want to suggest that such an approach may be questioned, and instead a robust

122. See generally Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 *GEO. MASON L. REV.* 257 (2008) (describing development and operation of full open-file discovery in North Carolina).

123. See *supra* note 87 and accompanying text.

124. See generally Mosteller, *supra* note 21 (describing dangers of informants, particularly "jail house" informants, and proposing measures to record and disclose early versions of informants' statements to the police).

defense should be developed that challenges, as Andy Taslitz termed it, the pervasive status quo bias of the criminal justice process.¹²⁵

Defense counsel should consider confronting the pernicious inferences in prior convictions and explain their pernicious effect on the investigation and the evidence presented at trial. In a typical identification case, giving the jurors an alternative scenario that the client is innocent and explaining to them that at the base all the prosecution has as proof is that, in common with many others in the jurisdiction, the defendant has a prior record for a similar offense and in common with a number of others he resembles the true perpetrator.

CONCLUSION

This symposium was organized to honor, and the scholarship generated stands as a lasting tribute to, an outstanding legal scholar and person, Andy Taslitz. In focusing on a topic, I tried to include multiple elements of Andy's writing. He constantly reached out beyond the law to the social sciences for insights into the way the human mind worked and the unfortunate influence of misguided perceptions and subconscious influences. He was sensitive to our flaws as human beings and appreciated how those flaws constrained our ability to accurately evaluate evidence and even interfered with our ability to appreciate the limitations of our thought processes in the evaluation.

On the other hand, Andy was optimistic generally and specifically about the capacity of scholarship to find solutions. As reflected in his piece co-authored with Richard Leo and others regarding false confessions, he proposed concrete steps to remedy dysfunctional processes in the criminal justice system.¹²⁶ He believed reforms, if well-crafted and implemented, could make a real difference.

Finally, Andy had true passion for fairness and justice. In one manifestation of that passion, he wrote forcefully that defense attorneys had the critical role of, not only fighting against, but overcoming the pervasive status quo bias in criminal adjudication that marches those charged with crime toward conviction.¹²⁷ I have described the

125. See Taslitz, *supra* note 104, at 337 (arguing that the role of defense attorney as agent for social change against status quo bias requires "counterfactual thinking: imagining alternatives to current reality" and that such thinking is "effortful, requiring significant motivation").

126. See Leo et al., *supra* note 57 (developing the rationale for and the details of a set of practices to eliminate false confessions by the innocent).

127. See Taslitz, *supra* note 104, at 337 ("The status quo . . . breeds cultural stereotypes . . . [that] block noticing and properly weighing stereotype-inconsistent information.").

pernicious influences that can lead to wrongful convictions and suggested ways investigators and prosecutors can challenge the tendency of an initial error to taint the process. Those efforts are critical to systemic success, but Andy identified the critical last line of protection. That is a robust defense by the only person in the process devoted to fighting the pervasive bias of the system that presumes its process have worked properly and that the defendant is guilty. This bias is particularly powerful when its processes have produced multiple, apparently independent, items of incriminating evidence. Andy, although proudly once a prosecutor, knew the criminal justice system needed everything that sophisticated multidisciplinary analysis could provide, but it also needed brave champions of the idea that the system's processes might get it completely wrong.

In writing about the pernicious effects of not only double counting evidence against the defendant, but generally being blind, or at least insufficiently sensitive, to these frequently encountered problems in criminal adjudication, I have attempted to employ some of the tools that Andy so adeptly used. I have done a more complete job identifying some of the problems than crafting solutions, but I hope my suggestions help move the search for remedies forward. A faith in the ability of people of good will to make progress by wrestling with problems was another of Andy's wonderful characteristics. I write in that part of his spirit as well.

Taz and Empathy

SUSAN A. BANDES*

ABSTRACT

One pervasive challenge for law is the difficulty of bridging empathic divides. The ability to understand the motivations, intentions, and goals of others is a prerequisite to fair and accurate legal decision-making. It is also essential to the ability to structure fair and effective legal institutions. Yet empathic accuracy for those from different backgrounds does not come easily—it requires self-knowledge, humility, openness to other perspectives, and the will to understand. Taz exemplified these attributes in both his scholarship and his approach to life.

This essay will discuss the elusive concept of empathy, the notion of empathic divides (a term usefully coined by Craig Haney and Mona Lynch), and the challenges of empathic accuracy, and will discuss Taz's scholarship as an ongoing project of bridging empathic divides. This project took many interrelated forms, of which I can address only a few. One primary focus is on the dynamics of cognitive bias and self-deception, drawing on psychology, neuroscience and related disciplines. Taz's scholarship keeps coming back to the question of the barriers to understanding the narrowness of one's own perspective, and the barriers to grasping the different frameworks employed by others. It focuses, to take a few examples, on racial blindsight, gender bias, status quo bias, tunnel vision, the bias against the poor, harmful rape narratives, and the self-deception that can lead to date rape. Another related focus is on the dynamics of empathy itself (see for example Taz's iconic article about Tinkerbell and criminal excuse). Another primary focus is on bridging the divides themselves. To take

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one example, Taz wrote as a committed feminist. These qualities, along with his respect for the dignity of others (another of his scholarly themes), were also the hallmarks of Taz's relationships with others. He was the rare person whose scholarship and life were of a piece.

INTRODUCTION

We experience grief in ways that aren't particularly logical, and as I reread, or in some cases read for the first time, a selection of Andy's works, I find myself thinking on multiple occasions: Oh, I didn't realize Andy was writing on this topic. Maybe he and I could talk about coauthoring. Or—wouldn't it be fun to put a panel together on this—Andy is always great fun to plan a panel with—I'll see if he's interested. Or just, on multiple occasions—I can't believe how deeply Andy has thought about this topic. I'd love to talk to him about it. Maybe get him to read my draft on the same topic. These feelings confirmed for me the wisdom of what this symposium is doing. In grieving for all these missed opportunities, I also get to celebrate Andy as a scholar, a colleague, and a friend. I get to continue some of our ongoing conversations, albeit not in the way I would have chosen.

I. EMPATHY: ITS STRANGE LEGAL CAREER

In the last several years, empathy—the legal concept—has had a meteoric rise. It was just about eight years ago, in 2007, that President Obama (then Senator Obama) kicked off a vociferous debate by stating that he wanted to appoint empathetic judges.¹ Empathy is such a gentle sounding, seemingly unobjectionable quality. How could it drive people to such anger, and generate that kind of alarm? This reaction to Obama's statement was especially surprising because the same concept of judicial empathy was approvingly invoked by conservative Republican congressmen about Samuel Alito, and by Alito

1. Senator Barack Obama, Campaign speech to Planned Parenthood (July 2007) (cited in Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 *CARDOZO L. REV. DE NOVO* 133, 135 (2009)) (“[W]e need somebody who’s got the heart – the empathy – to recognize what it’s like to be a young teenage mom. The empathy to understand what it’s like to be poor or African-American or gay or disabled or old – and that’s the criteria by which I’ll be selecting my judges.”). See also Barack Obama, Senator, Presidential Campaign Speech at the Democratic Presidential Debate (Nov. 15 2007) (“[S]ometimes we’re only looking at academics or people who’ve been in the [lower courts]. If we can find people who have life experience and they understand what it means to be on the outside, what it means to have the system not work for them, that’s the kind of person I want on the Supreme Court.”) (transcript available at http://www.nytimes.com/2007/11/15/us/politics/15debate-transcript.html?_r=0).

himself, in his confirmation hearings only a year earlier without evoking any such negative reaction.² But the topic of why President Obama evokes such heated reactions for doing what others do with impunity will need to be put aside for now—though I think it is fair to say that it is quite relevant to many of Andy’s themes.

There are some understandable reasons for the empathy contretemps. For one, the term “empathy” is a moving target: a concept with no fixed meaning across disciplines or even within disciplines.³ The many possible meanings and subtleties of the term are beautifully explored in Andy’s work, as I will discuss below. I have also explored these issues in detail elsewhere, and will not revisit those discussions here.⁴ In brief, the most prevalent and damaging misconception is the conflation of empathy and sympathy. Sympathy is a feeling *for* its object and is associated with a desire to alleviate suffering. Empathy is a capacity for understanding the motives, intentions, and desires of others. Empathy, unlike sympathy, has no action tendency—it connotes the desire to stand in the shoes of another, not the desire to help another. Empathy is thus an essential capacity for judging whereas sympathy can be a problematic emotion for judging.⁵

Another explanation for the reaction against empathy is that it is part and parcel of the negative reaction to the notion of emotion in law more generally. The specter of judges feeling anything at all for the parties evokes a rather strong—some might say emotional—reaction in those who view emotion as the enemy of rational thought.⁶ Indeed, this attitude toward emotion may help explain why empathy

2. Meeting of the Senate Judiciary Committee Subject: The Nomination of Samuel Alito to the Supreme Court, Federal News Service, Jan. 24, 2006, cited in Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE NOVO 133, 138 (2009).

3. See, e.g., C. DANIEL BATSON, *These Things Called Empathy: Eight Related but Distinct Phenomena*, in THE SOCIAL NEUROSCIENCE OF EMPATHY 3 (Jean Decety et al. eds., 2009).

4. Bandes, *supra* note 2; Susan A. Bandes and Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L. J. 1003 (2014); Susan A. Bandes, *Empathy and Article III: Judge Weinstein, Cases and Controversies*, 64 DEPAUL L. REV. (forthcoming 2015) [hereinafter *Empathy and Article III*].

5. Bandes, *supra* note 2, at 136–37. See generally Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944 (2012).

6. See generally SUSAN A. BANDES, *THE PASSIONS OF LAW* (1999); Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and the Emotions*, 94 MINN. L. REV. 1997 (2010); Andrew E. Taslitz, *Why Did Tinkerbell Get Off So Easy?: The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 TEX. TECH. L. REV. 419 (2009).

has gained traction when cast as a cognitive, rather than an emotional, capacity.⁷

A third factor in the empathy contretemps is that the current empathy debate is situated in a larger set of debates about the judicial role and the role of the courts.⁸ It is one strand in a complex and important debate about whether federal courts have a special obligation to protect those left unprotected by the political branches.⁹ And too often, it is one permutation of a tiresome and silly debate over whether judges interpret the law or simply “apply it as written”—a phrase that I cannot commit to paper without ironic quotation marks.¹⁰

Despite its inauspicious beginnings only a few years ago, the status of empathy has improved dramatically. Empathy has become a widely accepted term. In the last Supreme Court term, for example, empathy cropped up in popular media discussions of at least four major decisions.¹¹ Even more interesting, the original association of judicial empathy with judicial liberalism seems to be disappearing. Lack

7. Of course, the landscape is a good deal more complex. As I have argued elsewhere, emotion plays explicit as well as implicit roles across the legal spectrum. *See, e.g.*, Bandes, *supra* note 4; BANDES, *supra* note 5.

8. Bandes, *Empathetic Judging* *supra* note 2 at 146-148.

9. *Id.*

10. I am in the good company of Judge Posner in this. Posner observes that no “knowledgeable person actually . . . believes that the rules that judges in our system apply . . . are given to them the way the rules of baseball are given to umpires.” RICHARD A. POSNER, *HOW JUDGES THINK* 78 (2008).

11. *See, e.g.*, Irin Carmon, *For the Supreme Court, Empathy and Protection for Some*, MSNBC (July 3, 2014, 12:22 PM), <http://www.msnbc.com/msnbc/the-supreme-court-empathy-and-protection-some> (discussing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014)), *Harris v. Quinn*, 134 S. Ct. 2618 (2014), and *McCullen v. Coakley*, 134 S. Ct. 2518 (2014)); *see also* Linda Greenhouse, *The Supreme Court Justices Have Cellphones, Too*, N.Y. TIMES (June 25, 2014), <http://www.nytimes.com/2014/06/26/opinion/linda-greenhouse-the-supreme-court-justices-have-cellphones-too.html> (asserting that “empathy” did not drive the result in the cell phone search case, *Riley v. California*. Rather, “[t]he justices are walking in their own shoes. The ringing cellphone could be theirs – or ours”); Dawn Johnsen, *Corporations Who Worship – I, Women who Work – 0*, SCOTUS BLOG (July 1, 2014, 3:18 PM), <http://www.scotusblog.com/2014/07/hobby-lobby-symposium-corporations-who-worship-1-women-who-work-0/> (noting that “[n]otions of empathy and consequences . . . do not alone provide a basis for judicial resolution” but “the five-Justice majority opinion [in *Hobby Lobby*] fails to address the real-world consequences for women and their families.”); Dahlia Lithwick, *After Hobby Lobby: The Supreme Court Term Wrapped up Nice & Neat Last Week. Unless you are a Woman*, DOUBLEX (July 9, 2014, 6:05 PM), http://www.slate.com/articles/double_x/doublex/2014/07/after_hobby_lobby_mu_cullen_and_harris_v_quinn_the_men_of_the_supreme_court.html (asserting that “empathy” drove the decisions in *Harris*, *McCullen*, and *Hobby Lobby*); Laurence H. Tribe, *The Supreme Court Was Right to Allow Anti-Abortion Protests*, N.Y. TIMES (June 26, 2014), <http://www.nytimes.com/2014/06/27/opinion/the-supreme-court-was-right-to-allow-anti-abortion-protests.html> (discussing the abortion buffer-zone case, *McCullen v. Coakley*, and arguing, “neither empathy for their anguish, nor the need to protect the safety of women seeking such services . . . can justify far-reaching measures that restrict peaceful conversation in public spaces.”).

of empathy has become a term of opprobrium lobbed at courts and judges by commentators across the political spectrum. For example, I recently googled the phrase “empathy and Hobby Lobby”¹² to see what role empathy discourse played in media reactions to one of last term’s highest profile cases. The search yielded multiple results, critiquing both the majority and the dissent for displaying too much or too little empathy. The conservative Weekly Standard, in celebrating the decision, accused the dissenters of a lack of empathy toward the “religious, moral and ethical motives of for-profit corporations.”¹³ In some respects, I regard this development as a victory for empathy discourse. One of the arguments against empathetic judges is that empathy is a code word for sympathy toward vulnerable, marginalized litigants. For example, one influential essay argued that empathetic judges would disfavor corporations because corporations are abstract entities that are not emotionally engaging or sympathetic.¹⁴ So this new empathy discourse is an improvement in the sense that it recognizes how pervasive empathy is, and recognizes that empathy can flow toward the powerful as well as the powerless. More specifically, the use of the term empathy in relation to *Hobby Lobby* and other closely-held corporations underscores the surprisingly controversial point that the Justices are fully capable of empathy for powerful corporations.¹⁵

In short, we may be moving away from some misconceptions about empathy and judging. But what are we moving toward? Unfortunately, we may be moving from a debate over empathy’s meaning and role to a situation in which the term has lost all useful meaning. Consider a representative example—a recent MSNBC article called “For the Supreme Court: Empathy and Protection for Some.”¹⁶ The article, in recapping several of this term’s decisions, never actually dis-

12. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

13. Adam J. White, *Hobby Lobby, Liberty, Empathy, and Dignity*, WEEKLY STANDARD (July 1, 2014, 7:01 AM), http://www.weeklystandard.com/blogs/hobby-lobby-liberty-empathy-and-dignity_795861.html?page=3. A variety of other conservative authors similarly argued that the dissent in *Hobby Lobby* demonstrates a lack of empathy. See, e.g., Peter Berkowitz, *The Left’s Hollow Complaints About Hobby Lobby*, REAL CLEAR POLITICS (July 12, 2014), http://www.realclearpolitics.com/articles/2014/07/12/the_lefts_hollow_complaints_over_hobby_lobby__123293.html (discussing *Hobby Lobby* and arguing, “[p]racticing more of the empathy and compromise [liberals] preach would enable progressives to make a valuable contribution to containing the polarization they bewail.”).

14. See John Hasnas, *The ‘Unseen’ Deserve Empathy, Too*, WALL ST. J., (May 29, 2009), <http://online.wsj.com/articles/SB124355502499664627>.

15. See Bandes, *Empathy and Article III*, *supra* note 4 (responding to Hasnas’ argument).

16. Carmon, *supra* note 11.

cussed the concept of empathy.¹⁷ The phrase seems to mostly connote that the Court sided with the wrong party—or simply that it sided with one party and not the other. It is useful at this juncture to ask: What can be accomplished by bringing empathy into the legal conversation? If it is just a makeweight word, a vague compliment or insult, or a way to state the blindingly obvious fact that one side always wins, then it is hardly worth studying.

In fact, there is much to be learned about the dynamics of empathy, and this knowledge has tremendous practical import for the operation of legal institutions. Although there has long been a sophisticated and important theoretical discussion about the role of empathy in judging,¹⁸ this discussion has centered mainly on jurisprudential and epistemic issues about the role of judges. There has been far less focus on the psychological and sociological dynamics of empathy in legal contexts. Given that the legal system is a vast apparatus for evaluating, predicting and influencing behavior, the use—and misuse—of empathy is pervasive in law.¹⁹ The kind of study I have in mind has at least two attributes. First, it grapples with a range of interdisciplinary sources, particularly cognitive science, dealing with how empathy works and how it can be improved. Second, it grapples with the practical import of empathic inaccuracy in a broad range of legal contexts. It investigates how a wide range of legal actors, in a wide range of venues, seeks to understand the motives and intentions of others, and how the resulting decisions impact our justice system. In the criminal context, these venues include the criminal courtroom, the jury room, the prosecutor's office, the police station, and the street, among other important loci for legal decision-making.

And here is where my paper turns to celebrating Andy Taslitz, because he is a shining example of what it means to take empathy seriously. I deliberately did not confine that last statement to Andy's work. His work is indeed a superb example of what serious scholarship about empathy and law looks like and can accomplish. But Andy

17. *Id.*

18. See e.g., MARTHA NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS, 327–342 (2000); Robin West, *The Anti-Empathic Turn*, in *PASSIONS AND EMOTIONS* 243 (James E. Fleming ed., 2013); John Deigh, *Empathy, Justice, and Jurisprudence*, 49 S. J. OF PHIL. 73, 73 (2011); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1574–75 (1987); Tamar Schapiro, *Empathy as a Moral Concept: Comments on John Deigh's "Empathy, Justice, and Jurisprudence,"* 49 S. J. OF PHIL. 91, 91 (2011).

19. See generally Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996).

himself was another example of what it looks like to take empathy seriously, both as a way of approaching law and as a way of approaching life.

In this essay, I will highlight two ways in which the study of empathy can contribute to our understanding of legal theory and practice. For each approach, Andy's work will serve as an example. First I will turn to the dynamics of empathy. This discussion will also encompass the barriers to accurate empathy and the triggers for selective empathy. Specifically, it will discuss the cognitive biases that interfere with understanding the perspectives of others, and the biases that blind us to the narrowness of our own perspective. The question for law is: what can be done to reform our legal institutions in light of our growing knowledge about how we understand, and fail to understand, one another's motives and intentions? Second, I will discuss Andy's scholarship as an illustration of his own commitment to standing in the shoes of others—and of the value of that sort of perspective -taking for the study and the practice of law.

II. THE VALUE FOR LAW IN TAKING EMPATHY SERIOUSLY

Andy's work kept coming back to the empathic divides that lead to bias, inequality, unfairness and injustice. He was exceptionally well suited to this important project. First, the inquiry requires a complex, sophisticated knowledge of how empathy works, and how failures of empathy occur. This is one of those interdisciplinary issues at which Andy excelled; one that implicates, among other fields, cognitive psychology, neuroscience, sociology, and philosophy. Second, the inquiry requires not only openness to other disciplines, but willingness to examine the nuts and bolts of our own discipline. Andy had the broad legal knowledge and the insight to illustrate, in convincing detail, how vulnerable legal decision-making is to failures of empathy. This sort of argument cannot effectively rest on fuzzy generalizations. It requires a wealth of detail and examples. Andy had a seemingly endless supply of legal examples illustrating how empathy affects decision-making, including prosecutorial charging decisions, police evaluation of reasonable suspicion, the doctrines of justification and excuse in criminal law, the doctrine of consent to search, the pathologies of date rapists, and the dynamics of the jury room. Finally, Andy had a passionate commitment to exposing and reforming unjust and unequal legal practices, doctrines, and institutions. And as I will discuss, cogni-

tive empathy does not amount to much without the will to exercise it across difficult and challenging divides. To illustrate the uses of empathy for law, I turn to two examples from Andy's work. One concerns a legal doctrine; the other concerns a set of legal institutions.

A. Justification and Excuse in Criminal Law

In his brilliantly titled "Why Did Tinkerbell Get Off So Easy?"²⁰ Andy offered much of the groundwork for his analysis of empathy. Here he examines one of those criminal law distinctions that are the bane of the law student's existence: the distinction between complete and partial excuses.²¹ He argues that this distinction (like many legal distinctions) can be best understood with reference to underlying social norms and expectations about what sorts of conduct are worthy of sympathy or compassion.²² Andy's work characteristically anchored this argument in a nuanced and in-depth analysis of empathy, deftly interweaving insights from cognitive psychology, philosophy, and the sociology of emotion.²³ I cannot do justice to the complexity of the argument here; like all Andy's work, it repays reading in its entirety. I admire, among other aspects of the piece, the way it connects social norm theory to scholarship on the sociology of emotion (the latter a field that is under-utilized by legal scholars), and explains how social expectations influence our notions of appropriate sympathy and compassion. But I will focus here on the article's use of cognitive psychology to illuminate the role of empathy in law.

The analysis not only distinguishes empathy from sympathy and compassion, it also raises some hard questions about the definition of empathy itself. For example, those who defend empathy in law often do so on the ground that it is a cognitive capacity, yet as Andy points out, empathy may be "hot" or emotional, as well as "cold" or cognitive.²⁴ These distinctions matter to law. For example, purely cognitive explanations of empathy do not reach the question of *why* or *how* people become motivated to learn about others and to improve their empathic accuracy.²⁵

20. See generally Andrew E. Taslitz, *Why Did Tinkerbell Get Off So Easy?: The Roles of Imagination and Social Norms In Excusing Human Weakness*, 42 TEX. TECH L. REV. 419 (2009).

21. See *id.*

22. See *id.* at 420, 424-25, 481.

23. See *id.*

24. See *id.* at 438.

25. See *id.* at 432-33.

Empathic accuracy—the ability to “accurately infer the specific content of another person’s . . . thoughts and feelings”²⁶—is effortful.²⁷ It is particularly effortful when it must cross “empathic divides”²⁸ based on race, ethnicity, class, gender, and other chasms.²⁹ Intellectual curiosity alone is unlikely to explain the impetus for making a sustained effort to stand in the shoes of others—especially others with less privilege. The empathy literature helps explain why so much additional effort is involved in this sort of imaginative exercise, and why people so often forgo that effort in favor of shortcuts. But it does not explain what drives and sustains people who elect to make that imaginative leap.

The article examines the dynamics of empathy closely. It discusses the science of mirror neurons and the role of physical mimicry in the experience of empathy. But it also examines the triggers for emotional empathy—the ways in which people can be encouraged to care about getting it right. The distinctions among different sorts of empathy help inform the solution to the empathic divide. Attempts to bridge that divide must engage and motivate as well as educate.

As Andy observes, the fact that we “more eagerly imagine the circumstances of those of similar class, nationality, ethnicity, and social status” is bad news for those accused of crime, since they are usually from a different class, maybe a different race, living in different neighborhoods, belonging to different groups, and sharing different life experiences from fact-finders.³⁰ Legal institutions can ameliorate some of these divides, as Andy suggests.³¹ He advocates for the importance of diverse jurors, who are educated at trial by relevant expert testimony and other evidence bearing on a suspect’s life

26. William Ickes, *Empathic Accuracy: Its Links to Clinical, Cognitive, Developmental, Social and Physiological Psychology*, in *THE SOCIAL NEUROSCIENCE OF EMPATHY* 57, 57 (Jean Decety et al. eds., 2009).

27. See John R. Chambers & Mark H. Davis, *The Role of the Self in Perspective-Taking and Empathy: Ease of Self-Simulation as a Heuristic for Inferring Empathic Feelings*, 30 *SOC. COGNITION* 153, 154 (2012) (most theories of empathy argue that “the self is a template that observers apply to the target during perspective-taking,” but in addition it is possible that observers will be more empathic if they can easily imagine themselves in the same situation).

28. See Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the “Empathic Divide,”* 45 *LAW & SOC’Y REV.* 69, 75 (2011).

29. See, e.g., Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 *MICH. J. RACE & L.* 261, 264–65 (1996) (discussing the influence of race on credibility assessments); Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 *CONN. L. REV.* 1, 4 (2000) (presenting evidence that jurors are unable to accurately judge the demeanor of witnesses of a different race).

30. Taslitz, *supra* note 20, at 433–34.

31. *Id.* at 434–436.

circumstances, and who have face-to-face contact with the suspect.³² Moreover, as any good trial lawyer already knows, empathy is enabled and expanded by engaging and relevant narratives, including vivid stories and stories with emotional relevance for the listener.

B. Police and Reasonable Suspicion

Andy's work on police and cognitive bias again illustrates the value of studying empathy. There is much exciting work in the legal academy right now on cognitive bias and its effects on legal institutions, and on cognitive bias and policing in particular.³³ Andy's contributions to that field will be justly celebrated. What I want to highlight here are the connections Andy drew between cognitive bias and failures of empathy. As his work made clear, empathy is not simply a makeweight term, but an important component of the analysis of cognitive bias and stereotyping. In a series of articles on police stop and frisk, eyewitness identification, and other investigative tools,³⁴ for example, Andy continues his careful exploration of the dynamics of empathy. As he observes: "different social backgrounds make empathy harder."³⁵ This may be a commonplace, but the precise dynamics of the process deserve careful scrutiny, since breaking down exactly why different backgrounds interfere with empathy is key to addressing the problem. One aspect of this dynamic—of particular importance to police judging particularized suspicion based largely on visual observation and to those evaluating eyewitness identification—is the reading of facial expression.³⁶

When we break down the various sources of information about the intentions and motivations of others, we find that no source is more influential than facial expression.³⁷ When police read facial expression across racial lines, the likelihood of inaccuracy is great, for a

32. *Id.* at 436.

33. *See e.g.* Song Richardson, *Cognitive Bias, Police Character and the Fourth Amendment*, 44 ARIZ. ST. L. J. 267 (2012); Nicole Gonzalez Van Cleve and Lauren Mayes, *Criminal Justice Through "Colorblind" Lenses: A Call to Examine the Mutual Constitution of Race and Criminal Justice*, LAW & SOC. INQUIRY (forthcoming 2015).

34. *See, e.g.* Andrew E. Taslitz, "Curing" *Own Race Bias: What Cognitive Science and the Henderson Case Teach About Improving Jurors' Ability to Identify Race-Tainted Eyewitness Error*, 16 N.Y.U. J. Legis. & Pub. Pol'y 1049, 1049 (2013) [hereinafter *Curing Own Race Bias*]; Andrew E. 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, 7 (2010) [hereinafter *Police Are People Too*].

35. Taslitz, *Police Are People Too*, *supra* note 34, at 22.

36. *See generally id.* at 18-21.

37. *See* Taslitz, *Police Are People Too*, *supra* note 34, at 18.

host of reasons that cannot be fully explained here.³⁸ The dynamics of empathy help explain why. For example, lack of familiarity with facial appearance leads to a willingness to rely on shortcuts and stereotypes in determining who looks suspicious or dangerous, rather than careful observation.³⁹ It also leads to out-group bias—a dislike of the faces of those from other racial groups.⁴⁰ Moreover, those out-group stereotypes and that out-group antipathy, in the policing context, draw on deeply ingrained associations of crime with race that can fatally undermine the legitimacy of police evaluations of individualized suspicion.⁴¹ Delving more deeply into the notion of familiarity, Andy also reports that it is the quality, as well as the quantity, of interracial contact that helps ameliorate out-group stereotyping and bias.⁴²

Here again, Andy is not content in only identifying this challenge to equal justice; He devotes significant space to the question of how to fix it. He suggests concrete and achievable ways to restructure legal institutions to address the problem. For example, he argues that although some people are naturally more empathetic than others, empathy also depends on the motivation to perceive others accurately.⁴³ To counteract powerful first impressions, often based on pernicious stereotypes, one must be motivated to study the target in greater detail, and in ways that will not automatically confirm the initial impression.⁴⁴ Motivation to strive for greater empathic accuracy can be increased by changing institutional incentives. In the policing context, for example, it can be increased by making police responsible for the accuracy of their impressions, or by building in requirements for confirmation by other sources.⁴⁵ One must also have the ability to devote more time to carefully studying targets, and reforms such as increasing observation time could also be made a priority in policing.⁴⁶

I could certainly go on. These brief descriptions are intended only to illustrate the depth of Andy's examination of empathy, as well as his insistence on focusing on solutions as well as problems. Andy's work examined failures of empathy—and solutions—in a host of legal

38. *Id.* at 18–21.

39. *Id.* at 18–19.

40. See *id.* at 18–19.

41. *Id.* at 23–24.

42. Taslitz, *Curing Own Race Bias*, *supra* note 34, at 1058.

43. Taslitz, *Police Are People Too*, *supra* note 34, at 23–25.

44. *Id.*

45. *Id.*

46. *Id.* at 22–32.

contexts. But the salient point is that he discussed empathy as an attribute that is both essential to the justice system and easily derailed, and therefore as deserving serious study. He approached the project as an interdisciplinary endeavor, involving sociology, philosophy and cognitive science—and also a concern with the nuts and bolts of law. His work illustrated that taking empathy seriously in this way has concrete benefits for legal doctrines and legal institutions.

III. EMPATHY AND TAZ

Andy's scholarship keeps coming back to the importance of understanding the different frameworks employed by others. One prerequisite to this sort of understanding is the self-awareness—and the humility—to know that one's own perspective is partial. Another is the desire to learn how others experience the world. As discussed above, this desire is partly cognitive. But it is not solely cognitive. The empathy literature explores how we form beliefs about what others feel and know. One common means of doing so is by “knowledge projection:” projecting one's own feelings, behaviors, attitudes, and desires onto others.⁴⁷ This works best for those who do share our backgrounds and world-views—though it can also interfere with accurate understanding by blinding us to the ways in which others are different. Thus it is always helpful to keep in mind that although knowledge projection is “necessary and useful,” it can often fail.⁴⁸ Then comes the hard part—the task of understanding the perspectives of those unlike us, particularly those whose perspectives might be painful, or unsettling and threatening to our own world view.

In the blunt, powerful words of blogger Arthur Chu:

So is it possible for men to be feminists? . . . Is it possible to actually confront your privilege and set it aside, to try to be one of the “good guys”? Well, I hope so. But it's not going to be that easy. Becoming one of the good guys should hurt. It should be painful. It should involve seeing uncomfortable and ugly things about yourself that you'd rather not see. It should involve changing your behavior in ways that you'd honestly rather not do.⁴⁹

47. Raymond S. Nickerson et al., *Empathy and Knowledge Projection in THE SOCIAL NEUROSCIENCE OF EMPATHY* 43, 43-44 (Jean Decety et al. eds., Bradford Books 2011).

48. *Id.* at 48-49.

49. Arthur Chu, *Who Died and Made You Khaleesi? Privilege, White Saviors, and the Elusive Male Feminist Who Doesn't Suck*, DAILY BEAST (June 24, 2014), <http://www.thedailybeast.com/articles/2014/06/24/who-died-and-made-you-khaleesi-privilege-white-saviors-and-the-elusive-male-feminist-who-doesn-t-suck>

Andy's scholarship is never just about how others ought to get over their blind spots and cognitive biases. It is also a record and a reflection of his ongoing determination to confront the limits of his own perspective and to stand in the shoes of others. This determination is not merely cognitive—it is animated by, among other things, a deep compassion and a passionate commitment to equal justice. Andy wrote thoughtfully and insightfully *about* what it meant to be a feminist,⁵⁰ and he also wrote *as* a feminist. In his wonderful article on date rape, for example, he illuminated the flawed perspective of the “date rapist.”⁵¹ Without attempting to simplify his complex analysis, I will just say that the article illustrates many of the uses of empathy. It illustrates what it would mean for law to truly understand and incorporate the woman's perspective in such cases. It illustrates what it would mean if men were better trained to understand that perspective, and more basically, to understand that the woman's perspective is one they need to ascertain rather than assume. And it illustrates the value of understanding the perspective of the date rapist. Once the dynamic of subconscious self-deception, so often at work in date rape cases, is understood, it can be addressed, educated and repudiated.⁵² The first step is to understand what others think and feel; the next is to design legal institutions in light of that knowledge.

sive-male-feminist-who-doesn-t-suck.html. I thank Mary Anne Franks for bringing this article to my attention.

50. See e.g. Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in Ferguson v. City of Charleston*, 9 DUKE J. GENDER L. & POL'Y 1, 6 (2002).

51. Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J. L. & GENDER 381, 381–84 (2005).

52. *Id.* at 430–434.

The Seductive Power of Patriarchal Stories

AVIVA ORENSTEIN*

In his book, *Rape and the Culture of the Courtroom*,¹ the late Professor Andrew Taslitz (hereinafter lovingly referred to as Taz) analyzed the patriarchal stories that permit lawyers, judges, and juries to rely on sexist stereotypes and rape myths to discount victims' accounts of rape.² To honor Taz's scholarship, this Essay applies his brilliant scholarship and compassionate insights to recent case law involving rape shield and the interpretation of rape shield statutes.

This Essay will focus on cases in which the accused argues that rape shield's policy of excluding certain evidence about the rape victim violates his constitutional rights, and it will question the exception for prior sex with the accused. It examines the degree to which judges rely on patriarchal stories to determine whether evidence about the victim's sexual past or propensities is essential to a fair defense. It also analyzes the extent to which such constitutional objections function as a vehicle for circumventing the social policy and law reform for which rape shield was promulgated.

This Essay will begin by reviewing Taz's thesis about the role of patriarchal stories in shaping rape trials and the impediments such stories present for victims trying to tell their stories in a way that judges,

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1. ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* (1999). The name of this Essay, *The Seductive Power of Patriarchal Stories*, is intended as a tribute to the power of Taz's scholarship, which explained the nature of patriarchal stories and their role in shaping the culture of rape trials. Additionally, it acknowledges the continuing, powerful draw of such stories on our collective imaginations, and discusses how these stories influence our understanding and treatment of rape victims fifteen years after Taz's masterwork was published.

2. See generally Andrew E. Taslitz, *Patriarchal Stories: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387 (1996) (basing the book in part on his article).

juries, and the public can understand. It then briefly presents the federal rape shield statute. It analyzes the operation of recent constitutional attacks on rape shield in recent rape cases, focusing on an en banc decision from the Sixth Circuit.³ The critique of the recent constitutional cases will lead to a broader analysis of the role of propensity and a deeper examination of what information about the victim the jury needs to know. Finally, this Essay will discuss the role of propensity in rape shield exceptions.

A review of recent cases validates the persistent power of patriarchal stories. The open-ended constitutional exception invites sexist thinking and subversion of rape shield principles. Sometimes, the accused's constitutional claims indicate a resistance to the entire enterprise of rape shield—the accused is merely attempting to trigger the exception to legitimate the patriarchal stories he sees as essential to his defense.⁴ In other cases, truly difficult questions arise about the fairness of excluding evidence that negates a presumption about the victim or conveys significant information about the victim's motive.

I. PATRIARCHAL STORIES AND THE CULTURE OF RAPE TRIALS

Taz observed how cultural tropes, the adversary system, and the language of courtroom discourse serve to subvert the victim's ability to tell her story and be heard. He noted how gender stereotypes and rape myths can play into sexist and racist attitudes that harm the victim and render her less likely to be believed. Rape myths are empirically untrue but firmly held notions about the incidence and nature of rape.⁵ These prejudicial false beliefs about rape, rape victims, and rape perpetrators rely on and perpetuate gender stereotypes. As Taz explained, “jurors judge the credibility of courtroom stories by comparing how they square with standard cultural ones.”⁶

Taz recounted the various and sometimes contradictory cultural tale of rape. He observed our culture's “dual message: only vixens get raped, and when it happens it really is not rape anyway because they

3. See *infra* Part II D.

4. As did Taz, I refer to the accused rapists as men and the alleged victims as women because this reflects the overwhelming gender dynamics of rape accusations outside of prison. See TAZLITZ, *supra* note 1, at xi.

5. See generally Eliana Suarez & Tahany M. Gadalia, *Stop Blaming the Victim: A Meta-Analysis on Rape Myths*, 25 J. INTERPERSONAL VIOLENCE 2010 (2010) (examining rape-myths acceptance in published studies).

6. TAZLITZ, *supra* note 1, at 17.

really want and deserve it.”⁷ Such patriarchal stories “portray women as hypersexual, selfish liars.”⁸ This focus on the lying victim is pronounced in rape cases, and is associated with either female delusion or vengeance.⁹ As Taz observed, “[r]arely is the robbery victim portrayed as deranged or a liar.”¹⁰ He therefore concluded that “[t]reating rape like other crimes fails to contend with the unique power of these narratives.”¹¹

The patriarchal story concerning a “real” rape victim¹² recounts the tale of a virtuous woman who behaves modestly and cautiously but nevertheless is brutally attacked by a deviant stranger. When the facts of a rape story diverge from this cultural paradigm—such as when the victim is perceived to be sexually promiscuous, incautious, or drunk, she is seen as untrustworthy, partly culpable, or simply not worth bothering about.¹³

II. FEDERAL RAPE SHIELD LAW

Historically, the law treated a woman claiming to be a rape victim with great suspicion,¹⁴ subjecting her to intense cross-examination regarding her dress, sexual history, and proclivities. Any prior sexual activity on her part outside of marriage undermined the veracity of the victim’s claim. First, defense attorneys argued, such sexual activity indicated that she did not value her chastity or her marriage vows, a

7. TASLITZ, *supra* note 1, at 8.

8. TASLITZ, *supra* note 1, at 8.

9. TASLITZ, *supra* note 1, at 18.

10. TASLITZ, *supra* note 1, at 6.

11. TASLITZ, *supra* note 1, at 154.

12. SUSAN ESTRICH, *REAL RAPE* 1 (1987).

13. Psychologists tell us that victims are blamed for sexual or incautious behavior such as flirting, taking a man to her room, or drinking. See, e.g., Dominic Abrams et al., *Perceptions of Stranger and Acquaintance Rape: The Role of Benevolent and Hostile Sexism in Victim Blame and Rape Proclivity*, 84 J. PERSONALITY & SOC. PSYCHOL. 111 (2003) (“Researchers have reported that both legal practitioners and laypersons attribute blame to rape victims on the basis of extralegal factors such as clothing.”) (citations omitted); Amy Grubb & Julie Harrower, *Attribution of Blame in Cases of Rape: An Analysis of Participant Gender, Type of Rape and Perceived Similarity to the Victim*, 13 AGGRESSION AND VIOLENT BEHAVIOR 396, 397 (2008).

14. This suspicion can be traced back to the Bible, in which rape accusations that occurred in the city, where screams could be heard, were disbelieved. See *Deuteronomy* 22:24–25. As Taz explained:

[F]ear of female lies led judges to caution jurors about Hale’s concerns. Again, for no other crime were jurors told to distrust the victim. ‘Hell hath no fury like a woman scorned,’ the ‘sense of shame after consenting to illicit intercourse’, and similar motives to lie were said to explain why rape had to be treated differently. Notably, to avoid false cries of rape by women feeling guilty about their consensual sexual exploits, the law required women to resist to the utmost.

TASLITZ, *supra* note 1, at 152.

fact which made her a promiscuous character who was more likely to consent to sex with the accused. Second, any pre-marital sexual activity was deemed a character flaw that generally undermined her truthfulness.¹⁵ Third, although it was never openly expressed as such, a woman who was sexually active outside of marriage was already “damaged goods”; her dignity and personal integrity were thereby deemed less valuable, and as a realistic matter, would not be vindicated in court.¹⁶

In response to the humiliating treatment of rape victims at trial and concerns that such victims were being discouraged from testifying, a nationwide movement arose in the 1970s and 1980s to amend both the substantive and procedural law concerning rape.¹⁷ Although the statutes vary considerably, rape shield is designed to restrict information about the victim’s sexual history, behavior, and preferences in order to limit irrelevant inquiries that may embarrass or harass the victim.¹⁸ According to the Supreme Court, rape shield law “represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy.”¹⁹

Jurisdictions employ various approaches to the construction and reach of rape shield statutes.²⁰ One approach, exemplified by Federal

15. See TAsLITZ, *supra* note 1, at 152 (“The victim’s prior sexual conduct was relevant, both to impeach her credibility (tramps lie) and to make her consent more likely.”); Heather D. Flowe et al., *Rape Shield Laws and Sexual Behavior Evidence: Effects of Consent Level and Women’s Sexual History on Rape Allegations*, 31 *LAW & HUM. BEHAV.* 159, 160 (2007) (“[E]vidence of promiscuity was routinely admitted at trial to undermine the credibility of a complainant and to demonstrate to the jury that in all likelihood she consented on the occasion in question.”) (citations omitted).

16. As Taz noted:

Rape trial practices also reinforce oppressive social norms. Among the gendered norms are that a woman should not go out at night without a male protector, should dress modestly in public, and should not openly express sexual interest in a man. Women are taught that violating these norms risks rape. Correspondingly, to violate these norms risks being labeled a “slut”, for whom any assault is nonrape. When the rape victim is treated as a slut at trial and her assailant is found not guilty, the citizenry publicly expresses approval of these norms. Yet, these norms limit women’s freedom of movement and expression. They contribute to a gendered caste system.

TAsLITZ, *supra* note 1 at 113.

17. See generally Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 *SUFFOLK U. L. REV.* 467, 469–70 (2005) (discussing the first wave of rape reform 1970–2000).

18. See Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 *GEO. WASH. L. REV.* 51, 80–81 (2002) (dividing rape shield statutes into four categories, distinguished by the manner and degree to which they admit evidence of a woman’s sexual history).

19. *Michigan v. Lucas*, 500 U.S. 145, 149–50 (1991).

20. See Helim Kathleen Chun & Lindsey Love, *Rape Sexual Assault and Evidentiary Matters*, 14 *GEO. J. GENDER & L.* 585, 591–93 (2013) (distinguishing legislative, federal, judicial

The Seductive Power of Patriarchal Stories

Rule of Evidence 412, is a blanket ban on propensity evidence concerning the victim, only allowing for limited exceptions. Rule 412 provides exceptions for: (A) evidence of other sources of the cause of the victim's injury; (B) evidence of a prior relationship between the victim and the accused, where defense is consent; and (C) cases when "exclusion would violate the defendant's constitutional rights."²¹ The last, broad and amorphous exception contrasts markedly with the much more specific and narrow exceptions in the same rule.

Rule 412 serves as a template for many states.²² Some jurisdictions that follow the Rule 412 approach to rape shield provide additional exceptions, excluding evidence that:

- demonstrates prior untruthful rape allegations,²³
- impeaches the victim where she made her prior sexual behavior an issue,²⁴
- illustrates a distinctive pattern of sexual behavior that closely resembles the crime charged²⁵ and, remarkably,
- provides the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.²⁶

Other jurisdictions do not follow the federal approach and instead employ some sort of balancing test, weighing the probative value of the evidence against its unfair prejudice to the victim.²⁷ All versions provide for the possibility of having a nonpublic hearing outside the hearing of the jury to protect the victim's privacy and shield her from humiliation when issues of her prior sexual behavior or propensities are first raised.

Whatever the organization, rape shield gives the trial judge discretion. As Taz observed, historically "police, prosecutors, judges, and

hybrid and evidentiary purpose approaches); see also Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 773 (1986) (documenting four distinct approaches). See generally NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, *Rape Shield Statutes* (2011).

21. FED. R. EVID. 412(b).

22. See VA. CODE ANN. § 18.2-67.7(A)(1)–(3) (West 2010); UTAH R. EVID. 412(b).

23. WIS. STAT. ANN. § 972.11(2)(b)(3) (West 2012).

24. W. VA. CODE ANN. § 61-8B-11(B) (West 2014).

25. N.C. GEN. STAT. § 8C-1, Rule 412(b)(3) (West 2014); TENN. R. EVID. 412(c)(4)(iii).

26. N.C. GEN. STAT. § 8C-1, Rule 412 (b)(4) (West 2014).

27. See, e.g., S.C. CODE ANN. § 16-3-659.1(1) (2015); WASH. REV. CODE ANN. § 9A.44.020(3)(d) (West 2013); WYO. STAT. ANN. § 6-2-312(a)(iv) (2010); TEX. R. EVID. 412(b)(3).

defense counsel have used their discretion to circumvent these reforms.”²⁸

III. WHEN DOES THE ACCUSED’S DESIRE TO INTRODUCE EVIDENCE BARRED BY RAPE SHIELD RISE TO A CONSTITUTIONAL RIGHT?

A. Potential Constitutional Rights Involved

When criminal defendants raise a constitutional objection to the exclusion of evidence because of rape shield, they cite the Sixth-Amendment right to meaningfully confront witnesses and the right to present a complete defense: “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’”²⁹ “Highly relevant” or “indispensable” evidence may be constitutionally mandated, even if it runs afoul of established evidence rules.³⁰

The right to present a complete defense, however, is not unlimited. As the Supreme Court explained in *Michigan v. Lucas*,³¹ that right “‘may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.’”³² Accordingly, the Supreme Court has found that some evidence, even if it is prohibited by rape shield, must be admitted for the trial to be fair. In *Olden v. Kentucky*, the Court held that an accused was permitted to introduce evidence that the white rape victim was living with a black man with whom she was having an extramarital affair.³³ The defense in the case was consent and the accused wished to show the victim had a motive

28. Taslitz, *supra* note 1, at 7.

29. *Holmes v. South Carolina*, 547 U.S. 319 (2006) (quotations omitted).

30. *Crane v. Kentucky*, 476 U.S. 683, 683 (1986) (holding that the accused had a right to present the conditions under which his confession was made); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (holding that hearsay statements regarding a confession to the crime by someone other than the accused and the inability of the accused to confront that person violated Chambers’ due-process right to present a defense).

31. *Michigan v. Lucas*, 500 U.S. 145, 152 (1991). *See generally* *United States v. Elbert*, 561 F.3d 771, 776 (8th Cir. 2009) (quoting *Lucas*).

32. *Lucas*, 500 U.S. at 149 (quoting *Rock v. Arkansas*, 483 U.S. 44, 55 (1987)); *see* *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (noting that the trial court has “wide latitude” to impose “reasonable limits” to avoid “harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.”).

33. *Olden v. Kentucky*, 488 U.S. 227, 233 (1988).

to lie about having been raped because her lover saw her disembark from the accused's car.³⁴

B. Procedural Posture of Federal Cases

Constitutional questions regarding rape shield exclusion of evidence arise in federal court in two ways. First, the accused can directly challenge the exclusion of the victim's sexual reputation, history, or proclivity at trial or on appeal. In such direct appeals, the accused argues that the final exception of Rule 412 has been triggered and that certain evidence is so essential to a fair trial that the "exclusion would violate the defendant's constitutional rights."³⁵ Because rape is generally not a federal offense, there are not many such cases in the federal system outside the military and Indian Country, where federal courts have jurisdiction over the crime of rape.³⁶

Alternatively, such cases arise in habeas corpus collateral attacks on state convictions. The standard of review is highly deferential. On habeas, a federal court will reverse a state's determination only if it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts."³⁷

C. An Overview of Recent Rape Shield Cases with Constitutional Challenges

Many of the so-called constitutional objections to exclusion of evidence about the victim are nothing more than resistance to the regular function and underlying policy of rape shield.³⁸ For instance, in *U.S. v. Ambrose*, the court rejected the appellant's argument that he was denied his constitutional right to present a defense and to cross-

34. *Id.* at 230.

35. FED. R. EVID. 412(b)(1)(C).

36. *See generally*, Aviva Orenstein, *Propensity or Stereotype?: A Bad Evidence Experiment in Indian Country*, 19 CORNELL J.L. & PUB. POL'Y 173 (2010) (noting the jurisdictional anomalies of federal rape cases).

37. Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d) (2015).

38. *See also* United States v. Papakee, 573 F.3d 569, 573 (8th Cir. 2009) (holding that evidence that the victim propositioned an investigating deputy soon after the incident was rightfully excluded under rape shield); Collins v. State, 223 P.3d 1014, 1019 (Okla. Crim. App. 2009) (holding that trial court rightfully excluded victim's history of prostitution despite accused's argument "that this ruling impaired his ability to impeach [the victim] with her past crimes of 'moral turpitude' . . . because the convictions and past acts of prostitution were relevant to prove [the victim's] motive or propensity to lie and to supported Collins' defense of consent").

examine witnesses, because evidence of the victim's consensual sexual intercourse with one of the appellant's co-conspirators would have made it "more likely that she had consensual sex with the appellant."³⁹

Cases that involve a serious constitutional challenge to rape shield's exclusion of evidence seem to fall into five distinct categories: (1) the victim's past sexual conduct is offered to explain a child-victim's knowledge about sex;⁴⁰ (2) the victim's prior sexual activity reflects on the victim's motive to lie (for instance, the victim might lie about consent to placate a jealous husband or boyfriend,⁴¹ to protect a married paramour,⁴² to avoid her parents' wrath if they discover she willingly participated in premarital sex,⁴³ or to prevent the accused from exposing something private about her sex life);⁴⁴ (3) the victim's prior history of prostitution or exotic dancing is offered to show consent to the sex act;⁴⁵ (4) the victim's prior, allegedly false rape reports

39. *United States v. Ambrose*, No. NMCM 9900167, 2001 WL 1488485, at *6 (N-M. Ct. Crim. App. Nov. 16, 2001).

40. *See generally* *United States v. Seibel*, 712 F.3d 1229, 1234–35 (8th Cir. 2013); *Merritt v. Roper*, No. 4:09CV01068 AGF, 2012 WL 3541901, at *2 (E.D. Mo. Aug. 15, 2012); *State v. Mack*, No. 100695, 2014 WL 5500021, (Ohio Oct. 30, 2014).

41. *See* *United States v. Sizemore*, ARMY 20051235, 2008 WL 8087965, at *6 (A. Ct. Crim. App. Apr. 29, 2008).

42. *See* *United States v. Pumpkin Seed*, 572 F.3d 552, 561–62 (8th Cir. 2014) (rejecting the theory that victim lied about rape to protect her married lover because she was unable to become pregnant and her contracting a sexually transmitted disease would not have exposed the fact that she was in a relationship).

43. *See* *United States v. Gaddis*, 70 M.J. 248, 256–57 (C.A.A.F. 2011) (discussing the extent to which the accused had a constitutional right to present evidence that the victim had a motive to fabricate the rape allegation to hide the victim's other sexual activity from her mother).

44. *See* *Martin v. McKee*, No. 2:11-CV-15034, 2013 WL 3224174, at *18 (E.D. Mich. June 25, 2013) (crediting "[p]etitioner's theory of defense . . . that the complainant had a motive to falsely accuse him of rape because she was trying to protect her adult-aged boyfriend from going to jail for having sex with a minor," but finding that the issue was improperly raised on habeas). *Compare* *Cecil v. Commonwealth*, 297 S.W.3d 12, 17 (Ky. 2009) (rejecting accused's argument that evidence of victim's sexual behavior and prostitution while a runaway was relevant to her motive for inventing a rape claim against him because she feared discovery of her activity by her family, possible pregnancy, or a sexually transmitted disease), *with* *State v. Stephen F.*, 188 P.3d 84, 90–91 (N.M. 2008) (trial court infringed on juvenile's Sixth-Amendment right to effective cross examination by forbidding accused to establish a motive to fabricate by questioning the victim about a prior sexual encounter, and the consequent punishment she received from her parents). In yet another variation, an accused wanted to claim that the allegedly false rape accusation was made because the accused had threatened to reveal that the victim had undergone an abortion. *Valentine v. United States*, No. 3:11-CV-361-S, 2014 WL 2766076, at *1 (W.D. Ky. Mar. 28, 2014).

45. *See* *United States v. Mack*, No. 1:13CR278, 2014 WL 356502, at *3 (N.D. Ohio, Jan. 31, 2014). The fact of prostitution becomes more convincing if the accused uses it to explain that the conflict arose because of accused's failure to pay for a consensual sexual transaction. *See* *Chun & Love*, *supra* note 20, at 587.

The Seductive Power of Patriarchal Stories

are used to impeach the victim's credibility;⁴⁶ and (5) the victim's prior sexual practices, which are deemed unusual and unlikely to have been consented to, such as a propensity for rough or sadomasochistic sex,⁴⁷ use of sex toys or other objects,⁴⁸ interracial sex, or sex with multiple partners⁴⁹ are offered to negate the assumption that the victim was unlikely to have consented. It is this last category that is explored in *Gagne v. Booker*, below.

D. *Gagne v. Booker* – A Recent Case Considering the Constitutionality of Excluding Evidence under Rape Shield

Gagne v. Booker,⁵⁰ which was heard en banc by the Sixth Circuit in 2012, presents a fascinating case study of the tension between rape shield protections and concerns for the accused's right to present a full defense. It is particularly interesting because the accused's concerns about deprivation of vital evidence rely squarely on rape myths and assumptions about women's sexuality.

The underlying facts of *Gagne* involved what all parties acknowledged began as consensual sex between the accused, Gagne, and his

46. See *United States v. Crow Eagle*, 705 F.3d 325, 329 (8th Cir. 2013); *Mathis v. Berghuis*, 90 F. App'x 101, 107 (6th Cir. 2004) (affirming district court's admission of prior false rape claim); *Burke v. Pallito*, No. 2:12 CV 197, 2013 WL 6145810, at *11 (D. Vt. Nov. 20 2013). Often, courts that reject the proffered testimony do so because they find that the accused has failed to show that the prior claim was false. See *Crow Eagle*, 705 F.3d at 329 (8th Cir. 2013) (rejecting impeachment of victim with allegedly false prior rape charges where accused offered no evidence that the prior charges were false); *Bouie v. Mendoza-Powers*, No. CV07-111-JVS, 2009 WL 5220726, at *8 (C.D. Cal. Dec. 31, 2009) (finding that false claims "of molestation would be admissible under California law as relevant to the victim's credibility, but that accused was "speculating at best that R.'s comments involved a false claim of molestation."); *United States v. Hohenstein*, No. ACM 37965, 2013 WL 3971576, at *2 (A.F. Ct. Crim. App. July 1, 2013); cf. *Piscopo v. Michigan*, 479 F. App'x. 698, 704 (6th Cir. 2012) (rejecting accused's wish to introduce evidence of victim's claims that she was abused by her father, who, like the accused was a pastor, to show that her perception was skewed in the present case). See TAsLITZ, *supra* note 1, at 587–88.

47. See *Buchanan v. Harry*, No. 5:07-CV-11630, 2014 WL 1999047, at *5 (E.D. Mich., May 15, 2014); 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, 131–37 (2002).

48. See *United States v. Ramone*, 218 F.3d 1229, 1238 (10th Cir. 2000) (excluding the victim's statement that she previously used objects as part of sex with the accused, finding that evidence was not probative of whether victim consented after brutal beating by the accused).

49. See *Haidl v. Cate*, No. SACV 11-133 GW (AJW), 2014 WL 102341, at *19 (C.D. Cal. Jan. 7, 2014) (rejecting the accused's argument that evidence of the victim's willingness to engage in sexual act with multiple partners in front of others and that she derived pleasure from insertion of inanimate objects was crucial to their consent defense even though it was arguably impeachment in part because victim was incapacitated and issue of whether she might have consented if not inebriated was relevant).

50. *Gagne v. Booker*, 680 F.3d 493 (6th Cir. 2012) [*hereinafter* *Gagne II*].

ex-girlfriend, Clark.⁵¹ At some point, another accused, Swathwood, joined the sexual encounter and both men engaged in oral, vaginal and anal sex with Clark.⁵² The sexual activity became rough and involved spanking, whipping, and insertion of various objects into Clark's vagina and anus, which caused her to bleed and bruise. All parties were drinking and using drugs. After the sexual encounter, Gagne and Swathwood took Clark's ATM card to buy more crack cocaine, but did not return to Clark's home and instead smoked it by themselves. The parties agreed to these facts but did not agree on whether Clark consented to the inclusion of Swathwood and the subsequent sexual activity among the three of them.⁵³ Clark claimed she had been forcibly raped. Gagne and Swathwood claimed that Clark consented and was falsely charging rape because she was a woman scorned (Gagne, her ex-boyfriend, was leaving for California) or because Clark was angry about not getting to partake of the drugs that were bought with her money.⁵⁴

The Michigan trial court admitted some, but not all, of the evidence the defendants wanted to introduce about Clark's prior sexual behavior and propensities. The Michigan trial court admitted testimony about a previous consensual sexual encounter between Clark and the two defendants, Gagne and Swathwood. Clark did not fully remember the prior incident (because of alcohol) but she did not deny that it occurred.⁵⁵ This prior incident with Gagne and Swathwood included some other women but did not involve Clark having sex with both men simultaneously. Additionally, Gagne was permitted to introduce evidence that he and Clark had engaged in consensual sex play

51. The facts are portrayed in both *Gagne II*, and the prior panel opinion, *Gagne v. Booker*, 606 F.3d 278, 280–81 (6th Cir. 2010) [*hereinafter* *Gagne I*]. Although the victim is referred to as P.C. in the en banc opinion, *see Gagne II*, 680 F.3d at 496 (calling her “Gagne’s former girlfriend, P.C.”), she is named in the panel opinion, *see Gagne I*, 606 F.3d at 279 (referring to her as “Gagne’s ex-girlfriend, Pamela Clark.”). Various arguments can be made about the utility, wisdom, and fairness of withholding the alleged victim’s name. *See Aviva Orenstein, Special Issues in Rape Trials*, 76 *FORDHAM. L. REV.* 1585, 1593–97 (2007).

52. *Gagne I*, 606 F.3d at 280. Both Gagne and Swathwood were convicted for “forcibly and simultaneously engaging in sexual activities with Clark.” *Id.* at 279.

53. *See id.* at 281 (The accused’s “description of the sexual activities differed only in that Clark consented to them.”). Clark also claimed that her ATM card was taken without her permission. *Gagne II*, 680 F.3d at 497.

54. *Gagne II*, 680 F.3d at 497. Because of a procedural failure to appeal in time to the Michigan Court of Appeals, Swathwood lost his right to bring a habeas action. *See Gagne I*, 606 F.3d at 283 n.3.

55. *Gagne I*, 606 F.3d at 282. The consensual nature of that encounter could be questioned given that Clark was so drunk she claimed to remember none of it, although she did not dispute that it could have happened. *See id.*

The Seductive Power of Patriarchal Stories

involving rough sex, including the use of a whip and the insertion of various foreign objects into Clark's vagina and anus.⁵⁶ This evidence fell under Michigan's exception to rape shield, which permits "[e]vidence of the victim's past sexual conduct with the actor."⁵⁷

The key evidentiary dispute and potential constitutional questions concerned the Michigan trial court's exclusion of evidence of that: (1) Clark had a three-way sexual encounter with Gagne and a different man, Bermudez, a month before the alleged rape, when Gagne and Clark were still dating (hereinafter "the Bermudez evidence"); and, (2) Clark had offered to have sex with Gagne and his father simultaneously. Gagne argued that the trial unfairly excluded both pieces of evidence in violation of his constitutional rights.

The Michigan trial court excluded both pieces of evidence because it determined that their admission would have violated Michigan's rape shield law.⁵⁸ The Michigan Court of Appeals affirmed Gagne's conviction and the Michigan Supreme Court refused to hear the case.⁵⁹

Gagne brought a pro se habeas petition to the Federal District Court for the Eastern District of Michigan, which granted habeas relief.⁶⁰ The district court concluded that the Michigan Court of Appeals violated Gagne's Sixth-Amendment right to a fair trial, to confront the witnesses against him, and to present a complete defense by excluding the Bermudez evidence and Clark's alleged offer to have sex

56. *See Gagne II*, 680 F.3d at 533 (Kethledge, J., dissenting). Clark agreed about the whip, but denied any past sex play with a wine bottle. *See id.* at 522 n. 2 (Moore, J., concurring).

57. MICH. COMP. LAWS §750.520j(1)(a) (quoted in *Gagne I*, 606 F.3d at 281 n.2).

58. *Gagne I*, 606 F.3d at 281. Although there was serious disagreement about the credibility of the two contested pieces of evidence, they were excluded because of rape shield, not because the evidence was deemed baseless. Some of the judges expressed skepticism of the notion that the other events occurred at all. *See id.* at 299 (Batchelder, J., dissenting) (portraying the allegations as "self-serving and unverifiable" and noting that "Clark was prepared to refute these accusations, had Gagne been allowed to raise them."). Also, to the extent they did occur, at least one judge on the en banc panel questioned the factual similarities between the Bermudez incident and the rape charged. *See Gagne II*, 680 F.3d at 522 (Moore, J., concurring in the judgment only) (disputing the dissent's characterization of the Bermudez proffer as brutal or violent and noting that "the defense certainly did not proffer that the Bermudez incident left the victim bleeding and with bruises all over her body").

59. *People v. Swathwood*, Nos. 235540 and 235541, 2003 WL 1880143, at *1-2 (Mich. Ct. App. Apr. 15, 2003) (concluding that the evidence of the three-way sexual activity with Bermudez and the alleged invitation to Gagne's father were irrelevant because they involved third parties, not Gagne's co-defendant Swathwood, and noting that the jury heard at length about another encounter between the victim and the two accused). The Michigan Supreme Court denied certification, *People v. Gagne*, 673 N.W.2d 755 (2003) (unpublished table decision).

60. *Gagne v. Booker*, No. 04-60283, 2007 WL 1975035, at *1 (E.D. Mich. July 2, 2007).

with Gagne and his father simultaneously.⁶¹ A divided panel of the Court of Appeals for the Sixth Circuit affirmed the grant of habeas.⁶² The panel's majority opinion held that "[i]n our view, the court of appeals underestimated the vital nature of the disputed material, which we believe to be highly relevant, primarily as substantive evidence on the issue of whether Clark consented to the sexual activity."⁶³ The majority concluded that where "the question of guilt or innocence turned almost entirely on the credibility of the victim's testimony regarding consent, the exclusion was an unreasonable application of the principles set forth by the Supreme Court."⁶⁴

A fractured en banc Court reversed the grant of habeas. In eight separate opinions the judges disagreed on:

- the source and specificity of the constitutional protections involved,⁶⁵
- whether, even if a constitutional problem might exist with the exclusion of the evidence, the habeas standard was met,⁶⁶
- whether the excluded evidence fell within the rape shield exception relating to the victim's prior sexual relationship with the accused,⁶⁷

61. *Id.* at *5–9. See *Gagne II*, 680 F.3d at 497.

62. *Gagne I*, 606 F.3d at 279. Judge Norris wrote the panel opinion, in which Judge Kethledge concurred and to which Judge Batchelder dissented. See generally *id.*

63. *Id.* at 286.

64. *Id.* at 288–89.

65. *Gagne II*, 680 F.3d at 493. The judges disagreed about the reach of *Crane v. Kentucky*, 476 U.S. 683 (1986) (holding that due process required the admission of the circumstances surrounding a sixteen-year-old's confession to murder, even though the court had found the confession voluntary) and *Chambers v. Mississippi*, 410 U.S. 284 (1973) (holding that the hearsay rule could not serve to bar a crucial confession by another person to the murder with which Chambers was charged, and that Chambers had a constitutional right to confront the party who allegedly made and repeated the confession). The dissent read both cases broadly to require admission of highly relevant, non-cumulative, and indispensable evidence, where credibility was central to the dispute. The dissenters also read *Chambers* to stand for the principle that evidentiary rules must give way to basic fairness. The plurality read both cases more narrowly, confining them to their facts. The plurality also noted that in *Crane* there was no strong governmental policy favoring exclusion of the evidence as there was with rape shield. *Gagne II* at 493, 523.

66. *Gagne II*, 680 F.3d at 521–27. Some of those concurring in the judgment to reverse the grant of habeas relied on this very high standard, finding that even if constitutionally debatable, Michigan's decision to exclude the evidence could not be said to violate a clear determination of constitutional law as established by the United State Supreme Court. See, e.g., *id.* at 521–22 (Moore, J., concurring) ("Gagne is not entitled to habeas relief because the Michigan Court of Appeals did not unreasonably apply the clearly established constitutional principles."); *id.* at 526–27 ("Although I find the dissent's interpretation of the record reasonable, I do not think it is compelled.")

67. *Id.* at 519, 524–28. For the dissent, the two pieces of excluded evidence clearly fell squarely within the exception to rape shield involving prior sex with accused. See *id.* at 528 (Kethledge, J., dissenting). For the plurality, the importance of the excluded evidence and the prejudice that its exclusion engendered was not that Clark had sex with Gagne before — there

The Seductive Power of Patriarchal Stories

- the extent to which the court had discretion to exclude sexual behavior even if it fell within that exception,⁶⁸
- the extent to which Clark’s other sexual behavior admitted at trial (her prior threesome with Swathwood and Gagne, and her prior sexual activity with Gagne) mitigated the harm of excluding the allegations about Bermudez and Gagne’s father, and finally,⁶⁹
- whether, even if Michigan’s rape shield law were properly applied, the basic fairness of the trial was jeopardized by the exclusion of the evidence.

On this last point, the en banc debate revealed the persistent draw of patriarchal stories. Essentially, the dissenters believed that past sexual behavior was so probative of consent on this occasion that to exclude it violated Gagne’s constitutional rights. Writing for the dissenters, Judge Kethledge, who concurred in the original panel opinion, believed that “evidence that the complainant had consented to the same kind of conduct with the defendant, only a handful of weeks before, is indispensable to his defense.”⁷⁰ Admission was not only constitutionally necessary but required “by any measure of fairness and common sense.”⁷¹ Judge Kethledge continued: “The only evidence with which Gagne could realistically defend himself—evidence, I might add, that suggests a substantial possibility that he is innocent—was the evidence that the trial court excluded. . . . What was left was an empty husk of a trial—at whose conclusion came a prison sentence of up to 45 years.”⁷²

According to the dissenters, a jury could not possibly imagine that a woman would consent to the group sex, rough sex, or insertion of foreign objects into her orifices that Clark experienced in the al-

was much admitted evidence as to that point — but that a third-party was involved. As Judge Clay explained: “It is clear that the purpose of the Bermudez evidence would not have been to demonstrate prior consent between Clark and Gagne, but prior consent between Clark and Bermudez. What is not clear is how evidence of consensual sex between Clark and Bermudez would be material to the material factual issue of whether Clark consented to sex with Gagne on [the date in question].” *Id.* at 524 (Clay, J., concurring); *id.* at 519 (Griffin, J., concurring) (“Contrary to the dissent’s conclusion, evidence regarding consensual group sex does not fit into an exception to Michigan’s Rape Shield Statute.”).

68. *Id.* at 524 (Clay, J., concurring).

69. According to the dissenters, the admitted evidence concerning a prior sexual encounter among Clark, Gagne, and Swathwood was insufficient to make this point with the jury because the events concerning the prior sex act that were admitted were distinct, particularly because Clark did not engaged in sex with both men simultaneously. *Id.* at 532.

70. *Id.* at 527 (Kethledge, J., dissenting).

71. *Id.*

72. *Id.* at 534 (Kethledge, J., dissenting).

leged rape. Although the jury did hear evidence about such prior behavior, the excluded evidence was vital to counteract the jurors' notion that consent would have been unlikely under the circumstances.⁷³ Therefore, the jury simply had to hear the excluded evidence, which indicated that Clark had engaged in such behavior before.⁷⁴

The dissent in the en banc opinion rests on the sexist notion that unless forced, respectable women ("good girls") do not engage in the deviant sexual behavior described in this case. The dissenters feared that exclusion of evidence about Clark's past sexual behavior would leave the jury with the misimpression that Clark was a "normal" woman with normal appetites, and therefore could not possibly have consented to the sexual encounter at issue.⁷⁵ Judge Griffin criticized this approach in his concurrence, noting that "the logic espoused by the dissent opens the door to prior sexual conduct of the victim being admissible, as a constitutional requirement, whenever the sexual conduct at issue is outside the norm."⁷⁶

Another indication of the dissenters' adoption of patriarchal stories concerns the frequent mention of the victim's consumption of drugs and alcohol—though it had no relevance to the question of consent or the contested evidentiary issues. In fact, the dissenters seem positively hostile to the victim because of her drinking, drug use, and past sexual behavior. In his concurring panel opinion, Judge Kethledge noted that Clark engaged "in consensual oral sex with Gagne minutes before the very incident for which he was convicted (and moreover that she had drunk a pint of vodka and nine or so

73. *Gagne I*, 606 F.3d at 282. According to Judge Norris, the prosecutor remarked upon the unlikelihood of the defendants' version of the story. In closing argument, the prosecutor stated that the event was "more consistent with a pornographic movie than real life." *Id.*

74. *Gagne II*, 680 F.3d at 532 (Kethledge, J., dissenting). As Judge Norris stated in the panel's majority decision: "The idea that someone could have consented to this sort of thing seems incredible absent proof that the person had consented to it before." *Gagne I*, 606 F.3d at 288. Similarly, the district court stated: "[e]vidence of prior group sex involving Petitioner and Bermudez and evidence of the complainant's invitation to Petitioner's father was an indication that it was not unusual or implausible for the complainant to engage in a 'threesome.'" *Gagne Booker*, No. 04-60283, 2007 WL 1975035, at *8 (E.D. Mich. July 2, 2007) (cited in *Gagne II*, 680 F.3d. at 525) (Clay, J., concurring).

75. As a doctrinal matter, for Judges Norris and Kethledge on the panel, the case presented an easy application of Michigan's exception for prior sexual activity with the actor because Gagne was involved in both and according to the dissenters "these prior incidents have significant relevance not only because Gagne and Clark were involved in them, but also because they are both remarkably similar to the events that occurred the night [in question]." *Gagne I*, 606 F.3d at 286.

76. *Gagne II*, 680 F.3d at 520 (Griffin, J., concurring).

beers and smoked crack in the hours before the incident).”⁷⁷ This parenthetical aside is not only irrelevant, but also breezily disdainful in tone.

In a chilling, if revealing statement, Judge Kethledge wrote: “In this trial, I respectfully submit, there was virtually nothing left for the rape shield statute to protect.”⁷⁸ Judge Kethledge means that Clark’s interests in privacy and in preventing potential shame and embarrassment “such as they were in this case, given the evidence of sexual activity (albeit non-brutal) and drug use that was admitted at trial” were already forfeited.⁷⁹ Judge Kethledge expressed doubt that admitting the Bermudez evidence⁸⁰ and the alleged offer regarding Gagne’s father “would have diminished those interests any further.”⁸¹ Apparently, according to the dissenters, there are behaviors that put a victim beyond the core policies and protections of rape shield.⁸²

In arguing that a trial without the excluded evidence was so unfair as to be unconstitutional, the dissenters insinuated that somehow concern for rape shield (and sexual politics or perhaps political correctness) had trumped basic fairness.⁸³ Judge Kethledge criticized the notion “that certain statutory values are so important as to trump constitutional ones. . . . There is no rape-defendant exception to the Constitution.”⁸⁴

The implication from and effect of the opinions of the dissenters en banc (as well as from the district court and the two judges on the panel who voted to grant habeas) is that rape shield exists to protect

77. *Gagne I*, 606 F.3d at 292 (Kethledge, J., concurring).

78. *Gagne II*, 680 F.3d at 535 (Kethledge, J., dissenting). Part of the reason for this astounding statement lies in Judge Kethledge’s belief that the facts of this case fall squarely within the exception for sex with the accused; *see also* *Gagne I*, 606 F.3d at 292 (Kethledge, J., concurring) (“I submit that, under the circumstances of this trial, there was virtually nothing left of those interests to protect.”); *see generally* *Olden v. Kentucky*, 488 U.S. 227 (1988)

79. *Gagne II*, 680 F.3d at 535 (Kethledge, J., dissenting).

80. *See id.* at 534–35.

81. *Id.* at 535.

82. *See generally id.* at 535. The admitted evidence stripped Clark of any rape shield protection. Ironically, however, this other evidence was, according to the dissent, insufficient to render harmless any error in excluding the Bermudez and father allegations, but was not sufficient to educate the jury about the proclivities of the accused. *See generally id.*

83. *Cf. Giles v. California*, 544 U.S. 353, 376 (2008) (“[W]e are puzzled by the dissent’s decision to devote its peroration to domestic abuse cases. Is the suggestion that we should have one Confrontation Clause (the one the Framers adopted and Crawford described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women?”).

84. *Gagne II*, 680 F.3d at 528 (Kethledge, J., dissenting). Similarly, Judge Martin, who concurred in dissent, expressed his “disappoint[ment] in the majority’s decision to frame this evidentiary issue as a protection of Michigan’s rape shield statute.” *Id.* at 527 (Martin, J., dissenting).

the temperate, tee-totaling, sexually tame, decorous, missionary-position type of victim. Clark was portrayed as none of these and hence undeserving of (and indeed beyond) protection. Besides, according to the dissenters, given the evidence that had already been admitted, Clark had no reputational or privacy interest to salvage anyway. On the other hand (and here there is a slight tension given the first point), the dissenters believed that the accused will suffer because the jury may not realize how abnormal the victim is: the evidence of her past behavior was vital to show a pattern of abnormal sexual appetites and promiscuity that make the accused's consent defense plausible.

IV. THE DRAW OF PATRIARCHAL STORIES

A. Critiquing the Dissent in *Gagne*

By arguing that Clark's past sexual behavior was not only relevant, but constitutionally mandated by clear Supreme Court precedent, the dissenters reveal a deep and abiding belief in the truth of patriarchal stories. The dissenters say that they accept rape shield law,⁸⁵ and they more or less seem to credit the instrumental aspects of rape shield—encouraging victims to report and testify.⁸⁶ They are willing to prohibit inquiry into a victim's sexual history where such evidence is merely meant to harass and is not “indispensable.”⁸⁷ They are all too eager, however, to adopt the retrograde view that the victim's past sexual practices and proclivities indicate a great likelihood of future consent.⁸⁸ Context, including the surroundings, the relationship with the partner, or even the identity of the partner,⁸⁹ does not seem

85. *Id.* at 528–29 (Kethledge, J., concurring.) (“[O]ur concern for a defendant's constitutional rights does not amount to a lack of concern for the interests served by the rape-shield laws.”).

86. There is no reason to suppose the dissenters are consciously misogynistic or affirmatively mean-spirited. Aside, of course, from his remarks about having nothing left to protect, which are misogynistic and frankly horrifying, even Judge Kethledge asserts that he approves of rape shield. *Gagne I*, 606 F.3d at 292 (Kethledge, J., concurring).

