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UNIVERSITY OF CENTRAL FLORIDA DEPARTMENT OF LEGAL STUDIES LAW JOURNAL

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Articles

UNIVERSITY OF CENTRAL FLORIDA

DEPARTMENT OF LEGAL STUDIES LAW JOURNAL

BOARD OF EDITORS FOR 2022-2023

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FOREWORD

Dr. Ronnie Zimmerman, Ph.D.

Chair (Interim) and Associate Professor, Department of Legal Studies

As the interim Department Chair of the Department of Legal Studies, it is my distinct honor and pleasure to introduce the readers to this sixth annual edition of the University of Central Florida (UCF) Undergraduate Law Journal. The Law Journal is one of only a handful of academic journals nationwide that are authored, edited, and composed by undergraduate students.

Each of the published articles were authored by a UCF undergraduate student. Submissions to the journal were open to any full-time or part-time UCF undergraduate student and over thirty submissions were received for potential inclusion in the journal. The Law Journal Board of Editors is composed of undergraduate students. Each of the submitted papers underwent a double-blind peer review process by every member of the Board of Editors. That entailed the review and ranking of thirty-four separate articles. Since most of the submissions were in the range of twenty pages or longer (some closer to thirty or forty pages), these students reviewed 600 to 800 pages of materials. Once these students were done with their individual review and rankings, each board member was required to rank the papers and provide a short-written justification as to why they ranked each of the papers the way they did. The students' ranking and short narrative justifications of their rankings resulted in eighty pages of their critiques and analysis. Finally, after a Board of Editors discussion of the merits and potential deficiencies of each of the top papers, the Board members completed an anonymous vote/survey on what papers should be selected. Every student in the Law Journal class was also required to complete their own research material. Taking in its totality, this is simply an immense amount of work for an undergraduate student and should illustrate a strong work ethic is still thriving at UCF. These UCF students are examples of such a work ethic and dedication to a final project.

It is an utterly amazing an amazing group of students and it is easy to forget the talent and potential that is evinced by these undergraduate student authors and editors. Members of the Board of Editors are listed on the very first page of this journal and biographical details on each of the authors are listed in the last few pages at the end of this journal.

Even though I am currently serving in an interim role as Department Chair, I have marveled at the talent and erudition of UCF Legal Studies students for several decades. For years, I served as an Associate Dean in the college wherein Legal Studies was once housed. This allowed me over two decades to observe and marvel at the work of many of the best and brightest students UCF has to offer. Now, after working much more closely with Legal Studies students and faculty, all my positive impressions have been doubly—nay, triply—reinforced.

A review of topics addressed in this year's journal ran the gamut from topics ranging from national defense surveillance and law enforcement issues to current "hot" topics in the law. I would encourage you to pick a topic and start reading it selectively or arbitrarily. I am confident that once you start reading the article, you will need to remind yourself that these articles were written and edited not by faculty, professors, or graduate students, but by talented—exceptionally talented—UCF undergraduate students. I hope you enjoy the creativity and intellectual prowess illustrated by the fine work of UCF students. If the quality of the work is any indication of the talent of America's youth, our country will see brighter days and great accomplishments.

INTRODUCTION

James A. Beckman, Faculty Advisor

Professor, Department of Legal Studies

For the sixth and final introduction, it is my privilege to introduce readers to the University of Central Florida (UCF) Department of Legal Studies Undergraduate Law Journal. Over the last six years, it has been an honor to work with some of the best and brightest students at UCF in producing this journal. In future years, the journal will have a different academic advisor. If the last six years are any indication, the new faculty advisor in 2024 will be a lucky person indeed to work with such talented and gifted UCF students.

As in years past, this issue contains the top ranked peer reviewed articles submitted to the UCF Law Journal in academic year 2022-2023 (as voted on by students in a blind peer review). At first glance, the topics and issues covered in this issue appear to be very diverse and eclectic, with articles ranging from the use of empirical evidence in courts, the interpretation of legal themes contained in Shakespeare's *Macbeth*, the use of technology in law enforcement (both domestic surveillance and geowarrants), the intersection of domestic violence and bail reform, to parental liability laws. Two articles deal with the practical ramifications and consequences of Supreme Court decisions handed down in the last year.

Yet, despite the subject matter diversity, and upon closer scrutiny, there are striking similarities between the articles published this year. Regardless of the topic, each of the article topics are incredibly well-researched, delving into various nuances and nooks and crannies of the law. Each author completes a "deep dive" into case law and legal literature (and in one case, actual literature). The breadth of the research is simply amazing. The sophistication of the analysis employed and exhibited by each author is impressive. Each article topic is also presented in an interesting and thought-provoking way, and, of course, all the articles are very well written. In reading

through the various articles, it should become quickly apparent that each of the authors dedicated a vast amount of their time in researching the article topic and perfecting the presentation of the subject matter at hand. Thus, it should come as no surprise that each of the published articles were consensus top voter getters in a blind peer review process.

As in previous years, the review process took place over two rounds or stages. Thirty-four papers were submitted for potential inclusion in the journal (slightly higher than 2022). Each of these thirty-four papers were randomly placed into one of three review groups. The ranking/rating criteria utilized by editors can be found at the end of this Introduction. The top five articles in each group were moved on to a second round of review. As such, after this first blind peer-review round, the pool of thirty-four articles was reduced to fifteen papers. At that point, every editorial board member was tasked with re-reviewing these fifteen papers with an eye towards reducing the pool down to eight or nine finalists. Unfortunately, many good papers did not advance to the second stage. Regrettably, even among the fifteen finalists, space precluded the inclusion of all fifteen papers. As such, a second vote was conducted to further narrow the pool. This was a blind-review and blind-vote as well. Once the final papers were selected for publication, each article was again reviewed and edited. The goal of editing was to perfect the presentation of the article topic and not to change the voice and views of the individual authors.

The articles in the following pages received the highest number of votes across two review rounds and votes. The articles were evaluated on the sophistication of research and on how well the topic was presented and discussed (again, see the end of this introduction for a complete listing of relevant selection factors utilized by each reviewer). The articles contained herein were the *consensus* top vote getters by students in the Undergraduate Law Journal class.

Also, as has been the case in every year/issue since 2018, the group of individuals serving on the Board of Editors this year was remarkable in terms of their collective knowledge, life experiences, and work on the journal (and in the Law Journal class, generally). The

reader may find a complete listing of all participating individuals on this very first page of this journal. Being involved with the UCF Law Journal entails a huge sacrifice of time. It is not uncommon for editors to spend *hundreds* of hours reviewing papers and completing proposed edits. Students are asked to review, rank, and critique dozens of articles, all while also conducting their own research and writing. It is a heavy load. Then, once final articles are selected, each person edits at least one of the selected articles. Two individuals (Raymond Silipino and Scott Buksbaum) were "veterans" of the Law Journal, both having worked on the journal in a previous year (Raymond Silipino in 2022 and Scott Buksbaum in 2021). Having experienced editors on the board helped anchor the board and directly contributed to the high quality of the Journal. For their continued participation, I am appreciative.

In perusing the various articles, it is easy to lose sight of the fact this journal was created through the arduous work of *undergraduate* students. Undergraduate students researched and composed the top articles on an array of fascinating issues. Undergraduate students reviewed all the submitted papers and offered constructive feedback and comments. Undergraduate students determined which articles would appear in the journal. Undergraduate students re-reviewed the accepted articles and provided editorial suggestions. With the modest exception of the Foreword and this Introduction, the rest of this journal was one hundred percent the intellectual creation and by-product of undergraduate students alone. This should give the reader great hope and comfort. Creating and assembling this journal has put on full display the astonishing intellect, creativity, and potential of both the authors and editors. The amount of work that the authors and the editorial board put into the production of this journal was simply astonishing. The articles contained herein are as good, or better, than those one might find at the law school law review level. I have no doubt that articles contained in this year's journal could easily have found a home in a law school journal elsewhere. Thus, I am glad to see each author's research published here and am grateful that each author decided to publish their work in the UCF Department of Legal Studies Undergraduate Law Journal.

Lastly, and perhaps it goes without saying, but each article represents the individual author's own research, composition, and views. In fact, great effort was taken in the review process to ensure that the views and voice (and research results) of the individual authors would not be altered. As such, these articles do not necessarily represent the views of any single member of the Law Journal class/editorial board, or the Department of Legal Studies at UCF (or the Law Journal). However, by ranking each of these articles highly, the editorial board collectively determined that each of the included articles were soundly researched, cited, and written, in accordance with the below criteria, and represent the best of the thirty-four papers submitted this year. I am confident that readers will be impressed with the many intriguing and highly informative articles on a host of diverse issues and topics, and I hope the articles will spark further intellectual inquiry and/or conversations as to the topics presented.

LEGAL STUDIES UNDERGRADUATE LAW JOURNAL

Department of Legal Studies

College of Community Innovation and Education, University of Central Florida

Article Review Sheet for the UCF Legal Studies Undergraduate Law Journal

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Timeliness, Currency and Overall Analysis

1. Does the article deal with a topic of current relevancy? Is it timely?
1…..2…..3…..4…..5

2. Does the article offer new information or new perspectives for the readers?
1…..2…..3…..4…..5

3. Is the article coherent for the intended audience(s)?
1…..2…..3…..4…..5

4. Are the qualitative or quantitative analyses appropriate?
1…..2…..3…..4…..5

5. Does the article offer a viable solution, an alternative approach, or a transition position to the problem the research defines?
1…..2…..3…..4…..5

6. Does the evidence and reasons support the conclusions and implications made by the author(s)?
1…..2…..3…..4…..5

Facts, Issues and Conclusions in Article

7. Does article include clear legal issues and most significant facts?
1…..2…..3…..4…..5

8. Does article have clear conclusion and/or answers?
1…..2…..3…..4…..5

9. Does article use and apply legal principles/rules?
1…..2…..3…..4…..5

10. Does article include all material facts?
1…..2…..3…..4…..5

11. Does article exclude extraneous facts?
1…..2…..3…..4…..5

12. Does article include unfavorable and favorable facts?
1…..2…..3…..4…..5

13. Is Article organized in a logical fashion?
1…..2…..3…..4…..5

Discussion Issues

14. Is Article organized around issues and sub-issues?
1…..2…..3…..4…..5

15. Devotes appropriate amount and depth of analysis consistent with the importance of the authority
1…..2…..3…..4…..5

16. Does Article utilize appropriate authorities? Does the article weigh or apply the authorities appropriately?
1…..2…..3…..4…..5

17. Explains why and how the legal rules applies to the topic of the article?
1…..2…..3…..4…..5

Writing Style, Organization and Proper Grammatical Usage

18. Article uses complete paragraphs and paragraphs are organized to communicate logical progression of ideas
1…..2…..3…..4…..5

19. Article uses thesis sentences to create logical progression

1…..2…..3…..4…..5

20. Article uses appropriate word choice and grammar
1…..2…..3…..4…..5

21. Article contains few excess words
1…..2…..3…..4…..5

22. Article uses complete sentences with subject and verb agreement
1…..2…..3…..4…..5

23. Article uses accurate punctuation and proper quotation marks
1…..2…..3…..4…..5

24. Article includes no contractions or slang
1…..2…..3…..4…..5

25. Article writes out numerals and abbreviates as appropriate
1…..2…..3…..4…..5

26. Article uses correct possessives and capitalizations
1…..2…..3…..4…..5

Proper Citation

27. Provides citation for every utilized quotation
1…..2…..3…..4…..5

28. All citations are substantively accurate
1…..2…..3…..4…..5

29. Names of authorities are accurate
1…..2…..3…..4…..5

30. Volumes and sources accurate
1…..2…..3…..4…..5

31. Year and court accurate
1…..2…..3…..4…..5

32. Page numbers of cases or articles correct
1…..2…..3…..4…..5

33. Pin point cites are utilized and are accurate
1…..2…..3…..4…..5

34. Typeface, spacing, italicizing, underlying, et cetera, are accurate

1…..2…..3…..4…..5

M'NAUGHTEN AND MACBETH: DEMONSTRATING THE MOST PROMINENT INSANITY TEST VIA APPLICATION AND ANALYSIS TO SHAKESPEARE'S MOST PROMINENT REGICIDAL CHARACTER

Alphonse Holowczak

Introduction

It is no secret that the subject of Shakespeare has been discussed time and time again, immeasurably maintaining a captivating interest throughout the greater legal world. Across the expanse of court cases[1] and law reviews,[2] it is unavoidable that at least one will be grappling with The Bard himself in one way or another. Such is the case with this article, which will attempt to illustrate the importance of understanding how the M'Naughten insanity test[3] operates on a general basis via application to one of the most recognizable criminal characters Shakespeare has artfully crafted, Macbeth.[4] There is no

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[1] *Herring v. Rite Aid Corp.*, No. 1:15-CV-2440, 2016 WL 401026, at *5 (M.D. Pa. Jan. 28, 2016) ("In summary, Plaintiff's rather hyperbolic filings and argument bring to mind a passage from Act V, Scene 5 of William Shakespeare's play Macbeth, in that we ultimately find them to be ' ... full of sound and fury, signifying nothing.' We can find nothing even remotely defective in the Proxy despite Plaintiff's attempt to torture both its language and logic.").

[2] George Anastaplo, "LAW & LITERATURE AND SHAKESPEARE: EXPLORATIONS," vol. 26, Okla. City U. L. Rev. 143, 143-152 (2001).

[3] The name "M'Naughten," referring to the "M'Naughten insanity test" or "M'Naughten insanity defense," may also be spelled "McNaughtan," "MacNaghten," "M'Naghten" etcetera. These variations of the name are all pronounced similarly, and all refer to the same test and defense. The author will be using the "M'Naughten" spelling throughout the article. Additionally, the "M'Naughten insanity test" is also known as "The Right-Wrong Test," and "The M'Naughten Rule." Within the scope of this article, the author uses "M'Naughten insanity test" (sometimes abbrev. "M'Naughten test") and "M'Naughten insanity defense" (sometimes abbrev. "M'Naughten defense") interchangeably, both referring to the same legal test.

[4] William Shakespeare, *Macbeth*, Folger Shakespeare Library Edition (Barbara Mowat, Paul Werstine, eds., Washington, DC: Folger Shakespeare Library, 2013) (Macbeth is the name of the main character of Shakespare's play of the same name, *Macbeth*. The book cited here is the version of the play that the author will be referencing throughout the article.).

doubt that Shakespeare's influence is boundless, especially throughout the courts and greater legal world in relation to William Shakespeare's *Macbeth*.[5] This much beloved work of Shakespeare has made its own home within a magnitude of courts,[6] whether that be specifying statutory language according to how Shakespeare applies the word "consort" in *Macbeth*,[7] elaborating a dissenting opinion via Macbeth's

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[5] *Zip Dee, Inc. v. Dometic Corp.*, 949 F. Supp. 653, 655 n.2 (N.D. Ill. 1996) (Shadur, Senior District Judge, memorandum opinion and order) ("Both the litigants and any other readers of this opinion will no doubt recall Macbeth's challenge when he finally realizes the depth of deception in the three witches' prophecies, so that he must fight Macduff on equal terms (William Shakespeare, *Macbeth,* act 5, sc. 8): Lay on, Macduff, And damn'd be him that first cries, 'Hold, enough!'"). *See also Adams v. New Mexico Gov't*, No. CV 07-1209 JP/LFG, 2008 WL 11414614, at *1 n.1 (D.N.M. Jan. 17, 2008) (Lorenzo F. Garcia, Chief United States Magistrate Judge, memorandum opinion and order denying plaintiff's motion to disqualify) ("This lawsuit is only the latest in a series of unsuccessful attempts to have a court declare that there is an 'insurrection' or 'declared war' against the United States by judges, lawyers and other office holders. Adams' current claim is reminiscent of Shakespeare's murdered Banquo, who in the form of a ghost, rises from the dead, appearing and reappearing to haunt MacBeth [Macbeth]. *See, e.g.*, *MacBeth* [*Macbeth*], Act 3, Sc. 4 So, too, Adams' claims have been consistently rejected and each of his prior lawsuits dismissed. Unfortunately, their repose was not final, and like Banquo, these claims seem to appear and reappear in different apparitions."). *See also Bennett v. Progressive Specialty Ins. Co.*, No. 2:20-CV-987-WKW, 2022 WL 420767, at *3 (M.D. Ala. Feb. 10, 2022) (W. Keith Watkins, United States District Judge, memorandum opinion and order) ("Bennett argues that the first case never decided the particular claim that he now raises. (Doc. # 21 at 3–4.) But no matter whether his argument was addressed or not, the time to raise new arguments has passed and preclusion has attached. In the words of Shakespeare, 'the hurly-burly's done, ... the battle's lost and won.' William Shakespeare, Macbeth act 1, sc. 1, l. 3–4."). *See also Hunter v. Murdoch*, No. 19-CV-0590 (NEB/DTS), 2019 WL 1967130, at *1 (D. Minn. Mar. 21, 2019), *report and recommendation adopted*, No. 19-CV-590 (NEB/DTS), 2019 WL 1958653 (D. Minn. May 1, 2019), *aff'd*, No. 19-2293, 2019 WL 6977686 (8th Cir. Sept. 4, 2019) (David T. Schultz, United States Magistrate Judge, report and recommendation) ("At approximately 75,000 words, Hunter's complaint is longer than William Shakespeare's *Romeo and Juliet, King Lear*, and *Macbeth* combined.").

[6] *United States v. Simon*, 12 F.4th 1, 58 n.16 (1st Cir. 2021), *cert. denied sub nom. Kapoor v. United States*, 213 L. Ed. 2d 1037, 142 S. Ct. 2811 (2022), and *cert. denied sub nom. Lee v. United States*, 213 L. Ed. 2d 1037, 142 S. Ct. 2812 (2022) ("This verity has been part and parcel of the human experience from time immemorial. Over four centuries ago, the Bard of Avon [Shakespeare] famously wrote 'To beguile the time, look like the time — bear welcome in your eye, your hand, your tongue. Look like the innocent flower, but be the serpent under't.' William Shakespeare, *Macbeth*, act 1, sc. 5 (circa 1606).").

[7] *Nedza v. Klein*, Nos. 258, 259 116 N.J.L., 350, 352, 184 A. 628, 629 (N.J. Sup. Ct. 1936) ("So in Shakespeare we find in Macbeth, Act III, Scene 3, near the end of the

words,[8] or even expressing initial confusion when tackling eleven counts at issue in a case.[9] For those who have some familiarity with Shakespeare in an academic context, they may also be familiar with a common association that exists between the words 'Macbeth' and 'madness' within criminology,[10] or 'Macbeth' and 'madness' in literary studies,[11] as examples. Due to common exploration of these themes, there appears to be a resulting academic absence relating to Macbeth and the contents of legal insanity, prompting an in-depth look at this particular connection of law and literature. Due to the commonly known frequency at which this theme of 'madness' is explored across Shakespeare's oeuvre, one may be inclined to make assumptions about Macbeth's 'sanity' or 'insanity' before the legal analysis begins. In this context, this article has a significant relevance within law and literature–not only in the legal sense but also in terms of Shakespearean literary analysis. The primary goals of this article are to first, establish what legal insanity means under the M'Naughten test through application and analysis to a timeless Shakespeare character,

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scene Malcolm says: 'What will you do? Let's not consort with them: To show an unfelt sorrow is an office which the false man does easy.'").

[8] *Stais v. Sears-Roebuck & Co.*, 378 Pa. 289, 293, 106 A.2d 216, 217–18 (1954) (Bell, J., dissenting) ("The majority opinion approves *Lanni v. Pennsylvania R. R.*, 371 Pa. 106, 88 A.2d 887, *supra*, which was relied on by the Superior Court, but has misapplied the law to the facts of this case. The majority, to paraphrase Shakespeare's Macbeth, keep the word of promise to our ear but break it to our hope and understanding.").

[9] *MCG Cap. Corp. v. Maginn*, No. CIV.A. 4521-CC, 2010 WL 1782271, at *4 (Del. Ch. May 5, 2010) (Chandler, Chancellor) ("I have spent considerable time analyzing the complaint, the briefs, and the oral argument transcript in an effort to accurately characterize each of the eleven counts at issue. I confess that after undergoing this exercise I appreciate more fully MacDuff's sentiment: 'Confusion now hath made his masterpiece.'").

[10] Jeffrey R. Wilson, "*Macbeth* and Criminology." *College Literature* 46, no. 2 (2019): 453-485. doi:10.1353/lit.2019.0018 (This is a collection of three essays which connects Shakespeare's works, such as *Macbeth*, with modern concepts of criminology. The third essay of this collection, titled "'A Dagger of the Mind': Madness, Murder, and Medicine in *Macbeth*," on page 471, focuses on how the play is "brimming with madness.").

[11] Frank McGuinness, "Madness and Magic: Shakespeare's Macbeth." *Irish University Review: A Journal of Irish Studies* 45, no. 1 (2015): 69–80. doi:10.3366/iur.2015.0151 (This article highlights the theatricality found in the supernatural themes of *Macbeth*, and how Macbeth experiences a certain madness within the context of said themes.).

and second, subvert the general association that Macbeth is 'insane' in the context of legal insanity.

A Brief History of the M'Naughten Insanity Test

For the purpose of informing the reader about the M'Naughten insanity test, which will be applied to Macbeth, a brief history of the test that became the most prominently used across both state and federal jurisdictions within the United States is necessary.[12] As with most common law concepts in the United States, the M'Naughten test originated in England.[13] In 1843, a man named Daniel M'Naughten mistakenly shot private secretary Edward Drummond, believing him to be Sir Edward Peele, who was the English Prime Minister at the time.[14] In response to being charged with Drummond's murder, M'Naughten pleaded "not guilty by reason of insanity."[15] At trial, various medical examiners presented evidence regarding the "morbid delusion" M'Naughten claimed to experience when he mistook Drummond for Sir Edward Peele.[16] Lord Chief Justice Tindal, one of the judges presiding over the trial, outlined the central issues to the jury as follows:

> The question to be determined is, whether at the time the act in question was committed, the prisoner had or had not the use of

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[12] "The Insanity Defense Among the States," FindLaw (Jan. 23, 2019), https://www.findlaw.com/criminal/criminal-procedure/the-insanity-defense-among-the-states.html (last visited April 28, 2023) [hereinafter FindLaw Insanity Defenses] (As of writing this article in 2023, twenty-eight states within the United States, plus the federal government, use the M'Naughten insanity defense or a modified version of the M'Naughten defense. Additionally, it is important to note here that the burden of proof for the M'Naughten insanity defense varies across jurisdictions. For example, in the federal jurisdiction, according to 18 U.S.C. § 17 (2022), the state has to prove elements of a crime beyond a reasonable doubt while the defendant has to provide clear and convincing evidence of insanity after raising the insanity defense. Though the variance of burden of proof for insanity defenses can be seen in the FindLaw source, burden of proof rules are independent from the analysis of the M'Naughten insanity defense as explored in this article.).

[13] *M'Naghten's Case,* 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843) (The author does not plan to explore every detail in the history of *M'Naughten's Case*, only to provide enough information to inform about the origins and development of the core elements of the M'Naughten insanity defense.).

[14] *Id.*

[15] *Id.*

[16] *Id.*

> his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favour: but if, on the contrary, they were of opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him.[17]

The jury found M'Naughten "not guilty, on the ground of insanity."[18] An outrage rippled throughout the country at this verdict, the majority of which was a central taken-abackness that anyone 'mad' could now commit a crime and essentially get away with it.[19] Due to the response of the public, combined with urging from Queen Victoria herself,[20] a panel consisting of both the House of Lords[21] and judges revisited the specifics of M'Naughten's case in order to figure out what constituted legal insanity.[22] Their combined delegation resulted in the core elements of the M'Naughten insanity test, where Lord Chief Justice Tindal proclaimed that–at the time of the act–it must be proven that "the party accused was labouring under such a defect of reason, from

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[17] *Id.*

[18] *Id*.

[19] Keith J. B. Rix, "Towards a More Just Insanity Defence: Recovering Moral Wrongfulness in the M'Naghten Rules," *BJPsych Advances* 22, no. 1 (2016): 44–52. doi:10.1192/apt.bp.115.014951 (In this article, on page 44, Rix describes the public outage at M'Naughten's verdict in more detail. For example, there was an anonymous letter (under the pseudonym Justus) published in *The Times* two days after M'Naughten's verdict. The writing within this letter was structured as a poem, opening with the lines, "'Ye people of England exult and be glad / For ye're now at the will of the merciless mad.'")

[20] Queen Victoria, *The Letters of Queen Victoria, Volume 1 (of 3), 1837-1843, A Selection from Her Majesty's Correspondence Between the Years 1837 and 1861* 450-512 (Arthur Christopher Benson and Viscount Esher, eds., 2006) (ebook) (In a letter to Sir Robert Peel on March 12th, 1843, Queen Victoria had responded to news of M'Naughten's verdict as follows: "The law may be perfect, but how is it that whenever a case for its application arises, it proves to be of no avail? We have seen the trials of Oxford and MacNaghten [M'Naughten] conducted by the ablest lawyers of the day—Lord Denman, Chief Justice Tindal, and Sir Wm. Follett,—and *they allow* and *advise* the Jury to pronounce the verdict of *Not Guilty* on account of *Insanity*,—whilst *everybody* is morally *convinced* that both malefactors were perfectly conscious and aware of what they did!").

[21] UK Parliament, "House of Lords," UK Parliament (2023), https://www.parliament.uk/lords/.

[22] *M'Naghten's Case,* 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).

disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."[23] Modernly, the M'Naughten insanity defense[24] has developed from said core elements, and is outlined as follows: first, a defendant must demonstrate that he suffered a defect of reason[25] by a "mental disease" or "mental defect," and; secondly, that at the time of the act, he did not know the nature and quality of the act, or that the act was wrong.[26]

Clarifying Misconceptions about the Insanity Test: Legal Insanity & Rarity of Use

Now that the basics of the M'Naughten case and titular insanity test have been briefly discussed, it is important to distinguish that there is a key difference between legal insanity and legal competence before moving onto application of the M'Naughten test to Shakespeare's Macbeth. The scope of this article and the M'Naughten test as a whole deals with legal insanity, not legal competence. Legal insanity refers to what is defined by the insanity test of a given jurisdiction, such as the M'Naughten test.[27] In a court case where legal insanity is being determined, the jury (or the judge, if it is a bench trial[28]) will be the ones to determine–based on the evidence–if the defendant was legally

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[23] *Id.*

[24] 21 Am. Jur. 2d Criminal Law § 50 (2023) (21 Am. Jur. 2d Criminal Law § 50 summarizes the components of the M'Naughten insanity defense as "…first, a defendant can show that he was laboring under such a defect of reason, from a disease of the mind as not to know the nature and quality of the act he was doing, and second, even if the defendant did know the nature and quality of the act, he can still establish legal insanity if, because of a disease of the mind, he did not know what he was doing was wrong.").

[25] Joel Samaha, *Criminal Law* 212 (Cengage Learning et al. eds., 12th ed. 2017) (The presence of "defect of reason" within the M'Naughten insanity defense relates to the ability of the defendant to "reason" what is right from wrong. This is where the M'Naughten insanity test received its other name, "The Right-Wrong Test." Psychologists refer to this aforementioned ability to "reason" as "cognition.").

[26] *Id.* ("Boiled down to its essence, there are two elements to the right-wrong test (the McNaughtan [M'Naughten] rule) created in *McNaughtan* [*M'Naughten*]: 1. The defendant suffered a defect of reason caused by a disease of the mind. 2. Consequently, at the time of the act [he or] she did not know: a. the nature and quality of the act [he or] she didn't know what [he or] she was doing *or* b. that the act was wrong.").

[27] *Id.*

[28] *Id.*

insane at the time the criminal act in question was committed.[29] There is variance across state jurisdictions regarding what constitutes legal insanity, as some use the M'Naughten test, some use the irresistible impulse test, and some use the Model Penal Code test.[30] On the other hand, legal competence refers to the ability of a defendant to stand trial, understand the required legal proceedings, and help with his defense.[31] Competence is determined by a judge prior to or during a trial,[32] pursuant to the due process clause as well as a federal statute.[33] To reiterate, the M'Naughten test deals with legal insanity, not legal competence.

Additionally, individuals rarely submit insanity defenses, and it rarely succeeds as a defense. In a study done by Carmen Cirincione, PhD, et al., it was found that unless the defendant meets certain characteristics such as having a major mental health diagnosis, an insanity defense was unlikely to succeed in court.[34] The presence of an established medical history or diagnosis prior to the events of a given crime is needed for the first part of the M'Naughten insanity defense to hold water as a defense, and even then the remaining elements of the defense have to be proven.[35] For example, Georgia was one of the states examined in the aforementioned study, a state which uses the

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[29] *Id.*

[30] FindLaw Insanity Defenses, *supra* note 12.

[31] Samaha, *supra* note 25.

[32] *Id.* at 211 (A judge determines legal competence before or during a trial whereas a jury (or judge, if the trial is a bench trial) determines legal insanity at the end of a trial via a verdict.).

[33] 18 U.S.C. § 4241 (2022) (The full title of 18 U.S.C. § 4241 (2022) is "Determination of mental competency to stand trial to undergo postrelease proceedings." It details the process of determining competency more in depth.).

[34] Carmen Cirincione, PhD, Henry J. Steadman, PhD, and Margaret A. McGreevy, MA, "Rates of Insanity Acquittals and the Factors Associated with Successful Insanity Pleas," 23 Bull Am. Acad. Psychiatry Law, 399, 407 (1995) (In the study, Cirincione, Steadman, and McGreevy found that "In every state [of those states examined in the study], diagnosis was significantly related to the verdict at the .001 interval. Success rates were highest for defendants diagnosed with a major mental illness.").

[35] *See infra* note 63 (*United States v. Dixon*, 185 F.3d 393 (5th Cir. 1999) shows how the diagnosis of a mental illness alone is not enough to prove legal insanity under M'Naughten; it needs to be proven that the crime in question was a direct result of a diagnosed "severe mental illness." Additionally, the remaining elements of the M'Naughten test still need to be proven.).

M'Naughten test.[36] The results of the study determined that Georgia had the highest insanity plea rate (1.75 per one hundred felony cases) across the years 1976 to 1985, it also had the lowest success rate (13.1%) for insanity cases.[37] As this example may provide a general glimpse, it cannot be overstated how rarely insanity defenses are actually used, let alone how rare it is for them to succeed as defenses.[38] In light of these factors, Macbeth faces challenging odds in successfully proving an insanity defense for the crimes he commits, which will subsequently be discussed.

Meet the Defendant: A Brief Synopsis of Shakespeare's *Macbeth*

The author is writing under the general assumption that those reading have at least a passing familiarity of Shakespeare's *Macbeth*. However, in order to make sure each reader is on the same page when it comes to the M'Naughten analysis of Macbeth as a character, a brief summary of the central plot of the play is necessary to understand his relevant proclivity for crime. This article does not plan to detail every character, plot point, or crime that occurs throughout the play; it will only share what is necessary to show how each element of the M'Naughten insanity defense operates when applied to Macbeth. The titular main character, Macbeth, is introduced as a nobleman and general of a Scottish king named King Duncan.[39] From the onset of the play, Macbeth and his good friend Banquo, another general of the King, are visited after a recent battle by three witches.[40] These witches entertain Macbeth and Banquo with prophecies of the past, the present, and the future–the most enrapturing to Macbeth being a future prophecy that he will be king.[41] However, events quickly escalate

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[36] FindLaw Insanity Defenses, *supra* note 12.

[37] Carmen Cirincione, PhD, Henry J. Steadman, PhD, and Margaret A. McGreevy, MA, *supra* note 34, at 408.

[38] *Id.* at 409.

[39] Shakespeare, *supra* note 4, at 9.

[40] *Id.* at 17.

[41] *Id.* at 17-19 (The three witches each address Macbeth by his past, present, and future titles, indicating their ability to prophesize. The First Witch addresses Macbeth as "Thane of Glamis," a title of nobility Macbeth has previously received. The Second Witch addresses him as "Thane of Cawdor," a title he is about to presently receive from King Duncan for his valor in battle. The Third Witch addresses him as "Macbeth, that shalt be king hereafter," which particularly sticks with Macbeth, as he now expects and intends to become king.).

when Macbeth learns that Malcolm, King Duncan's son, will ascend to the throne,[42] leaving Macbeth to ponder ways to get rid of the obstacle now placed in his path.[43] From this moment, Macbeth begins to formulate a plan for ascending to the throne,[44] a plan which outlines the murder of King Duncan, who is going to stay overnight at Macbeth's castle.[45] He deliberates the pros and cons of the implications of killing a man who is not only a king, but also a guest and a friend.[46] Encouraged by his wife, Lady Macbeth, and emboldened by her assistance in the crime,[47] Macbeth decides to kill Duncan after all.[48] After successfully murdering King Duncan,[49] Macbeth kills Duncan's personal guards to eliminate potential

[42] *Id.* at 29 (King Duncan announces that his son, Malcolm, Prince of Cumberland, will succeed him as king.)
[43] *Id.* (Macbeth expresses frustration at King Duncan's announcement that Malcolm will be king. He notes "The Prince of Cumberland! That is a step / On which I must fall down or else o'erleap, / For in my way it lies.").
[44] *Id.* (Macbeth also plans to hide his forming intent to get rid of obstacles in his way to becoming king, "Stars, hide your fires; / Let not light see my black and deep desires.").
[45] *Id.* at 35 (Macbeth arrives home to Inverness Castle, where King Duncan will later be spending the night. Lady Macbeth, his wife, greets him and enthusiastically urges him to go through with his plan to kill King Duncan that night. Macbeth reassures her that they will "speak further," after Duncan arrives at Inverness.).
[46] *See infra* notes 109-113 (These notes pertain to discussing the intricacies of how Macbeth knew that killing King Duncan was morally wrong.).
[47] Shakespeare, *supra* note 4, at 43 (Macbeth expresses his fear of getting caught for his planned crime of murdering King Duncan, i.e., "if we should fail–," to Lady Macbeth. She further encourages him by explaining that she will get Duncan's guards–who are posted outside where Duncan's sleeping–drunk on wine so Macbeth can slip into the room and kill the king during the night.).
[48] *Id.* at 45 (After receiving reassurance from Lady Macbeth that he won't be caught committing the crime, Macbeth is "settled and bend up"–determined–to kill King Duncan.).
[49] *Id.* at 55 (Macbeth has successfully murdered King Duncan.).

witnesses as well as deflect suspicion,[50] and is soon instated as king.[51] Macbeth's growing obsession with remaining king develops into a reign of full-blown tyranny and terror, built on the bodies of his former friends and colleagues.[52] He consults with the witches who had initially shared the 'king' prophecy with him, his infatuation with downing threats to his reign overtaking all else.[53] Unsatisfied that all threats to his rule have been effectively neutralized, Macbeth targets any potential enemies that may stand in his way of a secure kingship,[54] which eventually leads to his downfall.[55]

The above-stated outline is necessary to inform the reader about the fictional character, Macbeth, to whom the M'Naughten insanity test will be applied, so that subsequent analysis may be better understood with fuller context of the play. Through the above summary, it is blatant that there are a number of Macbeth's crimes which can potentially be selected for a legal insanity analysis. However, the scope of this article, for the explicit purpose of showcasing the

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[50] *Id*. at 69-71 (Macbeth admits to Macduff that he killed the guards: "That I did kill them." Immediately following this admission, Macbeth lyingly says he did so because the guards were the ones who killed King Duncan: "Here lay Duncan, / His silver skin laced with his golden blood, / And his gashed stabs looked like a breach in nature / For ruin's wasteful entrance; there the murderers, / Steeped in the colors of their trade, their daggers / Unmannerly breeched with gore. Who could refrain / That had a heart to love, and in that heart / Courage to make 's [his] love known?" In these statements, Macbeth is deliberately lying about the circumstances surrounding Duncan's murder in an attempt to shift suspicion away from himself.) *See infra* note 83 (This note details Macbeth planning to frame the guards as Duncan's murderers, deflecting suspicion).

[51] *Id.* at 75 (Macduff, a fellow nobleman, announces that Macbeth has been named king and "gone to Scone / To be invested [coronated].").

[52] *Id.* at 87 (Macbeth orders two men to murder his friend, Banquo, and his son, Fleance, to ensure that he will remain king. Macbeth's motive to do so is borne from a witch's earlier prophecy given to Banquo, which entails that he "shalt get kings [have children who will become kings]." *Id.* at 19.).

[53] *Id*. at 123 (This begins the meeting where Macbeth receives the famous prophecies of "beware Macduff," "none of woman born / Shall harm Macbeth," and "Macbeth shall never vanquished be until / Great Birnam Wood to high Dunsinane Hill / Shall come against him." *Id.* at 125-27.).

[54] *Id*. at 131 (Macbeth decides to kill Macduff's wife and children to try and counter the three prophecies he just received from the witches.).

[55] *Id.* at 187 (Despite all of his criminal efforts to secure a long-reigning kingship, Macbeth is ultimately slain by Macduff.).

components of the M'Naughten insanity test in practice, is not going to focus on all of the crimes Macbeth committed in the play. Rather, the primary focus of analysis is going to center around Macbeth's initial crime of murdering King Duncan for sake of simplicity and ease of understanding how the M'Naughten test functions through each of its elements.

Applying the M'Naughten Insanity Test to Macbeth: Mental Disease or Mental Defect

Specifically referring to the facts presented in Shakespeare's play, limiting it to factual evidence via dialogue spoken or actions taken rather than speculation, Macbeth does not have a mental disease or mental defect as legally defined[56] at the time he murders King Duncan. Regarding the first requirement of the M'Naughten insanity test, the terms "mental disease" and "mental defect" refer to very specific legal definitions which are dependent on jurisdiction.[57] For instance, when it comes to the term "mental disease" and the courts in the context of the M'Naughten insanity defense, it is generally referring to medically diagnosed psychosis,[58] paranoia, and schizophrenia,[59] whereas "mental defect" usually refers to a form of severe brain damage or mental retardation.[60] Personality disorders, or otherwise antisocial behaviors, are not included within the definitions of "mental disease" or "mental

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[56] Samaha, *supra* note 25, at 212 (It is important to note that there is variance between what constitutes a "mental disease" or "mental defect" across the state jurisdictions which use the M'Naughten insanity defense. This article does not intend to detail each variance, and for the sake of demonstrating the basic operation of the M'Naughten insanity test, the terms "mental disease" and "mental defect" mentioned throughout the article will refer to the definitions Joel Samaha provides in his *Criminal Law* (12th ed., 2017) textbook.).

[57] *Id.*

[58] University of Minnesota Libraries Publishing, *Criminal Law* "Ch. 6.1 The Insanity Defense: M'Naghten Insanity Defense" (University of Minnesota Libraries Publishing, eLearning Support Initiative, et al. eds., 2012) (ebook), https://open.lib.umn.edu/criminallaw/chapter/6-1-the-insanity-defense/ ("The terms 'defect of reason' and 'disease of the mind' [mental disease or defect] can be defined in different ways, but in general, the defendant must be cognitively impaired to the level of not knowing the nature and quality of the criminal act, or that the act is wrong. Some common examples of mental defects and diseases are psychosis, schizophrenia, and paranoia.").

[59] Samaha, *supra* note 56.

[60] *Id.* at 213.

defect."[61] Additionally, after having established the existence of a mental disease or defect, whether that be through a documented medical history or previously established diagnosis, it is required to prove that because of the mental disease or defect the defendant did not know[62] the nature of the crime or that the crime was wrong. It is important to reiterate that the presence of a mental disease or mental defect through an established medical history prior to the criminal activity is pivotal for the M'Naughten defense to even operate in the first place, and even then, that is only the first part of the defense to be proven.[63] Without it, the defense does not hold water, and is very unlikely to be a successful defense in court.

Taking this first part of the M'Naughten analysis a step further, it is appropriate to refute an argument that may arise among those familiar with *Macbeth* as a whole. Some may point to Macbeth seeing his slain friend Banquo's ghost at a dinner feast as being a 'hallucination,'[64] or to Macbeth's obsession with preventing his removal from the throne as 'paranoia.'[65] Mainly, this appears to stem from a speculation that the

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[61] *Id.* at 212-13.

[62] *Id.* (In legal language, "know" usually correlates with cognition, or "intellectual awareness." The particulars vary across jurisdictions, with some courts letting the jury decide if a defendant knew what he was doing based on the facts of a given case.).

[63] *United States v. Dixon*, 185 F.3d 393, 406 (5th Cir. 1999) (Jerry E. Smith, Circuit Judge) ("The 'convincing clarity' burden for a defendant seeking a jury question on his insanity defense requires more than just a showing that he has been diagnosed with a mental illness at some point in his life; rather, he must provide sufficient evidence so that a rational jury could conclude, by clear and convincing evidence, that he was unable to appreciate his wrongdoing as a result of a severe mental illness. 18 U.S.C. § 17(a).").

[64] Shakespeare, *supra* note 4, at 101 (After Macbeth confirms with his hired mercenaries that Banquo has successfully been killed, Macbeth sees the ghost of Banquo sitting in his chair upon returning to a dinner feast. Macbeth, being struck by guilt at the sight of Banquo's ghost, causes a scene with his reaction to it that does not go unnoticed by other nobles at the table.).

[65] Shakespeare, *supra* note 53 (Macbeth seeks out the three witches who initially shared the dual king prophecy–the one told about Macbeth becoming "king thereafter," and the one about Banquo "get[ing, as in begetting] kings"–during the beginning of the play. *Id.* 17-19. When he meets with them after their first encounter, he is seeking proof that he has slain any and all enemies who would otherwise have him removed from his current position of power. In the case of Macbeth, those threats he is attempting to ward off are actual threats to him–such as Macduff, who wants revenge for his slain family as well as to end Macbeth's tyranny. The threats towards which Macbeth has a growing obsession are not borne from a state

ghostly apparitions within the supernatural setting of *Macbeth* are actually hallucinations, or that Macbeth's ever-present worry that he will lose kingship as 'paranoia.'[66] If these behaviors were to be offered as evidence of Macbeth experiencing a "mental disease" or "mental defect"[67] as part of his defense for the charge of murdering King Duncan, they would not be successful.[68] Macbeth exhibits this notoriously abnormal conduct,[69] both through seeing ghosts[70] and becoming increasingly preoccupied with remaining king,[71] exclusively

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symptomatic of a psychotic delusion (where the threats are in reality nonexistent, though the person in question typically believes them to be real). Mental Health America, Inc., "Paranoia and Delusional Disorders: What is a Delusion?" (2023), https://www.mhanational.org/conditions/paranoia-and-delusional-disorders (last visited April 26, 2023).).

[66] *Id.*

[67] Samaha, *supra* note 56.

[68] *Hall v. State*, 568 So. 2d, 882, 885 (Fla. 1990) ("In light of the requirements of the M'Naghten Rule any expert testimony by Dr. Farinacci on Hall's mental state, to be relevant, must concern whether Hall (1) was incapable of distinguishing right from wrong (2) as a result of a mental infirmity, disease, or defect.") (Posing an example, even if Macbeth did have an established medical history of a "mental disease" or "mental defect" at the time of murdering King Duncan, his defense would still have to subsequently prove under M'Naughten that one, Macbeth did not know the nature of the crime, and two, Macbeth did not know that killing King Duncan was "wrong.").