87. *Gagne II*, 680 F.3d at 527 (Kethledge, J., dissenting).

88. In fact, this is precisely what *Gagne* argued:

The idea that a woman would have sex with two or more men at the same time strikes most people as bizarre and a jury, therefore, [would] be inclined to view a consent defense in a case like this one with inherent disbelief. The evidence of past consensual group sexual activity is relevant to show that the charged incident in question occurred consensually, as [the defendant] testified it did, rather than as [P.C.] stated.”

Gagne II, 680 F.3d at 503.

89. Professor Deborah Tuerkheimer discusses *Gagne* in her article, *Judging Sex*, where she uses it to illustrate how courts “persist in making normative judgments about women's sexuality.” Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461, 1461 (2012). She specifically notes what should be, but apparently is not, obvious: “The identity of a woman's sexual partner greatly impacts her willingness to consent to sexual activities.” *Id.* at 1484.

The Seductive Power of Patriarchal Stories

to affect the relevance of the propensity argument. What matters only is that the victim is the type of woman who would do such a thing.⁹⁰

Taz's scholarship is clearly essential reading about and for those who share the dissenters' mindset. Despite protestations to the contrary,⁹¹ the dissenters ultimately resist rape shield in theory and practice.⁹² Rape shield does not make sense to the dissenters because it subverts their worldview of how women should and do behave. The dissenters' deep conviction that the propensity evidence of past sexual behavior is "vital" and "indispensable," explains why we have rape shield in the first place.⁹³

Judge Kethledge's newly minted rape shield exception, "nothing left to protect," is truly shocking.⁹⁴ Judge Kethledge does not see any distinction between engaging in consensual sexual acts in private and being questioned about them in a hostile and deriding manner in public. Apparently after an alleged rape victim engages in certain sexual behavior that Judge Kethledge finds distasteful or even just unusual, the victim forfeits rape shield protection entirely. This focus on women's propensities and prior sexual activity functions to control women's behavior. The social message is that sexual behavior too far outside the norm exposes women to attack and humiliation. The law will not come to the aid of a rape victim if in the past she has been incautious, sexually adventurous, or deviant.⁹⁵

90. Tuerkheimer notes that "female sexuality that fails to conform to normative standards sits uneasily with rape shield law." *Id.* at 1490 (footnote omitted). Instead, "retrograde notions of deviancy are substituting for rational deliberation on the question of consent." *Id.* at 1461. Tuerkheimer argues that *Gagne* "shows how the scope of rape shield protection is defined by reference to unmentioned, imagined benchmarks of acceptable female sexuality." *Id.* at 1482.

91. *Gagne II*, 680 F.3d at 528 (Kethledge, J., dissenting) ("[O]ur concern for a defendant's constitutional rights does not amount to a lack of concern for the interests served by the rape-shield laws."):

92. Chief Judge Batchelder, who wrote the en banc plurality opinion and dissented in the original three-judge panel, aptly observed that the dissenters' desired outcome "invalidates all rape shield laws as violative of the Sixth Amendment." *Gagne I*, 606 F.3d at 301 (Batchelder, C.J., dissenting).

93. See generally *Jardine v. Dittmann*, 658 F.3d 772, 778 (7th Cir. 2011) ("But evidence that a sexual-assault complainant often consented to sex with other men is archetypally prejudicial and not highly probative of consent in a particular case; precisely that concern underlies rape shield statutes."):

94. Judge Sutton wrote a brief concurrence in part to emphasize that "the State's interests in its rape shield laws remain strong even after a trial court admits some evidence of the victim's past sexual practices." *Gagne II*, 680 F.3d at 518 (Sutton, J., concurring).

95. See TAsLITZ, *supra* note 1.

Finally the dissenters can be fairly criticized for minimizing the state interest at stake in applying rape shield.⁹⁶ When a piece of evidence fits within the exception to rape shield, it nevertheless must be otherwise admissible and pass a Rule 403 balancing test whereby the evidence may be excluded if the unfair prejudice substantially outweighs its probative value.⁹⁷ Even assuming that the relevance of the two pieces of evidence in *Gagne* was high, there is still the problem of unfair prejudice. The danger of such evidence is that the trier of fact will believe that Clark has consented so often that she will (and did) consent to anything.

Even more pernicious than overvaluing the relevance of prior sexual behavior is the likelihood that the trier of fact might be less inclined to care about the victim's welfare or might believe that she "had it coming to her." This type of thinking taps into rape myths about fallen, ruined women. If Clark consented to a three-way sexual encounter, she crossed a line of propriety where rape shield no longer serves to protect her. Finally, no one seemed to raise the issue of the extreme prejudice of Clark's alleged proposal of an incestuous threesome among Gagne, his father, and herself. Even if a jury would forgive adventurous sex, incest might cross a line that would lead a jury to detest Clark and refuse to vindicate her rape.

The idea that some people cling to sexist assumptions, believe in rape myths, and adopt worldviews that have the effect of circumscribing women's acceptable sexual expression cannot be news. As Taz explained in *Rape Trials and the Culture of the Courtroom*, it would be ridiculous to imagine that our society has outgrown its fondness for patriarchal stories.⁹⁸ It is therefore more interesting, and in some respects depressing, to analyze the role of patriarchal stories in the plurality and concurring opinions in *Gagne*. If we shift the focus to the judges who voted to reverse the habeas grant, then we can spot the residual power of rape myths and patriarchal stories that undergird those opinions and influence the understanding of rape shield.

96. *Gagne II*, 680 F.3d at 536 (Kethledge, J., dissenting) ("the State's interests in excluding the evidence were minimal.").

97. See *United States v. Mack*, No: 1:13CR278, 2014 WL 356502, at *2 (N.D. Ohio Jan. 31 2014); see also *United States v. Anderson*, 467 Fed. 474, 477 (6th Cir. 2012) ("Although the language of Rule 412(b)(1)(B) is unqualified, it is well accepted that the admissibility of prior sexual acts between the accused and the alleged victim in order to prove consent is not absolute.").

98. See generally TAsLITZ, *supra* note 1.

The Seductive Power of Patriarchal Stories

Chief Judge Batchelder, who wrote the dissenting opinion on the original panel and the plurality for the en banc, displays some tentativeness and contradiction in her two opinions. She seems to vacillate between (1) arguing that the evidence is not relevant at all (or barely so) and (2) conceding that it is indeed extremely relevant but nevertheless prejudicial, and that the determination of the Michigan court should be respected, particularly because the state has an interest in encouraging prosecution and avoiding victim trauma.

In Judge Batchelder's original panel dissent, there is no equivocation. She wrote:

Some 35 years ago, the Michigan state legislature determined that a criminal defendant accused of rape may not introduce evidence about the victim's past sexual behavior, because the victim's past willingness is not relevant to the question of present consent. The majority here disagrees with that legislative determination and concludes that evidence of the victim's promiscuity or previous willingness to engage in somewhat similar sex acts was not only relevant but was "indispensable" and "the most relevant evidence."⁹⁹

In her en banc opinion, there is a thread of ambiguity and uncertainty. In the en banc plurality opinion, Batchelder focuses primarily on the habeas standard and the fact that the Michigan Court of Appeals was not objectively unreasonable.

It might be that Gagne is correct that, as a matter of his defense, this was the "most relevant evidence" and the state courts were wrong to exclude it, but "whether the trial judge was right or wrong is not the pertinent question under AEDPA." The question is whether the last state court's decision was "objectively unreasonable."¹⁰⁰

Part of Judge Batchelder's ambivalence stems from trying to meet the various arguments of the dissenters that the evidence was constitutionally mandated. As noted above, the judges who dissented en banc argued that the evidence of the other two alleged incidents were "the most relevant evidence" and "indispensable,"¹⁰¹ so part of the response by Judge Batchelder is clearly an argument in the alternative even if the disputed evidence is credible and highly relevant,¹⁰² it is

99. *Gagne I*, 606 F.3d at 292–93 (Batchelder, J., dissenting).

100. *Gagne II*, 680 F.3d at 517.

101. *Id.* at 527 (Kethledge, J., dissenting).

102. To be sure, jurors might find this behavior outlandish, aberrant, abnormal, bizarre, disgusting, or even deviant and, therefore, find it incredible or inherently unbelievable that P.C. would have consented to it. And it is not unreasonable to surmise that those

still inadmissible. But nevertheless, her commitment to the notion that the evidence was not relevant at all seemed to waiver.

Past consent to a sexually adventurous escapade with the accused and another man simultaneously does not indicate that the woman would consent to engage in similar sex acts with the same men on another occasion (the evidence that was admitted by the Michigan trial court) or with the accused and a different man (the contested Bermudez evidence). Behavior that is consensual in one circumstance could be forced in another. In his concurrence, Judge Clay wrote “separately to clarify the limitations required under the Michigan rape shield law and to further respond to the dissent’s argument in favor of admitting ‘pattern of conduct’ evidence.”¹⁰³ He lucidly and forcefully explained:

The only bridge to finding evidence of consensual sex between Clark and Bermudez material to whether Clark had consensual sex with Gagne on July 3, 2000, is to conclude that the kind of woman who would say “yes” to someone is the kind of woman who always says “yes.” But this is the kind of assumption that the Michigan legislature attempted to circumvent by enacting its rape shield law, and to rule otherwise would undermine the obvious intent of the legislature.¹⁰⁴

Judge Clay concluded that: “Such superfluous details of Clark’s sexual activity with Bermudez would serve no purpose but to embarrass or humiliate Clark; and furthermore, they fail the materiality test, and should be excluded.”¹⁰⁵ Similarly, in his concurrence, Judge Griffin critically observed that “the dissent embraces the inference that because the victim did it before, she likely did it again.”¹⁰⁶

In contrast, the dissenters’ argued that in some cases the accused really needs to show the victim’s propensity because it (she?) is weirder than the jury would otherwise dare to guess. Judges Clay and

jurors would be more likely to find consent if they were told that she had engaged in — and offered to engage in — group sex at least two other times in the past.

Gagne II, 680 F.3d at 517.

103. *Gagne II*, 680 F.3d at 524 (Clay, J., concurring in the judgment only).

104. *Id.* Judge Clay’s observations are mirrored by the Michigan Court of Appeals, which explained that “the complainant’s willing participation in a threesome with Gagne and Bermudez is not probative of whether she consented to a threesome with Gagne and Swathwood on the night of the alleged offense.” *People v. Swathwood*, Nos. 235540 and 235541, 2003 WL 1880143, at *2–3 (Mich. Ct. App. Apr. 15, 2003) (finding the alleged events involving Bermudez to be distinguishable and noting that other evidence that “the complainant was not averse to group sexual activity” was admitted in the description of a prior, consensual three-way sexual encounter among Gagne, Swathwood, and Clark).

105. *Gagne II*, 680 F.3d at 524 (Clay, J., concurring in the judgment only).

106. *Gagne II*, 680 F.3d at 520 (Griffin, J., concurring in the judgment).

Griffin fully understood and rejected the dissenters' argument, seeing it for what it was: a camouflaged propensity rationale serving to nullify rape shield's policy and intellectual underpinnings.

Gagne v. Booker should have been an easy case, particularly because of the almost insurmountable standard on habeas. And yet, five judges on the Court of Appeals for the Sixth Circuit could not resist the draw of propensity evidence about the sexual conduct and proclivities of the victim. Even some of the judges who voted to reverse the grant of habeas did so with reluctance, finding the two pieces of excluded evidence important to fairness, despite the fact their admission was not clearly commanded by Supreme Court precedent. And Judge Batchelder waived on the relevance of the excluded evidence sufficiently enough to inspire Judges Clay and Griffin to write separately.

V. RETHINKING THE APPLICATION OF THE RAPE SHIELD EXCEPTION FOR PRIOR SEX WITH THE ACCUSED

The *Gagne* case raises deep questions about the legitimate role of propensity arguments in applying rape shield exceptions. In dissent, Judge Kethledge emphasized that every rape shield statute “contains an exception for evidence of consensual sex with the defendant.”¹⁰⁷ The judges disagreed about whether this exception applied at all to the facts of *Gagne*, and whether the rights protected therein are constitutionally mandated. But it is worth examining *why* prior sex with the accused is an exception in the first place. Although limiting the evidence of prior sexual behavior to sex with the accused does undermine the broader retrograde notion that once a victim consents to one man, she is in general a “consenter” to all, it is still problematic. The exception can create mischief because it taps into the “intimacy discount” by which crimes against intimates are less likely to be perceived as criminal activities or will be punished more leniently.¹⁰⁸

Judge Kethledge reads the exception for prior sex with the accused as merely a permitted version use of propensity evidence—the victim agreed to sleep with this guy once, so it is more likely that she agreed on another occasion. This is not a necessary or wise interpreta-

107. *Gagne II*, 680 F.3d at 529 (Kethledge, J., dissenting); see Anderson, *supra* note 18, at 118.

108. See Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 701–06 (2006).

tion. He ignores the insight of Professor Tuerkheimer that “consent is contingent—meaning that consent on one occasion is not probative of consent on another.”¹⁰⁹ The special exception for prior sex with the accused relies on “the equally invidious common law inference that a woman’s consent to sexual intercourse has no temporal constraints.”¹¹⁰ Reading the exception as admitting the victim’s propensity to have sex with the accused subverts the policies of rape shield and taps into the rape myth surrounding date-rape and rape in marriage; that once a woman says yes to a particular man, she consents for all time.

It is possible, however, to understand the exception for sex with the accused in ways that give the exception meaning without undermining the practical benefits and policies of rape shield. There are at least three legitimate ways to read the exception without resorting to a propensity argument. First, the information about the prior relationship can help establish the victim’s bias or motive. Although it may also tap into a negative stereotype concerning the lying, vengeful woman, evidence about motive is often highly relevant. The accused has a right to say that he and the victim had a bad break up and that the false accusation against him was made out of malice.¹¹¹

Second, when the substantive rape law turns on the accused’s subjective understanding of consent, the prior relationship between the victim and the accused will sometimes be highly relevant. A wordless sexual encounter between people who have a sexual history might account for the accused’s belief that he received glances of encouragement and assent during the encounter.

Finally, without information that the accused and the victim knew each other, the jury will be confused about why certain events took place. For instance, in *Gagne*, the jury required some explanation of why Gagne stopped by Clark’s house and why she was willing to have sex with him, at least at first. So, information about a prior sexual relationship may be necessary to explain context.¹¹²

109. Tuerkheimer, *supra* note 89, at 1494.

110. See Anderson, *supra* note 18, at 121.

111. In a similar manner, evidence about a sexual relationship with a third party else may be relevant to show why the woman is lying about rape. See *Olden v. Kentucky*, 488 U.S. 227, 230 (1988); FED. R. EVID. 412(b)(1)(C); Orenstein, *supra* note 36 and accompanying text; see also Anderson, *supra* note 18 at 152–53.

112. See Anderson, *supra* note 18 at 130 (“For the sake of background and perspective, it is appropriate to allow the defendant to discuss general information about the nature of the parties’ relationship, such as the fact that the parties were married or lived together, or dated previously.”).

The Seductive Power of Patriarchal Stories

None of the above reasons is grounded on a propensity to have sex with the accused. In fact, propensity evidence is not as relevant as those who are swayed by patriarchal stories think. Such propensity evidence certainly does not rise to a constitutional mandate for admission. All evidence of prior sex with the accused should be screened by the trial judge for relevance and subject to Rule 403 balancing.

VI. THE PROBLEMATIC CONFLUENCE OF
RACE AND RAPE

The dissenters in *Gagne* argued that something peculiar and unexpected about the victim's sexual behavior and propensity constituted essential information for the jury. As Professor Deborah Tuerkheimer has persuasively argued, this type of thinking represents a constrained notion of female sexuality where "retrograde notion of chastity powerfully influence judicial inquiry."¹¹³ It is interesting to speculate on what other circumstances besides the group-sex and the victim's prior sex with the accused (both present in *Gagne*) might be deemed highly relevant to counteract suppositions about "normal" women, their sexual behavior, and the likelihood of consent. One problematic but very revealing scenario involves interracial sex.

In an older case, *People v. Williams*, the defendants challenged New York's rape shield law on statutory and constitutional grounds, arguing that the trial judge should have admitted evidence that the white teen-aged victim had previously engaged in group sex with different black men.¹¹⁴ On appeal, the accused presented a theory of relevance very similar to that of the dissenters in *Gagne*, arguing "that the prohibited evidence was needed to counter a possible inference by the jury that no woman would voluntarily have sexual relations with three men she had met just hours before on the street."¹¹⁵ Although unstated, the opinion very clearly implied that no young *white* woman from the suburbs would voluntarily have sex with three *black* men she met just hour before on the streets of New York. The court affirmed the exclusion of the evidence in part because the prosecution did not dwell on the unusual nature of the encounter in making his case.¹¹⁶

113. Tuerkheimer, *supra* note 89, at 1489.

114. *People v. Williams*, 614 N.E.2d 730, 733 (N.Y. 1993).

115. *Id.* at 735. At trial, the accused were pretty muddled in their reasoning, arguing that "evidence of the victim's prior group sex with black males would show her motivation for testifying against defendants." *Id.*

116. *Id.*

In another older case, *People v. Hackett*, the accused, a black man, sought to introduce evidence that the victim, a white man, engaged in previous homosexual acts with different black men, including three days before the alleged rape.¹¹⁷ The accused claimed that the evidence was necessary “to circumvent the inference that it would be improbable that a white male prisoner would consent to sodomy by a black male prisoner.”¹¹⁸ The Michigan Supreme Court affirmed the exclusion of the evidence, explaining that “a close[] question is presented where such evidence was sought to dispel the assumption that most jurors would believe such an act, especially given the interracial element, is not likely to occur voluntarily.”¹¹⁹ The Court nevertheless held that the accused was not denied his constitutional right to confrontation in part because some other evidence of homosexual conduct with a black prisoner was introduced.¹²⁰

Both cases involved interracial sex and another potential taboo (in *Williams*, group sex, in *Hackett*, gay sex).¹²¹ The confounding factor of race however, might alter the calculus. Certainly, if the prosecutor were to argue that the victim would *never* consent to sex with a black man, the probative value of such impeachment evidence increases tremendously and may rise to a constitutional imperative. But what do we do with the unspoken racist assumption that a white person would not generally consent to sex with a black man?

Taz noted how the patriarchal stories about rape alter when the accused is a black man and the victim is white (usually, but as *Hackett* indicates, not always a woman).¹²² Our historic skepticism of victims softens a bit when the perpetrator is a black man. As Taz wrote concerning the troubling history of false rape accusations against black men in American history: “A black defendant/white victim combination alone entitled a jury in some courts to draw the inference beyond a reasonable doubt that the defendant intended rape.”¹²³ He traced

117. *People v. Hackett*, 265 N.W.2d 120, 126–27 (Mich. 1984).

118. See generally Mark A. Whately & Ronald E. Riggio, *Gender Difference in Attributions of Blame for Male Rape Victims*, 8 J. INTERPERSONAL VIOLENCE 502 (1993) (analyzing victim blaming based on gender).

119. *Hackett*, 365 N.W.2d at 127.

120. *Id.*

121. In a psychological experiment more responsibility, more pleasure and less trauma was attributed to male rape victims who were homosexual than those who were heterosexual. See Damon Mitchell et al., *Attributions of Victim Responsibility, Pleasure and Trauma in Male Rape*, 36 J. SEX RESEARCH 369, 369 (1999).

122. Male victims of rape also suffer from rape myths, particular from the myth that if the victim did not actively and physically fight back, then the victim desired the unconsented-to sex.

123. TASLITZ, *supra* note 1, at 29.

the history of racism in rape charges from the Scottsboro boys to the central park jogger case.¹²⁴ Taz noted: “The usual presumption is that a suspect is *not* a bully but, rather, a victim of a Lying Woman. But this presumption is turned on its head when there is a black defendant and a white victim.”¹²⁵ As Professor I. Bennett Capers recently observed, in addition to suspicion of victims, “there is another history of distrust that is equally important: the distrust of testimony by black men.”¹²⁶

Unlike the propensities of victims that are perceived as unusual (group sex, anal sex, and sadomasochism), which often serve to shame the victim, the issue of race seems more legitimate. It is not simply something about the victim, but it is inextricably intertwined with the identity of the accused. It is troubling to rely on the propensity of the victim to have sex with black men; it is equally disturbing to let the jury’s racist attitudes serve to make consent less likely than it would have been had the perpetrator been white. Information that the victim had sex with black men in the past may be held against her; but silence on that point may tap into historic racist notions that infect the basic fairness of the trial.

VII. SEARCHING FOR THE BALANCE BETWEEN THE RIGHTS OF THE RAPE VICTIM AND THE ACCUSED

The constitutional exception to rape shield reflects tensions in evidence law between protecting victims and assuring a fair defense, two sometimes competing values, both cherished by our late colleague, Taz. It also highlights difficult related questions about our continuing reliance on propensity evidence, challenges notions of acceptable sexuality, and reminds us that our history and attitudes towards rape are linked to issues of race.

Certainly, occasions exist when evidence that discloses a victim’s sexual propensities and history must, out of basic fairness, be admissible.¹²⁷ Issues of motive or evidence that directly contradicts the victim’s assertions may indeed be vital to the defense. For instance, in *Lewis v. Wilkinson*, the Court of Appeals for the Sixth Circuit appro-

124. TASLITZ, *supra* note 1, at 30.

125. TASLITZ, *supra* note 1, at 31.

126. See I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1377 (2010).

127. As Judge Moore wrote, “[w]hen a state court mechanically applies a rape shield statute to exclude indispensable evidence of a victim’s sexual history, habeas relief may be warranted. That situation, however, is not before us today.” *Gagne II*, 680 F.3d at 523. (Moore, J., concurring in the judgment only).

priately held that the trial court had unconstitutionally excluded entries from the victim's diary.¹²⁸ Even though the entries referred to the victim's past sexual conduct and proclivities, her statements were essential because they cast doubt on her motives and indeed raised questions as to whether a rape had occurred at all.¹²⁹

However, there is no constitutional right to allow the victim's proclivity and sexual history to be introduced as propensity. The mistake many judges continue to make concerns the belief that propensity in itself is "highly relevant" and "indispensable" to the defense. The attempt to wedge sexual propensity into neutral pattern evidence should always be rejected. It is barely relevant and always extremely unfairly prejudicial to admit evidence that the victim tends to consent to a particular form of sexual activity, or even that the victim tends to consent to a particular person. Even an exception as deeply entrenched as the one for prior sex with the accused must be applied carefully, so that it does not become a free pass for the accused because of the victim's propensity to have sex with the accused.

Of all the tough problems Taz examined, the confluence of rape myths and negative stereotypes about black men were the most intellectually difficult and personally painful for our beloved lost colleague, whose intellect and heart merged to produce great scholarship. We are indebted to him for raising such questions in his scholarship and for his personal example of how to wrestle with competing concerns with integrity and compassion.

128. *Lewis v. Wilkinson*, 307 F.3d 413, 422–23 (6th Cir. 2002) (granting habeas for exclusion of victim's diary).

129. *Id.* at 417–18. The victim wrote: "I think I pounced on [the accused] because he was the last straw. That, and because I've always seemed to need some drama in my life . . . I'm sick of myself for giving in to them . . . I'm just not strong enough to say no to them. I'm tired of being a whore. This is where it ends." *Id.* at 417. The court observed that the victim's statements could "reasonably be said to form a particularized attack on the witnesses credibility directed toward revealing possible ulterior motives, as well as implying her consent." *Id.* at 422. The Court believed that the diary entries could be read as indicating that pursuing rape charges was the victim's "way of taking a stand against all the men who previously took advantage of her" and that no rape had occurred but rather the victim was angry at the accused's sexually caddish behavior as a "player." *Id.* at 421.

Fairly Pricing Guilty Pleas

ANNE R. TRAUM*

I. INTRODUCTION

How do we ensure that guilty plea outcomes are fair? This article considers how the late Professor Andrew Taslitz's work on Fair Price Theory sheds light on this question. Professor Taslitz was deeply concerned about the impact of the criminal justice system on the poor and minorities, and looked to other disciplines for ideas that could assist in understanding and reforming our legal system. Increasingly, Professor Taslitz turned his attention to what he called "The Guilty Plea State,"¹ in which prosecutors and defense counsel privately negotiate plea deals with little judicial oversight and no public involvement. In the guilty plea state, prosecutors set the "price" for plea-bargaining through charging decisions.² And as Professor Taslitz argued in *Judging Jena's D.A.: The Prosecutor and Racial Esteem*,³ those pricing decisions affect the defendant's and the community's perception of whether our criminal justice system is fair.

At the time of his death, Professor Taslitz had in the hopper a manuscript, "Plea Bargaining and Fair Price Theory." True to his style, Professor Taslitz likely would have explored in this unfinished piece how Fair Price Theory, a branch of behavioral economics, can help us better understand and regulate fairness in the guilty plea context. Fair price theory helps us understand what makes a price fair,

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1. See Andrew E. Taslitz, *The Guilty Plea State*, 23 CRIM. J. 4, 4 (2008) [hereinafter *Guilty Plea State*].

2. See Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393, 421, 428 (2009) [hereinafter *Judging Jena's D.A.*].

3. *Id.* at 428–29.

and Professor Taslitz harnessed the theory to examine fairness in the criminal justice system.

Building on Professor Taslitz's work, this article explores how Fair Price Theory can help us analyze the fairness of guilty pleas. In *Judging Jena's D.A.*, Professor Taslitz used Fair Price Theory to explore how prosecutors could strive to achieve fairness and reduce the perception of racial stigma. He used Fair Price Theory to propose a system of prosecutorial ethics that takes into account racial stigma.⁴ This article considers how Fair Price Theory challenges courts to analyze guilty pleas differently, by focusing on price without relying on the agency of prosecutors. Under current doctrine, a court examines whether the defendant's decision to plead guilty is voluntary, informed, and factually supported. Courts do not assess whether the defendant is getting a fair deal or fair price. Fair Price Theory could help define and assess what makes a deal (or price) fair. And that analysis, with its related questions, challenges the status quo by making price and fairness a central inquiry.

Fair Price Theory is useful for conceptualizing fairness in the guilty plea context. The theory is attractive because it comes from the marketplace and is based on marketplace behavior. Though contract law, which involves bargaining and pricing, has been an important ingredient in the law governing guilty pleas, Fair Price Theory adds an important behavioral dimension.⁵ It recognizes that fairness is based on both process and result (or outcome). Fair Price Theory reinforces the common-sense notion that fairness reflects procedural and substantive values.

Fair Price Theory poses a challenge to the status quo because it asks courts to think about procedure and substance in somewhat unfamiliar ways. Courts currently leave the job of charging to the prosecutor and assume that the parties, especially counseled defendants, can negotiate fair results. But courts do not investigate or regulate the process used to generate the price, and, understandably, might worry such scrutiny could tread on the prosecutor's charging authority or violate rules forbidding court-involvement in plea negotiations. Regulating that pricing process, which typically occurs off-the-record and behind closed doors, is new territory. Additionally, plea-pricing touches on the discrete stages of charging, guilt adjudication and sen-

4. *Id.* at 395–96, 398.

5. Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contracts*, 101 *YALE L.J.* 1909, 1910 (1992).

tencing, which get blended into a single plea-bargaining negotiation. Parties negotiate the charge with sentencing in mind, and may lock in sentencing certainty through charge-bargaining or prosecutor recommendations. Fair Price Theory provides an attractive, market-based reason for courts to focus on price. That shift in focus could be significant.

This essay revisits how Fair Price Theory informed Professor Taslitz's critique of prosecutorial charging decisions, especially in the Jena Six case, and explores how Fair Price Theory, by focusing on price, might challenge us to rethink how guilty pleas are regulated, with fairness in mind.

II. THE PROBLEM: REGULATING FAIRNESS IN THE GUILTY PLEA STATE

A. The Guilty Plea State

Professor Taslitz echoed the concerns of so many others in describing our system of guilty pleas. In the forward to an ABA symposium on plea-bargaining, Professor Taslitz described our traditional trial-adjudication system as the "Due Process State," and labeled our current system as the "Guilty Plea State."⁶ More recently the Supreme Court described the current system, in which over 94% of convictions result from guilty pleas, as "our system of pleas."⁷ Though guilty plea adjudication has been the dominant mode of conviction for nearly a century, it is less regulated and thus less developed compared to the dominant trial-based adjudication model.

The Due Process State, as Professor Taslitz and others have recognized, is loaded with constitutional, statutory, and institutional protections designed to ensure adversarial testing, community participation, judicial oversight, and accurate and fair results. Justice Scalia referred to this model, with its elaborate procedural protections, as "the gold standard of American justice—a full-dress criminal trial with its innumerable constitutional and statutory" protections.⁸ The reality is that few cases proceed to trial, nearly all convictions result from guilty pleas, and virtually every defendant engages in plea negotiations before conviction.⁹ The Guilty Plea State, in contrast to

6. *Guilty Plea State*, *supra* note 1, at 4.

7. *Lafler v. Cooper*, 132 S.Ct. 1376, 1381 (2012); *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012).

8. *Lafler*, 132 S.Ct. at 1398 (Scalia, J., dissenting).

9. *Guilty Plea State*, *supra* note 1, at 4.

the Due Process State, does not fully embody the same set of constitutional values.

The problem, in Professor Taslitz's view, was not pleading guilty, but rather the opaque, secretive, pressurized environment in which plea-bargaining takes place, without public participation or much judicial oversight. As he wrote, "[i]n the Guilty Plea State, negotiations take place largely in secret. The parties must persuade one another but not any representatives of the people. No judge supervises the proceedings. No transcript is made of the discussions. Moreover, few constitutional or statutory rights apply, and most of those that do can readily be waived."¹⁰ The real problem, Professor Taslitz argued, is "the nearly unregulated status of the system, a consequence of pretending that we still live in the fictional Due Process State when it long ago withered away."¹¹ Of course, Professor Taslitz was not alone in critiquing the laissez-faire market of plea-bargaining and recognizing the need for regulation and oversight.¹²

Compared to the Due Process State, there is a dearth of regulation in the Guilty Plea State. The elaborate trial-based model, though imperfect, embodies dearly held notions of community participation, predictability, oversight, and accuracy. Prosecutors charge and marshal evidence, defense counsel test and counter the prosecution's case, the jury weighs the evidence and determines guilt, and the judge referees the trial and later imposes sentence. The Guilty Plea State, in stark contrast, is largely unregulated and exists as a market model in which prosecutors (sellers) have monopoly power, defendants (consumers) have few protections, the community is not involved, and judges play a largely perfunctory role.¹³

Reforming the Guilty Plea State is a challenging task.¹⁴ Scholars advocate different approaches, reflecting their views about what needs

10. *Guilty Plea State*, *supra* note 1, at 4.

11. *Guilty Plea State*, *supra* note 1, at 5.

12. See e.g., Stephanos Bibas, *The Myth of the Fully Informed Rational Actor*, 31 ST. LOUIS U. PUB. L. REV. 79 (2011) ("[T]he Court has taken a laissez-faire, hands off approach, assuming that plea bargaining is a rational and well-functioning market in which price signals obviate regulation."); Rachel E. Barkow, *Separation of Powers and Criminal Law*, 58 STAN. L. REV. 989, 1044 (2006) (unreviewable prosecutorial discretion at charge bargaining "stands in sharp tension with the separation of powers"); George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 868 (2000) (describing modern prosecutor's "unilateral power to deal").

13. See generally Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117 (2011) (analogizing the evolution of enhanced plea bargaining protections with heightened protection for consumers).

14. Anne R. Traum, *Using Outcomes To Reframe Guilty Plea Adjudication*, 66 FLA. L. REV. 823, 853 (2014).

to be fixed. Some reformers seek to improve the current market-based system.¹⁵ Others strive to inject into guilty plea adjudication more meaningful constitutional or institutional checks, like increased judicial oversight and community participation, which mirror or adapt trial-based procedural protections.¹⁶ Professor Taslitz urged courts to be more involved in policing guilty plea agreements, encouraged prosecutors to temper their offers based on ethical concerns, and insisted on greater protection of defendants. Such process controls could yield more accurate results and faith in the process.¹⁷ Professor Taslitz's work on Fair Price Theory further supports his call for reforms that would make the Guilty Plea State more transparent and just.

B. Fair Price Theory and the Jena Six

Professor Taslitz drew on Fair Price Theory to critique prosecutorial charging decisions that perpetuate racial stigma. He relied on the theory to explore the themes of racial injustice surrounding the 2006 “Jena Six” case, in which six African-American high school students were convicted of assaulting a white classmate at Jena High School in Jena, Louisiana. The black students were treated more harshly than whites students and adults at every stage of the criminal justice process, from charging to bail to sentencing.¹⁸ Relying on Fair Price Theory, Professor Taslitz argued that prosecutors should take into account racial harm to avoid the kind of racial stigma and community resentment sparked in the Jena Six case.

For Professor Taslitz, the Jena Six case illustrated how racial harm can (or should) impact prosecutorial charging decisions. The facts, retold by Professor Taslitz in his article, underscore how a prosecutor's charging decisions can lead to results that, though legally defensible, appear racially skewed. The Jena Six were six African-American teenagers who were expelled from school and criminally charged for their alleged assault of a white student named Justin Barker.¹⁹ The assault of Barker stemmed from a dispute about the “white tree,” a

15. *Id.* at 864.

16. Laura Appleman, *The Plea Jury*, 85 *IND. L. J.* 731, 747–50 (2010) (arguing that a community jury should preside over pleas); Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining With Plea-Based Ceilings*, 82 *TUL. L. REV.* 1237, 1243–45 (2007).

17. *Judging Jena's D.A.*, *supra* note 2, at 442–44.

18. *Judging Jena's D.A.*, *supra* note 2, at 397, 456–57.

19. *Judging Jena's D.A.*, *supra* note 2, at 393; Andrew E. Taslitz & Carol Steiker, *Introduction to the Symposium: The Jena Six, The Prosecutorial Conscience, and the Dead Hand of History*, 44 *HARV. C.R.-C.L. L. REV.* 275, 276–78 (2009).

large tree under which only white students sat.²⁰ One of the black students received permission from the school to sit under the tree.²¹ Shortly thereafter, three hangman's nooses hung from the tree.²² After several black students sat under the tree,²³ the district attorney warned, "I can end your lives with the stroke of a pen."²⁴ In the same community, a black student named Robert Bailey was attacked by a white student outside a party and, the following day,²⁵ was threatened outside a store by a white man, who grabbed a shotgun from his truck, purportedly to use on Bailey. After Bailey and some friends wrestled the gun away from the man, they took it to police to report the incident. The local prosecutor charged the white student who assaulted Bailey with simple battery, did not charge the white man who grabbed his gun from his truck,²⁶ and charged Bailey and his friends with robbery for the theft of the firearm.²⁷

Two days later at Jena High, a white student named Justin Barker was injured in a schoolyard brawl and six black teens were arrested and charged with second-degree assault, which was later increased to attempted second-degree murder. One of the teens, Mychal Bell, was initially prosecuted as an adult.²⁸ Barker, the white victim, was charged with a firearm offense and released on \$5,000 bail.²⁹ For the Jena Six, bail ranged from \$70,000 to \$138,000.³⁰

As Professor Taslitz observed, the white defendants received more lenient treatment than the black students in terms of the seriousness of charges, size of the bond, length of sentences sought, arrest versus intra-school discipline, and adult versus juvenile court.³¹ Two of the prosecutor's decisions garnered particular criticism. First, by charging Mychal Bell with attempted second-degree murder, the prosecutor was able to transfer the case to adult court, exposing Bell to higher criminal penalties. Although the prosecutor later reduced the charge, observers suspected that the prosecutor increased the charges

20. Taslitz & Steiker, *supra* note 19, at 276.
21. Taslitz & Steiker, *supra* note 19, at 276–77.
22. Taslitz & Steiker, *supra* note 19, at 277.
23. Taslitz & Steiker, *supra* note 19, at 277.
24. Taslitz & Steiker, *supra* note 19, at 277.
25. Taslitz & Steiker, *supra* note 19, at 277.
26. Taslitz & Steiker, *supra* note 19, at 277–78.
27. Taslitz & Steiker, *supra* note 19, at 277–78.
28. *See* Taslitz & Steiker, *supra* note 19, at 275–76, 279.
29. Taslitz & Steiker, *supra* note 19, at 278.
30. Taslitz & Steiker, *supra* note 19, at 278.
31. *See* Taslitz & Steiker, *supra* note 19, at 278–80.

in order to secure harsher penalties.³² Second, the prosecutor did not charge the noose-incident as a hate crime, which would have exposed the white defendants to longer sentences.³³ The prosecutor defended his charging decisions as legally required, but critics observed that the charging decisions were highly discretionary.³⁴

Professor Taslitz drew on Fair Price Theory to argue that prosecutors should temper their charging decisions to avoid reinforcing racial stigma.³⁵ Professor Taslitz described Fair Price Theory as a branch of behavioral economics that “addresses the emotional reaction of buyers to prices that they perceive to be unfair.”³⁶ First, prices that violate social norms of equity, equality, and need will be perceived as distributively unfair.³⁷ In this context, equity means getting what you paid for, equality means being treated the same as others similarly situated, and need means making special allowance for the disadvantaged.³⁸

Second, a buyer will perceive a price as procedurally unfair if the process for determining the price lacks transparency or reflects favoritism.³⁹ Hence the buyer will perceive greater fairness in the price if they have some voice and control in setting the price, the process for determining the price is clear and rational, and favoritism doesn’t play a role.⁴⁰ Imbalances in the marketplace, Professor Taslitz argued, can lead to a sense of procedural unfairness.⁴¹ Common sources of imbalance in the criminal justice marketplace include lack of information and resources that are so critical to making a fully informed decision.⁴² The plea-bargaining process lacks transparency because defendants often plea-bargain based on incomplete information, are not privy to negotiations between the prosecutor and defense counsel, and

32. Taslitz & Steiker, *supra* note 19, at 279–80 (explaining that after conviction the appellate court remanded the case to juvenile court where Bell pled guilty to simple battery).

33. Taslitz & Steiker, *supra* note 19, at 280.

34. Taslitz & Steiker, *supra* note 19, at 281–83 (referring to the N.Y. Times article the prosecutor wrote in defense of his prosecutorial discretion). See Reed Walters, Op-Ed, *Justice in Jena*, N.Y. TIMES, Sept. 26, 2007, at A27 (rebutting descriptions of the events by commentators as “‘a schoolyard fight,’ as it has been commonly described in the news media and by critics”).

35. *Judging Jena’s D.A.*, *supra* note 2, at 428–30.

36. *Judging Jena’s D.A.*, *supra* note 2, at 428 & n.261–62.

37. *Judging Jena’s D.A.*, *supra* note 2, at 428.

38. *Judging Jena’s D.A.*, *supra* note 2, at 428.

39. See *Judging Jena’s D.A.*, *supra* note 2, at 428.

40. See *Judging Jena’s D.A.*, *supra* note 2, at 428–29.

41. See *Judging Jena’s D.A.*, *supra* note 2, at 429–30.

42. *Judging Jena’s D.A.*, *supra* note 2, at 431.

may feel that momentous and complex decisions are rushed or rote.⁴³ Prosecutors are far better resourced and enjoy broad power to set the price for a guilty plea, demand waivers of important rights— including access to relevant information and judicial review, and coerce a plea by increasing the trial penalty.⁴⁴

Third, an unfair price will trigger retaliatory behavior sparked by anger, which Professor Taslitz called “retributive anger.”⁴⁵ This anger, Professor Taslitz wrote, stems from the perception of being treated as less worthy than you are.⁴⁶ It is this perceived sense of unfairness— which stems from a lack of distributive and procedural fairness— that can lead to frustration and different forms of “retributive anger.”⁴⁷ For the defendant, this resentment can impede his own rehabilitation and lead to recidivism.⁴⁸ A community that perceives such unfairness may be less law-abiding, less willing to cooperate, which can lead to higher crime and other ill effects.⁴⁹ Professor Taslitz argued that charging and plea-bargaining, the key “pricing decision” are two prosecutorial decisions that can contribute to race-stigmatization.⁵⁰ Thus, summarizing the three key aspects of Fair Price Theory, Professor Taslitz argued that a prosecutor’s unfair pricing reinforces racial stigma, leads to anger and resentment, and sends a message to individuals and communities that the system is unfair.

Reflecting on the Jena Six, Professor Taslitz proposed that prosecutors could incorporate racial justice concerns into their charging or “pricing” decisions.⁵¹ The current “Do-justice Adversarialism,” Professor Taslitz wrote, assumes that the prosecutor and represented defendants are equal adversaries on a level playing field. In that model, the prosecutor’s adversarial zeal is tempered by an ethical, public duty to “do justice.”⁵² But the model permitted what happened in Jena

43. *Judging Jena’s D.A.*, *supra* note 2, at 430–34 (citing *United States v. Ruiz*, 536 U.S. 626, 631–32 (2002)) (suggesting that prosecutors are not required to disclose exculpatory evidence before a guilty plea).

44. *Judging Jena’s D.A.*, *supra* note 2, at 432.

45. *Judging Jena’s D.A.*, *supra* note 2, at 429.

46. *Judging Jena’s D.A.*, *supra* note 2, at 429.

47. *Judging Jena’s D.A.*, *supra* note 2, at 429.

48. *Judging Jena’s D.A.*, *supra* note 2, at 429 (citing JEREMY TRAVIS, AMY L. SOLOMON & MICHELLE WAUL, URBAN INST., *FROM PRISON TO HOME* 10–13 (2001)).

49. *Judging Jena’s D.A.*, *supra* note 2, at 420.

50. *Judging Jena’s D.A.*, *supra* note 2, at 421.

51. *Judging Jena’s D.A.*, *supra* note 2, at 421.

52. *Judging Jena’s D.A.*, *supra* note 2, at 442.

when ostensibly racially-neutral prosecutorial decisions led to harsher treatment of the black students.⁵³

Professor Taslitz proposed that instead of the flawed and narrow “do-justice” model, a model of ethics for prosecutors should mimic the model of ethics for medical practitioners, which embraces core principles of prevention, “do no harm,” and holistic treatment.⁵⁴ This model would encourage prosecutors to take into account and avoid the racial stigma and harm, what Professor Taslitz termed “racial disesteem,” that can flow from individual charging decisions.⁵⁵ A single charge may be legally justified, but does not occur in a vacuum and may not be justifiable when balanced against countervailing concerns about fairness. Prosecutors, Professor Taslitz wrote, are the “regulators of the market for racial disesteem, reinforcing pre-existing market biases working against racial minorities.”⁵⁶ Fair Price Theory provides a framework to define fairness in a way that incorporates these broader concerns and factors them into the pricing calculus.⁵⁷

Beyond prosecutorial ethics, Fair Price Theory provides useful insights on plea pricing, the aspect of the criminal justice system that actually operates as a market place of sellers (prosecutors) and buyers (defendants). Here the theory can help define what makes a guilty plea fair. And that inquiry, it turns out, poses a significant challenge to the status quo.

III. REORIENTING GUILTY PLEA REGULATION TO FOCUS ON FAIR RESULTS

Fair Price Theory, by focusing on price, offers a model for thinking about fairness in the guilty plea context.⁵⁸ The theory helps to identify what qualities make a price fair. The answer is that fairness is an amalgam of different components: there are the components that result in the price or result (distributive fairness) and the components that make up the process used to generate that result (procedural fairness). While Fair Price Theory has much to offer in terms of understanding and regulating the plea-bargaining marketplace and guilty plea process, two key insights are fundamental. First, fairness is both

53. *Judging Jena's D.A.*, *supra* note 2, at 417–18.

54. *Judging Jena's D.A.*, *supra* note 2, at 449.

55. *Judging Jena's D.A.*, *supra* note 2, at 430.

56. Taslitz & Steiker, *supra* note 19, at 290.

57. *Judging Jena's D.A.*, *supra* note 2, at 433–34.

58. *Judging Jena's D.A.*, *supra* note 2, at 428.

substantive and procedural, meaning that results, not just process, really matter.⁵⁹ Second, procedural fairness in this context refers to the process used to generate the price.⁶⁰ These two insights are important because they pose a challenge to our current system, which neither regulates substantive results at the plea stage, nor regulates the process for generating plea prices. Fair Price Theory provides a market-based framework for courts to regulate the fairness of guilty pleas. This challenges the status quo by reorienting courts to think about what is most important to the parties and society: getting a fair deal and having a system that produces fair deals.

A. A Market-based Framework for Testing Fairness

Fair Price Theory is a market-based model for exploring what makes a price fair. The theory is developed in Dr. Sarah Maxwell's work *The Price is Wrong*, which explores fair pricing as a mix of cultural norms, power dynamics, and emotional responses that inform one's sense of what is fair.⁶¹ Her work on fair pricing provides important insights for regulating plea-bargaining because it offers a vocabulary for assessing fairness in a buyer-seller marketplace of negotiated outcomes, and thus provides a market-based, instead of a trial-based, model for assessing the fairness of guilty pleas. Dr. Maxwell's approach is potentially useful because plea-bargaining is mostly unregulated, courts do not analyze whether each plea achieves a fair result, and market imbalances can distort plea results. Dr. Maxwell explores whether just pricing can ensure personal and social fairness. Importantly, Dr. Maxwell has illustrated a two-step model (price first, process second) that evaluates the fairness of price.

In criminal law, the fairness of plea deals is largely unregulated territory.⁶² Criminal procedure doctrine is shaped around trial being the "main event," and changes in trial procedure are implemented in the courtroom.⁶³ The system of pleas, by contrast, plays out mostly outside the courtroom, in private negotiations between the prosecutor and defense counsel, and with minimal judicial oversight.⁶⁴ Plea-bar-

59. *Judging Jena's D.A.*, *supra* note 2, at 428 (citing MAXWELL, *supra* note 61, at 74).

60. *Judging Jena's D.A.*, *supra* note 2, at 428 (citing MAXWELL, *supra* note 61, at 76-80).

61. See generally SARAH MAXWELL, *THE PRICE IS WRONG* (2008).

62. Bibas, *supra* note 13, at 1119.

63. See, e.g., *McFarland v. Scott*, 512 U.S. 1256, 1264 (Blackmun, J., dissenting from denial of certiorari) ("The trial is the main event in this system, where the prosecution and the defense do battle to reach a presumptively reliable result.").

64. Traum, *supra* note 14.

gaining blends three key phases of the criminal process – charging, guilt adjudication, and sentencing – into a single negotiation. The prosecutor decides which charges to bring, and can add, dismiss, or reduce charges during plea-bargaining.⁶⁵ The court, which is not involved in plea-bargaining, accepts the plea and later imposes sentence. Looking at a court docket sheet in a guilty plea case, these discrete proceedings – charging, pleading guilty, and sentencing – would appear as a distinct phases. But practically, for the parties, these phases are fully integrated into a plea negotiation, which fixes the charge and conviction, and predicts, or even mandates, a specific sentence.

The court, in accepting a guilty plea, performs a ritualized due process inquiry, but it is not about the fairness of the plea deal. To accept a guilty plea, a court must adhere to a few constitutional rules: the defendant must understand the rights he’s waiving by giving up his right to trial, as well as the terms and consequences of the plea.⁶⁶ The defendant must admit facts that satisfy the elements of the offense.⁶⁷ Though a coerced plea violates due process, it is widely acknowledged that defendants plead guilty under extreme pressure to avoid harsher sentencing consequences after a trial conviction.⁶⁸ Guilty plea adjudication can be rote and formal, and does not require the court to learn much about the case or the defendant.⁶⁹ The Supreme Court has acknowledged that guilty pleas, not trial-convictions, are the norm, and that plea-bargaining determines the conviction and the sentence.⁷⁰

Traditionally, courts have not asked, before accepting a guilty plea, whether the defendant received a fair deal. This is because the fairness questions that the court examines primarily go to the voluntariness of the plea, admitted elements, and waiver of rights, not the substance of the deal and how it compares with others. The Supreme Court has intimated, however, a general expectation that similar de-

65. Traum, *supra* note 14, at 835.

66. Traum, *supra* note 14, at 828.

67. Traum, *supra* note 14, at 830 n.30 (citing, *inter alia*, Henderson v. Morgan, 426 U.S. 637, 644–45 & n.13 (1976) (requiring for valid guilty plea the defendant understands the nature of the charge against him)).

68. Traum, *supra* note 14, at 833 (discussing Brady v. United States, 397 U.S. (1963)) (observing that many defendants plead guilty to get a more lenient sentence, to get reduced or dismissed charges, to gain certainty, and avoid the “agony and expense” of trial).

69. Traum, *supra* note 14, at 832 (citing Laura I. Appleman, The Plea Jury, 85 IND. L.J. 731, 733 (2010) (“Guilty pleas, although indispensable to the smooth processing of criminal justice, have become hasty and rote.”)).

70. Laffer v. Cooper, 132 S. Ct. 1376, 1388 (2012); Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

fendants get similar results.⁷¹ In *Lafler* and *Frye*, the Court recognized that ineffective assistance of counsel during the plea-bargaining phase could lead to a more serious conviction and a longer sentence.⁷² Ineffective assistance can contribute to uneven results, but it is not the only factor that can distort the plea market. Other market imbalances include the outsized power of the prosecutor, lack of transparency about the plea bargaining process, lack of relevant case information, and lack of judicial oversight.⁷³ How does a defendant, or defense counsel, or the trial judge, know if a plea deal is fair? Fair pricing theory can help answer that question.

Several key concepts inform our perception of what makes a price “fair.” A fair price is one that is both “acceptable” and “just,” terms that Dr. Maxwell assigns distinct meanings in evaluating fairness.⁷⁴ An acceptable price is satisfactory, favorable or reflects expected value.⁷⁵ A “just” price is consistent with social norms, rules and logic, in that it is free of favoritism or bias, just to all parties, and equitable.⁷⁶ The difference between an acceptable price and a just price is the difference between what Dr. Maxwell terms “personal” and “social” fairness. A personally fair price is one that is low enough to meet your expectations.⁷⁷ A socially fair price is one that is the same for everyone, not exploitative of consumer demand, and doesn’t result in outsized profit or benefit to the seller.⁷⁸

Both personal and social fairness reflect social norms about pricing, including who sets the price, what’s included in the price, and how much information is available about pricing.⁷⁹ Social norms affecting personal fairness might reflect what has been charged for the same thing in the past, for example, including tires in the price of a car.⁸⁰ Social norms affecting social fairness reflect societal values on how

71. *Lafler*, 132 S. Ct. at 1376; *Frye*, 132 S. Ct. at 1388.

72. See *Frye*, 132 S. Ct. at 1407; *Lafler*, 132 S. Ct. at 1387 (“The favorable sentence that eluded the defendant in the criminal proceeding appears to be the sentence he or others in his position would have received in the ordinary course, absent the failings of counsel.”). “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.” *Id.* (quoting *Bibas*, *supra* note 13, at 1138) (internal quotation marks omitted).

73. *Judging Jena’s D.A.*, *supra* note 2, at 430–33.

74. MAXWELL, *supra* note 61, at 6–7.

75. MAXWELL, *supra* note 61, at 6.

76. MAXWELL, *supra* note 61, at 6.

77. MAXWELL, *supra* note 61, at 7.

78. MAXWELL, *supra* note 61, at 7.

79. MAXWELL, *supra* note 61, at 8 (referring to Table 1.1).

80. MAXWELL, *supra* note 61, at 8.

people should behave, such as charging all customers the same price, and not sneaking in hidden surcharges. Violating those social norms is socially unfair because we as a society expect goods to be priced in a particular way and are offended when they are not.⁸¹

Fairness is the emotional part of economic decision making, as Professor Taslitz observed in his work critiquing prosecutorial “pricing” or charging decisions.⁸² Unfair pricing prompts an emotional response and, not surprisingly, social unfairness prompts a stronger emotional response like “retributive anger.”⁸³ Charging restaurant patrons extra for bread is a minor annoyance that is unlikely to provoke a strong response. But consumers will react more strongly if a store engages in unfair pricing, by misleading customers on price, hiding extra costs that should be included, or other deviations from socially accepted price terms.⁸⁴ Consumers’ emotional sense of fairness is a powerful component of economic decision making because it generates a fast, convincing belief about whether a price is good or bad.⁸⁵ Without this emotional guidance, consumers have trouble making a decision to buy. Fairness, Dr. Maxwell argues, is the emotional “yes” or “no.”⁸⁶

Socially fair pricing turns on the fairness of the outcome and the fairness of the process that led to that outcome.⁸⁷ This insight, taken directly from Dr. Maxwell’s work on fair pricing, seems directly applicable to plea-bargaining. Dr. Maxwell’s model starts with personal fairness and escalates to a broader inquiry about social fairness. Dr. Maxwell uses the example of an advertised sports car to illustrate this two-step inquiry for investigating the fairness of the price. The example underscores how Fair Price Theory, which starts with results and then examines the process that generated those results, could alter our approach to evaluating plea deals.

Dr. Maxwell considers a hypothetical consumer, who is intrigued by an advertisement for a new sports car priced at \$35,000. When this consumer arrives at the dealership, she is told the price is actually \$45,000. The consumer certainly would view this change as personally unfair (annoying, expensive, not what she expected), and this feeling

81. MAXWELL, *supra* note 61, at 8.

82. MAXWELL, *supra* note 61, at 9; *Judging Jena’s D.A.*, *supra* note 2, at 428.

83. MAXWELL, *supra* note 61, at 9.

84. MAXWELL, *supra* note 61, at 9–10.

85. MAXWELL, *supra* note 61, at 9–10.

86. MAXWELL, *supra* note 61, at 9–10.

87. MAXWELL, *supra* note 61, at 26.

would prompt her to query whether the price is also socially unfair. Determining social unfairness begins with determining the fairness of the outcome, and if that's concerning, the fairness of the process that led to that outcome.⁸⁸ The first is a question of substantive, or distributive fairness, which tests whether the result, the price, is acceptable. The second issue, which examined the process that led to this result, is a question of procedural fairness. Here, the consumer's decision will depend on whether she concludes the price increase violates social norms. Is the dealership being sneaky, or is the price increase justified for legitimate reasons? If the price violates social norms, the consumer will not agree to pay it and may be angry at the dealership. If the price increase is consistent with social norms, the consumer will conclude that the price is just, and might agree to pay it.

B. Results First Analysis of Guilty Pleas Would Challenge the Status Quo

Dr. Maxwell's two-step process for querying the fairness of a price (price first, process second) offers important insights for how courts might regulate the fairness of guilty pleas. This approach challenges traditional doctrine and reframes the courts' job in some specific and more general ways. First, putting results first, procedure second, is the opposite of how courts tend to analyze legal challenges to guilty pleas and sentences. Second, what do we mean by procedure? Fair Price Theory is very clear on this point: procedural fairness refers to the process that generated the price. This, too, challenges the way courts analyze guilty pleas. In adjudicating a guilty plea, courts ask certain questions, but not others. Courts focus on whether a guilty plea is knowing and voluntary, with the right to a jury trial providing the conceptual backdrop for that inquiry. Fair Price Theory would reorient that inquiry to examine a different procedural issue, specifically, the process used to generate the price. Hence, price is center stage, and process questions play a supporting role in generating and testing fair results.

1. Making Results Central

Results are what defendants and prosecutors care about most: the conviction and sentence. Though courts also care about results, they play a limited role in the substantive result of a case, and legal analysis

88. MAXWELL, *supra* note 61, at 26.

usually requires courts to consider procedure first, results second. This is because courts primarily regulate procedure, and review results that are connected or caused by a procedural violation. Putting results first flips the traditional order of operations. A results-first analysis would shift the court's focus from deciding whether there was a procedural violation, to deciding whether the plea procedure led to a substantively fair result. Although this may seem foreign at the plea stage, courts routinely evaluate results at the sentencing stage and have great familiarity with the charging, plea, and sentencing practices in their courts. Assessing results at the plea stage poses a challenge to the status quo in that it reorients the court's focus with intent to ensure substantive fairness. That shift in focus might also cause courts to think harder about whether the pre-plea procedure is designed to yield substantively fair results.

Generally, judicial attention in criminal cases is aimed at ensuring procedural, not substantive, regularity.⁸⁹ Courts primarily regulate criminal procedure consistent with deeply ingrained institutional roles. Before sentencing, courts act as referees in a process that is party-driven and litigated against the backdrop of an impending jury trial. Before trial, prosecutors charge and defense counsel seek to dismiss unsubstantiated charges and litigate procedural defects, such as illegal search and seizure. At trial, the prosecutor has the burden of proof, the court ensures that the trial is fair, and the jury determines whether the defendant is guilty. After the trial, the court switches gears when it imposes sentence, and impacts the case result.

The court's role is not that different in a guilty plea case. Trial adjudication remains the default. Key procedural protections, like the right to *Miranda* warnings before custodial interrogation, and the right to exculpatory evidence under *Brady v. Maryland*, are tethered to constitutional trial rights. The process for accepting a guilty plea operates as a substitute for the trial itself, with the court ensuring that the defendant understands the process he is giving up by pleading guilty, and the consequences of pleading guilty. The court is not in-

89. Criminal procedure governs the process for obtaining convictions and sentences. Substantive constitutional limits on convictions or sentences are rare. *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding unconstitutional state law criminalizing consensual, adult sexual activity inside the home); *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (Eighth Amendment bars capital punishment for children); *Graham v. Florida*, 560 U.S. 48 (2010) (Eighth Amendment prohibits a sentence of life without the possibility of parole for a juvenile convicted of a non-homicide offense).

volved and does not regulate the private, out-of-court negotiation that establishes the charges of conviction and the likely sentence.

Because courts primarily regulate procedure, results are a secondary concern. Whether at the trial, appellate, or collateral level, courts first consider whether there was a procedural error in the underlying case, and then consider whether that error made a difference in the outcome of the case.⁹⁰ Sentencing review, if any, typically focuses on procedural aspects of the sentence, not whether the imposed sentence was fair.⁹¹ When a sentencing court acts within its legal authority and complies with sentencing rules, the sentence will not be second-guessed by a reviewing court. To successfully challenge a guilty plea, a defendant must point to some procedural defect. An unfair result, on its own, is not enough.

The Supreme Court has recognized that plea-sentences, not trial-sentences, are the norm and that, for the parties, it is all about the result. Ours “is for the most part a system of pleas, not a system of trials,”⁹² the Supreme Court acknowledged in *Lafler*. The Supreme Court traditionally has assumed that the parties would negotiate to a fair result.⁹³ The Court’s recent decisions illustrate how that give-and-take can be hobbled by ineffective counsel’s failure to inform the defendant of immigration consequences of the plea, to communicate the government’s plea offer, or to correctly evaluate the charged offense.⁹⁴ In doctrinal terms, *Padilla*, *Frye*, and *Lafler* broke new ground in terms of applying *Strickland* during the plea-bargaining stage. These cases also illustrate the “process first” model: to get re-

90. A court considers whether an error was harmless, meaning that the error did not make a difference in the outcome of the case. FED. R. CRIM. P. 52 (describing harmless and plain error). Most constitutional errors are reviewed under harmless beyond a reasonable doubt standard, but a few, like denial of counsel or retained counsel of choice, are deemed “structural error,” meaning that the court cannot evaluate the prejudicial impact of the error, and thus must order a new proceeding. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006).

91. Anne R. Traum, *Mass Incarceration At Sentencing*, 64 HASTINGS L.J., 423, 446–47 (2013) (describing limited, error-based review of sentences on appeal).

92. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012), *quoted in* *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

93. *See Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978) (assuming that in the “give-and-take negotiation common in plea bargaining . . . the prosecution and defense . . . arguably possess relatively equal bargaining power”).

94. *Lafler*, 132 S. Ct. at 1387 (holding that the trial counsel was ineffective when, based on incorrect legal advice, he advised the defendant to reject a favorable plea); *Frye*, 132 S. Ct. at 1408 (holding that counsel was deficient for failing to timely communicate a plea offer that would have resulted in a shorter sentence and lesser offense); *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (holding that counsel was deficient in failing to accurately advise the defendant about the certainty deportation after pleading guilty to a drug trafficking offense).

lief, a defendant must prove a procedural defect (such as deficient counsel).

Results-first analysis would evaluate and compare plea pricing. Under the process-first analysis, a defendant would have no basis, absent a procedural defect, to complain, “my sentence was twice as long as his.” Results-first analysis would reframe that claim in terms of the fairness of plea pricing: Why did Defendant A, similarly situated to Defendant B, get twice as much time? This inquiry leads ineluctably to a number of other comparative and case-specific questions that may touch on sentencing questions (like culpability or disparities) and procedural factors, like the quality of defense counsel, variability in prosecutors, whether the defendant pled early or later in the case timeline, etc. Results-first analysis leads inevitably to an explication and investigation of how and why the parties reached this result.

Though procedural defects are the gateway to relief, courts understand that plea-bargaining is about results and that just results are paramount.⁹⁵ The Court has tested prejudice under *Strickland* by evaluating whether counsel’s deficient performance led to a longer sentence.⁹⁶ The Court recognizes that plea-sentences are the norm, and that defendants should expect results that are on par with what similarly positioned defendants receive in other cases. This last point, that similar defendants get similar results, is a bedrock principle of sentencing laws, with which courts are also familiar. Modern sentencing laws have aspired to reduce disparate treatment among similarly situated defendants, and reinforce predictable results. So while courts primarily regulate and remedy procedural violations, they understand the importance of just and fair results.

2. Redefining Procedure

Fair Price Theory could reorient courts to focus on the process that generated the guilty plea. This is a significant change in direction for courts, which do not regulate charging or plea-bargaining.⁹⁷ In

95. *Lafler*, 132 S. Ct. at 1388 (“[T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.”).

96. *Id.* (“That position ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas It is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.”).

97. *Frye*, 132 S. Ct. at 1407 (“This underscores that the plea-bargaining process is often in flux, with no clear standards or timelines and with no judicial supervision of the discussions

guilty plea adjudication, courts ask certain questions, but not others. Courts focus on whether the plea is knowing and voluntary, with the right to jury trial providing the conceptual backdrop for that inquiry.⁹⁸ Fair Price Theory would redirect courts to examine a different kind of procedural fairness, specifically, the process used to generate the price. The previous examples illustrate how this inquiry flows naturally from results-first analysis: With the price of a guilty plea occupying center stage, the process questions play a supporting role in generating and testing fair results. Fair Price Theory creates a framework for courts to develop and apply procedural rules to generate and ensure fair pleas.

Every court, including the Supreme Court, understands that horse-trading transpires between the parties during plea negotiations.⁹⁹ For decades, the Court has presumed that the prosecutor and defense counsel operate as equals on a level playing field. The legal standard is that prosecutors are free to charge any offense supported by probable cause, and can increase or decrease the charges during plea-bargaining.¹⁰⁰ The Court has approved prosecutors' use of coercive threats and charge-bargaining to induce defendants to plead guilty, arguing that such tactics were lawful so long as the charges are supported by probable cause.¹⁰¹ One justification for this hands-off approach is separation of powers.¹⁰² Because charging, and thus charge-bargaining is a prosecutorial function, courts have stayed out. Settlement negotiations are usually privileged, and in some jurisdictions, local rules prohibit court involvement in plea-negotiations. It was convenient for courts that this hands-off approach produced a steady stream of guilty pleas.¹⁰³

More recently, however, the Court has questioned the fairness of aggressive charge-bargaining and the distorted results it can yield. In *Lafler*, the defendant rejected a plea offer based on counsel's incorrect legal advice, and received a sentence after a jury conviction that was three and one half times longer than the plea offer would have

between prosecution and defense. Indeed, discussions between client and defense counsel are privileged.”).

98. See *Lafler*, 132 S. Ct. at 1390; *Frye*, 132 S. Ct. at 1406.

99. See *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978).

100. *Id.* at 372.

101. *Id.* at 364.

102. See *id.* at 365; *Brady*, 373 U.S. at 87–88.

103. See George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 1070 (2000); Anne R. Traum, *Using Outcomes To Reframe Guilty Plea Adjudication*, 66 FLA. L. REV. 823, 860–61 (2014).

yielded.¹⁰⁴ The Court recognized that the defendant should have gotten a sentence closer to the norm, and that in our system of pleas, trial-based sentences are exceptional. “The expected post-trial sentence is imposed in only a few percent of cases” the Court stated, “[i]t 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.”¹⁰⁵

The Court has repeatedly expressed concern about prosecutorial overcharging as a means to induce guilty pleas. The Court in *Frye* acknowledged that prosecutors use harsh statutes as negotiating tools, without regard to culpability or uneven results.¹⁰⁶ The Court is wary of prosecutors overcharging, even in relatively minor cases, to induce defendants to plead guilty.¹⁰⁷ In recent arguments this term, the Court circled back to this theme. The Court questioned why a prosecutor would charge an offense carrying a twenty-year maximum instead of a similar offense with a five-year maximum, and referenced a prosecutorial charging manual that instructs prosecutors to seek the most serious charges available.¹⁰⁸ The Court expressed concern about prosecutors exercising such broad discretion, and intimated that it might affect the Court’s interpretation of the criminal statute at issue.¹⁰⁹ None of the cases specifically address plea-bargaining, but they are telling indications of the Court’s skepticism about how prosecutors deploy statutes to extract guilty pleas, and whether that practice leads to just results.

As Professor Taslitz and other scholars have argued, there is much room to improve the process for generating pleas so that it is

104. *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012).

105. *See Bibas*, *supra* note 13, at 1138.

106. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (citing Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 *STAN. L. REV.* 989, 1034 (2006) (“[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. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial.”)).

107. Amy Howe, *Justices Take the Measure of Fish Case: In Plain English*, SCOTUSBLOG (Nov. 5, 2014, 10:28 PM), <http://www.scotusblog.com/2014/11/justices-take-the-measure-of-fish-case-in-plain-english/> (questioning why prosecutors would charge the defendant with an offense carrying a twenty-year maximum, when a similar statute carrying a five-year maximum was also available).

108. *Id.* (referring to a Department of Justice Manual that “instructs federal prosecutors to bring the charges that are most severe.”) (statement of Justice Scalia) (“[I]f that’s going to be the Department of Justice’s position, we’re going to have to be very careful about interpreting the scope [of laws like these].”).

109. *Id.*; Amy Howe, *Argument Analysis: Court Takes on “Very Peculiar” Bank Robbery Statute*, SCOTUSBLOG (Dec. 2, 2014, 9:34 PM), <http://www.scotusblog.com/2014/12/argument-analysis-court-takes-on-very-peculiar-bank-robbery-statute/>.

more transparent, understandable to defendants, predictable, and designed to yield measured, accurate guilty pleas. Prosecutors could be required to disclose exculpatory and impeachment evidence to help defendants better assess the strength of the case against the. Prosecutors could disclose their internal plea pricing policies so that defense counsel can better understand how the flow of offers, and what factors contribute to those incremental decisions.

The parties could be required to memorialize the history of plea offers in the case, so that defendants (and the court) are fully aware of earlier offers, in case there was a misunderstanding or miscommunication. Defendants could be educated on the plea market so that they have a firm understanding of trial risks, sentencing consequences, how similar defendants have been treated, or why certain options are available, but not others. In short, there is no shortage of ideas about ways to improve what is mostly unregulated territory.

Reorienting courts to ensure fair results and to oversee a process that is designed to yield fair results would be a significant change. Courts are masters of ensuring fair process, and Fair Price Theory creates an opportunity for courts to rethink the purpose of the process for evaluating guilty pleas. Most importantly, getting courts to care about guilty plea results aligns them with the parties, whose negotiations are results driven. The parties see plea-bargaining as a blending of charging, guilt, and sentencing. Courts understand that, too, but do not have a guilty plea adjudication process that reflects that reality. By probing the fairness of guilty pleas, and managing the procedure that generates those guilty pleas, courts can play a meaningful role in the process.

IV. CONCLUSION

Professor Taslitz reached to Fair Price Theory to explore the racial stigma and harm that flows from prosecutorial charging decisions. This is because Fair Price Theory offers a broad framework for thinking about fairness that links an individual transaction between the seller (prosecutor) and buyer (defendant), to a broader social context based on societal norms, distributive fairness, equity and emotions. In the plea-bargaining market, Fair Price Theory is especially relevant because it draws on market-place behavior. In subtle and obvious ways, the theory would pose a challenge to the status quo, especially for courts, by making price fairness the central focus. The parties are already there.

Fairly Pricing Guilty Pleas

For prosecutors and defendants, plea-bargaining blends into one seamless negotiation the charging, conviction and sentence. But courts continue to operate a procedure against the backdrop of an impending trial, taking a hands-off approach to plea-bargaining, and, often, a checklist approach to accepting a guilty plea. Fair Price Theory would support courts redirecting their focus, in alignment with the parties, to focus on results and the procedure that generated those results. While moving in this direction would represent a significant change, it would give courts a meaningful role in ensuring that our plea system is designed to yield fair results.

Hits, Misses, and False Alarms in Simultaneous and Sequential Lineups

ROGER C. PARK¹

Scholars who study eyewitness identification have produced an impressive body of empirical research. On the basis of this research, they have also proposed lineup reforms and worked with policymakers to get the reforms implemented.² One of the most important reform proposals involves use of sequential instead of simultaneous lineups. This paper is an examination of costs and benefits of that reform.

Advocates of sequential lineups maintain that simultaneous lineups encourage witnesses to use a process of “relative judgment.”³ When lineup witnesses view a simultaneous array, they often pick the person who most closely resembles their memory of the culprit’s appearance.⁴ This relative judgment process results in false identifications when the culprit is absent from the array.⁵ Risinger captures the

1. James Edgar Hervey Distinguished Professor of Law, University of California, Hastings College of Law. I would like to thank Hadar Aviram, Daniel Farber, Stephen Penrod, and Michael Risinger for helpful comments on earlier drafts of this article, and Stephen E. Clark, Nancy K. Steblay, and Stephen Penrod for guidance in research. Of course, the people thanked are not responsible for flaws in this paper. This paper is offered in honor of Andrew E. Taslitz after his untimely death. Professor Taslitz was a thoughtful and prolific contributor to the literature on evidence and criminal procedure.

2. See, e.g., Gary L. Wells et al., *Double-Blind Photo Lineups Using Actual Eyewitnesses: An Experimental Test of a Sequential Versus Simultaneous Lineup Procedure*, LAW & HUM. BEHAV., June 16, 2014, at 1 [hereinafter Wells, *Double-Blind*]. The authors note that many U.S. jurisdictions use sequential lineup procedures, including “the entire states of Connecticut, North Carolina, and New Jersey, as well as major cities such as Dallas and Boston.” *Id.* A white paper adopted by the American Psychology/Law Society was influential in encouraging reforms. Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photoarrays*, 22 LAW & HUM. BEHAV. 603, 603 (1998) [hereinafter Wells, *Eyewitness*].

3. See, e.g., Nancy K. Steblay et al., *Seventy-Two Tests of the Sequential Lineup Superiority Effect: A Meta-Analysis and Policy Discussion*, 17 PSYCHOL. PUB. POL’Y & L. 99, 102 (2011). Gary L. Wells, Nancy K. Steblay, and Jennifer E. Dysart, *Double Blind Photo Lineups Using Actual Eyewitnesses: An Experimental Test of Sequential Versus Simultaneous Lineup Procedure*, 39 LAW & HUM. BEHAV. 1, 2 (2015).

4. See, e.g., Steblay et al. *supra* note 3. Wells, *Double-Blind*, *supra* note 2, at 2.

5. See, e.g., Steblay et al., *supra* note 3.

essential point by quoting an expert who said that identification is supposed to be about recognition, not about figuring things out.⁶ Skeptics question this model. For example, Clark disparages the psychological assumptions behind the relative judgment/recognition dichotomy and argues for a model of memory of culprit appearance as a continuous variable instead of creating a dichotomy between legitimate “recognition” hits and illegitimate “relative judgment” hits.⁷

The relative judgment process is one explanation for the loss of hits when sequential lineups are used. But there are other possible explanations. A witness might hold back from making an identification in a sequential lineup simply because the witness is in doubt about whether the person shown is the culprit, and has hopes that someone later in the sequence can be identified without doubt. The difference in performance in simultaneous and sequential lineups could simply be due to features of the sequential lineup that make the witness more cautious and less likely to attempt an identification.

If the sequential lineup avoided false alarms⁸ without any loss of correct hits, then it would be easy to say that sequential lineups are better than simultaneous ones. Unfortunately, that is not the case. The experimental data indicates that the sequential lineup decreases the rate of false alarms at the cost of increasing the rate of lost hits. In other words, the reform reduces the rate of mistaken identification of non-culprits, at the cost reducing the rate of correct identification of culprits. A meta-analysis of studies of simultaneous and sequential lineups⁹ yielded a hit rate of .54 for simultaneous lineups and .43 for

6. D. Michael Risinger, *At What Cost?: Blind Testing, Eyewitness Identification, and What Can and Cannot Be Counted as a Cost of Reducing Information Available for Decision*, 58 *How. L.J.* (forthcoming 2015).

7. See Steven E. Clark, *Eyewitness Identification Reform: Data, Theory, and Due Process*, 7 *PERSP. ON PSYCHOL. SCI.* 279, 281 (2012). For a hypothesis about how simultaneous lineups might enhance witness’s abilities to distinguish faces they had previously seen and those they had not, see John T. Wixted & Laura Mickes, *A Signal-Detection-Based Diagnostic-Feature-Detection Model of Eyewitness Identification*, 121 *PSYCHOL. REV.* 262–76 (2014).

8. In the terminology of this article, a “hit” occurs when a witness makes a correct positive identification. A “miss” occurs when a witness fails to identify a culprit who is present in a lineup. A “false alarm” occurs when a witness identifies someone other than the culprit.

9. Steblay et al., *supra* note 3. The administrator of a simultaneous lineup shows the photographs or persons in the lineup to the witness simultaneously, so that all can be viewed at once. See, e.g., Steblay et al., *supra* note 3. When the sequential procedure is used, they are shown one at a time, and the witness is asked to make an identification decision about each before going on to the next one. Steblay et al., *supra* note 3. Critics of the simultaneous lineup assert that it produces false identifications in culprit-absent lineups, because a witness using “relative judgment” may choose the person who looks most like the perpetrator. Steblay et al., *supra* note 3.

Simultaneous and Sequential Lineups

sequential lineups,¹⁰ and a false alarm rate of .15 for simultaneous lineups and .09 for sequential lineups.¹¹

Additional hits would not be a benefit if they were produced by a procedure that increased hits without adding anything of value. That is theoretically possible, if the hit rate were increased by use of arbitrary or random criteria.