[69] *State v. Childers* 791 S.W.2d 779, 781 (Mo. Ct. App. 1990) (Stephan, Judge) ("Here, the jury heard a defense claiming mental disease or defect excluding criminal responsibility, along with the state's rebuttal testimony of abnormalities manifested only by repeated antisocial conduct. At trial, during rebuttal for the state, Dr. Michael Armour, a clinical psychologist, testified that appellant suffered from a personality disorder with antisocial and borderline features. Dr. Robert Carafoil, another witness for the state, testified that appellant's acts were 'reflections of antisocial behavior.' The parenthetical portion of the instruction [jury instruction] clarified the law because the state's evidence showed repeated antisocial conduct while appellant's pointed to mental disease or defect. The trial court did not abuse its discretion in permitting the parenthetical matter in MAI–CR3d 306.02 to be included in the instructions given.") (Abnormal behaviors or abnormalities which form only from repeated criminal–or otherwise antisocial–actions are not included within definitions of "mental disease" or "mental defect" for the purposes of the M'Naughten insanity defense.).

[70] Shakespeare, *supra* note 64.

[71] Shakespeare, *supra* note 65.

after his initial murder of King Duncan[72] to the following murders he commits.[73]

To summarize, as Macbeth commits more crimes, his subsequent behaviors escalate in abnormality as a result.[74] Macbeth's abnormal behaviors or abnormalities which formed solely from his repeated criminal–or otherwise antisocial–actions are not included within definitions of "mental disease" or "mental defect" for the purposes of the M'Naughten insanity defense.[75] Macbeth's gradual change of character over the course of the play, with his mounting bloodlust and obsessive preoccupation with the witches' prophecies are certainly abnormal behaviors,[76] but they do not constitute a mental disease or defect.[77] Put simply, Macbeth is afraid of losing his power as king, and is willing to do whatever it takes to maintain the position he achieved, even through repeated criminal action. Viewed in this light, according to what was established in the case above, the central piece of the insanity defense–the established presence of a mental disease or defect–is ultimately absent at or during the time Macbeth killed King Duncan.

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[72] Shakespeare, *supra* note 49 (King Duncan visits Macbeth's castle at Inverness, planning to feast and stay overnight as Macbeth's guest. Macbeth murders King Duncan as he is sleeping, which he does in Act II, Scene II of the play. The occurrences with Macbeth seeing Banquo's ghost at a royal feast happen in Act III, Scene IV, and Macbeth consulting with the three witches in a bizarre attempt to maintain his kinghood happens in Act IV, Scene I. This aforementioned abnormal conduct from Macbeth was not present at or during the time Macbeth murdered Duncan, the behaviors only manifested after the fact.).

[73] Shakespeare, *supra* note 52 (This is an example of one of the murders Macbeth has ordered after successfully killing Duncan and becoming king. He causes the murders of several others, such as Macduff's family, but that is not to be fully explored in this article. The purpose of this note is to illustrate that Macbeth directly and indirectly killed others in order to further ensure that his kingship went unopposed.).

[74] *State v. Childers* 791 S.W.2d 779, 781 (Mo. Ct. App. 1990) (Abnormal behaviors or abnormalities which form only from repeated criminal–or otherwise antisocial–actions are not included within definitions of "mental disease" or "mental defect" for the purposes of the M'Naughten insanity defense.).

[75] Samaha, *supra* note 56.

[76] Shakespeare, *supra* notes 64-65.

[77] Samaha, *supra* note 56.

Applying the M'Naughten Insanity Defense to Macbeth: Knowing the Nature and Quality of the Crime

Having applied the first part of the M'Naughten insanity defense to Macbeth, the analysis can move forward to examining how the first part of the second prong of the M'Naughten test operates. Referring to the first part of the second prong of the M'Naughten test, this part encompasses that a defendant did not know the nature and quality of the criminal act he committed.[78] This component of knowing the nature and quality of the crime joins in tandem with the existence of a mental disease or defect as explained in the previous sections.[79] Referring to whether Macbeth did not know the nature and the quality of killing King Duncan at the time he did so, Macbeth very lucidly indicates that he is aware of the nature and quality of murder, not only in a general sense, but also within his specific circumstances.

Macbeth expresses that he knows what the nature of murdering Duncan entails, as is expressed by his secretive actions and deliberations leading up to the moment where he ultimately murders King Duncan.[80] From the initial moment he learned that he would not be ascending to the throne, specific words spoken by Macbeth directly

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[78] Samaha, *supra* note 25, at 213 (Across most state jurisdictions, "knowing" in reference to the defendant knowing the nature and quality of the crime committed means having an "intellectual awareness" relating to the given crime. Many courts do not actually define what the "knowing" term entails in relation to "knowing the nature and quality of a crime." It is often left to be a fact for the jury to determine within the specific circumstances of a trial. As Samaha mentions, according to ALI [American Legal Institute] 1985 1:2, 174-76, the "nature and quality of the act" terminology is referring to the defendant not knowing what he is doing when he is committing a crime. Samaha provides an example to illustrate these concepts succinctly as follows: "'If a man believes he's squeezing lemons when in fact he's strangling his wife,' he doesn't know the 'nature and quality of his act.'").

[79] 21 Am. Jur. 2d Criminal Law § 50 (2023), *supra* note 24 (21 Am. Jur. 2d Criminal Law § 50 (2023) details the core components of the M'Naughten insanity defense.).

[80] Samaha, *supra* note 77 (Within most jurisdictions, the term "knowing" in reference to the defendant knowing the nature and quality of the crime committed means having an "intellectual awareness" of said crime. While acknowledging that there are variations across jurisdictions and specific insanity test applied (or not applied at all, in the states of Idaho, Kansas, Montana, and Utah), this section of the article is only focusing on the "knowing" definition Samaha mentions when applying the "knowing the nature and quality of the crime" to Macbeth via the M'Naughten test.). *See infra* notes 81-97 (These notes, immediately following note 80, detail the specifics of how Macbeth knew the nature and quality of murdering King Duncan.).

illustrate his attentiveness towards 'not getting caught' for the criminal act to which he repetitively refers.[81] In addition, Macbeth consults with his wife about his fears of being caught for the crime alongside how to outwardly deceive their guests so that he can commit his intended crime, which indicates that he knows the nature of the consequences which follow murder.[82] Not only that, but within the same conversation about expressing fears of being caught in the criminal act, Macbeth specifically plans to smear Duncan's blood onto his two guards, implicating them instead of himself for the murder.[83] In sum, Macbeth is trying to keep as many details of his crime hidden while planning how to escape future suspicion, so that he may more easily get away with killing the king.[84] Furthermore, his efforts to avoid any potential witnesses to his act alongside deflecting suspicion indicate that Macbeth is aware of the nature of murder as a crime.[85]

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[81] Shakespeare, *supra* note 42 (Mabeth's intent to kill in order to become king first manifests when King Duncan announces that Malcolm will ascend the throne. Macbeth states, "Stars, hide your fires; / Let not light see my black and deep desires. / The eye wink at the hand, yet let that be / Which the eye fears, when it is done, to see." He was always planning on secret deliberation to carry out the crime.).

[82] Shakespeare, *supra* note 48 (Macbeth receives reassurance from Lady Macbeth that he won't be caught committing the crime, and he is then "settled and bend up"–determined–to kill King Duncan. Macbeth also states, "Away, and mock the time with fairest show. / False face must hide what the false heart doth know." Macbeth is saying that he and Lady Macbeth must remember to convincingly pretend that they don't have ulterior motives for King Duncan's stay.).

[83] Shakespeare, *supra* note 4, at 43 (Macbeth, in rhetorical fashion, asks his wife, "Will it not be received [obvious], / When we have marked with blood those sleepy two / Of his own chamber [Duncan's two guards] and used their very daggers, / That they have done 't?").

[84] *Kassa v. State* 137 Nev. 150, 155, 485 P.3d 750, 756–57 (2021) ("Accordingly, even if the jury believed that Kassa had the delusions either of his psychiatrists described, and even if they believed those delusions were caused by a 'defect of the mind,' NRS 174.035(10)(a), and not Spice use, the evidence demonstrates that Kassa knew that he was setting a house on fire, the house was occupied by others, and the occupants would want to stop him. He likewise knew enough to escape from the fire and to attempt to evade arrest.").

[85] *State v. Fetters*, 562 N.W.2d 770, 774 (Iowa Ct. App. 1997) (Habhab, Chief Judge) ("As it relates to defendant's insanity defense, the State presented the testimony of psychiatrist Michael Taylor. Dr. Taylor examined defendant and opined she was fully capable of understanding the nature and quality of her acts and was fully capable of distinguishing right from wrong on October 25. He explained that he found no evidence of any diagnosable psychiatric disorder and he believed she suffered from only a personality disorder. Dr. Taylor noted defendant's precise

His keen deliberations and extensive planning surrounding the murder of King Duncan are staunch evidence that Macbeth fully understands the nature of the crime he intends to commit, as well as what it would take to cover his tracks.[86]

At and during the time of King Duncan's murder, Macbeth was highly self-aware of not only his thoughts and his actions, but also highly aware of the nature of the crime he was planning to commit.[87] In fact, Macbeth is so adamantly aware of the nature of murdering Duncan that he is overtly disgusted by the wickedness of it.[88] A central moment which showcases this disgust is the infamous 'bloody dagger' dialogue which Macbeth expresses as he makes his way towards Duncan's room: "Is this a dagger I see before me, / The handle toward my hand? Come, let me clutch / thee."[89] This is one of the most recognizable parts of the play–and for the purposes of this article, it is one of the most significant parts for displaying that Macbeth knew the nature and quality of his crime at the time of killing Duncan. Macbeth's 'bloody dagger' speech is an acknowledgement of the nature of murder prior to his immediately following actions of entering Duncan's room and stabbing him. He muses that the dagger he imagines may be a "fateful vision," dually referencing the earlier fateful premonition he receives from the witches,[90] and that he is

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planning and deception in the execution of her plan and statements she made after the killing which reflected she understood what she had done.").

[86] *Id.* To apply the succinct phrasing from Chief Judge Habhab in *State v. Fetters*, 562 N.W.2d 770 (Iowa Ct. App. 1997) to Macbeth and what constitutes "knowing," Macbeth's very precise and deliberate planning and deception in his plan to kill King Duncan reflects that he understands the nature of the crime.

[87] *Id.*

[88] 21 Am. Jur. 2d Criminal Law § 25 (2023) (21 Am. Jur. 2d Criminal Law § 25 describes as follows: "Crimes are often spoken of as being divided into the categories of acts wrong in themselves, termed 'acts mala in se,' and acts which would not be wrong but for the fact that positive law forbids them, termed 'acts mala prohibita.'" The crime of murder is categorized as an act "mala in se" ("evil in itself"), within criminal law. Macbeth being disgusted at the thought of murder, which he then commits, stems from a general awareness that murder is evil in itself. Macbeth's repulsion at what murder entails indicates that he understands the nature of murder.).

[89] Shakespeare, *supra* note 4, at 51.

[90] Shakespeare, *supra* note 41 (Macbeth is motivated to become king even if it means he must murder to become one. He first begins fixating on becoming king

actively visualizing the tool he intends to use to secure kingship.[91] Subsequently, he compounds this line of thought by actively questioning if it is a hallucination brought on by a fevered brain, which he himself discredits, as he states it stems from his reaction to the act of murder in general:

> Mine eyes are made the fools o' th' other senses
> Or else worth all the rest. I see thee [the imagined
> dagger] still,
> And on thy blade and dudgeon, gouts of blood,
> Which was not so before. There's no such thing.
> It is the bloody business which informs
> Thus to mine eyes.[92]

By this point, Macbeth has actively drawn his dagger and is making his way to King Duncan's room upon receiving a signal that the coast is clear.[93] In order for Macbeth to arrive at these highly introspective conclusions regarding his own criminal behavior, while approaching Duncan's room,[94] he has to know the nature of the crime he is going to commit.[95] As Macbeth says in his own words, he knows that murder is a "bloody business,"[96] and because he understands that the nature of

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when he receives the initial prophecies from the three witches that he will be "king hereafter.").

[91] Shakespeare, *supra* note 4, at 53 (Macbeth visualizes a bloody dagger, directly referring to the crime he is about to commit [i.e., the dagger he currently carries is still clean, but is soon to be marked by gore]. He unsheathes the dagger while conveying this brief speech aloud.).

[92] *Id.*

[93] *Id.* (With a dagger in hand, Macbeth says, "I go and it is done. The bell invites me. / Hear it not, Duncan, for it is a knell / That summons thee to heaven or to hell," while entering Duncan's chambers to kill him. The bell to which Macbeth refers is a signal from his wife (a signal that was deliberately chosen) that the coast is clear for him to enter Duncan's room unseen. The existence of this signal indicates that Macbeth knows murder is of a criminal nature, and if anyone saw him doing it, he would be accordingly punished for it. He seeks to avoid this through secrecy.

[94] *Id.* (Additionally, Macbeth exerts a very intense effort to be quiet while approaching Duncan's chambers, so that no one will hear him or consequently see him commit murder: "Thou [sure] and firm-set earth, / Hear not my steps, which [way they] walk, for fear / Thy very stones prate my whereabouts, / And take the present horror from the time, / Which now suits with it.")

[95] *State v. Fetters*, 562 N.W.2d 770, 774 (Iowa Ct. App. 1997), *supra* note 86.

[96] Shakespeare, *supra* note 91.

murder is evil in itself, he is naturally repulsed as a result.[97] Yet, despite his overt disgust at the nature of the crime in question, combined with his extensive deliberations to maintain secrecy, Macbeth intentionally overrides these qualms to murder King Duncan and successfully ascend the throne.

Applying the M'Naughten Insanity Test to Macbeth: Knowing that the Crime was Wrong

Now that the first portion of the second part of the M'Naughten insanity test has been applied to Macbeth and analyzed, it is time to discuss the second part of the second prong: the defendant knows that the crime committed was wrong.[98] What "wrong" means in context of the defendant knowing that the crime was "wrong" varies greatly across jurisdictions which use the M'Naughten insanity defense. Some state jurisdictions outline that knowing a crime is "wrong" refers to it being legally wrong, some detail that it means morally wrong according to societal standards,[99] and some detail that it includes both types.[100] There is demonstrable evidence that Macbeth knew that the criminal act he committed–the murder of King Duncan–was "wrong," both in a legal sense and a societal moral sense, so both avenues will be analyzed subsequently.

Macbeth understood that his ambition to commit murder was "wrong" in a moral sense, and that his conduct was wrong as well as "illegal by societal standards."[101] The main evidence for this is the back-and-forth

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[97] 21 Am. Jur. 2d Criminal Law § 25 (2023), *supra* note 88.

[98] Samaha, *supra* note 25, at 213 (What "wrong" means in the second prong of the M'Naughten insanity defense, that the defendant knows the crime committed was "wrong," varies greatly between jurisdictions which apply the test.).

[99] *Id.*

[100] *State v. Romero*, 248 Ariz. 601, 606, 463 P.3d 225, 230 (Ct. App. 2020) (Brown, Judge) ("In the oft-cited case of *People v. Schmidt*, 216 N.Y. 324, 110 N.E. 945 (1915), the court further explained the difference between legally and morally wrong. *See Malumphy*, 105 Ariz. at 210–12, 461 P.2d at 687–689….Although *M'Naghten* had not explicitly considered '[w]hether [a defendant] would also be responsible if he knew [the act] was against the law, but did not know it was morally wrong," *id.*, the *Schmidt* court pointed out that, in most cases, the analysis will be coterminous because '[o]bedience to the law is itself a moral duty.' *Id.* at 949.").

[101] Samaha, *supra* note 25, at 213 (Samaha points out how in the case of *People v. Schmidt*, 216 N.Y. 324, 110 N.E. 945 (1915), the New York Court of Appeals established that to hold the word "wrong" to mean wrong in only a legal fashion is too narrow of a definition for the word overall. The Court of Appeals recommended

dialogue Macbeth has with himself, weighing the pros and the cons of murdering King Duncan before he ultimately decides to do it.[102] This is a discussion he has on his own, unprompted by others, so he was not persuaded or otherwise influenced by another person to analyze this dilemma.[103] Macbeth begins this monologue by acknowledging that there are consequences, both legally and morally, attached to murder as a crime: "If th' assassination / Could trammel up the consequence and catch / With his surcease success [Duncan being killed], that but this blow / Might be the be-all and the end all here…."[104] In his aforementioned words, Macbeth is saying that the consequences of killing King Duncan do not begin and end with the act of killing him, there are extended consequences connected to this moral and legal wrong with which he will have to grapple.[105]

Relating to moral wrongness according to societal standards,[106] Macbeth's awareness of it is open-and-shut according to his own

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that suitable jury instructions for word "wrong" in context of the M'Naughten insanity test means both legally wrong and wrong according to accepted moral standards.).

[102] Shakespeare, *supra* note 4, at 39-41 (At the very beginning of Act I, Scene VII, Macbeth holds a conversation with himself in order to attentively weigh the pros and cons of murdering King Duncan, since he is currently deliberating the crime.).

[103] *Id.*

[104] *Id.*

[105] *Id.* at 39 (Macbeth says, "With his surcease success [Duncan being killed], that but this blow / Might be the be-all and the end all here…." His words "might be the be-all and the end all here" indicate that he acknowledges the greater wrongness of murdering Duncan. Macbeth can't simply kill Duncan and that's that, he has to deal with the consequences of this wrong both legally and morally.).

[106] *State v. Tamplin*, 195 Ariz. 246, 248, 986 P.2d 914, 916 (Ct. App. 1999) (Pelander, Presiding Judge) ("Moreover, the plain wording of § 13-502(A) does not suggest a different interpretation of the term 'wrong' than that articulated in *Corley,* which is consistent with other courts' constructions of that term. See, e.g., *People v. Serravo,* 823 P.2d 128, 137-38 (Colo.1992) (terms 'right' and 'wrong' in insanity statute 'are essentially ethical in character and have their primary source in the existing societal standards of morality,' thus defense should be objectively measured by those standards 'rather than by a defendant's personal and subjective understanding of the legality or illegality of the act in question'). *See also State v. Wilson,* 242 Conn. 605, 700 A.2d 633 (1997) (rejecting personal test as improper method of measuring defendant's capacity to appreciate wrongfulness of actions under statute); *State v. Worlock*, 117 N.J. 596, 569 A.2d 1314 (1990) (concept of moral wrong must be judged by societal standards, not personal standard of individual defendant). In addition, the court's construction of 'wrong' in *Corley*

words. Macbeth acknowledges that murdering Duncan would lead to ramifications in an afterlife, as committing murder would risk "jump[ing] the life to come" (his soul being damned).[107] Expanding a

'promote[s] justice and effect[s] the objects of the law,' as A.R.S. § 13-104 requires.").

[107] Shakespeare, *supra* note 4, at 39 (Macbeth says, "If th' assassination / Could trammel [catch] up the consequence and catch / With his surcease success [Duncan being killed], that but this blow / Might be the be-all and the end all here, / But here, upon this bank and ⌜shoal⌝ of time, / We'd jump the life to come." When Macbeth says "we'd jump the life to come," he is referring to how the act of killing King Duncan would affect his soul going to a paradise or hell.). To further clarify, based on the actions and language of Macbeth and others throughout the play, it is evident that Chrisitanity–alongside its moral standards–is societally prominent. The language used across character interactions is indicative of commonly known Christian mannerisms and customs, such as invoking "God" for blessings, making references to heaven and hell, angels and devils, etcetera. *See* Shakespeare, *supra* note 4, at 37 (Duncan: "Herein I teach you / How you shall bid God 'ild [would] for us your pains / And thank us for your trouble."). *See* Shakespeare, *supra* note 4, at 61 (Porter: "Who's there, i' [in] / th' name of Beelzebub?...Faith, here's an equivocator / that could swear in both the scales against either / scale, who committed treason enough for God's / sake yet could not equivocate to heaven."). *See* Shakespeare, *supra* note 4, at 77 (Old Man: "God's benison [blessing] go with you and with those / That would make good of bad and friends of foes."). *See* Shakespeare, *supra* note 4, at 83 (Macbeth: "While then, God be with you."). *See* Shakespeare, *supra* note 4, at 115 (Lord: "I'll send my prayers with him."). Having established that Christian customs are societally prominent within *Macbeth*, the morals which accompany Christianity are also societal standards of reference within *Macbeth*, further highlighted by characters' overt abhorrence at Macbeth's crimes. *See* Shakespeare, *supra* note 4, at 65 (Macduff: "Confusion now hath made his masterpiece. / Most sacrilegious murder hath broke ope / The Lord's anointed temple and stole thence / The life o' th' building [referencing Duncan's murder]."). *See* Shakespeare, *supra* note 4, at 71 (Banquo: "In the great hand of God I stand, and thence / Against the undivulged pretense I fight / Of treasonous malice."). *See* Shakespeare, *supra* note 4, at 115 (Lennox: "Some holy angel / Fly to the court of England and unfold / His message ere he come, that a swift blessing / May soon return to this our suffering country / Under a hand accursed [referring to Macbeth's tyranny]."). *See* Shakespeare, *supra* note 4, at 143 (Macduff: "Not in the legions / Of horrid hell can come a devil more damned / In evils to top Macbeth."). *See* Shakespeare, *supra* note 4, at 147 (Malcolm: "Devilish Macbeth / By many of these trains hath sought to win me / Into his power, and modest wisdom plucks me / From overcredulous haste. But God above / Deal between thee and me…."). The aforementioned examples provided are not meant to be an exhaustive list, but to provide enough evidence to show the societal prominence of Chrisitanity and its accompanying moral standards within *Macbeth*'s setting. In sum, this is why it is open-and-shut that Macbeth knows murder is morally wrong according to accepted societal standards within the setting of *Macbeth*. Macbeth is undoubtedly familiar with 'the moral law of God' (i.e., the commonly known Ten Commandments adhered to by Christianity, one of which is "Thou shalt not kill [Thou shalt not murder]") of the society he inhabits, given that

step further, Macbeth does not only acknowledge that in general murder is "wrong,"[108] but also how murder is "wrong" in the narrowly tailored circumstances of his specific situation: what wrongs he violates when murdering Duncan, both as a King, as his guest, and as his friend.[109] He realizes these multiple violations of societal morality in the crime of murder within the same deliberation: "He's [Duncan's] here in double trust: / First, as I am his kinsman and his subject, / Strong both against the deed; then, as his host, / Who should against his murderer shut the door, / Not bear the knife myself."[110] By making these statements, Macbeth is explaining that he knows he will be violating various standard forms of societal trust. He would be violating the trust that exists from a familial bond,[111] the trust that that exists between a king and his subjects,[112] and the trust that exists between a host and guests staying in his home under a general expectation of safety.[113]

Additionally, in the same vein of societal morality, Macbeth also conveys that Duncan's actions attest to him being a good king, so it would be wrong to kill him on this front. Compounded with this phrasing, Macbeth recognizes that the crime he is planning is wrong legally: "But in these cases / We still have judgment here, that but we teach / Bloody instructions, which, being taught, return / To plague th' inventor."[114] He is conveying that if one does "teach bloody

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one of his main cons to murder is the fear of eternal damnation as a punishment in an afterlife for doing so.

[108] Samaha, *supra* note 101.

[109] Shakespeare, *supra* note 4, at 39 (Macbeth says, "He's [Duncan's] here in double trust: / First, as I am his kinsman and his subject, / Strong both against the deed; then, as his host, / Who should against his murderer shut the door, / Not bear the knife myself."). *See infra* notes 111-113 (These notes outline the specific three-fold societal standards Macbeth violates by murdering King Duncan.).

[110] *Id.*

[111] *Id.* ("First, as I am his *kinsman* and his subject, / Strong both against the deed;" Duncan is Macbeth's cousin.) (emphasis added).

[112] *Id.* ("First, as I am his kinsman and his *subject*, / Strong both against the deed;" subjects are expected to be loyal to the king.) (emphasis added).

[113] *Id.* ("...then, as his *host*, / Who should against his murderer shut the door, / Not bear the knife myself;" Societally, it is generally understood and expected that a host will not harm those spending the night at his home.) (emphasis added).

[114] *Id.* (Macbeth says, "But in these cases / We still have judgment here, that but we teach / Bloody instructions, which, being taught, return / To plague th' inventor. This even-handed justice / Commends th' ingredience of our poisoned chalice / To our

constructions" (commit crimes), that legal consequences and judgments will return to him after doing so.[115] The fact that Macbeth is able to pick apart, piece by piece, what is morally "right" and "wrong" by societal standards as well as that of legal standards[116] without outside interjection shows that he is fully aware of the 'wrongness' of murder as a crime. His primary reason for intending to kill King Duncan is rooted in his own ambition to be king, and his will to become king far outweighs any moral or legal wrongs he acknowledges in this dialogue.[117]

Conclusion

According to the above evidence and analysis, Macbeth does not meet the requirements of legal insanity as established by the M'Naughten insanity defense. To reiterate, the M'Naughten insanity defense is composed of the following elements: first, that the defendant is experiencing a mental disease or defect, and; second, that as a result of said mental disease or defect the defendant did not know the nature and quality of the crime committed, or that the criminal act was wrong.[118] Macbeth does not have a mental disease or defect,[119] and

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own lips." Macbeth is acknowledging that there are earthly consequences to his actions, not just consequences in the form of an afterlife punishment for him. When he mentions "This even-handed justice / Commends th' ingredience of our poisoned chalice / To our own lips," Macbeth is referring to consequential punishments which follow criminal acts. By committing murder, Macbeth is intentionally drinking from a "poisoned chalice"–while he may be fine in the immediate aftermath of the crime, the consequences will overtake him. Interestingly, as an additional note, this piece of dialogue from Macbeth mirrors one of the main goals of criminal law: deterrence. National Institute of Justice, "Five Things About Deterrence," https://nij.ojp.gov/topics/articles/five-things-about-deterrence (June 5, 2016) (last visited April 29, 2023). Macbeth is fearful of the certainty that he may be caught for committing murder, which momentarily deters him, but he intentionally overrides his reluctance and murders Duncan anyway).

[115] *Id.*

[116] *State v. Tamplin* 195 Ariz. 246, 248, 986 P.2d 914, 916 (Ct. App. 1999), *supra* note 106.

[117] Shakespeare, *supra* note 102, at 41 (Macbeth says, "I have no spur / To prick the sides of my intent, but only / Vaulting ambition, which o'erleaps itself / And falls on th' other–." When Macbeth says "I have no spur / To prick the sides of my intent, but only / Vaulting ambition…," he is openly admitting that there is no other reason for him to kill King Duncan other than his own personal ambition to do so.).

[118] Samaha, *supra* 25.

[119] *See supra* notes 56-77 (These notes explain how Macbeth does not meet the "mental disease or defect" element of the M'Naughten insanity test.).

even if he did have an established medical history of having one, his own words and actions show that he not only knows the nature and quality of killing King Duncan,[120] but also knows that the crime was both morally and legally wrong.[121] As this article has demonstrated, the M'Naughten insanity defense is complex, and it is even more complex to establish legal insanity under it.[122] In the case of Macbeth, who does not meet the criteria of legal insanity as required under M'Naughten,[123] it serves as a key example for showing—in a basic sense—how the core components of the M'Naughten test collectively operate. Ideally, the contents of this article assist in clearing away some confusion or common misconceptions when navigating how the basic application of the M'Naughten insanity defense operates.

Thanks to the talented writing of Shakespeare, clear-cut examples are able to be extracted from the evidential words and actions taken by Macbeth throughout his deliberation to murder King Duncan. Throughout the whole of this article, these evidentiary examples were then applied to the core framework of the M'Naughten defense in order to demonstrate how the defense operates, how legal insanity is established, and, ultimately, how Shakespeare's Macbeth does not meet the criteria for legal insanity under M'Naughten. Distinct instances of whether a mental disease or defect is present with Macbeth, that he understood the nature of his committed crime, and that he understood murdering King Duncan was legally and morally wrong can be read and cited to the smallest origin of detail within Shakespeare's play. As is generally known, the same amount of insight granted to examiners as to the specific words and actions of Shakespeare's characters is not present with the same clarity for cases in real life, where it is more often than not vastly difficult to establish what can be clearly gathered and organized from pages in a book. But,

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[120] *See supra* notes 78-97 (These notes explain how Macbeth does not meet the "not knowing the nature and quality of the crime" element of the M'Naughten insanity defense.).

[121] *See supra* notes 98-117 (These notes explain how Macbeth does not meet the "not knowing that the criminal act was wrong" element of the M'Naughten insanity defense.).

[122] Carmen Cirincione, PhD, Henry J. Steadman, PhD, and Margaret A. McGreevy, MA, *supra* note 34.

[123] *See supra* notes 119-121.

for the purposes of law and literature, this aspect is always a relevant benefit for navigating intricate areas of legal matters in ways that may not otherwise be explored and cataloged. By being able to seek out a hard copy or online edition of Shakespeare's *Macbeth*, and to digest what was offered throughout this article relating to application of the M'Naughten insanity defense, this analysis functions as a practical tool for learning a legal aspect through a timeless literary character.

DO BLACK LIVES MATTER? CAPITAL PUNISHMENT, CRITICAL RACE THEORY, AND THE IMPACT OF EMPIRICAL EVIDENCE

Nicholas C. Murphy

Introduction

One might ask, what is the significance of social science evidence in judicial decision-making? Why is it important? Despite some justices holding an unfavorable attitude towards using empirical social science research, there has been a steady rise in its use throughout many judicial opinions.[1] For example, most familiar with law know of the landmark case *Brown v. Board of Education*,[2] its reliance on social science evidence, and the significance empirical research played.[3] However, many may not know of a case of arguably equal significance regarding racial inequality and the impact of empirical evidence. Like *Brown*, this case had real-world implications that still, to this day, affect the criminal justice system. This paper will examine the Baldus study, a form of social science research used in *McCleskey v. Kemp*,[4] which discovered a significant racial disparity in Georgia's capital sentencing cases. The empirical evidence from the Baldus study confirmed that black-defendant/white-victim cases advanced to capital punishment trials at roughly five times the amount of black-defendant/black-victim cases and over three times the amount of white-defendant/black-victim cases.[5] In *McCleskey*, a divide occurred on the relevance and value of the findings produced by the Baldus

[1] Monahan and Walker highlight the evolution of the use of social science research in the courts. Specifically, its use becoming more common among some justices, both conservative and liberal. *See* John Monahan, Laurens Walker, *Twenty-Five Years of Social Science in Law*, 35 Law & Hum. Behav. 72-75 (2011).
[2] Brown v. Bd. of Educ., 347 U.S. 483 (1954).
[3] Michael Heise, *Equal Educational Opportunity by the Numbers: The Warren Court's Empirical Legacy*, 59 Wash. & Lee L. Rev. 1309, 1310 (2002).
[4] McCleskey v. Kemp, 481 U.S. 279 (1987).
[5] *Id.* at 356.

study. Some U.S. Supreme Court justices relied on social authority throughout their judicial opinions, and others remained highly skeptical. The majority opinion viewed the findings of the Baldus study unfavorably and was critical of its use. While the minority opinions favored its use and the empirical findings it produced. More broadly, social authority or empirical social science evidence is relied upon throughout many U.S. Supreme Court cases. However, this paper narrows its focus to *McCleskey v. Kemp*.

As this study on *McCleskey v. Kemp* will display, social science evidence can provide valuable insights into phenomena that may have gone unnoticed if not examined empirically; the Baldus study confirmed a significant racial disparity in Georgia capital sentencing cases. This case study draws on critical race theory, examining how the social science evidence produced by the Baldus study brought awareness to racial inequality in Georgia death penalty cases. It will also examine which justices in *McCleskey* relied upon social authority in an attempt to overturn an African American man's death sentence and which justices opposed overturning the death sentence despite the unequivocal findings of Professor Baldus' research. Therefore, this study proposes that U.S. Supreme Court justices who rely on social authority in their decision-making can reduce racial disparities in the criminal justice system by bringing attention to the issue of implicit racial bias. Which the Baldus study confirms permeates throughout Georgia's capital sentencing process. This paper postulates that *McCleskey* not only displays a racial disparity in Georgia's criminal justice system but simultaneously acts as a prime example of implicit bias in a broader sense.[6] That being at the U.S. Supreme Court level, where some justices took a dismissive and critical tone toward the empirical social science evidence produced—postulating that the Court's decision to reject the Baldus study perpetuates racial discrimination in the criminal justice system.

Use of Social Science in the Criminal Justice System

[6] For a highly informative and stellar article on the topic, please see John Tyler Clemons, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 Am. Crim. L. Rev. 689, 713 (2014). Although not cited or referenced directly within this piece, this article has proved a valuable resource for background reading to provide context at the beginning stages of the author's research.

Over the past twenty-five years, Monahan and Walker, in their seminal text, in its seventh edition, *Social Science in Law: Cases and Materials*, provide in-depth reviews of the courts' evolving and changing uses of social science[7] and identified three fundamental forms of social science research in law: social fact, social authority, and social framework.[8] According to Smith, social fact aids juries and is evidence that provides information on who-what-where-why and is specific to the case at hand.[9] Social fact evidence does not attempt to change the law and does not focus on general questions. An example of social fact evidence is expert testimony on a specific topic. Drenner defines social authority as:

> Social science research relevant to creating a rule of law as a source of authority rather than a fact; compares replicated research to legal precedent. Not specific to the facts of the case but intended to describe general principles that pertain to behavior.[10]

Social science evidence in this form can aid in changing or creating case law concerning capital punishment, as the Baldus study attempts in *McCleskey* by providing insights into racial discrimination and disparities in the criminal justice system. Finally, Smith defines social framework as "General research results that are used to construct a frame of reference or background context for deciding a factual issue crucial to the resolution of a specific case."[11] Largely considered hybrid research, social framework evidence has general and broad characteristics. Generally associated with the creation of law and utilized in determining case-specific issues. Comparatively, Moran infers that the use of social science in cases is not new and reaches as far back as case law itself.[12] Ultimately decision-making by justices is influenced by their experiences and knowledge of the world around

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[7] Monahan & Walker, *supra* note 1, at 72-75.
[8] *Id.* at 72-73.
[9] ALISA SMITH, LAW, SOCIAL SCIENCE, AND THE CRIMINAL COURTS 84-85 (2d ed. 2020).
[10] Karla L. Drenner, Social Jurisprudence in the Changing of Social Norms: Emerging Research and Opportunities 25 (2019).
[11] Smith, *supra* note 9, at 97.
[12] Beverly I. Moran, *Constructing Reality: Social Science and Race Cases*, 25 N. Ill. U. L. Rev. 243 (2005).

them, consciously or subconsciously, through the use of the social sciences.[13]

Notably, Acker points out the consistent skepticism of its use by some members of the Court and the attempts to discredit its use throughout most majority opinions concerning capital punishment.[14] Acker also highlights that in many of those majority opinions, there is advocacy for irrelevant doctrines, which had no correlation to empirical evidence concerning capital punishment.[15] Additionally, Monahan and Walker, in *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law,* posited that social authority should hold the same weight as case law precedent.[16] Ultimately, Monahan and Walker illustrate the apparent similarities between social science research and law. As Monahan and Walker explain, social science research should take the form of social authority over social fact. Between social authority and social fact, the former is more comparable to law than the latter. Due to this, parties should present empirical research the same way they would submit caselaw, through briefs, instead of oral testimony.[17] Much of the empirical evidence today is submitted via *amicus* briefs to the court.

Critical Race Theory and Inequality in the Criminal Justice System

Harvard Law School's first African American tenured professor and one of the leading scholars in the development of Critical Race Theory, Bell, describes in *Who's Afraid of Critical Race Theory* that CRT is a body of legal scholarship whose members share the ideological goal of addressing the struggles of racism and oppression,

[13] *Id.* at 243.
[14] James R. Acker, *A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions*, 1986-1989, 27 Law & Soc'y Rev. 65 (1993).
[15] *Id.* at 81.
[16] John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. Pa. L. Rev. 477 (1986).
[17] *Id.* at 497.

specifically as institutionalized by law.[18] Bell also highlights CRT's roots in Critical Legal Studies and traditional civil rights scholarship. Similarly, Delgado conveys the origins of Critical Race Theory as an academic field of mostly lawyers and legal scholars who noticed the gains of the civil rights era stalled and, in many cases, regressed.[19] As Delgado puts it, this small group of lawyers and legal scholars aimed to provide new approaches to combat subtle and unconscious forms of deeply entrenched institutional racism.[20] Delgado also lays out the progression of Critical Race Theory, over a short span of time, from its origins as a small unknown group of academics focused on racial justice to an established legal theory taught in universities and a movement complete with conferences, anthologies, and law-review articles.[21]

Delgado and Stefancic, in *Critical Race Theory: An Annotated Bibliography 1993, A Year of Transition,* provide and describe eleven distinct themes of CRT.[22] These themes include a critique of liberalism, storytelling, revisionist interpretations of American civil rights law and progress, a greater understanding of the underpinnings of race and racism, structural determinism, intersectionality, essentialism and anti-essentialism, cultural nationalism/separatism, legal institutions/critical pedagogy and minorities in the bar, criticism/self-criticism and responses, and finally critical race feminism.[23] Not only has Critical Race Theory been firmly established in many law schools and universities, but it also offers a wide array of lenses through which to experience and make sense of the world around us. According to Delgado, one of the central ideas behind CRT is the engrained nature of racism in American society and that, over time, those living with it become accustomed to it, inferring that the notion of equality and laws compelling racial equality are only able to

[18] Derrick A. Bell, *Who's Afraid of Critical Race Theory*, 1995 U. Ill. L. Rev. 893 (1995); Jean Stefancic, *Discerning Critical Moments: Lessons from the Life of Derrick Bell Title*, 75 U. Pitt. L. Rev. 457, 461 (2014).
[19] Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 Iowa L. Rev. 1505, 1510 (2009).
[20] *Id.* at 1510–11.
[21] *Id.* at 1511.
[22] Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography 1993, A Year of Transition*, 66 U. Colo. L. Rev. 159 (1995).
[23] *Id.* at 160–62.

address the most obvious forms of racial injustice.[24] However, these laws are insufficient in addressing the more subtle microaggressions and implicit biases that affect people of color on a continuous basis.[25] As the next section will highlight, one example is the disproportionate use of capital punishment against African Americans in the United States criminal justice system.

Capital Punishment, Racial Inequality, and Social Science

In *Race, Crime, and Punishment in the Twentieth and Twenty-First Centuries*, Spohn articulates that racism largely permeated the criminal justice systems during the early twentieth century.[26] Spohn emphasizes that despite gains made in the civil rights era to address racial injustice, racial disparities still primarily exist today. Moran points out the overarching theme of racial bias against African Americans before arrest, during trial, and at sentencing, a racial bias that seems to permeate, consciously or subconsciously, throughout the criminal justice system and has historical and systemic roots.[27] Moran explains that although the number of Anglo-Americans who face execution is higher in comparison to African Americans since 1977 in the United States, African Americans are disproportionately affected.

For example, Moran highlights the execution of 295 African American defendants for killing an Anglo-American victim compared to just twenty-one Anglo-American defendants for killing an African American victim.[28] Spohn not only agrees that there is substantial evidence that African American defendants disproportionately face execution compared to Anglo Americans faced with similar crimes but also highlights that capital punishment appears to be applied explicitly to African American defendants in most rape cases involving white women.[29] However, Spohn conveys that many other legal factors come into consideration during the decision-making and sentencing

[24] Delgado, *supra* note 19, at 1505.
[25] *Id.* at 1511.
[26] Cassia Spohn, *Race, Crime, and Punishment in the Twentieth and Twenty-First Centuries*, 44 Crime & Just. 49 (2015).
[27] Mark Moran, *Black Lives Matter: Race and the Death Penalty*, Psychiatry Online (July 21, 2021), https://psychnews.psychiatryonline.org/doi/10.1176/appi.pn.2021.8.14 (Accessed on November 6, 2022).
[28] *Id.*
[29] Spohn, *supra* note 26, at 80.

process regarding capital punishment sentences.[30] Many appellate judges, legal scholars, and social scientists have contended for several decades with this specific issue.[31]

Comparably, Acker investigated the use of social science in twenty-eight Supreme Court death penalty cases from 1986 to 1989.[32] The article demonstrates that justices cited social science research evidence 35.7% of the time between 1986 to 1989. Additionally, out of the twenty-eight capital punishment cases, 32.6% of social science citations were used by justices in cases concerning racial discrimination and arbitrary application.[33] As it turns out, racial discrimination and arbitrary application cases are the highest among the categories examined concerning the use of social science citations.[34] The data from this research confirms the relevance of social science evidence research in capital punishment cases and highlights its prevalence, specifically in death penalty cases concerning racial discrimination and arbitrary application, at the time of the study.[35]

THEORETICAL FRAMEWORK

As mentioned, this study will take a critical race theory approach in examining how the Court's use of social science evidence can aid in combating racial inequality in the legal system. Key terms include *critical race theory, racial inequality, and implicit bias*. Through taking a critical race theory approach, a parallel becomes clear between social science's role in Supreme Court cases concerning racial discrimination and the arbitrary use of capital punishment involving African American defendants. A key element of critical race theory, as Litowitz describes, is that:

> The existing legal system (and mainstream legal scholarship as well) are not color-blind although they pretend to be. Despite the pretense of neutrality, the system has always worked to the disadvantage of

[30] *Id.*
[31] *Id.*
[32] Acker, *supra* note 14, at 69-71.
[33] *Id.* at 72.
[34] *Id.*
[35] *Id.*

> people of color and continues to do so. People of color are more likely to be convicted, to serve more time, to suffer arbitrary arrest and deprivation of liberty and property. A pervasive but unconscious racism infects the legal system.[36]

Cover best describes racial inequality within the criminal justice system:

> [T]he systemic racial inequality in today's sprawling criminal justice system is the successor to the discriminatory punishment of dissidents and the legalized differential punishment of minorities.[37]

Cover highlights the evolution of racial inequality within the criminal justice system, suggesting that racial discrimination has not gone away; it has just taken different forms. Prime examples include implicit biases and the disproportionate application of the death penalty against African-Americans.[38] Ultimately, the goal is to examine the Court's reliance on social authority in deciding capital punishment cases and deduce its potential impact on reducing racial disparities.