By analogy, suppose that a polygraph operator created a lie detector test that caught all liars because it automatically labeled everyone who took it a liar. That test would have a sensitivity of 100%. It would have a higher proportion of true hits than real testing. But it would not be worth considering. It adds nothing to the other evidence, making no change in the probability that the subject was lying. The hit rate and the false alarm rate would both be 100%. In Bayesian terms, its likelihood ratio would be 1, and multiplying prior odds by 1 does not change posterior odds.¹²

The same principle would apply if a polygraph operator performed a genuine test on some suspects, and then increased the hit rate by randomly re-designating some of the results as positive. Some of the random re-designations would be true hits—the ground truth would be that the subject was lying—but the re-designated positives would have no probative value. There is no difference between them and the inconclusive results that were not re-classified. If the extra hits that are obtained when a simultaneous lineup is used were produced purely by random guessing, then they would have no value.

The data indicate that the extra hits are not produced purely by random guessing. If a purely random process were the reason why simultaneous lineups have a higher hit rate, then the random process

10. See Clark, *supra* note 7, at 242. Fifty-one studies were utilized for this analysis. Clark, *supra* note 7, at 242. Clark did not count identifications of foils (fillers) as a false identification. Clark, *supra* note 7, at 243. The reason is that foils are known innocents who would not be prosecuted if they were falsely identified. Clark, *supra* note 7, at 243. He criticizes Steblay et al. for counting foil identifications as false identifications in their comparison of simultaneous and sequential lineups. Clark, *supra* note 7, at 243. In culprit-absent lineup experiments, the distinction between suspect and fillers is that the “suspect” or “designated innocent” is the person who most closely resembles the actual culprit. Steblay et al., *supra* note 7, at 118.

11. *Id.*; see also Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L., POL’Y & ETHICS J. 271, 275, 306 (2006) (recognizing the trade-off between simultaneous and sequential lineups and discussing its relevance to the deliberative process related to consideration of lineup reforms).

12. The likelihood ratio is calculated by dividing the probability of finding the evidence if the condition is true by the probability of finding the evidence if the condition is false. Here the probability of getting a positive result if the subject is lying is 100%. The probability of getting a positive result if the subject is not lying is also 100%. 100% divided by 100% is 1.

that produced the higher hit rate would be expected to cause innocent suspects to be falsely identified at the same rate that guilty suspects are correctly identified.¹³ If use of simultaneous instead of sequential lineups caused an increase in hits of .11 times the number of guilty suspects, then one would expect an increase in false alarms of .11 times the number of innocent suspects. In the Clark meta-analysis, hits increase by .11 when simultaneous lineups are used, but false alarms increase only by .06, a smaller amount than what be expected if the extra hits were produced by random guessing.¹⁴ Nevertheless, a portion of the extra hits could be due to guessing. If so, the extra hits would be balanced by an increase in the false alarm rate that would be detected by the measures of probative value that are discussed later in this paper.

When weighing hits lost against false alarms avoided, commentators often refer to the principle that it is better for a guilty person to go free than for an innocent one to be convicted. Convicting the innocent causes two harms by punishing the innocent while also letting the guilty go free (the conviction of an innocent person will normally end, or at least impede, the search for the real perpetrator). Acquitting the guilty only causes one harm, freeing a guilty person.¹⁵ So far so good. Unfortunately, the trip from the experimental data to inferences about the ratio of guilty freed to innocent convicted is fraught with hazards.

Suppose, for example, that a given reform would decrease the false alarm rate by 10% while at the same time decreasing the hit rate by 10%. Policymakers might be tempted to interpret this data as meaning that when the reform is put into place in the field, there will be a 10% decrease in false identification of the innocent, balanced by a 10% decrease in correct identifications of the guilty. Unfortunately, that is not the case.

The hit rates and false alarm rates yielded by experimental data do not tell us the ratio of hits lost to false alarms avoided when an

13. I am counting only identifications of suspects. I am not taking into account identifications of fillers because fillers are known innocents, and the false identification of a filler would not result in charges being filed. In lab experiments, the “suspect” in a culprit-present lineup is the culprit (the person who was observed by the witnesses during the scenario), and the “suspect” in culprit-absent lineups is a person designated by the investigator because of resemblance to the culprit.

14. See Clark, *supra* note 7, at 242; Gary L. Wells, Nancy K. Steblay & Jennifer E. Dysart, *Eyewitness Identification Reforms: Are Suggestiveness-Induced Hits and Guesses True Hits?*, 7 *PERSP. ON PSYCHOL. SCI.* 264, 268 (2012).

15. See Steblay et al., *supra* note 3, at 129.

Simultaneous and Sequential Lineups

identification is made in a lineup. In order to know the latter, we need to know how frequently suspects included in lineups are the culprit (the guilty base rate).¹⁶

For example, suppose that lineups have a guilty base rate of 90%. In other words, police investigation is so accurate that 90% of the suspects in lineups are guilty. In light of that assumption, consider the meta-analysis data indicating that under experimental conditions, the switch from simultaneous to sequential lineups results in a reduction in hits from .54 to .43 and a reduction in false alarms from .15 to .09. In 1000 lineups with a 90% guilty rate, there would be 900 guilty suspects and 100 innocent suspects. Using a simultaneous lineup, 486 of the guilty suspects will be correctly identified, and 15 of the innocent suspects will be falsely identified. Using sequential lineups, 387 of the guilty suspects will be correctly identified, and 9 of the innocent suspects will be falsely identified. Under the stated assumptions, the change from simultaneous to sequential would mean that avoiding 6 false identifications of the innocent has been purchased at the cost of missing 99 correct identifications of the guilty, yielding a lost guilty/saved innocent ratio of 16.5. In short, assessing the impact of a lineup reform that reduces false alarms while also reducing correct identifications is not a simple matter of comparing the false alarm rate to the hit rate, because impact in the field depends partly upon the guilty base rate, something we can only guess about.

Impact in the field also depends upon other features of the legal system. Suppose that a policymaker believes that the guilty base rate is 90% and that no more than ten guilty persons should be freed to exonerate one innocent person. For such a policymaker, should the sequential reform be rejected because the ratio is 16.5 to one instead of 10 to 1? The answer is no, not necessarily. The policymaker could still support the change from simultaneous to sequential lineups. The reason is that the 16.5 ratio of hits lost to false alarms avoided does not tell us the ratio of true convictions lost to false convictions avoided, and there are reasons to think that that ratio might be lower.

One reason it does not tell us that ratio is that the failure to identify will often not affect the binary variable to conviction or acquittal. Instead, it will have an impact on the continuous variable of length of sentence. Most cases are not tried. When a witness fails to make an identification in the 90% guilty base rate condition, the prosecutor is

16. See Clark, *supra* note 7, at 246–48 (discussing the relevance of the guilty base rate).

may decline to drop the charges because there is substantial non-identification evidence against the defendant. However, the failure to identify will help the defendant in plea bargaining. The likely result is that the plea bargaining will result in a lower sentence, not that the defendant will be acquitted.

Even among the cases tried, the ratio of correct identifications to false identifications will not be the same as the ratio of justified convictions to false convictions. In the condition in which the guilty base rate is .90, a miss in lineup ID might well be detected. If the police have succeeded in presenting lineup participants with suspects who are guilty 90% of the time, that means that the police have a good deal of other evidence incriminating the suspects that they choose for lineups. If the witness fails to identify the suspect, the police can proceed with that other evidence, and seek to develop more of it. And although the failure to identify will hurt the prosecution, a failure to identify does not mean that the witness will testify at trial that the suspect is not the perpetrator. As the witness learns of other evidence and other witnesses, the witness may well come around to see things the way the police see them.

In contrast, a false identification in the 90% guilty condition seems less likely to be detected. The identification is corroborated by other evidence of guilt, giving the prosecution and the trier of fact confidence that a guilty verdict is the right result. Moreover, the witness's confidence that the identification is correct is likely to increase as the witness learns about other evidence against the defendant. Thus, a 16.5-1 ratio of hits lost to false alarms avoided might well translate into a less than 10-1 ratio of true convictions lost to false convictions avoided.

There is yet another complication that points in the other direction. In trials, the legal system already privileges one type of error over the other. The trier of fact is told to follow a decision rule that avoids false positives even if that means tolerating false negatives. That decision rule is expressed to juries in the form of instructions not to convict unless the prosecution has proven its case beyond a reasonable doubt. If false negatives are also preferred to false positives in decisions about providing evidence to the jury, the preference is multiplied. For example, assume that the best decision rule is one that lets ten guilty go free to save one innocent. If that concept is applied both

by evidence providers in screening evidence and by evidence consumers in evaluating it, then the ratio will be higher than 10 to 1.¹⁷

In short, it is difficult to know whether the avoidance of false convictions is being purchased at too high a price. Even if the policy-maker specified exactly what the ratio of guilty freed to innocent exonerated should be, that would not answer the question. One cannot determine from the experimental data what ratio a lineup reform will lead to. First, the ratio of lost hits to false alarms avoided depends partly on the guilty base rate, something that requires guesswork and that will vary from place to place. Second, a false identification does not necessarily lead to a false conviction, nor does a lost hit necessarily lead to a false acquittal.

If the preference for false acquittals over false convictions does not give us the answer to which procedure is best, where else can we look for the answer? One possibility is to assess the probative value of a positive identification, and to choose the procedure whose identifications have the greatest probative value.

One method of assessing the probative value of a positive identification is by calculating a “diagnosticity ratio.” The diagnosticity ratio is a Bayesian likelihood ratio calculated by dividing the probability of an identification given that the suspect is the culprit by the probability of an identification given that the suspect is not the culprit—in other words, by dividing the hit rate by the false alarm rate.¹⁸ The higher the ratio, the more probative value the identification has. The Steblay et al meta-analysis yields a ratio of 7.72 for sequential lineups and 5.78 for simultaneous lineups.¹⁹ A Bayesian analysis based on those figures would indicate when there is a positive identification, the prior odds that the suspect is the culprit should be multiplied by 7.72 if the identification was made in a sequential lineup, and by 5.78 if the identification was made in a simultaneous lineup.

Of course, the diagnosticity ratio would vary depending upon which studies were included in the meta-analysis. A more modest ad-

17. Cf. Erik Lillquist, *Improving Accuracy in Criminal Cases*, 41 U. RICH. L. REV. 897, 904 (2007) (assuming that informational or cognitive obstacles prevent evidence providers and consumers from understanding and properly weighing what their counterparts are doing).

18. See, e.g., Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021 (1977) (suggesting the use of likelihood ratios as a guide to probative value); Dale A. Nance, *Naturalized Epistemology and the Critique of Evidence Theory*, 87 VA. L. REV. 1551, 1610–11 (2001) (suggesting the use of likelihood ratios as a means of converting random match frequencies to source probabilities).

19. Steblay et al., *supra* note 3, at 114.

vantage appears if one casts a wider net in including studies²⁰ or if one uses the studies chosen by Clark for meta-analysis.²¹

The diagnosticity ratios noted above are an assessment of the probative value of a positive identification by a witness of a suspect who is in the lineup. Suppose that the eyewitness does not identify the defendant as the culprit when the defendant is in the lineup. The defendant offers the non-identification as evidence of innocence. Here the diagnosticity advantage of sequential lineups may disappear or run in the other direction.²²

Recently, critics have questioned the value of the diagnosticity ratio as a measure of the probative value of lineup identifications. They have argued that a more appropriate tool for comparing lineup procedures is ROC analysis,²³ which has been used for many years in

20. See *id.* at 107 tbl.1.

21. For simultaneous lineups, Clark reports a correct identification rate of .54 and a false identification rate of .15. Clark, *supra* note 7, at 242 tbl.2. For sequential lineups, he reports a correct identification rate of .43 and a false identification rate of .09. *Id.* Calculating ratios in the fashion of Steblay et al. (2011), this yields a ratio of 3.6 for simultaneous lineups and 4.8 for sequential lineups.

22. The data in Steblay et al., *supra* note 3, at 113 tbl.3, is suggestive. In culprit-absent lineups, under the sequential procedure the witness refrained from identifying the designated innocent at a .85 rate. *Id.* In culprit-present lineups, the witness picked the culprit at a .44 rate. *Id.* Where E is the evidence that the suspect was not identified, the probability of E given the suspect is not the culprit is .85, and the probability of E given the suspect is the culprit is .56, yielding a likelihood ratio of 1.52. The equivalent calculation for the simultaneous lineup yields a likelihood ratio of 1.5. Using the more inclusive meta-analysis data reported in Steblay et al., *supra* note 3, at 107 tbl.1, the likelihood ratio is 1.4 for sequential lineups, compared to 1.56 for simultaneous lineups.

23. See Scott Gronlund, John Wixted, & Laura Mickes, *Evaluating Eyewitness Identification Procedures Using ROC Analyses*, 23 CURRENT DIRECTIONS IN PSYCHOL. SCI. 3, 5 (2014); Laura Mickes et al., *Receiver Operating Characteristic Analysis of Eyewitness Memory: Comparing The Diagnostic Accuracy of Simultaneous Versus Sequential Lineups*, 18 J. EXPERIMENTAL PSYCHOL.: APPLIED 361, 361 (2012) [hereinafter Mickes, *Operating Characteristic*]; Wixted & Mickes, *supra* note 7, at 265 fig.1; cf. Christian A. Meissner, Colin G. Tredoux, Janat F. Parker, & Otto H. MacLin, *Eyewitness Decisions in Simultaneous and Sequential Lineups: a Dual-Process Signal Detection Theory Analysis*, 33 MEMORY & COGNITION 783, 784 (2005). Gary L. Wells, a prominent proponent of the sequential advantage view, responded to the Gronlund et al. article by saying that in questioning the probative value advantage of sequential procedure, the authors “did so by pointing to a few selected contrasts in a few studies rather than relying upon broad meta-analyses. All literatures have some outliers.” Gary L. Wells, *Eyewitness Identification: Probative Value, Criterion Shifts, and Policy Regarding the Sequential Lineup*, 23 CURRENT DIRECTIONS IN PSYCHOL. SCI. 11, 12 (2014). Clark notes six quantitative measures of probative value that could be applied to lineup research. See Clark, *supra* note 7, at 244–46. He indicates that the procedures recommended by lineup reformers, including the change from simultaneous to sequential lineups, “the probative value of a suspect identification was numerically higher” for the recommended procedures, though for the sequential lineup reform the effect size was small. Clark, *supra* note 7, at 246.

assessment of medical tests.²⁴

To illustrate the concept of ROC analysis, suppose that an airport metal detector is being used as a test for detecting metal weapons such as guns and knives. When this hypothetical detector is set on “high,” it is very sensitive. In other words, it has a good hit rate, and will rarely miss metal knives or guns. However, its specificity will be poor. It will issue many false alarms because it will be set off by non-weapon metal items, such as belt buckles, pens, and paper clips. When it is set on “low,” its sensitivity will be less – it will miss some small metal weapons – but will issue fewer false alarms. There are a variety of intermediate settings. The operators choose a setting based on factors such as the perceived threat level and the need to process fliers quickly.

One way to evaluate this test would be to ask the operator to choose a particular setting and derive a diagnosticity ratio (likelihood ratio) at that setting. The probative value of evidence that the detector issued an alarm at that setting could be assessed with a likelihood ratio derived by dividing the hit rate by the false alarm rate.²⁵ However, a fuller picture of the discriminatory power of the detector could be obtained by comparing the hit rate to the false alarm rate at various settings, not just the one chosen by the operator on that particular occasion. That is what ROC analysis aims to do.

As with the hypothetical metal detector, the results of a medical diagnostic test usually fall along a continuum. Mickes and her colleagues use the following hypothetical example.²⁶ Suppose that a blood test always yields a result of 0 to 100.²⁷ The doctor administering the test uses a score of 50 as the cutoff point for a disease.²⁸ At that point, 63% of the patients who have the disease will have positive results (scores of 50 or more), as will 16% of the patients who do not have the disease. The hit rate is 63% and the false alarm rate is 16%,

24. See, e.g., Mark H. Zweig & Gregory Campbell, *Receiver-Operating Characteristic (ROC) Plots: A Fundamental Evaluation Tool in Clinical Medicine*, 39 *CLINICAL CHEMISTRY* 561, 561 (1993).

25. The likelihood ratio would be derived by dividing the probability that the detector would issue an alarm given that the passenger is carrying a metal weapon by the probability of an alarm given that the passenger is not carrying a metal weapon: $P(A|W)/P(A|\neg W)$. Multiplying the prior odds that the passenger had a weapon by the likelihood ratio would yield the posterior odds. The degree to which evidence of an alarm by the detector increases the odds that a passenger has a weapon depends upon how large the likelihood ratio is. The larger the likelihood ratio, the greater the probative value of evidence that the detector issued an alarm.

26. See Mickes, *Operating Characteristics*, *supra* note 23, at 362–63.

27. Mickes, *Operating Characteristics*, *supra* note 23, at 362.

28. Mickes, *Operating Characteristics*, *supra* note 23, at 362.

yielding a likelihood ratio of $63/16 = 3.9$.²⁹ An analyst using ROC analysis would not be satisfied with assessing the probative value of the test using only the likelihood ratio at that one operating point. She would also want to know how the hit rate compares to the false alarm rate at other cutoff points. She would plot an ROC curve showing how diagnostic the test was at various cutoff points, and evaluate its overall probative value by measuring how far the values on that curve deviated from those that would be obtained using a test that had no probative value, i.e. a test whose hit rate and false alarm rate were equal at every cutoff point.³⁰

The blood test example involves a test that yields specific, objectively obtained blood count numbers. ROC analysis can also be applied when the test result has to be judged subjectively, relying upon the judgment of the person performing the test. Mickes et. al. (2012) gives the example of a radiologist seeking to use a mammogram to determine whether a malignant tumor is present.³¹ In a study that whose objective was to compare the efficacy of judgments based on film and digital mammograms,³² the investigators did not simply ask the radiologists to make a judgment whether a malignant tumor exists and then compare hits with false alarms.³³ They also asked the radiologists to supply confidence ratings on a 7 point scale, from 1 for “definitely not malignant” to 7 for “definitely malignant.”³⁴ That allowed them to plot ROC curves showing the hit rate and the false alarm rate at different confidence levels.³⁵ Comparison of the ROC curves for digital and film mammography indicated that, for example, digital mammography was a superior technique when patients were women under 50 years old.³⁶

Lineup procedures can be compared in a similar fashion. The witnesses observing a lineup are analogous to the radiologists evaluating a mammogram. The lineup can be viewed as a test in which the witnesses are asked to detect whether the culprit is present, just as radiologists are asked to detect whether a malignant tumor is present.

29. Mickes, *Operating Characteristics*, *supra* note 23, at 362–63.

30. *See* Appendix, Fig.1.

31. Mickes, *Operating Characteristics*, *supra* note 23, at 364.

32. *See* E.D. Pisano et al., *Diagnostic Performance of Digital versus Film Mammography for Breast-Cancer Screening*, 353 *NEW ENG. J. OF MED.* 1773, 1773–74 (2005).

33. Mickes, *Operating Characteristics*, *supra* note 23, at 364.

34. Mickes, *Operating Characteristics*, *supra* note 23, at 364.

35. Mickes, *Operating Characteristics*, *supra* note 23, at 364.

36. *See* Appendix, Fig.2.

Simultaneous and Sequential Lineups

Instead of simply asking participants in experiments comparing sequential and simultaneous lineups to decide whether they have seen the culprit in the lineup, investigators could also ask them to state their level of confidence. Then the hit rate and false alarm rates for the two procedures could be compared at different levels of confidence, and ROC curves could be constructed and compared.

The basic point of critics who urge use of ROC analysis is that the conventional diagnosticity ratio used in comparing the probative value of identifications made in simultaneous and sequential lineups is inadequate because it is based on the hit rates and false alarm rates obtained at only one point in the ROC curve. A more accurate picture could be obtained by asking experimental participants to state confidence levels and by comparing the ratio of hit rates to false alarm rates at various levels of confidence. This approach has been tried in a few experiments, and the results suggest that simultaneous lineups may be just as good as or better than sequential ones.³⁷

If sequential lineups have no advantage over simultaneous ones, what accounts for the many studies indicating that the ratio of hits to false alarms – the diagnosticity ratio – is better for sequential lineups than for simultaneous ones? One possible explanation is that the sequential lineups cause witnesses to be more cautious in making identifications.³⁸ In other words, witnesses require a higher confidence level before making the identification when viewing a sequential lineup.

The probative value of a positive result on a test is influenced by both the discriminatory power of the test and the degree of caution used by the evaluator. The greater the caution – the greater the degree of confidence required before evaluator will say that a condition is present – the greater the probative value of a positive judgment. This proposition is intuitively plausible. Compare the probative value of a conviction as evidence that a defendant committed a forbidden act. If the jury is instructed not to convict unless it is convinced beyond a reasonable doubt, the observer is on firmer ground in believing that a conviction means that the defendant is guilty than if the jury is merely instructed to convict if it believes the defendant is probably

37. Mickes, *Operating Characteristics*, *supra* note 23, at 362; John T. Wixted & Laura Mickes, *A Signal-Detection-Based Diagnostic-Feature-Detection Model of Eyewitness Identification*, 121 *PSYCHOL. REV.* 262, 271 (2014).

38. See Christian A. Meissner et al., *Eyewitness Decisions in Simultaneous and Sequential Lineups: A Dual-Process Signal Detection Theory Analysis*, 33 *MEMORY & COGNITION* 783, 784 (2005).

guilty. Two factors affect the probative value of a conviction as evidence of guilt: the jury's astuteness in weighing the evidence, and the decision criterion employed by the jury.

Lineups are no exception to the principle that the more confident the judgment, the greater its probative value. The once-common notion that confidence has little or no relationship to accuracy has been debunked. The more confident a witness is that an identification is correct, the greater the probative value of the identification.³⁹

Thus, the value of a lineup identification is affected by the witness's ability to correctly identify (which may be influenced by system variables such as whether the lineup is sequential or simultaneous) and the witness's decision criterion. The higher the degree of certainty that the witness requires before being willing to identify, the greater the probative value of the identification. Hence sequential lineups show higher hit rates and a lower rate of false alarms because the witnesses are employing more conservative decision criteria.

The diagnosticity ratio measures the probative value of a lineup at the decision point chosen by the participants. If the witnesses are more cautious in a sequential lineup than in a simultaneous one, then an identification made in a sequential lineup will have more probative value. Use of ROC analysis is a way of attempting to evaluate the probative value of lineup procedures independently of the decision criterion employed by the witnesses⁴⁰. In other words, ROC analysis seeks to reach a judgment about how discriminating a test is apart from the effect of how cautious the witness is in applying it.⁴¹

As mentioned earlier, a few experiments have used ROC analysis to assess the probative value of lineup identifications, and the scholars conducting those experiments suggest that simultaneous lineups may have an advantage.⁴² When there is control for the decision criteria used by lineup witnesses, identifications from simultaneous lineups may be more probative than identifications from sequential ones.⁴³

What implications do these studies have for policy makers who are setting forth standards for conducting lineups? First, it is important to bear in mind that the ROC proponents have only conducted a

39. See Mickes, *Operating Characteristics*, *supra* note 23, at 366; N. Brewer et al., *The Confidence-Accuracy Relationship in Eyewitness Identification: the Effects of Reflection and Disconfirmation on Correlation and Calibration*, 8 J. EXPERIMENTAL PSYCHOL.: APPLIED 44, 45 (2002).

40. See *supra* notes 37-38.

41. See *supra* notes 37-38.

42. See *supra* notes 37-38.

43. See *supra* notes 35-36.

few experiments. Literally dozens of other experiments that have been conducted without ROC analysis⁴⁴ We do not have the data to perform an ROC analysis on those experiments, but the diagnosticity ratio approach to assessing probative value indicates an advantage for sequential lineups. Even supposing ROC analysis to be superior to likelihood ratio analysis, the latter cannot be dismissed as irrelevant to probative value. After all, it is based on a comparison hits to false alarms – the higher the proportion of hits compared to false alarms, the more probative the evidence. Even if this is not the best way to assess probative value, it's certainly a way that takes relevant factors into account and provides useful information⁴⁵

Secondly, even if the advantage of sequential lineups is due to use of more conservative decision criteria by witnesses, one might want to use the sequential procedure precisely because it does cause use of more cautious decision criteria. Other ways of seeking more cautious criteria – instructions or exclusion of low-confidence identifications – might not be as feasible. The sequential procedure does at least provide one tested way of achieving the effect.⁴⁶

The discussion above should give the reader a feel for the daunting problems involved in deciding whether sequential lineups are superior to simultaneous ones. (1) The preference for false acquittals over false convictions does not provide clear guidance. The comparison of correct hits to false alarms in the experimental data does not

44. See, e.g., Nancy K. Steblay et al., *Sequential Lineup Laps and Eyewitness Accuracy*, 35 *LAW. & HUM. BEHAV.* 262, 262–74 (2011) (showing meta-analysis that includes 72 such studies).

45. Mickes argues that where the information needed to perform ROC analysis is not available, the answer is not to compute the diagnosticity ratio, but to use a difference score, based on the difference between the hit rate and the false alarm rate (d'). Laura Mickes et al., *Missing the Information Needed to Perform ROC Analysis? Then Compute d' , Not the Diagnosticity Ratio*, 3 *J. APPLIED RES. IN MEMORY & COGNITION* 58, 60 (2014). If these authors are correct, the policy implications are unclear; Clark's review of fifty-one pre-ROC simultaneous versus sequential literature using d' as the outcome measure, showed that the simultaneous and sequential lineups yielded essentially identical average scores. See *id.* at 62; Clark, *supra* note 7, at 242 tbl.2. The seventy-two studies chosen by Steblay for their meta-analysis are more favorable to the sequential advantage than those chosen by Clark. See Steblay et al., *supra* note 3, at 99 tbl.1.

46. Wells argues that even if the increased probative value (diagnosticity) of sequential lineups is due to use of more conservative decision criteria instead of increased discrimination, identifications from sequential lineups can still be better trusted. Wells, *supra* note 23, at 12. "The simple way to think about this distinction is that eyewitnesses are less likely to make an identification with the sequential procedure than with the simultaneous procedure, but when they do make an identification with a sequential procedure, it is more trustworthy for the prosecutor." Wells, *supra* note 23, at 12. The fact that identifications are made with greater confidence increases their value as proof of guilt. But what about non-identifications that are offered as evidence of innocence? They are less valuable as evidence of innocence if witnesses would decline to make an identification unless they had a high degree of confidence.

even tell us what that ratio will be when the procedures are applied in the field, because that ratio depends upon the guilty base rate. Even if we knew the guilty base rate, the ratio of correct hits to false alarms does not tell us the ratio of correct convictions to false convictions. Based on current data about hits lost and false alarms avoided, it is difficult to say whether the protection of the innocent is purchased at a reasonable cost. (2) Estimates of the probative value of a correct identification are not conclusive, either, though they are certainly relevant. The proper measure of probative value is debatable, as illustrated by the controversy about ROC analysis and the diagnosticity ratio. Even if we knew how to measure probative value, the probative value of a positive identification is not the only relevant probative value. The probative value of a non-identification should also be considered. And probative value cannot be the only issue. However difficult they are to apply, the policy-maker also needs to take into account value judgments about the social cost of false alarms and lost hits.

SEQUENTIAL LINEUPS WITH A SECOND LAP

In jurisdictions that have adopted lineup reform that favors sequential lineups, it is common to allow the witness to see the sequence more than once at the request of the witness.⁴⁷ This “second lap” compromise adds a feature that is comparable to doing a sequential lineup and then following it with a simultaneous lineup if the witness makes no identification. The witness has already seen all the photos or individuals, and could make a relative judgment about which one looks most like the perpetrator. If proper records are kept, the trier of fact will learn that the witness did not make an identification in the first sequential lineup, even if it also learns that an identification was made in the later simultaneous lineup.

I have discussed in earlier paragraphs the difficulty of assessing the probative value of different lineup procedures. But for the purpose of argument, assume that the sequential lineup yields evidence with greater probative value than the simultaneous lineup. The second-lap compromise procedure could then be viewed as one that elicits evidence with high probative value (the sequential lineup) and then follows it with evidence of lesser probative value (the simultaneous

⁴⁷. See Wells, *Double-Blind*, *supra* note 2, at 7; Nancy K. Steblay et al., *supra* note 44, at 262.

lineup). In the law of evidence, there is nothing unusual about allowing evidence with high probative value to be supplemented with evidence of lesser probative value. In general, evidence law has given up on the idea of restricting admissibility to evidence that is extremely accurate, in favor of a free proof approach that relies upon the trier to consider all of the evidence together and give it proper weight. For example, disinterested witnesses are better than interested witnesses, but under modern law both can testify. DNA evidence is more diagnostic than eyewitness identification, yet both are admissible. An identification by someone familiar with the perpetrator is more diagnostic in lab experiments than an identification by a stranger, but in trial situations, the fact that a witness familiar with the defendant says he was not the perpetrator (or gives him an alibi) does not preclude evidence of an identification by a stranger who testifies that he was the culprit.

Similarly, even if the sequential lineup is more probative than the simultaneous lineup, that consideration alone would not justify excluding the simultaneous lineup when offered as a supplement. To offer a second lap is to, in effect, follow a sequential lineup with a simultaneous one. The ultimate question is whether the second lap is prejudicial in the sense that the jury will not be able to properly evaluate a second lap hit, even when it is also informed that the witness did not identify the suspect during the first lap. This particular issue has not yet been studied systematically, and in the absence of evidence to the contrary, there seems to be no reason to depart from the usual practice of allowing the trier of fact to consider both the gold and the brass, when both have probative value.⁴⁸

Even if sequential-only lineups are found to have an advantage in lab experiments over sequential-plus lineups,⁴⁹ that circumstance would not tell us how the evidence will impact determinations in the legal system. In cases that go to trial, the fact that the witness did not identify the defendant the first time could be effective impeachment material on cross-examination, and might fit in with other evidence of unreliability of the witness or of innocence of the defendant in a way

48. It is not clear whether it is practical to mandate a one-lap procedure. In cases in which the witness spontaneously requests a second lap, the administrator in the field might give one even if the procedure does not provide for it.

49. See, e.g., Steblay et al., *supra* note 44, at 262–73 (2011) (demonstrating through two experiments the way in which sequential only lineups may be advantageous over sequential-plus lineups). The authors use the diagnosticity ratio (hit rate divided by false alarm rate) as the measure of probative value. Steblay et al., *supra* note 44.

that mitigates the effect of additional false alarms caused by the second lap.

In the trial context, the probative value of an item of evidence, such as an identification in a lineup, depends upon how it fits in with other evidence. For example, suppose that the defendant comes under suspicion because of a DNA match in a trawl through a database of persons arrested for felonies. The DNA evidence alone is incriminating, but it is not necessarily conclusive. The probability of a coincidental match because of an identical genetic profile on the loci tested is usually small, but there is always the danger of a match due to sample contamination or lab error. Nonetheless, it is undoubtedly true that a DNA identification, considered in isolation, has greater probative value than a lineup identification, considered in isolation. Nonetheless, despite the higher probative value of DNA identification evidence, lineup identification evidence is worth hearing when offered as a supplement to DNA evidence. If the victim also identifies the defendant out of a lineup, the two items of evidence combined – the DNA match and the identification – fit together in a way that makes them overwhelmingly incriminating.⁵⁰

Now suppose that a victim is viewing a lineup that contains a suspect found through a database trawl. The lineup is a fair one: a non-witness would not know which participant is the suspect by reading the victim's description, there are enough fillers, and the victim has not been cued to the suspect because the administrator does not know who the suspect is. The value of an identification that fits with the DNA evidence is so great that it would seem wise to allow a victim a second lap if she requested it. The point here is not that this situation is the most common one, but that the value of lineup evidence cannot be assessed from experimental data alone, but only in view of other considerations, including whether it is corroborated by independently obtained evidence.

The second lap can be conceptualized in at least two ways. One is to view it as a variation of an identification procedure that makes the overall procedure less diagnostic. Another is to view it as a separate step that adds additional evidence to the sequential non-identification. If the trier of fact is able to give the two steps their proper weight no harm is done, and in some instances the extra evidence supplied by

50. *See Williams v. Illinois*, 132 S. Ct. 2221, 2244 (2012).

the second step will fit in with other evidence in a way that makes it highly probative.

One possible objection to the second lap is that it will lead to a higher identification rate that “spoils” witnesses. This point would be an extension of an argument by Steblay and her colleagues against simultaneous lineups.⁵¹ If a witness identifies a filler in a culprit-absent simultaneous lineup, then the witness is “spoiled” and cannot be used to make a subsequent correct identification in a culprit-present lineup.⁵² Because of the lower identification rate in sequential lineups, they argue, witnesses are less likely to be “spoiled” by them.⁵³

But the spoiler effect has good and bad aspects. A witness who is spoiled for subsequent correct identification of the actual culprit is also spoiled for a subsequent false identification of an innocent person. Moreover, the fact that a witness is spoiled (or at least highly impeachable) for trial testimony does not mean that the witness is spoiled for investigatory purposes. The police can still show the witness other suspects and then use the identification as a reason to investigate the other subjects more thoroughly and develop other evidence of guilt.

Another reason why it might be acceptable to tolerate simultaneous lineups as a supplement to sequential lineups is that there are differences between experimental conditions and field conditions that affect the trade-offs involved in comparing simultaneous and sequential lineups. Professor Risinger has provided a thought-provoking example.⁵⁴ He suggests that lineup suspects are often chosen because of tips or non-identification evidence incriminating the suspect.⁵⁵ (A neighbor might report suspicions, or a traffic stop might yield a suspect because he had goods from a robbery in his car.⁵⁶) In cases in which suspects are innocent, tip-based simultaneous lineups may be less error-prone than in experimental conditions. In an experiment, the investigator knows the identify of the culprit and can place someone who looks like the culprit in the lineup as the “designated innocent.”⁵⁷ If the mock witnesses use relative judgment, they are likely to identify the “designated innocent” because he looks more like the cul-

51. Steblay et al., *supra* note 3, at 126.

52. Steblay et al., *supra* note 3, at 126.

53. Steblay et al., *supra* note 3, at 126.

54. Risinger, *supra* note 6.

55. Risinger, *supra* note 6.

56. Risinger, *supra* note 6.

57. Risinger, *supra* note 6.

pruit than the fillers do.⁵⁸ In a tip-based field lineup, if best practices are followed, all of the fillers will fit the witness's description—or, if the suspect does not look like the description, they will resemble the suspect.⁵⁹ In the case of an innocent suspect in a tip-based lineup, the official choosing the fillers does not know what the real culprit looks like.⁶⁰ Everyone in the lineup, suspect and fillers, would have an equal chance of being the one who looks most like the culprit. If the witness makes an identification based on relative judgment, most of the time the witness will choose a filler instead of the suspect.⁶¹

* * * *

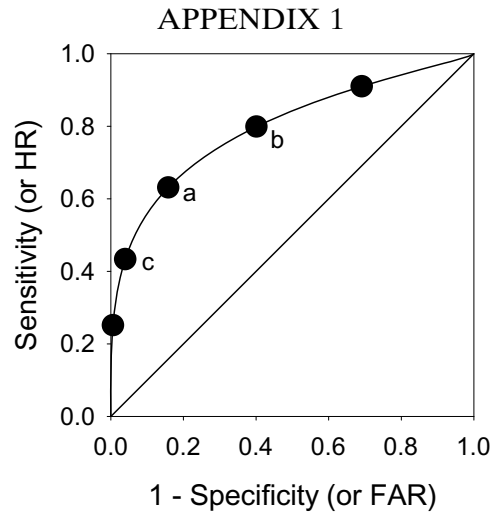
An academic lawyer cannot help but be awed by the many careful and thoughtful empirical studies of lineups. Nonetheless, despite decades of study, the question whether sequential lineups are superior to simultaneous lineups is still open to debate. A reasonable way to accommodate doubt is to use both types of lineups by following a sequential lineup with a second lap. That approach is consistent with the general presumption in evidence law that evidence should be admitted when it has probative value, trusting the trier of fact to sort the grain from the chaff.

58. Risinger, *supra* note 6.

59. Risinger, *supra* note 6.

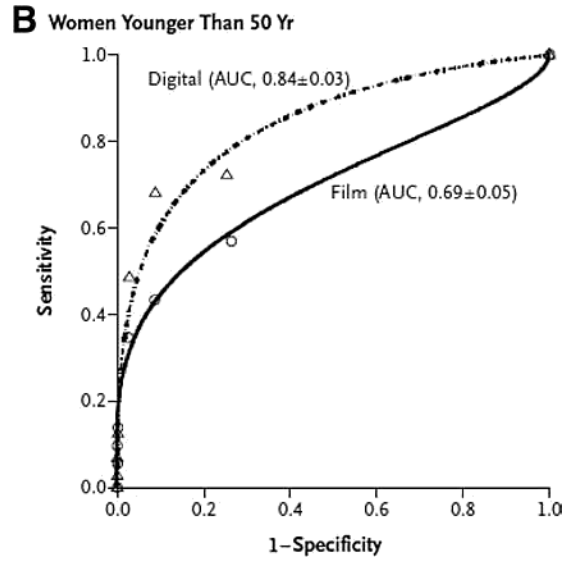
60. Risinger, *supra* note 6.

61. If the tip-based lineups hypothesized by Professor Risinger were common, their existence would affect the inferences drawn from data from field studies describing the rate of identification of fillers. In field studies the investigators do not know which identifications are false alarms and which are hits. The proportion of filler identifications has, however, been used as a clue to the false alarm rate. If a procedure produces a higher rate of filler identifications than a comparison procedure, then one can infer that it has a higher rate of false alarms—that is, a higher rate of identifying not only fillers, but also of identifying innocent suspects. Viewed that way, a high rate of filler identification is a strike against a lineup procedure. See Wells, *Double-Blind*, *supra* note 2, at 13. But a high filler identification rate could also indicate that many of the lineups are tip-based lineups that include innocent suspects who are not more likely to resemble the culprit than the fillers.



This figure is an hypothetical illustration of an ROC curve. The vertical axis shows the hit rate (HR) at various cutoffs. The horizontal axis shows the false alarm rate (FAR). The a, b, and c designations at the data points could, in the lineup context, represent the results obtained at different levels of confidence. Thus, data point “c” could refer to the results obtained when witnesses report a very high level of confidence on a confidence scale, while data point “b” could represent the results when witnesses report a much lower level of confidence. At point “c” the hit rate is just above .2, and the false alarm rate is close to zero. At point “b” the hit rate and the false alarm rate are both much higher. The solid diagonal line represents the no-probative-value line, where the hit rate and the false alarm rate are equal. The larger the area between the curved line and the no-probative-value line, the greater the probative value of the lineup procedure. The figure (but not this explanation) comes from figure 2 in Mickes et al. (2012).

APPENDIX 2



This figure shows the results of an actual experiment comparing the probative value of judgments made from digital mammogram displays compared to those made from film mammogram displays. The ROC curve indicates that judgments made from digital mammogram displays have greater probative value. The figure (but not this explanation) comes from Figure 3B in Mickes et al. (2012).

Unwrapping the Box the Supreme Court Justices Have Gotten Themselves Into: Internal Confrontations Over Confronting the Confrontation Clause

PAUL F. ROTHSTEIN*

“The court has . . . boxed itself into a choice of evils: render the Confrontation Clause pro forma or construe it so that its dictates are unworkable.”

—Justice Anthony Kennedy,
vehemently dissenting in
Bullcoming v. New Mexico (2011)¹

INTRODUCTION

*Williams v. Illinois*², handed down in 2012, is the latest in a new and revolutionary line of U.S. Supreme Court cases beginning with

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This paper was prepared for the conference honoring the great Evidence scholar and professor, Andrew Taslitz, held at Howard University Law School on September 19, 2014. The U.S. Supreme Court's decisions in *Melendez-Diaz*, *Bullcoming*, and *Williams*, dealing with expert evidence under the U.S. Constitutional Confrontation Clause, are a central focus of this paper. See *infra* Parts I-II. They are particularly appropriate to this conference in view of Professor Taslitz's abiding interest in and superb contributions to legal scholarship concerning expert testimony and the Confrontation Clause. See, e.g., Andrew Taslitz, *Catharsis, The Confrontation Clause, and Expert Testimony*, 22 *CAP. U. L. REV.* 103, 104 (1993).

The previous writings of many scholars, especially a number who are participants in this conference and symposium, have contributed enormously to my thinking about the Confrontation Clause. I wish to express my supreme gratitude to them and especially to Professors Taslitz and Myrna Raeder who are here in spirit only. Of course any errors in this article are my own.

1. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2726 (2011).

2. See generally *Williams v. Illinois*, 132 S. Ct. 2221 (2012).

the 2004 decision of *Crawford v. Washington*³ which radically altered the Court's former approach to the Constitutional Confrontation Clause. That clause generally requires persons who make written or oral statements outside the trial, that may constitute evidence against a criminal defendant, to take the witness stand for cross-examination rather than those statements being presented at the trial only by the writing or by another person who heard the statement.

Previous to *Crawford*, under *Ohio v. Roberts*⁴ decided in 1980, the Court did not apply the requirement to statements made outside the trial if they were considered reliable. They were considered reliable only if they fit a traditional "firmly rooted" hearsay exception or were otherwise deemed reliable on the facts.⁵ But *Crawford* overruled *Roberts*.⁶ *Crawford* held that reliability is too subjective and flexible a concept, and that the Confrontation Clause by its terms does not command merely that evidence be reliable, but that reliability be determined in a particular way—by live cross examination.⁷ Thus *Crawford* decreed that henceforth, oral or written statements made outside of the trial that are "testimonial" cannot be admitted into evidence against the criminal defendant unless defendant has an opportunity to cross examine the maker at the trial or (if the maker is unavailable then) there was a sufficient earlier opportunity for cross examination.⁸ "Testimonial" generally speaking seemed to mean statements intended or understood to potentially supply evidence (perhaps only if the statement is acquired by agents of the state in a somewhat formal or solemn setting).⁹

In *Williams*, the latest case, it has become apparent that many of the Justices on the Supreme Court are unwilling to continue embracing the logical consequences of *Crawford*, at least insofar as those consequences require the attendance at trial of laboratory analysts who performed forensic tests and wrote reports embodying the test results.¹⁰ Requiring their attendance essentially would outlaw the tradition of allowing the reports alone to stand as evidence in cases where they report, for example, DNA profiles or the concentration of nar-

3. See generally *Crawford v. Washington*, 541 U.S. 36 (2004).

4. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

5. *Id.*

6. See generally *Crawford*, 541 U.S. 36.

7. See *id.* at 43, 63.

8. *Id.* at 53-54.

9. See generally *Crawford*, 541 U.S. 36.

10. See *Williams*, 132 S. Ct. at 2232-33, 2243-44.

Confronting the Confrontation Clause

cotics or alcohol in a blood or other sample.¹¹ These Justices apparently feel that applying the plain meaning of *Crawford* to this kind of case would entail undue expense and administrative dislocation in a large variety of forensic situations—virtually everything the “CSI” labs do—especially if analysts from every step of every process might have to come to court.¹²

The *Williams* decision, therefore, invokes several subterfuges to escape that result. Most problematic, it suggests that a surrogate witness, in the form of an independent expert who had nothing to do with the test, could satisfy the requirement of on-the-stand testimony.¹³ Under this stratagem, personnel who performed the test and/or wrote the report would be excused from testifying. But in order to reach this result without overruling the new Confrontation jurisprudence spawned by *Crawford*, these Justices in *Williams* had to engage in enormous feats of doctrinal legerdemain. In fact, the Justices in *Williams* could not agree on any single rationale, and there was no majority on any line of reasoning or any theory of the Confrontation Clause.¹⁴

One is led to suspect that a majority of Justices on the Court may be looking for a way—any way at all, whether sensible or not—to escape what they regard as the rigid box the Court has gotten itself into with *Crawford*. It may even be that *Crawford* will eventually face overruling either directly or sub silentio.

I. CRAWFORD OVERRULES ROBERTS

Between 1980 and 2004, *Roberts* governed Confrontation Clause jurisprudence until *Crawford* was handed down.¹⁵

Roberts involved evidence offered at a defendant’s state criminal trial for forgery and stolen credit card possession.¹⁶ That evidence consisted of a transcript of the preliminary hearing testimony of a witness who did not appear at the trial.¹⁷ For our purposes, the significant holding of *Roberts*, as perfected by its progeny¹⁸, was that, to be

11. See generally dissents in *Melendez-Diaz* and *Bullcoming*, *infra*.

12. See *id.* at 2251.

13. *Id.* at 2242-68.

14. *Id.* at 2227-44.

15. See *Crawford*, 541 U.S. at 68-69.

16. See *Roberts*, 448 U.S. at 56-62.

17. See generally *Roberts*, 448 U.S. 56.

18. E.g., *White v. Illinois*, 502 U.S. 346, 553-54 (1992); *Idaho v. Wright*, 497 U.S. 805, 816 (1990).

admissible under the Confrontation Clause, hearsay statements—as this evidence was—must fit within a “firmly rooted” hearsay exception or be otherwise deemed reliable on the facts, unless the maker of the statement appears for cross examination.¹⁹ The actual result in *Roberts* was that the evidence used against defendant was held violative of his Confrontation right, and his conviction was reversed.²⁰

Twenty-four years later, *Crawford* came along.²¹ In *Crawford*, Mrs. Crawford was questioned and tape recorded by police in an inquiry into a stabbing of a third party her husband was being charged with.²² She had been present before, during, and after the stabbing.²³ Her taped statement inferentially undercut somewhat the husband’s defense of self defense.²⁴ Marital privilege kept her off the stand at her husband’s state criminal trial for the stabbing, so the prosecution introduced the tape-recording which was not privileged under state law.²⁵ The hearsay rule was surmounted because this out-of-court statement of hers was offered and received as a declaration against penal interest since it also somewhat implicated her.²⁶ The husband was convicted.²⁷ The U.S. Supreme Court reversed and remanded the conviction on grounds that the admittance of the wife’s statement violated his Confrontation Clause rights.²⁸ In the course of so doing, the Court gave birth to a radically new approach to the Confrontation Clause.²⁹

In an opinion for the Court written by Justice Scalia, *Crawford* overruled *Roberts*, drastically altering the application of the Confrontation Clause to out-of-court hearsay statements offered against the criminal defendant where the declarant does not testify and the statement is offered for its truth, as here.³⁰ The Confrontation Clause under *Crawford* no longer parallels the hearsay rule and its exceptions (nor allows hearsay just because it is found reliable) as was the approach under *Roberts*.³¹ Instead, the Court in *Crawford* identifies a

19. *Roberts*, 448 U.S. at 66.

20. *See generally Crawford*, 541 U.S.36.

21. *See id.* at 38-41.

22. *Id.*

23. *Id.* at 39-41.

24. *Id.* at 40.

25. *Id.*

26. *Id.* at 41-43.

27. *Id.* at 68-69.

28. *Id.*

29. *See generally Crawford*, 541 U.S.36.

30. *Id.*

31. *Id.*

Confronting the Confrontation Clause

class of “testimonial” out-of-court statements that (according to Scalia) were specially suspect historically in England in the days leading up to the adoption of the U.S. Confrontation Clause.³² This suspect class included the un-confronted statements taken, and later used at trial, by prosecutors in the Sir Walter Raleigh case.³³ That suspect class would ordinarily contain (according to *Crawford*) officially garnered statements like grand jury statements, affidavits, recorded testimony at other trials or proceedings, and statements taken by police in investigations, among others.³⁴ The Court’s holding in *Crawford* is that even if these testimonial statements come within a hearsay exception or are otherwise deemed reliable, they are inadmissible unless the declarant can currently be cross examined, or is unavailable and there has been an earlier opportunity to cross-examine her.³⁵

The Court in *Crawford* leaves somewhat fuzzy exactly what “testimonial” means in the Confrontation context, expressly postponing a more complete definition to another day.³⁶ But there is some language in the opinion shedding a modicum of light on the concept. “Testimonial” as *Crawford* intended it seems to have something to do with whether government was involved in obtaining the statement—to what extent and with exactly what subjective or objective purpose was not completely specified—and/or with whether the declarant or questioner would, should, or did know at the time of the statement that it

32. *Id.*

33. Raleigh was convicted of treason against the King based on an out-of-court affidavit by Lord Cobham given to authorities, implicating Raleigh. *Crawford*, 541 U.S. at 44. Cobham later said he would have repudiated it had he been called as a witness. See *id.* This is the evidence the Supreme Court in *Crawford* refers to. *Id.* at 62. The Court fails to include in its analysis, another piece of hearsay used against Raleigh than Lord Cobham’s government garnered statement. This other piece was a vague out-of-court statement, perhaps based on nothing but blatant opinion and speculation, which statement was made by a random boatman in Spain to an private English traveler, who also little connection with the events other than to be called as a witness against Raleigh to recount the boatman’s statement. The boatman’s statement was that the boatman thought the English King would never be crowned if Raleigh had anything to do with it. See generally 1 J.STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 *et seq.* (1883). Would the reforms that ultimately led to the confrontation clause be concerned with this evidence, as well as Lord Cobham’s government garnered statement against Raleigh that is mentioned as fundamental to those concerns in *Crawford*? This rank hearsay of the boatman would not seem to fit into the outlawed “testimonial” category outlined in *Crawford*, let alone any hearsay exception.

34. See *Crawford*, 541 U.S. at 51-53.

35. See *Crawford*, 541 U.S. at 53-54. As case-law develops under *Crawford*, issues will surface concerning what kind of former opportunity to cross-examine is sufficient for these purposes. Will there be a “similar motive” requirement as there is under Fed. R. Evid. 804(b)(1) (the former testimony hearsay exception) and will it be defined the same way? Will there be a same-party or similar-party requirement?

36. See *Crawford*, 541 U.S. at 68.

could be usable in a trial or official investigation.³⁷ The challenged evidence in *Crawford* itself had a variety of both characteristics — it was garnered from the wife by police questioning and she knew that the information was related to an investigation into her husband’s killing of another, which she witnessed, though perhaps she did not realize that her statement would be evidence *against* her husband (it turned out that circumstantially it undercut somewhat her husband’s defense of self-defense).³⁸ Because of these characteristics, it was pretty clearly “testimonial,” on almost any notion of the concept suggested by *Crawford*.³⁹ The court hints without clearly holding, that statements made under a formal police procedure like this may be testimonial *per se*, perhaps in a special class comprised of this and other formalized material like affidavits and depositions.⁴⁰ In this special category, there might be no necessity to inquire into intention or knowledge as may be necessary with other out-of-court statements.

In summary, the factors significant to determining whether a statement is classified as “testimonial” under *Crawford* arguably *may* be (1) intent/knowledge/purpose (whether subjectively or objectively determined is unclear)⁴¹ by either or both the maker and receiver of the statement (it is unclear which)⁴², (2) perhaps government involvement⁴³, (3) perhaps a degree of formality/solemnity/structure to the

37. *Id.* at 53.

38. *Id.* at 38-43.

39. *See generally Crawford*, 541 U.S. 36.

40. *Id.* at 51-52.

41. Justice Sotomayor’s opinion for five members of the Court subsequently in *Bryant*, interpreting *Crawford*, says the factor is objective, meaning determined based on reasonable appearances. *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011). But “objective” and “reasonable appearances” are vague terms. Reasonable appearances to whom? From what perspective? Who is the objective observer? With what experiences and sophistication? And it is doubtful that *Bryant* means that if an objectively viewed statement does not appear to be for a prosecutorial, accusatory, incriminatory, or evidential purpose, but secretly in fact is intended for that purpose, that this would not be testimonial.

42. Sotomayor’s opinion for five members of the Court subsequently in *Bryant* interpreting *Crawford*, says both must be considered, which sidesteps the question. *Id.* at 1160. What if they differ? Later in the opinion she seems to retract, saying the reason to look at the interrogator’s purpose is to determine the purpose of the maker of the statement. *Id.* Justice Scalia in dissent reads the Sotomayor opinion as placing primary emphasis on the interrogator’s purpose. *Michigan v. Bryant*, 131 S. Ct. 1143 (2011) (Scalia J., dissenting). Justice Scalia, who wrote *Crawford*’s majority opinion, in dissent in *Bryant* states that the significant purpose under *Crawford* is that of the declarant, although he admits *Crawford* did not have to specifically decide this point. *Id.* at 1168.

Sotomayor counts a lack of ability to form any purpose, as perhaps in the case of the seriously injured declarant in that case, counts as a non-testimonial purpose. *Id.* at 1169.

This factor we have labeled (1) seems from the decisions to be a focus of most of the attention in these cases in the Supreme Court.

43. *Crawford*, 541 U.S. at 40, 51-52, 66.

Confronting the Confrontation Clause

proceeding,⁴⁴ and (4) perhaps that the statement was made under some form of questioning or interrogation.⁴⁵ Mrs. Crawford's statement qualified under all of them.⁴⁶

According to *Crawford*, even statements falling within firmly rooted hearsay exceptions are no longer free from a Confrontation Clause challenge just because they fit the exception.⁴⁷ Rather, they, like all out-of-court statements, must be analyzed individually on the particular facts of the case to determine whether they are testimonial.⁴⁸ While certain language in the opinion suggests that some categories of hearsay *ordinarily* are not testimonial, e.g., business records and conspirator statements, even those categories may sometimes contain testimonial statements, depending on the particular facts.⁴⁹ That would be the case if, for example, statements within those exceptions were made to police or other government agents for evidentiary or investigative purposes. Forensic lab test reports offered as business records ordinarily would seem to fit this description.

An exception to this general principle may be dying declarations, that is, the hearsay exception for statements made by declarants in contemplation of their own imminent death.⁵⁰ A footnote in the opinion notes that dying declarations seem to have been admitted at common law even when they were testimonial.⁵¹ The Court concluded the footnote by cautioning, "We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*."⁵²

44. Sotomayor's opinion for five members of the Court subsequently in *Bryant* interpreting *Crawford*, says this factor is only significant as one of the circumstances indicating that the purpose was probably to provide evidence (a testimonial purpose). *Bryant* at 1153.

45. The Court in the subsequent *Davis* case interpreting *Crawford*, says "volunteered testimony" can still be subject to the Confrontation Clause. *Davis v. Washington*, 547 U.S. 813, 822 n.1 (2006).

46. This of course sets us up for future uncertainty when a case arises that on its facts satisfies some but not all of the factors. There is also the question of what exactly do each of the factors mean. And all of them are attended by ambiguity as to degree.

47. *See Crawford*, 541 U.S. 60.

48. *Id.* at 60-68.

49. *Id.* at 55-56.

50. *Id.* at 72-73.

51. *Id.* at 76 n.6.

52. Developing case law will eventually tell us whether there is such a constitutional exception and whether it has the same contours as the dying declarations hearsay exception in Rule 804(b)(2) of the Federal Rules of Evidence, which made some changes in the exception from the common law. FED. R. EVID. 804(b)(2).

It can be seen from all this, that *Crawford* has a dimension that is unfriendly to the prosecution, as well as one that is prosecution-friendly. On the anti-prosecution side, *Crawford* almost completely restricts “testimonial” hearsay statements offered against the criminal defendant. They can no longer be rendered admissible by showing they are within a firmly rooted hearsay exception or are otherwise reliable.⁵³ But, on the other hand, all confrontation-clause scrutiny is removed by *Crawford* from non-testimonial hearsay statements, which is a *pro*-prosecution effect, since formerly, pursuant to *Roberts*, even non-testimonial hearsay statements were subjected to confrontation-clause scrutiny.⁵⁴

Crawford excoriated *Roberts* for being too subjective: *Roberts* had many undefined and subjective terms like “firmly rooted” and “reliable.”⁵⁵ Exactly how reliable is reliable? But the *Crawford* idea of “testimonial” has also proved somewhat difficult and subjective to define: What statements are “testimonial”? Can the purpose of a statement really be ascertained? What if police have a different purpose in questioning than the declarant has in answering? What about a statement where there is a mixed purpose say both to resolve an ongoing emergency or obtain medical treatment *and* to get or supply evidence for a trial, as, for example in the case of statements to rape treatment nurses specially trained by law enforcement?⁵⁶ Or statements made by a declarant to a friend with the purpose to incriminate or accuse another (perhaps even hoping it will get to authorities although that may not be necessary)? What about statements made before any crime has been committed that subsequently prove useful in a prosecution? What about a statement made after a crime but before there is a particular suspect? What about a statement made where police are gathering evidence against a particular suspect but the declarant is unaware he is being questioned by a police or government agent, who is undercover? What about volunteered statements, where there is no official questioning? What about statements overheard by police or eavesdropped upon by them? What about a statement made under excitement without direct thought of investigatory or prosecutorial use such as some 911 calls? What about statements

53. See text at footnotes 35-48 *supra*.

54. *Id.*

55. *Crawford*, 541 U.S. at 60.

56. A subsequent Supreme Court case, *Davis*, made relatively clear that the inquiry is into what is the *primary* purpose, at least in the ongoing emergency situation. *Davis*, 547 U.S. at 822. *Davis* is treated *infra*.

Confronting the Confrontation Clause

made for purposes of helping police in an emergency—say to stop a further assault, or to obtain immediately needed medical help after an assault, or to help catch a criminal at large who may pose a threat to the public? What about statements with mixed motives, such as to a rape treatment nurse who is both gathering evidence and providing treatment? Can children have the knowledge and intent to make testimonial statements? Are statements to doctors or nurses who may have been selected by police, but are not police, testimonial? Subsequent cases have shed some light, but not a lot, on some of these questions, but many remain unanswered.⁵⁷

One question that *Crawford* would seem to answer by fairly clear implication is whether forensic laboratory reports prepared at the behest of the police or prosecution for a particular criminal case are testimonial. The logic of *Crawford* would seem plainly to indicate that if these reports are prepared for law enforcement or prosecution with the knowledge that they might be used against a criminal defendant, they are testimonial. They meet every reasonable test of testimoniality that seems to arise from *Crawford*.⁵⁸ Whether the test involves intention or knowledge on the part of the police, or of the declarant, or both, that the report will be used prosecutorially, it seems to be satisfied, regardless of whether the test is subjective or objective in focus. The primary purpose—indeed the only purpose—is law enforcement. Where the test is commissioned by law enforcement or the prosecution, in connection with a particular case, there would seem to be no doubt. A report of such a lab test done on defendant that tends to indicate his guilt, offered against the criminal defendant, is testimonial and cannot be introduced against him unless at least someone involved in its preparation appears for cross examination (or if unavailable, previously appeared for cross examination).

57. *E.g.*, *Davis v. Washington*, 547 U.S. 813 (2006); *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

58. Recall the factors that *may* be significant under *Crawford* enumerated above: (1) primary purpose/intent/knowledge (of whom and whether subjectively or objectively determined was unclear) (2) perhaps government involvement, (3) perhaps a degree of formality/solemnity/structure to the proceeding, and (4) perhaps whether or not the statement was made under some form of questioning or interrogation. Any reasonable version of all of them seems to be satisfied in the case of these reports. While Justice Thomas suggests (see *infra*) that the forensic report in *Williams* was not formal or solemn enough to be testimonial, apparently because not sworn, that seems out of keeping with the degree of formality or solemnity that has been required in the other cases discussed herein and would result in an anomaly: that sworn statements (presumably somewhat reliable) would be less well received than unsworn ones (presumably less reliable), and that admissibility could be assured merely by refraining from swearing. *See generally Crawford*, 541 U.S. 36.

Yet a number of the Supreme Court Justices, including some who signed onto the decision in *Crawford*, seem reluctant to countenance this result.⁵⁹ While this may be because of practical concerns peculiar to the area of forensic reports, it may be a sign of something broader. At least some members of the Court may be starting to feel that they have painted themselves into a corner in *Crawford*, and may be looking for an escape. The Justices on each side of the divide are using increasingly harsh rhetoric criticizing those on the opposite side.

The case of *Melendez-Diaz v. Massachusetts*⁶⁰ first clearly surfaced this fault-line among the Justices.⁶¹ *Melendez-Diaz* was convicted in state court of drug possession.⁶² The prosecution introduced a state lab analyst's certificate to the effect that material seized by police and connected to petitioner was cocaine.⁶³ Pursuant to state law, the certificate had been sworn before a notary public which action licensed the certificate's use as prima facie evidence of the truth of what it asserted—that the material was cocaine.⁶⁴ The U.S. Supreme Court ruled the certificate “testimonial,” with the result that its admission violated the defendant's right to confront the witnesses against him under *Crawford*.⁶⁵ The chemist (“analyst”) himself should have been called by the prosecution to testify, unless he was unavailable and there had been a previous opportunity to cross examine him (none of which was the case here).⁶⁶

Consequently, Mr. *Melendez-Diaz*'s conviction was overturned and the case was sent back for re-trial (this time without the evidence), where he was acquitted.⁶⁷ According to unofficial reports, the

59. See *infra* concluding section of this paper.

60. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

61. The decision was 5-4. *Id.* at 306. Justice Scalia wrote the opinion for the Court strongly enforcing the *Crawford* principle and requiring the analyst behind a forensic report to testify. *Id.* He was joined by Souter, Stevens, Ginsburg and, on a somewhat different rationale (the formality of the report), Thomas. Dissenting were Kennedy, Roberts, Alito, and Breyer. *Id.*

The only significant Confrontation Clause case in the Court between *Crawford* and *Melendez-Diaz* was *Davis v. Washington*, 547 U.S. 813 (2006). There was remarkable agreement among the Justices there supporting *Crawford* except that in a partial concurrence and partial dissent, Justice Thomas focused on the formality/informality notion. See *Melendez-Diaz*, 557 U.S. at 329-357. While an argument can be made that *that* case was already a retreat from *Crawford* because it created the emergency exception to it, that exception is arguably fairly consistent with the rationale of *Crawford*.

62. See *Melendez-Diaz*, 557 U.S. at 309.

63. *Id.* at 308.

64. *Id.*

65. See generally *Melendez-Diaz*, 557 U.S. 305.

66. *Id.*

67. See ROTHSTEIN, RAEDER & CRUMP, EVIDENCE: CASES, MATERIALS & PROBLEMS, 620 (LexisNexis 4th Ed. 2013).

Confronting the Confrontation Clause

result was not based on issues like those involved in the Supreme Court, but on doubts about whether in fact the drugs were his.⁶⁸

The decision presumably affects a whole range of expert and non-expert government and CSI-type reports, not just reports involving chemists in drug tests. Prosecutors became immediately concerned that cases would be dismissed unless costly measures were taken to augment the number of analysts employed so there would be enough of them to handle the lab caseload and take time away from the lab to testify.⁶⁹

The decision was 5-4, with Justice Scalia writing for the majority, which included him and Justices Souter, Stevens, Ginsburg and, on a somewhat different rationale (the formality of the report), Thomas.⁷⁰ Dissenting were Justices Kennedy, Roberts, Alito, and Breyer.⁷¹

Justice Kennedy's vituperative dissent (joined by Chief Justice Roberts, and Justices Breyer and Alito) complained quite vehemently that the word "testimonial" does not appear in the constitution; rather, the phrase is "witness against."⁷² In his opinion, this applies to ordinary witnesses not "neutral experts."⁷³

Justice Scalia spent most of the majority opinion trying to rebut in strong almost belligerent terms the views of the dissenters.⁷⁴ The dissenters argued that the declarant, as an expert, was not a conventional witness who observed facts of a crime being committed, nor was he a witness directly accusing defendant.⁷⁵ The information was accusatory only when taken together with other evidence linking defendant to the drugs.⁷⁶ Declarant, the dissent argued, was an impartial scientific expert, reporting neutral science, not prone to the kinds of errors that infect fact witnesses.⁷⁷ Declarant was not recounting historical events.⁷⁸

Justice Scalia for the majority replied that there is no rational principle and no authority limiting the Confrontation Clause to the

68. The drugs had been found in a car in which he and others, including another person who was more clearly involved with drugs, were riding. *Melendez-Diaz*, 557 U.S. at 308.

69. See the dissent in *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2726 (2011).

70. See generally *Melendez-Diaz*, 557 U.S. 305 (2009).

71. See *id.*

72. See *id.* at 330-57.

73. *Id.* at 346-47.

74. *Id.* at 347-48.

75. See *id.* at 330-34, 344-47.

76. *Id.*

77. See *id.* at 337-40.

78. See *id.*

kinds of conventional accusatory historical-event witnesses the dissent mentions.⁷⁹ Further, Scalia noted, scientific tests can involve mistakes, errors, uncertainties of basis, unclarity or incompleteness of meaning, and fabrication, that require cross examination as much as lay evidence does.⁸⁰ He cited recent National Academy of Sciences findings in support:

Nor is it evident that what respondent calls “neutral scientific testing” is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, “[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency.” National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (Prepublication Copy Feb. 2009) (hereinafter National Academy Report). And “[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.” A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution. . .

Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. . . .

This case is illustrative. The affidavits submitted by the analysts contained only the bare-bones statement that “[t]he substance was found to contain: Cocaine.” At the time of trial, petitioner did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise

79. See generally *Melendez-Diaz*, 557 U.S. 305 (2009).

80. See *id.* at 317-321. The problem Justice Scalia foresees if report writers did not need to take the stand is even worse with non-scientific expert reports and the “soft” sciences. See, for example, *State v. Dunlap*, 155 Idaho 345 (2013), *petition for cert. filed*, 2014 U.S. S. Ct. Briefs LEXIS 1695 (U.S. April 28, 2014) (No. 13-1315), wherein a local jail psychologist’s report was allowed into evidence without the psychologist appearing, stating that in an interview he found the demeanor of the murder defendant to be uncaring, callous, and smiling, when relating the crime, and therefore the crime was committed with the depraved mind required as an aggravating factor to allow the death penalty. The question upon which cert. is being sought is whether the Confrontation Clause applies to the penalty phase in a capital case, a matter on which there appears to be a split of authority. *Id.* at *7.

Confronting the Confrontation Clause

of judgment or the use of skills that the analysts may not have possessed. . .

“[T]here is wide variability across forensic science disciplines with regard to techniques, methodologies, reliability, types and numbers of potential errors, research, general acceptability, and published material.” National Academy Report (also discussing problems of subjectivity, bias, and unreliability of common forensic tests such as latent fingerprint analysis, pattern/impression analysis, and toolmark and firearms analysis).⁸¹

To the dissent’s claim that interrogation is required for a statement to be testimonial, Scalia replies “[t]he Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.”⁸²

To the dissent’s assertion that it is sufficient that the defense could call the analyst to the stand under the Constitution’s Compulsory Process Clause, Scalia says: The defendant’s ability to subpoena the analysts “pursuant to state law or the Compulsory Process Clause—is no substitute for the right of confrontation. Unlike the Confrontation Clause, those provisions are of no use to the defendant when the witness is unavailable or simply refuses to appear. . . More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.”⁸³

The dissent also argued that the report here was like common law business records or official records.⁸⁴ Scalia responds that it does not qualify as a traditional official or business record, and even if it did, the author would be subject to confrontation nonetheless because it was prepared for use at trial.⁸⁵ “[A]nalysts’ certificates—like police reports generated by law enforcement officials—do not qualify as business or public records for precisely [this] reason.”⁸⁶

Perhaps the most troublesome points made by the dissent are those related to the burden the majority position places on prosecutors and law enforcement.⁸⁷ The fear is that supplying the testimony

81. *Id.* at 318-21.

82. *Id.* at 316 (citing *Davis*, at 547 U.S. at 822-23, n.1).

83. *Id.* at 324.

84. *See generally Melendez-Diaz*, 557 U.S. at 330-357 (Kennedy, J., dissenting).

85. *Id.* at 321-22.

86. *Id.* at 321-22 (citing FED R. EVID. 803(8) (defining public records as ‘excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel.’))

87. *Id.* at 340-43 (Kennedy, J., dissenting).

required by the majority will be expensive and will disrupt laboratory work, in view of the large number of cases involved across the country, and in view of the large number of analysts that may be involved even in one individual report.⁸⁸ To this, Justice Scalia replies that the Confrontation Clause cannot be ignored to accommodate the necessities of trial and the adversary process:

Perhaps the best indication that the sky will not fall after today's decision is that it has not done so already. Many States have already adopted the constitutional rule we announce today, while many others permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution's intent to use a forensic analyst's report. Despite these widespread practices, there is no evidence that the criminal justice system has ground to a halt in the States that, one way or another, empower a defendant to insist upon the analyst's appearance at trial.⁸⁹

Scalia notes here that states can ease the burden and facilitate case management by adopting notice-and-demand statutes.⁹⁰ These statutes require advance notice by the prosecution of proposed use at trial of a forensic report and require defendants to promptly thereafter request the appearance of the analyst if that is what they want.⁹¹ Failure of defendant to so request waives the confrontation objection to the report.⁹² In justification Scalia notes that defendants always must raise their Confrontation Clause objections.⁹³ Notice-and-demand procedures merely prescribe the time within which he must do so.⁹⁴ States are allowed to adopt reasonable procedural rules regulating objections, he says.⁹⁵ Some such statutes require good cause

88. *Melendez-Diaz*, 557 U.S. at 331-32 (Kennedy, J., dissenting). On just these practical grounds of "unworkability," especially if all the analysts who worked on a particular analysis and report had to testify, the New Jersey Supreme Court has just refused to require any underlying witnesses and has allowed the report to be evidenced through a supervisor who had reviewed the report. *State v. Michaels*, 95 A. 3d 648, 651 (N.J.2014). *But cf. Bullcoming*, 131 S. Ct. at 2726 ("The court has thus-in its fidelity to *Melendez-Diaz*-boxed itself into a choice of evils: render the Confrontation Clause pro forma or construe it so that its dictates are unworkable.").

89. *Id.* at 325-26.

90. *Id.*

91. *See e.g.*, Fed. R. Evid. 803(10)(B) and its advisory committee note. .

92. Because of this indication by the Supreme Court, the Federal Rules of Evidence have been amended, effective Dec. 1, 2013, to incorporate a notice-and-demand provision into Rule 803(10) (hearsay exception allowing a certificate to establish the absence of a public record without the certifier taking the stand). *See* FED. R. EVID. 803(10).

93. *See id.* at 327.

94. *See id.*

95. *See id.*

before the defendant's request will be granted, but the Court expressed no opinion on that.⁹⁶

Further easing the burden on prosecutors and law enforcement, in Scalia's view, is the fact that the defense will frequently offer to stipulate to the nature of the substance in the ordinary drug case.⁹⁷ He stated:

"It is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis. Nor will defense attorneys want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion."⁹⁸

Closely allied to the burden on law enforcement is the question of which persons must testify where a scientific test that is reported involved multiple analysts, perhaps each doing a separate phase of the work or the reporting.⁹⁹ The *Melendez-Diaz* decision seems to proceed on the basis that there was a single analyst—the analyst who analyzed the substance—and that he or she is also the person who wrote the report.¹⁰⁰ That is the person who must testify.¹⁰¹ The decision did not specify who must testify when more than one person is involved in the analysis and/or report. Yet there could be different tasks performed by different people in the analysis and reporting process. There may be different people obtaining, preparing, and analyzing the evidence, separate from the report writer. In many types of scientific testing there may be more than one person involved in the analysis itself. There may be a series of successive steps, each building on the last, and each performed by a separate technician. There may be a separate supervisor signing off on the process, or on the report. Who would be a sufficient witness?

The majority indicates that the absence of some of these witnesses from the witness stand may affect only the weight of the evidence, which the fact finder assesses, and not admissibility.¹⁰² But the decision leaves it unclear how this is to be determined.

96. *See id.* at 355 (Kennedy, J., dissenting).

97. *See id.* at 328.

98. *Id.* at 328.

99. *Id.* at 332-35 (Kennedy, J., dissenting).

100. *Id.* at 313-29.

101. *Id.*

102. *Id.* at 335-37 (Kennedy, J., dissenting).

Other related practical concerns also arise under the *Melendez-Diaz* rule. What is to be done, for example, when the analyst is no longer employed by the department, moves away, or has died before there has been any occasion to confront? Can someone else interpret the report on the witness stand, or must the analysis be redone by a new analyst who *can* appear? But what if the evidence is no longer available for testing?

Such scenarios are not rare. There frequently are “cold hits” years after a crime: a culprit is finally identified based on comparison of his DNA with a DNA analysis made at the time of the crime.¹⁰³ Another scenario where the problem of the unavailable analyst who cannot be cross-examined might arise is where there is a retrial a year or so after an original trial and the original forensic analyst who was not subject to cross-examination at the original trial (because under older law, *that* was not required) is now irretrievably gone. Or suppose an original autopsy was performed on a body some time ago by a medical examiner who is now dead or cannot be found and the body cannot be autopsied again because it has deteriorated. Though there is normally no statute of limitations on murder, this may as a practical matter impose one.¹⁰⁴

It is concerns like these that may be driving some of the members of the Court to feel they rushed too readily into the *Crawford* approach, and may be driving some of them into a kind of retrenchment.

The next case in the U.S. Supreme Court concerning forensic reports provided an opportunity for such retrenchment, but it didn't quite garner enough votes to do so. The case was *Bullcoming v. New Mexico*.¹⁰⁵ It posed the question: What if the witnesses offered to justify offering the report in evidence is, say, an expert co-worker in the lab, say even a supervisor, who can testify to the procedures of the lab, but had nothing to do with the particular analysis of this sample itself, but rather is testifying about the report compiled by the real analyst, who is not offered and who is not shown to be unavailable?¹⁰⁶ Would

103. See Detective Lindsey Wade, *Cold Hit: New Technology Reveals Old Evidence*, FORENSIC MAG (Jan. 16, 2015, 2:31 PM), <http://www.forensicmag.com/articles/2015/01/cold-hit-new-technology-reveals-old-evidence>.

104. *Id.* at 335 (Kennedy, J., dissenting).

105. 131 S. Ct. 2705.

106. See generally, Ronald J. Coleman & Paul F. Rothstein, *Grabbing the Bullcoming by the Horns: How the Supreme Court Could Have Used Bullcoming v. New Mexico to Clarify Confrontation Clause Requirements for CSI-type Reports*, 90 NEB. L. REV. 502 (2011) (explaining what *Bullcoming* did and did not decide).