According to leading critical race theorists Bell and Delgado, a key feature driving racial inequality and discrimination is the framework of implicit bias.[39] Rose describes implicit bias as an automatic preference or predisposition stemming from a person's subconscious preconceived opinions or attitudes.[40] Rose explains that implicit bias can have adverse effects; more specifically, it may contribute to behavior that is discriminatory, even if that is not one's overt intention. Additionally, bringing attention to such behavior can cause denial and, in some

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[36] Douglas E. Litowitz, *Some Critical Thoughts on Critical Race Theory*, 72 Notre Dame L. Rev. 503, 506 (1997).
[37] Aliza Cover, *Cruel and Invisible Punishment Redeeming the Counter-Majoritarian Eighth Amendment*, 79 Brook. L. Rev. 1141, 1162 (2014).
[38] *Id. at* 1162.
[39] Bell, *supra* note 18, at 904; Delgado, *supra* note 19, at 1510–11.
[40] Rachel V. Rose, *The Subtle and Not-So-Subtle Impact of Bias on Women and Minorities*, Fed. Law., September/October 2021, at 66.

cases, an adverse reaction, further intensifying the discriminatory behavior.[41] Rose highlights a quote from the Department of Justice, "[w]ith implicit bias, the individual may be unaware that biases, rather than the facts of a situation, are driving his or her decision making."[42] Rose postulates that bias, whether explicit or implicit, can be both positive and negative and highlights the importance of discerning between a reaction based on facts of a situation and the individuals involved versus a negative bias toward a specific group at large and the characteristics the group shares.

Lynch brings attention to the relationship between the behavioral-realism concept of implicit bias and CRT's perspective of unconscious forms of racism.[43] Girvan describes behavioral realism as "a prescriptive jurisprudential method or approach based upon the proposition that judges ought not to speculate about human behavior. Rather, to the extent possible, judges have the affirmative responsibility to base their assumptions about how people act on a solid evidentiary, that is to say, scientific footing."[44] As Lynch conveys in her article, the combined scholarship from both perspectives displays their discontent for showing intent, notably required by law concerning cases involving discrimination.[45] In addition, she highlights the unconscious psychological processes by which individuals perceive and acknowledge race. In sum, implicit bias is a central theme of CRT and a contributing factor in racial discrimination, which permeates the criminal justice system at all levels.

METHODOLOGY

Research Design

This study uses a qualitative exploratory case study approach and a textual analysis methodology to examine *McCleskey v. Kemp*. Stępień, in *Using Case Studies for Research on Judicial Opinions: Some*

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[41] *Id.*
[42] *Id.*
[43] Mona Lynch, *Institutionalizing Bias: The Death Penalty, Federal Drug Prosecutions, and Mechanisms of Disparate Punishment*, 41 Am. J. Crim. L. 91, 105 (2013).
[44] Erik J. Girvan, *On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law*, 26 Geo. Mason U. Civ. Rts. L.J. 1, 43 (2015).
[45] Lynch, *supra* note 43, at 106.

Preliminary Insights, conveys confidence in applying case study research to judicial opinions, holding a favorable view.[46] In addition, Stępień specifies three particular types of case studies, emphasizing that there is no one-size-fits-all approach. These include exploratory case studies, interpretive case studies, and intensive case studies.

According to Stępień, exploratory case studies are widely applied and correspond closely to judicial opinions.[47] In particular to projects characterized by their narrow research area and highly structured research. Stępień posits that an exploratory case study is ultimately an effective approach due to the small range of research approaches and the distinct boundaries of the research concerning the examination and study of judicial opinions.[48] Stępień expresses the utilization of exploratory case studies to test an approach, concept, theory, or research tool for a specific area of research. By contrast, an interpretive case study approach offers limited possibilities and would only be logical in projects with a broader research area than solely judicial opinions. Stępień also highlights that the guiding principle of interpretative case studies is skepticism toward theory-driven and deeply structuralized research. Lastly, Stępień conveys that intensive case studies focus on a small research area. Proponents of this approach believe that accurate knowledge of a limited area is more beneficial than broader or flat knowledge about the whole.[49] Generally, intensive case studies are best when examining a fragment or part of a more extensive research area.[50]

Due to this study's narrow scope of the U.S. Supreme Court capital punishment case of *McCleskey v. Kemp* and its critical race theory framework, an exploratory case study is most suitable for examining this judicial opinion. An exploratory case study design will help discover and understand patterns and trends concerning racial disparities in capital sentencing. For example, one trend frequently discovered in racial discrimination and arbitrary use cases is the use of social science research. An example of one pattern would be some

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[46] Mateusz Stępień, *Using Case Studies for Research on Judicial Opinions. Some Preliminary Insights*, LaM, Nov. 2019, at 1-19.
[47] *Id.*
[48] *Id.* at 4.
[49] *Id.* at 3.
[50] *Id.* at 16.

justices' skepticism and rejection of social science evidence. In short, through analysis of social science citations used by justices in opinions, we can determine what role social science use plays in capital punishment cases, whether used to persuade against the death penalty or in favor of it—determining which justices use it and for what reasons. This approach will be ideal for gaining insights into the racial disparity phenomena found in capital punishment cases and perhaps may aid in explaining why African Americans are disproportionately affected in the U.S. criminal justice system compared to every other race.

Methods

Bowen describes qualitative examination as a systematic procedure for evaluating printed and electronic documents.[51] In addition, Bowen emphasizes examining data (documents) to extract valuable insights and establish empirical knowledge.[52] As Bowen explains, content analysis requires vigorous data collection techniques while also requiring the documentation of the research procedure.[53] Therefore, Bowen emphasizes its use when it is the only option available, as is the case regarding judicial opinions. In addition, Bowen highlights the criteria for selecting documents.[54] These include purpose, authenticity, relevance, the context of production, and the intended audience. Notably, evaluating documents can provide background, context, questions to be posed, a mode of tracking changes or developments, and verifying findings of various data sources.[55]

In sum, according to Bowen, this method has many advantages.[56] A few key advantages include lack of obtrusiveness and reactivity, exactness, and coverage. Additionally, Bowen explains that the elements of content and thematic analysis are combined when conducting a qualitative examination of documents.[57] Thematic analysis is a mode of pattern recognition when analyzing data, honing

[51] Glenn Bowen, *Document Analysis as a Qualitative Research Method*, 9 Qual. Res. J. 27 (2009).
[52] *Id.*
[53] *Id.* at 29.
[54] *Id.* at 30.
[55] *Id.*
[56] *Id.* at 31.
[57] *Id.* at 32.

in on emanating themes, which become categories for analysis.[58] This form of pattern recognition is ideal for the analysis of judicial opinions and evaluating the use of social science evidence. Therefore, uncovering these themes will be crucial in analyzing and understanding the phenomena of racial inequality concerning death sentences involving African American defendants.

Accordingly, discourse analysis is another method that can be effective when examining judicial opinions. According to Shuy, one of the crucial characteristics of discourse analysis is that it is widely applicable in various contexts and settings, effectively applied to any continuous text, written or spoken.[59] Furthermore, Shuy conveys that the judicial system is suitable for discourse analysis, as meticulously documented written and verbal communications primarily dominate the field.[60] Shuy postulates that discourse analysis is primarily linguistic, and the legal field provides rich opportunities for discourse analysis.[61] In short, this form of analysis is a prime method for examining judicial opinions.

In particular, critical discourse analysis is an ideal method for analyzing *McCleskey v. Kemp*, considering this paper's critical race theory framework. According to Blommaert and Bulcaen, critical discourse analysis aims to analyze the implicit and explicit structural relationships of dominance, discrimination, control, and power as conveyed by language.[62] Critical discourse analysis essentially got its origins from social theory. Blommaert and Bulcaen posit that CDA focuses on power and ideology while attempting to overcome structuralist determinism.[63] Delgado and Stefancic, in *Critical Race Theory: An Introduction,* define structural determinism as a "Concept that a mode of thought or widely shared practice determines significant social outcomes, usually without conscious knowledge."[64] In other

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[58] *Id.*
[59] ROGER W. SHUY, THE HANDBOOK OF DISCOURSE ANALYSIS 822 (Deborah Tannen et al. eds., 2d ed. 2015).
[60] *Id.*
[61] *Id.*
[62] Jan Blommaert & Chris Bulcaen, *Critical Discourse Analysis*, 29 Ann. Rev. of Anthrop. 447, 448-449 (2000).
[63] *Id.* at 452.
[64] RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY : AN INTRODUCTION 155 (New York Univ. Press. 2001).

words, CDA can analyze text to discover the implicit, underlying, or concealed meanings behind one's words. Critical discourse analysis specifically focuses on how power flows within society, how power gets conveyed through language, and how the use of language keeps in place structures of power or challenges power structures. Ultimately, implicit attitudes emerge from words or texts.

Data Collection

The data source examined in this study is the U.S. Supreme Court opinion of *McCleskey v. Kemp*, which centered on Eighth and Fourteenth Amendment constitutional challenges to McCleskey's death sentence on the grounds of racial discrimination and arbitrary use of the death penalty. Most importantly, *McCleskey* was the first instance the Court addressed the issue of racial discrimination in a capital punishment case. *McCleskey* was historic and vitally important in that it forced the U.S. Supreme Court to reckon with the notion that implicit racial bias and discrimination existed in Georgia's criminal justice system. The Baldus study unequivocally displayed and confirmed a racial disparity concerning Georgia's capital sentencing decisions. As mentioned, Warren McCleskey was an African American defendant awaiting his death sentence for killing a white police officer in Georgia.

The trailblazing findings of the Baldus study presented the basis for McCleskey's argument that the death penalty is arbitrarily applied and racially discriminatory. The U.S. Supreme Court majority, in a five to four decision, rejected McCleskey's claims concluding he did not prove purposeful racial discrimination specific to his case. Ultimately, reasoning that racial bias is inevitable and accepting the claims would question the principles of the entire criminal justice system. Despite the Court's controversial ruling, rejecting McCleskey's claims, the impact of the Baldus study's findings are unequivocal and salient. Moreover, the results of the Baldus study provide valuable insights into phenomena that may have gone unnoticed if not examined empirically.

These findings confirm a significant racial disparity in Georgia capital sentencing cases which continues today. For these reasons, *McCleskey* is the ideal data source to explore through the lens of critical race theory and understand the potential impact social science evidence has

in reducing racial inequality within the criminal justice system. In short, the majority in *McCleskey* essentially upheld and maintained a racially biased capital punishment system, deeming it constitutional. Therefore, making it a prime data source for analyzing the possibility that the justices in the majority may have suffered from an implicit racial bias in their decision-making.

ANALYSIS

Thematic Analysis

Through qualitative examination and content analysis to analyze *McCleskey v. Kemp,*[65] several themes became apparent throughout the majority and the three dissenting opinions. Code categories included Racial Discrimination, Social Science Research, Constitutional Issues, and Arguments for upholding the Death Penalty. Under the category of Racial Discrimination falls the codes of Racial Bias and Arbitrary Use. Social Science Research includes the Baldus Study, Myrdal Study, and empirical evidence by Wolfgang and Riedel. The Constitutional Issues category consists of the Eighth Amendment and Fourteenth Amendment. Arguments for the Death Penalty include the discretion of the actors in the criminal justice system, statutory safeguards against abuse of discretion, consequences of broader challenges to criminal sentencing, and understanding the contours of the judicial role.

Code Categories

During the content analysis examination process, the theme of racial discrimination was central throughout the dissent opinions and the majority opinion. In qualitative research, the researcher is the primary research tool. Therefore, a complete read-through of the *McCleskey* opinion starts the analysis process. The themes of racial bias and arbitrary use became apparent when reading the majority opinion and the multiple dissent opinions several times. Next, through in-depth reading, portions of the text relevant to racial discrimination, racial bias, and arbitrary use are selected and highlighted in yellow. For example, for the theme of racial bias, “The specter of race discrimination was acknowledged by the Court in striking down the

[65] *McCleskey*, 481 U.S. at 279.

Georgia death penalty statute in *Furman.*"[66] An example of text highlighted for arbitrary use:

> [W]e struck down death sentences in part because mandatory imposition of the death penalty created the *risk* that a jury *might* rely on arbitrary considerations in deciding which persons should be convicted of capital crimes.[67]

These highlighted themes in the form of text, in turn, created the first overarching code category of racial discrimination.

The social science research category followed the same process as the initial racial discrimination code category. Through several read-throughs of the judicial opinion in both the majority and the dissent opinions, text mentioning the Baldus study, Myrdal Study, and empirical evidence by Wolfgang and Riedel formed the themes for this category. For example, for the Baldus study:

> The Baldus study indicates that, after taking into account some 230 nonracial factors that might legitimately influence a sentencer, the jury *more likely than not* would have spared McCleskey's life had his victim been black.[68]

For the Myrdal study, a prime example is, "For offenses which involve any actual or potential danger to whites, however, Negroes are punished more severely than whites."[69] An example of highlighted text for the Wolfgang and Riedel theme:

> Furthermore, evidence submitted to the Court indicated that black men who committed rape, particularly of white women, were considerably more likely to be sentenced to death than white rapists.[70]

[66] *Id.* at 330.
[67] *Id* at 324.
[68] *Id.* at 325.
[69] *Id.* at 330.
[70] *Id.* at 332.

Highlighting the texts excerpts above and those similar in green created the overarching code category of social science research.

Following the same process of the subsequent categories above, the code category of constitutional issues consisted primarily of the Eighth Amendment and Fourteenth Amendment. An Eighth Amendment example of highlighted text is, "McCleskey also argues that the Baldus study demonstrates that the Georgia capital sentencing system violates the Eighth Amendment."[71] For the Fourteenth Amendment, one prime example includes, "Yet McCleskey's case raises concerns that are central not only to the principles underlying the Eighth Amendment, but also to the principles underlying the Fourteenth Amendment."[72] Selecting and highlighting text referring to or mentioning either of the two constitutional amendments in turquoise blue created the third category of constitutional issues.

The arguments for the death penalty themes primarily took place within the majority opinion, with some emerging in the dissent opinions, essentially refuting the arguments made in the majority opinion. Once again, the coding process followed the categories above, with four themes emerging. As mentioned, these themes within the overarching category include the discretion of the actors in the criminal justice system, statutory safeguards against abuse of discretion, consequences of broader challenges to criminal sentencing, and understanding the contours of the judicial role. One example of text selected as an emanating theme or pattern concerning the discretion of the actors in the criminal justice system includes:

> First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold.[73]

An example concerning statutory safeguards against abuse of discretion is, "Moreover, where the statutory procedures adequately channel the sentencer's discretion, such proportionality review is not

[71] *Id.* at 299.
[72] *Id.* at 346
[73] *Id.* at 305.

constitutionally required."[74] For the theme concerning consequences of broader challenges to criminal sentencing, "Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty."[75] For the final theme within this category, understanding the contours of the judicial role, a key example includes:

> Second, McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes.[76]

Text highlighted in red throughout the judicial opinion made up the code category of arguments for the death penalty. Found primarily within the majority opinion.

Figure 1. Code Categories

Racial Discrimination	Social Science Research	Constitutional Issues	Pro-Death-Penalty Arguments
Racial Bias	Baldus Study	Eighth Amendment	Discretion of the Actors in System
Arbitrary Use	Myrdal Study	Fourteenth Amendment	Statutory Safeguards Against Discretionary Abuse
	Wolfgang & Riedel Research		Consequences of Broader Challenges to Criminal Sentencing
			Understanding Contours of Judicial Role

Critical Discourse Analysis

As mentioned, critical discourse analysis involves the examination of the text to discover the implicit, underlying, or concealed meaning behind one's words. When conducting a critical discourse analysis of

[74] *Id.* at 306.
[75] *Id.* at 315.
[76] *Id.* at 319.

McCleskey, the process was similar to the examination process conducted during thematic analysis, in which an in-depth read-through of the judicial opinion occurs. However, instead of searching for emerging themes and patterns, as is the case with thematic analysis, a critical discourse analysis examines the text or language used throughout the *McCleskey* decision with a focus on how words convey the way in which power flows within society, how one conveys power through language, and how one's language keeps power structures in place. One key example found in the majority opinion includes:

> Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender.[77]

Another example penned by Justice Powel in the majority opinion is, "We noted that the imposition of the death penalty for the crime of murder 'has a long history of acceptance both in the United States and in England.'"[78] In short, conducting a critical discourse analysis of *McCleskey*, analyzing word choice and the intention of word use, revealed Justice Powell's and the majority's attitudes and implicit values concerning the power structure of the legal system and the capital punishment system within it. The selection and highlighting of text conveying views on or referring to power structures, systems, traditional norms, the history of capital punishment, or the power dynamic involving race was highlighted in purple throughout the opinion, primarily focusing on Justice Powell's majority opinion.

FINDINGS

Accordingly, the majority opinion offered very little empirical evidence to combat the social science evidence used by McCleskey. More specifically, the majority failed to rebut most of the empirical evidence and statistical analysis produced by the Baldus study, which confirms racial discrimination/bias against African Americans in Georgia's criminal justice system. When analyzing the *McCleskey* opinion, the majority did not provide any empirical evidence sufficient

[77] *Id.* at 315-17.
[78] *Id.* at 301.

to nullify the findings of the Baldus study.[79] Ultimately, the majority, more or less, rejected the significance of the Baldus study and provided insufficient reasoning in doing so. Conversely, a clear trend or pattern in the dissenting opinions was the citing of the Baldus study and other relevant social science research, correlating it with the history of discrimination against African Americans in the United States to bolster its validity. Throughout most of the dissents, the trend of the Eighth Amendment, Fourteenth Amendment, and *stare decisis* to defend against the application of the death penalty and its correlation to the empirical evidence found in the Baldus study was a consistent theme.

The Baldus Study Discourse

Ultimately, the dissenting opinions put forth a stronger, more convincing argument against the application of the death penalty, putting forth persuasive arguments favoring the validity of the Baldus study. For example, the dissenting opinions highlighted key stats from the Baldus study confirming a racial disparity, "The statewide statistics indicated that black-defendant/white-victim cases advanced to the penalty trial at nearly five times the rate of the black-defendant/black-victim cases (70% v. 15%), and over three times the rate of white-defendant/black-victim cases (70% v. 19%)."[80] The majority opinion maneuvered around the validity of the Baldus study without providing much empirical research or convincing reasoning to refute its legitimacy. Instead, the majority opinion highlighted the District Court's view on the Baldus study, stating:

> As to McCleskey's Fourteenth Amendment claim, the court found that the methodology of the Baldus study was flawed in several respects. Because of these defects, the court held that the Baldus study 'fail[ed] to contribute anything of value' to McCleskey's claim. Accordingly, the court denied the petition insofar as it was based upon the Baldus study.[81]

[79] *Id.* at 279-320.
[80] *Id.* at 365.
[81] *Id.* at 288–89 (internal citations omitted).

Conversely, Justice Blackmun's dissent highlights the Court of Appeals' view on the validity of the Baldus study, stating:

> Justice BRENNAN has thoroughly demonstrated…that, if one assumes that the statistical evidence presented by petitioner McCleskey is valid, as we must in light of the Court of Appeals' assumption, there exists in the Georgia capital sentencing scheme a risk of racially based discrimination that is so acute that it violates the Eighth Amendment.[82]

Consequently, the majority acknowledges the Court of Appeals' recognition concerning the validity of the Baldus study but highlights the appellate court's skepticism in methodology, stating, "Even assuming the study's validity, the Court of Appeals found the statistics' insufficient to demonstrate discriminatory intent or unconstitutional discrimination in the Fourteenth Amendment context, [and] insufficient to show irrationality, arbitrariness and capriciousness under any kind of Eighth Amendment analysis.'"[83]

The majority goes further in an attempt to justify its dismissal of the Baldus study's findings, quoting the Court of Appeals, "There are, in fact, no exact duplicates in capital crimes and capital defendants. The type of research submitted here tends to show which of the directed factors were effective, but is of restricted use in showing what undirected factors control the exercise of constitutionally required discretion."[84] In short, the majority shared the skepticism of the Court of Appeals and rejected McCleskey's claims based on the Baldus study. The majority states its reasoning:

> McCleskey's claim of discrimination extends to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute and allows it to remain in effect despite its allegedly discriminatory application. We agree with the Court of Appeals, and every other

[82] *Id.* at 345.
[83] *Id.* at 289.
[84] *Id.* at 290.

> court that has considered such a challenge, that this claim must fail.[85]

However, Justice Brennan's dissent offers a powerful rebuke of the majority's reasoning, stating:

> It is important to emphasize at the outset that the Court's observation that McCleskey cannot prove the influence of race on any particular sentencing decision is irrelevant in evaluating his Eighth Amendment claim. Since *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Court has been concerned with the *risk* of the imposition of an arbitrary sentence, rather than the proven fact of one.[86]

As mentioned, the majority opinion was unfavorable to the Baldus study, and the three separate dissenting opinions held a favorable view of the study. When conducting a critical discourse analysis of the majority opinion in *McCleskey v. Kemp*, the main objective, as mentioned previously, is discovering underlying attitudes concerning power dynamics. In short, attempting to gain an understanding of the justice's implicit views or values in an attempt to help explain the majority's unfavorable view concerning the validity of the study.

The overarching attitudes of skepticism and dismissal of the study seemed to permeate the majority opinion. For example, the majority quotes the Court of Appeals:

> Viewed broadly, it would seem that the statistical evidence presented here, assuming its validity, confirms rather than condemns the system.... The marginal disparity based on the race of the victim tends to support the state's contention that the system is working far differently from the one which *Furman* [*v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)] condemned.[87]

The majority appears to share the view that the Baldus study confirms the opposite of what McCleskey claims, that the system functions in an unarbitrary fashion, claiming a marginal racial disparity, and since

[85] *Id.* at 292.
[86] *Id.* at 322.
[87] *Id.* at 290.

Furman v. Georgia,[88] the system has ensured safeguards to prevent arbitrary use of the capital sentencing. The majority goes even further, stating, "At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system."[89] One cannot help but infer from these statements a general attitude of denial and dismissal that racial bias plays a factor in capital sentencing. The majority conveys an outright denial that implicit bias exists, and even if it were so, such a disparity is inevitable in Georgia's criminal justice system. Moreover, the majority appears to downplay the significance of the Baldus study's empirical findings, which undoubtedly convey a racial disparity.