Confronting the Confrontation Clause

this surrogate witness be sufficient to satisfy the Confrontation Clause?¹⁰⁷ That would solve some of these problems, but seems inconsistent with what *Crawford* appears to demand.¹⁰⁸

Mr. Bullcoming was tried and convicted in state court of driving while intoxicated.¹⁰⁹ Principal evidence used against him was a forensic laboratory report certifying that his blood alcohol concentration was a number well above the threshold for Aggravated Driving While Intoxicated.¹¹⁰ The prosecution did not call the analyst who did the test and signed the certification (Caylor) but instead called another analyst (Razatos) from the lab, who was familiar with the lab's testing procedures but had neither participated in nor observed the test on Mr. Bullcoming's blood sample.¹¹¹

In a decision written by Justice Ginsburg, the Court held that using Razatos to testify was not sufficient under the Confrontation Clause.¹¹² Caylor needed to be called.¹¹³ The majority saw this as demanded by the whole philosophy of *Melendez-Diaz*, perceiving no significant difference between that case and this.¹¹⁴ In other words, Justice Ginsburg's opinion gives full sway to the logical implications of *Crawford*.¹¹⁵

107. *Id.*

108. See discussion of *Crawford*, *supra*.

109. See *Bullcoming*, 131 S. Ct. at 2709-10.

110. *Id.* at 2709.

111. *Id.* at 2711-12. Caylor was on administrative leave for some mysterious reason, which Razatos could not illuminate, but was not shown to be unavailable. *Id.* The certification, which was, arguably, formal, attested not only to a technical number, but to several other matters such as proper calibration of the equipment and handling of the sample, etc., facts which seemed to preclude one of the state court's rationales for admitting the evidence, that Caylor was a mere "scrivener." *Id.* at 2710-11. The Court sidesteps the question whether that would make him a mere scrivener and whether there is such an exception to Confrontation, by noting merely that more than a mere scrivener or copying of the blood alcohol concentration number was contained in this certification. *Id.* at 2711-13.

112. *Id.* at 2713.

113. *Id.*

114. *Id.* at 2713-14.

115. In *Bullcoming*, Justices Thomas and Kagan concurred in the result and in Ginsburg's opinion in part. Coleman & Rothstein, *supra* note 106, at 524. Justice Thomas disagreed with that part of Ginsburg's opinion stressing the primary purpose test of testimoniality rather than his test of formality/informality; but because the report was in the form of a certification (i.e. was, arguably, formal), he concurred in the result that Caylor had to take the witness stand. *Id.* at 531. Justice Kagan disagreed with a portion of the Ginsburg opinion that depreciated the law enforcement burdens that would ensue from requiring the analyst to testify. *Id.* at 556-57. Justice Sotomayor similarly concurred in the result and with the Ginsburg opinion (except for that same part) in a separate opinion pointing out what the case did not decide, leaving open some indirect routes for the admission of forensic report information that she suggested might not require the presence of the analyst (although later in *Williams* she did not apply this). *Id.* at 524.

Justice Kennedy wrote a blistering dissent in which Chief Justice Roberts and Justices Breyer and Alito joined, advocating a significant retrenchment of *Crawford*, at least in the forensic report context.¹¹⁶

Justice Sotomayor's concurrence in *Bullcoming* suggested that even though *this* expert witness was not the way out of the box some of the Justices were beginning to feel *Crawford* had put them in, another expert, properly grounded concerning the particular test administered, might be.¹¹⁷ She did this by stating what *Bullcoming* was *not* holding—that is, doors to admissibility *Bullcoming* was not necessarily foreclosing:

First, this is not a case in which the State suggested an alternate purpose, much less an alternate primary purpose, for the [Blood Alcohol Content] report. For example, the State has not claimed that the report was necessary to provide Bullcoming with medical treatment.

Second, this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue. The court . . . recognized [the witness'] total lack of connection to the test at issue.

Third, this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence. See Fed. Rule Evid. 703 (explaining that facts or data of a type upon which experts in the field would reasonably rely in forming an opinion need not be admissible in order for the expert's opinion based on the facts and data to be admitted). We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence.

Finally, this is not a case in which the State introduced only machine-generated results, such as a printout from a gas chromatograph. The State here introduced [the analyst's] statements, which included his transcription of a blood alcohol concentration, apparently copied from a gas chromatograph printout, along with other statements about the procedures used in handling the blood sample.¹¹⁸

The dissenters in *Bullcoming* were concerned with the burden on law enforcement, especially but not only if multiple analysts are in-

116. *Id.* at 2723- 28.

117. *Id.* at 2722.

118. *Id.* at 2722.

Confronting the Confrontation Clause

volved in a test and have to be called to the stand.¹¹⁹ They pointed to a 71% increase in the number of subpoenas for New Mexico analysts' testimony in impaired-driving cases between 2008 and 2010, as well as experiences in other states.¹²⁰ The dissent portrayed the certifying analyst's role as "no greater than that of anyone else in the chain of custody."¹²¹ An implicit theme of the dissenters, found in the other cases as well, particularly *Williams*, the DNA case, is that making it difficult to introduce scientific reports will promote reliance on other less reliable evidence such as eye-witnesses.¹²²

Justice Kennedy in the dissent in *Bullcoming* very forcefully advocates confining *Melendez-Diaz* to its facts or perhaps overruling it, and obliquely suggests reconsidering *Crawford* as a whole.¹²³

Bullcoming had little to say clarifying how it is to be determined who must testify if there is a chain of participants in the analysis and report. Must they all? If not, Why not? Which one(s) must? Justice Ginsburg for the majority speaks only of "the analyst who signed the certification" and seems to ignore the possibility that there might be others involved in the collecting, testing, analyzing, or reporting process too.¹²⁴ There may be several people doing different steps of the analysis. Caylor in fact seems to have done most of the analysis as well as signing the certification.¹²⁵ Caylor is who Ginsburg says should have testified in this case.¹²⁶ But the opinion's logic might also require others where several are involved.¹²⁷

Justice Sotomayor's second (and perhaps third) undecided scenario, above, hints at the possibility that in proper circumstances, a single surrogate witness might do the trick even for a group.¹²⁸

The next forensic report case in the Supreme Court, *Williams v. Illinois*, adopts a version of one of Justice Sotomayor's "hints"—that a properly grounded expert may get the report before the fact-finder.¹²⁹ But oddly, she dissents in *Williams*.¹³⁰

119. *See id.* at 2728 (Kennedy, J., dissenting).

120. *See id.*

121. *Id.* at 2724.

122. See Justice Breyer's separate opinion in *Williams*, *infra*.

123. *Id.* at 2723-28.

124. *See generally Bullcoming*, 131 S. Ct. 2705.

125. *Id.* at 2710.

126. *Id.* at 2710-13.

127. The logic behind the opinion is that anyone who supplies facts in this context is a witness who must be confronted.

128. *Id.* at 2719-23.

129. *Id.* at 2221 (holding the expert testimony did not violate the Confrontation Clause).

130. *Id.* at 2264-77.

But more broadly, *Williams* demonstrates graphically that a substantial number of Justices are now prone to some very extreme measures to get around *Crawford* in this area, if not outright overruling.¹³¹

II. WHAT HAPPENED IN *WILLIAMS V. ILLINOIS*?

In *Williams*, a sample of the semen from the rapist was taken from the victim and sent by the Illinois state police technicians to Cellmark Diagnostics, a pre-eminent Maryland company specializing in DNA analysis.¹³² An analysis and report from Cellmark isolated and reported back to the police technicians a DNA profile with certain features. In the meantime, Mr. Williams became a suspect in the rape.¹³³ A sample of Mr. Williams' blood was obtained and analyzed for DNA by the Illinois state police lab, and an expert witness from the Illinois state police lab testified at Williams' trial for rape that the two profiles matched.¹³⁴ No one from Cellmark testified.¹³⁵ The victim identified Williams.¹³⁶ Williams was convicted in a bench trial, and ultimately appealed to the Supreme Court on grounds that the use made of the Cellmark report without the state putting any Cellmark analyst on the stand violated his Confrontation Clause rights.¹³⁷

Justice Alito announced the judgment of the court that the analyst's testimony was not required and he delivered a plurality opinion.¹³⁸ Justices Roberts, Kennedy, and Breyer joined that opinion.¹³⁹ Breyer filed a concurring opinion as well suggesting it might be time for a re-examination of *Crawford*, at least in this area.¹⁴⁰ Justice Thomas filed an opinion concurring in the judgment on a different ground, peculiar to himself.¹⁴¹ Justice Kagan filed a strong dissent supporting a fulsome reading of *Crawford*, requiring the analyst to

131. *Id.*

132. *Id.* at 2229.

133. *Id.*

134. *Id.* at 2229-32.

135. *Id.*

136. *Id.* at 2229.

137. *Id.* For a debate on the issues raised by *Williams* published just prior to the decision, see Ronald J. Coleman & Rothstein, *Williams v. Illinois and the Confrontation Clause: Does Testimony by a Surrogate Witness Violate the Confrontation Clause?* (2011), <http://scholarship.law.georgetown.edu/facpub/740>.

138. The opinion is called a "plurality opinion" because while not a majority owing to its somewhat controversial rationale applying but limiting *Crawford*, it got the most votes.

139. See generally *id.* at 2227-44.

140. See generally *id.* at 2244-52 (Breyer, J., concurring).

141. See *id.* at 2255-64.

testify, in which Scalia, Ginsburg, and Sotomayor joined.¹⁴² The tone of several of the opinions, compared with what is usual at the Court, suggests the Justices are almost at each other's throats.¹⁴³

THE PLURALITY OPINION THAT THE CONFRONTATION
CLAUSE WAS NOT VIOLATED

A. The Cellmark Report Was Not Admitted for the Truth of the
Matter Asserted in It

In the first part of his opinion for the plurality, Justice Alito tacitly assumes that the Cellmark report was testimonial and thus if it had been put forth to the fact-finder (here, the judge) for the purpose of establishing its truth—that the DNA it examined in truth had the features it reported—it could not be used in that capacity without the state presenting the Cellmark personnel.¹⁴⁴ But he further holds that *that was not* the purpose for which it was used and understood at the trial.¹⁴⁵ He holds that the report of the outside laboratory (Cellmark) as used in the *Williams* trial can be equated to a hypothetical set of facts put to the on-the-stand expert.¹⁴⁶

In other words, the testifying witness in essence answered “yes” to the prosecutor’s question on direct examination which question Alito treated (and assumed the trier-of-fact, the judge in this case also treated) as the equivalent of this question: “Assuming that the profile Cellmark sent back to you at the police lab was an accurate representation of the DNA profile of a sample of the semen that had been deposited in the person of the victim, does it match the one that your state lab took from the defendant?”¹⁴⁷

Even though the question and answer did not strictly adhere in form to this format, nevertheless the net effect was the same, Alito argues: the net effect was that the witness’s answer was intended and understood by all to be conditional on the assumption that the facts in the report were true.¹⁴⁸ The essential point for Alito is that the answer did not claim they were true.¹⁴⁹

142. *Id.* at 2264-77.

143. See the general tone of the opinions, particularly Justice Kagan’s dissent.

144. *Id.* at 2227-28.

145. *Id.*

146. *Id.*

147. *Id.* at 2236.

148. *Id.*

149. *Id.* at 2236-37.

Justice Alito states that, since this was a bench trial without the jury, the judge can be presumed to understand all this—i.e., that the facts in the report were not being put forth as true, but merely as hypothetical assumptions only.¹⁵⁰

Understood this way, the testimony conforms, Justice Alito says, to the well-established common law practice, codified in Federal Rule of Evidence 703, that expressly allows experts to base their testimony on an unproven assumed hypothetical state of facts, which may not be taken as proven by the fact-finder until there is independent evidence of their truth.¹⁵¹ Such facts, offered this way, through the testimony of the expert, are not offered to prove the truth of those facts, but merely as a basis for the expert's testimony. Since they are not offered for their truth, the statement in the Cellmark report as used in *Williams* cannot be testimonial under *Crawford*. Justice Alito points to a supported footnote in *Crawford* that the Confrontation Clause only applies to statements offered for their truth.¹⁵² The on-the-stand expert has not said anything about whether the assumed facts are true, which is what would invoke the Confrontation Clause being applied to require the Cellmark analyst(s) live testimony.¹⁵³ The report is not being used for the truth of the matter asserted in it.

But, even if Justice Alito is correct in all this—that the report embodies hypothetical facts only, not offered for their truth—it would then be up to the fact-finder to decide whether the assumed hypothetical facts are true before they could utilize the testifying expert's opinion as evidence of guilt. If there is no other evidence to support the hypothetical facts on which the testifying expert's opinion depends, the trier-of-fact may not credit the on-the-stand expert's opinion that there is a match between the DNA on the swab taken off the person of the victim, and the DNA in the defendant's blood, since that opinion is based on hypothetical facts that have not been proven. There may not have been the same verdict without the expert's testimony of a match. It is virtually certain that the trier-of-fact (here, the judge)

150. *Id.* at 2236-37.

151. *Id.* at 2236. However a close examination of Rule 703 reveals the matter is not quite that simple. 703 requires that such underlying facts be "reasonably" relied upon by the testifying expert, and, even then, allows the judge discretion to exclude mention of them if they would be too prejudicial. Arguably when the underlying material itself would be constitutionally inadmissible, as here, 703 would probably result in exclusion.

152. *Crawford*, 541 U.S. at 59 n.9 (citing *Tennessee v. Street*, 471 U.S. 409 (1985)).

153. *Id.* at 2235-37.

Confronting the Confrontation Clause

did indeed consider the match testimony in arriving at the verdict of guilt.¹⁵⁴

The question then comes down to this: Was there other evidence supporting what was reported in the Cellmark report—that the DNA in the sample they examined had a certain set of features? If not, under standard evidentiary law, the expert’s testimony should have been stricken or disregarded and could not be considered to help establish guilt.

On this point, Alito says there was indeed “other” evidence to support the hypothetical facts.¹⁵⁵ That “other” evidence was the circumstantial evidence that the police sent a sample swabbed from the victim to Cellmark, a DNA profile came back from Cellmark, and it exactly matched the defendant’s, the person the victim testifies raped her.¹⁵⁶

But the trouble with this is that this circumstantial evidence itself depends on the truth of Cellmark’s implied statement that the profile they sent back to the police came from the same sample the police had sent to Cellmark (or at least from some sample).¹⁵⁷ Cellmark conceivably could have just made up the profile. This is unlikely, especially since it matched Williams’s and he was not yet a suspect in the rape.¹⁵⁸ But the unlikelihood is only significant because it confirms reliability and the Confrontation Clause according the *Crawford* no longer hinges on reliability.¹⁵⁹

Perhaps the “knowledge-of-extraordinary-features” principle (best illustrated by the notorious *Bridges* case¹⁶⁰) might rescue Judge Alito here. None of the opinions in *Williams*, including Justice Alito’s, specifically mention this *Bridges* principle, but it might be something he was getting at without realizing it.¹⁶¹

In *Bridges*, a little girl, the victim of child molestation, showed awareness of some highly distinctive features of defendant’s apart-

154. This is because he ruled it admissible without stating it would not be considered, and it was a powerful link in the chain of evidence, relied on heavily by the prosecution.

155. See generally Justice Alito’s discussion of the evidence presented at trial.

156. *Id.* at 2230-31.

157. *Id.*

158. See generally Justice Alito’s discussion that Williams was not “targeted”.

159. *But cf.* Michigan v. Bryant, 131 S. Ct. 1143, 1149 (2011). See *infra* note 52 (explaining certain possible implications of *Bryant* concerning a re-birth of the reliability factor).

160. See *Bridges v. State*, 19 N.W.2d 529 (Wisc. 1945). Notorious amongst Evidence scholars, anyway.

161. This would be where he discusses that the evidence received back from Cellmark matched Williams DNA profile.

ment (which features were proved another way—say by photographs).¹⁶² This was offered to prove that she was at his apartment, which was then offered as part of the case against defendant for the molestation.¹⁶³ Her statement of the distinctive features was not considered hearsay because her awareness of them—their presence in her consciousness—did not depend upon her credibility or the truth of the matter asserted by her, the evidence would have been just as good had she spontaneously mentioned the features and said she imagined them and had never been at a place with those features.¹⁶⁴ The awareness was beyond her control, and it would just be too coincidental to be able to make up those distinctive features spontaneously.

That principle if applied to the *Williams* case, might make the Cellmark report admissible *not* on a theory that it was offered for its truth (which is what would invoke the Confrontation Clause). It would just be too coincidental that Cellmark would be able to provide features of DNA that exactly matched Williams' if they were not from his DNA, regardless of Cellmark's honesty.

If this theory is correct, the Cellmark report would not be being offered for what we mean in the law by “truth of the matter it asserts.”¹⁶⁵ The Cellmark report, then, would be admissible both under the Hearsay Rule and the Confrontation Clause.

But should this definition of “truth of the matter asserted” be accepted for Confrontation Clause purposes, even if accepted for hearsay purposes? I have my doubts. There are a number of things confrontation and cross examination could reveal even in these “awareness of features” cases which would justify requiring that the declarant appear in court.

For example, the little girl in *Bridges* may have been coached by police or her parents (even though there was evidence this was not the case; such evidence could be disbelieved).¹⁶⁶ Similarly, Cellmark could have been tipped off by police as to what features to report in the DNA (although unlikely since it appears Williams was not yet a suspect—but the evidence that he was not might itself not be true).¹⁶⁷

162. See *Bridges* at 531-34.

163. *Id.* at 531-32.

164. *Id.* at 534-36.

165. *Williams*, 132 S. Ct. at 2227-28.

166. *Bridges*, 19 N.W.2d at 530-34.

167. This is where he discusses his theory that Williams was not “targeted”. See *Williams*, 132 S. Ct. at 2242.

Confronting the Confrontation Clause

Anyway, under *Crawford*, *reliability is not supposed to be the touchstone*.¹⁶⁸

A different though not very satisfying answer to the point that the hypothetical facts were never proven would be *not* that the circumstantial evidence supports the truth of the hypothetical facts, but that the question whether the hypothetical facts could be found true by the trier-of-fact was not before the Supreme Court.¹⁶⁹ This is perhaps obliquely suggested in other portions of Justice Alito's opinion.¹⁷⁰

B. Mr. Williams Was Not a Target at the Time of the Cellmark Report

In the second part of his opinion for the plurality, Justice Alito advances a second, independent reason why the Confrontation Clause was not violated by the Cellmark evidence in the *Williams* case.¹⁷¹ Relying on the confrontation clause's phrase "witness against the accused", Alito holds that since there was no rape suspect at the time Cellmark did its test and composed its report, the report itself is not testimonial because it was not specifically against the accused, but rather was to find a rapist.¹⁷²

This would be like a case in which a robbery has occurred adjacent to a certain parking lot at a certain time, and police, before they

168. See *Crawford*, 541 U.S. at 61; but cf., *supra* note 52 (discussing certain possible implications of *Bryant* concerning a re-birth of the reliability factor).

169. Normally the Supreme Court leaves it to the state court to decide the sufficiency of evidence. To put that question before the Court would probably require a specific claim of Due Process violation pinpointing the lack of evidence supporting the expert opinion. And even if that argument were made, there was enough *other* evidence of guilt in *Williams* to convict—e.g., the victim's testimony identifying Williams as the rapist—aside from this questioned evidence about the expert testimony and the Cellmark report. See Justice Alito's discussion of the evidence in the case. It is not clear to the present author, though, that the overall sufficiency of other evidence of guilt—here, the victim's testimony, and a little else—would be an answer to a Due Process claim that important evidence of guilt like the police lab expert's testimony relying on the Cellmark report, was allowed at trial when it shouldn't have been. But this is a murky area of the law.

170. See *generally id.* at 2227-44.

171. See *id.* at 2242-44.

172. See *id.* at 2225. This has echoes of, and perhaps expands, the notion of emergency in *Bryant*. Alito also notes here that DNA tests in these circumstances have the potential of exculpating perhaps more than inculcating, a theory that may have expansive consequences. *Id.* at 2228. Under Alito's "non-target" rationale for the decision, the report would be admissible independently, without having to be part of the testifying expert witness' testimony. *Id.* This is also like the non-adversarial or routine record doctrine that provides for an exception to the law enforcement records exclusion in the hearsay exception for public records in Federal Rule of Evidence 803(8). See *U.S. v. Grady*, 544 F.2d 598 (2d Cir. 1976); *U.S. v. Brown*, 9 F.3d 907 (11th Cir. 1993); *U.S. v. Orozco*, 590 F.2d 789 (9th Cir. 1979); *U.S. v. Quezada*, 754 F.2d 1190 (5th Cir. 1984).

have a suspect, ask a citizen on the street (who observed the parking lot just before the crime), “What kind of cars were in the parking lot.” Later the description given in that interview becomes significant when the police catch a suspect for the robbery, who has a car matching one of the cars described as being in the parking lot. At the time of the on-the-street interview, the information about the cars had no specific significance, but attained significance later. Under this second theory of Justice Alito, the statement identifying cars in the parking lot would not be testimonial. Justice Alito puts the “target” theory this way:

The [Confrontation] Clause refers to testimony by witnesses against an accused . . . prohibiting modern-day practices that are tantamount to the abuses that gave rise to the recognition of the confrontation right¹⁷³ [namely,] (a) they involved out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct, and (b) they involved formalized statements such as affidavits, depositions, prior testimony, or confessions.¹⁷³

His part (a) is the “target” theory and seems relatively new to these cases.¹⁷⁴ It adds a wrinkle to the primary purpose test, which had seemed only to require contemplation of use prosecutorial or in a legal proceeding, not necessarily against any particular individual.¹⁷⁵ Applying the new wrinkle here, the plurality holds that the report was not testimonial because Williams was not a suspect in the rape at the time it was compiled.¹⁷⁶

The primary purpose of the Cellmark report, viewed objectively, was not to accuse petitioner or to create evidence for use at trial.¹⁷⁷ When the ISP lab sent the sample to Cellmark, its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time.¹⁷⁸

Under this “target” theory, what state of affairs at the time of the testing and report would make a report non-testimonial? Not actually having a suspect? Defendant not yet a suspect? Defendant not sus-

173. *Williams*, 132 S. Ct. at 2242.

174. *See id.*

175. *Id.* at 2242-44.

176. *Id.*

177. *Id.* at 2243.

178. *Id.* at 2225. This is slightly reminiscent of the expansion of the emergency theory of *Davis* as expanded by *Bryant* and is an even further extension of the “criminal at large” notion of emergency. See discussion of those two cases in this article, in Part I. Hence, I have said this theory of Justice Alito’s is “relatively new.”

pected yet in ANY crime? Not telling the lab there is a suspect? (Would that only work if the laboratory was independent?) No crime yet committed when the test is done or the report is compiled?

An example of this last kind of report might be routine factory-production-point recordations made of bullet lead compositions, gun barrel striations, or genetic markers of bio-agents, all for purposes of customer identification in case the product was ever used in a crime. Another more doubtful example might be routinely made and kept DNA profiles or fingerprints of members of the prison population, for later use for potential I.D. when other crimes occur after the prisoner's release.

III. IS THERE A THEORY IN *WILLIAMS* THAT COMMANDS A MAJORITY?

Five of the nine votes on the Supreme Court are needed for a majority.¹⁷⁹ Was there a majority behind any of the theories mentioned by various Justices in *Williams* as their own particular *ratio decidendi*?

Theory One: When a Report is Used With an Expert as in Williams, It is Not Offered for the Truth of the Matter Asserted for Confrontation Purposes and is Thus Not Offered in a Testimonial Capacity: Only Four Votes.

Although the conviction was affirmed, only the 4 Justices in the plurality subscribed to the theory that the Cellmark report was not used for the truth of the matters asserted in it (Justices Alito, Roberts, Kennedy and Breyer) as their reason for that decision.¹⁸⁰ There were 5 votes finding exactly the contrary: that the report *was indeed* used for the truth of the matter asserted in it even though the report was not itself technically introduced into evidence (the four dissenters, Justices Kagan, Scalia, Ginsburg, and Sotomayor plus Justice Thomas who concurred on a different ground).¹⁸¹ The four votes in the plurality, who believed the report was not used for the truth and thus was not testimonial, were unable to garner a fifth vote (to get a majority) for *that* theory supporting admissibility.¹⁸² But they picked up Justice

179. See John Schwartz, *Between the Lines of the Defense of Marriage Act Opinion*, N.Y. TIMES, www.nytimes.com/interactive/2013/06/26/us/annotated-supreme-court-decision-on-doma.html?_r=0.

180. See *id.* at 2227-29.

181. *Id.* at 2264-77.

182. *Id.* at 2227-29

Thomas' vote as a fifth vote supporting admissibility which Thomas cast on a different theory, that the report was not testimonial because of its informality, which none of the other eight Justices subscribed to.¹⁸³

Theory Two: When a Report Is Done Without a Targeted Individual it is Not Testimonial: Only Four Votes.

This was the alternate theory of the 4-member plurality. Both Justices Thomas (concurring in the result) and Kagan dissenting (and the three other dissenters for whom Kagan wrote, Scalia, Ginsburg and Sotomayor) expressly rejected the “targeted individual” requirement for testimoniality.¹⁸⁴ This “targeted individual” addition to the test for testimoniality currently lacks a fifth vote, and so it, too, has no majority behind it.¹⁸⁵

Theory Three: A “Formal” (“Solemn”) Report is Testimonial; an “Informal” One is Not: Only One Vote, But a Critical One.

Only Justice Thomas subscribed to this theory.¹⁸⁶ All the other Justices vigorously rejected it.¹⁸⁷ But because this theory produced constitutional admissibility here, it produced the same result as the plurality's theories, and thus provided the necessary fifth vote for admittance of the evidence.¹⁸⁸ In consequence, Justice Thomas and his theory may be the swing vote in many future cases, determining the outcome even though it is rejected by every other Justice.¹⁸⁹

Justice Thomas' “Formality” or “Solemnity” theory drew a distinction between the report in *Williams*, on the one hand, where Justice Thomas voted against admissibility, and, on the other hand, the reports in *Melendez-Diaz* and *Bullcoming* (both discussed supra), in which Thomas voted in favor of admissibility.¹⁹⁰ In *Melendez-Diaz*, the report was in the form of a sworn affidavit, and Justice Thomas voted that the report was formal/solemn and therefore was testimonial.¹⁹¹ While the report in *Bullcoming* was not sworn, it was in the form of “certifying”—the report said the signatory affirmed the truth of what was reported.¹⁹² Justice Thomas felt this was still formal and

183. *Id.* at 2255-64.

184. *Id.* at 2264-77 (Kagan, J., dissenting).

185. *Id.*

186. *Id.* at 2255-64.

187. *See generally* *Williams*, 132 S. Ct. 2221.

188. *Id.*

189. *Id.*

190. *See* at 2255-64. *See generally* *Melendez-Diaz*, 557 U.S. 305; *Bullcoming*, 131 S. Ct. 2705.

191. *See* *Melendez-Diaz*, 557 U.S. at 307-09.

192. *See* *Bullcoming*, 131 S. Ct. at 2709-11.

solemn enough to make the report testimonial.¹⁹³ In *Williams*, the report language somehow was deemed by Justice Thomas as less formal and solemn—that it did not say it certified or affirmed anything, and so it was insufficiently formal to qualify as testimonial.¹⁹⁴ Contributing to this conclusion would also be the fact that state law established the procedures in *Melendez-Diaz* and *Bullcoming*, providing for the reports' evidentiary use if in the proper form, which was apparently not the case in *Williams*.¹⁹⁵ Maybe also contributing to the characterization of the reports as formal/solemn or not was the fact that in *Williams*, as opposed to *Melendez-Diaz* and *Bullcoming*, the reporting laboratory was a private lab, not an arm of the state.

The other Justices in *Williams* were quite vehement about the fact that the formality/solemnity theory produces anomalous results, and draws distinctions without a difference.¹⁹⁶ The anomalous results they point to are that efforts to make the report more reliable, like swearing to its content, makes the report more likely to be rejected, under the formality/solemnity theory, and that rejection can be avoided simply by carefully not swearing to the report.¹⁹⁷ As to distinctions without a difference, the other Justices have said that the distinction the theory draws between *Bullcoming* and *Williams*, mentioned just above, is a distinction of no substance.¹⁹⁸

Theory Four: Full-blown Crawford and Melendez-Diaz—The Uncompromising View that Providers of Adverse Information Must Come Forward: Only Four Votes.

Justice Kagan wrote a blistering dissent in *Williams*, joined by Justices Scalia, Ginsburg, and Sotomayor.¹⁹⁹ These dissenters rejected the reasons given by the plurality and the reasons given by Justice Thomas, sticking to a pure *Melendez-Diaz* view requiring the appearance of the analyst responsible for a report whose contents gets before the factfinder regardless of how the contents of the report came before the factfinder (as the basis of an expert's opinion or more directly) and regardless of whether the report targets an individual or not.²⁰⁰

193. *Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring)

194. *Id.* at 2255.

195. Compare Justice Thomas's opinions in those cases, cited *supra*.

196. *Id.* at 2275-77 (Kagan, J., dissenting). See, for example, Justice Kennedy's disparaging reference to the "pro forma" option opening this article.) *Bullcoming*, 131 S. Ct. at 2726.

197. This is how it appears to the present author, at any rate.

198. See *Williams*, 132 S. Ct. 2264-77 (Kagan, J., dissenting).

199. See *id.*

200. *Id.* at 2277 (Kagan, J., dissenting).

In sum, as Supreme Court disagreements go, there is, as the title to this article suggests, a vigorous, if not nasty, confrontation going on among the Justices, about how to confront the box they have gotten into concerning the Confrontation Clause. Justice Alito's plurality opinion including its two-branch reasoning was joined only by the Chief Justice, Justice Kennedy, and Justice Breyer.²⁰¹ Justice Thomas concurred in their conclusion that the evidence was constitutionally admissible and thus concurred in the judgment, which upheld Williams' conviction.²⁰² But he had a different reason for the admissibility—the informality of the report—than the plurality, rejecting all the reasons given by the plurality (as well as rejecting the dissenters theory).²⁰³ Justice Kagan's blistering dissent, joined by Justices Scalia, Ginsburg, and Sotomayor, rejected the plurality's theories and Justice Thomas's, staunchly defending pure *Melendez-Diaz* and requiring the appearance of the analyst.²⁰⁴ Thomas's approach, relying on formality/informality, rejects in no uncertain terms the dissenters' entire approach.²⁰⁵ So in *Williams*, there is no constitutional theory achieving five votes, though there was a cobbling together of disparate theories commanding five votes for constitutional admissibility (Thomas' informality theory and the plurality's). For this reason it could be said that there is no “holding” of the case.

IV. WHAT SHOULD PROSECUTORS DO NOW IN LIGHT OF *WILLIAMS*?

Let us imagine you are a prosecutor who wants to make use in court of the results of a laboratory test that police commissioned in connection with a case against a particular suspect they had in custody.

Imagine you have a results-report from the lab. You would *prefer* not to call to the stand anyone from the lab, because they have a heavy workload. You may be able to recruit an expert who did not actually participate in this particular testing and report done on the defendant.

201. *See id.* at 2223. Justice Breyer, in addition to concurring with the plurality, also wrote a separate concurrence suggesting that the case should be set for re-argument to consider how the Confrontation Clause applies more generally to crime laboratory reports and technicians statements in them. *Id.* at 2244–45.

202. *See id.* at 2255-64 (Thomas, J., concurring).

203. *Id.*

204. *Id.* at 2264-77 (Kagan, J., dissenting).

205. *Id.* at 2255-64 (Thomas, J., concurring).

Confronting the Confrontation Clause

As a result of *Williams*, you may want to consider doing the following, at least if the case arises *now*, before any further developments in the Confrontation law:

If the trial is a jury trial, make sure the facts found in the report are presented clearly²⁰⁶ at trial in the form of a hypothetical question to the testifying expert (“. . .if facts A, B, and C are true, what would be your opinion. . .”). Be sure careful to have some *other* admissible evidence that those facts are indeed true.

While that *other* evidence may be nothing more than showing that the sample was sent to the lab and the lab sent back a report showing a certain profile that fits with the case, it would be risky to go that route, owing to the uncertainty surrounding whether the *Bridges* principle applies.

Ask the judge to instruct the jury that the particular facts you have used from the report are purely hypothetical and not at this point offered for their truth. It should explain they serve merely as a basis for the expert’s opinion, and that they are assumptions the testifying expert has made which that expert feels if true lead to the opinion she is giving. The instruction should go so far as to say that if the jury finds these facts are not proven up by other evidence, the opinion should be disregarded.²⁰⁷ The trial judge in ruling on admissibility will understand this would pick up four votes (the plurality) if the case got to the Supreme Court.

But you need a fifth vote because there are nine Justices on the Supreme Court. To get a fifth vote, you will *also* have to make sure the report is not in some form that would be regarded as “formal” by Justice Thomas, because you would want to pick up Justice Thomas’ vote as a fifth vote for admissibility. It is the only fifth vote you could get, because the other Justices who might be candidates for that fifth vote (i.e., the dissenters in *Williams*) are staunchly against you. Be sure there is no evidence that you did something special to make a report that normally is formal, informal, since Justice Thomas will be

206. As discussed above, the plurality in *Williams* indicated that if *Williams* had been tried to a jury the Justices would be less inclined to have applied the “not-for-truth” theory because a jury might not understand that theory unless it were made clearer. See *Williams*, 132 S. Ct. at 2236.

207. If you have a report that was made in circumstances where the defendant was not at the time a “targeted individual,” none of the above may be necessary if the report is regarded as “informal.” In such a situation, the report itself would be directly admissible, whether or not a testifying expert witness used to convey it to the fact-finder.

alert to whether the informality is in “bad faith.” It is unclear what kind of showing might demonstrate “bad faith”.

If the trial is a judge-trial rather than a jury trial, the same principles apply but it need not be made so clear that the facts in the report are hypothetical only—the expert can frankly base his opinion on the report, and the judge will understand that the facts in the report are in the nature of a hypothetical that need to be proved. This is basically the *Williams* case.²⁰⁸ Your trial judge will realize you have garnered the four plurality votes but that you will still need to establish the informality of the report to pick up Justice Thomas’ vote.

In all events, it is likely the expert witness must not be a mere conduit for the hearsay findings of those doing the test and making the report. This means that in addition to being qualified, the expert witness must have done some independent analysis or work of her own contributing to her opinion, as in *Williams*, although the Supreme Court did not expressly say this.²⁰⁹ And it may increase your chances of success if your expert witness is the lab supervisor who had something to do with the testing and report.²¹⁰

If the report is at the same time both informal (so Justice Thomas would vote for admissibility) and does not target an individual (so the four plurality Justices would vote for admissibility), the expert-witness route to admissibility of the report’s contents is not necessary and the report can come in directly because five Justices would vote that the report itself is non-testimonial in the first place (though for different reasons). Therefore the prosecutor would not have to resort to showing that a non-testimonial use is being made of it, i.e., a use that involves illuminating an expert witness’s basis rather than establishing the report’s truth.²¹¹

If the report is formal (so Justice Thomas would vote for inadmissibility), Thomas would join the four *Williams* dissenters (who felt the report information is always inadmissible based on a pure reading of *Melendez-Diaz*). They felt this was so (1) regardless of formality/informality, (2) regardless of whether the report is the basis of expert testimony, and (3) regardless of whether it targets an individual, all of

208. See generally *Williams*, 132 S. Ct. 2221.

209. See *id.* at 2229-32.

210. This is the thrust of Justice Sotomayor’s second case scenario in *Bullcoming* supra. See *Bullcoming*, 131 S. Ct. at 2722.

211. This is in fact the *Williams* case itself. The expert-witness theory of Justice Alito was logically not needed at all.

Confronting the Confrontation Clause

which tests they thought were completely bogus.²¹² In that case there is nothing you as prosecutor can do to get the evidence in (short of arguing the Supreme Court will change its views). The expert route will not get it in (because Justice Thomas and the four dissenters felt that route is entirely bogus) nor will arguing that it does not target an individual get it in either (even if it truly does not target an individual) because Justice Thomas and the four dissenters feel that the “targeting” test is also a bogus approach and that targeting makes no difference—the evidence is inadmissible regardless of targeting.²¹³

Thus, if the report is formal, the evidence will be constitutionally inadmissible, regardless of any of these other things.²¹⁴ So, in that particular instance (where the report is formal), Justice Thomas’s vote (Justice Thomas’ formality/informality test) is absolutely controlling.²¹⁵

If the report is informal (as in the actual *Williams* case) so that Justice Thomas would say it is constitutionally admissible, his vote is not entirely controlling: you must pick up four more votes for admissibility.²¹⁶ The four *Williams* dissenters in no event will vote for admissibility (since they take a pure *Melendez-Diaz* approach).²¹⁷ So the only hope to accomplish constitutional admissibility in this situation is to pick up (with Thomas) the four in the *Williams* plurality.²¹⁸

But if (unlike in *Williams*) the report *does* target an individual and the expert route has not been used properly in the trial court (so that neither of the conditions is present that made the evidence in *Williams* admissible in the eyes of the plurality), the four plurality votes for admissibility drop away, Thomas stands alone for admissibility, and the evidence is constitutionally inadmissible.²¹⁹

This is all assuming there is no change in the Justices’ thinking after *Williams*, which may or may not be a good assumption, as the next section herein demonstrates.

212. See discussion of all the *Williams* opinions above.

213. *See id.* at 2262 (Thomas, J., concurring).

214. *Id.* at 2255.

215. *Id.* at 2255.

216. *Id.* at 2227-44.

217. *Id.* at 2264-77 (Kagan, J., dissenting).

218. *Id.* at 2227-64.

219. *Id.* at 2255-64 (Thomas, J., concurring).

V. WAS THE PLURALITY IN *WILLIAMS* JUST LOOKING FOR A WAY TO OVERRULE *MELLENDEZ-DIAZ* WITHOUT ACTUALLY DOING IT?

Notice that the plurality in *Williams* are the dissenters in *Melendez-Diaz* (Justices Roberts, Alito, Kennedy, and Breyer).²²⁰ So in actuality, despite what they say in *Williams*, they don't think these forensic reports violate the Confrontation Clause, even if introduced directly without any testifying expert, whether or not they target an individual.²²¹

Suppose in *Williams* the facts were slightly different so that the plurality could invoke neither of its two rationales, i.e., the "not-for-truth" rationale and the "not-targeted-person" rationale.²²² It is possible the Justices in the plurality would have come up with yet another theory why the report did not violate the Confrontation Clause—for example, that Cellmark was an independent lab and was quite reliable; and/or that on the facts there was no realistic possibility the DNA profile that came back to the police was faked, mistaken, switched, or obtained from some other sample or source of *Williams's* DNA.

In a portion of *Williams* these factors are mentioned by the plurality in passing as a kind of practical support for but not necessarily a rationale for the admissibility result reached.²²³ Reliability is mentioned in part of the reasoning in *Bryant* as well.²²⁴

This would mean that in a future case, even where the two rationales for admissibility given by the plurality in *Williams* would not apply, if the report is informal (thus satisfying Justice Thomas's requirement for admissibility), and reliable in the fashions just mentioned, the report itself (whether targeting an individual or not) would be constitutionally admissible even without an expert (there being five votes for admissibility, four on reliability grounds, and one on the informality grounds).²²⁵

220. See generally *Williams*, 132 S. Ct. 2221; *Melendez-Diaz*, 557 U.S. 305.

221. *Id.*

222. See *id.* at 2227-44, 50-52.

223. See e.g., *id.* at 2237.

224. See *Bryant*, 131 S. Ct. at 1152 (shades of the old *Roberts* approach).

225. See generally *Williams*, 132 S. Ct. 2221.

VI. WHERE DO THE JUSTICES CURRENTLY STAND ON
CRAWFORD IN GENERAL?

Confidence in the *Crawford* principle seems to be in decline on the U.S. Supreme Court since *Crawford* itself.²²⁶ The decline seems most evident in the forensic reports cases, as detailed above.²²⁷

It may be that special law enforcement and prosecution needs in the forensic area mean the decline is confined to cases in that area.

But I sense the decline is broader than that. I sense there is a general perception by a number of Justices—who may have been initially inclined to agree with *Crawford*—that *Crawford*'s strenuous and uncompromising application would be counter-productive across the board, depriving prosecutors in court and police in the field of too many useful statements and options, as well as imposing undue expense and administrative burdens in a wide variety of areas of law enforcement.

Whether *Crawford* will be doomed to overruling in the future,²²⁸ or eaten away at, is hard to say. But it probably will never be what it promised to be.

The Justices currently on the Court who joined the majority opinion by Justice Scalia in *Crawford* are Kennedy, Breyer, Thomas, and Ginsburg.²²⁹ Justices Kennedy and Breyer who signed on to *Crawford* when it was handed down, now display hostility to the fairly clear implications of *Crawford*, that the author of forensic reports must appear, which hostility they expressed in *Melendez-Diaz*, *Bullcoming*, and *Williams*, all *supra*.²³⁰

226. As shown by the progress of the cases in Part I, *supra*, culminating in the fractured Court in *Williams*, discussed in Part II *supra*.

227. See generally *Williams*, 132 S. Ct. 2221; *Bullcoming v. New Mexico*, 131 S. Ct. 2705; and *Melendez-Diaz*, 557 U.S. 305. .

228. See generally David Crump, *Overruling Crawford v. Washington: Why and How*, 88 NOTRE DAME L. REV. 115, 151–57 (2012) (discussing *Williams v. Illinois*, 1332 S. Ct. 2221 (2012)).

229. *Crawford v. Washington*, 541 U.S. 36, 37 (2004). They were joined by Justice Souter and Justice Stevens who were no longer on the court by the time of the forensic report cases. See generally *Crawford*, 541 U.S. 36. Justices Rehnquist and O'Connor, also no longer on the court for any of the cases after *Crawford*, concurred in the result in *Crawford* but did not subscribe to the new “testimonial” theory, voting to continue the *Roberts* approach but finding that it produced the same result—inadmissibility—on the facts of *Crawford*. *Id.* at 71–76. The bottom-line result of inadmissibility in *Crawford* was 9-0 but the vote adopting its new rationale was 7-2. *Id.* at 69-76.

230. See Parts I and II.

Current Justices Roberts and Alito, who were not on the Court at the time of *Crawford*, expressed similar hostility in *Melendez-Diaz*, *Bullcoming* and *Williams*.²³¹

These four Justices expressed this hostility even though they previously appeared to endorse *Crawford* by signing on to *Davis v. Washington*²³² and to *Michigan v. Bryant*²³³, which seemed to accept, and were purported interpretations of, *Crawford*.²³⁴

However, those two cases, *Davis* and *Bryant*, arguably themselves were retrenchments from *Crawford*, or at least *Bryant* may have been. *Davis* in 2006, only two years after *Crawford*, created an emergency exception to *Crawford*.²³⁵ *Bryant* in 2011 extended that emergency concept to include less immediate emergencies.²³⁶ Justice Scalia, who had written the Court's opinion in *Crawford*, bitterly and witheringly dissented from the extension of the emergency exception in *Bryant*, even though he had voted for the exception in *Davis*, where he viewed the exception not as an exception to *Crawford*, but merely a refinement of *Crawford's* testimonial purpose requirement—that where the purpose is to resolve an on-going emergency, the purpose is not to gather evidence for a prosecution.²³⁷ But in *Bryant* he argued that the extension of this principle to a broader kind of emergency gutted *Crawford* and the meaning of emergency because almost any criminal situation can then be regarded as involving some kind of emergency if

231. See discussion of these cases *supra*, Parts I and II.

232. *Davis v. Washington*, 547 U.S. 813, 816 (2006).

233. *Michigan v. Bryant*, 131 S. Ct. 1143, 1149 (2011).

234. See *Bryant*, 131 S. Ct. at 1152-56; *Davis*, 547 U.S. at 821-34.

235. *Davis*, 547 U.S. at 816-23. In *Davis*, a 911 call by a victim involved in a currently occurring domestic-violence attack was held non-testimonial; but a statement made to police on the scene by a victim after such an attack was held testimonial, where the attack was over and the perpetrator was isolated in the next room. *Id.* at 829-32. Justices Scalia delivered the opinion of the Court, in which Justices Roberts, Stevens, Kennedy, Souter, Ginsburg and Alito joined. Justice Thomas filed an opinion concurring in the judgment in part and dissenting in part. *Id.* at 816.

236. *Bryant*, 131 S. Ct. at 1156. *Bryant* was a case in which a bullet-wounded citizen bleeding on the street made a statement to police. The Court extended *Davis'* emergency exception to include as an emergency, the need to apprehend the assailant because he was at large with a gun and hypothetically presented a possible continuing danger to the public (although by all indicators the shooting was the result of a particular grievance against this particular victim only). Justice Sotomayor wrote the opinion for the court in which Justices Roberts, Kennedy, Breyer and Alito joined. Justices Ginsburg and Scalia dissented. Justice Thomas filed a concurrence. Justice Kagan recused herself. *Id.* at 1149; *Cf. United States v. Liera-Morales*, 759 F.3d 1105, 1106, 1109 (9th Cir. 2014) (extending the emergency exception to a statement of a mother to the kidnappers of her son over the telephone which she arranged for the police to hear. The phone call was made for the purpose of obtaining her son's safe release).

237. See *Bryant* 131 S. Ct. at 1172-76. See generally *Crawford*, 541 U.S. 36.

Confronting the Confrontation Clause

the suspected criminal is still at large.²³⁸ Thus, at least *Bryant*, if not *Davis*, may be seen as a retreat from full *Crawford*.²³⁹

Arguably the emergency doctrine, or at least its extension, was born of a post-*Crawford* disaffection (by at least some of the Justices) with unrestrained *Crawford* logic which they began to feel would unduly harm law enforcement by handicapping police operations in the field and by depriving prosecutors at trial of too many useful statements of crime witnesses and victims.²⁴⁰

Justice Thomas who signed on to the majority opinion in *Crawford* with no express caveats also seems to be falling away from *Crawford*'s obvious implications, but he had indicated even before *Crawford* that he was not enthusiastic for the kind of theory *Crawford* ultimately adopted.²⁴¹ Although he did not say so in *Crawford*, he had earlier indicated that he could subscribe only to the part that seemed to place importance on the formality or informality of the statement.²⁴² After *Crawford*, his disagreement came to the fore in his separate partial-concurrence-partial-dissent in *Davis*; his version of the confrontation right is very narrow indeed.²⁴³ I believe his position is also attributable to practical law enforcement and prosecution concerns, like those which are causing other Justices to fall away from a fulsome reading of *Crawford*.²⁴⁴

Justices Souter and Stevens, who signed on to the majority opinion in *Crawford*, have since retired and been replaced by Justices Sotomayor and Kagan, who presently occupy their seats on the Court. Sotomayor and Kagan are arguably staunchly behind the full logic of *Crawford*, in favor of strongly applying it to require the appearance of the analysts in forensic reports cases, judging by these Justices' combined strongly worded dissenting opinion in *Williams, supra*.²⁴⁵

But on the other hand, Sotomayor authored the opinion in *Bryant*, the non-forensic case extending the emergency doctrine, which may be seen as weakening *Crawford*.²⁴⁶ Furthermore, Justice Sotomayor took pains to note the limits of the application of *Craw-*

238. *Id.*

239. *Id.*

240. See generally, *Bryant* 131 S. Ct. 1143; *Davis*, 547 U.S. 813.

241. See his concurrence in *White v. Illinois*, 502 U.S. 346 (1992).

242. *Id.*

243. See *Davis*, 547 U.S. at 834-42 (Thomas, J., dissenting).

244. See dissents in *Melendez-Diaz* and *Bullcoming*, discussed supra, Part I.

245. See Part II supra.

246. Justice Kagan recused herself from *Bryant*. See *Bryant*, 131 S. Ct. at 1167. She was not yet on the Court for *Davis*. See *id.* at 1149.

ford in her concurrence in *Bullcoming* as detailed supra.²⁴⁷ And she refused to subscribe (as did Justice Kagan) to a portion of the majority opinion in *Bullcoming* written by Justice Ginsburg, which portion seemed to denigrate the law enforcement concerns behind the opposition to *Crawford*.²⁴⁸ All this may reflect some lack of sympathy with *Crawford*. But, on the other side of the coin, Justice Sotomayor voted to robustly apply *Crawford* in the subsequent *Williams* case (which vote she lost) and joined Justice Kagan's very strong dissenting opinion in that case vigorously defending the full sweep of *Crawford*, as detailed supra.²⁴⁹

So, are there any Justices today who appear relatively uncompromisingly committed to *Crawford's* strongly stated right to confront? Yes. A dwindling few. Justice Scalia, the author of the *Crawford* decision, and Justice Ginsburg, who joined that opinion, remain today staunchly committed to strongly enforcing the full implications of *Crawford*, voting for requiring the declarant to take the stand in all the cases discussed in this article, i.e., all the significant U.S. Supreme Court Confrontation cases since and including *Crawford* (except, quite consistently with the implications of *Crawford*, in the case of the 911 call in *Davis*).²⁵⁰ Justice Kagan sat only on the last two cases to arise, *Bullcoming* and *Williams*, two of the three forensic reports cases, but she seems from her position in these, to stand with Scalia and Ginsburg as strong enforcers of *Crawford's* fullest implications.²⁵¹ However, as said, she has not voted on all the cases and she rejected the law-enforcement-downplaying part of the Ginsburg opinion for the Court in *Bullcoming*, so we cannot be *absolutely* sure about Justice Kagan's commitment to a fully expansive scope for *Crawford*.²⁵²

With the caveat noted just above in this section, Justice Sotomayor's views and voting record appear to be somewhat similar to Justice Scalia and Ginsburg who strongly support full *Crawford*, except that, being relatively new to the Court, Sotomayor only voted on the last three cases (*Bryant*, *Bullcoming*, and *Williams*) and she wrote the opinion of the Court in *Bryant* extending the emergency exception, all of which makes her complete devotion to *Crawford's*

247. See *Bullcoming*, 131 S. Ct. at 2719-23 (Sotomayor, J., concurring).

248. *Id.*

249. See *Williams*, 132 S. Ct. at 2264-77 (Kagan, J., dissenting).

250. See supra, Parts I and II.

251. See *Bullcoming*, 131 S. Ct. 2705; *Williams*, 132 S. Ct. at 2264-77 (Kagan, J., dissenting).

252. See *Bryant*, 131 S. Ct. at 1167.

Confronting the Confrontation Clause

fullest implications a little more difficult to call.²⁵³ However, she strongly voted to require the analyst's testimony in the two forensic cases that she voted on (*Bullcoming* and *Williams*), joining the strong biting opinion of Justice Kagan defending *Crawford's* full implications in *Williams*.²⁵⁴

Bottom line, we currently have 2 Justices, Scalia and Ginsburg (3 if you count Kagan and 4 if you count Sotomayor) out of 9 for vigorous, full application of *Crawford*, whereas at the time of *Crawford*, 7 out of 9 voted for the *Crawford* revolution, which was phrased in rather ringing, strong, broad language.²⁵⁵ Admittedly the Court then was not comprised of all the same Justices as now.²⁵⁶

Among the current Justices, that leaves Kennedy, Roberts, Alito, Breyer, and Thomas who all might vote to overrule or give a cramped reading to *Crawford*.²⁵⁷

Justices Kagan and Sotomayor are in an in between camp, but leaning toward considerable support for giving *Crawford* an expansive reading, with Kagan slightly more inclined in that direction than Sotomayor.²⁵⁸ Sotomayor was formerly a prosecutor and may be a bit more sympathetic to law enforcement needs.²⁵⁹

VII. WHERE MIGHT THE JUSTICES GO FROM HERE?

The Relationship of the Factors of Purpose, Government Involvement, Formality, and Interrogation

Recall again the factors which *Crawford* pointed to as possibly having potential significance in the "testimonial" computation: (1) primary purpose/intent/knowledge concerning potential legal use, (2) government involvement, (3) a degree of formality/solemnity/struc-

253. See generally *Bullcoming*, 131 S. Ct. 2705; *Williams*, 132 S. Ct. 2221; *Bryant*, 131 S. Ct. 1143.

254. See *Williams*, 132 S. Ct. at 2264-77 (Kagan, J., dissenting)

255. See discussion of *Crawford*, *supra*, Part I.

256. But at least the *general* profile of each replacement Justice has been similar to the profile of the Justice they replaced. Roberts replaced Rehnquist, who voted against the rationale of *Crawford*, the rationale Roberts seems to be trying to get around in *Williams*, *Bryant*, *Bullcoming* and *Melendez-Diaz*. See *supra* Part II; *supra* note 48; *supra* Part I (discussing *Bullcoming*); *supra* note 21. Sotomayor replaced Souter who voted for *Crawford*, and Sotomayor seems roughly similar. *Id.* Kagan replaced Stevens, who voted for *Crawford* and Kagan seems to be following suit. See, e.g., *supra* Part III. Alito replaced O'Connor, who voted against the rationale of *Crawford*, which rationale Alito seems to be trying to get around in *Williams*, *Bryant*, *Bullcoming* and *Melendez-Diaz*. See, e.g., *supra* Part II.

257. See discussion in Parts I and II, *supra*.

258. *Id.*

259. *Id.*

tured proceeding, and (4) maybe that the statement was made under some form of questioning or interrogation.²⁶⁰

It is at least arguable that all the cases discussed herein in the Supreme Court that deal with applying *Crawford*, including *Crawford* itself, are consistent with the following pattern: *If all four of these testimoniality factors are present on the facts, the statement is testimonial (and therefore ordinarily inadmissible without the maker).*²⁶¹ If any one or more of the factors is not present, the statement is not testimonial (and therefore is admissible insofar as the Confrontation Clause is concerned).²⁶²

260. Justice Sotomayor's opinion for the Court in *Bryant*, *supra*, has some language suggesting a fifth factor: a return in some measure to considering *reliability* as a factor (like in the former *Roberts* confrontation jurisprudence) but it was only in aid of describing the purpose factor and the difference under that factor between statements for the purpose of resolving an emergency and of memorializing evidence. Compare *Michigan v. Bryant*, 131 S. Ct. 1143, 1147 (2011), *with id.*, at 1171 (Scalia, J., dissenting).

261. The four cases in which the statements were found to be testimonial, and therefore constitutionally inadmissible, are *Crawford*; the domestic battery victim's written statements during the field investigation part of *Davis*; and the forensic reports cases, *Melendez-Diaz* and *Bullcoming*. See *Bullcoming*, 131 S. Ct. at 2710; *Melendez-Diaz*, 557 U.S. at 310; *Davis*, 547 U.S. at 829-34; *Crawford*, 541 U.S. at 68-69. See discussion *supra* Part I. In *Crawford* (involving the wife's statement taken and tape-recorded by police), all four testimonial factors were clearly present. See generally *Crawford*, 541 U.S. 36. In *Davis* (as to the statement in the field investigation after the domestic violence was over) all four factors were arguably present, at least in some form. See generally *Davis*, 547 U.S. 813. In *Melendez-Diaz* and *Bullcoming* the forensic tests and formalized reports, embodied in an affidavit or formal certification, were requested by law enforcement in connection with a case pending against a particular defendant. See generally *Bullcoming*, 131 S. Ct. 2705; *Melendez-Diaz*, 557 U.S. 305. Thus they clearly satisfied the government involvement, prosecutorial purpose, and formality factors, and, since they were requested, arguably fulfilled the questioning factor.

262. The three cases (all discussed *supra* Part II and IV) in which the evidence has been deemed constitutionally admissible, because they involved non-testimonial statements, are *Davis*, *Bryant*, and *Williams*. See generally *Williams*, 132 S. Ct. 2221; *Bryant*, 131 S. Ct. 813; *Davis*, 547 U.S. 813. *Davis* involved the 911 emergency call where, *arguably*, the only factors indicating testimoniality that were missing was the primary intent/knowledge-of-potential-prosecutorial-use factor because the purpose was to resolve an emergency and possibly the interrogation/questioning factor. See *Davis*, 547 U.S. at 823-29. *Bryant* involved the bleeding victim on the street where the statement was deemed necessary to handle the extended emergency of finding an armed criminal on the loose. See *Bryant*, 131 S. Ct. at 1150-67. The missing factors were the primary prosecutorial intent/knowledge/purpose factor, and *arguably* the formality/solemnity/structured factor). *Williams* involved the lab test report, where the four Justices in the plurality felt the intent/knowledge/purpose factor was not present, adopting the "target" version of that factor, and where Justice Thomas, the fifth vote, felt, somewhat strained, that the formality/solemnity/structured factor was not present. See *Williams*, 132 S. Ct. at 2221-64. The questioning/interrogation factor probably would be deemed present where a report is asked for by enforcement authorities as in *Williams* and the other forensic reports cases so far.

The four factors indicating testimoniality (prosecutorial purpose, government involvement, formality, and questioning) will normally go together. An officially sponsored session will normally mean there is some degree of formality, the government is involved, the purpose is evidently a law purpose, and there will be some questioning; but not as this footnote and the preceding one show. A test case of our italicized "rule" would be how the Supreme Court would treat a statement by one friend to another over the back fence, on the workplace hallway,

Confronting the Confrontation Clause

These italics suggest one potential escape from the “box” or “corner” into which Kennedy and other Justices believe the Court has put or painted itself—as referenced by Kennedy in the quotation at the very opening of this article.²⁶³ The escape is this: The Court could adopt *as a decisional rule*, the principle stated in those italics. This would considerably narrow the reach of *Crawford*, without overruling *Crawford*. It would lessen its restriction on what Kennedy and other of the Justices feel is “good” evidence, and would ease the burdens on law enforcement that are their main concerns. It thus might satisfy Justice Kennedy’s yearning for a “workable” theory of the Confrontation Clause that is not merely “pro forma,” to use his words from the quotation.²⁶⁴ In fact, if one pays attention merely to the results of the cases, the italic “rule” is entirely consistent with what the Court is in fact doing.²⁶⁵

There are also other ways the Justices could choose to limit the reach of *Crawford* without overruling it. For example, the purpose factor could be interpreted to mean that only if the *sole* purpose was a prosecutorial/evidentiary purpose, would a statement be regarded as testimonial. This would exclude from the concept of testimonial, a wide variety of statements, such as, among others, (1) 911 calls with a mixed emergency and evidentiary or incriminatory purpose; (2) statements about sexual or physical abuse to medical personnel who may or may not be nominated by police but where there is both a treatment motive and an accusatory or evidentiary motive, on the part of either the patient or the medical person; and (3) statements describing the assailant made on the scene to police by someone seriously injured in a shooting while the gunman has escaped but is still at large, that have *both* a resolving-emergency aspect (a health need-for-treatment emergency on the part of the victim, or a danger-to-public emergency

at the water cooler, or on the street, where the intention is purposely to incriminate a third party, the criminal defendant—perhaps with the hope that it might attract authorities. There would be no government involvement in the obtaining of the statement at the time, no formal, structured, solemn proceeding of any kind, and no questioning. The only testimoniality factor present, would be purpose/intention. Under our proposed rule, the statement should not be regarded as testimonial. Yet there is a substantial chance it might be because the intention/purpose factor has been a major influence in the cases.

263. See *Bullcoming*, 131 S. Ct. at 2726.

264. *Bullcoming*, 131 S. Ct. at 2726. Even with this rule, however, there would be interpretational problems, particularly concerning the knowledge, purpose, intent, or awareness prong. It could be interpreted as indicated in the next paragraph herein.

265. See Parts I, II, and III *supra*.

because a gunman is still at large) and a prosecutorial/evidentiary purpose.

Another way to limit the potential reach of the concept of testimonial would be to confine the purpose factor to the purpose of the declarant, which actually makes a great deal of sense in view of the wording, history and purpose of the Confrontation clause.²⁶⁶ There are other ways that *Crawford* could be restricted without overruling it.

CONCLUSION

It is not certain any of these “adjustments” to *Crawford* will be adopted as the way out of the perceived “box.” There may be other or more drastic measures taken, even outright overruling.

While it is too early to tell with exactitude where the cases will go from here, it seems clear that there has been a retrenchment of sorts since the ringing rhetoric of *Crawford* and its strong promise of a relatively unqualified right to confrontation. The thirst for retrenchment is most evident in the forensic reports area, with the result that there will very likely be more retrenchment in that area, and perhaps beyond, in the near future. One would hope that the reach of the Confrontation clause would not be drastically restricted as some of the solutions above might entail.

* * *

266. The Confrontation Clause speaks of “witnesses”; the purpose of the clause according to *Crawford* is to provide a particular procedure for testing such a witness’s statements; and the dissatisfaction with the Sir Walter Raleigh case was that Lord Cobham, a “witness”, was not confronted in person. See Part I *supra*. All this suggests a concern with the purpose of the witness/declarant.

Challenging Police Discretion

ERIC J. MILLER*

I. INTRODUCTION

Law enforcement officials have tremendous discretion to determine the amount and style of policing that occurs in their jurisdiction.¹ They decide which crimes or suspects to pursue, which communities or locations to target for policing, the best methods to prevent or respond to crime, and how best to balance prevention and detection.² These policy decisions have a tremendous impact on the public. Police policy renders the public liable to be targeted for surveillance or questioning, and stopped, searched, handcuffed, arrested, jailed, or even shot.³ Policing decisions inevitably distribute these resources across communities.⁴ Police policy may direct law enforcement officers to interfere with some people rather than others, more intensively or invasively, based on where they live or how they look as much as how they act or whether the police have specific information to suspect particu-

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1. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (noting law enforcement policy making is the special function of the executive and they have “broad discretion” in setting police policy).

2. *See generally* Carol S. Steiker, *The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771 (1998) (discussing preventative policing practices).

3. *See, e.g.*, *Mueler v. Mena*, 544 U.S. 93 (2005) (holding that police may handcuff suspect while searching her house); *Armstrong*, 517 U.S. 456 (affording law-enforcement wide discretion over the range of crimes to target for policing); *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that police may stop and frisk a suspect if they have reasonable suspicion to believe the suspect is engaged in criminal activity); *Tennessee v. Garner*, 471 U.S. 1 (1985) (when case is found insert case in order by date of decision in reverse chronological order with all other cases in footnote) (holding police may shoot a suspect so long as they use of force is proportionate to the crime committed).

4. Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1186 (2012).

lar individuals of criminal activity.⁵ Yet these highly discretionary policy decisions are, for the most part, opaque to public scrutiny.

Under the Supreme Court's division of labor, decisions concerning the distribution of the benefits and burdens of policing are mostly left to the executive, without interference from the courts.⁶ When the courts do have a role in the fourth- and fifth-amendment regulation of criminal investigations, the problems of policing are mostly framed in terms of procedural and corrective justice.⁷ The central questions are: (procedurally) whether the police acted appropriately in detaining and interrogating criminal suspects, and (correctively) if not, whether criminal defendants are entitled to be restored to the *status quo ante*, usually by the exclusion of unlawfully seized evidence. However, viewed more broadly, the politics of policing raises concerns of distributive justice as well.⁸ Policing spreads a variety of important social resources across communities, as well as imposing certain burdens of the prevention or investigation of crime.⁹ Quite often, it is the police themselves who determine how to apportion those benefits and burdens. They do so by making policy, just as any other administrative agency concerned with resource-allocation might.¹⁰

Unlike those other agencies, however, police rulemaking is most often not open to public input. Evidence suggests that the police regard themselves as experts in defining both the nature of crime problems and the best means of addressing those problems.¹¹ Their claim to expertise renders the police particularly prone to make and enforce policing policy free from public interference. The resulting policy is often based solely on their own internal assessment of the

5. See, e.g., *City of Chicago v. Morales*, 527 U.S. 41 (1999).

6. See, e.g., *Armstrong*, 517 U.S. at 465 (finding law-enforcement decisions setting "the Government's enforcement priorities . . . are not readily susceptible to the kind of analysis the courts are competent to undertake").

7. See, e.g., JOHN GARDNER, *LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL* 243, 247 (2012) (describing distributive, corrective, and procedural justice).

8. The criminal justice system also addresses a range of values not exhausted by justice's distributive, corrective, and procedural interests. These values include mercy, compassion, etc. See, e.g., GARDNER, *supra* note 7, at 240 (noting that law ought to be, not only just, but also "honest, loyal, trustworthy, humane, temperate, considerate, courageous, charitable, diligent, public-spirited, prudent, and so on").

9. See, e.g., Sekhon, *supra* note 4; Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761 (2011).

10. See, e.g., Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies* 98 J. CRIM. L. & CRIMINOLOGY 489, 528-30 (2008).

11. Dennis P. Rosenbaum, *The Limits of Hot Spots Policing*, in *POLICE INNOVATION: CONTRASTING PERSPECTIVES* 245, 251-52, 259 (David Weisburd & Anthony A. Braga, eds., 2006) (describing ways in which police regard themselves as crime experts).

appropriate goals and values to pursue, independent of the interests of the community they police.¹² Departmental policy-makers thus remain remote from the community, looking inwards rather than outwards to determine the proposed policy's social and criminological impact. Given this feature of police policy-making, community members lack the ability to participate in—and especially, to challenge—police policy at the front-end during the equivalent of the drafting and comment process.¹³

The distributive consequences of police policy-making, expressed in the amount and style of policing on the ground, include a range of social harms that can generate friction between the police and the public.¹⁴ These harms are often concentrated in communities, who are subject to the most intensive and invasive policing.¹⁵ The result is a public that feels “disrespected” by the police,¹⁶ and police who feel under-appreciated by the public.¹⁷ The resultant “simmering distrust” between the police and the community¹⁸ finds its most visible expression in the predictable and periodic explosions of dissatisfaction with policing by the public,¹⁹ and the similarly frustrated response by police officers who regard the public (and the politicians who represent that

12. David Weisburd & Anthony A. Braga, *Introduction: Understanding Police Innovation*, in *POLICE INNOVATION: CONTRASTING PERSPECTIVES* 1, 13 (David Weisburd & Anthony A. Braga, eds., 2006) (describing as a “dominant” law enforcement attitude the claim that “the police, like other professionals, could successfully carry out their task with little help and preferably with little interference from the public”).

13. See Kami Chavis Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Reform*, 59 *CATH. U. L. REV.* 373, 402–04 (2010).

14. Harmon, *supra* note 9, at 776–78.

15. See, e.g., Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 *FORDHAM L. REV.* 2257, 2261–63 (2002).

16. See, e.g., Taslitz, *supra* note 15, at 2263.

17. See, e.g., Steve Osborne, *Why We're So Mad at DeBlasio*, *N.Y. TIMES* Jan. 7, 2015 (suggesting that, as a result of protests against police shootings, the police “feel demonized, demoralized and, at times, literally under assault”).

18. Marc Fisher et al., *A Movement or a Moment?*, *WASH. POST*, Feb. 20, 2015, A1 (quoting President Obama).

19. Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 *OHIO ST. J. CRIM. L.* 133, 169 (2011) (describing the “array of relatively cheap informal means: protests, vigils, strikes, ad hoc rallies, and unexpected visits to legislators’ offices” available to the public to protest police activity); see also Ashley Southall, *Across Country, Demonstrators Fill the Streets*, *N.Y. TIMES*, Dec. 5, 2014, A28 (describing wave of national protests in wake of police shootings of unarmed African American men in Missouri and New York); Eli Yokely, *Ferguson Protesters Reach the Missouri Capital With Their Message*, *N.Y. TIMES*, Dec. 6, 2014, A15 (describing protests in the wake of the police shooting of an unarmed African American man in Ferguson, Missouri).

public) as ill informed about—and unappreciative of—the nature of policing on the ground.²⁰

Professor Andrew Taslitz spent a lifetime worrying about the unequal distribution of policing, and the silencing of poor and minority citizens most often targeted by the police. In *Fourth Amendment Federalism and the Silencing of the American Poor*,²¹ he identified ways in which the structure of the national political dialogue makes it particularly difficult for vulnerable populations to be heard.²² He described a top-down, elitist structure in which uniform standards are promulgated by experts and powerful lobbyists but do not account for the lived experiences of the people (and officials) at the bottom.²³ Professor Taslitz thought this was true not only of the political process but Supreme Court doctrine as well: cases like *Whren v. United States*²⁴ and *Virginia v. Moore*,²⁵ that systematically undervalue the local interests of discrete poor and minority subjects of the criminal law.

In addition to the legislature and the Court, the municipal police department²⁶ is an important source of policy on policing. Distinctive

20. Michael M. Grynbaum et al., *Mayor vs. Police: Many Missteps Behind the Rift*, N.Y. TIMES, Jan. 12, 2015, A1.

21. Andrew E. Taslitz, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI.-KENT L. REV. 277 (2010).

22. *Id.* at 289–93 (citing LISA L. MILLER, THE PERILS OF FEDERALISM: RACE, POVERTY AND THE POLITICS OF CRIME CONTROL (2008)).

23. *Id.* at 284–93.

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

25. *Virginia v. Moore*, 553 U.S. 164 (2008).

26. In this paper, I restrict my claims to policy making among municipal police departments (large and small). The municipal police department is a core policy-making institution, and one that the both the federal government and the recent protest movements addressing police use of force against unarmed minority men and children have targeted for reform. See generally, Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1 (2009); see Jay Caspian Kang, *Our Demand Is Simple: Stop Killing Us* N.Y. TIMES MAGAZINE, May 4, 2015, <http://www.nytimes.com/2015/05/10/magazine/our-demand-is-simple-stop-killing-us.html>. For example, the Department of Justice has investigated or entered into court-enforced consent decrees with a number of municipal police departments, including those in Los Angeles, California; Steubenville, Ohio; Pittsburgh, Pennsylvania; Prince George's County, Maryland; Detroit, Michigan; and Columbus, Ohio. See Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 509 (2008). Others, including Seattle, Albuquerque, Cincinnati, Washington, D.C., Newark, and New Orleans could be added to that list. See Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1347 (2015); see also Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 815–16 (1999) (discussing additional Department of Justice investigations of police departments in Orange County, Florida; East Point, Michigan; Buffalo, New York; New York, New York; and Charleston, West Virginia). Most recently the Department of Justice has reached a consent decree with the Cleveland, Ohio police department, see Mitch Smith & Matt Apuzzo, *Police in Cleveland Accept Tough Standards on Force*, N.Y. TIMES, May 26, 2015, and the Mayor of Baltimore has called for a federal investigation of her police department. There are a variety of law enforcement agencies with different

features of policy-making at the departmental level can render the police remote and insular. In this piece, I build on Professor Taslitz's localist and participatory politics of policing to propose that police reformers focus on the departmental level of police policy-making to give local communities and disadvantaged individuals a more meaningful voice in evaluating and checking local police policy.²⁷ The basic idea is a republican one: that dialogue, rather than brute power, is the best way to promote responsive public policies, and that the inclusion of new voices in the policing dialogue can have a democracy-enhancing effect.²⁸ It emphasizes public participation at the front-end, where the police generate policy that they use to implement laws and govern their actions on the street. I suggest that a more republican, inclusive form of public participation in law-enforcement decision-making could improve the quality of, not only police policy-making, but also of police-community relations in ways that enhance trust and increase the community's social power. Indeed, in cities like Baltimore, Maryland and Ferguson, Missouri, protesters challenging police policies at the departmental and municipal levels have used direct action and social media to force law-enforcement officials to address their concerns.²⁹

My argument proceeds as follows. In Section II, I demonstrate that policing presents (in addition to the usual procedural and corrective issues) a problem of distributive justice. The distributive issue addresses the differential imposition of the benefits and burdens of policing across different communities and localities. These distributive concerns are not captured by the court system's individualized focus on the reasonableness of police activity, and the remedies of exclusion

jurisdictions and different competencies. Some operate at the federal level, some at the state level, some at the municipal level. All of these agencies may face inter-jurisdictional issues of policy-making that municipal police departments do not. These other law-enforcement agencies and inter-jurisdictional competencies are not the subject of this article.

27. I primarily want to focus on policy. On the individual level, the police can engage in mistrust with consequences that range from the inconvenient to the disastrous. These ways can include discounting a minority suspect's claims that no crime has been committed (Michael Brown), or that the person does not pose a threat to the police or public, or is in distress (Eric Garner); all the way up to discounting entire communities as untrustworthy because of criminal activity (High Crime).

28. See, e.g., Jay Caspian King, *Our Demand Is Simple: Stop Killing Us*, NY TIMES, May 4, 2015 (describing community organizers' use of social media as new platform through which to critique policing).

29. See, e.g., Mark Berman, *How the Response to Protests Over Police Force Changed Between Ferguson and Baltimore*, WASHINGTON POST, May 1, 2015 (describing how protests have forced police to address public concern over deaths, particularly of African Americans, in police custody).

or civil damages. In Section III, I employ the political theory of civic republicanism to explain how the insulation of the police from the possibility of public challenge produces a series of vices, including political remoteness and value fragmentation, that undermine the political standing of the community, and in particular the poor and racial minorities. In Section IV, I propose some ways in which republican political structures can undermine remoteness and fragmentation to produce a more inclusive, egalitarian, and accurate form of police policy-making.

II. DISTRIBUTING POLICING

Familiarly, the Constitution and the substantive state criminal law regulate the practices of police investigation and order-maintenance. In addition to these sources of policing norms, law enforcement officials also develop their own policies and practices to tackle crime. The policies have an impact on the wider population, not only criminals. At the most general level, police policies and practices enable law enforcement officials to determine which people or places to target,³⁰ whom to detain and whom to search, and sometimes provide guidance about what to do during and after these searches and seizures—how much and what sort of force to use, whom to take into custody, and whom to release.

The Constitution grants law enforcement officials, both police and prosecutors, a great deal of discretion in making these policy determinations. Law enforcement officials can choose—for no reason or only the barest of reasons—which areas to target for policing³¹ and which individuals to select for non-custodial encounters.³² Law enforcement officials can target particular types of crime, from the most

30. Perhaps the most famous policy was the drug courier profile. See *United States v. Sokolow*, 490 U.S. 1, 10 (1989) (permitting use of departmentally generated drug courier profiles to target suspects for investigation). Other, more high-tech, techniques of targeting people and places have been developed as part of the movement towards community policing. See, e.g., David Weisburd & Anthony A. Braga, *Hot Spots Policing as a Model for Police Innovation* in *POLICE INNOVATION: CONTRASTING PERSPECTIVES* 225–44 (David Weisburd & Anthony A. Braga, eds., 2006); Rosenbaum, *supra* note 11, at 245–63 (discussing “hotspots” policing); Eli B. Silverman, *Compstat’s Innovation*, in *POLICE INNOVATION: CONTRASTING PERSPECTIVES* 267–83 (David Weisburd & Anthony A. Braga, eds., 2006); David Weisburd et al., *Changing Everything So Everything Can Remain the Same: Compstat and American Policing*, in *POLICE INNOVATION: CONTRASTING PERSPECTIVES* 284–01 (David Weisburd & Anthony A. Braga, eds., 2006).

31. *United States v. Armstrong*, 517 U.S. 456 (1996) (finding it permissible to target minority communities for crime-enforcement so long as targeting reason is crime-related).

32. *Terry v. Ohio*, 392 U.S. 1 (1968).

trivial³³ to the most serious, or particular criminals, sometimes using detailed profiles,³⁴ sometimes simply because, like Freddie Gray, the notorious case of a young African American man who died in police custody under mysterious circumstances, the individual flees at the sight of an officer.³⁵ If an individual commits a crime, the police have a great deal of discretion over whether to arrest or not, and how to effectuate an arrest.³⁶

Buried within these constitutionally reasonable choices may be other, *constitutionally unreasonable* ones. Individual officers or whole departments may have a policy of selecting minority communities³⁷ or minority people³⁸ for increased policing. Individual officers or whole departments may use heightened, even unlawful, levels of force against the minority people they might otherwise-lawfully choose to seize.³⁹ So long as there is some Constitutional justification for their choices, these buried reasons might never come to light—or if they do, they may be immune to challenge under the Fourth Amendment.⁴⁰

Constitutional unreasonableness is not the only vice that can undermine the legitimacy of police policy-making. Constitutionally rea-

33. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (finding it permissible to arrest driver for violation of seat-belt code); *United States v. McFadden*, 238 F.3d 198 (2d Cir. 2001) (finding it permissible to use arrests for minor crime as pretext for investigative searches incident to arrest); *People v. Mantel*, 388 N.Y.S.2d 565 (N.Y. Crim. Ct. 1976) (finding it permissible to target minor crimes as a means of addressing more serious infractions). *But see* *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (finding relatively minor crimes may be treated differently than more serious ones).

34. *United States v. Sokolow*, 490 U.S. 1 (1989).

35. When Freddie Gray fled at the sight of a police officer, the officer treated his flight as probable cause to arrest him. Gray later died in police custody, resulting in six officers being indicted for homicide. *See Excerpts from Baltimore State's Attorney Marilyn J. Mosby's Statement, Transcript of Charging Document Presented to the Media on Friday in the Death of Freddie Gray*, WASHINGTON POST, May 1, 2015. On the circumstances that might lead to a finding of probable cause upon the flight of a suspect, *see* *Illinois v. Wardlow*, 528 U.S. 119 (2000).

36. *Plumhoff v. Rickhard*, 134 S. Ct. 2012 (2014).

37. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

38. *Whren v. United States*, 517 U.S. 806 (1996) (finding that the Fourteenth Amendment precludes race-based stops of public); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (finding it impermissible to target aliens for roving traffic stops at the border on the basis of race without any further reason).

39. *Tennessee v. Garner*, 471 U.S. 1, 10–11 (1985). There is strong evidence that historically and currently the police use disparate and disproportionate levels of force against minorities. *See, e.g.*, Ryan Gabrielson, *Deadly Force, in Black and White*, PROPUBLICA Oct. 10, 2014 (examining nationwide statistics on police killings of African American men, and concluding that African Americans are twenty-one times more likely to be killed than whites) <http://www.propublica.org/article/deadly-force-in-black-and-white>. *See also* Michael Wines, *Are Police Bigoted?* N.Y. TIMES Aug. 30, 2014 (discussing paucity of data on police shootings that result in death).

40. *See generally Whren*, 517 U.S. 806. However, the Court in *Whren* held out the possibility that the Fourteenth Amendment may provide some recourse to criminal defendants who were subject to racial discrimination by the police. *Id.* at 813.

sonable choices may turn out to be *politically* unreasonable. The constitutional permission to arrest and jail citizens for minor traffic offenses may turn out to subject individual motorists unjustly to overly harsh punishment.⁴¹ The right to detain someone while searching their domicile⁴² including by placing them in handcuffs for a period of hours, may unjustly stigmatize or traumatize the person so detained.⁴³ Stop-and-frisk regimes may unjustly impose undue burdens on the (often minority) communities targeted for heavy enforcement of the law, resulting in the lawful-but-irritating (or worse) detention of a large number of non-criminal suspects relative to the number of criminal suspects caught.⁴⁴

A core feature of policing, then, is how to distribute the benefits and burdens of policing across communities. Professor Rachel Harmon argues that, while the benefits include “effectively control[ing] crime, fear, and disorder,” policing also imposes palpable costs.⁴⁵ One of those costs is the violence associated with police searches and seizures. For example, “[e]very arrest harms an individual, and perhaps a community, no matter how lawful,” Harmon argues, because, at the least, an arrest is a legalized form of (hopefully justified) grabbing of or attack on the person detained.⁴⁶

Harms are not wrongs. A harm exists independent of the legality of the arrest, in virtue of the sort of activity that an arrest is—an often physically intense intervention with an individual that disrupts her life. Such disruptions can take the form (when seizing someone) of grabbing them, perhaps fighting them to the ground, choking them, and so on. Searches can range from simple “gropings”⁴⁷ to stripping individuals⁴⁸ and even (should law-enforcement deem a cavity search necessary) sodomizing them.⁴⁹

Other, similarly constitutionally protected activities, can impose costs upon individuals and the community: “police engage in many

41. See generally *Virginia v. Moore*, 553 U.S. 164 (2008); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). But see *Welsh v. Wisconsin*, 466 U.S. 740 (1984).

42. See generally *Illinois v. McArthur*, 531 U.S. 326 (2001).

43. See generally *Mueler v. Mena*, 544 U.S. 93 (2005) (noting that the police handcuffed innocent suspect during search of her house, despite policy to the contrary).

44. See generally *Terry v. Ohio*, 392 U.S. 1 (1968).

45. Harmon, *supra* note 9, at 762.

46. Harmon, *supra* note 9, at 777.

47. Harmon, *supra* note 9, at 779.

48. See *Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510 (2012) (upholding legality of strip searching an individual charged with nonpayment of a fine).

49. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 558 (1979).

legal but disturbingly intrusive searches: they enter homes at night in full SWAT gear, bang down doors with battering rams, detain partially dressed family members, shoot pet dogs when they approach, and damage interiors during the subsequent search.”⁵⁰ Accordingly, a question of harm is *always* present when the police engage in investigative activity: could the police have achieved the same result, “just as effectively and safely but less harmfully[?]”⁵¹

Harms are translated into wrongs when the police act without adequate justification. There are, however, many dimensions of justification: legal, political, moral, and so on. A focus on the different sources of justification reveals that policing harms which may be justified in virtue of some constitutional provision may nonetheless be unjustified politically or morally. In that case, the policing harm is a political or moral wrong, whatever the Constitution says. Politically, the police inflict unjustified harms not only when they fail to follow constitutional or departmental rules governing their interactions with the public, but also when they adopt rules or policies that unfairly burden some people or groups rather than others.

Questions about how to police effectively but with the minimum of harm are mostly asked at the departmental level. Local departmental policy is incredibly important for policing on the ground.⁵² Departmental policy operates independently of the substantive and

50. Harmon, *supra* note 9, at 779.

51. Harmon, *supra* note 9, at 780.

52. I do not mean to underestimate the importance of municipal policy-making for law-enforcement practices on the street. For example, the municipality may set formal policing targets that determine which crimes receive heightened police attention and which receive less. Ideally, municipal target-setting responds to concerns raised by members of the local community and so identifies conduct that is genuinely disruptive of legitimate social activity. *See, e.g.*, LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY AND THE POLITICS OF CRIME CONTROL* 144–45 (2008) (discussing ways in which the local community can influence municipal policy making). However, municipalities may also enact policies that target certain groups within the community—or even the community as a whole—for police activity disconnected from the proper ends of policing. Disconnected policies may include a policy of aggressive enforcement of local traffic laws, the indiscriminate forfeiture of suspects’ assets during criminal investigations, and other constitutionally legitimate, but politically (and distributively) problematic, goals of police activity. *See, e.g.*, United States Department of Justice Civil Rights Division, *Investigation of the Ferguson Police Department* 9–14 (2015) (discussing the manner in which the City of Ferguson, Missouri used police practices primarily to generate revenue), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf; ArchCity Defenders, *Municipal Courts White Paper* 30–40 (2014) (revealing ways in which the Cities of Ferguson, Bel-Air, and Florissant, Missouri used the police to generate revenues for the municipality), <http://03a5010.netsohost.com/WordPress/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf>; Jerome H Skolnick, *Policing Should Not Be for Profit*, 7 *CRIMINOLOGY & PUBLIC POLICY* 257–261 (2008) (discussing the various incentives presented to the police by civil asset forfeiture laws).

procedural law to determine (within substantive and procedural limits) what sort of activity is policed, how much, and in what manner.

The discretionary decisions of state, municipal, and departmental-level policy-makers have a tremendous impact upon policing.⁵³ State and municipal legislators have the power to craft substantive limits upon the power of the police both directly and indirectly, including by creating, terminating, or re-categorizing the powers available to the police to enforce the laws and ordinances.⁵⁴ Executive officials, including members of law-enforcement, may also develop rules and policies to direct police activity on the street or in the interrogation room.⁵⁵ These policies, whether at the national, state, municipal, or departmental levels have the potential to determine the location, target, manner, and intensity of police activity on the ground.⁵⁶ Together, they constitute a “law of the police,”⁵⁷ that fourth-amendment doctrine largely overlooks.

Viewing police policy from the vantage point of the station-house, it quickly becomes apparent that not only does a substantial amount of state law govern police conduct,⁵⁸ so does a great deal of internally-generated administrative policies that the police use to regulate their behavior and organize their day-to-day activities. The constitutional criminal procedure and state substantive law that regulates police conduct is thus often supplemented by police administrative policies that also have a powerful impact on the practice of policing.

Conceptually, departmental policy-making is the same sort of rule-making undertaken by any other administrative agency in the executive branch.⁵⁹ For example, the police may have a policy determining *how much* or *what sort* of activity is policed.⁶⁰ Most famously, perhaps: in the 1980s and 1990s, the New York Police Department, at the instigation of Chief of Police William Bratton, adopted a form of policing known as “broken windows.” Broken windows policing ear-

53. See, e.g., Harmon, *supra* note 9, at 803 (arguing that “departmental administrative rules provide the most important guidance to police officers about what they may and may not do”).

54. See, e.g., Harmon, *supra* note 9, at 795–801 (discussing the range of international, federal, state, and municipal laws that comprise the “law of the police”).

55. Erick Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 540–54 (2000); Simmons, *supra* note 10, at 489.

56. Sekhon, *supra* note 4, at 1186–88.

57. Harmon, *supra* note 9, at 785.

58. Harmon, *supra* note 9, at 795–02.

59. See Simmons, *supra* note 13.

60. Sekhon, *supra* note 4, at 1187 (“Departmental discretion operates in three related dimensions: geographic deployment, enforcement priority, and enforcement tactics.”).

marks low-level street crime as a focus of police attention. The new police policy identified certain offenses—public soliciting of prostitution, public drunkenness, noise caused by “boom box” cars, graffiti, illegal street vending or panhandling, fare evasion on public transportation, and squatting in restricted areas on the subway—and directed officers to enforce rather than ignore these offenses.⁶¹ Crimes that the police had previously ignored now received much greater scrutiny, in an effort to prevent more serious crimes, promote public order, and improve the quality of life of the residents of crime-ridden communities.

The police may also set policy governing the *manner* in which they engage in policing.⁶² Policing may be more or less invasive. For example, the police may adopt a hands-off policy seeking to enhance public cooperation with and support for law enforcement through interacting with the public in a respectful manner.⁶³ Or they may adopt a hands-on model relying upon stopping and frisking members of the public in the street. The police may express a preference for SWAT teams or other militarized forms of intervention.⁶⁴ The police may even adopt a policy that prioritizes serving search warrants at particular times of the day or night. Each of these activities can have a major impact on the way communities are policed.

All these policies can have distributive effects that make it more likely that some rather than others bears the burdens or the benefits of these policies.⁶⁵ Where law enforcement officials engage in policies disseminating the benefits and burdens of policing across individuals and groups, those policies call for justification. Certainly, these sorts of decisions can be justified in terms of identifying and prosecuting criminal conduct. Distributing the burdens of policing more heavily on those who are committing crimes is, after all, one of the central goals of policing. Nonetheless, some policies lack this robust justification, or

61. William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality of Life Crimes*, 3 J.L. & POL'Y 447, 448–50 (1994).

62. Sekhon, *supra* note 4, at 1189 (calling the manner of policing “enforcement tactics”).

63. See Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 84, 91–93 (2004) (discussing how respectful policing oriented towards producing feelings of legitimacy is likely to increase cooperation) *see also* Taslitz, *supra* note 15, at 2261–62 (2002) (discussing ways in which disrespectful policing, including stops and frisks, undermine public cooperation with the police).

64. See, e.g., Harmon, *supra* note 9, at 789 (discussing the use of SWAT teams).

65. Sekhon, *supra* note 4, at 1214 (citing to David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1821 (2005); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2149 (2002)).

implement the policy in ways that also distribute the burdens of policing in ways that do not track the criminality justification.

For example, the police may adopt policies that increase contacts with community members and are easy to administer but impose extreme burdens those people with whom the police interact. Stop-and-frisk policies are notorious for just this kind of easy administrability but invasive style of police intervention. In addition, stop-and-frisk policies are not evenly distributed among communities: middle-class white communities may gain the benefits of stop-and-frisk policing—security, freedom from interference by the police, and so on and so forth—without suffering the burdens of increased targeting or invasive investigative practices.⁶⁶ Central to the distributive implications of policing, then, are important political issues concerning the unequal distribution of the burdens of policing, including when those burdens are distributed along the lines of race and class.

From the perspective of constitutional criminal procedure, these distributive (or “redistributive”⁶⁷) policing issues remain obscure.⁶⁸ Current criminal procedure doctrine does not engage with the ways in which decisions about who, what and where to police disparately affect discrete communities. Indeed, the common thread joining a triumvirate of cases decided within one month of each other—*Armstrong v. United States*,⁶⁹ *Whren v. United States*,⁷⁰ and *Ornelas v. United States*⁷¹—is that the presence of probable cause insulates law the enforcement officials who set policy at the departmental level from having to justify the reasons they might have for targeting some individual or group over another. For example, *Armstrong* and *Whren*, start from the proposition that the Fourth Amendment’s reasonableness requirement provides a uniform, objective standard by which to assess police conduct, and conclude that the Fourth Amendment analysis should avoid inquiring into local law enforcement practices or regulations. The basic idea is that what counts as “reasonable” under the Fourth Amendment is the same everywhere: its meaning is not

66. See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 7 (describing the ways in which the criminal justice system “gives power over criminal justice to voters who have little stake in how the justice system operates”).

67. Sekhon, *supra* note 4.

68. Sekhon, *supra* note 4, at 1214.

69. *Armstrong v. United States*, 517 U.S. 456 (1996) (decided on May 13).

70. *Whren v. United States*, 517 U.S. 806 (1996) (decided on June 10).

71. *Ornelas v. United States*, 517 U.S. 690 (1996) (decided on May 28).

modified by local police practices or departmental regulations.⁷² Whatever the local variations in law enforcement policies at the departmental level, what matters for Fourth Amendment reasonableness is the presence of probable cause⁷³ justifying the police intrusion or prosecutorial “enforcement priorities.”⁷⁴ If there is probable cause, then (warrant issues aside) the legal inquiry is at an end.⁷⁵

With departmental-level, inter-community questions off the table, the court is left to focus primarily on officer-level questions about the individual reasonableness of a given intrusion. That question is, for the most part, determined by the presence or absence of probable cause. Indeed, these three cases stand for the proposition that courts are mostly incompetent to second-guess the distributive decisions of law enforcement officials,⁷⁶—what groups law-enforcement select for investigation or interdiction—particularly, the *Ornelas* Court claims, where a decision is discretionary and grounded in the official’s professional judgment.⁷⁷

Constitutional criminal procedure thus overwhelmingly defers to the discretionary choices of individual police officers and their consequences for individual criminal defendants. The Constitution proceeds directly to evaluating individualized acts of official discretion (along with any remedial steps necessary to undo official wrongdoing), while jumping over the discretionary policy-making acts at the level of the police department that often more directly governs police conduct on the ground.⁷⁸

72. *Whren*, 517 U.S. at 815.

73. *See, e.g., Whren*, 517 U.S. at 819; *Armstrong*, 517 U.S. at 464.

74. *Armstrong*, 517 U.S. at 465.

75. *Whren*, 517 U.S. at 819 (“For the run-of-the-mine case, which this surely is, we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure.”); *Armstrong*, 517 U.S. at 464 (“In the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

76. *See, e.g., Armstrong*, 517 U.S. at 456 (“Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts.”).

77. *See, e.g., Ornelas*, 517 U.S. 690 at 699 (“A police officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference.”).

78. Sekhon, *supra* note 4 at 1172. Anthony Amsterdam made perhaps the most famous call for a constitutional law of criminal procedure to address departmental-level policy making. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416–17 (1974). Amsterdam argued that police policy-making was simultaneously extremely important yet also very often delegated to the discretion of individual officers on the ground. *Id.* at 415 (quoting KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 222 (1969)). Amsterdam believed

Professor Taslitz brilliantly revealed some of the ways in which substantive state law of policing has proved a potential resource in corralling constitutionally or politically unreasonable police policies. He showed that states may try to constrain law-enforcement's power to search or seize by limiting either the number or type of offenses on the books or those that result in an arrest rather than a caution or some other non-custodial intervention.⁷⁹ Professor Taslitz argued, however, that constitutional doctrine can override the political limits communities seek to place upon the police, and so immunize and even facilitate politically unreasonable law-enforcement conduct—including, egregiously, law enforcement conduct that the state has found so unreasonable that it enacted legislation to put a stop to it.⁸⁰

For example, in one of the cases Professor Taslitz discussed, *Virginia v. Moore*,⁸¹ the state legislature re-categorized certain traffic offenses as non-arrestable violations.⁸² Nonetheless, the United States Supreme Court held that local variations in state substantive criminal law would not override the police arrest power (and the related power to search consequent to an arrest).⁸³ Instead, under the Court's universalizing interpretation, "the Fourth Amendment's meaning [does] not change with local law enforcement practices—even practices set by rule,"⁸⁴ and so the police would retain their fourth-amendment power to arrest when taking minor traffic offenders into custody, whatever the state law on arrestability.

The *Moore* Court, for the most part, regarded itself as re-applying the same sort of rule it established in *Whren v. United States*.⁸⁵ In the latter case, the Supreme Court dismissed the constitutional significance of the fact that the police officers violated local police department regulations when conducting a traffic stop that led to the

these policy decisions should not be left to individual officers. *Id.* at 416–17. Instead, their constitutionality should depend, Amsterdam thought, upon the existence and propriety of departmental rules that officers would be bound to follow, on pain of constitutional unreasonableness. *Id.* This (as Professor Taslitz noted) is pretty much the argument of the defendants in *Whren v. United States*. See *Whren*, 517 U.S. at 815; Taslitz, *supra* note 20, at 299. The Court rejected it out of hand. See *Whren*, 517 U.S. at 815.

79. See *Virginia v. Moore*, 553 U.S. 164 (2008).

80. See, e.g., Taslitz, *supra* note 21.

81. *Moore*, 553 U.S. 164.

82. *Moore*, 553 U.S. 164.

83. *Id.*

84. *Id.* at 172. The Virginia legislature could have done more to prohibit arrests: the legislature did not go so far as to require the exclusion of evidence found during a search incident to arrest. See *id.* at 1606.

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

discovery of illegal narcotics.⁸⁶ The *Whren* defendants argued that a violation of police departmental regulations, designed primarily to constrain the police, made the stop presumptively unreasonable. Yet, as Professor Taslitz points out, the Supreme Court rejected these “efforts designed to circumscribe arbitrary police behavior.”⁸⁷ Instead, the Court characterized police policy as constitutionally “trivial[],” when measured against the need for a uniform fourth-amendment standard of reasonableness.⁸⁸ As it would later do in *Moore*, the *Whren* Court applied a version of the Fourth Amendment that focused on establishing uniform and universal standards for the exercise of individualized discretion, while ignoring the geographic variations of police policy at the departmental level.

These departmentally-generated and regulated “police enforcement practices . . . vary from place to place and from time to time,” the Court noted, but it was precisely because of these variations that the Court could “not accept that the search and seizure protections of the Fourth Amendment are so variable.”⁸⁹ As a result, fourth-amendment case law mostly dismisses local regulations as of little constitutional import.⁹⁰ The police can engage in a range of ethical violations,⁹¹ or ignore departmental policy,⁹² or even state law,⁹³ without incurring a constitutional sanction. In effect, the Court turned a blind eye to some of the most important policies regulating police discretion, instead treating the Fourth Amendment as shielding local departmental policy from constitutional scrutiny.

The classic fourth-amendment worry is that too general a reasonableness standard confers too much discretion to police officers on the street. These officers may then expressly or implicitly engage in policy-making in ways that can disparately impact individuals along lines of race.⁹⁴ Whatever one thinks about the on-the-street discretion of

86. *Id.* at 815.

87. Taslitz, *supra* note 21, at 299.

88. *Whren*, 517 U.S. at 815.

89. *Id.*

90. The major exception is suits against municipalities alleging failure to train officers adequately. *See City of Canton v. Harris*, 489 U.S. 378 (1984).

91. *See, e.g., Moran v. Burbine*, 475 U.S. 412 (1986) (finding the failure to inform defendant that counsel was outside the interrogation room was at most unethical, and not unconstitutional).

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

93. *Virginia v. Moore*, 553 U.S. 164 (2008).

94. *See, e.g., L. Song Richardson, Arrest Efficiency and the Fourth Amendment*, 95 MINNESOTA L.R. 2035, 2044–47 (2011) (discussing the manner in which an officer’s implicit biases can impact the determination of fourth-amendment reasonableness).

individual officers to make policy on the fly, the problem of departmental discretion is quite separate and, I have argued, mostly concealed by the Court's fourth-amendment doctrine. The problem of departmental policy-making is one that sounds in distributive justice, whereas the problem of individual policy-making sounds in corrective justice. Current doctrine leaves us without a means to remedy—or even to address—distributive concerns about policing policy. Solving the distributive problem does not entail solving the corrective problem (though it may impact it, for example by removing officers from certain neighborhoods or prohibiting them from engaging in certain tactics, such as stops-and-frisks or broken-windows policing, in certain neighborhoods). Currently, however, fourth-amendment doctrine does not even address the distributive problems, and so they remain problematic whatever the solution to the corrective-justice problem of individual discretion on the street.

We are thus left with a problem about policy-making—how to ensure that the benefits and burdens of policing are shared equally by the community—while lacking an institutional fix. In the next section I shall argue that the problem of providing institutional access to police policy-making is a political one, and that a particular political theory—civic republicanism—is best placed to provide our answers.

III. THE POLITICS OF POLICING

Following the eminent philosopher, John Rawls, we might suppose that politics is about “justice and the common good, and about what institutions and policies best promote them.”⁹⁵ Distributive issues concerning the spreading of harm around the community implicate political questions about the institutional strategies necessary to minimize or eliminate those harms. The unjust distribution of policing implicates, not one, but two dimensions of harm. On the one hand, harm, as identified by Rachel Harmon, is the power to directly use force or impose some restraint upon a member of the public. On this view, the police directly harm the public when they grab, grope, injure, or confine members of the public. However, there is another di-

95. JOHN RAWLS, LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY 5 (2008). Even if justice is not *the* central concern of politics, *see, e.g.*, JOHN GARDNER, LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL 264 (2012) (arguing against the Rawlsian view that justice is core virtue of political institutions), it is nonetheless, often enough, *a* concern. Quite independently of how the police allocate their interests, we should be concerned that the police do not engage in torture, or show mercy, or exhibit charity, all of which virtues are independent of justice. *Id.*

mension of harm that occurs whether or not the police use force or impose restraints. This second type of harm is more indirect, and it consists in the ability to monopolize decision with whom to interfere (and when and how). In this latter instance, though the police never *directly* engage in harming or interfering with people on the street, they nonetheless retain a power to influence people's conduct *indirectly*.

Civic republicanism calls the power to monopolize the decision to inflict or withhold harm *domination*. The republican critique of domination emphasizes the ways that power-as-domination operates even if there is no direct harm to create a relationship of dependency, in which those without a monopoly of harm-inflicting power must rely, for their well-being, on the beneficence of the powerful. The monopoly over indirect harm thus undermines the dependents' autonomy, in the literal sense of their ability to be self-regulating or self-governing. The core value emphasized by many republicans is thus autonomy-as-non-dependence (or, as the most prominent contemporary civic republican puts it, non-domination).⁹⁶

It is worth emphasizing, albeit briefly, that republican political theories organized around value of non-domination are importantly different from liberal political theories organized around the value of non-interference. Non-interference is just the absence of the direct sort of harm to use force or impose restraints. So long as a member of the public is not injured or restrained, they suffer no harm from the police. To the extent they are injured or restrained, they are harmed. The classic liberal fourth amendment right, the right to privacy, is often portrayed as having, at its core, this "negative liberty" from government interference.⁹⁷ Most often, the liberal justification for state interference resulting in harm, is "security," that is, ensuring the safety of the community from those who would threaten it.

Instead of emphasizing freedom from government, civic republicans propose that political autonomy requires a shared division of

96. PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 22 (1997) ("Domination . . . means, at the limit, that the dominating party can interfere on an arbitrary basis with the choices of the dominated. . . . The dominating party can practice interference, then, at will and with impunity; they do not have to seek anyone's leave and they do not have to incur any scrutiny or penalty.").

97. "Negative liberty, as Berlin conceives of it, involves the absence of interference, where interference is a more or less intentional intervention of the sort exemplified, not just by the physical coercion of kidnap or imprisonment, but also by the coercion of the credible threat ('Your money or your life'; 'Your money or the bailiff'). I am negatively free 'to the degree to which no human being interferes with my activity.'" PETTIT, *supra* note 102, at 17.

power among all members of society. Public officials should not have greater standing than other people to determine who suffers what harms. Instead, everyone should have equal standing to challenge the actions of public officials, before, during, and after the fact, as well as the ability to ensure that those challenges can be effective by having those in power alter their policies in response to reasonable challenges.

Republicanism's radical idea is that it not only contemplates challenges after the fact, for example, in a court of law. Republicanism also contemplates challenges before and during the fact, as part of the decision-making and decision-enforcing process. The republican goal, after all, is to ensure that everyone is politically independent and on equal footing—expressed, in a classic metaphor of civic republicanism, as each member of the society, civilian or public official, being able to look the other in the eye.⁹⁸ Accordingly, one goal of constructing political institutions for a given polity, for republicans, is to develop political processes that permit the public to participate in official decision-making by challenging it.

Civic republicanism does not limit legitimate the scope of participation in the political process to particular people or places—for example, elected representatives or designated institutions.⁹⁹ Members of the public are not bound to pursue their interests only through designated lawmaking or law-applying body, the decisions of which are supposed to induce obedience.¹⁰⁰ Instead, republicanism extends the right to contest the exercise of public authority to any member of the public and relocates the challenging public officials from formal institutional settings, such as the legislative chamber or the courtroom, into the street. Taslitz's sympathies are, on this point, republican, citing the “array of informal means: protests, vigils, strikes, ad hoc rallies, and unexpected visits to legislators' offices” available to the public as legitimate means of participating in policy-making.¹⁰¹

Civic republicanism thus promotes an inclusive understanding of public opportunities to participate properly in official policy-making.¹⁰² Rallies and street demonstrations, of the sort recently seen in

98. PETTIT, *ON THE PEOPLE'S TERMS* 3, 8 (2013). Pettit later calls this account of non-domination the “eyeball test.” *Id.* at 47.

99. PETTIT, *supra* note 104, at 15.

100. PETTIT, *supra* note 104, at 15.

101. Taslitz, *supra* note 21, at 290.

102. For example, political theorist Iseult Honohan has argued that, “[f]or deliberative politics to be inclusive of all citizens, deliberation must be understood in a broad sense; rather than

Ferguson, Missouri, to protest law-enforcement conduct in the police killing of an unarmed African American, Michael Brown, and the subsequent investigation of the shooter, Officer Darryl Wilson; or in New York, New York, protesting police conduct in an unarmed African American, Eric Garner, and the subsequent investigation of the person who choked him to death, Officer Daniel Pantaleo; and in Baltimore, Maryland, protesting police conduct in the killing of an unarmed African American, Freddie Gray, and calling for a public investigation, are all—from a civic republican perspective—legitimate means of engaging with the political process. They are a more massive and organized form of the generic republican right to challenge police officers on the street, as part of the police encounter with the public (and, in this case, the public’s encounter with the police).¹⁰³

Rallies and demonstrations satisfy republican norms when they operate as a rational means of demanding participation in the policy-making process.¹⁰⁴ Demonstration is a legitimate means of ensuring that marginalized members of the public are able to make their voice heard when otherwise it would be silenced. Indeed, it is the lack of inclusion in formal, institutional processes that may make public demonstrations a particularly urgent form of political engagement, one that enables minorities to demand that the power to participate in political decision-making takes a meaningful form.

As Eric Luna neatly describes the problem, republicans worry that:

poor, urban, largely minority communities are not coextensive with political units and, as a consequence, do not have political power

being strictly formal, it allows for many modes of expression. Thus, in a republican politics of deliberation, all individuals and groups are entitled to make proposals, advance views in their best light, and offer their reasons for these—there are no barriers to the claims and demands that they can make. Any voice may be heard and any claim expressed.” ISEULT HONOHAN, *CIVIC REPUBLICANISM* 228 (2003).

103. See Eric J. Miller, *Police Encounters with Race and Gender*, U.C. IRVINE L.J. (forthcoming 2015) (discussing the republican right that the public possesses to challenge police officers during a police encounter).

104. In her discussion of republican political participation, Iseult Honohan suggests that, “uncivil though non-violent methods may be necessary to get a hearing. Then the thrust of deliberation may need to be extended to more strident measures of demonstration for certain views to gain a hearing at all.” HONOHAN, *supra* note 108, at 229 (2003). From a republican perspective, then, the Ferguson and Baltimore demonstrations, which on occasion descended from rational to irrational protest, contained both republican and non-republican elements. While understandable, see, e.g., Ta-Naheshi Coates, *Non-Violence as Compliance*, *THE ATLANTIC MONTHLY*, Apr. 27, 2015, irrational violence is not a legitimate republican means of political participation. That is the case even though the rioting may have been provoked by equally irrational and anti-republican police displays of force. See, e.g., David A. Graham, *The Baltimore Riot Didn’t Have to Happen*, *THE ATLANTIC MONTHLY*, Apr. 30, 2015.

separate from other constituencies. These communities thereby lack independent control over law enforcement in their neighborhoods; they instead must rely on the benevolent application of political power by individuals and groups outside their borders.¹⁰⁵

When minority individuals that lack the power to advance their political interests must seek out the majority members of their own or neighboring communities who do have policy-making influence over the police, then those minority individuals suffer a form of political domination. The alternative may be to engage in some forms of organizing to empower the standing of minority community members as political agents on equal footing with other members of the political community.

Contemporary republican political philosopher Phillip Pettit provides a brief, republican accounting of the ways in which policing can undermine the standing of the public to challenge police policy. He argues:

Charged with the job of ensuring public order, guarding against crime, and apprehending criminals, police forces are nowadays given enormous powers, they are exposed to huge temptations to abuse those powers, and their use of the powers is subject only to very imperfect controls. The powers in question include the power to charge or not to charge, perhaps even the power to frame; the power to harass and make life miserable for someone; the power to spread rumours and ensure someone's defamation; and, of course, the power to threaten such ills and thereby coerce people to do what they want. . . . Here in republican terms is a recipe for disaster: a recipe for ensuring that the police may become a greater force of domination than any, which they seek to counter.¹⁰⁶

Pettit does little more than sketch out some of the ways in which the police could consolidate their power over the public. There are, unfortunately, plenty of more detailed contemporary examples of ways in which the police have developed this sort of power to dominate.

I shall highlight some of the ways in which the police dominate the public by rendering themselves *remote* and isolated from the com-

105. Eric Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 589 (2000)

106. PETTIT, *supra* note 89, at 154–55.

munities they police.¹⁰⁷ This claim may appear somewhat surprising. After all, the police may come into contact with the public quite frequently on the street.¹⁰⁸ Where the police have lots of contact with the public, we might say they are not *pragmatically* remote from the people they police.¹⁰⁹ On the contrary, the police interact with the public in a direct way, engaging in a variety of encounters that require the police to observe, question, seize and search members of the public. This sort of activity shows that law enforcement may be deeply pragmatically engaged with the problem of crime in a particular community.

On the other hand, law enforcement may develop the policies it adopts to target certain communities, locations, crimes or criminals *internally*, without consultation with or input from the community policed. Unlike other administrative agencies that might be required to assess the impact of their policies on the affected members of the public, the police can (and do) develop and adopt policies and practices without gauging public sentiment or the impact of their policies on the public. Absent consultation, the police need never justify their conduct to the people they police—or to anybody outside the station-house or the institutional chain of command.¹¹⁰

Without an obligation to consult the public and respond to their concerns (except during individualized judicial hearings), the police can remain *politically* remote from and so unaccountable to the public they police. Political remoteness is a feature of the bureaucratic structure of many police departments, which have (historically and currently) adopted a somewhat hierarchical and authoritarian model of police professionalism. Authoritarian policing practices may render the police politically remote even as they are pragmatically accessible on the street. Individual officers may routinely encounter the public in their cars or on the street, and may make low-level policy decisions

107. These different reasons are compatible with each other.

108. However, it is not clear that this is so. The police may patrol in cars or enter communities only in response to calls for help. Accordingly, the police may have very little on-the-ground contact with the communities they police.

109. While I make no general judgment on police-public interactions, it is worth noting that many police departments and many police officers may, in fact, be pragmatically remote from the people they police. Officers may mostly patrol in car, and only interact with the public in response to call-outs. In that case, they will have little on-the-street contact with members of the community.

110. As I have already discussed, the only other forum in which law enforcement need justify the results of their policies may be in a court of law during a suppression hearing or while defending a civil lawsuit. Even these settings may not require the police to justify the policy itself, only the resultant arrest or search.

about how to proceed. Authoritarian policing precludes the sort of respect and equality of political standing associated with legitimacy.¹¹¹

Many police departments lack strong channels of communication to and from the communities they police or are attitudinally impervious to community-generated criticism of their values or practices. The more bureaucratically professional the police department, the more they rely upon their own internal, institutional sense of right and wrong, and the less they trust the community or the courts as articulating legitimate concerns about police policy or practice.¹¹² This bureaucratic and hierarchical posture undermines the political power of the local community to participate in (self-) government and can result in a police force that is insulated and alienated from the community it polices, and a community that is alienated from the police.¹¹³

One factor that may contribute to political remoteness is (ironically) the move to increased assessment of individual officers and departments in the name of transparency and accountability. In the last quarter-of-a-century, police departments around the country have collected data and developed processes designed to evaluate the effectiveness of policing, and to disseminate that information to the public. The goal is, in part, to improve policing, and in part to convince the public that policing is addressing their concerns about crime levels, safety, and security. The police have become adept at identifying the factors that produce crime and public perceptions of crime, and generating metrics to measure whether their responses to these challenges are effective.

Over the past twenty-five years, the police have made significant advances in accountability and professionalism, consolidating their claim to be the true experts on crime prevention and detection. This data-driven policing includes developing various ways of sharing information internally and externally. Internally, to better target criminal activity; and externally, to convince the public that policing is a success.

111. See, e.g., 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, 239–42 (2008) (discussing the ways in which personal interactions with the police can contribute to legitimacy).

112. See, e.g., JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 328–29 (1st ed. 1966) (describing conflicting imperatives of efficiency and legitimacy that operate upon the police, and the tendency of the police to embrace efficiency and reject legitimacy).

113. The police are alienated from the community by being split from it; not serving the good or flourishing of the community as community; and the community would be split from the police in being dominated by them.

The data-driven model of police professionalism depends, however, on collecting and disseminating the right data, and evaluating it objectively, using the correct standards. Data collection and dissemination works best when there is a tight fit between the standards law enforcement uses to measure crime and police effectiveness and actual effectiveness. Where there is a mismatch, police claims to competence will prove unjustified, and undermine public trust in their responses to crime and the public's concerns about crime.

For example, political philosopher Onora O'Neill argues that, paradoxically, assessment metrics intended to increase public confidence that public officials are working effectively to address their problems often have the opposite effect. She identifies two problems with accountability metrics: *what* the officials measure and *to whom* they report.¹¹⁴ Start with the problem of reporting. The goal of accountability is to make officials more aware of and responsive to public concerns. But the “accountability revolution”¹¹⁵ does not require public officials, including the police, to report to the public. Instead, the primary body to whom the police must report is some sort of *regulator*.¹¹⁶ These regulators are usually other officials located elsewhere within the executive or administrative branch.

The regulator's interests are often much different from the public's. In the context of policing, the various officials to whom the police report—mayor, prosecutor, chief-of-police, and so on and so forth—may have little or no contact with that part of the local community that bears the brunt of policing. In this way, the regulator is able to externalize the cost of policing away from itself or those communities to which it is answerable, and on to those communities without the social power to influence the regulator's actions. Call this the problem of fragmentation.¹¹⁷

114. ONORA O'NEILL, A QUESTION OF TRUST 52–53 (2002).

115. *Id.* at 52.

116. *Id.* at 53.

117. Professor Taslitz described an example of fragmentation. “Poor urban blacks, for example, are both socially and geographically distant from middle-class white legislators. This distance, therefore, encourages a feeling of division between the two groups rather than of commonality as members of a higher order group: “Americans.” Taslitz, *supra* note 21, at 298. The problem of fragmentation, at least in the context of policing, is a complex phenomenon. Jerome Skolnick famously identified some aspects of normative fragmentation: police officers “caught between two competing expectations, efficiency [controlling crime] and legality [obeying the law, and in particular, constitutional norms enforced by the judiciary]” tend to view the demand of legality as “frustrating” crime control, and so adopt an antagonistic attitude towards judicial control of the police. See SKOLNICK, *supra* note 112. A separate form of fragmentation, one consistent with Taslitz's emphasis on divisions between the police and the community, con-

Fragmentation also tends to produce a straightforward problem of distributive justice. Fragmentation occurs when the values driving police conduct differ from those endorsed by the community. Professor Taslitz's discussion of *Virginia v. Moore* articulated a form of fragmentation: the voters of the state of Virginia decided that the police should not have the power to arrest suspects during traffic stops; but police decided differently, and continued to engage in arrests and the searches allied to arrests when engaging in traffic stops of criminal suspects.¹¹⁸

In *Moore*, the police evaluation of the value of enforcing the law through arrests is starkly different from the community's.¹¹⁹ The impact is profound. In Virginia, the police still decide which motorists may be searched as well as arrested.¹²⁰ In New York City, broken windows policing allowed the police to decide whom to target for public order offenses by determining which low-level offenders to arrest. In each case, the policy adopted by the police conflicts with the policy anticipated by the community, resulting in fragmentation.

For reasons similar to these, O'Neill argues that "[t]he new accountability is widely experienced not just as *changing* but . . . as *distorting the proper aims of professional practice* and indeed as *damaging professional . . . integrity*."¹²¹ The public loses confidence when the metrics chosen are a poor proxy for efficacy, and where the public has no way to assess the accuracy of the metric or hold the agency to account.¹²² Rather than increasing openness and public participation, assessment has the effect of rendering officials accountable to the regulatory bodies that collect and scrutinize the data that they

sists in the police tendency to view criminals [and the communities identified with them] as the enemy, "outside the law." *Id.* Yet another form of fragmentation occurs when "street cops" resist the policies imposed by "management cops." Elizabeth Reuss-Ianni & Francis A. Ianni, Street Cops and Management Cops: The Two Cultures of Policing, in CONTROL IN THE POLICE ORGANIZATION 251-74 (Maurice Punch, ed., 1983). In this article, I am primarily interested in sort of fragmentation that occurs between the police and the public. Though the other types of fragmentation present challenges when developing police policy, they are outside the scope of a relatively short paper intended primarily as an appreciation of professor Taslitz's work.

118. Taslitz, *supra* note 21.

119. Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, U. ILL. L. REV. 363, 378 (1999)

120. At the State suppression hearing in *Virginia v. Moore*, Taslitz notes, "one of the police officers explained . . . that they had ignored Virginia law relative to the issuance of citations in such circumstances because it was 'just our prerogative; we chose to effect an arrest.'" Taslitz, *supra* note 20, at 299 (quoting Stephen J. Fortunato, Jr., *Supreme Court OKs Racial Profiling*, IN THESE TIMES, www.inthesetimes.com/article/3685/supreme-court-oks-racial_profiling (May 19, 2008)).

121. O'NEILL, *supra* note 120, at 50.

122. O'NEILL, *supra* note 120, at 4-10, 52-53.

generate. The upshot is a system that empowers the regulators rather than the public, and increases centralization, insularity, and remoteness, undermining trust and alienating both the professionals and the public alike.

IV. CIVILIAN PARTICIPATION IN POLICE POLICY-MAKING

The duty of political decision-makers is to do what is in the best interests of the community over which they govern. But a feature of political authority—or any authority, for that matter—is that the authority’s decisions stick, even if they are wrong. These two features of authority, taken together, explain yet another reason why republicans insist on the power to challenge public officials. At the front end, when the decision-maker is making up her mind, the power to challenge ensures that the various stakeholders can have their interests considered and factored into the decision. But at the back end, if the decision is mistaken or sufficiently shortsighted that circumstances change, the ability to challenge and revise the decision ensures that mistakes can be corrected, or decisions updated to reflect changed circumstances.

Fragmentation and remoteness undermine the chances that officials will govern in the best interests of the community, and increase the chances of mendacity or mistake. Republicanism offers a solution to the problems of fragmentation and remoteness. The goal of republicanism is to develop a range of both formal and informal opportunities for the community to participate in and influence the law enforcement policy-making process.

There are at least two advantages to community participation in police decision-making: on the one hand, the community can reassert sovereignty over police and so minimize the normative fragmentation and political remoteness that underlies a large part of the police disempowerment of—in particular—minority communities. Members of the community can better contest policing if law enforcement constitutes itself as answerable to the community and oriented to community’s common good, rather than internal good of police department and its regulators.¹²³

A second advantage is that police openness to community input is likely to enhance the police contextualization of, and so understand-

123. Onora O’Neill, *A Question of Trust* 52–53 (2002).

ing of, the data they collect. For example, one critique of hotspots policing is that it provides an a-contextual map of specific areas that may be relatively transiently prone to criminal activity. Furthermore, the police response upon identifying a hotspot may be rather clunky and predictable: stopping and frisking individuals identified near the hotspot thanks to the “high crime” designation. Much better, suggests criminology Professor Dennis Rosenbaum,¹²⁴ would be to contextualize both the geographic spread and temporal duration of the hotspot using information from the affected community, and to consider alternative methods of securing the space, once again with community advice.

Currently, there are at least three core criminal justice institutions that can be used to garner community feedback for the police. Most obviously, perhaps, is the civilian review board. That institution is mostly used to review individual police conduct in response to civilian complaints. Two others are of much more ancient vintage: the grand jury and the petit jury. Each of them permits jurors to vote to determine whether to indict or convict, and so operates as an informal poll on law-enforcement performance.

All of the three institutions has its drawbacks. The petit jury is easily circumvented. A variety of pre-trial arrangements, including onerous bail schedules, drawn out proceedings, prosecutorial charging practices, more-or-less determinate sentencing, and the like, have produced the demise of the jury trial (and with it the petit jury) in favor of plea bargaining and prosecutorial control of the process.

Civilian review boards are often, paradoxically, police-friendly.¹²⁵ A common critique of civilian review boards is one of political remoteness: once constituted, the pressure groups that prompted the boards’ creation fail to participate in its decision-making process.¹²⁶ The reason for this non-participation is obscure. It may be that many

124. Dennis P. Rosenbaum, *The Limits of Hot Spots Policing*, in *POLICE INNOVATION: CONTRASTING PERSPECTIVES* 245, 247–49 (David Weisburd & Anthony A. Braga, eds., 2006).

125. I do not claim that civilian review boards are *necessarily* police-friendly. Instead, it may just be a contingent feature of police politics that, given the success of police unionization, it is impossible to create a review board without widespread police support. However, it may equally be the case that, absent unionization, more police-neutral boards could be created. As David Sklansky concedes, it is difficult to tell. See David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 571–75 (2008) (discussing the police-friendly aspects of civilian review boards).

126. Sklansky, *supra* note 131, at 567–84.

Challenging Police Discretion

of them are not truly civilian, but are mixed police-civilian boards.¹²⁷ In that case, as in the grand jury, it may be that the law-enforcement expert gets to dominate the process at the expense of the lay neophyte. Or it may be that law-enforcement politics ensure that the appointing official—for example, the mayor—is dependent on law-enforcement support. In that case, appointment to the civilian review board creates the sort of legislative bottleneck that enables law-enforcement domination of the civilian members of the board.

The major participatory problem facing the grand jury and civilian review board alike is law-enforcement domination of the deliberative process. So influential is the prosecutor, the running joke is that she could persuade the grand jury to indict a ham sandwich if she so chose.¹²⁸ Civilian review boards have faced strident opposition from police unions, and their ability to discipline officers is often stymied by police officer bills of rights, which impose stringent and easily-triggered statutes of limitations on police discipline through demotion or termination.¹²⁹

The more profound problem with these criminal justice institutions—grand juries, petit juries, and civilian review boards—is that they operate at the back end of the process. To the extent they address the conduct of public officials, they are mostly concerned with whether the official followed the rules stipulated by some law or policy, rather than with the substance of the law or policy itself.

Debra Livingston, recognizing this feature of civilian review boards, argues that they should be reconfigured to acknowledge that while:

some portion of complaints are best treated in “rule enforcement” terms: as presenting allegations to be investigated, with an eye to punishing those rule violations that can be shown. Many complaints, however, should be treated differently: as shedding light on problems that may lend themselves to a rule enforcement process, but that might also require additional or altogether different forms of intervention and response.¹³⁰

127. See Gregory D. Russell, *The Political Ecology of Police Reform*, 20 POLICING AN INT'L J. POLICE STRATEGIES MGMT. 567–89 (1997).

128. See, e.g., Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 754 (2008) (discussing the ham sandwich joke).

129. Harmon, *supra* note 9, at 799–00 (2011).

130. Debra Livingston, *The Unfulfilled Promise of Citizen Review*, OHIO ST. J. CRIM. L. 1, 653, 661 (2003).

Livingston proposes transforming our understanding of civilian complaints, so that we no longer just treat them individually, as disputes to be resolved. Instead, we should treat them in the aggregate, where they can reveal patterns of conduct, and so “shed light on problem officers, problem squads, or problem precincts.”¹³¹ Not only should the police treat each complaint seriously, as evidence of individual wrongdoing or aggregate patterns of behavior: the police should share this information with the public to increase trust.

Livingston’s approach leaves political agency around police policy-making mostly in the hands of the police themselves. Kami Simmons and Eric Luna provide a more active opportunity for civilian participation. They propose a role for the public not only in enforcing the rules, but setting them too. In particular, they suggest that police policy-making be subject to the same process of notice and comment as are other administrative agencies.¹³² That process, by which agencies develop and promulgate policies, which are then subject to feedback from the public, certainly provides some of the features necessary to empower the public to challenge to the process of rule making.

All of these proposals run up against a core problem of public policy-making, which is the domination of some by others, so that political minorities are dependent upon others to ensure their voice is heard. The process of notice and comment satisfies the formal virtue of non-interference. Notice and comment removes an obstacle to public policy-making, which is law-enforcement exclusion of the public from the decision process. Under Simmons’ and Luna’s proposals, the public will not be interfered with should they seek to participate in decision-making. However, their process does little, on its own, to ensure the more substantive virtue of non-domination. What more is needed is to have the community actually participate, and have the institution take them seriously by tailoring its policy based on the information the community provides.

Professor Taslitz offered the answer, and he did so with a distinctly republican twist. He clearly recognized the exclusionary tendencies of public decision-making, and promoted participatory features of public deliberation to combat it. For example, he emphasized the need to ensure that the state makes law-enforcement policy

131. *Id.* at 665.

132. Simmons, *supra* note 13; Luna, *supra* note 55, at 594–96.

“only after receiving widespread and diverse input from individuals and social groups.”¹³³ Furthermore, he insisted that minority voices are likely to be drowned out unless heard in “relatively small venues offering opportunities for informed discussion with the real prospect of such discussion at least sometimes altering policy outcomes. This activity occurs in an expectation of compromise rather than domination.”¹³⁴

Professor Taslitz’s proposals mirror the insights of a broad range of political theorists who promote egalitarian deliberation of this sort as increasing both the political standing of the participants and the accuracy of the outcome. Take accuracy first. So long the deliberative body is sufficiently large and includes sufficient diverse experiences, diverse non-expert deliberating bodies tend to outperform experts in reaching the right (or better) result.¹³⁵ In other words, groups of non-experts deliberating together are often better at solving problems than experts alone. This feature of non-expert deliberation is called the *Diversity Trumps Ability Theorem*.¹³⁶ Moral philosopher Elizabeth Anderson gives a neat summary of the theorem:

if (a) the problem is hard (no individual always gets it right), (b) the problem solvers converge on a finite set of solutions, (c) the problem solvers are epistemically diverse (they don’t all converge on the same local optimum), and (d) there are many problem solvers who work together in moderate sized groups, then a randomly selected collection of problem solvers outperforms a collection of the best problem solvers.¹³⁷

Another political philosopher, H el ene Landemore, explains why.¹³⁸ She argues that the sort of perspectival diversity is a positive resource available to a deliberating body.¹³⁹ Experts, because educated in the same field, tend to share the same assumptions and ways of thinking. Diverse groups, however, draw upon a plurality of assumptions and different ways of thinking. They are thus likely, through rational deliberation, to develop solutions that would not oc-

133. Taslitz, *supra* note 18, at 135.

134. Taslitz, *supra* note 18, at 135.

135. Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 PROCEEDINGS OF THE NAT’L ACAD. OF SCI. 16385–89 (2004).

136. *Id.*

137. Elizabeth Anderson, *The Epistemology of Democracy*, 3 EPISTEME 8, 12 (2006).

138. H el ene Landemore, *Deliberation, Cognitive Diversity, and Democratic Inclusiveness: An Epistemic Argument for the Random Selection of Representatives*, 190 SYNTH ESE 1209 (2012).

139. *Id.* at 1212–19.

cur to their more closed-minded, but individually more knowledgeable, experts. The non-expert-but-cognitively-diverse group, thinking as a group, thus has more knowledge than the less diverse group of experts. Accordingly, “in groups of problem solvers [such as the civilian review grand jury] it is often more important to maximize cognitive diversity” than expertise.¹⁴⁰

To ensure the accuracy benefits of deliberative populism, a second set of conditions must obtain. The deliberative panels must be afford equal standing to each member of the panel. Deliberative panels must not only include diverse groups of people but also encourage them to express the different perspectives that they may have, and give those perspectives the appropriate weight. Policy-making works best when broad range of opinions treated with respect, so that opinions are included and appropriately valued.

For example, political philosopher James Bohman thinks that egalitarian, face-to-face deliberation is vital to the process of including different perspectives into the deliberative process.¹⁴¹ Bohman treats the notion of “perspective” as a term of art. He conceives of perspectives as an inescapable part of a pluralistic society.¹⁴² They express values generated by, but not reducible to, “different social positions primarily emerging from the range and type of experience.”¹⁴³ Perspectives include the geographic, demographic, educational, familial, and so on, features of an individual’s lived experience, and the moral and political values that experience has engendered. These perspectives shape what reasons people find compelling and which ones they do not, and so go to the weight that deliberators assign to reasons through the deliberative process. To ensure a fair and accurate weighting of reasons, Bohman believes, each person’s perspective should participate equally in the deliberative process.¹⁴⁴

Policy-makers who fail to appreciate and give appropriate weight to others’ epistemic perspectives engage in deliberative or “epistemic injustice.”¹⁴⁵ That is the central claim of the “Black Lives Matter”

140. *Id.* at 1210.

141. James Bohman, *Deliberative Democracy and the Epistemic Benefits of Diversity*, 3 EPISTEME 175, 179 (2006).

142. *Id.* at 178.

143. James Bohman, *Deliberative Democracy and the Epistemic Benefits of Diversity*, 3 EPISTEME 175, 178 (2006).

144. *Id.* at 179 (discussing “equal entitlement” of members of deliberative process to have their perspective considered when deliberating).

145. MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER & THE ETHICS OF KNOWING (2009).

movement, which takes as its core critique of police decision-making the idea that the police discount the impact of police policies upon African Americans, and in particular, African American men.¹⁴⁶ This sort of moral failure consists in unreasonably discounting the views of those whose perspective we do not share. In more Taslitzian terms, epistemic injustice is the unreasonable silencing of minority voices as in some way unqualified to participate in the deliberative process. As Taslitz might have put matters, the account of deliberation advanced by Anderson, Bohman, and Landemore, promotes accuracy and fairness by giving voice to *all* members of the community, including political minorities. In fact, the case is stronger than that: *only* by promoting a diverse and discursive deliberation process can we ensure accurate and fair outcomes.

Finally, it is worth recognizing that the various proposals to fix departmental-level policy-making point in two directions. One is backward-looking, seeking to identify past and present practices in order to change what is going wrong. One is forward-looking, seeing to gather information about what could go wrong, and take steps to avoid it. These different points of view suggest that, rather than propose some specific institutional fix, we should recognize that there is no silver bullet. What matters is the promoting public feedback to empower members of the community to identify problems with current policy, and effectuate repeal or reform, as well as to head off problems with proposed policies before they are enacted.

Police departments around the country publicly embraced the imperative to incorporate local voices in departmental policy making during the heyday of community policing. The goal of community policing was to “require[the] police [to] engage with the public as they set priorities and develop their tactics.”¹⁴⁷ This all sounds very republican: the police were to consult with residents, community members, and civic organizations to develop policing priorities and “creat[e] new cultures within police departments.”¹⁴⁸ Those cultures were supposed to be more inclusive and responsive to the local concerns of the public, who were to be affording some form of standing to engage in the making of departmental policies.

146. Jay Caspian Kang, ‘*Our Demand Is Simple: Stop Killing Us*’, N.Y. TIMES MAGAZINE, May 4, 2015, <http://www.nytimes.com/2015/05/10/magazine/our-demand-is-simple-stop-killing-us.html>.

147. Wesley G. Skogan, *The Promise of Community Policing* in *Police Innovation: Contrasting Perspectives* 27, 28 (David Weisburd & Anthony A. Braga, eds., 2006).

148. *Id.*

Unfortunately, however, the work of changing the culture of police departments is a much harder process than simply opening a dialog between the police and the community they police. To become inclusive of and answerable to the public or to particular communities requires that the police create institutions that enable the community to participate in policy-making and holding the police to account when things go wrong. The police, in short, would have to change a culture of political remoteness, and instead grant the public political standing in the policy-making process. But the weakness of community policing was to leave the reform process—and the evaluation of the goals and success of reform—to the police themselves, so that the police dominate both the implementation and assessment of community policing reforms. As a result, community policing has become associated with a variety of technical reforms—the policing equivalent of moneyball—that empowered experts and regulators instead, instead of the public, and ensured the continuation of business as usual.¹⁴⁹

Rather than just crunching numbers, the police must ensure that their data accurately reflects the lived experience of the communities they police. That requires actively seeking input from those communities, and treating that input as a valuable source of data, of equal worth to the other types of data generated by the police, one that is worthy of spurring institutional and cultural reform.¹⁵⁰

Professor Taslitz, in his typically pragmatic way, did indicate some solutions he thought would work. One he was particularly taken with was the typically republican device of the “town hall,” a form of community-police interaction popular in Washington State.¹⁵¹ Other inno-

149. David Weisburd et al., *Changing Everything So Everything Can Remain the Same: Compstat and American Policing* in POLICE INNOVATION: CONTRASTING PERSPECTIVES 284, 290 (David Weisburd & Anthony A. Braga, eds., 2006).

150. Major impediments to cultural reform are the power of the police unions and the ways in which norms of policing on the street may conflict with norms of policing in the academy or at the departmental level with which I am concerned. Police unions have traditionally frustrated efforts at reform: indeed, the police unionized expressly to defeat the civilian review board reform movement of the 1960s. See David Alan Sklansky, *supra* note 131 at 571–75 (discussing police unionization as a direct response to proposals for civilian review boards). On the one hand, the sorts of poorly supervised apprenticeships that constitute an officer’s post-academy, experiential training on the street permits institutionally ingrained norms to be transmitted and entrenched from officer to officer. See generally David H. Bayley, & Egon Bittner, *Learning the Skills of Policing*, 47 L. & CONTEMP. PROBS. 35 (1984). On the other hand, “street cops” take these norms to reflect important truths about the practice of policing in the field, in contrast to the norms of policing set in policy form by “management cops.” Reuss-Ianni & Ianni, *supra* note 123. Holding policing accountable to the public may promote an integrated challenge to the ingrained, institutional fragmentation of policing norms.

151. Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*. 9 OHIO STATE J. CRIM. L. 133, 147 (2011). Intriguingly, political theorist Lisa

vations include a Chicago policing initiative described by Harvard professor of public policy, Archon Fung. In Chicago, the Mayor's Office and the Chicago Police Department reorganized police officers into teams, and required officers to engage in monthly meetings with local residents.¹⁵² As described by Archon Fung, a Harvard professor of public policy, the City had to engage in educating or re-educating, not only the police, but also the local community, by hiring organizers "to knock on doors, post posters, contact community leaders, and call and facilitate meetings."¹⁵³ Of particular interest for the republican concern with domination, the community initially resisted participating in those meetings as much as did the police.¹⁵⁴ The problem may be public distrust of a process that they initially perceived as dominated by the police.

However, Professor Taslitz's work points us beyond such small-bore institutional fixes to a more radical notion of public participation (and perhaps police reform).¹⁵⁵ He suggests, after all, that direct public engagement with local political agents (ranging from "protests . . . rallies . . . and unexpected visits to legislators' offices")¹⁵⁶ operates as an informal but important means of policymaking. Republicanism extends that insight to all public officials, including the police. The police are part of the executive and administrative branch of government, and like all municipal executive officials from the Mayor on down, are political officers called upon to justify their conduct to the public. Unlike the Mayor, who may render herself pragmatically remote by en-

Miller suggests that, at the level of municipal policy making, the police are mostly reactive, focused on the corrective justice issues raised by employment decisions and the creation of civilian review boards. Miller, *supra* note 52. Miller notes that even the police union, the Fraternal Order of Police, is more reactive than aggressive in setting policing policy and determining the distributive question of who gets policed. There is thus some hope that the sort of front-end issues surrounding the distribution of policing across communities may engender less police resistance than back-end policies that focus on corrective justice once things have gone wrong.

152. See Archon Fung, *Deliberative Democracy, Chicago-Style: Grass-roots Governance in Policing and Public Education*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE 112–17 (Archon Fung & Erik Olin Wright eds., 2003).

153. See Archon Fung, *Beyond and Below the New Urbanism: Citizen Participation and Responsive Spatial Reconstruction*, 28 B.C. ENVTL. AFF. L. REV. 615, 619 (2001).

154. See ARCHON FUNG, EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY 70–73 (2004).

155. See Taslitz, *supra* note 21, at 289–90 (pointing to "protests, vigils, strikes, ad hoc rallies, and unexpected visits to legislators' offices" as means of engaging in political activity). See also Miller, *Federalism* at 145 ("[A]ttending a rally, calling a city council member, or showing up at a council hearing to talk about a recent shooting in the neighborhood also constitute political activity.")

156. Taslitz, *supra* note 21 at 290.

gaging with the public only when running for election, the police interact directly with individuals on the street. Because of their position in the executive, they are not (on the republican account) politically remote either.

Perhaps the most radical aspect of the republican agenda, then, is the demand to re-envisage the relation between police and public as one of political equals, in which all members of the public can call upon the police at any time to justify their actions as both correctively and distributively justified. In this, republican, way of thinking about policing and police professionalism, the police are not depoliticized agents of the state or the law. Instead, republicanism recognizes law-enforcement's important political role as agents of the executive branch who often operate as a target—but also a conduit—of public dissatisfaction with the existence and enforcement of the law. On this republican view, the people on the street are not simply good guys or bad guys, law abiders or law breakers,¹⁵⁷ but people with political standing to challenge the way municipalities distribute both the benefits and harms of policing. On this republican view, the act of challenging the police is not (only) a signal of disobedience, but also an assertion of political standing, and the police should take it seriously as such.

The challenge for the police—and for community activists concerned with the problem of police policy-making as a form of distributive justice, and for municipal policy-makers seeking to empower the minorities that bear the brunt of policing—is to invent new ways to empower the community to challenge the police and hold them to account. That means that the new generation of activists radicalized by the current round of police injustice should not simply seek to reform the grand jury or beef up the powers of civilian review boards.¹⁵⁸ Instead, they must advance a new understanding of the police role, and imagine new institutions to constrain police power at the departmental level. That is the level at which the police make decisions on how to distribute police resources over different communities, or different individuals within the community. And decisions made at the depart-

157. For a view separating the public into law-abiders and law-breakers, *see, e.g.*, Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 675–77 (1998) (identifying criminal policy protecting law-abiders and undermining law-breakers).

158. Such initiatives run slap bang into the self-interest of police unions, which were founded precisely to resist or tame civilian review.

mental level have a major impact upon the style and intensity of policing that communities face on the street.

V. CONCLUSION

Criminal procedure has, for a long time, been obsessed with solving the problem of police discretion. Discretionary judgments by individual officers too often result in biased decisions with disastrous results, for the individual engaged by the police and for the Constitution. But discretionary judgments by individual officers are only one part of policing, and only one part of policing's problems.

Traditional criminal law proposes a series of solutions to the problems of policing—juries and review boards—that act mostly after the fact to remedy individual wrongs. But just as important, the police have excluded the public from police decision-making rendering themselves politically from the justified concerns of—in particular—minority communities that policing is distributed unjustly so that the poor and minorities bear an unfairly large proportion of the burdens of policing. Contemporary popular and populist criminal justice movements have begun to reject their exclusion from police policy-making, mobilizing through direct action and social media to demand the police address their concerns before the officer has the chance to act.

The problem of distributive justice in policing is not primarily one of ministerial control over police on the ground. Distributive justice addresses whether the techniques of policing are spread fairly across the public that is policed. Certainly, this concern—the distribution of policing across communities—is one that non-republicans share. But republicans believe that distributive injustices produce a posture of dependency that itself constitutes a distinctive harm. Exclusion from policy-making renders the police politically unresponsive to the communities they police—a harm that is not captured or remedied by the standard procedures and institutions available to civilian participation under the current law of criminal procedure. If we are to address the problem of distributive justice in policing, a problem that originates at the departmental level, then a new set of institutions, both formal and informal, must be developed or repurposed to encourage community participation on terms of deliberative equality. These themes of equality, respect for, and the voice of minority communities were central to Professor Taslitz's jurisprudence. We still urgently need to develop

spaces in which the police hear those voices with respect as having equal political standing to challenge law enforcement in the policy-making process.

The Star Trek Enrichment Series: An Exploration in Teaching and Learning

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INTRODUCTION

The Star Trek Enrichment Series¹ developed out of a series of conversations among three professors who love teaching and absolutely love Star Trek in all of its forms in television and the movies.² The idea was simple – to combine both of these interests so that we could use a creative way to teach legal analysis, engage in some skills training, and even perhaps challenge what it means to have a just and fair judicial system, especially when there is a great deal of diversity reflected in cultures, values, and perspectives.³ In this way, students

* Professor of Law, Howard University School of Law. My co-author, Professor Atiba Ellis, and I are grateful to our dear colleague and friend, the late Professor Andrew Taslitz, who truly contributed to the writing of this article through his example and insights. Some of his insights are discussed in this article.

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1. This six week, non-credit course was offered in the fall of 2007.

2. We certainly are not alone in this. *Star Trek* is one of the longest running science fiction franchises in American history. The original *Star Trek* television show first aired in 1966 and had a three-year run. Due to its popularity, the *Original Series* spawned four live-action spin-off shows (and one animated television show) over the course of forty years and a dozen feature length movies, including two movies produced within the last six years. For a comprehensive introductory discussion of the Star Trek franchise, See, Caroline Siede, “Beam Me Up: A Beginner’s Guide to the Star Trek Franchise,” <http://www.avclub.com/article/beam-me-beginners-guide-star-trek-franchise-207976> (Aug. 29, 2014 12:00 AM) (last visited Mar. 25, 2015).

3. As we discuss below, scholars and teachers have sought to use *Star Trek* for precisely this purpose. See, e.g., Paul Joseph & Sharon Carton, *The Law of the Federation: Images of Law, Lawyers, and the Legal System in “Star Trek: The Next Generation,”* 24 U. TOL. L. REV. 43, 47 (1992).

might develop a better appreciation for the law's pervasive influence on society and vice versa.

In this short essay, we first discuss our aims for the Enrichment Series. We then turn to Star Trek academic literature that explored how the Star Trek series has been used as a tool for teaching and situate our contribution within this literature. Finally, we discuss our dear colleague Andrew Taslitz's (Taz) use of Star Trek as a means to enhance student learning outcomes, particularly for first-year students. The series was designed to reinforce doctrine, to improve their understanding of jurisprudence, and to draw larger connections between the law, culture, and society. We posit that this innovation, spurred by Taz, and combining all our talents, is an important and substantial contribution to the practice and the literature on teaching and learning.

I. SIX LESSONS IN SIX WEEKS

We largely relied upon the stories from Star Trek: The Next Generation (TNG) series to develop the six lessons that became the six-week, non-credit course for first year law students.⁴ TNG aired almost twenty years after the original Star Trek. In terms of the storyline, TNG was seventy-eight years after Kirk and Spock in the original Star Trek so, in class, we often referred to how the law of the twenty-fourth century compared to the twenty-first century.⁵ TNG stories tended to be more complicated, nuanced, and more easily raised the kind of legal questions that allowed us to rely on the courses typically covered in the first year program. We were not seeking to teach new areas of law or doctrine, but rather to help students to identify and understand the theory underlying the doctrine, and to provide them with concrete examples that well illustrated the connection between theory, doctrine, and practice.

We started out with several goals to help students improve their understanding of the legal material that we covered in a class and to engage in legal analysis in discussing a problem that arose out of an episode. However, we did not want this experience to replicate their

4. The course was focused on the first year students and the first year curriculum. However, upper class students were permitted to attend/participate in the course. The inclusion of second or third year students enhanced the quality of the interaction and outputs when they were engaged in peer-to-peer activities. In the end, our class was mostly comprised of first year students.

5. LARRY NEMECEK, *STAR TREK THE NEXT GENERATION COMPANION 7* (2003).

experiences in a typical first year class, so we always incorporated an activity that allowed them to develop skills that lawyers would use in practice. There was, in essence, a practicum included in most of the classes, which made the class more dynamic and engaging for students.⁶ As one student stated “the enrichment series is a great idea. It provide[d] us with a different way to not only learn law, but to apply it.” We did not have a name for what we were doing at the time, but today, most in legal education would identify our practicums as an example of experiential learning exercises incorporated throughout the course.⁷

An important aspect of this course is that it was delivered by a team of faculty with varying levels of experience as teachers. This was a true collaboration. Each segment of the course was discussed in detail by the faculty team, even though one person was the designated lead for each of the class segments. The expectation and reality of this course was that all of us would participate in the teaching and dialogue in the classroom. So, the basic framework of the course and its goals were constantly being critiqued and evaluated by the team as a team. We met before each class to discuss the plan for the class and any assigned materials and posted those materials on a TWEN⁸ site specially created for this course. We met immediately following each class to debrief and critique it especially seeking to identify ways in which we could improve the learning experience for our students. Students completed evaluation forms after each class, so we received immediate feedback from students regarding what worked and what needed improvement, and we factored their comments into our thinking and planning for the next class.

Each class was organized with a lead teacher who presented the topic, a mini-lecture on the law if necessary, and showed a clip of a Star Trek episode to set up the practicum phase of the class. The

6. Spearit & Stephanie Smith Ledesma, *Experiential Education as Critical Pedagogy: Enhancing the Law School Experience*, 38 NOVA L. REV. 249, 250–51 (2014) (discussing how to improve student learning through experiential education).

7. See, e.g., Margaret Martin Barry, *Practice Ready: Are We There Yet?*, 32 B.C. J.L. & SOC. JUST. 247, 250–54 (2012) (proposing a framework to incorporate practice and experience into the law school curriculum so that students are better equipped to enter the legal market).

8. TWEN stands for “The West Educational Network,” which its host, West Academic, states “is an electronic extension of the classroom, created by law professors for use by law professors.” See *Technology Tools*, WEST ACADEMIC, <http://www.westacademic.com/Professors/About/TechTools.aspx?tab=1> (last visited Mar. 25, 2015). TWEN sites serve as webpages for law courses, allowing students to access materials for courses, utilize online computer-assisted legal research tools, and utilize online resources for dialogue and sharing to supplement the learning environment.

other professors on the team supported the class discussion by contributing a point of view and/or raising questions to get the students thinking more broadly or deeper about the topic. In the practicum phase of the class, all team members were actively engaged in supporting student groups as they worked on an exercise or problem. The collaboration strengthened the personal and professional bonds of the team faculty members, and we believe this was reflected well in the class as we co-taught these segments. Students could see that we respected each other's opinions. They had an opportunity to observe professionals in dialogue with each other when they agreed, and when they disagreed or offered another point of view. This rarely happens in a classroom where there is only one faculty member.

Professor Taslitz's great respect for students and their points of view infused all aspects of the course. We sought their opinions in every way possible throughout the planning and execution of this course. Taz believed that the students had much to teach us about building an effective learning environment because they were subject to it. They have very useful insights on what is working and what is not working. So, we encouraged them to post comments on TWEN, seek us out before and after class, complete the evaluations for each of the classes, and finally, we listened to their comments at the end of the series at a session whose sole purpose was to evaluate all aspects of the Enrichment Series.⁹ In this way, our students were an important part of the collaboration as well. This approach could help to explain why students continued to attend a two hour class for no-credit, once a week, and complete reading assignments prior to class. They were truly vested in this effort because they were a part of the team.

Collaborative learning is a powerful way to enhance student engagement in the classroom because student voices are valued, students feel supported by faculty and peers, and there is a higher commitment or level of engagement on the part of each individual student to do his/her personal best. Students commented that they felt that they had "more freedom to be wrong. Did not feel the pressure that they

9. In addition to the feedback that students provided to us throughout the Enrichment Series, we provided students with immediate feedback on their performance on each of the segments. Feedback is an important way to reinforce material and engage in assessing the student's classwork. See Terri LeClercq, *Principle 4: Good Practice Gives Prompt Feedback*, 49 J. J. LEGAL EDUC. 418, 418 (1999) (emphasizing how important feedback is to effective teaching and learning); see also Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 76 (2002).

feel in their first year courses to be right and therefore, could listen to how others reason out a problem. This helped them to develop their reasoning skills.” The series helped some develop “confidence in voicing their opinions among their peers. . . . They felt freer in the discussion.”¹⁰

In our final debrief session on the Enrichment Series, it was clear from the discussion that the students understood the goals in the course. Students saw this course as law in action. “The sessions allowed them to see how the cases and/or rules really operate in real situations.”¹¹ Granted, the “real situation” that we examined was on some planet in the universe and with some imagined species, but in typical Star Trek form—the issue or problem was one that dealt with a real and familiar conflict in this century.

Throughout this series, we used group exercises, which meant that most of the learning and critiquing occurred in small groups.¹² The small groups helped all students to be able to participate in the class simultaneously rather than the usual Socratic Method which limits the number of students who could potentially comment on or critique a topic or issue. Also, in the small groups, the control lies within the group rather than with the professor and that can be less intimidating for students, which encourages them to offer a perspective/opinion. The faculty team noted that the use of small groups to work out legal problems is fairly common in a variety of practice settings as well. Learning how to work with others in a group setting was one of the ways to learn how to include other’s thinking into the final product. In this way, our students were beginning to function more like they will when they enter the practice of law.¹³

Finally, there was a very intangible goal that we hoped to accomplish with this series and that was to show our students that the study of law was fun. Many times first year students get bogged down in the daily drudgery of briefing cases, preparing outlines, fearing being called on in class, recovering from being called on in class, and meeting one deadline after another; it is difficult for them to see how all of

10. Comments from student evaluation forms and the final feedback session, Fall 2007. (Evaluations in office of Professor Dark).

11. *Id.*

12. For example, students worked in groups to draft a judicial opinion on a contract issue, counts in a civil complaint, or proposed legislation on Privacy.

13. See generally ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 1–4 (2007) (emphasizing how to teach students to be self-learners so that they become expert legal problem solvers).

this activity will actually prepare them for a legal career. More importantly, they begin to wonder whether they even want a career in law. For our students, this series was enjoyable exactly because we were in out-of-space, in another century, talking about legal issues involving the Ferengi and the Borg. In this way, it was actually easier for our students to see the legal question and consider its implications. They took seriously the legal discussion but the context freed them up to challenge, hypothesize, and even dream a creative or different solution than suggested by the law.

II. STAR TREK AND THE ADJUDICATORY PROCESS

We believe that this was possible in part because of the depth of Star Trek's enduring themes. While originally conceived of as a western set in space, Star Trek throughout its years of production told stories that explored multiple facets of the human condition. The franchise in all of its incarnations included narratives that considered the self and the other, that imagined the limits of the possibilities of human exploration and how to extend the limits of human knowledge, and that imagined how the human condition might evolve if there was greater trust and community as the basis of human relationships. Star Trek as a cultural phenomenon helped to push the limits of human imagination and articulate the boundaries of a future to which many aspire. In a sense, Star Trek is an engine of imagination that allows us to recast and understand our best selves.

Of particular interest to us is the fact that as part of the powerful reimagining that Star Trek provided, it paid particular attention to images of the law and of lawyers. The various series have provided images of the adjudicatory process with attention to both the procedural structures familiar to lawyers, as well as providing images of courts, jurists, and lawyers that are accessible to the viewing audience.

We certainly are not the first to use Star Trek as a vehicle to promote learning, generally, or law instruction in particular. Indeed, a small but substantial Star Trek academic literature has developed around the use of Star Trek as both a means to create analogies to real-life problems and as a pedagogical tool. We turn now to discussing this literature briefly and situating this essay's contribution to that literature.

Paul Joseph and Sharon Carton discuss the various images related to the legal system in TNG.¹⁴ Joseph and Carton explore in detail the procedural legal system portrayed (by necessity rather than by intentional design) in TNG. They note the core procedural protections created in the episode and elaborate on how those protections mirror those that exist when they were writing in the twentieth century, and how they illustrate the strengths and weaknesses of real-life contemporary practice. They even go further to identify the substantive law embedded in the TNG universe—including rights such as the right to privacy, protections analogous to those set forth in the Bill of Rights of the U.S. Constitution, and other substantive rights that manifest in *The Next Generation* episodes.