As mentioned, the statistics from the Baldus study confirm a significant racial disparity in Georgia capital punishment cases involving African American defendants. Additionally, Justice Brennan's dissent highlights some key figures from the Baldus study which are compelling:

> For the Georgia system as a whole, race accounts for a six percentage point difference in the rate at which capital punishment is imposed. Since death is imposed in 11% of all white-victim cases, the rate in comparably aggravated black-victim cases is 5%. The rate of capital sentencing in a white-victim case is thus 120% greater than the rate in a black-victim case. Put another way, over half—55%—of defendants in white-victim crimes in Georgia would not have been sentenced to die if their victims had been black.[90]

Justice Brennan goes on further, citing even more compelling statistics from the Baldus study:

> Furthermore, blacks who kill whites are sentenced to death at nearly *22 times* the rate of blacks who kill blacks, and more than *7 times* the rate of whites who kill blacks. In addition, prosecutors seek the death penalty for 70% of black defendants with white victims, but for

[88] Furman v. Georgia, 408 U.S. 238 (1972).
[89] *McCleskey,* 481 U.S. at 312.
[90] *Id.* at 326.

> only 15% of black defendants with black victims, and only 19% of white defendants with black victims.[91]

Justice Brennan also addresses the District Court's concerns about the Baldus study stating, "In this case, Professor Baldus in fact conducted additional regression analyses in response to criticisms and suggestions by the District Court, all of which confirmed, and some of which even strengthened, the study's original conclusions."[92] There is an apparent theme of defending the Baldus study in the dissents and combating the majority's concerns over the study with well-reasoned justifications for McCleskey's reliance on the Baldus study, which provides the basis for his Eighth Amendment and Fourteenth Amendment legal arguments. Perhaps the most powerful statement made by Justice Brennan justifying the Baldus study is:

> The statistical evidence in this case thus relentlessly documents the risk that McCleskey's sentence was influenced by racial considerations. This evidence shows that there is a better than even chance in Georgia that race will influence the decision to impose the death penalty: a majority of defendants in white-victim crimes would not have been sentenced to die if their victims had been black.[93]

Furthermore, to buttress his argument, Justice Brennan highlights the history of racial discrimination against African Americans, stemming back to slavery, where enslaved African Americans automatically got sentenced to death for killing whites in Georgia, regardless of self-defense or in defense of another. Justice Brennan also brings attention to Georgia's penal code during the Civil War era, where African Americans automatically got sentenced to death for murder. However, in contrast, whites who committed the same crime might have received a life sentence if the circumstantial testimony or jury permitted it. It is hard not to infer from the combination of historical facts and the sound statistics of the Baldus study not to conclude that an implicit racial bias exists within Georgia's criminal justice system.

Legal Implications of the Baldus Study Discourse

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[91] *Id.* at 327 (internal citations omitted).
[92] *Id.* at 328.
[93] *Id.*

Along with undermining the validity of the Baldus study, the majority, in an effort to further discredit the constitutional claims made by McCleskey, provided several potential legal implications if the study was deemed credible. These concerns included the discretion of the actors in the criminal justice system, statutory safeguards against abuse of discretion, consequences of broader challenges to criminal sentencing, and understanding the contours of the judicial role. However, strikingly there was no empirical evidence to refute the Baldus study, simply speculation and an attitude of denialism that racial discrimination could be involved in the process. On the issue of discretion of the actors in the criminal justice system, the majority suggests McCleskey's claim is "antithetical to the fundamental role of discretion in our criminal justice system."[94] Conversely, Justice Brennan rebuts this claim stating:

> As we said in *Batson,* however, such features do not justify imposing a "crippling burden of proof," in order to rebut that presumption. The Court in this case apparently seeks to do just that. On the basis of the need for individualized decisions, it rejects evidence, drawn from the most sophisticated capital sentencing analysis ever performed, that reveals that race more likely than not infects capital sentencing decisions.[95]

The majority also states that McCleskey's claims must fail because the current safeguards within the system function to minimize racial bias in capital sentencing. However, Justice Brennan counters this assertion stating:

> As a result, the Court cannot rely on the statutory safeguards in discounting McCleskey's evidence, for it is the very effectiveness of those safeguards that such evidence calls into question. While we may hope that a model of procedural fairness will curb the influence of race on sentencing, "we cannot simply assume that the model works as intended; we must critique its performance in terms of its results."[96]

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[94] *Id.* at 311.
[95] *Id.* at 337 (internal citations omitted).
[96] *Id.* at 338.

Additionally, Justice Brennan confronts the majority's view that deeming McCleskey's claims as valid would create broader challenges in all areas of criminal sentencing, stating:

> The prospect that there may be more widespread abuse than McCleskey documents may be dismaying, but it does not justify complete abdication of our judicial role. The Constitution was framed fundamentally as a bulwark against governmental power, and preventing the arbitrary administration of punishment is a basic ideal of any society that purports to be governed by the rule of law.[97]

Justice Brennan goes on further:

> As a result, the degree of arbitrariness that may be adequate to render the death penalty "cruel and unusual" punishment may not be adequate to invalidate lesser penalties. What these relative degrees of arbitrariness might be in other cases need not concern us here; the point is that the majority's fear of wholesale invalidation of criminal sentences is unfounded.[98]

In other words, Justice Brennan, to an extent, concedes to the concerns of the Court on this topic but ultimately is unpersuaded that granting validity to the Baldus study would subject the system to widespread criminal sentencing challenges. Suggesting the concerns of the majority are baseless and speculative on the topic. In short, Justice Brennan reaffirms his confidence in the findings of the Baldus study, promoting its soundness, persuasiveness, and strength.

Lastly, Justice Brennan views the majority's concern of overstepping the Court's judicial role and supplanting the role of the legislature concerning capital punishment as a justifiable concern. However, Justice Brennan states:

> The fact that "[c]apital punishment is now the law in more than two thirds of our States", however, does not diminish the fact that capital punishment is the most

[97] *Id.* at 339.
[98] *Id.* at 340.

> awesome act that a State can perform. The judiciary's role in this society counts for little if the use of governmental power to extinguish life does not elicit close scrutiny.[99]

Justice Brennan argues that while the Court should be cautious not to overstep its boundaries, the issue of capital punishment is one of enormous magnitude, and its outcome is final and one of the most severe. Justice Brennan argues that "The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of 'sober second thought.'"[100] In other words, the issue requires constitutional intervention due to the severity of execution and warrants the intense scrutiny of death sentences, especially if they potentially concern arbitrary use.

Ultimately, the majority conveyed an attitude of maintaining the status quo and that allowing such a study would challenge the system, damaging Georgia's criminal justice system. The majority opinion states, "First, McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."[101] The statement above clearly conveys a concern that if the Baldus study and its findings were to be accepted, it would shake the foundation of the criminal justice system. The majority goes on further, stating:

> Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since McCleskey's claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys, or judges.[102]

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[99] *Id.* at 342 (internal citations omitted).
[100] *Id.* at 343.
[101] *Id.* at 314–15.
[102] *Id.* at 315–17.

This concern by the majority concerning broader legal challenges was already strongly rebutted by Justice Brennan above. Additionally, the emerging attitudes from these statements by the majority consistently convey the Baldus study's findings as a threat or having severe implications for the criminal justice system. However, what are those threatening implications really? A more just criminal justice system? One which acknowledges that implicit racial biases exist and that one racial demographic suffers disproportionately from a broken capital sentencing system, which appears to need significant reforms to address the apparent racial disparity that the Baldus study without a doubt confirms? It is striking that the majority consistently takes a dismissive attitude and an apparent avoidance of the study's overall conclusions.

Thus, begging the question, is the Baldus study viewed as challenging the power structure of Georgia's criminal justice system? Or is it simply that social science, as a whole, is not considered legitimate in the eyes of some Supreme Court Justices? Perhaps it is a mix of both, and if so, why? One thing is certain; the Baldus study provides sound statistical evidence, which essentially went unchallenged. Instead, the majority focused on the broadness of the study and the study not directly involving the instant case and that such concerns should ultimately fall in the legislature's jurisdiction. The majority concludes its opinion by stating:

> It is the ultimate duty of courts to determine on a case-by-case basis whether these laws are applied consistently with the Constitution. Despite McCleskey's wide-ranging arguments that basically challenge the validity of capital punishment in our multiracial society, the only question before us is whether in his case, the law of Georgia was properly applied. We agree with the District Court and the Court of Appeals for the Eleventh Circuit that this was carefully and correctly done in this case.[103]

[103] *Id.* at 319 (internal citations omitted).

The majority conveniently ignored the totality of the issue involving racial bias and discrimination concerning capital sentencing, which appears to permeate the entire Georgia criminal justice system. As Blackmun's dissenting opinion highlights:

> Considering McCleskey's claim in its entirety, however, reveals that the claim fits easily within that same framework. A significant aspect of his claim is that racial factors impermissibly affected numerous steps in the Georgia capital sentencing scheme between his indictment and the jury's vote to sentence him to death. The primary decisionmaker at each of the intervening steps of the process is the prosecutor, the quintessential state actor in a criminal proceeding.[104]

Justice Blackmun's dissent goes further, stating:

> In addition to this showing that the challenged system was susceptible to abuse, McCleskey presented evidence of the history of prior discrimination in the Georgia system. Justice BRENNAN has reviewed much of this history in detail in his dissenting opinion, including the history of Georgia's racially based dual system of criminal justice. This historical background of the state action challenged "is one evidentiary source" in this equal protection case.[105]

As conveyed by Blackmun's dissent opinion, the majority failed to realize this direct correlation to McCleskey's claims, as he is a black man sentenced to death within the system.

Figure 2. Majority vs. Dissent

Majority Opinion	Dissent Opinion
Justice Powell (Centrist)	Justice Brennan (Liberal)
Justice Rehnquist (Conservative)	Justice Marshall (Liberal)
Justice White (Centrist)	Justice Blackmun (Centrist)
Justice Scalia (Conservative)	Justice Stevens (Centrist)
Justice O'Connor (Conservative)	

[104] *Id.* at 350.
[105] *Id.* at 358–59 (internal citations omitted).

CONCLUSION

In conclusion, this paper posed the question, what is the significance of social science evidence in judicial decision-making, and why is it important? This study drew on critical race theory, examining how the social science evidence produced by the Baldus study brought awareness to racial inequality in Georgia death penalty cases. It also examined which justices in *McCleskey* relied upon social authority in an attempt to overturn an African American man's death sentence and which justices opposed overturning the death sentence despite the unequivocal findings of Professor Baldus' research. Therefore, this paper proposed the hypothesis that U.S. Supreme Court justices who rely on social authority in their decision-making can help address racial inequality in the criminal justice system by bringing attention to an important issue like implicit racial bias.

Ultimately, the majority upheld and maintained a racially biased capital punishment system through its decision in *McCleskey*, deeming it constitutional. However, the majority failed to acknowledge the direct correlation between McCleskey's broad claims, confirmed by the Baldus study, and the fact that he is a black man sentenced to death within that same system. A fact that the majority conveniently maneuvered around, dismissing the unequivocal empirical findings of the Baldus study and simultaneously deeming constitutional a tool of oppression utilized disproportionately against a historically disenfranchised people. In a broader sense, considering the current empirical evidence confirming racial inequality in America's criminal justice system today and the disproportionate incarceration of African Americans, capital punishment is nothing more than an institutionalized form of modern-day lynching.

Moreover, it is essential to note that after retiring from the Court, Justice Powell, who wrote the majority opinion and was one of the deciding votes on the issue, conveyed regret regarding *McCleskey*, ultimately taking a stance against capital punishment. According to Wermiel, writing a piece for SCOTUSblog:

> Powell said he would change his vote in *McCleskey v. Kemp*, a 1987 ruling, decided by a five-to-four vote, in which the Court rejected the argument that the death

> penalty in Georgia was being administered in a racially discriminatory fashion.[106]

Wermiel goes on further, stating:

> [I]t turned out Powell was repudiating the death penalty itself, rather than his decision in *McCleskey*. His criticism was that the inability of states to carry out the death penalty in a fair and constitutional manner undermines the credibility of the Court and the criminal justice system. "It brings discredit on the whole legal system," Powell told Jeffries.[107]

These words of regret are striking by Justice Powell concerning the *McCleskey* decision. Although Powell claimed he did not regret his decision in *McCleskey,* he conceded to the unfairness and unconstitutional manner of the death penalty's application in the criminal justice system.

It is hard not to take these words by Justice Powell as a concession that racial discrimination does indeed exist within the criminal justice system. Although rejected initially, the Baldus study ultimately can be deemed vindicated in that Powell subtly acknowledges, although several years later, its findings. Begging the question, is it possible that Justice Powell, during *McCleskey*, may have suffered from implicit racial bias in his decision-making process? Did any of the four concurring justices as well? Nevertheless, though the majority in *McCleskey* rejected the Baldus study*,* its findings shed light on a racial disparity that may have gone unnoticed. Most importantly, the Baldus study offers hope that addressing racial inequality in the criminal justice system can be accomplished through social science research. At the very least, social science research can successfully bring awareness to crucial issues like implicit racial bias and discrimination in the criminal justice system.

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[106] Stephen Wermiel, *SCOTUS for law students (sponsored by Bloomberg Law): When Justices express regrets*, SCOTUSblog (May. 14, 2013, 11:12 AM), https://www.scotusblog.com/2013/05/scotus-for-law-students-sponsored-by-bloomberg-law-when-justices-express-regrets/ (Accessed on December 8, 2022).
[107] *Id.*

THE UNCONSTITUTIONALITY OF GEOFENCE WARRANTS

Shamona Joseph

Introduction

Suppose that you take your late-night jog through your neighborhood every night. You follow your nightly routine and track the number of miles that you jog through an exercise app on your phone. A few days later, you receive a notice from Google that you have been made a suspect in a local burglary case and that you must go to court, or your personal Google account information will be turned over to the police for investigation. What do you do? What do you make of this predicament? This hypothetical scenario posed above was modeled after the real-life case of a man named Zachary McCoy. McCoy was an innocent bike rider who was labeled a suspect in a burglary case.[1] McCoy, from Gainesville, Florida, regularly rides his bike through his neighborhood. He tracks the distance he rides on an exercise app.[2] His location history from his Android phone had led the police to consider him a suspect for burglary.[3] The app, RunKeeper, utilized his phone's location service, which was then fed to Google.[4] He looked at his route on the day of the burglary and saw that he had passed by the burglarized home three times within the hour as part of his regular loops through his neighborhood.[5] His lawyer, Caleb Kenyon, learned that the police had used a "geofence warrant" to track him down.[6] Geofence warrants are an obscure surveillance tool that law enforcement is increasingly employing to narrow down a suspect based on a specific geographic location.[7] The police cast a virtual net

[1] Jon Schuppe, *Google tracked his bike ride past a burglarized home. That made him a suspect.*, NBC News (Mar. 7, 2020), https://www.nbcnews.com/news/us-news/google-tracked-his-bike-ride-past-burglarized-home-made-him-n1151761 (last visited Feb. 21, 2023).
[2] *Id.*
[3] *Id*.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*

over crime scenes and collect the data gathered to aid in their investigation. During their data gathering, they sweep up Google location data from anyone who was near a crime scene. Fortunately, McCoy and his lawyer managed to clear McCoy from the investigation, and the case was dropped.[8] A more egregious example of the dangers posed by geofence warrants is that of Jorge Molina. Jorge Molina was wrongfully arrested and interrogated for a murder that he did not commit.[9] Law enforcement tracked him down because the actual culprit had Molina's old phone, which was still logged into his email and social media accounts.[10] The case against him quickly fell apart, and he was released from jail.[11] Zachary McCoy and Jorge Molina are among the many innocent Americans who have unfortunately been roped into the overly expansive geofence warrants increasingly used by law enforcement. These little-known warrants have been extensively used since 2016.[12] Traditional warrants often employed by law enforcement must be based upon "probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."[13] Warrants must also be approved by a "neutral and detached magistrate."[14] Geofence warrants do not pass these constitutional requirements. Although these warrants are signed by neutral judges, they are broad in scope and devoid of individualized suspicion. These geofence warrants do not particularly describe the place to be searched or the persons or things to be seized. Because of that, innocent people get dragged into the crosshairs of a criminal investigation. These warrants work backward. They are akin to general warrants from the past, in which officers simply reported that a crime had occurred or that they suspected one had occurred. These warrants did not specify a location or suspect to

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[8] *Id.*
[9] Meg *O'Connor*, *Avondale Man Sues After Google Data Leads to Wrongful Arrest for Murder*, Phoenix New Times (Jan. 16, 2020), https://www.phoenixnewtimes.com/news/google-geofence-location-data-avondale-wrongful-arrest-molina-gaeta-11426374 (last visited Feb. 21, 2023).
[10] *Id.*
[11] *Id.*
[12] Jennifer Valentino-DeVries*, Tracking Phones, Google Is a Dragnet for the Police (Published 2019),* The New York Times (Apr. 13, 2019), https://www.nytimes.com/interactive/2019/04/13/us/google-location-tracking-police.html (last visited Feb. 21, 2023).
[13] U.S. Const. amend. IV.
[14] *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

be searched for. The issuing magistrate would not question the officer to ascertain the veracity of their suspicion.[15] There is a lack of judicial oversight regulating the use of geofence warrants, save for a few jurisdictions. In the legislative realm, only New York[16] and Utah[17] have introduced bills to significantly address geofence warrants. Because of the lack of federal or state oversight concerning geofence warrants, law enforcement has unrestricted authority to violate the constitutional rights of thousands of people. This article argues that a clear, constitutional standard should be established by the Supreme Court of the United States for law enforcement to follow while executing geofence warrants. The Court must also extend Carpenter v. United States protections and declare that individuals have a reasonable expectation of privacy in their Location History.

Section I will define geofence warrants in-depth and analyze how law enforcement uses them in their investigations. Section II will discuss what the Constitution requires for warrants, the Supreme Court case of Carpenter v. United States, and whether geofence warrants satisfy the constitutional requirements of the Fourth Amendment. Section III will explore how some courts and states address geofence warrants. Section IV lists some arguments in favor of the use of geofence warrants. Section V lists some common arguments against the use of geofence warrants. Lastly, in Section VI, this paper argues that the Supreme Court should establish strict guidelines to regulate the unfettered use of these geofence warrants by law enforcement.

Section I: What are Geofence warrants, and how does law enforcement use them?

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[15]Leonard W. Levy, *Origins of the Fourth Amendment*, 114. POL. SCI. Q. 79, 82 (Spring 1999).

[16] Zack Whittaker, *A bill to ban geofence and keyword search warrants in New York gains traction*, TechCrunch (Jan. 13, 2022), https://techcrunch.com/2022/01/13/new-york-geofence-keyword-search-warrants-bill/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cubnlzZW5hdGUuZ292Lw&guce_referrer_sig=AQAAAC7tvinhX5oEHqcVACwsY0YWf4brnR-Pz_QT9FWtS7xL-0DLbwWHxAsjPqhi-b4DRW1GgxkpLUnk0cr4GO1v7dsZ6XC5SjDsgwA9aWHVz5fc7M7jJrGLQvDMSA0410H2i_hjG9p-u4v6yEE2hETWtsR9LX4aigzUGxEUtRL0XTN- (last visited Feb. 21, 2023).

[17] HB0057, Home | Utah Legislature, https://le.utah.gov/~2023/bills/static/HB0057.html (last visited Feb. 21, 2023).

Google is one of the world's most influential, recognizable, and profitable multinational companies. How many times have you used Google's search engine today? Do you own a Gmail account? Or what about when you use Google Maps to navigate you to your destination? Google's digital tentacles reach into every aspect of our personal lives, and some cannot imagine life without it. Many do not realize it, but every piece of Google tech or software, covertly or overtly, collects user data.[18] According to the Pew Research Center, 85% of Americans have owned a smartphone since February 2021, up from 35% when the poll was first conducted in 2011.[19] The United States has 133.4 million Android users as of 2022.[20] Google developed the Android mobile operating system, which accounts for 45% of the mobile operating systems in the U.S.[21] Google Maps dominates the most popular mapping apps in the United States. As of April 2018, its audience reach was double that of all other mapping apps combined.[22] Google also enjoys preeminence in the global search market, accounting for 84% of the search engine market since December 2022.[23]

Google's SensorVault

Because of Google's ever-present reach in our personal lives, it is a frequent recipient of warrants from law enforcement requesting personal data from users. Law enforcement has been seeking people's location information from a Google database called SensorVault.[24]

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[18] Ryan Nakashima, *AP Exclusive: Google tracks your movements, like it or not*, AP NEWS (Apr. 13, 2018), https://apnews.com/article/north-america-science-technology-business-ap-top-news-828aefab64d4411bac257a07c1af0ecb (last visited Feb. 21, 2023).
[19] Mobile Fact Sheet, Pew Research Center: Internet, Science & Tech, https://www.pewresearch.org/internet/fact-sheet/mobile/ (last visited Feb. 21, 2023).
[20] Petroc Taylor, Android smartphone users in the US 2014-2022 | Statista, Statista (July 27, 2022), https://www.statista.com/statistics/232786/forecast-of-andrioid-users-in-the-us/ (last visited Feb. 21, 2023).
[21] Petroc Taylor, Mobile OS share in North America 2018-2023 | Statista, Statista (Jan. 17, 2023), https://www.statista.com/statistics/1045192/share-of-mobile-operating-systems-in-north-america-by-month/ (last visited Feb. 21, 2023).
[22] L. Ceci, Top U.S. mapping apps by reach 2018 | Statista, Statista (Jan. 18, 2022), https://www.statista.com/statistics/865419/most-popular-us-mapping-apps-ranked-by-reach/ (last visited Feb. 21, 2023).
[23] Tiago Bianchi, Topic: Online search market, Statista (Feb. 17, 2023), https://www.statista.com/topics/1710/search-engine-usage/ (last visited Feb. 21, 2023).
[24]Valentino-DeVries, *supra* note 12.