Joseph and Carton's article marked the beginning of a small but substantial Star Trek-themed academic literature. Scholars over the last two decades have used Star Trek in various disciplines as a mechanism to discuss a variety of topics raised by the science fiction series that are also relevant to the core questions of several academic disciplines. In this sense, Star Trek has been used as a frame to discuss philosophy,¹⁵ culture,¹⁶ myth,¹⁷ and, most importantly for our purposes, law.¹⁸

Following Joseph and Carton's 1992 *Law of the Federation* article, Michael P. Scharf and Lawrence D. Roberts in 1994 wrote another article for the Toledo Law Review, *The Interstellar Relations of the Federation: International Law and "Star Trek: The Next Generation."*¹⁹ They built upon Joseph and Carton's focus by analyzing how the Fed-

14. See Joseph & Carton, *supra* note 3.

15. See, e.g., STAR TREK AND PHILOSOPHY: THE WRATH OF KANT (Jason T. Eberl & Kevin S. Decker eds., 2008).

16. See, e.g., LINCOLN GERAGHTY, LIVING WITH STAR TREK: AMERICAN CULTURE AND THE STAR TREK (2007); Michael Jindra, *It's About Faith in our Future: Star Trek Fandom as Cultural Religion*, in RELIGION AND POPULAR CULTURE IN AMERICA (Bruce David Forbes & Jeffery H. Mahan eds., Univ. of California Press 2000); ROBERTA PEARSON & MAIRE MESSENGER DAVIES, STAR TREK AND AMERICAN TELEVISION (University of California Press 2014); THE INFLUENCE OF STAR TREK ON TELEVISION, FILM AND CULTURE (Lincoln Geraghty ed., 2008).

17. STAR TREK AS MYTH: ESSAYS ON SYMBOL AND ARCHETYPE AT THE FINAL FRONTIER (Matthew Wilhelm Kapell ed., 2010).

18. STAR TREK VISIONS OF LAW AND JUSTICE 4–10 (Robert H. Chaires & Bradley Chilton eds., 2003). Chaires and Chilton collected a range of essays concerning law themes explored in both *The Original Series* and *The Next Generation*, including the nature and mechanics of the legal system, justice-related themes in *Star Trek*, and how *Star Trek* precepts may be applied in the future. In particular, one of the essays directly concerns the teaching of *Star Trek*. We address it briefly in the remaining text.

19. Michael P. Scharf & Lawrence D. Roberts, *The Interstellar Relations of the Federation: International Law and "Star Trek: The Next Generation,"* 25 U. TOL. L. REV. 577 (1994).

eration interacted with non-Federation worlds rather than focus within the boundaries of the Federation as Joseph and Carton did.²⁰ Scharf and Roberts saw the popularity of TNG as an opportunity to facilitate the teaching of international law,²¹ and their article explores how The Next Generation raised various international law issues.²²

Other professors have discussed more recently how they use Star Trek in their classrooms. For example, Robert H. Chaires has discussed the possibilities and limitations around building a writing class upon Star Trek.²³ While Chaires is discussing the application of Star Trek themes from the point of view of undergraduate classes dedicated to writing,²⁴ he presents several of the problems that also affected our Star Trek course. He acknowledges that students have different perspectives on social justice themes and ideas,²⁵ that there may exist a gap between theory and application of a concept,²⁶ and that students may be approaching the Star Trek themed material from across a generational gap, so that the “historical and social reference points can become confused.”²⁷ One solution that Chaires adapts to some of these challenges, which we discuss later, is to teach the class as if the students did not have any prior knowledge of the Star Trek franchise.²⁸

While these insights from Chaires’ teaching parallel our own, it is worth focusing on the small literature on the uses of Star Trek in law school teaching. Several authors have discussed their uses of Star Trek in their classes. K.J. Greene has noted how he uses clips from Star Trek in contrast with other film clips to illustrate the nuisances of copyright infringement.²⁹ He discusses this particular use within the context of discussing his overall method of using multimedia material to supplement his approach to teaching traditional doctrinal materials

20. *Id.* at 578.

21. *Id.*

22. *Id.* at 610–11 (“Because of [the similarities between 24th century interstellar law and modern international law] STNG can be an effective pedagogical aid to teaching the fundamental principles of international law.”).

23. Robert H. Chaires, *Star Trek as a Pedagogical Vehicle for Teaching Law and Justice*, in *STAR TREK VISIONS OF LAW AND JUSTICE* 236 (Robert H. Chaires & Bradley Chilton eds., 2003).

24. *Id.* at 239.

25. *Id.*

26. *Id.*

27. *Id.* at 240.

28. *Id.* at 242.

29. K.J. Greene, “*There’s No Business Like Show Business*”: *Using Multimedia Materials to Teach Entertainment Law*, 52 *ST. LOUIS L. J.* 765, 769 (2008).

in Entertainment Law. In the context of Criminal Law, Kate E. Bloch has noted her use of Star Trek hypotheticals as a means to illustrate and reinforce learning in her classroom.³⁰ Bloch's major contribution, however, is to discuss insights collected from cognitive science and apply those ideas to legal education. She notes the following insights: (1) active learning; (2) the value of stories; (3) the pivotal role of the visual pathway; and (4) personalizing.³¹ With this theory as her basis, Bloch then describes four different exercises based on plotlines from The Original Series and TNG to apply these techniques to her criminal law teaching.³² What ties this prior literature together is the recognition that the use of visuals and active learning are important approaches to reinforcing learning outcomes.

As this survey of the academic literature surrounding Star Trek reveals, this pop culture phenomenon is a flexible vehicle for intellectual pursuits due to the depth of metaphors and appeals within its context. We believe this is due to the fact that the Star Trek universe contains panoply of archetypes and situations that both question the human condition and re-imagine the state of that condition through encounters with the "other." Moreover, Star Trek has the capacity to allow the viewer to re-imagine the issues presented in the series and to re-consider them in ways that were not confined to the constraints of contemporary, twenty-first century life. Like the literature cited above sought to do this as a substantive manner for the disciplines noted above, our Star Trek Enrichment Series sought specifically to do so within the context of law teaching, and in particular, for first year students.

However, unlike the approaches discussed by Greene or Bloch, which appear to focus on supplementing the formal classroom experience, we created the Star Trek Enrichment Series to provide an op-

30. Kate E. Bloch, *Cognition and Star Trek: Learning and Legal Education*, 42 J. MARSHALL L. REV. 959, 993 (2009).

31. *Id.* at 968–93.

32. *See id.* at 993–1015 (emphasizing that these learning approaches are meant to augment the teaching methods currently applied in the first-year curriculum by allowing instructors to teach through the "problem method" as opposed to relying on the "case method," and noting the concern that first-year courses teach through the traditional case method, but then test by posing hypothetical problems); *id.* at 1006 (suggesting that the use of active learning, problem solving approaches will help address this gap between teaching and evaluation.); *id.* ("To the extent that we have been failing to prepare our students for the assessment tools we use, the types of active-learning vehicles envisioned here should begin to address these failings."). We believe that Bloch is correct in her assessment of this first-year pedagogical dilemma, and our teaching of the *Star Trek* Enrichment Series was our approach to beginning to remedy this dilemma.

portunity *outside* of the environment of the formal classroom to supplement and augment the learning of law students. As we stated above, our prime aim in doing so was to provide an opportunity for students to engage in the subject matter without the pressures of performance that came along with the largely traditional law teaching methods. We felt that providing them this opportunity would provide some students with chances for reinforcement of the issues they learned about in the primary classroom. We also believed that some students would benefit from learning through a variety of teaching styles and approaches within a space dedicated to that purpose. Indeed, without the pressure of grades and the rigidity of the law school Socratic classroom, we believed our students would relish the opportunity to experiment with approaches to learning. And we believed that by providing students an opportunity to interact with us—teachers in the first year curriculum with different teaching styles, personalities, and backgrounds — without the judgment that came with the first year classroom experience, would provide us and them an opportunity to build a learning community that would hopefully pay off both in their immediate performance as novice law students as well as provide a foundation for their continued success.

III. CONCLUSION

We conclude this short essay by providing a more specific overview of the course through discussing Taz's contribution in the Star Trek Enrichment Series. The course began with an overview of the Star Trek Universe, which prominently features the United Federation of Planets (short hand – Federation), the Starfleet, the enforcement arm of the Federation, and its flagship, the Enterprise, and her crew. When Gene Roddenberry, the creator of Star Trek, developed the original TV series titled simply Star Trek, he likely did not conceptualize a legal system and accompanying rules to regulate the Federation except in the most general way. However, over the years, it is clear that many Star Trek episodes raised legal problems or issues thus necessitating the development of a judicial system and law.³³ Of course, this introductory session also included an overview of the different Star Trek series with an emphasis on TNG and the leading characters in the Enterprise crew.

33. See STAR TREK VISIONS OF LAW AND JUSTICE, *supra* note 18 (demonstrating how *Star Trek* was a vehicle for illustrating modern legal problems).

Taz led two of the six sessions. One was titled “Contracts, Greed and the Ferengi,” and the other was “Vengeance, Criminal Law and Trek.” The Ferengi society is based on contract, which is the way that they operate in all aspects of their life. However, the Ferengi are also known as a dishonorable people, and while they would comply with a contract, they always sought imaginative ways of re-interpreting the contract or forcing the other party to breach an agreement so that they got a better bargain than originally contemplated or bargained for in the agreement. The class viewed a portion of a TNG episode where a Ferengi (A) contracted with a human to deliver stolen plasma conduits (a highly valued energy source) in exchange for a specified amount of latinum (like gold). Ferengi (B) contracts with the same human to provide a ship so that product could be delivered to Ferengi A. Instead, Ferengi B loads the conduits onto his ship, zooms off, and sells the conduits as his own. Ferengi A sues for breach of contract against Ferengi B. One of the rules of acquisition (Ferengi Law) declares: “A contract is a contract is a contract . . . if with a Ferengi.” Does Ferengi A have a legal basis for a contract suit against Ferengi B? What should be the result if Ferengi B files a motion to dismiss the complaint in the contract case? Are the Ferengi likely to have criminal law to address this situation (since they are a dishonest people), and would it be better to have this dispute handled as a criminal matter? If so, who should be the defendants, and why?

The class had student groups with the following assignments: a group that sat as a Ferengi panel of judges addressed the motion to dismiss on the contract claim, another group of students were Ferengi prosecutors deciding what to do about a possible criminal matter, and a final group of students role played diplomats who focused on how to deal with the dispute because there were two different species and therefore, possible nation states or planets involved in this dispute. What role might the Federation have in resolving this case?

Taz used the Ferengi Rules of Acquisition to consider the meaning of the social contract and its connection to constitutionalism and in examining the nature of a contract to determine the advantages and disadvantages of a society based solely on individual freedom of contract. The feedback from this session was uniformly positive as students began to see how their knowledge of contract law could help them determine the status of the contract between Ferengi A and the human and whether there was even a legal relationship between Ferengi A and B. Students praised the session because it provided a re-

view of contract law and allowed them to have an interesting discussion on how social contracts and culture may affect the law of contracts. How does culture, in this case the Ferengi culture, affect and shape contract law? Essentially, the discussion was about how social policy can influence contract law and the interpretation of a contract. A couple of students remarked that they even had a better understanding of the meaning of a motion to dismiss, which of course is discussed in the civil procedure course. Moreover, the students were able to critique this situation from multiple perspectives – judicial, prosecutorial, and political.

This was the genius of Taz. His was always a multi-disciplinary, multi-goal, and multi-approach to teaching and learning. And if he could achieve his goals by using a subject that he clearly loved, i.e. Star Trek, all the better. In Taz's words, ultimately he wanted students to have a better understanding of their coursework, an appreciation of the jurisprudential concepts underlying their first year subjects, a broadening of legal analytical tools, and an appreciation for the interaction between law and society/culture in shaping rules of law. In this way, Taz's use of Star Trek through this Enrichment Series offered a truly novel innovation on the use of Star Trek in the classroom and presaged the active learning and experiential learning movements that now are reshaping the way law students are prepared for the practice of law.³⁴

34. See generally WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 3 (2007) ("*Educating Lawyers* examines the dramatic way that law schools develop legal understanding and form professional identity. The study captures the special strengths of legal education, and its distinctive forms of teaching."); ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 1 (2007) (providing "principles of best practices . . . based on long recognized principles of sound educational practices as well as recent research and scholarship about teaching and learning").

The Hidden Life of Andrew Taslitz

FRANK H. WU*

What do dogs want most? They want to belong, and they want each other. — Elizabeth Marshall Thomas, *The Hidden Life of Dogs*¹

The late Andrew Taslitz was renowned as a scholar and a teacher. His influence is attested to by the tributes in this volume and his skill training the next generation is confirmed by his selection as an exemplar.² He was not known, however, to most of his peers as a husband and the human to canine companions. These aspects of his life deserve to be memorialized in this venue, the pages of law reviews where he otherwise displayed his talents.

Only some individuals make a mark on the world. It is easy to overlook the humanity of such persons, because their accomplishments are so impressive. Yet Andy was able to achieve what he did, thanks to everything else that remained in the background.

For many, perhaps most, professors, scholarly interests are intimately related to life experiences. Whether one follows the dictum to “write what you know,” almost all of us write what we love – either already or in anticipation. In this instance, Andy was an expert on dog evidence who became the head of a dog pack. His objective inquiry into dogs preceded his personal contact with them.

In the summer of 1978 while preparing for the LSAT exam, he met Patricia (“Patty”) Sun, another applicant to law school.³ Andy had been encouraged to sign up for the course by a friend, who claimed that he would meet smart women there. Andy and Patty each succeeded in their studies.

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1. ELIZABETH MARSHALL THOMAS, *THE HIDDEN LIFE OF DOGS* 111 (1993).
2. See generally MICHAEL HUNTER SCHWARTZ, GERALD F. HESS & SOPHIE M. SPARROW, *WHAT THE BEST LAW TEACHERS DO* (2013) (profiling a total of 26 law professors).
3. Interview with Patricia Sun, in Wash., D.C. (June 20, 2014).

They married, and, after a stint in Philadelphia, they moved to Washington, D.C. Andy joined the faculty of Howard University School of Law, while Patty went to work for the federal government.

He continued his research on criminal law, substantive and procedural, and established himself in the classroom of the leading historically black college/university (HBCU). He also was recognized as a leader among his colleagues: the respect he was accorded was signaled by the offer made to him to serve as the Associate Academic Dean (which he turned down). He later moved as a lateral to American University, but he continued to be identified by his two-decade affiliation with Howard.

One of his earliest law review articles considered the credibility of dog testimony.⁴ Although popular portrayals of the legal process suggest that evidence from dogs is reliable and should be credited, Andy was a skeptic. He presented a comprehensive catalog of cases in which a dog sniff was used to identify a specific scent, and, on the basis of a bark directed toward a suspect, that person could be convicted, even given the death sentence.⁵

He suggested that the courts had imbued the canine sense of smell, which is extraordinary, with mythic qualities.⁶ Thus the courts did not regard a dog's sniff as a "search" and also excused it from the requirement of corroboration. The dog sniff was not an esoteric topic. It was integral to investigations of drug smuggling among other transgressions.

After considering the scientific findings on the canine sense of smell,⁷ including the factors affecting a dog's accuracy in tracking and the variability within the species, Andy turned to the evidentiary rules. Writing when scientific evidence was governed by the *Frye* test,⁸ prior to the ruling in *Daubert*,⁹ he offered the following understatement about dogs' testimony: "effective cross-examination is difficult."¹⁰ He concluded that dogs could and should serve "a special and valuable function in law enforcement."¹¹ But he urged that the dog

4. Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 HASTINGS L.J. 15 (1990).

5. See Taslitz, *supra* note 4, at 18 n.7 (citing *State v. Roscoe*, 700 P.2d 1312 (1984)).

6. *Id.* at 20–33.

7. *Id.* at 43–52.

8. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

9. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

10. Taslitz, *supra* note 4, at 87–88.

11. *Id.* at 133.

scent no longer be admitted into evidence as probative of guilt in criminal trials.¹²

This 114-page law review article was more than comprehensive. It demonstrated a Renaissance person's ability to blend together disciplines. Andy surveyed literature (showing the reverence for the dog in Western culture), science (demonstrating the reasons to doubt the dog's abilities, including to communicate through a handler), and law (reviewing the doctrine).

With publication of the piece, Andy became the leading authority on the subject. In the best tradition of engaged scholarship, he later published a practical version of his analysis for an American Bar Association magazine.¹³ He was called upon from time to time to serve as an expert with respect to the weight to be accorded to dog testimony. The article itself has been cited at least 15 times by the courts.¹⁴

The role of the *Canis familiaris* is more significant than the merely academic. Andy and Patty became interested in acquiring a dog, through their neighbors who owned a Norwegian elkhound. (Andy had not grown up around dogs, but Patty's family had had an outdoor dog.)

They cared for Hope, when her family traveled. Based on those interactions, they decided they wished to rescue another member of the same breed.

After an extensive search, Andy and Patty adopted B'lanna through a rescue organization. They named her for a character from *Star Trek: The New Generation*.¹⁵ The screen version of B'lanna is a half-human, half-Klingon.¹⁶

12. *Id.*

13. Andrew E. Taslitz, *The Cold Nose Might Actually Know? Science & Scent Lineups*, 28 CRIMINAL JUSTICE 4 (2013).

14. United States v. \$5,000 in U.S. Currency, 40 F.3d 846, 850 (6th Cir. 1994); United States v. Carr, 25 F.3d 1194, 1215 (3rd Cir. 1994); United States v. Florez, 871 F. Supp. 1411, 1421 (D.N.M. 1994); United States v. \$639,558 in U.S. Currency, 955 F.2d 712, 714 (D.C. Cir. 1992); People v. DeSantiago, No. BA182395, 2003 WL 21753766, *14 (Cal. Ct. App. July 30, 2003); People v. Mitchell, 2 Cal. Rptr. 3d 49, 65 (Cal. App. 2003); State v. Kelly, No. CR0661742, 2009 WL 323481, *9 (Conn. Super. Ct. 2009); Harris v. State, 71 So.3d 756, 768 (Fla. 2011); People v. Cruz, 643 N.E.2d 636, 663 (Ill. 1994); Commonwealth v. Santiago, No. WOCV201100872, 2012 WL 2913495, *3 (Mass. Super. 2012); Harris v. City of Mayfield Heights, No. 95601, 2011 WL 1584579, *4 (Ohio Ct. App. 2011); State v. Dominguez, 425 S.W.3d 411, 423 (Tex. App. 2011); Powell v. State, No. 14-09-00398-CR, 2011 WL 1579734, *2 (Tex. App. 2011); State v. Smith, 335 S.W.3d 706, 712 (Tex. App. 2011); Winfrey v. State, 323 S.W.3D 875, 883 (Tex. Crim. App. 2010).

15. *Star Trek: The New Generation* (Paramount television 1987).

16. *Star Trek: Voyager* (Paramount television 1995).

Andy had long been a Trekkie, but unlike some fans of the Gene Rodenberry science fiction show celebrating diversity he enjoyed more than the original series from his adolescence. Patty became immersed in the online culture dedicated to the Norwegian elkhound.

Later, they decided that it was important for B'lanna to have a friend at home. They returned to the same network to find Odo — another moniker from the Star Trek universe.¹⁷

Their lives were complete.

Andy was survived by Patty, as well as B'lanna and Odo.

For the rest of us who continue to perform intellectual labors, there is a salutary effect in catching this glimpse of a family man. While Andy will continue to live through his ideas, he also will influence us through his actions.

All of us will miss his wisdom. Patty, B'lanna, and Odo knew an Andy Taslitz who was more than a source of learned argument.

17. Odo was a “shapeshifter” in *Star Trek: Deep Space Nine* (Paramount television 1993).

The Taz I Knew

ARNOLD H. LOEWY*

I knew Andy Taslitz well, and I am better for it. Many of you know that I host an annual criminal law symposium. Thus far, there have been eight, which can be divided this way: Five that Taz was invited to, and three that he should have been. The three that he was not invited to were “Convicting the Innocent,” “Criminal Law and the First Amendment,” and “Juveniles and the Criminal Law.” It wasn’t that he wasn’t an expert in those things (and many others) too, I just didn’t feel right leaning on him every single year. Indeed, the year I held the “Convicting the Innocent” symposium, he spoke on that very topic at a different symposium just a couple of months earlier.

To be truthful, there were really three types of symposia, those at which Taz participated (4), those to which I foolishly (from the perspective of the symposium) did not invite him (3), and one, homicide, to which he was invited, had accepted, but could not come because of his unfortunate and untimely death. Although I was able to secure a very competent fill-in, he was not Taz.

Taz had that special touch. Who else at a symposium on excuses, would write about whether Tinkerbell “got off too easy.”¹ Apparently, the student editors were also sufficiently impressed to name his article on Tinkerbell the best lead article of the year.

I cannot do this tribute without thinking of the fickleness of death. In April, 2012, which I believe is the last time that I saw him, Taz, Craig Bradley, and I were all on a panel discussing the pre-trial right to counsel. Both Craig and Taz subsequently succumbed to illness while I, who had cancer both the year before and the year after that symposium, am still here, and in reasonably good health.²

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1. Andrew E. Taslitz, *Why Did Tinkerbell Get Off So Easy?: The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 TEX. TECH L. REV. 419 (2009).

2. Since writing this paper, I have suffered a third bout with cancer, but thankfully, as with the other two, I am now in remission.

But I don't want to get too maudlin. Taz would never approve. Let me focus on the creativity of his articles, particularly their titles. For example, at my very first symposium, entitled "Citizen Ignorance, Police Deception, and the Constitution," we published a number of very good articles with such titles as *Ignorance and Democracy*, *Consent to Search by Ignorant People*, *Rights Knowledge: Values and Tradeoffs*, and *The Myth of Consent*. All were fine articles I might add.

Then there was Taz's article, entitled: *Bullshitting the People: The Criminal Procedure Implications of a Scatalogical Term*.³ My first thought was: "My God, is the law review going to print this with this word on the cover of their issue?" But print it they did. My thought was that he was going to imitate George Carlin by satirizing America's attitude to dirty words.⁴ But he did not, although he did speak of his mother's propensity to wash his mouth out with soap when he used that word as a child, especially when it was directed at a family member.

Rather he relied on several philosophical books, which discussed "political bullshit", which was defined as a combination of "lies, truths, half-truths, and irrelevancies in infinite combinations to hide some particularly important truth from the listener's observation."⁵ He then applied that to a police officer's request to a bus passenger to open his backpack for a drug inspection.⁶ The bullshitting officer will not tell the "bullshittee" that he must open the backpack, but he will imply as much by his tone of voice.⁷ Taz then examined what impact such behavior has on both the innocent and guilty bullshittee when he succumbs to the bullshitting policeman's show of apparent authority.⁸

I've already alluded to his prize-winning *Tinkerbell* essay in which he examined Tinkerbell's crime through the lens of her own extenuating circumstances and suggested that such analysis might be appropriate as a general guide to excuses and the law.

In the Fourth Amendment symposium, Taz was tasked with speaking and writing on the topic of "History and the 4th Amendment." His title: *The Happy Fourth Amendment: History and the Peo-*

3. Andrew E. Taslitz, *Bullshitting the People: The Criminal Procedure Implications of a Scatalogical Term*, 39 TEX. TECH L. REV. 1383 (2007).

4. See *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978).

5. Taslitz, *supra* note 3, at 1384.

6. Taslitz, *supra* note 3, at 1387.

7. Taslitz, *supra* note 3, at 1387.

8. Taslitz, *supra* note 3, at 1396-98.

*ple's Quest for Constitutional Meaning.*⁹ My thought was: "Gee, whoever thought of the Fourth Amendment as happy, or sad, or anything else emotionally related." But Taz's reference was to the pursuit of happiness in the Declaration of Independence, and his analysis dealt with how we can construe the Fourth Amendment in a manner that maximizes that concept.¹⁰

In his final visit to the Texas Tech Criminal Law Symposium, Taz spoke about the role of pre-trial counsel to challenge the status-quo in an article he entitled, *Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*¹¹ I remember that occasion well because apart from the fact that I believe it was the last time I saw Taz, I largely controlled the order of speakers on that panel, and I put myself in a position to immediately follow Taz. I should have known better. He is a very tough act to follow.

There is little doubt that Taz was a prodigious worker. Indeed, some recent blog posts, particularly from his wife, Patty, have suggested that he might have been too prodigious. I always tell my symposium speakers that their paper need be no more than their twenty-minute talk with footnotes. In Taz's case, his four articles were 52, 61, 60, and 72 pages long, totaling a staggering 245 pages of careful scholarship over four articles. He averaged more than 500 footnotes per article, totaling a staggering 2081.

I am quite sure that Taz holds the record for the most pages and most footnotes published in the eight symposium issues because the only person to write in more is me, and I have always taken my own admonition to limit the paper to my twenty (or, in some cases, thirty) minute talk with footnotes seriously.

Taz's prodigiousness is truly inspirational. I know that what he did as my guest represents only a small fraction of his overall output, which was enormous. But the reason for holding this conference is not just, or even primarily, to honor Taz as a scholar, but to remember him as a human being. I will speak of two such instances. First, I remember London when Taz and I were attending an Oxford Roundtable on, what else, criminal law. The two of us, along with our wives,

9. Andrew E. Taslitz, *The Happy Fourth Amendment: History and The People's Quest for Constitutional Meaning*, 43 TEX. TECH L. REV. 137 (2010).

10. *Id.* at 138-40.

11. Andrew E. Taslitz, *Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, 45 TEX. TECH L. REV. 315 (2012).

Patty and Judy, attended dinner and a play in London. I do not remember the name of the play¹², nor what we had for dinner, but I do remember it was a very pleasant evening. Thereafter, at my first symposium, Taz and Patty stayed after it was over, and joined Judy and I looking for prairie dogs in a Lubbock park dedicated to preserving them. We ate lunch at a local Lubbock eatery, and once more had a thoroughly enjoyable time.

Andy Taslitz, old friend, it was wrong, wrong, wrong that you were taken from us so young. You and Patty deserved so much more. But wherever you are, my friend, rest in peace.

12. Subsequently, Patty has told me that the name of the play was “Whistle Down the Wind.”

Taz: The Legal Academy's Happy (and Erudite) Warrior

WAYNE A. LOGAN*

Published in 1807, William Wordsworth's poem, "Character of the Happy Warrior," begins as follows:

Who is the happy Warrior? Who is he
That every man in arms should wish to be?
– It is the generous Spirit, who . . . hath wrought
Upon the plan that pleased his boyish thought:
Whose high endeavours are an inward light
That makes the path before him always bright:
Who, with a natural instinct to discern
What knowledge can perform, is diligent to learn[.]¹

Andy Taslitz ("Taz") epitomized Wordsworth's polymath "generous [s]pirit," "with a natural instinct to discern [w]hat knowledge can perform," ever so "diligent to learn."² In my talk today, I'll canvass a few of the many knowledge contexts Taz mined, thought very deeply about, and applied in his scholarship.

Preparing for today's event provided me with a welcomed opportunity to step back from and then dig into Taz's remarkable oeuvre. I've always been a dedicated fan of his work, yet this always required considerable effort; it seemed that every few months or so a new article of his landed on my "must read" pile. Taz, as we know, was an uncommonly prolific scholar (in addition to being a top-notch teacher who was supremely dedicated to service and law reform). During his twenty-four years in the legal academy, scholarship absolutely flowed

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1. William Wordsworth, *Character of the Happy Warrior* (1807), reprinted in WILLIAM WORDSWORTH POEMS, VOLUME 1 662–64 (John O. Hayden ed., 1981).

2. *Id.* at 662.

from Taz; by a conservative count, he wrote five books and over sixty articles, along with multiple chapters and other short entries.³ The pieces themselves, moreover, were notable for their thoroughness and breadth. Taz liked to hit the long-ball; as a rule his articles ran in the neighborhood of sixty or seventy pages, with generous helpings of meaty and often quite lengthy footnotes. And these often were just his symposium pieces!

Reflecting on the whole of Taz's work, another thing becomes abundantly evident: the remarkable range of analytic tools that he brought to bear. His orientation was obvious from the very outset of his professorial career at Howard University School of Law where he began teaching in 1989. In 1990, the *Hastings Law Journal* published his piece *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, a modest 119-page effort, which remains the *locus classicus* of the subject.⁴ In *Does the Cold Nose Know?*, Taz laid the benchmark for his many subsequent articles drawing on findings from the social sciences: a thorough marshalling of available evidence combined with fair-minded analysis of how the evidence can and should affect the real-world work of criminal justice actors.⁵

Taz read voraciously and thought deeply about many subjects, and he infused his ready command of doctrine and policy with what he learned, writing in a style that was sophisticated yet accessible. Psychology was of particular interest to him, and he often applied its teachings. Taz commonly focused on its implications for the courtroom, which should not come as a surprise given that he was a former prosecutor (in Philadelphia) and taught Evidence. Just a few of his article titles should suffice to highlight the breadth of his interest in this regard: *Myself Alone: Individualizing Justice through Psychological Character Evidence*;⁶ *Catharsis, the Confrontation Clause, and Ex-*

3. According to the most recent C.V. that I could locate, at the time of his death, Taz not only had twelve articles underway, he also had three book manuscripts in progress: *The Cognitive Fourth Amendment: How Mind Science Helps Us Choose the Best Institutions to Protect Our Privacy and Makes Them Better* (unpublished manuscript); *The New and Improved Prosecutor: Fighting Error and Disesteem in the Land of Outcasts* (unpublished manuscript); *Expressing Justice: Mapping Dissent as the Bridge Between the First and Fourth Amendments* (unpublished manuscript). Curriculum Vitae of Andrew Eric Taslitz, <http://www.wcl.american.edu/faculty/cv/taslitz.pdf> (last visited Oct. 21, 2014). Unless otherwise noted, the written works cited in this article are attributable to the hand of Taz.

4. Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 HASTINGS L.J. 15 (1990).

5. *Id.*

6. Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1 (1993).

Taz: The Legal Academy's Happy (and Erudite) Warrior

pert Testimony;⁷ *Forgetting Freud: The Courts' Fear of the Subconscious in Date Rape (and Other) Cases*;⁸ and *Willfully Blinded: On Date Rape and Self-Deception*.⁹ Drawing on recent findings from cognitive psychology, Taz likewise offered thoughtful solutions on how to best address the known problems associated with the cross-racial eyewitness identification of suspects.¹⁰

Taz repeatedly examined the corrosive effects of bias in the criminal justice system. Strikingly, for a white male professor, issues relating to race¹¹ and feminism¹² predominated in his work. He wrote at

7. Andrew E. Taslitz, *Catharsis, The Confrontation Clause, and Expert Testimony*, 22 CAP. U. L. REV. 103 (1993).

8. Andrew E. Taslitz, *Forgetting Freud: The Courts' Fear of the Subconscious in Date Rape (and other) Cases*, 16 B.U. PUB. INT. L.J. 145 (2007).

9. Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381 (2005).

10. See generally Andrew E. Taslitz, "Curing" Own Race Bias: What Cognitive Science and the Henderson Case Teach About Improving Jurors' Ability to Identify Race-Tainted Eyewitness Error, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 1049 (2013) (examining "the causes of own race bias in eyewitness identifications" and its effect in jury deliberations); Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 271 (2006) (focusing on how prosecutors use social science to create legal policy in the area of eyewitness identification).

11. See, e.g., *The Slave Power Undead: Criminal Justice Successes and Failures of the Thirteenth Amendment*, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 245 (Alexander Thesis ed., 2010); Andrew E. Taslitz, *Racial Threat Versus Racial Empathy in Sentencing—Capital and Otherwise*, 41 AM. J. CRIM. L. 1 (2013); Andrew E. Taslitz, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI.-KENT L. REV. 277 (2010); Andrew E. Taslitz, *Judging Jenna's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393 (2009); Andrew E. Taslitz & Carol Steiker, *Introduction to the Symposium: The Jena Six, the Prosecutorial Conscience, and the Dead Hand of History*, 44 HARV. C.R.-C.L. L. REV. 275 (2009); Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 SW. L. REV. 1091 (2008); Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1 (2007); Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121 (2006); Andrew E. Taslitz, *Racial Profiling, Terrorism, and Time*, 109 PENN. ST. L. REV. 1181 (2005); Andrew E. Taslitz, *Foreword: The Political Geography of Race Data in the Criminal Justice System*, 66 LAW & CONTEMP. PROBS. 1 (2003); Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 LAW & CONTEMP. PROBS. 221 (2003); Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1287–88 (2000); Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOMEN'S L.J. 3 (2000); Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. REV. 739 (1999); Andrew E. Taslitz, *An African-American Sense of Fact: The O.J. Trial and Black Judges on Justice*, 7 B.U. PUB. INT. L.J. 219 (1997); "Curing" Own Race Bias, *supra* note 9.

12. Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in Ferguson v. City of Charleston*, 9 DUKE J. GENDER L. & POL'Y 1 (2002); Andrew E. Taslitz, *What Feminism Has to Offer Evidence Law*, 28 SW. U. L. REV. 171 (1999); Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH. J. GENDER & L. 1 (1998); Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387 (1996).

least fifteen articles focusing on race,¹³ four articles on feminism,¹⁴ and several others joining the two.¹⁵ In his book, *Rape and the Culture of the Courtroom*, Taz, after surveying the distorting effect of cultural narratives commonly associated with sexual assault and male-dominated evidence rules and courtroom customs, he made a compelling case for a “Feminist Evidence Law.”¹⁶

In *Police Are People Too* (short title), Taz provided an insightful treatment of the ways in which cognitive biases hinder the ability of officers on street patrol to make decisions on individualized suspicion.¹⁷ And in a symposium entry published shortly before his death, he offered a creative take on the well-tilled soil of the problems associated with the Sixth Amendment right to counsel; he provided a thorough and insightful treatment of the ways in which status quo bias impedes the ability of system actors, especially defense counsel, to deliver just and fair outcomes.¹⁸

Taz was also a dedicated student of history. His considerable knowledge of American history was on full display in his book, *Reconstructing the Fourth Amendment: A History of Search and Seizure, 1789–1868*.¹⁹ The work provides a panoramic treatment of search and seizure practices during the post-Framing era through Reconstruction, lending emphasis to central themes and purposes that have been lost along the way. In what I find the most interesting and illuminating part of the book, its latter half, Taz ties the Fourth Amendment to the Fourteenth, which took shape in response to repressive historic incidents of the time, including limits on the right of locomotion of freedmen, the violent coercive power of slave patrols, enforcement of the repressive Black Codes, and the widespread disregard for privacy and property rights of African-Americans.²⁰ The book is chock-full of en-

13. See *supra* note 10.

14. See *supra* note 11.

15. See, e.g., Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 785 (1996).

16. ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 11 (N.Y.U. Press 1999).

17. See Andrew E. 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, 7 (2010).

18. Andrew E. Taslitz, *Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, 45 TEX. TECH. L. REV. 315, 316–18 (2012).

19. ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868* (N.Y.U. Press 2006).

20. *Id.*

grossing richly detailed realities of the time, such as the slave practice of masking scent from slave patrol dogs by rubbing their feet with turpentine.²¹ Taz draws upon this often overlooked historical background to make the case for affording increased modern constitutional weight to the right against group subordination and individual insult and humiliation, as well as the right to bodily movement and informational privacy.²²

Taz, however, also had a somewhat whimsical side, as evidenced in his devotion to popular culture. In a 2009 article, he deployed the character Tinkerbell, from J.M. Barrie's classic *Peter Pan*,²³ to deliver an extended and insightful exegesis on sympathy's role in differentiating complete and partial excuses. In the article, he used the cognitive psychology of imagination, philosophy, and social norms to offer thoughts on the relative decision making competence of juries and legislatures vis-à-vis the two species of excuse.²⁴ Five years earlier, the comic book (and later movie) character, Daredevil,²⁵ served as the vehicle for Taz to deploy social science—highlighting the connection between high execution rates and a state's history of vigilantism, and showing us how a more nuanced understanding of the Daredevil can point the way toward a more just resort to capital punishment.²⁶ It is highly likely that another academic tasked with drawing serious lessons from Tinkerbell and Daredevil would falter, offering a pedantic deconstruction, or tritely espousing the benefits of using popular culture as a lens into modern affairs. Taz, however, as is his wont, goes deep and invokes social science findings from a broad array of areas to deliver a rich, multifaceted take on his subjects.

Finally, I would be remiss if I did not mention that Taz was not only an omnivorous consumer and disseminator of knowledge, he also was actively involved in its creation. Taz regarded his professional service obligation as entailing much more than institutional committee work; he actively sought out, and was asked to provide, law reform-related work with a research component. Among other things, he conducted a comprehensive overview of electronic recording of interroga-

21. *Id.*

22. *Id.*

23. Andrew E. Taslitz, *Why Did Tinkerbell Get Off So Easy?: The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 TEX. TECH. L. REV. 419, 421 n.10 (2009).

24. *Id.* at 420–21.

25. DAREDEVIL (20th Century Fox 2003).

26. Andrew E. Taslitz, *Daredevil and The Death Penalty*, 1 OHIO ST. J. CRIM. L. 699, 707, 716–17 (2004).

tions, for the Uniform Law Commission (formerly National Conference of Commissioners on Uniform State Laws), and served on ABA committees addressing eyewitness identification and the third-party doctrine. True to form, the findings of this work often found their way into print.²⁷ At the time of his death, moreover, Taz had five empirical projects underway, working with others collecting data on such varied matters as search and seizure warrant practices among police (with David Harris); the impact on jurors of instructions concerning the videotaping of confessions (with Richard Leo and Neil Vidmar); and popular attitudes regarding the reasonableness of searches and seizures (with Song Richardson and Audrey Miller).

I hope that my remarks today provide a sense of the reach of our friend Taz's intellectual ambition and curiosity. I said at the outset that I welcomed the chance to sit down and review his work *en masse*, and having done so, I now have an even greater appreciation for Taz's scholarship. The work he left behind provides us with a tangible and enduring reminder of just how special an intellect he was.

I remain, however, curious about what motivated our friend; what drove him to seek out and think so deeply about so many varied and often quite complex academic disciplines? I think I found at least partial answers in his work itself. In explaining to readers in 2004 why the Daredevil character had meaning to him, he offered with characteristic humility that, "perhaps such movies reach only my soul, which is in many ways still that of a twelve-year old child."²⁸ The other snippet I found illuminating is contained in the preface to his 2009 book, *Reconstructing the Fourth Amendment*; when reflecting on why he undertook the effort, he offered that the criminal justice system's racial disparities and other inequities hit home early, affecting him as a "twelve- or thirteen-year old boy," "a bookish kid who read widely and was always sensitive to unfairness."²⁹ I tell my own children that

27. See, e.g., Andrew E. Taslitz, *Cybersurveillance Without Restraint? The Meaning and Social Value of the Probable Cause and Reasonable Suspicion Standards in Governmental Access to Third-Party Electronic Records*, 103 J. CRIM. L. & CRIMINOLOGY 839, 840–42 (2013) (relating to his work with the ABA committee drafting Standards on Law Enforcement Access to Third Party Records); Andrew E. Taslitz, *High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations*, 7 Nw. J.L. & Soc. POL'Y 400, 400 (2012) (relating to his work as Reporter for the Uniform Law Commission addressing videotaping confessions).

28. *Daredevil and the Death Penalty*, *supra* note 24, at 712.

29. RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 18, at vii. For other examples of Taz's abiding concern for fairness in his written work: See, e.g., Andrew E. Taslitz, *The People's Peremptory Challenge and Batson: Aiding the People's Voice and Vision Through the "Representative" Jury*, 97 IOWA L. REV. 1675, 1710–12 (2012); Andrew E. Taslitz, *The Criminal*

Taz: The Legal Academy's Happy (and Erudite) Warrior

the character traits of the sixth and seventh graders that they know will very often mark the adults that they one day will be. I can now offer Taz as a prime example, and hope that my kids turn out to be anything like the extraordinarily decent, intellectually curious, and eternally optimistic individual we knew our dear friend Andy to be.

Republic: Democratic Breakdown as a Cause of Mass Incarceration, 9 OHIO ST. J. CRIM. L. 133, 137 (2011); Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 15 (2003); Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257, 2261 (2002); *Fourth Amendment Federalism and the Silencing of the American Poor*, *supra* note 10, at 277, 311.

A Tribute to Andrew Eric Taslitz

NAREISSA SMITH*

Some people knew Professor Andrew Taslitz (“Taz”) as a teacher. Some knew him as a colleague. Some knew him as a mentor. Others simply knew him as a friend. I was fortunate to know him in all of these capacities.

I first met Professor Taslitz during my first year at Howard University School of Law. I had gone home over the break and a terrible winter storm delayed my return flight. At that time, Howard Law had a very strict attendance policy. First year students could not miss more than fifteen percent of the scheduled meetings in any course. I was afraid that the flight delay might cause me to come dangerously close to violating the attendance policy in all of my classes. I called Professor Taslitz, my Criminal Law professor. I asked him if he could excuse the absences. He politely – but firmly – stated that he could not. We chatted briefly. After the call ended, I thought, “That was the nicest ‘no’ I’ve ever gotten.” Little did I know that this conversation would be the beginning of a years-long relationship.

I eventually returned to Washington, D.C. I enjoyed Criminal Law very much. So much so, in fact, that in my second year, I made certain to enroll in his Criminal Procedure course. Taz was nothing short of an inspiring teacher. The first year can be frightening, but Taz had a way of helping us all to relax and more importantly, to learn. Years later, I was not shocked at all when he was selected as one of America’s best law teachers.¹

Taz was also a great mentor. In my first teaching job, I was an adjunct professor assigned to teach criminal procedure. I was terrified. But I had selected the Taslitz and Paris (now Taslitz, Paris, and

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1. In 2013, Professor Taslitz was named one of the 26 best law professors in the nation in “What the Best Law Teachers Do.” See Michael Hunter Schwartz et al., *What the Best Law Teachers Do* (2013).

Herbert) textbook. So, I called Taz whenever I needed help – which was often. He helped me with my syllabus. (He kindly pointed out that I'd forgotten to assign the supplemental readings.) He helped me figure out the best ways to present the information to my students. (Keep things short and simple.) We also had many conversations about the substantive doctrines of the Fourth, Fifth, and Sixth Amendments. (Taz was particularly patient when explaining standing to me.) Taz was gracious enough to guide me each time I taught Criminal Procedure over the years. In addition, he provided advice about my various career moves and surviving in academia.

A short time after completing my adjunct position, I returned to Howard to teach in the Legal Writing Program. As a colleague, Taz was a source of support and sage counsel. He often talked with me about how to be a good faculty member. In fact, while I was on the faculty at Howard Law, myself, Rhea Ballard-Thrower, Cheryl Nichols, Tamar Meekins and a few others decided to put together a group for junior faculty. We decided that we needed a patron. Taz was the obvious choice. He met with us and told us how he devised his scholarly agenda, how he planned his summers to maximize scholarly output, and so much more.

Finally, over the years, I got to know Taz as a friend. We had many conversations. He had the most wonderful, hearty laugh. As time passed and I began to attend academic conferences and events, invariably, the question, “And where did you attend law school?” was asked. When I told people that I went to Howard, many would ask if I knew Taz. Over the years, I got to see a pattern develop. No one ever had an unkind word to say about Taz. I ran into him at the Association of American Law Schools conference in San Diego. I spent some time sipping drinks and eating hors d'oeuvres with Taz and his wonderful wife, Ms. Patty Sun. At one point, I mentioned my observation that I'd never heard anyone say anything negative about him. He replied with characteristic modesty. But I told him that it was true, and that I'd been teaching long enough to know that there were very few people in academia about whom that could be said. (At this point, I believe Ms. Sun told me to stop lest the praise go to his head.) But it was true then and remains true now.

So, in the end, what do you say when you lose someone whose teaching, guidance, and friendship have meant so much to your personal and professional development? The initial response is anger. Anger at a world that could give such a brief time to such a great

A Tribute to Andrew Eric Taslitz

person. But upon reflection, rather than being angry for Taz's far too short time on this earth, I will instead choose to be grateful for the fates that decided that I should be placed into his first year section. Instead of railing against this outrageous fortune, I will instead strive to be eternally grateful that I got to be his student, mentee, colleague, and friend.

Thank you, Taz, for everything.

James Ryan Critique

MARIA BLAEUER*

First in a series of articles bringing additional scholarly attention¹ to the Individuals with Disabilities Education Act, or IDEA², James Ryan offers great insight to the origins and impact of IDEA's exclusionary clause in his article, *Poverty as Disability and the Future of Special Education Law*, published in the *Georgetown Law Journal*.³ He delves into the theoretical underpinnings of IDEA's definition of learning disability, describes the new insights offered by neuroscience, and explains the systemic challenges to achieving IDEA's goal of providing children with disabilities an appropriate education.⁴ He presents a compelling argument to remove the exclusionary clause from IDEA.⁵ In his final section, Ryan looks beyond the exclusionary clause and discusses other potential changes to IDEA that may be warranted by our newfound knowledge of neuroscience.⁶

The recommendation to remove the exclusionary clause from IDEA is based on a solid analysis of the purposes of the IDEA, combined with new knowledge about brain development and neuroscience. The major premise is clearly stated at the outset of the article

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1. As a practitioner, I am grateful for the additional scholarly attention these series of articles will bring to IDEA. However, the author asserts that IDEA has received relatively little attention from legal scholars, Ryan, *infra* note 3, at 1456, and does so without acknowledging the body of work done by scholars such as Perry Zirkel, Mark Weber, Robert Dinerstien, Joseph Tulman, and many others. This practitioner has found their work invaluable to her advocacy and wishes to place this article in the context of their work.

2. The Individuals with Disabilities Education Act, better known as IDEA, is codified at 20 U.S.C. §§ 1400–1491. It is the main federal law dealing with the education of children with disabilities. 20 U.S.C. § 1400.

3. See generally James E. Ryan, *Poverty as Disability and the Future of Special Education Law*, 101 GEO. L.J. 1455 (2013) (arguing that IDEA should not exclude “economic disadvantage as an eligible cause of a learning disability”).

4. *Id.*

5. *Id.* at 1457–58.

6. *Id.* at 1499–1503.

“The Article’s central contention is that this exclusionary clause, even if once justifiable, is no longer defensible given advances in neuroscience research that reveal the impact of poverty on cognitive development. In fact, the presumption that poor students are not learning disabled, as the statute suggests, may be exactly backwards.”⁷

SUMMARY

Ryan notes at the outset of the article that IDEA is the costliest and most important education statute in America.⁸ The article then provides a brief background of the IDEA and explains how the exclusionary clause grew out of a belief that a learning disability is something that is internal to the child and unexpected, consistent with the medical model of disability that runs throughout the IDEA.⁹ The article helpfully contextualizes this belief from IDEA’s precursor statute, the Education for All Handicapped Children Act or EHCA, to the present day.¹⁰ After establishing the intellectual origins of the concept of learning disability, the article then moves to how it has functioned across time, from the discrepancy model of learning disability to the Response to Intervention (RTI) model currently in fashion and contained in the most recent reauthorization of IDEA.¹¹

The sections on the discrepancy model and RTI are some of the strongest in the article, pointing out the problems of the discrepancy model and how it acted as a barrier to services for many students; it was also the section that rang truest to my experience as a practitioner. The article captured the fuzziness of much of the IDEA-mandated process; “[eligibility] is where things became murky because the process to determine the cause of the discrepancy was essentially one of elimination, based on the exclusionary factors. Students who had a discrepancy but also met one of the exclusionary criteria—like growing up in poverty—were not supposed to be eligible. The group that survived this inquiry consisted of students with learning problems that were not only *unexpected* and (presumably) *inherent* but also *inexplicable*. And that was the group considered learning disabled.”¹² Ryan notes the impact this had on poor children: “In effect, the law and

7. *Id.* at 1458.

8. *Id.* at 1456.

9. *Id.* at 1463.

10. *Id.* at 1460–61.

11. *Id.* at 1467–78.

12. *Id.* at 1469.

regulations created a presumption that poor children did *not* have a learning disability, and it was a difficult presumption to overcome.”¹³ This presumption continues under the RTI model,¹⁴ as the exclusionary clause remained part of the eligibility analysis.

After providing the legal and intellectual history the current framework schools are working in, the article shifts to a discussion of the neuroscience of poverty. One quote early in the section provides the reader with Ryan’s bottom line: “Growing up poor is bad for your brain.”¹⁵ As he did in the other sections, the article provides the reader with a solid historical grounding with which to consider the current research.¹⁶ As such, Ryan starts with the heritability of IQ and provides the reader with a well annotated outline of where the current research is, and the increasing role of genes on IQ as one moves up the income brackets: “For children from poorer homes, IQ seemed largely a function of SES [socio-economic status]. For children from more affluent homes, genes seemed to play the dominant role.”¹⁷ The article details the research done by Martha Farrah and others at the Center for Cognitive Neuroscience at the University of Pennsylvania looking at the correlations between SES and specific cognitive functions.¹⁸ They found that SES was correlated with “consistent and significant disparities in the cognitive systems needed for language development, working memory, memory, and executive function.”¹⁹ The article then moves on to *how* poverty might change the brains of children who experience it.

The portion of that article that details the mechanics of how poverty changes the brain begins with a reference to Darwin and quickly moves to modern animal studies that demonstrate that there are two environmental factors that strongly influence brain development—stress and environmental complexity.²⁰ Ryan then quickly moves the reader to human studies, which show that “children with poor lan-

13. *Id.* at 1470.

14. *Id.* at 1477.

15. *Id.* at 1481 (citing Richard Monastersky, *Researchers Probe How Poverty Harms Children’s Brains*, CHRON. HIGHER EDUC., Feb. 29, 2008, at A8 (quoting neuroscientist Martha Farah)).

16. *Id.* at 1479–81.

17. *Id.* at 1482.

18. *Id.* at 1483–84.

19. *Id.* at 1484 (citing Martha J. Farah, Kimberly G. Noble & Hallam Hurt, *Poverty Privilege, and Brain Development: Empirical Findings and Ethical Implications*, in *NEUROETHICS: DEFINING THE ISSUES IN THEORY, PRACTICE, AND POLICY* 277, 279, 283 (Judy Iles ed., 2006)).

20. *Id.* at 1485 (citing Martha J. Farah et al., *Childhood Poverty: Specific Associations with Neurocognitive Development*, 1110 *BRAIN RES.* 166, 169 (2006)).

guage abilities were more likely to come from homes lacking stimulation, regardless of how nurturing they were. By contrast children with poor memory skills were more likely to come from homes lacking nurturing, regardless of how stimulating.”²¹ He also details the role stress plays on working memory by reporting on a longitudinal study looking at working memory and the stress, which shows that poverty, experienced as chronic stress, adversely affects a major cognitive function, in this case, working memory.²² The article then moves from this correlation to brain imaging, which the article points out is just in its infancy as a field.²³ However, this does not stop Ryan from explaining to the reader where this science can take us and what it might mean for special education.²⁴ Ryan argues that new information from neuroscience will do away with the concept of the “slow learner.”²⁵ The so-called slow learner is the student who has no particular, identifiable cognitive or processing deficiency, thus they are not eligible for special education, no matter how much they may benefit from it.²⁶ He argues that developments in brain imaging may soon make it clear that the slow learner has specific brain dysfunctions and therefore, is eligible for Special Education as a student with a learning disability,²⁷ which leads to the crux of the article, as the IDEA has long recognized that there is no difference between disability one is born with (i.e. the slow learner) and one that is obtained (by exposure to pov-

21. *Id.* at 1486 (citing Farah et al., *supra* note 19).

22. *Id.* at 1487 (citing Brandon Keim, *Poverty Goes Straight to the Brain*, WIRED SCI., Mar. 30, 2009, available at <http://wired.com/wiredscience/2009/03/poordevelopment>; Gary W. Evans & Michelle A. Schamberg, *Childhood Poverty, Chronic Stress, and Adult Working Memory*, 106 PROC. NAT'L ACAD. SCI. 6545, 6548 (2009)).

23. *Id.* at 1488–90.

24. *Id.* at 1491, 1497.

25. *Id.* at 1498.

26. *Id.* at 1499. I read this section with great interest, as the so-called slow learner presents a re-occurring challenge to special education attorneys and advocates. These students may benefit immensely from special education's instructional techniques and individualized attention, but because of how the IDEA and implementing regulations are structured, they frequently do not qualify as students with disabilities.

27. “Neuroscience has thus advanced to the point where it is possible to go beyond the conclusion that a particular student is slow all around. A closer look can indicate relative deficits and strengths, which in turn can be linked to internal, neurobiological sources. With these advances, it becomes harder to sustain the idea that some students are simply slow learners and others have a specific learning disability. . . . Indeed, the concept of a ‘slow learner’ is already falling out of favor among neuroscientists, who find little reason to distinguish between students with expected learning problems—‘slow learners’—and those whose problems are unexpected. As explained by one group of researchers, ‘[t]he notion that expected and unexpected low achievement reflects variation in cognitive and behavioral correlates, prognosis, response to instruction, or even a broad range of neurobiological factors, does not have strong validity.’” *Id.* at 1498 (citations omitted).

erty).²⁸ Therefore, there is no reason to keep the exclusionary clause in light of what we know about brain development and poverty. If poverty can and does change the brains of children who experience it, which the science compellingly demonstrates it does, then the exclusionary clause is simply indefensible and must be removed from the IDEA.

Ryan then goes on to discuss the financial and administrative burden that such a change would place on school districts, and the very real possibility that due, in-part to the process-orientation of IDEA, it would result in no better outcomes for the very students such a such would be intended to help.²⁹

CRITIQUE

Ryan's recommendation to remove the exclusionary clause from IDEA is by far the most developed recommendation in the article; therefore, my critique of the piece will focus on this recommendation. To restate, "the Article's central contention is that this exclusionary clause, even if once justifiable, is no longer defensible given advances in neuroscience research that reveal the impact of poverty on cognitive development. In fact, the presumption that poor students are not learning disabled, as the statute suggests, may be exactly backwards."³⁰ Ryan provides strong arguments in favor of this change, however, at no point does the article discuss the impact of such a change on the low-income communities of color it is most likely to impact. Fundamentally, removing the exclusionary clause from the IDEA pathologizes differences that children of poverty experience, rendering what is currently considered "normal," a disability, by forcing the label of disability on differences that children of poverty experience. This further marginalizes an already disempowered group. The article's failure to discuss what removing the exclusionary clause means for the communities it is most likely to impact is a serious omission that merits further scholarship by those who work with and care about those communities.

As a practitioner of Special Education Law primarily in a large urban school district, my first reading of this piece was overwhelmingly positive. I was excited to see that IDEA was commanding addi-

28. *See id.* at 1457-58.

29. *Id.* at 1496.

30. *Id.* at 1458.

tional scholarly attention, and thankful that there was a nexus between my practice and the subject of the article. The majority of my clients were low-income students of color in Washington, D.C., a jurisdiction that has struggled to serve students with disabilities for decades.³¹ My colleagues and I had often wondered if our low-income clients were testing as learning disabled (and to a lesser extent attention deficit/hyperactive) *because* they were poor. It was gratifying to know that our clients did not just ‘test’ as learning disabled, but that there potentially were real neurological differences underneath those test scores. However, upon further reflection, it became clear to me that there was a serious omission in Ryan’s work: the impact of this proposed change on the communities affected. The work could have been strengthened by a discussion of what the removal of the exclusionary clause means for the communities it will impact, like the community I represented—poor children of color in urban schools.

In theory, removing the exclusionary clause from IDEA means that more poor children will receive needed specialized instruction and related services, and that as a result, those children will have better outcomes. However, the data consistently indicate that students with disabilities have *poorer outcomes* than their non-disabled peers,³² and that little benefit comes from the potentially stigmatizing label of learning disabled, despite the fact that there is no reason why students with learning disabilities should not be achieving at the same levels as their nondisabled peers.³³ Therefore, removing the exclusionary clause from IDEA *will not mean* measurably better outcomes for the students who would now be able to receive services under IDEA, which significantly undermines the article’s implicit argument that this change would benefit low-income students.

31. See, e.g., *Petties v. District of Columbia*, 662 F.3d 564 (D.C. Cir. 2011); *D.L. v. District of Columbia*, 274 F.R.D. 320 (D.D.C. 2011); *Blackman v. District of Columbia*, 328 F. Supp. 2d 36 (D.D.C. 2004).

32. For example, the drop-out rate for students with disabilities is twice the rate of non-disabled students. DAVID R. JOHNSON ET AL., NAT’L CTR. ON EDUC. OUTCOMES, DIPLOMA OPTIONS, GRADUATION REQUIREMENTS, AND EXIT EXAMS FOR YOUTH WITH DISABILITIES: 2011 NATIONAL STUDY (TECHNICAL REPORT 62), at 3–4 (2012), available at <http://www.cehd.umn.edu/NCEO/onlinepubs/Tech62/TechnicalReport62.pdf>.

33. MARTHA L. THURLOW ET AL., NAT’L CTR. ON EDUC. OUTCOMES, MEETING THE NEEDS OF SPECIAL EDUCATION STUDENTS: RECOMMENDATIONS FOR THE RACE TO THE TOP CONSORTIA AND STATES 5–6 (2011) (“The vast majority of special education students (80-85 percent) can meet the same achievement standards as other students if they are given specially designed instruction, appropriate access, supports, and accommodations, as required by IDEA.”).

The article acknowledges, early on, the “fairly wide gap between the law on the books, and the law in action,”³⁴ but does not return to this gap as a problem when discussing what IDEA, without the exclusionary clause, would look like in schools, especially in urban school districts. The article also acknowledges (and undermines in the same sentence)³⁵ something that I have found to be true in my practice: the race of the student is relevant when the team is to determine if the student is eligible for special education as a student with a disability, and under what classification. To have something I have seen in operation dismissed out of hand was frustrating, especially when disproportionate identification³⁶ and discipline³⁷ of children of color are documented problems in our schools. Even more troubling to me however, was that Ryan’s article failed to address the impact of this change on children, families, and communities. For example, the article never discusses what it means to presume that low-income children of color who struggle academically are disabled, when this presumption has obvious implications for the identity and agency of those children, their families, and communities. This presumption could further marginalize a community that already feels disconnected from educational institutions. Poor children of color may struggle in school for many reasons, and they labor against entrenched stereotypes about themselves, their families, and their communities, that rob them of agency in their own lives. Before adding a presumption that poor children who struggle academically are also disabled, which is what the article advocates for, there needs to be a serious conversation about whether or not that presumption will help those children, those fami-

34. Ryan, *supra* note 3, at 1456.

35. “There is some anecdotal evidence, as well as some passing references by researchers, that poor students were less likely than middle-income or affluent students to be classified as learning disabled. One researcher, for example, asserted in a 1988 article that ‘children from lower SES levels with LD-type behaviors have little chance of receiving LD diagnosis and treatment but an increased likelihood of being labeled retarded.’ Others have suggested, again without much hard data, that the LD category functioned as a way to offer a nonstigmatic label to white, middle-income students who were struggling in school, while poor students were more likely to be labeled as retarded or emotionally disturbed.” *Id.* at 1470–71.

36. See, e.g., Julie Bollmer, James Bethel, Roberta Garrison-Mogren & Marsha Brauen, *Using the Risk Ratio to Assess Racial/Ethnic Disproportionality in Special Education at the School-District Level*, 41 J. SPEC. EDUC. 186, 186 (2007); Martha J. Coutinho & Donald P. Oswald, *State Variation in Gender Disproportionality in Special Education: Findings and Recommendations*, 26 REMEDIAL AND SPECIAL EDUCATION 7, 7 (2005).

37. See, e.g., Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, 2003 NEW DIRECTIONS FOR YOUTH DEV. 9; see also *School-to-Prison Pipeline*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/school-prison-pipeline> (last visited Feb. 12, 2015); *School-to-Prison Pipeline*, ADVANCEMENT PROJECT, http://b3cdn.net/advancement/a6feca50e851bccdd3_eam6y96th.pdf (last visited Feb. 12, 2015).

lies, and that community, and if those families and that community *want* that label. Without that conversation, we risk putting another label on an already “othered” community, rendering them even more the “other.” That this article never attempts to have that conversation is troubling and is a significant gap in an otherwise excellent article.

CONCLUSION

This is a well-written, detailed piece of forward-looking scholarship that helps the reader see what IDEA may become in the future. It places both the IDEA and the relevant neuroscience in proper historical context and carefully explains how we got to where we are in special education. The article crafts a compelling argument for removing the exclusionary clause from IDEA. However, despite all this care and attention to detail, the voices of the communities most affected by this proposed change are not heard in this article. Were the changes in the law that the article advocates for to take place, and the exclusionary clause removed from IDEA, possibly every low achieving poor child could be presumed disabled. This has serious implication for communities like the one my practice is focused on, Washington, D.C., and yet at no time in the article are those concerns discussed or even mentioned. This is a serious omission that additional scholarship is needed to address.

COMMENT

Quiet Sabotage of the Queer Child: Why the Law Must Be Reframed to Appreciate the Dangers of Outing Gay Youth

AISHA SCHAFER*

“If I didn’t define myself for myself, I would be crunched into other people’s fantasies for me and eaten alive.”

—Audre Lorde

INTRODUCTION

Sebastian is dating a boy at school. The boys are sixteen-year-old high school juniors who play baseball together on the varsity team. The pair began dating in their sophomore year of high school after meeting during team tryouts. Sebastian and his boyfriend are both open about their relationship at school, but neither boy has told his parents about the relationship. The two feel more comfortable expressing their affection for one another within the walls of their high school than in any other place. The boys know that their families would not be accepting of their relationship.

* J.D. Candidate, Howard University School of Law, Class of 2015; Senior Notes & Comments Editor, *Howard Law Journal*, Vol. 58; B.A., The George Washington University, 2012. I want to first thank my mother and father for their selfless dedication to my learning and education in and beyond the classroom. I thank my mother for teaching me to be brave, and to stand up, and speak in the face of injustice. I thank my father for encouraging me to explore the world around me with curiosity, and without quick judgment. A warm thank you to my faculty advisor Professor Josephine Ross for challenging and expanding my intellectual creativity—your guidance was priceless. I dedicate this Comment with endless love to the most vulnerable within the LGBT community—the youth.

One day during baseball practice, the varsity coach observed Sebastian and his boyfriend kissing in the locker room. The coach told the boys that he did not want that type of behavior between players on his team. That night, the coach called Sebastian's parents and informed them that he had seen Sebastian kissing another boy on the team.

Sebastian had never told his parents that he was romantically involved with another boy. He simply was not ready for them to know that he was gay. Sebastian was not even sure if he really was gay—he had dated girls in the past—but he did know that he had strong feelings for his boyfriend. Sebastian's parents had no idea that Sebastian liked boys, let alone that he was engaging in same-sex sexual conduct with one, until the day his baseball coach called.

Outing¹ a teenager can have more serious consequences than is commonly understood. One out of two lesbian, gay, or bisexual (LGB) youth will receive a negative reaction from their parents when they come out of the closet.² Statistics show that LGB youth who experience family rejection are more likely to be depressed, abuse drugs and alcohol, engage in risky sexual behavior, become homeless, and attempt suicide.³ Lack of family support leads LGB youth to being eight times more likely to attempt suicide, six times more likely to suffer from severe depression, and three times more likely to use illegal substances or engage in unprotected sex.⁴

1. *Glossary of Terms*, HUMAN RIGHTS CAMPAIGN, available at <http://www.hrc.org/resources/entry/glossary-of-terms> (last visited Mar. 29, 2015); see also Kathleen Guzman, *About Outing: Public Discourse, Private Lives*, 73 WASH. U. L.Q. 1531, 1531 (1995). The term "outing" describes the act of disclosing a person's same-sex sexual orientation without that person's consent.

2. Andrew Cray, *3 Barriers that Stand Between LGBT Youth and Healthier Futures*, CENTER FOR AM. PROGRESS (May 29, 2013), <http://www.americanprogress.org/issues/lgbt/news/2013/05/29/64583/3-barriers-that-stand-between-lgbt-youth-and-healthier-futures/>.

3. *Id.*

4. *Id.* A 15-year old boy from Jackson, Mississippi wrote the following letter about his experiences with rejection as a consequence of being outed:

If you refuse [to help] me, all I will have left is suicide. I am a gay teen. When my friends found out, they all disowned me. Some even come together to beat me up. I am not afraid or ashamed to say that I have never hurt or cried as much as I am doing right now. I am so alone. Even my father will have nothing to do with me. My mother does not know, and I plan to keep it like that for as long as I can. Right now she is the only person talking to me. You guys are my only hope. I beg of you to help.

Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy that Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 272 (1996).

Quiet Sabotage of the Queer Child

Today, the gay community as a whole commonly uses LGBT as an acronym to describe itself.⁵ The term LGBT encompasses a variety of sexual identities, including lesbian, gay, bisexual, and transgender.⁶ While that term applies to many discussions of sexual orientation and gender identity, this article narrowly focuses upon lesbian, gay, and bisexual issues of sexual orientation and identity.⁷ This Comment will use the terms “gay” or “LGB” to refer to individuals with a “self-acknowledged tendency toward same-sex sexual interactions.”⁸ This is not to minimize those with bisexual tendencies or identity, but for the purposes of highlighting issues surrounding same-sex attraction, this Comment will interchangeably use the terms “gay” or “LGB.”⁹

This Comment argues that school codes which give school officials the discretion to disclose a student’s LGB identity—to justify disciplinary action taken against that student—unjustifiably intrude on the student’s privacy interest in their sexual identity or orientation.¹⁰ Admittedly, it is appropriate for schools to have some degree of authority to limit affectionate and sexual conduct between students on school property. Schools have a justifiable right to effect disciplinary action against a student that engages in impermissible affectionate conduct. The core problem examined here is rooted in the manner in which schools implement their disciplinary action against LGB students with little regard to the unique privacy interests they have in protecting information about their sexual orientation. When school discipline intrudes upon private matters exclusively tied to LGB identity, unique problems can arise. A new paradigm is needed to restrain

5. *Glossary of Terms*, HUMAN RIGHTS CAMPAIGN, available at <http://www.hrc.org/resources/entry/glossary-of-terms> (last visited Mar. 29, 2015).

6. *Id.*

7. Courtney Weiner, Note, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV. 189, 192 (2005). The issues examined in this Comment focus upon the unconsented disclosure of one’s sexual orientation, as distinct from issues of gender identity or expression. As Weiner notes, “[g]ender refers to one’s social identity as related (or not related) to one’s sex” while “[s]exual orientation refers to sexual attraction to members of one or both . . . sexes.” The cases illustrated in this Comment speak to the latter.

8. *Id.*

9. *Id.* The term “gay” was chosen to serve as an inclusive term, encompassing any person with a self-acknowledged attraction to persons of the same sex.

10. See generally MICHELLE A. MARZULLO & ALYN J. LIBMAN, HUMAN RIGHTS CAMPAIGN FOUND., RESEARCH OVERVIEW: HATE CRIMES AND VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE 2 (2009) (providing “an overview of research about [LGB] hate crimes [and discussing] best reporting practices for law enforcement agencies . . .”).

school discretion in order to prevent the disclosure of a student's LGB identity without her consent.

School administrators argue that school codes require them to provide the parents of suspended students an explanation of why discipline was imposed.¹¹ The United States District Court, Central District of California agrees, stating that there is a "legitimate reason to provide facts which go beyond an abstract description of the conduct warranting the discipline."¹² Administrators claim that in order to provide the factual context surrounding the offending conduct, they must be permitted to disclose certain illustrative facts, even if those facts permit an inference of a student's sexual orientation.¹³ Yet, it is wholly inadequate for a school to justify the forced disclosure of a student's LGB identity to a parent by stating that as a matter of enforcing school policy, the LGB student was treated equally to a straight student engaging in similar conduct.¹⁴ Statistical data shows that LGB students often face disparate consequences for such disclosures even if treated equally in accordance with school policy.¹⁵

The argument for heightened protection of LGB minors' informational privacy in their sexual orientation and identity proceeds in four parts. Part I will discuss the consequences of outing considering the particular vulnerabilities of minors. Part II critically examines the current U.S. legal framework shaping the treatment and protection of LGB minors' privacy interests in their sexual orientation and identity. Part III argues that school officials' discretion to effectively out LGB students not only intrudes upon those students' privacy interests, but also endangers them by failing to consider their family structure. Lastly, Part IV will propose that in applying the balancing test, courts should not turn their decisions upon the question of whether a school

11. See *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1194 (C.D. Cal. 2007); see also CAL. ED. CODE § 48911(d).

12. *Nguon*, 517 F. Supp. 2d at 1194.

13. See *Id.*

14. Adam J. Kretz, *The Right to Sexual Orientation Privacy: Strengthening Protection for Minors Who Are "Outed" in Schools*, 42 J.L. & EDUC. 381, 400 (2013) ("In *Nguon* . . . there was no evidence that Principal Wolf acted out of malice toward Charlene due to her sexual orientation. Quite the opposite—the court found that Wolf was similarly diligent in disciplining heterosexual students for public displays of affection that violated school policy, and that he had sought advice from the school's legal counsel to ensure that he was not treating Charlene and Trang differently due to their orientation. *Nguon's* suit, then, sought redress not because she was maliciously treated, but rather under the theory that outing, whether actual . . . or constructive . . . was a *per se* violation of her privacy rights.").

15. See Sarah E. Valentine, *Traditional Advocacy for Nontraditional Youth: Rethinking Best Interest for the Queer Child*, 2008 MICH. ST. L. REV. 1053, 1076–77.

has imposed disparate treatment onto a LGB student in enforcing school policy against public displays of affection. Instead, courts should focus on the disparate impact that full disclosure of impermissible affectionate activity, including the sex of the student's romantic partner, imposes upon LGB students. As a result of this proposed shift in perspective, courts should prohibit school codes that give school officials the discretion to decide whether to disclose information concerning a student's sexual orientation to her parents or guardian without her consent. Courts should reframe their application of balancing tests, which weigh the respective interests of states and students, to give greater weight and consideration to the privacy interests of LGB minor students.

I. OUTING: THE PARTICULAR VULNERABILITIES OF THE MINOR CHILD INTRODUCTION

LGB minors are particularly vulnerable to the negative consequences that can arise from the forced disclosure of their sexual orientation or identity.¹⁶ "Outing," as a term, conceptualizes the act of disclosing an individual's same-sex sexual orientation or identity without that individual's consent.¹⁷ The act of outing can occur within a variety of contexts: it can be facilitated by state¹⁸ or private¹⁹ actors, and can function as retaliatory, informational, or anything in between.²⁰ Current privacy law precedent grants outed adults with

16. See generally Caitlan M. Cullitan, *Please Don't Tell My Mom! A Minor's Right to Informational Privacy*, 40 J.L. & EDUC. 417, 432 (2011) ("Minors are 'affected acutely by the threat of disclosure of their personal matters,' as fears of disclosure may prevent them from seeking medical attention or expressing themselves. This acute impact that the threat of disclosure has on minors is due, in part, to their particular vulnerabilities, and these vulnerabilities demonstrate a need for greater protection of children's informational privacy." A study by the Williams Institute showed that forty percent of homeless youth identify as LGBTQ and that family rejection is the leading cause of their homelessness. Zack Ford, *STUDY: 40 Percent of Homeless Youth Are LGBT, Family Rejection Is Leading Cause*, THINKPROGRESS (July 12, 2012, 4:39 PM), <http://thinkprogress.org/lgbt/2012/07/12/515641/study-40-percent-of-homeless-youth-are-lgbt-family-rejection-is-leading-cause/>; see also Susanne M. Stronski Huwiler & Gary Remafedi, *Adolescent Homosexuality*, 33 REV. JUR. U. INTER. P.R. 151, 152 (1999) ("Sexual orientation refers to the persistent pattern of physical and/or emotional attraction to members of the same or opposite sex and encompasses the different dimensions of sexual fantasy, emotional attraction, sexual behavior, self-identification, and cultural affiliation, which may not be congruent in each individual. *Homosexuality* specifically relates to a persistent pattern of same-sex arousal accompanied by weak or absent heterosexual arousal, and *bisexuality* refers to attractions to both genders.").

17. See Guzman, *supra* note 1, at 1531.

18. See Cullitan, *supra* note 16, at 419.

19. See Guzman, *supra* note 1, at 1536; Maureen O'Connor, *The Tragic Story of Tyler Clementi, Rutgers' Webcam Voyeurism Victim*, GAWKER (Sept. 29, 2010), <http://gawker.com/5651367/the-tragic-story-of-tyler-clementi-rutgers-webcam-voyeurism-victim>.

20. Kretz, *supra* note 14, at 382.

greater protections than it affords LGB minors, who are offered only inconsistent and varying degrees of protection.²¹ In large part, the reduction of legal protections for LGB minors' rights results from the broader failure of American culture and society to recognize LGB sexual orientations as legitimate prior to one's arrival into adulthood.²²

A. Arguments in Favor of Outing

Outing LGB youth has been the preferred response in certain instances. In 2011, school officials from Utah defended their decision to out a student to his parents based on a desire to protect him from bullying.²³ The fourteen-year-old student at Willowcreek Middle School in Lehi, Utah, was assigned a school project in which he was to advertise something about himself; several days later, he came to school with a poster that declared he was gay.²⁴ The fourteen-year-old asked his teacher to display his project in plain view alongside the others.²⁵ After the boy's project was displayed, school officials became worried that he might be targeted for bullying due to negative comments they overheard in the hallway.²⁶ The school district's spokeswoman stated that, "If there is the potential for a bullying or a harassment situation, it's the responsibility of the school to step in and to make sure the student is safe."²⁷ Guided by a concern for student safety, the assistant principal decided that it was important to inform the boy's parents that he might be bullied.²⁸ The student "reluctantly" agreed to allow school officials to contact his parents after he was approached by school officials. The officials expressed their concerns about harassment and bullying from other students, because the boy had come out as gay.²⁹ The boy's father defended the school's deci-

21. *See id.* at 393, 396.

22. "Like the courts described below, Ingram claims that she is not anti-gay but is merely trying to protect the best interests of children, and, like the courts, she relies on the assumption that homosexuals are 'adult people,' thereby creating a dichotomy between 'children' and 'homosexuals.' In order to maintain that the interests of children and homosexuals are necessarily opposed, she turns the two groups into mutually exclusive categories." Ruskola, *supra* note 4, at 298.