SensorVault is a treasure trove of detailed personal information from at least hundreds of millions of devices worldwide.[25] SensorVault is tied to what is known as Location History.[26] Think of the many times you browse the web on your smartphone, and on the corner of the page, you see ads for products you've bought before or for places you have traveled. That is Google's Location History at work. Whenever a Google user accesses Gmail, Google Search, or Google Maps, they get a personalized experience while using those apps.[27] Google users can choose to opt-in to "Location History" as it is an optional Google account service.[28] When a user opts into Location History, Google can track the user's location wherever they carry their smartphone.[29] Google's Location History is fundamentally a journal that chronicles the user's activities. This enables Google to recommend personalized maps based on places the user has visited or receive real-time traffic updates based on their commute patterns.[30] Opting out of Location History may seem easy, but Google has been accused of surreptitiously collecting user data even though the user has seemingly opted out of Location History.[31] An Associated Press investigation "found that many Google services on Android devices and iPhones store your location data even if you've used a privacy setting that says it will prevent Google from doing so."[32] Google settled for an 85 million-dollar payout in a suit brought by the then Attorney General of Arizona, Mark Brnovich.[33] Brnovich sued Google in May 2020 for allegedly tracking people's locations with deceptive practices. When users turned off their Location History, Google continued to secretly

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[25] *Id.*
[26] *Id.*
[27] Brief of Amicus Curiae Google LLC in Support of Neither Party Concerning Defendant's Motion to Suppress Evidence From a "geofence" General Warrant (ECF No. 29) at 5, *United States v. Chatrie*, 590 F. Supp. 3d 901 (E.D. Va. 2022)(No. 3:19-cr-00130-MHL) [hereinafter Google Amicus Brief].
[28] *Id.*
[29] *Id.*
[30] *Id.* at 7.
[31] Nakashima, *supra* note 18.
[32] *Id.*
[33] Angela Cordoba Perez and Jose R. Gonzalez, The Arizona Republic, *Arizona announces $85M settlement with Google for allegedly tracking users' location deceptively*, Arizona Republic (Oct. 4, 2022), https://www.azcentral.com/story/news/local/arizona-breaking/2022/10/04/mark-brnovich-announces-85-m-settlement-google-after-investigation/8176001001/ (last visited Feb. 21, 2023).

collect user data through other settings, like Web & App Activity. The suit further alleged that Google collected user data to amplify ad revenue while not giving users a clear way to stop location tracking.[34] In a nutshell, law enforcement can gain access to the location history of millions of Google users through Google's SensorVault.

Execution of Geofence Warrants

Geofence warrants give law enforcement access to anonymized data from a specified geographic location and at a specific time.[35] With a traditional warrant, the police target a specific suspect and establish probable cause to search that suspect with a search warrant signed by a magistrate. Geofence warrants work backward in that the police do not target a specific suspect in the beginning; instead, they draw a virtual border around a geographic location and begin gathering data on users located in that area.[36] Google developed a three-step process to aid law enforcement in their geofence warrant requests. First, law enforcement obtains a warrant compelling Google to provide a list of all Google user accounts that have Location History logged, indicating that the users were present in a specified location during a specific time. This list is anonymized, and the volume of data produced at this stage depends on the size and nature of the area and the length of time covered by the geofence request.[37] Second, law enforcement reviews the anonymized list to discover anonymized device numbers of concern. If additional information is necessary to determine if a specific device is important to the investigation, law enforcement can compel Google to provide additional contextual location coordinates beyond the time and geographic scope of the original request. Law enforcement next examines the anonymized data, which reveals the user's movement data, and chooses the anonymized device for which it will ask Google to reveal identifying user account information.[38] Finally, the government compels Google to provide them with personal user information, such as the first and last name associated

[34] Complaint for Injunctive and Other Relief ¶ 8, State *ex rel. Brnovich v. Google LLC*, No. CV2020-006219 (Ariz. Super. Ct. May 27, 2020).
[35] Leila Barghouty, *What Are Geofence Warrants? – The Markup*, The Markup (Sept. 1, 2020), https://themarkup.org/the-breakdown/2020/09/01/geofence-police-warrants-smartphone-location-data (last visited Feb. 21, 2023).
[36] *Id.*
[37] Google Amicus Brief, *supra* note 27, at 12.
[38] *Id.* at 13-14.

with the Google account.[39] In sum, law enforcement begins their investigation with a specific geographic location, and with the help of Google, they are given a list of Google account holders. From there, they narrow their search to identify a suspect.

Some notable examples of geofence warrants

Since 2016, federal law enforcement has been increasingly relying on geofence warrants to catch suspects for their investigations.[40] The practice has spread to state and local police departments as well. Florida,[41] Virginia,[42] New York,[43] and Minnesota[44] are some noteworthy examples. Google has received over 1,500% more geofence requests in 2018 than it did in 2017, and so far, the rate has climbed by over 500% from 2018 to 2019.[45] Since 2018, Google has received thousands of geofence warrants per quarter, and at times, these warrants have made up around a quarter of all U.S. warrants that Google receives.[46] Local and state governments comprise the majority of geofence requests, whereas the federal government accounts for just 4% of requests.[47] Law enforcement has utilized these warrants in

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[39] *Id.*
[40] *Supra* note 12.
[41] Justin Garcia, *Tampa police use 'geofencing' to investigate crimes, a spying tactic critics call unconstitutional*, Creative Loafing Tampa Bay (July 6, 2022), https://www.cltampa.com/news/tampa-police-use-geofencing-to-investigate-crimes-a-spying-tactic-critics-call-unconstitutional-13712912 (last visited Feb. 21, 2023).
[42] Thomas Brewster*, Feds Order Google To Hand Over A Load Of Innocent Americans' Locations*, Forbes (Oct. 23, 2018), https://www.forbes.com/sites/thomasbrewster/2018/10/23/feds-are-ordering-google-to-hand-over-a-load-of-innocent-peoples-locations/?sh=b4302415a0dc (last visited Feb. 21, 2023).
[43] George Joseph & WNYC Staff, *Manhattan DA Got Innocent People's Google Phone Data Through A 'Reverse Location' Search Warrant*, Gothamist, https://gothamist.com/news/manhattan-da-got-innocent-peoples-google-phone-data-through-a-reverse-location-search-warrant (last visited Feb. 21, 2023).
[44] Tony Webster, *By a crime scene? The police may know, thanks to Google*, MPR News (Feb. 7, 2019), https://www.mprnews.org/story/2019/02/07/google-location-police-search-warrants (last visited Feb. 21, 2023).
[45] Google Amicus Brief, *supra* note 27, at 3.
[46] Zack Whittaker, *Google says geofence warrants make up one-quarter of all US demands*, TechCrunch (Aug. 19, 2021), https://techcrunch.com/2021/08/19/google-geofence-warrants/ (last visited Feb. 21, 2023).
[47] Google, Supplemental Information on Geofence Warrants in the United States, at 2. https://www.documentcloud.org/documents/21046081-google-geofence-warrants

several instances, such as locating rioters during violent protests[48] or seeking those who participated in the Capitol attack on January 6th.[49] To identify the individuals responsible for a series of arsons in Milwaukee, Wisconsin, the Bureau of Alcohol, Tobacco, Firearms and Explosives (or ATF) asked Google to provide the organization with records of user devices in the places where the arsons occurred.[50] The ATF sought to locate which Google users were located in areas spanning 29,387 square meters during a nine-hour timeframe. The search turned up an unprecedented 1,494 device identifiers in Google's SensorVault.[51] Another notable example of these geofence requests is a bank robbery case in Virginia. The police obtained a geofence warrant to locate the suspect of a bank robbery after following several unsuccessful leads.[52] A federal district court judge declared this warrant unconstitutional for reasons that will be expounded upon later in this article. These are just a few examples. Due to the explosive use of this novel surveillance tool by law enforcement, there has been little judicial or administrative oversight to prevent the police from ensnaring innocent people's personal information in their criminal investigations.

Section II: What the Constitution requires for warrants

The Fourth Amendment of the Constitution is very clear about the specific requirements of a warrant needed to search or seize. American citizens have a right to be secure in their persons, houses, papers, and effects from unreasonable searches and seizures. Warrants shall not be

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[48] Zack Whittaker, *Minneapolis police tapped Google to identify George Floyd protesters*, TechCrunch (Feb. 6, 2021), https://techcrunch.com/2021/02/06/minneapolis-protests-geofence-warrant/ (last visited Feb. 21, 2023).

[49] Mark Harris, *A Peek Inside the FBI's Unprecedented January 6 Geofence Dragnet*, WIRED (Nov. 28, 2022), https://www.wired.com/story/fbi-google-geofence-warrant-january-6/ (last visited Feb. 21, 2023).

[50] Thomas Brewster, *Google Hands Feds 1,500 Phone Locations In Unprecedented 'Geofence' Search*, Forbes (Dec. 11, 2019), https://www.forbes.com/sites/thomasbrewster/2019/12/11/google-gives-feds-1500-leads-to-arsonist-smartphones-in-unprecedented-geofence-search/?sh=49a46c1327dc (last visited Feb. 22, 2023).

[51] *Id.*

[52] Jon Schuppe, *Cellphone dragnet used to find bank robbery suspect was unconstitutional, judge says*, NBC News (Mar. 7, 2022), https://www.nbcnews.com/news/us-news/geofence-warrants-help-police-find-suspects-using-google-ruling-could-n1291098 (last visited Feb. 21, 2023).

issued, except upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched and the persons or things to be seized.[53] The Fourth Amendment safeguards citizens from unreasonable intrusions in their persons, houses, papers, and effects. If the government seeks to search or seize a person, house, or paper, it must abide by the constitutional requirements and obtain a warrant established on probable cause, supported by oath or affirmation, and the warrant must specifically describe the place or persons to be searched or seized. There have been numerous Supreme Court decisions interpreting and expanding the protections of the Fourth Amendment. The Supreme Court in Katz v. United States established a two-pronged test to determine whether a search occurs for purposes of the Fourth Amendment. First, a person must exhibit an actual expectation of privacy. Second, that subjective expectation of privacy must be one that society recognizes as reasonable.[54] If the government intrudes on a person's expectation of privacy that society recognizes as reasonable, then it is a search. In Katz, the Court ruled that Charles Katz had a reasonable expectation of privacy while he was making calls in a phone booth. Even though a phone booth is both outside and public, Katz expected that his phone calls would not be intercepted. He shut the door behind him and expected that no one could hear his conversation. Society recognizes that a person using a phone booth to make a private call has an expectation of privacy. Probable cause has no clear definition in the Constitution, so the Supreme Court has generally interpreted it to mean "when an officer has knowledge of such facts as would lead a reasonable person to believe that a particular individual is committing, has committed, or is about to commit a criminal act."[55] Probable cause requires individualized suspicion and is needed before an arrest or a search, with or without a warrant. The Constitution further requires warrants to be supported by oath or affirmation and specifically describe the place, person, or things to be searched or seized. The Supreme Court in Marron v. United States ruled that the requirement that warrants should particularly describe the things to be seized is necessary, as it makes

[53] U.S. Const. amend. IV.
[54] *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
[55] *Definitions Of Probable Cause Vs. Reasonable Suspicion*, *BLACK'S LAW DICTIONARY* (11th ed. 2019).

general warrants impossible.[56] The particularity requirement also restricts the discretion of the officer to not expand the search beyond what is particularly described. The Constitution further necessitates those warrants be supported by oath or affirmation. Police officers must sign an affidavit and go before a "neutral and detached magistrate" who is tasked with determining if there is probable cause to search or seize.[57] The Supreme Court has defined a magistrate as "a public civil officer, possessing such power, legislative, executive, or judicial, as the government appointing him may ordain."[58] Magistrates must be neutral and detached from a criminal case, as the police and prosecutors have an interest in fettering out crime and, therefore, cannot be neutral.[59] The Supreme Court has a wealth of case law carefully interpreting the Fourth Amendment to ensure that citizens' rights are safeguarded while also constraining the government to prevent unconstitutional overreach.

Carpenter v. United States

In our current digital age, with everyone's personal information and movements logged online, the Supreme Court has expanded Fourth Amendment protections to cover cell phone location data. Carpenter v. United States is a recent landmark case in which the Supreme Court ruled that individuals have a legitimate expectation of privacy in the record of their movements captured through cell phone location data. In 2011, four men suspected of robbing a series of stores in the Detroit, Michigan, area were arrested. One of the men, Timothy Ivory Carpenter, confessed to robbing nine stores in Michigan and Ohio with a group of people comprised of lookouts and getaway drivers. Carpenter handed the FBI the cell phone numbers of fifteen accomplices. The FBI also obtained Carpenter's cell phone records to procure other phone numbers Carpenter had called during the robberies. The FBI received court orders under the Stored Communications Act to obtain the cell phone records of Carpenter and his accomplices.[60] The Stored Communications Act allows the

[56] *Marron v. United States*, 275 U.S. 192, 196 (1927).
[57] *Shadwick*, 407 U.S. at 350; *Johnson v. United States*, 333 U.S. 10, 14 (1948).
[58] *Compton v. Alabama*, 214 U.S. 1, 7 (1909).
[59] *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932); *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971).
[60] *Carpenter v. United States*, 138 S. Ct. 2206, 2212 (2018).

government to compel the release of certain telecommunication records when it "offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation."[61] Federal magistrate judges issued two orders instructing Carpenter's cell phone providers to disclose his cell site information during the four months in which the robberies occurred. Altogether, the government obtained 12,898 location points cataloging Carpenter's movements, an average of 101 data points per day. Carpenter was charged with six counts of robbery and six counts of carrying a firearm during a federal crime of violence.[62] Before the trial, Carpenter moved to suppress the cell site location data on the grounds that the government violated his Fourth Amendment rights because they did not acquire a warrant supported by probable cause before they collected his records. The Federal District Court for the Eastern District of Michigan denied his motion and convicted him on all but one of the firearm counts, and he was sentenced to more than 100 years in prison.[63] He appealed, but the Court of Appeals for the Sixth Circuit affirmed the conviction.[64]

The Supreme Court reversed and remanded the case. Chief Justice Roberts wrote the majority opinion. He argued that "much like the GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled."[65] He also wrote that the fact that an individual constantly reveals their location to their wireless carrier implicates the third-party doctrine. The third-party doctrine, created in United States v. Miller, set the standard that individuals do not have a reasonable expectation of privacy when they voluntarily give their information to third parties.[66] The majority of the justices in Carpenter declined to extend the doctrine in this case, given the unique nature of cell phone location data. The justices noted that an individual maintains a legitimate expectation of privacy in the record of their physical movements collected through cell site location information

[61] 18 U.S.C. § 2703(d).
[62] *Carpenter*, 138 S. Ct. at 2212.
[63] *Id.* at 2213.
[64] *Id.*
[65] *Id.* at 2216.
[66] *United States v. Miller*, 425 U.S. 435, 443 (1976).

(CSLI).[67] The Court further noted that cell-site records present greater privacy concerns than GPS, as a cell phone is always on a person's body.[68] Individuals carry their cell phones at all times and in both public and private places. Cell phones can go where no GPS or beeper can. With the possession of cell site data, the government can achieve near-perfect surveillance on an individual.[69] Cell site location information meticulously catalogs an individual's entire whereabouts. The third-party doctrine did not apply here, as individuals do not "voluntarily" consent to their information being logged by cell phone companies. Cell phones are designed to log cell site information without any affirmative action on the part of the user beyond turning the phone on.[70] The doctrine also did not apply because cell phone companies collect an exhaustive chronicle of location information and store it for years. The information collected is unlike bank records in Miller. The Court held that the access to Carpenter's CSLI data was a search and that individuals have an expectation of privacy when it comes to CSLI. The government must obtain a warrant supported by probable cause before obtaining those records. This case raises questions about the current unrestricted use of geofence warrants by law enforcement. Do individuals have a reasonable expectation of privacy when it comes to Location History collected by Google? This paper contends that they do and that the Supreme Court should follow Carpenter's precedent and extend Fourth Amendment protections to Location History.

Do geofence warrants follow the Fourth Amendment's requirements?

This paper previously discussed what the Fourth Amendment requires for warrants to be issued, as well as how they should be properly executed to limit governmental overreach. This paper also introduced the Carpenter case and how, in our digital age, individuals have a reasonable expectation of privacy when it comes to their cell phone records. The question is whether geofence warrants accurately follow the constitutional parameters set by the Fourth Amendment. To answer this question, we first must determine if geofence warrants are

[67] *Carpenter*, 138 S. Ct. at 2217.
[68] *Id.* at 2218.
[69] *Id.*
[70] *Id.* at 2220.

searches for purposes of the Fourth Amendment. As written above, a search is an intrusion by the government upon an individual's reasonable expectation of privacy, which society recognizes as reasonable. This article asserts that individuals have a reasonable expectation of privacy when it comes to Location History, which is compiled through Google and stored in SensorVault. As stated earlier, Google chronicles a user's entire movement and whereabouts even if they turn Location History off or on. When law enforcement gains access to private information through geofence warrants, they can view a user's entire physical movements during a specific timeframe. Due to the unique nature of cell phones and how they naturally collect information even when the user is not using them, the Supreme Court ruled in Carpenter that individuals have a reasonable expectation of privacy in their cell site location information. When it comes to the issue of geofence warrants, Google has admitted that the information collected by geofence warrants through Location History is more precise and detailed than cell site location information.[71] Additionally, Google wrote that "the steps Google must take to respond to a geofence request entail the government's broad and intrusive search across Google users' LH information to determine which users' devices may have been present in the area of interest within the requested timeframe."[72] If the personal information collected through geofence warrants is more precise than CSLI and the government must access Google's deep SensorVault data, this article contends that individuals should have a greater degree of privacy expectation with Location History than with CSLI data. In short, the government does conduct searches when it executes geofence warrants. Next, we must determine if the warrants themselves appropriately satisfy the Fourth Amendment's requirements. A warrant must be based on probable cause and supported by oath or affirmation. It must also describe the persons or places to be searched or seized in great detail. This article maintains that geofence warrants fail to satisfy the probable cause requirement and the particularity standard. Probable cause requires individualized suspicion and specificity. Geofence warrants lack probable cause in that when executing these warrants, law enforcement does not have a specific suspect in mind; instead, they cast a virtual

[71] Google Amicus Brief, *supra* note 27, at 10.
[72] *Id.* at 4.

geofence around a certain geographic area and ask Google for assistance in tracking down a suspect by going through a well of location information. Geofence warrants operate by exposing every person within a "geofence" to a search merely because they were in close proximity to a crime scene. In fact, a federal district court Judge in Illinois denied the government's application for a geofence warrant as it failed to satisfy the probable cause requirements. In Chicago, the police applied to a magistrate judge, M. David Weisman, for geofence warrants to solve an investigation into stolen pharmaceuticals.[73] The government had no particular suspect that it was looking for yet. Law enforcement submitted a request to Google to compel the location history of all devices within their designated "geofence" during a 45-minute timeframe on three different dates. Being that Chicago is one of the most densely populated cities in the country, the area and scope of their search were suspect. The judge rightly denied the government's application. He wrote that "[t]he geofence, which has a 100-meter radius, is in a densely populated city, and the area contains restaurants, various commercial establishments, and at least one large residential complex, complete with a swimming pool, workout facilities, and other amenities associated with upscale urban living."[74] The second and third geofence warrant requests also covered a commercial establishment where the government believed that the suspect shipped the stolen pharmaceuticals.[75] The judge wrote that these warrant requests suffered from two constitutional ailments. "First, the scope of the search is overbroad, and second, the items to be seized are not particularly described. As to the scope of the warrant, the government is seeking all data of the cellular telephones that accessed Google applications or used Google's operating system in the three requested geofences."[76] This federal judge highlighted the major concerns with geofence warrants. The government, in this case, had a 100-meter radius that they were seeking to comb through just to locate a suspect. But in their search, innocent people were implicated who may have had a Google device and just happened to be near the crime

[73] In the Matter of Search of Information Stored at Premises Controlled by Google, as further described in Attachment A, No. 20 M 297, 2020 WL 5491763 (N.D. Ill. July 8, 2020).
[74] *Id.* at 1.
[75] *Id.*
[76] *Id.* at 3.

scene. The judge wrote that their search radius included many residential and commercial establishments that were full of people who had nothing to do with the offense at hand. In their search, at least hundreds of Google users could have had their personal Location History searched without their knowledge or consent. The government also failed to particularly describe the things to be searched or seized, as the judge noted.[77] These geofence warrants do not adequately abide by the parameters set by the Fourth Amendment. They fail to establish probable cause and particularity. Without those requirements, a neutral and detached magistrate cannot issue a warrant because probable cause and particularity have not been established.

Section III: What the courts and states say about geofence warrants

Federal and state courts have instituted very little judicial guidance on the unrestricted use of geofence warrants by law enforcement. In recent years, there have been a select few very significant judicial rulings that have strongly challenged the use of these geofence warrants. When it comes to legislation governing or constraining the use of these warrants, only a couple of states in the country have formally introduced bills addressing them. Those states are New York and Utah. At the time of this writing, there has been no federal legislation introduced to deal with geofence warrants. The threat of geofence warrants was mentioned during a July 2020 congressional hearing involving the heads of Apple, Google, Amazon, and Facebook before the House Judiciary Subcommittee on Antitrust legislation.[78] Representative Kelly Armstrong of North Dakota cautioned against the use of geofence warrants due to their lack of probable cause and particularity. "People would be terrified to know that law enforcement can grab general warrants and get everybody's information anywhere."[79] He also called for Congress to act on this issue, but as of now, not a single piece of legislation regulating geofence warrants has been introduced.