23. *See* Staff Reports, *Utah School Defends 'Outing' Student to Parents, Citing Potential for Bullying*, LGBTQ NATION (Dec. 14, 2011), <http://lgbtqnation.com/2011/12/utah-school-defends-outing-student-to-parents-citing-potential-for-bullying/>.

24. *See id.*

25. Kretz, *supra* note 14, at 381.

26. Staff Reports, *supra* note 23.

27. *Id.*

28. *Id.*

29. *See id.*

Quiet Sabotage of the Queer Child

sion to reach out, stating that “[t]he administration handled everything just fine False [w]e didn’t have any problems with what they did.”³⁰

Despite the father’s endorsement of the school’s actions, it was notably his son’s privacy, and not his own, that was at stake. In response to the incident at Willowcreek, Eliza Byard, Executive Director of the Gay, Lesbian & Straight Education Network, publicly stated that outing a student “violates their right to privacy” and could “compromise their safety.”³¹ In her statement, Byard highlighted the core problem with outing students: “Taking away the choice for a LGBT student to come out on their own terms opens the door to significant risks including harassment at school and family rejection.”³² Although the school asserted a justifiable interest in the boy’s safety, the trouble with the school’s course of action is that it presumed that the boy’s family would respond to the disclosure of their son’s sexual orientation in a manner that would prioritize the youth’s safety interests. The school failed to consider the fact that many parents initially react to learning that their child is gay in a hostile manner.³³ By failing to realize that many families react negatively,³⁴ the school failed to recognize and appreciate the risk of family rejection and residual consequences.

Some within the gay community advocate outing anti-gay public figures in order to expose the hypocrisy of their homophobia.³⁵ Many question this line of thinking, because even when outing is used as a tool to undermine adversaries of the gay community, it still is an act that intrudes upon an individual’s interest in privacy.³⁶ Those in favor of this practice justify outing by arguing that increased visibility of LGB people is vital to restructuring common beliefs about people

30. Christina Ng, *Utah Family Supports School that Outed Gay Son*, ABC NEWS (Dec. 15, 2011), <http://abcnews.go.com/US/utah-family-supports-school-outed-gay-son/story?id=15162006>.

31. *Id.*

32. *Id.*

33. See Ruskola, *supra* note 4, at 308 (“Another counselor ‘helped’ a gay boy by reporting his sexual orientation to his parents, who then forced him to leave home.”).

34. *Id.*

35. *Disgraced Pastor Haggard Admits Second Relationship with Man*, CNN (Jan. 30, 2009), http://www.cnn.com/2009/US/01/29/1kl.ted.haggard/index.html?eref=in_us. Evangelical Pastor Ted Haggard was first publicly outed by a prostitute in 2006, who said the pastor had paid him for sex over three years. The claims made by the prostitute triggered widespread news coverage and controversy, particularly because Haggard had routinely condemned homosexual sex as a pastor.

36. Guzman, *supra* note 1, at 1536–37.

with same-sex attractions.³⁷ Opponents of outing counter that an individual's privacy rights should never be intruded upon by the forced exposure of an individual's sexual identity in a public forum regardless of the objectives pursued.³⁸ Even those who advocate outing as a tool for increased visibility, readily recognize the particular vulnerabilities that youth face when their LGB orientation or identity is forcibly disclosed.³⁹

B. One Severe Consequence of Forcibly Outing Youth

Gay youth attempt suicide at higher rates than their heterosexual counterparts.⁴⁰ The disclosure of sexual orientation to family and friends has been identified as a suicide risk factor that uniquely endangers young LGB people.⁴¹ Pediatrician Gary Remafedi, of the University of Minnesota, emphasizes that “[t]he youths who are at the greatest risk for suicide are the ones who are the least likely to reveal their sexual orientation to anyone.”⁴² One recent incident affirms Dr. Remafedi's observation and provides a shocking example of the risk of suicide among gay youth.⁴³

In September 2010, the suicide of eighteen-year-old Rutgers University freshman Tyler Clementi pushed the dangers of outing to the forefront of public discussion.⁴⁴ After discovering that his roommate had secretly used a webcam to live stream his romantic encounter with another man, Tyler committed suicide by jumping off the George

37. *See id.* at 1535–36.

38. *See id.* at 1536–37.

39. *See id.*; *see also* Ruskola, *supra* note 4, at 325–26 (“Indeed, where the law is as indeterminate as ‘the best interests of the child,’ the only thing we need to change is our vision of the child and her good. We must be more visible as gay and lesbian adults and never cease to remind the world of its neglect of gay and lesbian children. . . . By default, the protection of gay children is the work of gay adults. No one else is going to do it, for no one ever has.”).

40. Am. Ass'n of Suicidology, *Suicidal Behavior Among Lesbian, Gay, Bisexual, and Transgender Youth Fact Sheet*, <http://www.suicidology.org/Portals/14/docs/Resources/FactSheets/LGBTSuicidalBehavior.pdf> (last visited Sept. 29, 2013).

41. Andrew Roffman, *Gay, Lesbian and Bisexual Teens: Facing Challenges and Building Resilience*, THE CHILD STUDY CENTER, http://www.aboutourkids.org/articles/gay_lesbian_bisexual_teens_facing_challenges_building_resilience (last updated Nov. 2010).

42. Ruskola, *supra* note 4, at 271.

43. *See* Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES (Sept. 29, 2010), http://www.nytimes.com/2010/09/30/nyregion/30suicide.html?pagewanted=all&_r=0.

44. Richard Pérez-Peña, *More Complex Picture Emerges in Rutgers Student's Suicide*, N.Y. TIMES (Aug. 12, 2011), http://www.nytimes.com/2011/08/13/nyregion/with-tyler-clementi-suicide-more-complex-picture-emerges.html?_r=0.

Washington Bridge.⁴⁵ Dharun Ravi, Tyler's roommate, had spied on him, displayed his private affairs across the Internet, and Tweeted messages encouraging others to watch him "making out with a dude."⁴⁶ Dharun was ultimately convicted for invasion of privacy and sentenced to thirty days in jail.⁴⁷ The facts surrounding Tyler's death drew heightened media attention toward the suicide risks associated with the forced disclosure of LGB youths' sexual identity.⁴⁸

A school's decision to out a LGB student to her parents creates a similar risk of suicide and other harmful consequences, because it exposes private information related to sexual identity without the consent of the student.

II. JURISPRUDENCE GOVERNING LGBTQ PRIVACY INTERESTS

At present, privacy law affecting LGB adults and children is rife with inconsistencies due to the Supreme Court's failure to clearly articulate the extent of constitutional privacy protection afforded to an individual's personal information.⁴⁹ The federal circuits adhere their decisions to the principle that the right of informational privacy "is a conditional right which may be infringed upon a showing of proper governmental interest."⁵⁰ As of yet, that principle has not been applied in a way that clearly defines LGB minor's right to informational privacy in their sexual identity. Historically, courts have been hesitant to fully recognize the privacy interests of both the LGB community⁵¹ and youth⁵² as distinct classes. As a result, LGB minors, who are posi-

45. Kate Zernike, *After Gay Son's Suicide, Mother Finds Blame in Herself and in Her Church*, N.Y. TIMES (Aug. 24, 2012), <http://www.nytimes.com/2012/08/25/nyregion/after-tyler-clementis-suicide-his-parents-make-painful-changes-in-the-search-for-why.html?ref=tyler-clementi>.

46. O'Connor, *supra* note 19; *see also* Zernike, *supra* note 45.

47. Michael Koenigs, Candace Smith & Christina Ng, *Rutgers Trial: Dharun Ravi Sentenced to 30 Days in Jail*, ABC NEWS (May 21, 2012), <http://abcnews.go.com/US/rutgers-trial-dharun-ravi-sentenced-30-days-jail/story?id=16394014>.

48. Pérez-Peña, *supra* note 44.

49. *Davis v. Bucher*, 853 F.2d 718, 719 (9th Cir. 1988) ("[The informational privacy right] has been infrequently examined; as a result its contours remain less than clear."); *see also* Kretz, *supra* note 14, at 394–95.

50. Kretz, *supra* note 14, at 394–95.

51. *See* *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (holding that a Texas statute that made it a crime for two people of the same sex to engage in certain sexual conduct violated the Due Process Clause); *Bowers v. Hardwick*, 478 U.S. 186, 186 (1986) (holding that a Georgia statute that made it a crime for two people of the same sex to engage in certain sexual conduct was constitutional under the Due Process Clause).

52. *Nguon*, 517 F. Supp. 2d at 1195 (holding that the school principal did not violate the student's First Amendment right to privacy by disclosing the student's sexual orientation to her

tioned at the intersection of these two groups, are consistently disfavored in court when asserting a claim against a school for violating their right to informational privacy—the extent of which remains ambiguous.⁵³

A. Origins of the Right to Privacy

The right to privacy is not easily defined.⁵⁴ The United States Constitution, unlike some state constitutions,⁵⁵ does not explicitly provide enumeration, definition, or parameters to articulate which protections the right to privacy affords.⁵⁶ Nevertheless, privacy jurisprudence suggests that the right is centered upon several concepts: the right to be let alone,⁵⁷ the right to make personal decisions without government interference,⁵⁸ and the right to have personal information remain confidential unless one consents to the disclosure.⁵⁹ In laying the foundation for the right to privacy, the Supreme Court first recognized that the Constitution protects rights beyond those specifically enumerated.⁶⁰ The Court then moved forward to draw the

mother without her consent); *Wyatt v. Fletcher*, 718 F.3d 496, 509–10 (5th Cir. 2013) (holding that the minor student did not have a clearly established privacy right under the Fourteenth Amendment that barred school officials from disclosing her sexual orientation to her parent).

53. See, e.g., *Lawrence*, 539 U.S. at 562; *Bowers*, 478 U.S. at 186; *Nguon*, 517 F. Supp. 2d at 1195; *Wyatt*, 718 F.3d at 509–10.

54. See Anne C. Hydorn, *Does the Constitutional Right to Privacy Protect Forced Disclosure of Sexual Orientation?*, 30 HASTINGS CONST. L.Q. 237, 240 (2003); Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1337; Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

55. See, e.g., CAL CONST. art. I, § 1; FLA. CONST. art. I, § 23; see also Edward Stein, *Introducing Lawrence v. Texas: Some Background and a Glimpse of the Future*, 10 CARDOZO WOMEN'S L.J. 263, 263 (2004).

56. Hydorn, *supra* note 54, at 241; see also Jack Hirshleifer, *Privacy: Its Origin, Function, and Future*, in PRIVACY VOLUME I: THE CONCEPT OF PRIVACY 649 (Raymond Wacks ed., 1993) (“privacy is a concept that might be described as autonomy within society”) (emphasis in original); G. Sidney Buchanan, *The Right of Privacy: Past, Present, and Future*, 16 OHIO N.U. L. REV. 403, 507–08 (1989) (defining the right to privacy as a subset of the liberty interests expressly protected by the due process clauses of the Constitution); Lois Shepherd, *Looking Forward with the Right of Privacy*, 49 U. KAN. L. REV. 251, 251 (2001) (“[I]f the question seeks an answer to what the right of privacy means today, any answer still hazards a guess.”).

57. See *Bowers*, 478 U.S. at 199 (Blackman, J. dissenting); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); Hydorn, *supra* note 54, at 240.

58. See *Bowers*, 478 U.S. at 204–05 (Blackman, J. dissenting); *Whalen v. Roe*, 429 U.S. 589, 598–600 (1977); *Roe v. Wade*, 410 U.S. 113, 153 (1973); Hydorn, *supra* note 54, at 240–41.

59. See *Sterling v. Borough of Minersville*, 232 F.3d 190, 195 (3d Cir. 2000); *Gruenke v. Seip*, 225 F.3d 290, 303 (3d Cir. 2000); *Doe v. Southeastern Penn. Transp. Auth.*, 72 F.3d 1133, 1141 (3d Cir. 1995); *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 110 (3d Cir. 1987); *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980); Hydorn, *supra* note 54, at 241.

60. *Griswold v. Connecticut*, 381 U.S. 479 (1965); see Hydorn, *supra* note 54, at 241; see also Buchanan, *supra* note 56, at 404–05.

limits of the right to privacy from a broader understanding of the rights protected under the Constitution.⁶¹

B. *Griswold v. Connecticut*⁶²

Modern-day privacy jurisprudence evolved from judicial affirmation of the public's perception that there should only be limited government interference in the sexual relations between married individuals.⁶³ It began in 1965 with *Griswold v. Connecticut*, where the United States Supreme Court announced for the first time that privacy is a fundamental right and a guaranteed protection under the Constitution.⁶⁴ The *Griswold* decision, which invalidated a law banning the use of birth control,⁶⁵ marked the conception of the Supreme Court's right to privacy doctrine.⁶⁶ In *Griswold*, the Court struck down the challenged law on grounds that it violated married couples' right to privacy.⁶⁷ Various justices found constitutional authority for a privacy right within the "penumbras" and "emanations" of the Bill of Rights,⁶⁸ the Ninth Amendment's reservation of fundamental rights beyond those enumerated,⁶⁹ or as implied within the liberty interests protected by the Constitution.⁷⁰ In his concurring opinion, Justice Goldberg explained that there are fundamental rights protected by the Constitution that are neither enumerated nor explicitly guaranteed in the Bill of Rights.⁷¹ He cited the Ninth Amendment to support the inclusion of the right to privacy in jurisprudential understanding of constitutionally protected fundamental rights:

To hold that a right so basic and fundamental and so deeprooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight

61. See *Whalen*, 429 U.S. at 598 n.23 (explaining how privacy rights were originally justified based upon the compilation of various provisions of the Bill of Rights); *Roe*, 410 U.S. at 153 (expressing the opinion that the "right of privacy" is founded in the Fourteenth Amendment's concept of personal liberty); Stein, *supra* note 55, at 263–64.

62. See *Griswold*, 381 U.S. at 488–89.

63. *Id.* at 485.

64. See *Griswold*, 381 U.S. at 485; Hydorn, *supra* note 54, at 241.

65. *Griswold*, 381 U.S. at 485; Stein, *supra* note 55, at 264.

66. Hydorn, *supra* note 54, at 242; see also *Griswold*, 381 U.S. at 485.

67. *Griswold*, 381 U.S. at 479; Stein, *supra* note 55, at 264.

68. See *Griswold*, 381 U.S. at 484–85; Stein, *supra* note 55, at 264.

69. *Griswold*, 381 U.S. at 486–87 (Goldberg, J., concurring); Stein, *supra* note 55, at 264.

70. *Griswold*, 381 U.S. at 500 (Harlan, J., concurring); see also *id.* at 502 (White, J., concurring); Stein, *supra* note 55, at 264.

71. *Griswold*, 381 U.S. at 491 (Goldberg, J., concurring); see also David Helscher, *Griswold v. Connecticut and the Unenumerated Right of Privacy*, 15 N. ILL. U. L. REV. 33, 37 (1994).

amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.⁷²

Although the *Griswold* decision was centered upon the right of privacy in marital relations, its precedent suggested to some, a greater willingness of the Court to limit government intrusions into the intimate affairs of adults on a broader scale.⁷³ Gay rights advocates of the *Griswold* era anticipated that privacy arguments stemming from the 1965 decision would ultimately expand to encompass the right of adults to engage in consensual sexual activities with adults of the same sex.⁷⁴

C. From *Bowers* to *Lawrence*

By 1986, the Supreme Court had directly addressed privacy issues related to government intrusion into the sexual lives of LGB people. In *Bowers v. Hardwick*, the Court upheld a Georgia state statute that criminalized adults who engaged in consensual sexual conduct with adults of the same sex.⁷⁵ The majority rejected the theory that the constitutional right to privacy established that “any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription.”⁷⁶ The Court narrowly identified the pertinent question to be whether “the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy”⁷⁷ Under this narrow framing of the issue, the Court held that there was no fundamental right conferred upon “homosexuals to engage in acts of sodomy,”⁷⁸ because the privacy right articulated in earlier cases, such as *Griswold*, only applied when there was some connection with the sexual conduct at issue to “family, marriage, or procreation”—none of which the Court perceived as applicable to gays.⁷⁹

Seventeen years later, in *Lawrence v. Texas*, the Supreme Court overruled its *Bowers* decision, which upheld Georgia’s statutory criminalization of consensual same sex sexual conduct.⁸⁰ In Septem-

72. *Griswold*, 381 U.S. at 491 (Goldberg, J., concurring); see also Helscher, *supra* note 71, at 37–38.

73. See *Griswold*, 381 U.S. at 485; see also Stein, *supra* note 55, at 264.

74. Stein, *supra* note 55, at 264; see also WALTER BARNETT, *SEXUAL FREEDOM AND THE CONSTITUTION* 52–73 (1973).

75. See *Bowers*, 478 U.S. at 189.

76. *Bowers*, 478 U.S. at 191; see also Stein, *supra* note 55, at 265.

77. *Bowers*, 478 U.S. at 190.

78. *Id.* at 189–90.

79. See *id.* at 191; Stein, *supra* note 55, at 264–65.

80. See *Lawrence*, 539 U.S. at 560.

ber of 1998, John Geddes Lawrence and Tyron Gardner were arrested for engaging in anal sex in Lawrence's home.⁸¹ The two were prosecuted and convicted under Texas' Homosexual Conduct Law.⁸² When the men brought suit challenging their convictions before the Supreme Court, the questions presented were: (1) whether the Texas law denied the plaintiffs' equal protection; (2) whether the law violated their right to privacy; and (3) whether the Court's decision in *Bowers* should be overruled.⁸³ Justice Kennedy noted in his opinion that although judicial considerations of history and tradition are the starting point in the substantive due process inquiry, they are not the end point in all cases.⁸⁴ Writing for the Court, Justice Kennedy centered his *Lawrence* opinion on liberty grounds under the Due Process Clause:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.⁸⁵

Ultimately, the Supreme Court in *Lawrence* held that the challenged Texas state statute—criminalizing consensual adult same sex sodomy—unconstitutionally violated the Due Process Clause of the Fourteenth Amendment.⁸⁶

D. Equal Protection

Post-*Bowers*, advocates and theorists of gay rights began to shift their litigation strategy away from privacy arguments under *Griswold*, toward claims brought under the Equal Protection Clause of the Four-

81. *Lawrence*, 539 U.S. at 562–63; see also Stein, *supra* note 55, at 272.

82. *Lawrence*, 539 U.S. at 563.

83. *Id.* at 564; see also Stein, *supra* note 55, at 272–73.

84. In support of its narrow framing of the liberty claim presented before it, the *Bowers* Court stated that anti-sodomy laws have “ancient roots.” However, there is no longstanding history of targeting same sex sexual conduct in this country. The core purpose of early American sodomy laws was to prohibit nonprocreative sexual activity, regardless of the sex of the participants. Laws targeting same-sex couples did not arise in the U.S. until the latter third of the 20th century. *Lawrence*, 539 U.S. at 559.

85. *Id.* at 562.

86. *Id.* at 578.

teenth Amendment.⁸⁷ The strategic focus moved away from challenging “act-based laws”—like the anti-sodomy statute at issue in *Lawrence*—toward expanding laws designed to protect classified identities—such as pushing amendments to include protections against sexual orientation discrimination.⁸⁸

Efforts under the Equal Protection Clause have been frustrated by the Supreme Court’s refusal to recognize sexual orientation as a suspect classification deserving of heightened scrutiny in judicial review of discriminatory laws.⁸⁹ LGB people are denied heightened protection from discriminatory laws despite the applicability of factors to be considered when determining “whether more than a mere rational basis is required to evaluate the constitutionality of a statute that invokes a classification.”⁹⁰ The factors to consider “include whether the classification has historically been used to intentionally discriminate against a particular group,⁹¹ whether the use of this classification bears any ‘relation to ability to perform or contribute to society,’⁹² whether any groups demarcated by this classification lack the political power to combat the discrimination,⁹³ and whether groups demarcated by this classification exhibit obvious, immutable or distinguishing characteristics that define them as a discreet and insular group.”⁹⁴ Although the Court has never ruled that sexual orientation is a suspect classification, in *Romer v. Evans*, the majority found, under rational basis review, that an amendment to a state constitution

87. See Stein, *supra* note 55, at 266, 268; See generally Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993) This article discusses the ways in which judicial affirmations of anti-sodomy statutes reduced gay identity to the sexual act of sodomy, and consequently, criminalized “gay” as an identity.

88. See *Lawrence*, 539 U.S. at 578; see generally Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993) (“Sodomy statutes maintain themselves in part by their equivocal reference to identities *and/or* acts. The duality of the sodomy statutes—sometimes an index of identity, sometimes an index of acts—is a rhetorical mechanism in the subordination of homosexual identity and the superordination of heterosexual identity. Designating homosexual identity as the personal manifestation of sodomy confirms its subordination. At the same time, the ways in which homosexual identity is *not* sodomy are subject to an organized forgetting. And heterosexual identity becomes superordinate not because it is absolutely immune, but because it is *intermittently and provisionally* immune from regulation under the sodomy statutes.”)

89. See Stein, *supra* note 55, at 268.

90. Stein, *supra* note 55, at 267; see also *Frontiero v. Richardson*, 411 U.S. 677, 684–86 (1973).

91. Stein, *supra* note 55, at 267; see also *Frontiero*, 411 U.S. at 684–86.

92. Stein, *supra* note 55, at 267; see *Frontiero*, 411 U.S. at 686.

93. Stein, *supra* note 55, at 267; see *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 445 (1985).

94. Stein, *supra* note 55, at 267; see also *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

violated the Equal Protection Clause, because it prohibited any state action to protect LGB citizens from discrimination.⁹⁵

In a concurring opinion to *Lawrence*, Justice O'Connor distinguished herself from the majority, by grounding her vote to overrule *Bowers* in the Fourteenth Amendment's Equal Protection Clause.⁹⁶ Justice O'Connor framed the issue in *Lawrence* to be "whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy."⁹⁷ In her Equal Protection analysis, Justice O'Connor applied the rational basis standard of review, citing that "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."⁹⁸ In a review of the Court's prior applications of the rational basis standard, Justice O'Connor stated: "We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships."⁹⁹ In *Lawrence*, Justice O'Connor found that the Texas statute was unconstitutional because (1) it "treat[ed] the same conduct differently based solely on the participants" and, (2) same sex participants were held in violation of the state law, whereas different sex participants were not.¹⁰⁰ Other Supreme Court decisions, which invalidated laws driven by animus against gays, rested upon reasoning analogous to Justice O'Connor's in *Lawrence*.¹⁰¹

E. Informational Privacy Interests of LGBTQ Minors

By invalidating the sodomy statute in *Lawrence*, the Supreme Court took a step toward advancing gay rights—affirming the right of all adults, regardless of sexual orientation, to engage in intimate acts free from discriminatory government intrusion.¹⁰² Yet, it remains unclear whether minors possess the right to protect information concerning their sexual identities from being disclosed by state actors. Federal circuit courts are split in their approach to cases that raise this

95. *Romer v. Evans*, 517 U.S. 620, 635 (1996); see also Stein, *supra* note 55, at 268.

96. *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring).

97. *Id.* at 582.

98. *Id.* at 579 (quoting *City of Cleburne*, 473 U.S. at 440); see also *Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

99. *Lawrence*, 539 U.S. at 580.

100. *Id.* at 581, 585.

101. See, e.g., *Romer*, 517 U.S. at 632.

102. See *Lawrence*, 539 U.S. at 578.

question.¹⁰³ A lack of Supreme Court precedent on the issue has led to inconsistencies in lower courts' analytical approaches.¹⁰⁴

Only three circuits—the Third, Ninth, and Tenth—have directly addressed the question of minors' right to informational privacy.¹⁰⁵ The Supreme Court has left the circuit courts with the task of drawing the lines that shape the informational privacy rights afforded to children.¹⁰⁶ Throughout the circuits, all courts agree that “the right of informational privacy ‘is not absolute; rather, it is a conditional right which may be infringed upon a showing of proper governmental interest.’”¹⁰⁷ The 1977 case *Whalen v. Roe*¹⁰⁸ provided that there are two distinct types of privacy interests protected respectively by two prongs of informational privacy.¹⁰⁹ The first is the “individual interest in avoiding disclosure of personal matters” and the second is the “interest in independence in making certain kinds of important decisions.”¹¹⁰ *Whalen*'s two prongs of informational privacy merge in the case of an outed LGB youth.¹¹¹ Under the first prong, the LGB person has an “individual interest in avoiding disclosure of personal matters” of sexual orientation. The second *Whalen* prong outlines a youth's “interest in independence in making . . . important decisions” regarding the circumstances of her coming out as an LGB-identified person.¹¹² In effect, *Whalen* provides that two distinct interests in informational privacy are violated when a third party forcibly discloses an LGB youth's sexual orientation to others.¹¹³

103. Cullitan, *supra* note 16, at 427–28.

104. *See, e.g., Nguon*, 517 F. Supp. 2d at 1195; *Wyatt*, 718 F.3d at 510. In *Nguon*, the district court recognized that the minor had a First Amendment privacy right in her sexual identity, but found that the school principal had not violated that right. In *Wyatt*, the Fifth Circuit ruled that no Supreme Court precedent provided that a student had a right to prevent school officials from discussing her sexuality with her parents.

105. *See Anderson v. Blake*, 469 F. 3d 910, 914 (10th Cir. 2006); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 179 (3d Cir. 2005); *Planned Parenthood of Idaho v. Wasden*, 376 F. 3d 908, 922 (9th Cir. 2004); *see also Kretz, supra* note 14, at 396.

106. *Id.* at 394–95.

107. *Id.* (quoting *Doe v. Attorney General*, 941 F.2d 780, 796 (9th Cir. 1991)).

108. 429 U.S. 589 (1977).

109. *See Whalen v. Roe*, 429 U.S. 589, 599–600 (1977); *see also Kretz, supra* note 14, at 392.

110. *Whalen*, 429 U.S. at 599–600.

111. *Id.*

112. *Id.*

113. *Id.*

F. The Third and Ninth Circuits Application of the *Westinghouse* Balancing Test

The Third and Ninth Circuits have applied the *Westinghouse* balancing test to analyze privacy violation claims brought by minors.¹¹⁴ Both circuits evaluate minors' informational privacy rights under this balancing test, which lists seven factors to be considered "when a person's informational privacy has been intruded upon, including the type of information being sought and 'the potential for harm in any subsequent nonconsensual disclosure.'"¹¹⁵

There are two key issues that arise when the question presented before a court concerns a minor's right to retain privacy over his or her sexual orientation.¹¹⁶ Adam Kretz articulated the court's inquiry to be two-fold: "(1) does the minor have a protected privacy right in his or her sexual orientation, and (2) how should the courts appropriately define 'proper governmental interest.'"¹¹⁷ *Nguon v. Wolf* was one of the most seminal cases decided on the issue of minors' informational privacy in their sexual orientation.¹¹⁸ The state court, under the jurisdiction of the Ninth Circuit, held that minors have a constitutionally protected privacy interest in their sexual orientation, and examined the limits of that interest in the context of a public school.¹¹⁹ Two critical errors in *Nguon* were the court's "near-complete deference to school officials who have made the decision to out a student," and broad definition of "the state's interest in ways that allow principals, teachers, and other school officials to out students to family members"¹²⁰

In *Nguon*, a school official outed a minor student to her mother while describing acts by the minor which were prohibited by school policy.¹²¹ The description was given to the mother in order to provide a factual context to support the school's decision to suspend her

114. Kretz, *supra* note 14, at 396.

115. *Id.* "The factors which should be considered in deciding whether an intrusion into an individual's privacy is justified are the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access." *Westinghouse*, 638 F.2d at 578.

116. Kretz, *supra* note 14, at 397.

117. *Id.*

118. *Nguon*, 517 F. Supp. 2d at 1196; Kretz, *supra* note 14, at 397.

119. *Nguon*, 517 F. Supp. 2d at 1196; Kretz, *supra* note 14, at 397.

120. Kretz, *supra* note 14, at 397-98.

121. *Nguon*, 517 F. Supp. 2d at 1192.

child.¹²² Seventeen-year-old Charlene Nguon was suspended for violating her high school's policy against inappropriate displays of affection.¹²³ When she was suspended, the principal told Charlene's mother that the other student that Charlene had been caught kissing at school was a girl. Charlene's mother had not inquired about this detailed information, and Charlene had not consented to it being disclosed.¹²⁴ The principal considered the sex of the other student to be relevant to his decision to suspend her, even though the school's ban on public displays of affection applied equally to different-sex and same-sex couples.¹²⁵ Before the principal's conversation with her mother, Charlene had not told her that she was in a romantic relationship with another girl.¹²⁶

At least one circuit court has upheld a school official's decision to out a student, even though the disclosure appeared to be retaliatory in nature.¹²⁷ In *Wyatt v. Fletcher*, school officials retaliated against a minor student by disclosing information regarding her same-sex orientation to her mother without her consent.¹²⁸ S.W. was a sixteen-year-old student and softball player at Kilgore High School in Texas.¹²⁹ S.W. had told only a few friends that she was gay and was involved in a relationship with eighteen-year-old Hillary Nutt, an ex-girlfriend of one of S.W.'s softball coaches.¹³⁰ Upon hearing rumors that S.W. was in a relationship with Nutt, softball coaches Cassandra Newell and Rhonda Fletcher locked S.W. in the locker room to interrogate her about "her relationship with Nutt, her sexual orientation, and whether she had told anyone about Newell's alleged relationship with Nutt."¹³¹ The two coaches subsequently arranged a meeting with S.W.'s mother during which they disclosed to her that S.W. was having a sexual relationship with another girl.¹³² Prior to that meeting, S.W.'s mother had no previous knowledge that S.W. identified as gay or had any romantic attractions to the same sex.¹³³

122. *Id.*

123. *Id.* at 1191; *see also* Cullitan, *supra* note 16, at 417.

124. *Id.*

125. *See id.*

126. *See id.*

127. *Wyatt*, 718 F.3d at 510 & 515 (Graves, J., dissenting).

128. *See id.* at 510–11, 515 (Graves, J., dissenting).

129. *Id.* at 510.

130. *Id.* at 510–11.

131. *Id.*

132. *Id.* at 511.

133. *Id.*

Quiet Sabotage of the Queer Child

In both *Nguon* and *Wyatt*, the courts found the schools' disclosure of a minor student's LGB orientation to their parents to be constitutionally permissible.¹³⁴ The district court in *Nguon* applied a balancing test to weigh Charlene's interests in keeping her sexual orientation private, against the school's interest in disclosing such information to her mother.¹³⁵ In granting summary judgment against Charlene, the district court held that although Charlene did have a constitutionally protected privacy right over information related to her sexual orientation,¹³⁶ the school principal had a more compelling state interest in informing Charlene's mother of the exact nature of Charlene's impermissible conduct; even if such facts would provide a basis for Charlene's mother to infer her sexual orientation.¹³⁷ In contrast to *Wyatt*, in *Nguon*, there was no evidence that the school official had acted out of malice when he outed Charlene.¹³⁸ The court found that the principal was equally diligent in disciplining both straight and gay students for violating school policies against public displays of affection.¹³⁹ Retracting from the holding in *Nguon*, the Fifth Circuit in *Wyatt* held that sixteen-year-old S.W. did not have a clearly established privacy right that barred her school softball coaches from discussing private matters concerning her sexual activity with her parents, regardless of their motive.¹⁴⁰

The Fifth Circuit failed to protect the privacy rights of LGB youth by refusing to recognize S.W.'s right to privacy in information regarding her sexual orientation.¹⁴¹ This decision established a regressive precedent with potentially dangerous consequences. Ideally, courts should weigh the following three factors when deciding on the extent of protection to be afforded to a minor's right of privacy: (1) identity formation; (2) LGBTQ minors' particular privacy interests; and (3)

134. *Nguon*, 517 F. Supp. 2d at 1195; *Wyatt*, 718 F.3d at 510.

135. *Nguon*, 517 F. Supp. 2d at 1194–95; see Kretz, *supra* note 14, at 402; see also *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999); cf. *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981) (“An intrusion into the interest in avoiding disclosure of personal information will thus only be upheld when the government demonstrates a legitimate state interest which is found to outweigh the threat to the plaintiff's privacy interest.”).

136. Kretz, *supra* note 14, at 401 (citing *Nguon*, 517 F. Supp. 2d at 1195).

137. CAL. EDUC. CODE § 48911(d); see *Nguon*, 517 F. Supp. 2d at 1194 (“[T]he statute does not describe what must be disclosed and in what detail.”). The statute at issue gave school officials the authority to use their discretion to disclose to parents the factual circumstances giving rise to disciplinary action taken against the student. See also Kretz, *supra* note 14, at 403.

138. Kretz, *supra* note 14, at 400 (citing *Nguon*, 517 F. Supp. 2d at 1185–87).

139. *Id.* (citing *Nguon*, 517 F. Supp. 2d at 1185–87).

140. *Id.*

141. *Wyatt v. Fletcher*, 718 F.3d 496, 510 (5th Cir. 2013)

the consequences of outing youth. In *Wyatt*, the Fifth Circuit neglected to consider the unique challenges that LGB minors face during the process of identity formation that occurs in the adolescent years.¹⁴² The *Wyatt* court categorically neglected to identify and discuss the particular reasons that a youth might aim to keep certain information surrounding their same-sex sexual orientation or identity private from their parents.¹⁴³ Consequently, the Fifth Circuit's ruling has left hundreds of LGB minors, who attend public schools in their jurisdiction, exposed to forced outing and a consequential increased risk of familial rejection, depression, substance abuse, homelessness, and suicide.¹⁴⁴ The Fifth Circuit's ruling reflects a broader failure of the circuit courts to adequately recognize and address the harmful consequences that LGB youth face when outed.¹⁴⁵

III. ARGUMENT: HEIGHTENED PROTECTION FOR LGBTQ MINORS

Two, four, six, eight!

What makes you think your kids are straight?

—Gay and lesbian youth in Chicago¹⁴⁶

Minors' rights to informational privacy should be protected under the law, in light of the particular vulnerabilities imposed upon gay youth when facts providing a basis to infer their sexual orientation are disclosed to their parent or guardian without their consent.

A. Process of Identity Formation in LGBTQ Youth

Identity formation is the process in which an adolescent begins to define her adult self by shaping a particular set of beliefs, goals, preferences and values by which she will live.¹⁴⁷ Throughout this process

142. See James E. Marcia, *Identity in Adolescence*, in HANDBOOK OF ADOLESCENT PSYCHOLOGY 159 (Joseph Adelson ed., 1980); Cullitan, *supra* note 16, at 435–36; Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 318 (2007).

143. See generally *Wyatt*, 718 F.3d 496 (failing to recognize a privacy right that protects minor students' from the unconsented disclosure of information regarding their sexual identity to their parents).

144. See Cullitan, *supra* note 16, at 440; Guzman, *supra* note 1, at 1593.

145. See *Anderson*, 469 F. 3d at 914; *Ridgewood Bd. of Educ.*, 430 F.3d at 179; *Wasden*, 376 F. 3d at 922; see also Cullitan, *supra* note 16, at 427. The standards that have emerged from the only three circuit courts to directly address the issue of minors' right to informational privacy have routinely been applied to favor government interests over minors' interests.

146. Ruskola, *supra* note 4, at 319 (citation omitted).

147. See Emily Buss, *The Adolescent's Stake in the Allocation of Educational Control Between Parent and State*, 67 U. CHI. L. REV. 1233, 1234; Cullitan, *supra* note 16, at 432–33.

a minor's identity is fluid and likely to be influenced¹⁴⁸ by various circumstances, people, and experiences.¹⁴⁹ The ability to remain fluid during the exploratory process of identity formation is a critical component to an adolescent's health and wellbeing.¹⁵⁰ Identity theorists that have examined the development of a minor's sexual identity recognize that sexual identity is fluid and malleable throughout an adolescent's development.¹⁵¹ Throughout her development, an adolescent's health and wellbeing is vulnerable to harm and destruction if the identity formation process is disrupted by shame and humiliation¹⁵² that targets a particular identity she holds. The process of adolescent identity formation has a lasting and dramatic affect on one's life.¹⁵³ Informational privacy is fundamental to identity formation among LGB youth, because it shields the LGB child from the public disclosure and potential disruption of her evolving identity.¹⁵⁴

Throughout the process of identity formation, each adolescent—straight, gay, and everything in between—battle with pressures to assimilate to social expectations.¹⁵⁵ Each youth must contemplate the adult that she ultimately wishes to be, as she considers and selects those social expectations to which she will conform, and those that she will reject. Early in a child's life, the state, through the public school system, imposes upon children a variety of demands to assimilate.¹⁵⁶

Recognizing the harm that can result from such imposition, Professor Holning Lau poses the following question: "How should the law protect children from harmful assimilation demands?"¹⁵⁷ Lau responds by proposing a two-prong pluralism principle to be applied in children's rights jurisprudence.¹⁵⁸ The first prong states "the government must avoid socialization policies that undermine children's ability to develop and express their identities."¹⁵⁹ Still, the second prong

148. Cullitan, *supra* note 16, at 433; Helen L. Gilbert, *Minors' Constitutional Right to Informational Privacy*, 74 U. CHI. L. REV. 1375, 1401 (2007).

149. See Huwiler & Remafedi, *supra* note 16, at 160.

150. See Cullitan, *supra* note 16, at 432–33 ("[I]dentity formation is most intense during adolescence.").

151. See Cullitan, *supra* note 16, at 436.

152. See *id.* at 433; Lau, *supra* note 142, at 330.

153. See Cullitan, *supra* note 16, at 433; Lau, *supra* note 142, at 329–31 (citing ERIK H. ERIKSON, *IDENTITY AND THE LIFE CYCLE* (W.W. Norton & Co. 1980) (1959)).

154. See Cullitan, *supra* note 16, at 434; Ken D. Kumayama, *A Right to Pseudonymity*, 51 ARIZ. L. REV. 427, 438 (2009).

155. Lau, *supra* note 142, at 335.

156. *Id.*

157. *Id.*

158. *Id.* at 335–36.

159. *Id.*

permits the government to justify a policy that effectively undermines a child's autonomy over her identity by "showing that protecting a child's exercise of identity interests would generate cognizable harm to the child herself or to others."¹⁶⁰

Legal scholar Kenji Yoshino's writings on assimilation underscore the notable harm that can result from the failure to protect even an adult's exercise of identity. Yoshino observes that gay employees are implicitly ordered to assimilate to a heterosexual norm, when their employer requires them to hide their same-sex relationships for business or other purposes.¹⁶¹ Lau molds the context of Yoshino's argument to consider the impact of assimilation demands on children: "What happens when we shift the focus from the office to the schoolhouse? Is it equally, less, or more troubling when a public high school punishes students who openly display same-sex affection and threatens to out those students to their parents?"¹⁶² Lau proposes that pluralism principles offer a uniform solution that addresses the inconsistencies arising from the varied responses to these questions.¹⁶³

B. Disruption of LGB Youth's Identity Formation

Sex and gender identity remain fluid in children and many teens throughout their identity formation process.¹⁶⁴ A forced disclosure of a youth's same sex attractions, while the youth is still exploring their sexual identity, can increase the disruptive impact of assimilation demands upon the youth's identity formation.¹⁶⁵ Pediatricians Susanne M. Stronski Huwiler and Gary Remafedi explain that the "coming out" process is a gradual progression, and "careful decisions and timing are critical to the outcome."¹⁶⁶ "Coming out" is understood to be a gradual process for both children and adults.¹⁶⁷ Premature disclosure of a child's same-sex orientation can create heightened risks for

160. *Id.*

161. *Id.* at 318; see KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 27 (2006).

162. Lau, *supra* note 142, at 318; see generally *C.N. v. Wolf*, 410 F. Supp. 2d 894 (C.D. Cal 2005) (a high school disciplined a lesbian student for being affectionate with her girlfriend and outed the student to her parents, even though the school allegedly never punished opposite-sex couples for similar conduct).

163. Lau, *supra* note 142, at 321–22.

164. See Cullitan, *supra* note 16, at 436; Ian Rivers & Daniel J. Carragher, *Social-Developmental Factors Affecting Lesbian and Gay Youth: A Review of Cross-National Research Findings*, 17 CHILD. & SOC'Y 374, 382 (2003).

165. See Cullitan, *supra* note 16, at 436–37; Hydorn, *supra* note 54, at 254.

166. See Cullitan, *supra* note 16, at 436–37; Huwiler & Remafedi, *supra* note 16, at 160–61.

167. See Cullitan, *supra* note 16, at 436–37.

Quiet Sabotage of the Queer Child

that child. Identity disruption, caused by the premature or forced disclosure of a same-sex orientation, threatens the psychological well-being of a child.¹⁶⁸ This risk is amplified when the disruption occurs within the familial context.¹⁶⁹ Studies show that minors are extremely vulnerable to heightened family conflict when their sexual orientation is disclosed to their family without their prior consent.¹⁷⁰

Throughout the fluid process of identity formation, an adolescent who is exploring same-sex attractions is faced with the challenge of deciding to whom, if anyone at all, to disclose her developing sexual identity.¹⁷¹ A forced “disclosure” creates the risk of disrupting the youth’s identity formation. Identity formation can be disrupted by a forced disclosure which imposes upon the youth a label regarding her sexual identity before she has had the opportunity to fully explore and develop it. Premature labeling of the youth’s sexual identity intrudes on the youth’s process of self-identification by imposing a label upon her sexual orientation as it has been externally perceived.¹⁷²

Studies conducted by the American Medical Association show that: “[m]ost of the emotional disturbance experienced by gay men and lesbians around their sexual identity is . . . due False to a sense of alienation in an unaccepting environment.”¹⁷³ The disclosure of an individual’s sexual identity, without her consent, is particularly distressing when that individual is a youth.¹⁷⁴ Experts stress that the “coming out” process is a gradual progression and that any premature disclosure can create drastic turmoil in the youth’s life.¹⁷⁵ Pediatrician Gary Remafedi notes that, “The youths who are at the greatest risk for suicide are the ones who are the least likely to reveal their sexual orientation to anyone.”¹⁷⁶

168. *See id.*; Huwiler & Remafedi, *supra* note 16, at 154 (“Despite the likelihood that sexual orientation is established by birth or early childhood, uncertainty about sexual orientation might persist through the teen years, thus complicating attempts to measure its prevalence.”).

169. *See* Cullitan, *supra* note 16, at 436–37; Huwiler & Remafedi, *supra* note 16, at 154 (“Despite the likelihood that sexual orientation is established by birth or early childhood, uncertainty about sexual orientation might persist through the teen years, thus complicating attempts to measure its prevalence.”).

170. *See* Cullitan, *supra* note 16, at 437.

171. *See id.* at 436; Lau, *supra* note 142, at 371.

172. Huwiler & Remafedi, *supra* note 16, at 160–61.

173. HUMAN RIGHTS CAMPAIGN, A RESOURCE GUIDE TO COMING OUT FOR AFRICAN AMERICANS 7 (2013), available at <http://www.hrc.org/resources/entry/resource-guide-to-coming-out-for-african-americans>.

174. *See* Cullitan, *supra* note 16, at 436–37; Hydorn *supra* note 54, at 253–54.

175. *See* Cullitan, *supra* note 16 at 436; Huwiler & Remafedi, *supra* note 16, at 160.

176. Ruskola, *supra* note 4, at 271; Huwiler & Remafedi, *supra* note 16, at 164.

The Fifth Circuit failed to consider the supported fact that “coming out” is a gradual progression and that “careful decisions and timing are critical to the outcome.”¹⁷⁷ In response to 16-year old S.W.’s assertion that the forced disclosure of her sexuality violated her constitutional right to privacy, the Fifth Circuit stated that it had to first consider whether “the right purportedly violated is clearly established.”¹⁷⁸ The Fifth Circuit placed great significance on the fact that the recipient of the disclosed information was S.W.’s mother. The circuit court asked whether “S.W. has a constitutional right to the confidentiality—even with respect to her mother—of her own sexual orientation False”¹⁷⁹ The Fifth Circuit refused to hold that S.W. had such a right to privacy, in large part due to the fact that the disclosure was made to S.W.’s mother. Underscoring its own reasoning, the court commented: “it is appropriate to point out that the ‘disclosure’ here was only to the student’s mother.”¹⁸⁰ The court accordingly held that there was no “clearly established Fourteenth Amendment privacy right that prohibits school officials from communicating to parents information regarding minor students’ interests, even when private matters of sex are involved.”¹⁸¹

C. Diminishing Children’s Interests in Favor of Parental Rights

The Fifth Circuit arrived to its conclusion in *Wyatt* by finding the parent’s interest in being informed to be more decisive than the child’s interest in maintaining privacy regarding her sexual identity. The Fifth Circuit rejected S.W.’s claim that children should have the right to keep their sexual orientation private and away from their parents; “Under *Wyatt*’s theory, S.W. has a constitutional right to the confidentiality—even with respect to her mother—of her own sexual orientation.”¹⁸² The Fifth Circuit’s language suggests that a parent’s interest in knowing their child’s sexual orientation is greater than the child’s interest in having autonomy over that identity.

This understanding of the competing interests rests upon a presumption that parents will act in the best interest of their child. This presumption is particularly weak when applied to a LGB child, whose

177. Huwiler & Remafedi, *supra* note 16, at 160.
178. *Wyatt v. Fletcher*, 718 F.3d 496, 504–05 (5th Cir. 2013).
179. *Id.* at 504–05.
180. *Id.* at 508.
181. *Id.* at 508.
182. *Id.* at 504–05 (emphasis added).

Quiet Sabotage of the Queer Child

parents may be persuaded by an objective to suppress or change their child's sexual identity in order to satisfy hetero-normative prejudices.¹⁸³ Even still, this wavering presumption is pervasively applied throughout the body of common law governing parent-child relationships.¹⁸⁴

Courts across the United States have consistently decided cases based upon the presumption that a parent's preferences are, in fact, in the child's best interests.¹⁸⁵ The Supreme Court has supported this presumption by declaring that the "natural bonds of affection lead parents to act in the best interests of that child."¹⁸⁶ One justification for the Court's standardized approach to complex matters in family law is that "procedure by presumption is always cheaper and easier than individualized determination."¹⁸⁷ This approach ignores the fact that in many instances a parent's actions in regard to her child are "patently irrational, abusive, or worse."¹⁸⁸ Although parents rightfully possess certain fundamental rights in controlling the custody and care of their children, these rights can be detrimental when they conflict with what is truly in the child's best interest.¹⁸⁹

The tension between a parent's fundamental right to control their children and a minor child's right to make a private decision regarding her body was disputed in *Planned Parenthood of Central Missouri v. Danforth*.¹⁹⁰ The statute at issue provided that a pregnant minor could not proceed with her decision to have an abortion without first receiving parental consent.¹⁹¹ The Court invalidated the statute reasoning that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision" of the pregnant minor.¹⁹² The *Danforth* decision rejected the state's asserted interest in the promotion of parental authority and

183. Kretz, *supra* note 14, at 412.

184. James A. Cosby, How Parents and Children "Disappear" in Our Courts - and Why It Need Not Ever Happen Again, 53 CLEV. ST. L. REV. 285, 295 (2006); Barbara Jones, Do Siblings Possess Constitutional Rights?, 78 CORNELL L. REV. 1187 (1993).

185. Cosby, *supra* note 179, at 296-97.

186. See *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (quoting *Parham v. J.R.*, 442 U.S. 548, 602 (1979)).

187. See *Stanley v. Illinois*, 405 U.S. 645, 657 (1972); see also Cosby, *supra* note 179, at 297.

188. Cosby, *supra* note 179, at 301. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

189. Francis B. McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 1006 (1988); Allison M. Brumley, Comment, *Parental Control of a Minor's Right to Sue in Federal Court*, 58 U. CHI. L. REV. 333, 354 (1991).

190. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 52 (1976).

191. *Id.* at 74

192. *Id.* at 74

held that the parental interest in a child's decision-making is at most equal to the minor's right to privacy.¹⁹³ In reaching its decision, the Court announced that the parents' fundamental right to raise their children does not outweigh the child's fundamental right to privacy.¹⁹⁴ *Danforth* has been cited to support the conclusion that parental rights do not retain their fundamental status when asserted against a child's right to privacy.¹⁹⁵

Following in step with circuit courts across the country, the Fifth Circuit has blindly presumed that parents will act in the best interest of their children, even when faced with decisions involving a child's same-sex orientation.¹⁹⁶ When considering questions of minors' constitutional right to informational privacy, courts often assume that parents are entitled to information regarding their children, even if that information is so sensitive that the child wishes to keep it confidential.¹⁹⁷ The Supreme Court has explicitly stated that: "It is the Court's belief that the parental role implies a substantial measure of authority over one's children."¹⁹⁸ As previously mentioned, "[t]his presumption is particularly questionable in the area of sexual orientation, as data denote that parents often take action adverse to the interests of the minor when confronted with the fact that their child is gay, lesbian, bisexual or transgender."¹⁹⁹ Reports show that anti-gay hate crimes and violence are most commonly perpetrated in the home.²⁰⁰

There is a clear, predicative link between family rejection of lesbian, gay and bisexual adolescents and negative health outcomes in early adulthood.²⁰¹ Studies find that lesbian, gay, and bisexual youth who reported high levels of family rejection during adolescence were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to use illegal drugs, and 3.4 times more likely to report having en-

193. Jones, *supra* note 179, at 1217.

194. *Id.* at 1187.

195. McCarthy, *supra* note 189, at 1006; Brumley, *supra* note 189, at 354.

196. Wyatt v. Fletcher, 718 F.3d 496, 508 (5th Cir. 2013); Kretz, *supra* note 14, at 411-12

197. Kretz, *supra* note 14, at 411.

198. *Id.* at 411-12 (quoting Bellotti v. Baird, 443 U.S. 622, 638 (1979)).

199. Kretz, *supra* note 14, at 412; *Lesbian, Gay, Bisexual, and Transgender Health*, CENTERS FOR DISEASE CONTROL, <http://www.cdc.gov/lgbthealth/youth.htm> (last updated May 19, 2011) (citing Caitlyn Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 PEDIATRICS 346 (2009)).

200. Marzullo & Libman, *supra* note 10, at 6.

201. Family Rejection of Lesbian, Gay And Bisexual Children Linked to Poor Health in Childhood, SCIENCE DAILY (Dec. 31, 2008), <http://www.sciencedaily.com/releases/2008/12/081229080901.htm>.

Quiet Sabotage of the Queer Child

gaged in unprotected sexual intercourse, when compared with peers from families that reported no or low levels of family rejection.²⁰²

D. Family Rejection of LGB Children

The possibility of family rejection can drive a youth into despair when he is threatened with outing. In 2000, a young man committed suicide after a police officer threatened to tell his grandfather that he was gay after discovering the youth in his car engaged in sexual conduct with another boy.²⁰³ A 15-year-old boy from Jackson, Mississippi—wrote to a gay youth group seeking help after being rejected by loved ones:

If you refuse [to help] me, all I will have left is suicide. I am a gay teen. When my friends found out, they all disowned me. Some even come together to beat me up. I am not afraid or ashamed to say that I have never hurt or cried as much as I am doing right now. I am so alone. Even my father will have nothing to do with me. My mother does not know, and I plan to keep it like that for as long as I can. Right now she is the only person talking to me. You guys are my only hope. I beg of you to help.²⁰⁴

Sometimes a family's rejection of a gay child can be fatal. In March 2014, the bludgeoned bodies of two 24-year-old women, Britney Cosby and Crystal Jackson, were discovered near a dumpster in Port Bolivar, Texas.²⁰⁵ Britney's father, James Cosby, was the prime murder suspect. Following his arrest the young victim's mother Loranda McDonald spoke about James in a television news interview: "He said it to me a few times that he did not like the idea of her being gay. But, like I told him, there's nothing we could do about that. That's who she is."²⁰⁶ But it seems that James Cosby never could accept that his daughter was a lesbian.

One reason why a parent might react to his child being gay in an extreme manner is that he believes his child's sexuality reflects upon him negatively as a parent. Professor Teemu Ruskola explores this notion by suggesting that an openly LGB child "outs his or her par-

202. *Id.*

203. See Cullitan, *supra* note 16, at 439; *Sterling v. Borough of Minersville*, 232 F.3d 190, 195 (3d. Cir. 2000).

204. Ruskola, *supra* note 4, at 272.

205. Sasha Goldstein, *Texas dad killed daughter, her lesbian lover because he disliked that she was gay: mom*, NY DAILY NEWS (Mar. 14, 2014, 5:39 pm), <http://www.nydailynews.com/news/crime/dad-killed-daughter-lesbian-lover-gay-mom-article-1.1722103> (last visited Mar. 21, 2014).

206. *Id.*

ents as the mother and father of a [queer] child”; which the parent perceives as a public declaration that he has, in some way, messed his kid up, and “arrested” her normal development into heterosexuality.²⁰⁷

Be that as it may, family acceptance of lesbian, gay and bisexual children has the power to significantly decrease risks to those children and improve their overall health in adulthood.²⁰⁸ Parental behavior that encourages a child’s healthy development into a LGB identity—such as supporting a gay daughter’s butch gender expression—protects adolescents against depression, substance abuse, suicidal thoughts and suicide attempts in early adulthood.²⁰⁹ Research has shown that LGB youth raised in highly accepting families have substantially higher levels of self-esteem and social support in young adulthood.²¹⁰

E. “Fear of the Queer Child”

The social, legal, and political marginalization of LGB people is propelled by a fear of having gay children.²¹¹ At the core of this fear is the belief that exposing children to homosexuality will “turn” them gay.²¹² This permeating belief encompasses social fears that exposing children to same-sex relationships and gender variance²¹³ will make them more likely to “develop homosexual desires, engage in homosexual acts, form homosexual relationships, deviate from traditional gender norms, or identify as lesbian, gay, bisexual, or transgender.”²¹⁴

207. Ruskola, *supra* note 4, at 321 (“Having a gay or lesbian child reflects not only on the child but the entire family. For one thing, it also alters the parents’ social status. Walter Fricke, a father of a gay son, writes: Hopefully, [your gay children] will understand, or come to understand, that as hard as it was for them to look at themselves while growing up gay and say ‘I am gay,’ it is a thousand times more difficult for you to look at yourself and say ‘My child is gay.’”).

208. Family Acceptance of Lesbian, Gay, Bisexual and Transgender Youth Protects Against Depression, Substance Abuse, Suicide, Study Suggests, *SCI. DAILY* (Dec. 6, 2010), <http://www.sciencedaily.com/releases/2010/12/101206093701.htm>.

209. *Id.*

210. *Id.*

211. Clifford J. Rosky, *Fear of the Queer Child*, 61 *BUFF. L. REV.* 607, 608 (2013).

212. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010); *see* Rosky, *supra* note 206, at 608.

213. Gender diversity [or variance] is a term that recognizes that many peoples’ preferences and self-expression fall outside commonly understood gender norms. Gender diversity is a normal part of human expression, documented across cultures and recorded history. Non-binary gender diversity exists throughout the world, documented by countless historians and anthropologists. Examples of individuals living comfortably outside of typical male/female identities are found in every region of the globe. *Understanding Gender*, Gender Spectrum, <https://www.genderspectrum.org/quick-links/understanding-gender/> (last visited Mar. 20, 2014).

214. Rosky, *supra* note 211, at 608.

Quiet Sabotage of the Queer Child

These fears were crystallized throughout the 1970s. During the 70s, religious conservatives opposing LGB rights worked to shape a narrative of fear in response to the rapid rise of the gay-rights movement.²¹⁵ The movement's opponents articulated a new set of frightening circumstances through which children could "become" gay. Social fears were enflamed, and discrimination against LGB people intensified as a necessary step in discouraging children from entering into same-sex relations.²¹⁶

The 1970s's production of "fear of the queer" was later broken down into three components to appear more detailed, logical, and convincing: (1) the indoctrination fear; (2) the role modeling fear; and (3) the public approval fear.²¹⁷ Professor Clifford J. Rosky explained the theories behind each fear: (1) "[t]he indoctrination fear is that LGBT adults will actively recruit and proselytize children into queerness, in a deliberate attempt to increase the population of LGBT people"; (2) "[t]he role modeling fear is that children will learn to imitate queerness by identifying with influential LGBTQ adults, such as parents and teachers."; and (3) "[t]he public approval fear is that by granting equal rights to LGBT people, the government will teach children that queerness is acceptable—an "alternative lifestyle" that children should feel free to adopt."²¹⁸ The success of these fears in anti-gay campaigns has been propelled by two traditional beliefs regarding children's sexuality. First, is the perception that children are pre-sexual, and thus lack any sexual orientation whatsoever.²¹⁹ Second, is the firm belief that heterosexuality is the only natural result of sexual development, and as such, any demonstration of same sex desire by a child is simply a "passing phase" to be discouraged.²²⁰

Traditionally, advocates of LGB rights have operated within the same framework as their opponents to combat homophobic ideas concerning the development of same-sex orientation. Advocates have argued, "a child's sexual orientation and gender identity are fixed early in life and cannot be learned, taught, chosen, or changed."²²¹ Rosky finds this approach to be troubling, because not only is it "defensive"

215. *Id.* at 609.

216. *Id.*

217. *Id.* at 608.

218. *Id.* at 609.

219. Kathryn Bond Stockton, *The Queer Child, or Growing Sideways in the Twentieth Century* 7 (2009).

220. *Id.*

221. Rosky, *supra* note 211, at 609.

in nature, but “worse still, it is apologetic.”²²² Although he acknowledges that the traditional approach attacks the factual premise that queer sexuality “can be contained,” Rosky critically notes that this approach fails to challenge the normative premise that queerness “should be contained.”²²³ This failure to challenge the hetero-normative proposition, that children must be shielded from same-sex love for their own best interest, has given states a basis to assert that there is a legitimate interest in discouraging children from being or becoming gay.²²⁴

In Charlene Nguon’s case, the district court failed to fully recognize the risks associated with the disclosure of LGB students’ sexual orientation. This failure reflected a greater cultural resistance against acknowledging the existence of LGB youth.²²⁵ Professor Ruskola concludes that this resistance stems from the notion of “latent homosexuality,” which suggests that anyone could be or become homosexual.²²⁶ Latent homosexuality is a particularly poignant concept in light of the fact that youth in adolescence are in the beginning stages of identity formation, and are thus, vulnerable to “becoming” queer if not steered towards heterosexuality.²²⁷ Children are, both explicitly and implicitly, persuaded to adopt heterosexuality through the social stigmatization of LGB-identified people. By stigmatizing any same sex desires displayed by them or others, the hope is that youth will be deterred from claiming an LGB identity as their own.²²⁸

Heteronormativity is a concept that analyzes cultural bias that simultaneously promotes heterosexual relationships and discourages same-sex relationships.²²⁹ The concept of heteronormativity positions heterosexuality as the social norm, and all other expressions of sexuality as deviant.²³⁰ Heteronormative standards are perpetuated through

222. *Id.*

223. *Id.*

224. *Id.* at 610.

225. Ruskola, *supra* note 4, at 276–77; *see generally* Nguon v. Wolf, 517 F. Supp. 2d 1177 (C.D. Cal. 2007).

226. *Id.* Ruskola asserts that the fear of latent homosexuality stems from the recognition that human sexual desire can act as “an unpredictably powerful solvent of stable identities.” *Id.*

227. *Id.*; *see* Huwiler & Remafedi, *supra* note 160.

228. Ruskola, *supra* note 4, at 299.

229. Tom Head, *Heteronormativity*, ABOUT.COM, <http://civilliberty.about.com/od/gendersexuality/g/heteronormative.htm> (last visited Nov. 27, 2013).

230. Juan Battle & Colin Ashley, *Intersectionality, Heteronormativity, and Black Lesbian, Gay, Bisexual, and Transgender (LGBT) Families*, 2 BLACK WOMEN, GENDER, & FAMILIES 1, 1 (2008).

heterosexist²³¹ social institutions that affirm heterosexuality's normality²³²—and alternatively, homosexuality's abnormality—by acting upon the presumption that one is or ought to be straight.²³³

F. The Coming Out Experience in Light of Race & Gender

“Perhaps the most maddening question anyone can ask me is ‘Which do you put first: being Black or being a woman; being Black or being gay?’”

—Barbara Smith²³⁴

Intersectionality is a theoretical framework used to examine the way in which multiple forms of oppression affect people differently.²³⁵ Each individual under the framework is understood to have multiple identifiers (such as race, sex, and religion) that shape the ways in which she experiences life.²³⁶ LGB people of color in America possess multiple identifiers—a LGB sexual identity, a non-White race in a majority white country, and for many a non-conforming gender identity/expression—that mark them with a subordinate social status.²³⁷ Layers of socially marginalized identities embodied in one individual give space for the phenomena of “secondary marginalization” to occur.²³⁸ A study of secondary marginalization examines: (1) the power structure within a particular marginalized group; and (2) how that structure is used to regulate individuals belonging to multiple marginalized groups.²³⁹ For example, many lesbian and gays of color experience race-based marginalization in White-dominated mainstream LGBTQ organizations, where allegations of racial “divisiveness” often preclude discussions of race in the context of LGB sexuality.²⁴⁰ Mainstream LGBTQ organizations implicitly urge their non-White members to ignore issues stemming from their racial identity, and instead, ask them to compress their multi-layered identity to

231. Elizabeth Boskey, Ph.D., *Heteronormative*, ABOUT.COM, <http://std.about.com/od/glossary/g/Heteronormative.htm> (last updated Jan. 26, 2014).

232. *Id.*

233. *Id.*

234. Barbara Smith, *Blacks and Gays: Healing the Great Divide*, in *THE NEW OUR RIGHT TO LOVE: A LESBIAN RESOURCE BOOK* 221, 221 (Virginia E. Vida ed., 1996).

235. Antonio Pastrana, Jr., *The Intersectional Imagination: What Do Lesbian and Gay Leaders of Color Have To Do With It?*, 13 *RACE, GENDER & CLASS* 218, 226 (2006).

236. *Id.* at 220.

237. *Id.* at 221.

238. *Id.* at 224; see Cathy J. Cohen, *The Boundaries of Blackness: AIDS and the Breakdown of Black Politics* 70–76 (1999).

239. See generally Cohen, *supra* note 238; Pastrana, *supra* note 235, at 223.

240. See generally Cohen, *supra* note 238; Pastrana, *supra* note 235, at 224, 227.

reveal a flatter version of themselves that is only concerned with issues of LGB sexuality.²⁴¹ This is secondary marginalization. Race and sexuality intersect, and present unique challenges for individuals belonging to more than one marginalized group.²⁴²

Sexual orientation, as an identity group, does not depend on the sexual orientation of one's relatives in order to develop.²⁴³ Racial identity, on the other hand, is shared amongst blood relatives. Many youths that experience life as racial minorities depend on their family members for guidance and support as they navigate through life situations that are colored by their race.²⁴⁴ This familial guidance is often unavailable for LGB youth whose immediate family members usually do not share the firsthand experiences associated with managing a sexual minority identity. LGB youth of color may be more vulnerable, than their White LBG peers, to being persuaded to conceal their LGB identity due to a fear of losing the familial structure that provides them with critical support as they navigate through life's challenges as a racial minority.²⁴⁵

For many people of color, coming out involves cultural factors that bring additional challenges into the process.²⁴⁶ A close look at the relationship between race, and the coming out experience brings light to the contours shaping the intersection between race and sexuality. Being gay has unique cultural implications for people of color, who must remain self-determined in their management of two marginalized identities in order to survive with their self-esteem intact.²⁴⁷ LGB people of color are subjected to a dual set of disadvantages, being both racial and sexual minorities.²⁴⁸ An examination of

241. Pastrana, *supra* note 235, at 231–32.

242. *Marginalize Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/marginalize> (last visited Mar. 29, 2015); Pastrana, *supra* note 232, at 231–32.

243. *See generally* Orly Rachmilovitz, *Masters of Their Own Destiny: Children's Identities, Parents' Assimilation Demands and State Intervention* (B.U. L. Pub. L & Legal Theory, Working Paper No. 13-35, 2013).

244. *Id.* A white mother of black adoptive children described the difficulties she experiences in preparing her children for the racism: "I am not enough for my children to prepare them for the racism they're going to encounter because I haven't experienced it myself." Chris Branch, *How This White Mother Plans to Help Her Black Children Deal With Racism*, HUFFPOST, (Oct. 7, 2013, 4:34 PM), http://www.huffingtonpost.com/2014/10/07/white-mother-black-children-racism-n_5947908.html.

245. *See generally* Rachmilovitz, *supra* note 243; A white mother of black adoptive children described the difficulties she experiences in preparing her children for the racism: "I am not enough for my children to prepare them for the racism they're going to encounter because I haven't experienced it myself." Branch, *supra* note 244.

246. HUMAN RIGHTS CAMPAIGN FOUNDATION, *supra* note 168, at 15.

247. *See, e.g., id.* at 14.

248. Pastrana, *supra* note 235, at 231–32.

Quiet Sabotage of the Queer Child

the challenges that arise when a person of color makes the decision to disclose their LGB identity provides a foundation for crafting a legal framework that recognizes all of the particularities that shape a gay youths' interest in privacy.

Audre Lorde once wrote “[w]ithin black communities, where racism is a living reality, differences among us often seem dangerous and suspect.”²⁴⁹ Coming out to family members can be particularly challenging for Black Americans, as gay blacks struggle to find ways to cope with intersecting states of oppression.²⁵⁰ Critically acclaimed filmmaker, Lee Daniels, told a story from his early childhood that demonstrates how LGB people have been historically perceived as threatening to the ideal image of black identity:

At the age of 5 or 6, [Daniels] remembers walking down the stairs, in his mother’s red high heels. His dad was playing poker with his cop friends, who were white. “That was a big deal in the ‘60s, having white guys over at the house. Everything had to be perfect. And here is his son, walking down the stairs wearing heels. . . . [H]e got really mad, and that began a series of beatings”.²⁵¹

Some within the Black community still believe that, by being openly gay, their sons and daughters cause further damage to public images of Black men and women, in a world rife with negative imagery of Black people.²⁵² Professor Michael C. LaSala, of Rutgers University School of Social Work, summarizes the message delivered to many same-sex loving Black men: “The world already sees you as less than others. By being gay, you’re further hurting the image of African-American men.”²⁵³ Studies show that same-gender loving black males face a unique set of personal, familial, and social challenges.²⁵⁴ Many young gay black men worry that they will not be able to meet the “rigid expectations of exaggerated masculinity” maintained by their families and communities.²⁵⁵ Research on black male sexuality indicates that Black men typically endorse hetero-normative notions of masculinity: “tough,” “physically strong,” “athletic,” “eco-

249. HUMAN RIGHTS CAMPAIGN FOUNDATION, *supra* note 173, at 12.

250. Steve Manas, *Gay African-American Youth Face Unique Challenges Coming Out to Families*, RUTGERS TODAY (Jan. 22, 2013), available at <http://news.rutgers.edu/news-releases/2013/january-2013/gay-african-american-20130118#.U0lRTygaBjA>.

251. HUMAN RIGHTS CAMPAIGN FOUNDATION, *supra* note 173, at 14–15.

252. Manas, *supra* note 200.

253. Manas, *supra* note 200.

254. Manas, *supra* note 200.

255. Manas, *supra* note 200.

nomic provider”.²⁵⁶ Black men who fail to meet this standard of masculinity may fear that they will be dismissed, rejected and ridiculed by members of their own family and community.²⁵⁷ Anxiety stemming from a fear that the disclosure of one’s sexuality will not only disappoint one’s own family, but one’s greater community, underscores the considerations many Black youths must grapple with when deciding whether to come out as gay.²⁵⁸

IV. REMODELING THE APPLICATION OF THE BALANCING TEST

Cultural marginalization often results in the dismissal of a minority group’s unique set of experiences, that mold its members realities. The culture of silence surrounding LGB youths’ issues²⁵⁹, facilitates judicial blindness toward the dangers that LGB youth face when their sexual orientation is disclosed by a third party without their consent. Courts consistently fail to identify, let alone discuss, the full range of consequences that can result from a school official using his discretion to reveal a gay student’s sexual orientation to her parents.²⁶⁰ LGB children’s privacy interests are built upon precedent that precludes any in-depth consideration of the expansive array of outing outcomes.

Incidentally, some members of the Supreme Court recognize that a party may voluntarily disclose information to the public for a “limited purpose”.²⁶¹ The Supreme Court has noted that “the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information”.²⁶²

256. Terrell L. Strayhorn & Derrick L. Tillman-Kelly, *Queering Masculinity: Manhood and Black Gay Men in College*, in 1 SPECTRUM: A JOURNAL ON BLACK MEN 83, 96–97 (Indiana Univ. Press ed., 2013).

257. *Id.* at 87. A sophomore participant of the study observed the tensions experienced by his peers who struggled to cope with the conflicts arising from the intersection of their race and sexuality:

[A] lot of the Black men on [my] campus are gay and they just don’t know how to deal with it. . . . Maybe it’s because of . . . the intersection of their . . . race and sexual identity and they can’t, you know, deal with it, but I don’t know why there’s so many Black men on this campus who are in the closet.

Id. at 99.

258. Manas, *supra* note 250.

259. Talia Yasmee Stoesel, Esq., Addressing the Harm of Silence and Assumptions of Mutability: Implementing Effective Non-Discrimination Policies for Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Foster Care, 17 U.C. DAVIS J. JUV. L. POL’Y 79, 83 (2013).

260. *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1194 (C.D. Cal. 2007).

261. *United States v. Jones*, 132 S. Ct. 945, 957 (2012); *Smith v. Maryland*, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting); *Katz v. United States*, 389 U.S. 347, 351 (1967).

262. *U.S. Dep’t of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 770 (1989).

In *United States v. Jones*, Justice Sotomayor wrote in her concurring opinion “I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection”.²⁶³ Justice Sotomayor’s concurrence echoed sentiments expressed in previous decisions by the Court: “Privacy is not a discrete commodity, possessed absolutely or not at all”²⁶⁴; “[W]hat a person seeks to preserve as private, even in area accessible to the public, may be constitutionally protected.”²⁶⁵

When a student decides to be openly affectionate with her same sex partner at school, it is often found that her showing of affection, visible to the school population, effects a disclosure to a third party. The student’s expectation of privacy is no longer considered to be reasonable, because she has assumed the risk that any member of the school’s population may tell others outside of the school information regarding her sexual orientation, which she initially disclosed herself through her public acts at school. As a consequence of this framing, the student’s privacy interest in maintaining the exclusive right to control her coming out process is undermined—despite the fact that she does not want her parents to know that she is gay—because she was comfortable enough to be openly affectionate with her same sex partner at school.

A. The Competing Interests of the Minor and School Were Properly Analyzed in *Nguon*

Questions regarding the distinctions drawn between a minor’s reasonable expectation of privacy at school and at home arose in *Nguon*. Evidence in that case showed that the plaintiff Charlene and her girlfriend were openly affectionate with one another at school.²⁶⁶ Because this conduct “was inconsistent with any right to keep her sexual orientation private”²⁶⁷, the court concluded that Charlene had no reasonable expectation that her sexual orientation would not be disclosed to others within the school.²⁶⁸ Building upon this conclusion, the school argued that Charlene had forfeited her privacy right in “all

263. *Jones*, 132 S. Ct. at 957.

264. *Smith*, 442 U.S. at 749.

265. *Katz*, 389 U.S. at 351.

266. *Nguon*, 517 F. Supp. 2d at 1191.

267. *Id.*

268. *Id.*

contexts”.²⁶⁹ This argument was flatly rejected. Echoing the Supreme Court, the district court stated that “[i]t does not follow that disclosure in one context necessarily relinquishes the privacy rights in all contexts”.²⁷⁰ Accordingly, the court proceeded in its analysis to consider whether Charlene had a reasonable expectation of privacy that her sexual orientation would not be disclosed to her parents at home.²⁷¹

Two key factors permeated the court’s analysis of Charlene’s reasonable expectation of privacy concerning her sexual orientation at home.²⁷² First, the court considered Charlene’s family’s ethnic and cultural background noting that her “parents emigrated from Southeast Asia, and spoke a limited amount of English”.²⁷³ Second, the court looked to whether Charlene’s conduct was consistent with an expectation of privacy at home: “[h]er parents rarely went to the high school, and Charlene did not bring Trang home to visit. Outside of school, displays of affection. . .were limited to holding hands at a shopping mall”.²⁷⁴ Ultimately, the court found that Charlene had a reasonable expectation of privacy in her sexual orientation at home because: (1) Charlene’s home was an “insular environment”; and (2) “her activities with [her girlfriend] at school were unlikely to be known to her parent unless they were expressly informed”.²⁷⁵

Courts should not discredit the reasonableness of LGB youth having one distinct set of privacy expectations at school and another set at home. Schools are quickly becoming one of the safest environments for LGB minors to be out.²⁷⁶ Many LGB youth today would sympathize with the fact that Charlene felt comfortable being openly affectionate with her girlfriend at school, but wanted to keep information regarding her same-sex relationship private from her family at

269. *Id.*

270. *Id.*; see *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 770 (1989) (“An event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information.”).

271. *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1191 (C.D. Cal. 2007).

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. Benoit Denizet-Lewis, *Coming Out in Middle School*, N.Y. TIMES, Sept. 27, 2009, available at <http://www.nytimes.com/2009/09/27/magazine/27out-t.html?pagewanted=l&partner=rss&emc=rss>.

home.²⁷⁷ This phenomenon can, in large part, be explained through demographic surveys showing that support for LGBT rights rises with each younger generation. Millennials, encompassing youth born from the 1980s to the early 2000s, grew their support for same-sex marriage, from 51% in 2003 to 70% in 2013.²⁷⁸ Seventy percent of millennials favor same-sex marriage, compared to just forty-nine percent of adults in their parents' generation.²⁷⁹

The wide-spread support of same-sex couples right to marry amongst youth²⁸⁰ shows that those youths recognize the underlying right of each individual to enjoy a loving relationship regardless of their sexual orientation. Millennial supporters of LGB rights help foster an environment where their same-sex loving classmates and friends can gain relief from fears of social ostracization. School grounds can function as a refuge for minor children, who have limited autonomy to enter into spaces designed to be safe for LGB people.²⁸¹ When faced with the question of a minor student's reasonable expectation of privacy, courts should find that it is reasonable for LGB youth to want to prevent information regarding their sexual identity to go beyond the limits of their school.

Following an analysis of a LGB student's privacy interests, the question remains: whether the school's interest in justifying disciplinary action taken against a student for the violation of school policy prohibiting PDA, is a compelling one.²⁸² It is a fact that school codes may impose upon school officials, a statutory duty to provide the parent of a suspended student, an explanation as to why such disciplinary action was taken.²⁸³ But the boundaries guiding the official's explana-

277. Marilyn Elias, *Gay Teens Coming Out Earlier to Peers and Family*, USA TODAY, (Feb. 7, 2007, 8:01 pm), available at http://usatoday30.usatoday.com/news/nation/2007-02-07-gay-teens-cover_x.htm?csp=34.

278. *Growing Support for Gay Marriage: Changed Minds and Changing Demographics*, PEW RESEARCH CTR. (Mar. 20, 2013), <http://www.people-press.org/2013/03/20/growing-support-for-gay-marriage-changed-minds-and-changing-demographics/>.

279. *Id.*

280. *Id.*

281. *Parental Authority: Rights and Duties of Parents Toward Children*, EDUCALOI, <http://www.educaloi.qc.ca/en/capsules/parental-authority-rights-parents-towards-children> (last updated Feb. 20, 2014). Parents have the legal authority to decide which spaces and communities their children can enter, as a component of their rights and responsibilities to supervise and protect their children. *Id.*

282. Kretz, *supra* note 14, at 403; see CAL. EDUC. CODE § 48911(d) (West 2014); see also *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1194–95 (C.D. Cal. 2007) (“The statute does not describe what must be disclosed and in what detail.”).

283. See EDUC. § 48911(d) (West); see, e.g., *Nguon*, 517 F. Supp. 2d at 1194.

tions are unclear, and permit an invasive use of discretion.²⁸⁴ Speaking to the issue of discretion in exercising this statutory duty, the court in *Nguon* asked “whether the principal’s duty of disclosure extends beyond the elements which make the conduct subject to discipline” and replied “[i]f the limits of permissible disclosure were confined to the elements which make the conduct subject to discipline, there would have been no basis for [the principal] to disclose Charlene’s sexual orientation, albeit by inference.”²⁸⁵ Even still, the court found that the principal had a compelling state interest in the disclosure of “objective facts” constituting and providing the context for the discipline imposed.²⁸⁶ The court reasoned that the disclosure of Charlene’s sexual orientation fell within those objective facts, because Charlene had “injected the nature” of her conduct into the home by subjecting herself to the disciplinary process, requiring the principal to provide an explanation to her parents.²⁸⁷ Thus, although the court acknowledged that “by telling [Charlene’s mother] that Charlene had been kissing another girl, [the principal] conveyed Charlene’s sexual orientation to her mother,”²⁸⁸ the court ultimately found that there was no violation of Charlene’s privacy rights.²⁸⁹

This Comment concurs in the *Nguon* court’s analysis of LGB students’ reasonable expectation of privacy at school versus at home. Admittedly, schools do have a justifiable interest in notifying a student’s parent(s) and/or guardian(s) of the circumstances giving rise to disciplinary action. This Comment centers upon the proposition that the district court erred in its balancing of the privacy interests of Charlene against the more bureaucratic interests of the state. Ideally, courts should weigh the competing interests of a student and a state, under the framework of an individualized analysis which considers how a particular student may be impacted by the forced disclosure of her sexual identity to her family.

B. Remodeling the Balancing Test

When applying the *Westinghouse* balancing test, the Third and Ninth Circuits have not yet fully recognized the unique privacy inter-

284. See EDUC. § 48911(d) (West); see, e.g., *Nguon*, 517 F. Supp. 2d at 1194.

285. *Nguon*, 517 F. Supp. 2d at 1194.

286. *Id.* at 1195.

287. *Id.*

288. *Id.* at 1192.

289. *Id.* at 1195.

Quiet Sabotage of the Queer Child

ests of LGB students.²⁹⁰ The courts' failure to frame LGB students' privacy interests in consideration of the risks associated with outing effectively punishes the youth for failing to adopt a heterosexual identity, or at least, mask an LGB identity. The youth's LGB identity is ignored by courts' refusal to acknowledge the unique outcomes that can result from a school official disclosing her LGB sexuality to her family. Courts impose heterosexuality upon gay youth as the norm by assuming that gay and heterosexual youth possess comparable privacy interests in matters of sexuality.²⁹¹

The relevant provision of the school code in *Nguon* shaped the scope of information that could be permissibly disclosed to parents. Under that provision, a school official could tell a parent information about "the causes, the duration, the school policy involved, and other matters pertinent to the suspension."²⁹² The district court noted that deciding which matters were "pertinent" required the exercise of the official's discretion and an individualization of the discipline process.²⁹³ Arguably, under this interpretation of the code,²⁹⁴ the process of determining which information is pertinent should include an individualized consideration of the potential consequences of effectively telling parents that their child is gay. An individualized consideration of the consequences should be required by each school code that provides school officials with the authority to make discretionary decisions to disclose LGB students' sexual orientation without their consent.

In *Nguon*, the district court considered the ethnic and cultural makeup of Charlene's family in finding that she had established a reasonable expectation of privacy at home.²⁹⁵ However, the court fell short by failing to consider the particular consequences that would arise from the disclosure of Charlene's sexual identity to her mother. Cultural factors such as race and gender often impact the way in which an LGB individual reacts when she is outed, and the way in which she is received by her family when her sexual identity is disclosed. These factors should be drawn into a court's determination of

290. *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 581–82 (3d Cir. 1980); see *Nguon*, 517 F. Supp. 2d at 1194–95; see also Kretz, *supra* note 14, at 396.

291. *Westinghouse Elec. Corp.*, 638 F.2d at 581–82 (3d Cir. 1980); see *Nguon*, 517 F. Supp. 2d at 1194; see also Kretz, *supra* note 14, at 396.

292. *Nguon*, 517 F. Supp. 2d at 1197; CAL. EDUC. CODE § 48914 (West 2014).

293. *Nguon*, 517 F. Supp. 2d at 1197; EDUC. § 48914 (West).

294. *Nguon*, 517 F. Supp. 2d at 1197; EDUC. § 48914 (West).

295. *Nguon*, 517 F. Supp. 2d at 1191.

a student's privacy interest in their LGB identity, and should be afforded weight accordingly when balanced against the state's interest in explaining the factual context of a student's infraction.

CONCLUSION

The law has been a complicit force in undermining the security of LGB youth by failing to protect them when they are outed to their parents by their schools. Despite courts' obligation to protect children's best interests, LGB youth remain vulnerable to the dangerous outcomes of outing.²⁹⁶ Courts must recognize that the disclosure of a gay child's sexuality raises incomparable concerns, so that they can begin to appreciate and understand youths' critical need to protect private information regarding their sexual orientation and identity.²⁹⁷

296. Ruskola, *supra* note 4, at 273–74.

297. *Id.*

COMMENT

Courts and the Political Process – How Activists Can Implement Social Change

BRITTANY WILLIAMS*

INTRODUCTION

Imagine walking down the street, a few feet away from your apartment.¹ While you are walking and texting, you look up and notice two officers standing directly in front of you.² One of the officers grabs your cell phone and orders you to put your hands on the wall of a church.³ The officer begins to pat down your entire body.⁴ Both officers dig into your pockets and take out your wallet and keys.⁵ Without even asking for permission, one officer rummages through your wallet to look for your ID.⁶ The officers ask you where you were coming from, and you inform them that you were coming from your apartment.⁷ One officer reaches towards your chest and snatches your shirt, clutching it in his fist.⁸ The officer then proceeds to put you in handcuffs.⁹ The other officer asks you which of the keys is your

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1. *See* *Floyd v. New York*, 959 F. Supp. 2d 540, 636 (S.D.N.Y. 2013).

2. *See id.*

3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.*

house key.¹⁰ After you identify your house key, the officer decides to walk into your apartment building and go into your home without your permission.¹¹

While one officer is intruding into your apartment, the other officer puts you in the backseat of the police car.¹² The officer proceeds to take off your shoes and pats down your socks.¹³ Finally, the other officer comes back from encroaching on your apartment, and they take off your handcuffs and give you back your personal items.¹⁴ The officers then inform you that you were subjected to this type of treatment simply because you fit the description of someone who was ringing a doorbell at a residence.¹⁵ For many people, this story is unfathomable. Unfortunately, this story was a reality for Nicholas Peart on April 13, 2011.¹⁶

This is a typical New York Stop and Frisk encounter; it violates the human dignity of New York residents through degradation and public humiliation.¹⁷ Opponents of New York's Stop and Frisk practice argued that this type of policy violated individuals' constitutional rights by attempting to secure peace of mind for some at the expense of many. These opponents sought to bring about social change by reforming New York's Stop and Frisk policy. What was the best method for them to use in order to effectuate that desired change?

There is a significant debate regarding the most effective way to implement social change and whether recent social movements, such as the civil rights movement and women's rights movement, have over-relied on the courts. Some social scientists and academicians propose that the courts cannot adequately or consistently serve as an agent for social change.¹⁸ These scholars emphasize the political process as an effective tool for social change.¹⁹ However, others argue

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. *See* CTR. FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK THE HUMAN IMPACT: THE STORIES BEHIND THE NUMBERS, THE EFFECTS ON OUR COMMUNITIES 5 (2012).

18. *See* Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 486 (2004).

19. *See* STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 8 (2d ed. 2004). *See generally*, MICHAEL W. McCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994) (discussing the importance of political mobilization).

How Activists Can Implement Social Change

that reliance on the courts is necessary in order to implement social change.²⁰

Floyd v. City of New York involved a case where “over 4.4 million” people in New York City were stopped by the New York Police Department (“NYPD”) over an eight-year period.²¹ *Floyd* was a civil rights issue because the NYPD unconstitutionally targeted African American and Latino residents.²² *Floyd* found that the NYPD stopped African Americans and Latinos at a higher rate than Whites, but Whites were more likely to be found carrying weapons and contraband when stopped.²³ *Floyd* also found that African Americans “were 30% more likely to be arrested . . . than whites, for the same suspected crime.”²⁴ The New York Stop and Frisk issue involved the courts, as well as the political process. In *Floyd*, the court ruled that the NYPD conducted unlawful stops and unlawful frisks, thereby violating plaintiffs’ Fourth Amendment and Fourteenth Amendment rights.²⁵ In addition to litigation surrounding New York’s Stop and Frisk policy, there were also demonstrations held to protest the policy. New York City’s current mayor, Mayor De Blasio, focused a significant portion of his campaign on reforming New York’s Stop and Frisk practice. Therefore, *Floyd* serves as a useful example to analyze the debate of whether the courts, the political process, or a combination of the two is the best way to implement social change.

Initially, *Floyd* appeared to be a great decision that would serve to effectuate social change. However, New York City appealed the order in *Floyd*, and the appellate court granted a stay for the order and preliminary injunction.²⁶ During this time, New Yorkers participated in marches and demonstrations to highlight the disproportionate impact of New York’s Stop and Frisk policy on African Americans and Latinos. Then, New York City elected a new mayor, Mayor De Blasio. After this election, the issues surrounding New York’s Stop and Frisk policy were resolved. Was it the court, the demonstrations, the election, or a combination of all of these methods that led to the social reform of New York’s Stop and Frisk policy?

20. See Lobel, *supra* note 18.

21. *Floyd*, 959 F. Supp. 2d at 558.

22. *Id.* at 560.

23. *Id.* at 559.

24. *Id.* at 560.

25. *Id.* at 658.

26. See *Ligon v. City of New York*, 538 F. App’x 101, 102 (2d Cir. 2013).

This Comment will address this debate by analyzing New York's recent Stop and Frisk reform. This Comment argues that a combination of the courts and the political process are needed in order to effectuate social change. Stop and Frisk is a great example of where affected parties tried to use the courts to effectuate social change. This Comment will discuss whether the courts were the best tool to implement social change or whether another method was needed in order to implement social change. Part I of this Comment will discuss the issues surrounding New York's particular Stop and Frisk policies. Part II will compare the role of the courts and the political process in New York City to see which method was more effective in implementing social change. Part II.A will discuss the civil rights movement to see which methods were successfully employed to implement social change. Part III will analyze Stop and Frisk by applying the different theories of the court and political process as effective tools for social change.

I. ISSUES SURROUNDING NEW YORK'S STOP AND FRISK PRACTICE

"Stop and Frisk" describes a particular police encounter where a police officer stops an individual who is walking in a public place and proceeds to pat down the outside of the individual's clothing.²⁷ This authority is permitted by the Fourth Amendment in the Constitution, as well as the New York State Criminal Procedure Law section 140.50, which provides for limited government intrusion upon individuals in public places where a police officer suspects criminal activity.²⁸ "Stop and Frisk" is a very intrusive encounter and often leaves the individual feeling stripped of their personal dignity, especially when the individual is an innocent pedestrian.²⁹ New Yorkers who were subjected to the NYPD's Stop and Frisk practice reported "being forcibly stripped to their underclothes in public, inappropriate touching, physical violence and threats, extortion of sex, sexual harassment and other humiliating and degrading treatment."³⁰ Clearly, a "Stop and Frisk" encounter is not a petty indignity under the Fourth Amendment;

27. *See generally* Terry v. Ohio, 392 U.S. 1 (1968).

28. N.Y. CRIM. PROC. LAW § 140.50 (McKinney 2012) (practice commentaries by Peter Preiser).

29. *See generally* CTR. FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK THE HUMAN IMPACT: THE STORIES BEHIND THE NUMBERS, THE EFFECTS ON OUR COMMUNITIES (2012).

30. *Id.* at 5.

How Activists Can Implement Social Change

therefore, it is supposed to occur only when the officer has reasonable suspicion that crime is afoot.³¹ The officer may then proceed to pat down the outside of the individual's clothing only if the officer reasonably suspects that the individual may be armed and dangerous.³²

Terry v. Ohio is the seminal case that held that it was within the purview of the Constitution for an officer to conduct a "Stop and Frisk," as long as the officer had reasonable suspicion.³³ Therefore, if an officer conducts a stop without reasonable suspicion that criminal activity is afoot, then the stop is unlawful.³⁴ Similarly, if an officer performs a frisk without reasonable suspicion that the individual is armed and dangerous, then the frisk is unlawful.³⁵

New York's Stop and Frisk practice went beyond *Terry* in two ways. First, the NYPD was conducting unconstitutional stops and unconstitutional searches because the NYPD was stopping and searching people without reasonable suspicion.³⁶ Second, the officers were actually targeting members of minority racial groups.³⁷ The officers' actions of targeting minorities could have been the result of explicit or implicit racial bias.³⁸ According to Andrew E. Taslitz, "[r]acial stereotypes and subconscious biases can negatively affect police perceptions of danger and of suspicious behavior."³⁹ Therefore, an officer could be more likely to stop and frisk minorities because the officer finds minorities inherently more suspicious, simply due to stereotypes and preconceived notions regarding minorities.

A. Cases Pertaining to New York's Stop and Frisk Policy

The New York Civil Liberties Union's and Center for Constitutional Rights' movement against New York's Stop and Frisk regime exemplifies a court-focused effort to implement social reform. A modern example of *Brown v. Board of Education*, they brought several cases that preceded Judge Scheindlin's decision in *Floyd*.⁴⁰ The

31. See generally *Terry v. Ohio*, 392 U.S. 1 (1968).

32. See generally *id.*

33. See *id.* at 29–30,

34. *Id.*

35. *Id.*

36. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 561–62 (S.D.N.Y. 2013).

37. See *id.* at 562.

38. See Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 LAW & CONTEMP. PROBS. 221, 238 (2003).

39. *Id.*

40. *Floyd v. New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013); see also *Ligon v. New York*, 925 F. Supp. 2d. 478, 485 (S.D.N.Y. 2013); *Matthews v. New York*, 889 F. Supp. 2d. 418, 449

first case to challenge New York's Stop and Frisk practice was *Daniels v. City of New York*.⁴¹ *Daniels* arose after an unarmed African immigrant was shot and killed by police officers.⁴² This was the first class action lawsuit alleging that New York's Stop and Frisk policy was unlawful.⁴³ Shortly after this lawsuit was filed, the New York State Attorney General at the time, Eliot Spitzer, announced a study to see whether New York's Stop and Frisk practice disproportionately impacted, and possibly targeted, communities of color.⁴⁴ The results of the 1999 study showed that New York's Stop and Frisk practice disproportionately impacted communities of color.⁴⁵

Judge Scheindlin presided over all of the cases challenging New York's Stop and Frisk practice in the Southern District of New York.⁴⁶ On December 12, 2003, Judge Scheindlin approved a settlement agreement for the *Daniels* case.⁴⁷ The agreement included the implementation of several procedures to monitor the NYPD and safeguard against racial profiling.⁴⁸ Four years later, Al Sharpton, enraged by the disproportionate impact of New York's Stop and Frisk practice on communities of color, threatened to bring a lawsuit against the NYPD.⁴⁹ During this same time, then-City Council Speaker, Christine Quinn announced that the NYPD was not fulfilling its requirement (under the settlement) to submit all data relating to Stop and Frisk.⁵⁰ Two years later, a professor at Columbia Law School issued the results of a study he conducted that found that NYPD's Stop and

(E.D.N.Y. 2012); *Daniels v. City of New York*, No. 99 CIV 1965, 2001 WL 228091, at *1 (S.D.N.Y. Mar. 8, 2001).

41. See *Timeline: The City's Use of Stop and Frisk*, WYNC NEWS (May 29, 2012), <http://www.wnyc.org/story/212932-timeline-citys-use-stop-and-frisk/>; see also *Daniels*, 2001 WL 228091 at *1.

42. See *Timeline: The City's Use of Stop and Frisk*, *supra* note 41; see also *Daniels*, 2001 WL 228091 at *1.

43. *Id.*

44. See *Timeline: The City's Use of Stop and Frisk*, *supra* note 41; see also N.Y. STATE OFFICE OF THE ATT'Y GEN., http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf, iv-v.

45. See *Timeline: The City's Use of Stop and Frisk*, *supra* note 41; see also N.Y. STATE OFFICE OF THE ATT'Y GEN., http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf, vii.

46. See *Floyd v. New York*, 959 F. Supp. 2d 540, 555 (S.D.N.Y. 2013); *Ligon v. New York*, 925 F. Supp. 2d 478, 483 (S.D.N.Y. 2013); *Daniels v. New York*, 198 F.R.D. 409, 411 (S.D.N.Y. 2001).

47. See *Timeline: The City's Use of Stop and Frisk*, *supra* note 41.

48. *Id.*

49. *Id.*

50. *Id.*

How Activists Can Implement Social Change

Frisk practice disproportionately focused on communities of color.⁵¹ Displeased with the NYPD's failure to adhere to the order in *Daniels* by producing quarterly reports, litigants again sought relief from the courts to end New York's Stop and Frisk practice by filing *Floyd*.⁵² In *Floyd*, Judge Scheindlin found that "[i]n [the NYPD's] zeal to defend a policy that they believe[d] to be effective, they . . . willfully ignored overwhelming proof that the policy of targeting 'the right people' [was] racially discriminatory and therefore violate[d] the United States Constitution."⁵³

B. The Court's Decision at Risk

The city of New York appealed Judge Scheindlin's ruling in *Floyd* and requested a stay on the remedies order and a preliminary injunction.⁵⁴ The Second Circuit granted the stay for the order and preliminary injunction.⁵⁵ The Second Circuit also asserted that Judge Scheindlin appeared to be biased in her decision.⁵⁶ Further, the Second Circuit took her off of two Stop and Frisk cases that she presided over.⁵⁷ The parties did not call for her to be taken off the cases; the panel made the decision on their own volition.⁵⁸ In particular, the panel pointed to three interviews that Judge Scheindlin participated in, which gave the impression that she was slightly biased towards the plaintiffs in the New York Stop and Frisk cases.⁵⁹

51. See Bob Hennelly, *Analysis Suggests Racial Profiling in NYPD Stop and Frisk*, WYNC NEWS (May 1, 2009), <http://www.wnyc.org/story/74584-analysis-suggests-racial-profiling-in-nypd-stop-and-frisk/>; see also Second Supplemental Report, *Floyd v. New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) 08 Civ. 01034.

52. See *Daniels v. City of New York*, CENTER FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/ourcases/past-cases/daniels,-et-al.-v.-city-new-york>.

53. Stephanie Francis Ward, *Has 'Stop and Frisk' Been Stopped?*, ABA JOURNAL (Mar. 1, 2014), http://www.abajournal.com/magazine/article/has_stop_and_frisk_been_stopped.

54. See *Ligon v. City of New York*, 538 Fed. Appx. 101, 102 (2nd Cir. 2013).

55. See *id.*

56. See Ward, *supra* note 53.

57. See *id.*

58. See *id.*; see also Brett Logiurato, *Here Are the Media Interviews that Got the Stop-and-Frisk Judge Removed From the Case*, BUSINESS INSIDER (Oct. 31, 2013 5:43 PM), <http://www.businessinsider.com/stop-and-frisk-judge-shira-scheindlin-media-interviews-2013-10> (describing the three interviews that Judge Scheindlin participated in).

59. See Ward, *supra* note 53.

C. New York City's Political Process and Stop and Frisk

The first quarter of 2009 showed a more aggressive execution of New York's Stop and Frisk practice.⁶⁰ Indeed, police officers frisked a record number of 171,000 residents in the first quarter of 2009.⁶¹ This trend did not slow down for the rest of the year.⁶² By this point, New York's Stop and Frisk practice became an issue at the forefront of New York City politics.⁶³ Several candidates in the mayor's race weighed in on their views of the constitutionality of New York's Stop and Frisk practice, as well as their views on the effectiveness of New York's Stop and Frisk policy as a resource for police officers.⁶⁴ Politicians also began to call for a deeper look into the NYPD's Stop and Frisk practice.⁶⁵

In 2012, the City Council called for more accountability and supervision of the NYPD and its Stop and Frisk practice.⁶⁶ In addition, the City Council also introduced a bill to make the NYPD more accountable for its Stop and Frisk practice.⁶⁷ The state legislature also introduced a bill that sought to establish an inspector general to oversee the NYPD's execution of stops and frisks.⁶⁸

New York's "Stop and Frisk" practice received a significant amount of attention in recent years. Mayor De Blasio ran on a platform to end New York's Stop and Frisk practice.⁶⁹ He asserted that

60. See *NYPD Makes Record Number of 'Stop and Frisks'*, WYNC NEWS (May 12, 2009), <http://www.wnyc.org/story/74494-nypd-makes-record-number-of-stop-and-frisks/>.

61. See *id.*

62. See Bob Hennelly, *NYCLU Says Stop and Frisks Increasing*, WYNC NEWS (Aug. 14, 2009), <http://www.wnyc.org/story/73668-nyclu-says-stop-and-frisks-increasing/>.

63. See Bob Hennelly, *Stop-and-Frisk Becomes Issue in Mayor's Race*, WYNC NEWS (Sept. 5, 2009), <http://www.wnyc.org/story/73475-stop-and-frisk-becomes-issue-in-mayors-race/>.

64. See *id.*

65. See *Oversight Needed for NYPD Stop and Frisk Policy, Politicians Say*, WYNC NEWS (Oct. 19, 2011), http://www.wnyc.org/story/165680-blog-stop_and_frisk/.

66. See Alisa Chang, *Council Speaker Christine Quinn Demands Greater Oversight of NYPD's Stop-and-Frisks*, WYNC NEWS (Feb. 8, 2012), <http://www.wnyc.org/story/185897-blog-council-speaker-christine-quinn-says-nypd-stop-and-frisk-policy-has-sown-distrust-among-minorities/>.

67. See Alisa Chang, *Council Members Push NYPD Reform to Curb Stop-and-Frisk Practice*, WYNC NEWS (Feb. 29, 2012), <http://www.wnyc.org/story/189728-blog-council-members-tout-legislation-aimed-nypd-accountability/>.

68. See Colby Hamilton, *Brooklyn State Legislators Introduce NYPD Oversight Legislation*, THE EMPIRE (Feb. 10, 2012), <http://www.wnyc.org/story/195846-brooklyn-state-legislators-introduce-nypd-oversight-legislation/>.

69. See Ward, *supra* note 53.

Those who are routinely subjected to stops are overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention. Some plaintiffs testified that stops make them feel unwelcome in some parts of the City, and distrustful of the police. This alienation cannot be good for the police, the community, or its leaders.

How Activists Can Implement Social Change

New York City's Stop and Frisk practice led to poor race relations due to the police department's overly aggressive use of the practice.⁷⁰ In January, shortly after his election, Mayor De Blasio vowed not to pursue the appeal of Judge Scheindlin's ruling in *Floyd*.⁷¹ Evidence collected in *Floyd* showed that the NYPD had an undocumented practice of identifying individuals that looked suspicious.⁷² This often resulted in African Americans and Latinos being stopped, frisked, and searched based upon unlawful reasons.⁷³ For example, African Americans and Latinos constituted 87 percent of individuals stopped by NYPD in 2011 and 2012.⁷⁴ However, 90 percent of the African Americans and Latinos who were stopped were released because police officers could not find any reason to make an arrest.⁷⁵

II. COMPARISON OF COURTS AND THE POLITICAL PROCESS AS EFFECTIVE TOOLS FOR SOCIAL REFORM

There is a debate regarding whether the court, the political process, or some combination thereof is the best way to effectuate social reform. This section will focus on the arguments on either side of the debate. First, this section will focus on the court and the issues surrounding the courts ability and willingness to effectuate social change. Second, this section will focus on the political process and whether it is the best tool to utilize for social reform. Lastly, this section will discuss whether a combination of the courts and political process is the optimal method for social change.

Gerald Rosenberg proposes two ways in which courts behave: "Dynamic Court" and "Constrained Court."⁷⁶ The Dynamic Court is an activist court that goes against the majority public will in order to effectuate social reform for minorities and other underrepresented

Floyd v. New York, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013).

70. See Ward, *supra* note 53.

71. See *id.*

72. See *id.* In 2008, the NYPD reported over 500,000 stops. Over half of these stops resulted in the police officer frisking the stopped individual. During these frisks, the officer seized a weapon approximately 1.24 percent of the time and seized other contraband approximately 1.70 percent of the time. See Ta-Nehisi Coates, *The Dubious Math Behind Stop and Frisk*, THE ATLANTIC (Jul. 24, 2013), <http://www.theatlantic.com/national/archive/2013/07/the-dubious-math-behind-stop-and-frisk/278065/>.

73. See Ward, *supra* note 53.

74. See *id.*

75. See *id.*

76. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 9 (1991).

groups.⁷⁷ The Constrained Court is viewed as the “‘least dangerous’ branch of government” where the people have the liberty to govern themselves without officials, who were not elected through the political process, imposing their will on them.⁷⁸ Whether a court is a Dynamic Court or a Constrained Court depends on the judge and how he or she views their role and the role of the court. The Constrained Court view explains how the courts are ineffective in their ability to bring about social change, whereas the Dynamic Court view explains how the courts could serve as an effective tool to bring about social change.⁷⁹

A. The Constrained Court View

The Constrained Court view proposes that courts are not an effective tool in producing social reform for three reasons: “the limited nature of constitutional rights, the lack of judicial independence, and the judiciary’s inability to develop appropriate policies and its lack of powers of implementation.”⁸⁰

1. The Limited Nature of Constitutional Rights

Advocates of the Constrained Court view explain that constitutional rights are limited. While the Constitution protects private rights, such as a right to privacy or an individual property interest, it does not protect public rights, such as access to public resources.⁸¹ Also, supporters of the Constrained Court view believe that judges’ decisions are cabined, to a certain extent, by the values and views of the members in the legal environment.⁸² To a certain extent, the law is significantly molded by society’s beliefs and expectations.⁸³ Scholars that support the Constrained Court view suggest that these two boundaries constrain courts in such a way that it is extremely difficult for the court to be a vehicle for significant social reform.⁸⁴

Most litigants that seek to use the courts for social reform are claiming that a private right was violated; so, if the Constitution does not protect public rights and the court is often influenced by the val-

77. *See id.* at 22.

78. *See id.* at 15.

79. *See id.* at 9.

80. *Id.* at 10.

81. *See id.*

82. *See id.*

83. *See* SCHEINGOLD, *supra* note 19, at 3.

84. *See* ROSENBERG, *supra* note 76, at 10–11.

How Activists Can Implement Social Change

ues and views of the majority of the American populace, it makes it very hard for the court to effectuate significant social reform.⁸⁵ The Constitution was a dynamic document that spurred social change when it was first written.⁸⁶ However, over the centuries, Americans constantly sought to implement the aim and purpose of the Constitution to the point where, now, according to the Constrained Court view there are not many significant changes left.⁸⁷

Supporters of the Constrained Court view purport four primary reasons why the limited nature of constitutional rights limits the courts' ability to effectuate significant social reform.⁸⁸ First, the fact that the Constitution does not protect certain rights places a limitation on the types of claims that a party can assert, since the party would be claiming that a constitutional right was violated or not provided.⁸⁹ Although claims pertaining to public rights are important, the constitutional constraint that is placed on the courts simply results in courts not being able to hear certain claims.⁹⁰

Second, even when a litigant is able to claim a certain constitutional right, they often have to argue that the a new right should be created to remedy the harm that a party sustained or that an existing right should be extended to apply to a new set of facts and circumstances.⁹¹ If a litigant drives courts to read the Constitution more broadly to apply to their particular claim, it raises concerns for courts.⁹² Judges uphold *stare decisis* and do not seek to significantly deviate from precedent.⁹³ In adhering to precedent, judges tend "to make changes in the halting kind of way that tends to mask change

85. *See id.*

86. *See* SCHEINGOLD, *supra* note 19, at 99.

87. *See id.*

88. ROSENBERG, *supra* note 76, at 11.

89. *Id.*

With increasing barriers to litigating, fewer citizens will find their own way into court (although they may be brought there to answer criminal charges). Those who are not barred from using the courts by contractual agreement will increasingly find themselves shepherded outside the courthouse to confidential conferences presided over by private neutrals in private venues. With little experience of public adjudication and little information available about the process or outcomes of dispute resolution, citizens' abilities to use the justice system effectively to achieve social change will diminish markedly. Surrounded by a culture that celebrates social harmony and self-realization and disparages social conflict—whatever its causes or aims—citizens' tendencies to turn to the court as a vehicle for social transformation will diminish as well.

Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 196 (2003).

90. *See* ROSENBERG, *supra* note 76, at 11.

91. *Id.*

92. *See id.*

93. *See id.*

with the appearance of stability or at least of continuity.”⁹⁴ Moreover, some scholars contend that significant shifts away from prior precedent usually occur in instances where the underlying precedent is already fragile due to prior decisions that diluted its strength.⁹⁵

Third, if a litigant asserts a certain right in court, the litigant is inherently accepting the rules and procedures that follow the process for asserting a claim.⁹⁶ Indeed, “judges tend to be tied to the procedural absolutes which are bound up in a regime of rules with its attendant emphasis on vindicating rights and enforcing obligations *irrespective of the consequences.*”⁹⁷ These rules and procedures constrain the courts’ ability to hear certain cases.⁹⁸ Thus, these rules and procedures create more hurdles for the plaintiff to go through in order to properly assert a claim for them to “have their day in court.”⁹⁹ After the plaintiff overcomes those hurdles and makes it to court, it is unlikely that the court will remedy the underlying social issues that the plaintiff wishes to address.¹⁰⁰ Courts primarily focus on identifying and remedying concrete issues between two parties, as opposed to focusing on the broad policy considerations that affect a larger group as a whole.¹⁰¹ Therefore, courts are more likely to view an issue in isolation as it pertains to two litigants and provide a remedy solely for that particular case instead of remedying the underlying social ills that led to the litigation.¹⁰²

Fourth, since plaintiffs have to sculpt their claims in a way that asserts legal issues, it dilutes the strength of the political persuasion.¹⁰³ Scholars have noted that “reliance on litigation [can] sap the democratic process of its vitality.”¹⁰⁴ Litigants’ reliance on the courts inappropriately trumps the decisions of political officials that are more appropriately situated to handle policy and political issues.¹⁰⁵ This re-

94. SCHEINGOLD, *supra* note 19, at 107.

95. *See id.* at 107–08. “The separate but equal doctrine was only a hollow shell when it was finally swept away in 1954. By that time a whole series of decisions had made it clear that separate educational facilities were unequal in ways that could be corrected only by ending separation.” *Id.* at 108.

96. ROSENBERG, *supra* note 76, at 12.

97. SCHEINGOLD, *supra* note 19, at 111.

98. ROSENBERG, *supra* note 76, at 12.

99. *Id.*

100. *Id.*

101. *Id.*

102. *See id.*

103. *Id.*

104. *Id.*

105. *Id.*

How Activists Can Implement Social Change

liance also leads plaintiffs to overly focus on the role of the courts to provide social reform instead of focusing on ways to address social reform through the political process.¹⁰⁶ For these reasons, the limited nature of constitutional rights results in the courts not being the most effective vehicle for implementing social reform.¹⁰⁷

2. Lack of Judicial Independence

Although federal judges are appointed instead of elected, they do not exercise the level of independence that one would expect.¹⁰⁸ Historically, the courts have not served as first movers in deviating from societal norms and traditions.¹⁰⁹ Typically, in order for the court to take a stance on issues, the issues must be based in constitutional values.¹¹⁰ A court is very unlikely to serve as a trailblazer for social reform on issues that are not based upon constitutional values.¹¹¹ Thus, judges cannot always be relied upon to devise a solution to remedy every social goal.¹¹² This suggests that courts have limited independence and cannot or will not often serve as a renegade for social reform.¹¹³ It also suggests that courts will not reach beyond the extent of constitutional values in order to implement social reform.¹¹⁴

The Constrained Court view suggests that the Appointments Clause also limits courts.¹¹⁵ Indeed, judges are chosen in a very similar manner as other officials.¹¹⁶ The President must appoint a federal judge, with the advice and consent of the Senate.¹¹⁷ The President typically appoints judges whose political views seemingly align with

106. *See id.*

107. *See id.* at 12–13.

108. *See id.* at 13.

109. *See id.*

110. *See* SCHEINGOLD, *supra* note 19, at 97.

111. *See id.*

112. *See id.* at 5.

113. ROSENBERG, *supra* note 76, at 11.

114. *See* SCHEINGOLD, *supra* note 19, at 97.

115. *See* ROSENBERG, *supra* note 76, at 13.

116. *See* SCHEINGOLD, *supra* note 19, at 87. “Beneath superficial variations, recruitment patterns to public office are remarkably alike. Federal and state judges, elected and appointed judges, the Chief Justice of the United States and the lowly justice of the peace are all products of the political system.” *Id.*

117. *See* U.S. CONST. art. II, § 2, cl. 2; *See* Rosenberg, *supra* note 76, at 13.

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2.

his or her own views.¹¹⁸ Therefore, it can be harder for judges to implement social reform because the President can deliberately choose judges that will not deviate significantly from their political affiliation.¹¹⁹ Thus, the Appointments Clause can limit courts because the President can add judges that will align with the views of the President.¹²⁰

Litigants typically turn to the courts in order to seek social reform when they cannot find relief from one of the other co-equal branches in government.¹²¹ In order for courts to make a decision that is in opposition to the stance of Congress and the Executive branch, courts must be independent to keep it isolated from pressure and influence from the other branches.¹²² This independence would provide the court with the autonomy to make such a decision.¹²³ According to the Constrained Court view, the framers did not give the courts the same level of independence as the other branches, nor were the courts provided with the necessary isolation to make decisions free from political pressure.¹²⁴ These two concerns suggest that courts are highly unlikely to serve as trailblazers for social reform.¹²⁵

3. Lack of Resources to Implement Policies and Procedures Needed for Social Reform

The Constrained Court view also suggests that courts lack the necessary resources to implement critical policies and procedures needed for social reform.¹²⁶ One of the primary issues is that courts lack the authority to enforce their decisions.¹²⁷ Courts can make a decision; however, they cannot force the parties to act in accordance with that decision.¹²⁸ Courts can “deal[] with recalcitrant individuals but [they are] probably insufficient for bringing large groups or powerful institutions in line.”¹²⁹ Courts typically need Congress and the Executive branch to help enforce the courts’ decisions.¹³⁰ For exam-

118. See ROSENBERG, *supra* note 76, at 13.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. See ROSENBERG, *supra* note 76, at 15.

127. *Id.*

128. *Id.*

129. See SCHEINGOLD, *supra* note 19, at 8.

130. See ROSENBERG, *supra* note 76, at 15.

How Activists Can Implement Social Change

ple, the courts needed the President to send troops to Little Rock Arkansas to enforce the court's order for desegregation.¹³¹ Without the assistance of the Executive branch, the court would have faced a great amount of difficulty in trying to force the state of Arkansas to implement its order.¹³²

If courts cannot rely on the other branches to help enforce a particular decision, then courts will have to rely on the majority of the populace to carry out their orders.¹³³ However, studies show that *most the majority* of the populace is unaware of court decisions, including even the most significant decisions.¹³⁴ So, it makes it extremely difficult for the courts to rely on the majority of the populace to help carry out their orders because the majority of the populace do not even know what the courts' decisions are for many cases and issues.¹³⁵ Furthermore, when it comes to issues pertaining to social reform, the majority of the populace will be unlikely to enforce implementation of an order that goes against their values.¹³⁶ This concern makes it even harder for courts to garner support from the majority of the populace to enforce its orders when it goes against the values and beliefs of the other branches and the majority of the populace.¹³⁷

Courts' lack of authority for implementation is exacerbated by the absence of vertical integration in the court hierarchy.¹³⁸ For example, an appellate court can make a decision; however, the appellate court cannot look at every decision by the lower courts to make sure that the lower courts are implementing the decision correctly.¹³⁹ Lower courts may misinterpret the holdings of appellate court decisions or may choose not to apply it to the facts of their particular case when it should have been applied.¹⁴⁰ It would be a very long time, possibly several years, before an appellate court judge noticed that a lower court judge was misinterpreting the law.¹⁴¹ The Constrained Court view argues that this type of issue makes it even harder for

131. *Id.*

132. *Id.*

133. *Id.* at 16.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. See ROSENBERG, *supra* note 76, at 16.

141. See *id.* at 17.

courts' decisions to consistently be enforced because the absence of vertical integration complicates the oversight of lower courts.¹⁴²

B. The Dynamic Court View

The Dynamic Court view argues that the concerns that the Constrained Court view raises are not significant obstacles to challenging the status quo in court.¹⁴³ One key element of courts is that they are free from political influence, since, unlike officials of other branches, judges are not elected through the political process.¹⁴⁴ This gives courts the strength to act when other branches are unwilling or unable to do so because of political constraints.¹⁴⁵ In particular, courts have the strength to make decisions that are not aligned with the views of the majority of the populace because they do not face political pressure to act in accordance with the majority.¹⁴⁶

The Civil Rights and Women's Rights movements are only two examples of when the Court made unpopular decisions to provide a remedy for the few as opposed to acting in accordance with the many.¹⁴⁷ Justice Brennan summarized the court's unique position best when he stated, "Insulated as they are from political pressures, and charged with the duty of enforcing the Constitution, courts are in the strongest position to insist that unconstitutional conditions be remedied, even at significant financial cost."¹⁴⁸ Courts are less likely to be influenced by political pressure.¹⁴⁹ Thus, courts can be used to effectuate social change, especially when the courts are going against popular societal views.¹⁵⁰ *Brown v. Board of Education* is a great example of when the Court went against the majority of society to effectuate social and educational reform.¹⁵¹

1. Courts Can Address Interests That Other Branches Cannot

The Dynamic Court view also proposes that, due to the shortcomings of certain aspects of the political process, courts are more

142. *See id.*

143. *See id.* at 22.

144. *See id.*

145. *See id.*

146. *See id.*

147. *See id.*

148. *Rhodes v. Chapman*, 452 U.S. 337, 359 (1981); *see ROSENBERG, supra* note 76, at 22.

149. *See ROSENBERG, supra* note 76, at 22.

150. *See id.* at 22-23.

151. *See id.* *See generally* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that separate but equal has no place in the educational arena).

How Activists Can Implement Social Change

effective in areas where the other branches are not.¹⁵² Since Congress and the Executive branches are elected officials, they typically represent the interests of the majority of the populace, whereas courts have the ability and authority to represent the interests of the minority.¹⁵³ The ability for courts to hear a dispute does not depend on the parties' political connections or economic strength.¹⁵⁴ Therefore, courts can hear disputes that pertain to interests of the minority, whereas the political process typically only addresses the views of the majority.¹⁵⁵ Simply put, Congress and the Executive branch cannot sufficiently address the interests of all groups in society.¹⁵⁶

Proponents of the Dynamic Court view contend that courts are able to address the interests of all groups, regardless of the respective parties' political or economic capital.¹⁵⁷ The types of resources needed to garner support from Congress and the Executive branch, such as significant lobbying efforts, is not needed for a party to prevail in court.¹⁵⁸ Minority groups that do not have the necessary economic or political capital can use the courts to reform laws and bolster their position in the other branches.¹⁵⁹ Minority groups can also use the courts to give them more power to address their interests in the public arena.¹⁶⁰ Therefore, the Dynamic Court view suggests that courts are a great resource to underrepresented groups in society, which tend to be the groups that need social reform the most.¹⁶¹

2. Court Decisions Impact Parties in Non-Conventional Ways

Proponents of the Dynamic Court view also contend that courts can serve as leaders in showing what is "right."¹⁶² Congress and the Executive branch's political associations influence their direction.¹⁶³ These associations guide representatives' positions on issues.¹⁶⁴ Courts tend to inform the public about popular issues and enlighten

152. See ROSENBERG, *supra* note 76, at 23–24.

153. *See id.*

154. *See id.*

155. *See id.*

156. *See id.*

157. *See id.*

158. *See id.*

159. *See id.*

160. *See id.*

161. *See id.*

162. *See id.* at 25.

163. *See id.*

164. *See id.*

the public about the Constitution and how citizens' responsibilities fall therein.¹⁶⁵

When a particular group uses the Court as a public forum, sometimes the amount of publicity and attention brought to the issue and increase in public discourse regarding the issues are more important than actually receiving the relief sought.¹⁶⁶ Indeed, some individuals use litigation to not necessarily win a case but as a means to bring enough negative publicity to the opposing party that settlement becomes more appealing.¹⁶⁷ Litigation can often serve as an effective tool to gain the media's attention.¹⁶⁸ In particular, complaints can have a preamble section that does not have to conform to the same legal standards as other sections of the complaint.¹⁶⁹ Therefore, the preamble section can be an effective way to bring a litigant's issue to the attention of the masses.¹⁷⁰ This view of litigation focuses primarily on the litigants and their relationship to, and impact on, society.¹⁷¹ The decision by the judge is important; however, it is not as significant to effecting social change as raised public awareness.¹⁷²

When a litigant attracts the media's attention to a particular issue, it can put pressure on elected officials to act in conformity with the litigants' position.¹⁷³ Indeed, litigants can utilize the courts as a way to bring public attention to their issue and to convey their concerns to

165. *See id.*

Our nation has seen a long tradition of litigators and movements using the courts as platforms for arguing controversial positions and garnering public support for them. From the Revolutionary period, through this country's struggle with the issues of slavery and women's suffrage, up until modern instances where private citizens and public officials have attempted to challenge governmental actions, our system's courts have been used as forums to stir debate by the citizenry.

Lobel, *supra* note 18, at 560.

166. *See* Lobel, *supra* note 18, at 487.

167. *See id.* at 487–88.

168. *See id.* at 487.

169. *See* Alexandra D. Lahav, *The Political Justification for Group Litigation*, 81 *FORDHAM L. REV.* 3193, 3208 (2013). The complaints against Union Bank of Swiss provided a preamble section as well as anecdotal descriptions of the individuals who were impacted. *See, e.g.*, Amended Complaint at 1, *Weisshaus v. Union Bank of Switz.*, No. 96-5161 (E.D.N.Y. July 30, 1997), available at <http://www.swissbankclaims.com/Documents/weisshaus%20amended.pdf>.

170. *See* Lahav, *supra* note 172, at 3208–09.

171. *See* Lobel, *supra* note 18, at 489.

172. *See id.*

The litigation can serve a variety of roles: to articulate a constitutional theory supporting the aspirations of the political movement, to expose the conflict between the aspirations of law and its grim reality, to draw public attention to the issue and mobilize an oppressed community, or to put public pressure on a recalcitrant government or private institution to take a popular movement's grievances seriously.

Id. at 480.

173. *See* ROSENBERG, *supra* note 76, at 25–26.

How Activists Can Implement Social Change

Congress and the Executive branch.¹⁷⁴ This view further supports the notion of a democracy that hears and gives reverence to the concerns of all groups in society.¹⁷⁵ Court decisions can serve as a method for bringing national attention to an issue and poking at the conscience of publicly elected officials.¹⁷⁶ Court decisions can also serve as a catalyst for social change through the political process by encouraging affected parties to rally behind a particular issue.¹⁷⁷

Courts can also serve as a medium for negotiation between interested parties.¹⁷⁸ Courts can serve as an unbiased arena where litigants can discuss and work through their concerns.¹⁷⁹ Courts can also serve as an effective bargaining tool to entice parties to enter into negotiation proceedings.¹⁸⁰ Although a party may have the financial resources to go through litigation, negotiation may be a better alternative if that party does not want certain information introduced to the public.¹⁸¹ The party would risk scrutiny under the public eye, which could prove to be more costly than settling with the opposing party through negotiations.¹⁸²

C. The Political Process

This section will explore how the political process contributes to social change and whether the political process can be relied upon exclusively to implement social change. According to Stuart Scheingold, the political process is much more thorough and expands the limits of the “straight-line projection from judicial decision to compli-

174. See Lahav, *supra* note 172, at 3208; see also JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* xviii (1970) (“Citizen initiatives in the courts can be used to bring important matters to legislative attention, to force them upon the agendas of reluctant and busy representatives.”).

175. See Lahav, *supra* note 172, at 3208.

176. See ROSENBERG, *supra* note 76, at 25–26.

177. See *id.*

178. See *id.* at 26.

179. See *id.*

180. See *id.*

181. See FOLBERG, GOLANN, STIPANOWICH, & KLOPPENBERG, *RESOLVING DISPUTES: THEORY, PRACTICE, & LAW* 13 (2d ed. 2010); ROSENBERG, *supra* note 76, at 21–36.

182. See FOLBERG et al., *supra* note 184, at 7; ROSENBERG, *supra* note 76, at 26. Litigation can be very costly; parties that do not have the financial resources or are unwilling to expend the necessary financial resources may determine that negotiation is a better alternative. See FOLBERG et al., *supra* note 184, at 7; ROSENBERG, *supra* note 76, at 26.

ance.”¹⁸³ The political process consists of both legal and Constitutional goals.¹⁸⁴

Rights are viewed as something to which citizens are entitled.¹⁸⁵ Rights are basic privileges that should be accorded to every citizen.¹⁸⁶ When these privileges or entitlements are not properly provided to a certain group, affected parties as well as certain unaffected parties are more willing to mobilize through the political process to address the issue.¹⁸⁷ As J.P. Nettl noted, “[o]ne of the most successful elementary forms of mobilization of otherwise unacculturated sections on the periphery of society is the claim for the return of rights believed to have been illegally removed or denied.”¹⁸⁸ Particularly, the denial of a right is viewed as something that was unlawfully taken away from a citizen.¹⁸⁹ As a result, rights can be viewed as a stimulus for social change.¹⁹⁰

According to Joseph L. Sax, “[c]ourts are not to be used as substitutes for the legislative process—to usurp policies made by elected representatives—but as a means of providing realistic access to legislatures so that the theoretical processes of democracy can be made to work more effectively in practice.”¹⁹¹ In order for a concern for a certain group in society to become a political issue, the group must effectively organize to bring its concerns to the forefront of public attention.¹⁹² This aspect is critical because very few individuals view the political process as “direct” and “concrete.”¹⁹³ Indeed, for most, the political process is more of a spectatorship rather than a process in which most individuals are actively involved.¹⁹⁴ Perhaps, this may be the case because if elected officials primarily represent the views of the majority of the populace, then there is really no need for those individuals to become involved in the political process. Unless members of the ma-

183. SCHEINGOLD, *supra* note 19, at 8.

184. *See id.* at 84–85. “The assumption is that our rights are reflected in, protected by, and consistent with the basic tendencies of American politics—allowing, of course, for some inevitable slippage between reality and aspiration.” *Id.* at 84.

185. *See id.* at 131.

186. *See id.*

187. *See id.*

188. J.P. NETTL, *POLITICAL MOBILIZATION: A SOCIOLOGICAL ANALYSIS OF METHODS AND CONCEPTS* 247 (1967).

189. *Id.*

190. SCHEINGOLD, *supra* note 19, at 148.

191. SAX, *supra* note 177, at xviii.

192. *See* SCHEINGOLD, *supra* note 19, at 139.

193. *See id.* at 206.

194. *See id.*

How Activists Can Implement Social Change

majority of the populace express a certain level of compassion regarding a social issue of another group in society, members of the majority may be more inclined to observe the actions taken by other groups in the political process, as opposed to being actively engaged in the political process.

Individuals who decide to mobilize to bring attention to their issues and concerns are not necessarily predisposed to organizing toward a collective goal.¹⁹⁵ It is more so the case that those individuals are frustrated with the current state of their issues and feel that the political process is a realistic option for them to utilize to bring about social change.¹⁹⁶ One of the most important elements that lead to individuals joining to advance a particular cause is “the victimized group’s *perception of expanded opportunities* for effective political challenge.”¹⁹⁷ Interestingly enough, the more a particular group is marginalized, the more these expanded opportunities appear to be realistic and attainable to those groups.¹⁹⁸ Similarly, an issue that has a significantly disproportionate impact on affected groups is more likely to generate collective action by the affected parties.¹⁹⁹ This occurs particularly because the impact is so disparate that affected parties are frustrated to the point where they seek to mobilize to effectuate change.²⁰⁰

D. Combination of the Courts and the Political Process

According to Michael McCann, social change depends upon an integration of both the courts and the political process.²⁰¹ There are three elements that impact legal mobilization: political issue, necessary resources, and the courts.²⁰² Political issues and the necessary resources must align in order for groups to collectively come together in pursuit of social change.²⁰³ The courts can then serve as a stimulus for social movements by fostering individuals who feel that a right has been withheld.²⁰⁴ Accordingly, “all three conditions are essential,

195. See McCANN, *supra* note 19, at 94.

196. *See id.*

197. *Id.*

198. *See id.*

199. *See id.* at 104.

200. *See id.* at 94.

201. *See id.* at 136 & fig.4.1.

202. *See id.*

203. *See id.*

204. *See id.* at 136–37

though not sufficient, to the process of legal mobilization.”²⁰⁵ The courts are not necessarily a constraint on the political process, nor are they simply an instrument for the political process.²⁰⁶ The effectiveness of the courts in combination with the political process depends upon the type of social reform needed.²⁰⁷ Therefore, social change can occur through a combination of the courts and the political process.

IIA. SOCIAL MOVEMENTS THAT USED THE COURTS AND THE POLITICAL PROCESS FOR SOCIAL REFORM

Various groups in society have used the court as a public forum over the course of American history.²⁰⁸ The abolitionist movement, civil rights movement, women’s rights movement, and gay rights movements are but a few examples of groups that chose to utilize the court as a forum for social change.²⁰⁹ These groups chose to implore the assistance of the court when Congress and the Executive branch did not take action.²¹⁰ These groups pulled the courts into the “public arena” by choosing to use the court as an effective tool of raising media attention to their issues and furthering the public debate pertaining to a specific subject matter.²¹¹

The civil rights movement is an example of the court serving as an effective tool for social reform.²¹² I choose to discuss *Brown v. Board of Education* because *Brown* is often viewed as the quintessential case that illustrates how the court can be used as a tool for social reform.²¹³ In *Brown*, the Court ruled that the separate-but-equal doctrine, when used in the education arena, was unconstitutional.²¹⁴ This decision invalidated almost sixty years of racial segregation and essentially reversed the separate but equal doctrine established in *Plessy v.*

205. *Id.* at 137.

206. *See id.*

207. *See id.*

208. *See* Lobel, *supra* note 18, at 493.

209. *See id.*

210. *See, e.g.,* ROSENBERG, *supra* note 76, at 42–71.

211. *See* Lobel, *supra* note 18, at 477, 530.

212. *See* ROSENBERG, *supra* note 76, at 42–71. *See generally* SCHEINGOLD, *supra* note 19 (stating that the court led the way in implementing social change with the civil rights movement).

213. *See* ROSENBERG, *supra* note 76, at 42–71.

214. *See* *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); *see also* ROSENBERG, *supra* note 76, at 42–71 (discussing the Court’s holding in *Brown*).

How Activists Can Implement Social Change

Ferguson.²¹⁵ Proponents of the Dynamic Court view contend that *Brown* shows how the court can be used as an effective tool for social change.²¹⁶ However, opponents assert that something more than pure reliance on the court was needed in order to implement the overall effect that *Brown* had on society.²¹⁷ Next, I will discuss these two views through the lens of the *Brown* decision and the aftereffects thereof.

A. *Brown*'s Reliance on the Court as a Tool for Social Change

At the time that *Brown* was decided, twenty-one states permitted racial segregation in public schools.²¹⁸ After *Brown*, President John F. Kennedy requested for Congress to enact legislation “giving all Americans the right to be served in facilities which are open to the public.”²¹⁹ In response, Congress enacted the Civil Rights Act of 1964.²²⁰

In the decade before the Civil Rights Act of 1964, the Court was very active in denouncing racial segregation as unconstitutional.²²¹ During this same timeframe, the other branches did not take any significant steps towards social change regarding civil rights.²²² It was not until 1964 when Congress responded with meaningful civil rights legislation that carried the level of substance needed to implement social reform.²²³ This distinct demarcation between court action and Congress provides a workable timeline to determine which branch was more effective in implementing social change for civil rights.²²⁴ If

215. See ROSENBERG, *supra* note 76, at 42–71. Compare *Brown*, 347 U.S. at 495 (1954) (holding that separate but equal has no place in the educational arena), with *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896) (“[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia.”). After the Court’s decision in *Brown*, racial segregation was held to be unconstitutional in “public parks and recreation facilities, in intrastate and interstate commerce, in courtrooms, and in facilities in public buildings.” ROSENBERG, *supra* note 76, at 39; see also *Watson v. Memphis*, 373 U.S. 526, 539 (1963) (holding that racial segregation in public parks and other recreational facilities is unconstitutional); *Mayor & City Council of Baltimore v. Dawson*, 350 U.S. 877, 877 (1955) (mem.) (affirming the Fourth Circuit’s decision that racial segregation in public beaches and bathhouses is unconstitutional).

216. See ROSENBERG, *supra* note 76, at 42–71.

217. See *id.* at 49.

218. See *id.* at 42.

219. President John F. Kennedy, Address on Civil Rights (June 11, 1963).

220. *A Case History: The 1964 Civil Rights Act*, CONGRESSLINK, http://www.dirkscenter.org/print_basics_histmats_civilrights64text.htm (last visited Mar. 24, 2015).

221. See ROSENBERG, *supra* note 76, at 46.

222. See *id.*

223. See *id.*

224. See *id.*

the Court was successful in effectuating social change, the effects would be evident prior to the 1964 legislation.²²⁵ If, however, the other branches were more effective in implementing social change, those results would come to light after the 1964 legislation.²²⁶

Statistical analysis is a good indicator of the impacts of racial discrimination.²²⁷ As Judge Brown once noted, “[i]n the problem of racial discrimination, statistics often tell much.”²²⁸ Statistics show that in the year prior to the Civil Rights Act of 1964, only 1.2 percent of public schools in the South were desegregated.²²⁹ This was the highest percentage of desegregation achieved prior to the 1964 legislation.²³⁰ Immediately after the Civil Rights Act of 1964, school desegregation in the South increased to 2.3 percent.²³¹ 91.3 percent of public schools in the South were desegregated nine years after the 1964 legislation.²³²

The statistics for Southern states indicates a sharp contrast between the amount of desegregation before the 1964 legislation and the amount thereafter.²³³ Essentially a decade after *Brown*, only 1.2 percent of public schools were desegregated.²³⁴ This statistic shows that “[d]espite the unanimity and forcefulness of the *Brown* opinion, the Supreme Court’s reiteration of its position and its steadfast refusal to yield, its decree was flagrantly disobeyed.”²³⁵ Although the Court provided a poignant opinion in *Brown* and was very active in denouncing segregation in succeeding cases, it completely failed to have an impact on the states in the South—the region that needed to desegregate the most.²³⁶

Clearly, the legislative and executive branches had more of an impact on southern states.²³⁷ Surprisingly, in the first year after the 1964 legislation, public school desegregation in the South almost doubled the amount that it took the South six years to accomplish

225. *Id.*

226. *Id.*

227. *Id.*

228. *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir. 1962).

229. *See ROSENBERG, supra* note 76, at 52.

230. *See id.* at 50 tbl.2.1 (illustrating the percentage of black children integrated into formerly segregated elementary and secondary schools in the South before and after passage of the Civil Rights Act of 1964).

231. *See id.*

232. *See id.*

233. *See id.*

234. *See id.*

235. *Id.* at 52.

236. *Id.*

237. *Id.*

How Activists Can Implement Social Change

prior to the legislation.²³⁸ Over the course of a couple of months between 1964 and 1965, the amount of school desegregation was almost three times as much as it was in the ten years preceding the legislation.²³⁹

The Supreme Court appeared to have virtually no effect on southern states.²⁴⁰ It was not until the passage of the Civil Rights Act of 1964 that southern states started to make a concerted effort to desegregate public schools.²⁴¹ This same upward trend was evidenced with higher education and voting rights as well.²⁴² Statistics showed a sharp increase in those areas after the Civil Rights Act of 1964.²⁴³ This seems to suggest that the other branches are needed in order to fully effectuate social change. The courts, alone, were unsuccessful in implementing social reform for the civil rights movement.

Public school desegregation in states bordering the South, including the District of Columbia, steadily increased from 1956-1973.²⁴⁴ *Brown* seemed to impact border states and the District of Columbia because in the years preceding the 1964 legislation, public school desegregation in those states rose by 15.2 percentage points.²⁴⁵ The rate of desegregation, however, rose considerably after the 1964 legislation.²⁴⁶ In the years after the 1964 legislation up to 1970, the amount of desegregated public schools increased by 22 percentage points.²⁴⁷ This data proposes two suggestions: First, the Court's decision in *Brown* impacted desegregation in states bordering the South, including the District of Columbia.²⁴⁸ Second, public schools desegregated at a faster rate after the 1964 legislation.²⁴⁹

238. *See id.* at 50 tbl.2.1 (illustrating the percentage of black children integrated into formerly segregated elementary and secondary schools in the South before and after passage of the Civil Rights Act of 1964).

239. *Id.* at 52.

240. *See id.*

241. *See id.*

242. *See id.* at 56 tbl.2.3A (illustrating the percentage of black enrollment at formerly segregated Southern colleges and universities before and after passage of the Civil Rights Act of 1964); *id.* at 61 tbl.2.4 (illustrating the percentage of black voter registration in the South before and after passage of the Civil Rights Act of 1964).

243. *See id.*

244. *See id.* at 50 tbl.2.1 (illustrating the percentage of black children integrated into formerly segregated elementary and secondary schools in states bordering the South before and after passage of the Civil Rights Act of 1964).

245. *See id.* at 50.

246. *See id.* at 51.

247. *Id.*

248. *Id.*

249. *Id.*

B. The Political Process as an Effective Tool for Social Change During the Civil Rights Movement

Some scholars contend that the NAACP's reliance on the courts served as a hindrance to the civil rights movement because it took away from the political process, which was the more effective method for social change.²⁵⁰ Real social change did not occur until the other branches became engaged in civil rights issues.²⁵¹

U.S. courts can virtually "never be effective producers of significant social reform." . . . *Brown* failed, for example, and undermined the civil rights movement by 'siphoning' resources and talent away from more promising political strategies for achieving change. . . . *Brown* only advanced racial change indirectly, through a perverse "backlash effect." Violent white resistance to the decision and black protests inspired the passage of the Civil Rights Act, which actually desegregated society.²⁵²

Just six years after the Court's decision in *Brown*, certain members in the civil rights movement no longer viewed "the Supreme Court as a beacon of hope, but as a powerful manifestation of official indifference to the cause of racial equality."²⁵³ Due to the combination of strong opposition to desegregation from white Americans and the Court's seeming inability to address the opposition, agitated civil rights members sought relief through protests instead of relying on the courts.²⁵⁴ These protests were instrumental in leading to the enactment of the Civil Rights Act of 1964.²⁵⁵

Prior to the enactment of the Civil Rights Act of 1964, the other branches were almost completely silent on the issue of desegregation

250. See TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 135 (2011).

251. *Id.*

252. *Id.* at 10.

253. See *id.* at 134.

254. See *id.* "Paradoxically, then, the Court's failure to enforce *Brown* and its subsequent civil rights decisions, and the failure of the NAACP's court victories to bring about tangible improvement in numerous areas of race relations, reaped bountiful fruits for the direct action movement." *Id.* at 135.

255. See BROWN-NAGIN, *supra* note 253, at 135.

The fires of frustration and discord are burning in every city, North and South, where legal remedies are not at hand. Redress is sought in the streets, in demonstrations, parades, and protests which create tensions and threaten violence and threaten lives. We face, therefore, a moral crisis as a country and as a people. It cannot be met by repressive police action. It cannot be left to increased demonstrations in the streets. It cannot be quieted by token moves or talk. It is a time to act in the Congress, in your State and local legislative body and, above all, in all of our daily lives.

President John F. Kennedy, Address on Civil Rights (June 11, 1963).

How Activists Can Implement Social Change

in public schools.²⁵⁶ The Supreme Court's activity in *Brown* made Congress and the Executive branch appear to be relatively docile and unresponsive to the need for social change pertaining to civil rights.²⁵⁷ Although Congress contemplated a civil rights bill for several years, Congress finally enacted the Civil Rights Act of 1957²⁵⁸, which was its first civil rights legislation since the Civil Rights Act of 1875.²⁵⁹ Unfortunately, the act failed to provide critical provisions in the educational arena.²⁶⁰ Three years later, Congress enacted the Civil Rights act of 1960.²⁶¹ Although this act cured some of the issues with racial equality in education, it still failed to carry the necessary kick that it needed.²⁶²

Congress took a different approach with the Civil Rights Act of 1964, providing "the most sweeping civil rights legislation since the Civil War and Reconstruction era."²⁶³ Unlike the previous civil rights acts, the Civil Rights Act of 1964 gave the attorney general the authority to file suits in the interest of individuals calling for desegregation of public schools.²⁶⁴ Congress also chose to use the power of the purse by adding a provision that ceased to provide federal funding to any public school district that chose to continue to partake in racial discrimination.²⁶⁵

In order for integration to occur, the government needed to play an active role to eliminate discrimination on the part of individuals and institutions.²⁶⁶ Any action that the government takes to eliminate discrimination contradicts the constitutional value of individual freedom to choose to do as one pleases.²⁶⁷ Judges were somewhat hesitant to fully enforce integration because of the conflicting

256. See ROSENBERG, *supra* note 76, at 42–71.

257. *See id.*

258. *See A Case History: The 1964 Civil Rights Act, supra* note 223.

259. See ROSENBERG, *supra* note 76, at 42–71.

260. *See id.*

261. *See id.* at 46. The Department of Justice did not have the power to assert claims against the States in the interest of individuals calling for public school desegregation. *See id.*

262. *See id.* at 46–47.

263. *Id.*

264. *Id.* at 47.

265. *See id.* "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Title VI, Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964).

266. See SCHEINGOLD, *supra* note 19, at 103.

267. *See id.*; *see also id.* ("[a]bsent a constitutional violation there would be no basis for judicially ordering assignments of students on a racial basis").

constitutional values.²⁶⁸ Judges supported integration but did so in a “guarded fashion.”²⁶⁹

According to Tomiko Brown-Nagin, none of the branches of government were responsible for the overall success of the civil rights movement—it was student leaders and other members of the African American community that ultimately caused social change in civil rights.²⁷⁰ During the time of the Civil Rights Act of 1964, African Americans became more assertive with their pleas for racial equality.²⁷¹ Indeed, the civil rights movement entailed “explosive periods of racial violence to open up local legislatures enough for the poor to take advantage of the greater ease of access to the local corridors of power.”²⁷² Also, a growing number of white Americans’ view of racial equality began to shift.²⁷³ African Americans brought issues of racial inequality with public facilities, education, and job opportunities to the forefront of the public debate through their use of non-violent demonstrations.²⁷⁴

III. STOP AND FRISK – APPLICATION OF THE DIFFERENT VIEWS OF COURTS AND THE POLITICAL PROCESS

Floyd was a quintessential case that resulted in a great decision; however, the appellate court was poised to step in and reverse the lower court’s ruling. During this time, New York City residents held demonstrations to bring attention to the issue of New York’s Stop and Frisk policy and its disproportionate impact on African Americans and Latinos. Then, Mayor De Blasio was elected as mayor, after largely running his campaign on Stop and Frisk reform.

First, this section will discuss Stop and Frisk through its reliance on the courts. This section explores Stop and Frisk through the two theories of effecting social change to determine which theory served as the ultimate factor in resolving New York’s Stop and Frisk problem.

268. *See id.*

269. *See id.*

270. *See* BROWN-NAGIN, *supra* note 253, at 135.

271. *See A Case History: The 1964 Civil Rights Act*, *supra* note 223.

272. Andrew E. Taslitz, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI-KENT L. REV. 277, 291 (2010).

273. *See A Case History: The 1964 Civil Rights Act*, *supra* note 223.

274. *See id.*

A. Stop and Frisk's Reliance on the courts

New York City had several cases that sought to reform NYPD's Stop and Frisk practice. Judge Scheindlin presided over three significant Stop and Frisk cases. Judge Scheindlin presided over *Ligon v. City of New York*. *Ligon* ended with an order for the NYPD to stop performing unlawful stops at Clean Halls Buildings.²⁷⁵ Judge Scheindlin also presided over *Daniels*. In *Daniels*, she approved a settlement agreement. The NYPD did not adhere to some of its requirements in the settlement agreement.²⁷⁶ Particularly, the NYPD did not always provide quarterly statistics on its Stops and Frisks to maintain transparency to the public.²⁷⁷ The transparency was supposed to insure that stops were based upon the requisite reasonable suspicion, as opposed to other factors. However, the city failed to consistently provide the obligatory quarterly audit reports. Thus, although the city had an order, the city failed to adhere to all of the terms and conditions of the order.

As a result of the city's failure to consistently provide quarterly reports, plaintiffs decided to file a new suit—*Floyd*. Most importantly, Judge Scheindlin presided over *Floyd*, where she handed down a decision striking down NYPD's current practice of Stop and Frisk as unconstitutional. After handing down this decision, though, Judge Scheindlin was strongly criticized by the Court of Appeals. The Court of Appeals felt that Judge Scheindlin appeared to be partial towards the plaintiffs in Stop and Frisk cases. As a result, she was removed from two Stop and Frisk cases over which she had originally presided. The Second Circuit also granted a stay for the remedial order and preliminary injunction.²⁷⁸

This is an instance where the District Court is acting as a Dynamic Court. The District Court presided over a Stop and Frisk case that involved a significant amount of plaintiffs from minority communities. Judge Scheindlin ruled in favor of the plaintiffs. Therefore, she provided a remedy for minority communities that may not have had a significant amount of resources to access other branches of government. Arguably, the minority groups used the court as a means to enter issues pertaining to Stop and Frisk into the public debate. After *Daniels*, studies were conducted to see the impact of Stop and Frisk

275. See *Daniels v. City of New York*, *supra* note 52.

276. See *id.*

277. See *id.*

278. See *Ligon v. City of New York*, 538 Fed. Appx. 101, 102 (2d Cir. 2013).

on certain communities. Politicians also began to weigh in on Stop and Frisk once the issue entered the public discourse. Before *Daniels*, there was not much debate on Stop and Frisk and how it impacted certain communities in a disproportionate manner relative to other communities. Therefore, just as the Dynamic Court view suggests, the courts were a great resource for minority groups to utilize to achieve social reform.

Proponents of the Dynamic Court view believe that the courts can lead the way in showing society what is “right.” Judge Scheindlin, in her Stop and Frisk cases, served as a trailblazer in striking down the NYPD’s method of carrying out Stop and Frisk. She acknowledged and attempted to remedy the fact that the NYPD’s execution of Stop and Frisk led to a disproportionate amount of people of color being subjected to the NYPD’s stops and frisks. The minority groups’ decision to access the courts highlighted the issues surrounding Stop and Frisk by bringing publicity and attention to those issues. This also led to an increase in public discourse regarding the issues of Stop and Frisk.

Although Judge Scheindlin was removed from the Stop and Frisk cases, there was a large amount of publicity and public awareness regarding Stop and Frisk by the time she was removed from the cases. Therefore, as the Dynamic Court view suggests, the courts were an effective tool to bring media attention to the issues surrounding Stop and Frisk. As a result, minority communities that were impacted by Stop and Frisk were able to bring their concerns to the public debate. The Stop and Frisk cases also galvanized New York City residents behind the issues surrounding Stop and Frisk. Also, political organizations would have never had the police data if it was not for Judge Scheindlin requiring police officers to track information related to Stop and Frisk encounters.

Although the court served as a trailblazer in implementing social reform through *Floyd*, the Constrained Court view has some merit when explaining the Stop and Frisk saga. The courts’ lack of authority to enforce their decisions was evident in *Daniels*. In *Daniels*, the parties entered a settlement agreement. Part of Judge Scheindlin’s order was for the NYPD to produce audited quarterly reports to ensure that there was an internal procedure and control to minimize racial profiling. However, the NYPD failed to consistently provide the quarterly reports. The District Court lacked the ability to enforce its decision.

How Activists Can Implement Social Change

Also, the fact that decisions by lower courts can be reviewed and reversed had an impact. With the Stop and Frisk saga, there was a dynamic lower court. However, the appellate court reviewed Judge Scheindlin's decision in the lower court and removed her from the case. The appellate court also granted a stay on the remedies order and preliminary injunction. Clearly, the inherent constraints of the court are visible even when there is a dynamic court.

B. The effectiveness of Stop and Frisk addressed through the Political Process

In addition to the Stop and Frisk cases, Stop and Frisk was addressed through the political process as well. In 2011, several New York City politicians called for Stop and Frisk reform and a deeper look into the NYPD's execution of Stop and Frisk. For years, the City Council put pressure on the NYPD concerning Stop and Frisk issues. The City Council called for the NYPD to adhere to the settlement agreement in *Daniels* by providing quarterly reports. Four years later, the City Council was still pressuring the NYPD by calling for more supervision of stops and frisks. The City Council ultimately introduced a new bill that would make the NYPD more accountable for its Stop and Frisk practice.²⁷⁹ State legislatures also proposed for an Inspector General to oversee the NYPD's Stop and Frisk practice.²⁸⁰ Although former New York City mayor, Mayor Bloomberg, was a staunch proponent of Stop and Frisk, Mayor De Blasio ran his campaign on Stop and Frisk reform.

Stop and Frisk concerned an individual's Fourth Amendment right against unreasonable searches and seizures. This is a basic privilege that should be accorded to every individual. Not only did Stop and Frisk implicate the Fourth Amendment, but it also implicated the Fourteenth Amendment rights of African Americans and Latinos who were targeted by officers. Since Stop and Frisk affected significant fundamental rights, African Americans and Latinos were more willing to collectively organize behind Stop and Frisk reform. The denial of these rights served as a catalyst for social change. Even groups that

279. See Alisa Change, *Council Members Push NYPD Reform to Curb Stop-and-Frisk Practice* WNYC, (Feb. 29, 2012), <http://www.wnyc.org/story/189728-blog-council-members-tout-legislation-aimed-nypd-accountability/>.

280. See Colby Hamilton, *Brooklyn State Legislators Introduce NYPD Oversight Legislation*, WYNC (Feb. 10, 2012, 05:29 PM), <http://www.wnyc.org/story/195846-brooklyn-state-legislators-introduce-nypd-oversight-legislation/>.

were not disproportionately impacted by Stop and Frisk began to rally behind the issue.

Derrick Bell's "interest convergence theory" may serve as an explanation for why Stop and Frisk galvanized New York City residents, including those who were not part of the groups that were disproportionately impacted by Stop and Frisk. According to Derrick Bell's interest convergence theory, "whites are, in general, more powerful than racial minority groups and work to further primarily white self-interest, regardless of whether their motivations are conscious or not."²⁸¹

Members of African American and Latino communities were significantly marginalized by Stop and Frisk. As a result, members of African American and Latino communities, as well as members of the majority of the populace and other groups, united to show political demonstrations, such as rallies and marches. These demonstrations served to effectuate Stop and Frisk reform. Mayor De Blasio also successfully ran on a platform to reform Stop and Frisk. The political process was very effective in implementing social change. However, could this social reform have occurred without the courts? This Comment takes the position that social reform could not have occurred without a combination of the courts and the political process.

C. Combination of the Courts and the Political Process

Stop and Frisk reform would not have been possible without both the courts and the political process. Judge Scheindlin served as a necessary trailblazer to hold the NYPD's execution of Stop and Frisk unconstitutional. The courts were necessary to garner public attention for the issues surrounding Stop and Frisk. It was not until *Daniels* when politicians finally began to discuss Stop and Frisk's disproportionate impact on minority groups. Furthermore, the political mobilization behind Stop and Frisk served to put pressure on elected officials to reform Stop and Frisk. Lastly, Mayor De Blasio served as an effective resource to significantly push for Stop and Frisk reform. None of these processes in isolation could have brought about social reform of Stop and Frisk.

The courts had several great cases that held the NYPD accountable for its actions. However, the NYPD still continued to practice

281. Andrew E. Taslitz, *Bullshitting the People: The Criminal Procedure Implications of a Scatological Term*, 39 TEX. TECH L. REV. 1383, 1402 n.135 (2007).

How Activists Can Implement Social Change

Stop and Frisk in a similar manner as before the suits. The political demonstrations put a necessary level of pressure on politicians to take a stance on Stop and Frisk. Ultimately, Mayor De Blasio ran his platform on Stop and Frisk reform. He also put necessary officials in place to ensure that Stop and Frisk reform was carried out. Therefore, the courts and the political process are both needed in order to effectuate social change. One cannot survive without the other.

IV. CONCLUSION

Both the courts and the political process are necessary tools for effectuating social change. The civil rights movement and Stop and Frisk are great examples of how the courts and the political process can be integrated and used as effective tools for social change. Although each process has its individual strengths and weaknesses, both of the processes can be strategically leveraged in order to bring about social change.

The story surrounding *Floyd* shows that there was a great case with a significant amount of data. *Floyd* ended with a great decision handed down by Judge Scheindlin; however, this was not enough in order to effectuate the social reform that New Yorkers sought. It took the political process, namely demonstrations and the election of Mayor De Blasio, combined with the courts in order to fully effectuate social reform.

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