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[77] *Id.* at 5-6.
[78] *See User Clip: Heads of Facebook, Amazon, Apple, & Google Testify on Antitrust Law. Google Geofence warrants questioned by Rep. Kelly Armstrong from North Dakota*, CSPAN (July 29, 2020), https://www.c-span.org/video/?c5056032/user-clip-cspanorg-heads-facebook-amazon-apple-amp-google-testify-antitrust-law-google.
[79] *Id.* at 0:19-0:23.

United States v. Chatrie

A major federal judicial ruling announced on March 4th, 2022, by United States District Judge, Hannah Lauck, ruled that a geofence warrant by the government to find the suspect of a bank robbery was unconstitutional. The case is United States v. Chatrie. On May 20th, 2019, Okello Chatrie robbed a bank at gunpoint and made away with $195,000.[80] In their investigation, law enforcement requested that Google assist with executing a geofence warrant to locate the suspect. Google complied and provided law enforcement with certain location information, which led to the arrest of Chatrie. He was charged with two crimes in connection with the robbery.[81] He filed a motion to suppress in the United States District Court for the Eastern District of Virginia. The judge denied the motion but ruled in her memorandum that the use of geofence warrants by the police was unconstitutional. She wrote that the government lacked probable cause and particularity. She noted the three services that Google uses to acquire and store data on its users.[82] Furthermore, she writes that "Location History is powerful: it has the potential to draw from Global Positioning System ("GPS") information, Bluetooth beacons, cell phone location information from nearby cellular towers, Internet Protocol ("IP") address information, and the signal strength of nearby Wi-Fi networks."[83] The second service is Web and App Activity. If a user opts-into Web and App Activity, Google can collect certain data points when a user affirmatively engages in certain activities. Lauck wrote that when a person performs a Google search, Google, through WAA, keeps a record of that search to suggest that search to the user later.[84] The last service, Google Location Accuracy, available on Android devices exclusively, allows a user's phone to draw in location information from sources other than GPS.[85] The geofence warrant sought by the government encompassed not only the bank that was robbed but also included a megachurch, a busy highway, and a hotel.[86]

[80] *United States v. Chatrie*, 590 F. Supp. 3d. 901, 905 (E.D. Va. 2022).
[81] *Id*. at 906.
[82] *Id*. at 907.
[83] *Id*. at 908.
[84] *Id*. at 909.
[85] *Id*. at 910.
[86] *Id*. at 922-23.

The geofence warrant spanned seventeen acres.[87] The judge wrote that the government failed to include any facts to establish probable cause to collect a broad and general sweep from individuals within the geofence. Finally, Lauck remarked that the geofence warrant did not explicitly state which accounts that the police would obtain to acquire further identifying information.[88] The warrant also failed to identify objective parameters by which the police may choose which accounts would be subject to additional investigation.[89] Finally, the warrant did not even limit the number of devices for which the police could obtain identifying information.[90] In short, the geofence warrant failed to abide by the boundaries set by the Fourth Amendment and was ruled unconstitutional. The judge, however, denied the motion to suppress based on the "good faith" exception to the exclusionary rule. The exception states that whenever law enforcement has a reasonable, good-faith belief that they were acting legally by relying on a search warrant that later turned out to have been illegal, the evidence seized is still admissible. There is no police illegality.[91]

In the Matter of Search of Information that is Stored at Premises Controlled by Google, LLC

In June 2021, Judge Angel Mitchell of the United States District Court for the District of Kansas denied a geofence warrant from the Kansas police based on Fourth Amendment grounds.[92] Law enforcement sought a geofence warrant directed at Google for location history data spanning a specified area and including a building where a federal crime had allegedly occurred.[93] Mitchell noted that the application from the police correctly established probable cause that a crime was committed. However, it failed to establish probable cause that evidence of the crime would be found at the crime scene, which would be Google's records showing the location data of smartphone users within the geofence zone.[94] The government's statements in this

[87] *Id.* at 918.
[88] *Id.* at 934.
[89] *Id.*
[90] *Id*.
[91] *United States v. Leon*, 468 U.S. 897, 920-21 (1984).
[92] In the Matter of Search of Information that is Stored at Premises Controlled by Google, LLC, 542 F. Supp. 3d 1153 (D. Kan. Jun 4, 2021).
[93] *Id*. at 1154.
[94] *Id*. at 1156.

application were too vague and generic to establish a fair probability that the identity of the suspect was located in their proposed geofence warrant.[95] The opinion noted that law enforcement further failed to establish a fair probability that any suspect would have been using a device that fed their location history to Google.[96] The court recognized that the application was missing key information to determine whether the proposed geofence warrant was appropriately particularized. The proposed geofence warrant contained two public streets that could have caught anyone driving their car near the crime scene.[97]

In the Matter of Search Warrant Application for Geofence Location Data Stored at Google Concerning an Arson Investigation

This ruling illustrates a case in which geofence warrants were properly in line with the Constitution and the Fourth Amendment requirements. Judge Sunil R. Harjani of the United States District Court for the Northern District of Illinois granted an application for geofence warrants to investigate a series of ten arsons in the Chicago area. The police believed that these arsons were connected, as the suspects targeted specific commercial lots.[98] Law enforcement captured two vehicles on surveillance cameras suspected of transporting the arsonists.[99] The police believed that the geofence data for six specific locations would contain evidence concerning the identity of the suspects. Law enforcement tightly limited the six places covered by the geofence warrant to the commercial properties where the fires occurred and along sections of the road where the arsonists may have escaped.[100] The timeframe specified in these warrants was also reasonable, as they were limited to between fifteen- and thirty-seven-minute intervals during the early mornings.[101] Because fewer people would be present during those time intervals and times of day, the risk

[95] *Id*. at 1157.
[96] *Id*.
[97] *Id*. at 1158.
[98] In the Matter of Search Warrant Application for Geofence Location Data Stored at Google Concerning an Arson Investigation, 497 F. Supp. 3d 345, 351 (N.D. Ill. Oct 29, 2020) [hereinafter *Arson*].
[99] *Id.*
[100] *Id.* at 352.
[101] *Id.* at 357.

of innocent people's private information being searched would be reduced. Judge Harjani wrote that:

Courts have expressed concern about requests for geofence data that sweep too broadly and capture vast amounts of location data on uninvolved individuals. For example, geofence zones can be drawn, at the government's discretion, to include large swaths of land and buildings, including office and apartment buildings, shopping malls, churches, and residential neighborhoods, which could result in revealing location data of hundreds, if not thousands, of individuals that are uninvolved in the underlying crime.[102]

Geofence warrants do not target a specific individual but rather an area that might contain the location data of Google users. He also wrote that in this case, the government had satisfied the Fourth Amendment's requirements by structuring the warrants in a way to minimize the potential for capturing the data of innocent people while also maximizing the potential to catch the suspects through location data.[103] The government has ample probable cause to believe a crime has been committed and that someone committed the crime, as they have evidence and camera footage of the perpetrators.[104] The warrants are also limited in scope, time, and location to properly satisfy the particularity requirements.[105]

State-level legislation addressing geofence warrants

At the state level, only a couple of states in the country have formally introduced bills curtailing or banning the use of geofence warrants. The state senate of New York back in April 2020 introduced the Reverse Location Search Prohibition Act.[106] State senator Zellnor Myrie introduced the bill to combat the widespread use of geofence and keyword search warrants. "In dense, urban communities like the ones I represent in Brooklyn, hundreds or thousands of innocent people who merely live or walk near a crime scene could be ensnared

[102] Id. at 353.
[103] *Id.*
[104] *Id.* at 354.
[105] *Id.* at 357-58.
[106] Zack Whittaker, *A bill to ban geofence and keyword search warrants in New York gains traction*, TechCrunch (Jan. 13, 2022), https://techcrunch.com/2022/01/13/new-york-geofence-keyword-search-warrants-bill/ (last visited Feb. 22, 2023).

by a geofence warrant that would turn over their private location data."[107] The bill would prohibit the search by geolocation, with or without a warrant, of people who happened to be near a specified location at a set point in time.[108] The bill contains a provision for the suppression of evidence gathered from the use of these warrants, along with a private right of action in which individuals can sue the police department if their records were obtained because of these warrants.[109] The bill had multiple co-sponsors but never passed. The bill was recently re-introduced in January 2021 by a group of Democratic lawmakers.[110] The bill is currently in committee, and no updates have been reported since then. The New York ACLU has lent its support to the bill.[111] A coalition of big tech companies, including Google, also voiced support for the bill.[112] If passed, the bill would be the first in the country to address geofence warrants. In a more optimistic route, the state of Utah could pass a bill restricting geofence location tracking while also mandating law enforcement report each use of these warrants.[113] H.B. 57 was introduced by State Representative Ryan Wilcox with State Senator Todd D. Weiler as a co-sponsor.[114] The bill would require law enforcement reporting requirements for geofence warrants, require the State Commission on Criminal and Juvenile Justice to receive and compile data concerning geofence warrants, and place procedures and restrictions for law enforcement when accessing location data.[115] The bill passed the House and is currently being discussed in the Utah Senate.[116] When it comes to addressing or restricting the use of geofence warrants, there is more legislative development at the state level, and more states could adopt similar bills in the future.

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[107] *Id.*
[108] NY State Assembly Bill A84A, NY State Senate, https://www.nysenate.gov/legislation/bills/2021/A84 (last visited Feb. 22, 2023).
[109] *Id.*
[110] Whittaker, *supra* note 103.
[111] *Id.*
[112] Zack Whittaker, *Tech giants pledge support to ban controversial search warrants*, TechCrunch (May 10, 2022), https://techcrunch.com/2022/05/10/google-new-york-geofence-keyword-warrant/ (last visited Feb. 22, 2023).
[113] Utah Legislature, *supra* note 17.
[114] *Id.*
[115] *Id.* ¶ 12.
[116] *Id.*

Section IV: Some arguments for geofence warrants

Despite the controversial nature of geofence warrants, several supporters are in favor of the use of these warrants by law enforcement to solve crimes. Law professors, prosecutors, and legal scholars have written positive articles about geofence warrants. There are some examples listed here. The first of them is from Professor Jane Bambauer, a leading information law scholar who teaches at the University of Arizona, expressing her opinions on the recent Chatrie geofence case. She disagreed with the federal judge's ruling that declared the use of geofence warrants unconstitutional. She believed that the judge's opinion was poorly reasoned in its handling of the Fourth Amendment.[117] She hopes that the courts do not impede the recent technological tools like geofences that could help the police solve crimes. Bambauer, in answering if geofence warrants are a search, said that the third-party doctrine "is part of messy-but-necessary process of dividing zones of privacy from the areas where police have a freer hand."[118] She also disagrees with the judge's assessment that the warrant was broad and shallow in that 19 people's devices were caught up in the geofence parameters.[119] The professor writes that this thinking goes against how the Fourth Amendment is structured in that the police begin an investigation with superficial information gathering without process and then demand more particularized suspicion as the intrusiveness of the search develops.[120] She gives an example of the broad-but-shallow surveillance that law enforcement employs. She writes that when law enforcement stands on a street corner or conducts a stakeout under the plain view doctrine, they are conducting a broad-but-shallow search.[121] Professor Bambauer does not consider geofence warrants to be searches for purposes of the Fourth Amendment. She argues that even if geofence warrants are searches, then they may be considered a reasonable search even if they lack individualized suspicion. She supports her

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[117] Eugene Volokh & From Prof Jane Bambauer*, "Geofence Warrants Are the Future (and That's a Good Thing)"*, Reason.com (Mar. 16, 2022), https://reason.com/volokh/2022/03/16/geofence-warrants-are-the-future-and-thats-a-good-thing/ (last visited Feb. 22, 2023).
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*

claim with the Supreme Court case of Illinois v. Lidster, 540 U.S. 419 (2004). The Supreme Court upheld the use of a temporary highway checkpoint that was set up after a "hit-and-run" accident. Law enforcement would stop drivers and question them about the crime without individualized suspicion or a warrant procedure.[122] She also claims that courts have upheld checkpoints because they limit police discretion as they do not control who passes through them.[123] Finally, she offers some virtues of geofence warrants. She states that if people want the police to solve serious crimes, then criminal justice and civil liberties organizations should embrace geofence warrants to help them do that.[124] In the Chatrie case, law enforcement followed two leads in their investigation that went nowhere. But when they employed the help of Google to locate the suspect, they solved the crime and arrested the suspect. She writes that in order to solve crimes quickly, law enforcement should use geofence warrants as a first resort rather than a last resort.[125] At the end of her article, she does acknowledge some concerns with geofence warrants but notes that those issues could be resolved by having a warrant-like process during a geofenced investigation and reserving geofences for more serious crimes.[126] Along with this article, Professor Bambauer penned a Washington Post opinion piece last year, again arguing for the use of geofence warrants to help the police solve crimes.[127]

A second supportive argument for geofence warrants was written by Reed Sawyers, a law clerk for Judge Harvie Wilkinson III of the United States Court of Appeals for the Fourth Circuit. He published a lengthy article for the George Mason Law Review and argued that geofences are an originalist approach to the Fourth Amendment.[128] In this paper, he analyzes every aspect of the Fourth Amendment from an originalist point of view—a view of what the founding fathers

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[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] Jane Bambauer, *Perspective | Letting police access Google location data can help solve crimes*, Washington Post (Mar. 28, 2022), https://www.washingtonpost.com/outlook/2022/03/28/geofence-warrant-constitution-fourth-amendment/ (last visited Feb. 22, 2023).
[128] Reed Sawyers, *For Geofences: An Originalist Approach to the Fourth Amendment*, 29 GEO. MASON L. REV. 787 (2022).

originally intended. Sawyers argues that geofence warrants are compelled production and not a search under the Fourth Amendment. So, because they fall outside Fourth Amendment protections, geofence queries can be carried out with subpoenas and do not require warrants, and concepts like probable cause and particularity are irrelevant.[129] He argues that investigative techniques, like subpoenas, that order a recipient to turn over evidence to which he already has access did not constitute a search at the time of the founding.[130] So, by his logic, ordering Sprint or an Internet Service Provider to turn over location data or emails does not constitute searches under the Fourth Amendment.[131] He writes that when it comes to geofence queries, forcing Google to turn over location data is analogous to when the government ordered a bank to turn over bank records in United States v. Miller.[132] He mentions that geofence queries do not require warrants, and if law enforcement wishes to request a warrant, then probable cause and particularity should be easy to establish with the ubiquitous nature of cell phones and the ever-present reach of Google.[133] He says that establishing probable cause is easy because, to do so, the police only need to demonstrate that there is a fair probability that contraband or evidence will be found.[134] In terms of geofence warrants, that requires demonstrating that the suspect's information will be returned by a geofence query. He contends that given the pervasiveness of phones, there is a fair probability that a suspect would be carrying a phone when in the geofence.[135] "Unless there is evidence indicating that the target was affirmatively not carrying a cell phone or otherwise avoiding location tracking--at least for significant providers like Google or one of the three major mobile telecoms-- there will normally be a fair probability a geofence query will reveal evidence of crime."[136] He backs up his point with a few statistics about the number of smartphone-owning Americans, and the number of Android phones in the U.S. Sawyers believed that the judge in Chatrie erred in determining that individualized suspicion was

[129] *Id.* at 797.
[130] *Id.* at 798.
[131] *Id.*
[132] *Id.* at 799.
[133] *Id.* at 806.
[134] *Id.*
[135] *Id.* at 807.
[136] *Id.*

needed to search every Google user in the geofence. He wrote that "the search warrant standard requires only that there be a fair probability that evidence will be found somewhere in the place to be searched."[137] He argues that police officers can search a house based on probable cause that it contains evidence of a crime without having probable cause to believe that every occupant in that house is connected to a crime. His article continues in greater depth on the reasons why geofence queries are not searches, and he advocates for their continued use to solve crimes. They offer minimal privacy intrusion, and they have a greater public safety benefit. In the end, he argues that geofence warrants should be regulated by Congress, not the courts.[138]

Police officers and investigators have pointed to the use of geofence warrants as a beneficial tool that helps law enforcement in criminal investigations that have gone cold. An example of this can be found in the state of Utah. A shooter fired upon several cars driving on the interstate. A man was struck on his shoulder and a woman was grazed by a bullet while they were driving. Tracking down the suspect proved difficult, as no one had seen the shooter. So, the police obtained smartphone information and location data from several people who had passed through at the time of the shooting.[139] They narrowed the field to four people and eventually located the suspect out of the four. Six months after the shooting, Adam Lloyd Green was apprehended.[140] Deputy Utah County Attorney Ryan McBride emphasized that when a judge signs off on a geofence warrant, the first batch of information keeps smartphone users anonymous to law enforcement. Once they want to unmask or get identifying data about people, they need another warrant from a judge weighing the strength of the evidence in hand against people's privacy rights.[141] McBride wants people to know that there are appropriate checks along the way. He notes that geofence warrants are very helpful in two situations: The first is when a crime takes place in a rural area where there are few

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[137] *Id.* at 809.
[138] *Id.* at 826.
[139] Daniella Rivera & Annie Knox, *Location data cracks open police cases, but critics say there's a cost to privacy*, KSLTV.com (Aug. 18, 2022), https://ksltv.com/503143/location-data-cracks-open-police-cases-but-critics-say-theres-a-cost-to-privacy/ (last visited Feb. 22, 2023).
[140] *Id.*
[141] *Id.*

people. The second is when there is a string of crimes at multiple places, like similar bank robberies across a city.[142] The news article further notes that a double murder of two Utah teenagers in the desert was also solved by using geofence warrants. The suspect was found guilty of two counts of aggravated murder.[143]

The use of geofence warrants solved a hit-and-run case in California. Surveillance cameras captured bicyclist Pamela Morehouse getting struck from behind.[144] Witnesses heard a truck screech away but failed to catch a good glimpse. A driver called 911, and Morehouse later died from injuries she sustained in the crash. For months, all the police had to rely on was camera footage. The license plate number wasn't visible. California Highway Patrol Officer Ted Luna noted that there was a complete lack of evidence, and the case went cold in the summer of 2018.[145] Everything changed when he learned how to use a geofence. He created a virtual geographic border around potential witnesses and suspects. Luna obtained a warrant in order to compel Google to produce a list of mobile devices that crossed through the intersection around the time of the accident.[146] This provided officers with a new opportunity, and they were successful in finding the suspect who would face trial. "We went from zero to 100 pretty fast on what we got back from Google, [w]ithout the geofence, this would have remained a cold case," Luna says.[147] Luna considers the geofence tool a supplement to detective work. He, however, does not consider it a tool you can use by itself. With the ever-increasing use of geofence warrants by law enforcement, an increasing number of cold cases are being resolved. Law enforcement and prosecutors advocate for geofence warrants as a beneficial and crucial technological surveillance tool that can be used in the pursuit of public safety. However, not everyone feels the same way.

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[142] *Id.*
[143] *Id.*
[144] Christopher Damien & Nick Penzenstadler, *Private data or police evidence?*, USA Today (Sept. 13, 2022), http://link.gale.com/apps/doc/A717326003/OVIC?u=lincclin_pcc&sid=bookmark-OVIC&xid=d9f78260. (last visited Feb. 22, 2023).
[145] *Id.*
[146] *Id.*
[147] *Id.*

Some arguments against geofence warrants

A growing number of privacy rights groups, law professors, civil rights activists, and defense attorneys have strongly voiced grave concerns about the use of geofence warrants by the government. They caution that innocent people's private data passively collected by Google can rope them in as potential suspects in crimes that they have nothing to do with. Some of those opposed to geofence warrants call for a complete and total ban, while others think congressional regulation might solve the danger posed by them. Either way, opponents of geofences consider geofence warrants to be unconstitutional and a threat to privacy.

Geofence warrants a threat to privacy

Bonnie Kristian, a journalist who writes on a range of issues, including civil liberties, warned in her opinion article for Reason Magazine last year that geofence warrants are a threat to privacy.[148] She writes about the House committee investigating the January 6th Capitol attack and of a unique case involving David Rhine, a Capitol rioter who is presenting a potentially successful challenge to the FBI's use of geofence warrants to pursue the attackers.[149] The FBI's geofence warrants have been overly expansive, as Google gave law enforcement 5,723 devices in response to the warrant.[150] The FBI whittled the number down to exclude Capitol staff and police, as well as anyone who wasn't entirely within the geofence that the FBI created. The final list that the FBI received contained 1,535 names. The FBI, through surveillance footage, located Rhine. Kristian writes that geofence warrants are troubling as they do not traditionally follow constitutional guidelines; they work backward. She writes that they seem like general warrants that are supposed to be prohibited by the Fourth Amendment.[151] She also warns that law enforcement can track innocent people's movements and that the virtual maps drawn by the police are not always accurate.[152] She notes the example of Zachary

[148] Bonnie Kristian, *Geofencing warrants are a threat to privacy*, Reason.com (Dec. 5, 2022), https://reason.com/2022/12/05/geofencing-warrants-are-a-threat-to-privacy/ (last visited Feb. 22, 2023).
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*

McCoy, who was wrongly accused of burglary.[153] She ultimately portends that law enforcement could use geofence warrants to look for a journalist's whistleblowing source or to track down those who attend political protests. She ends her piece by saying that, with the absence of legal constraint, the trend of the police using geofence warrants will continue and that the January 6th cases may set a crucial precedent.[154]

The ACLU filed an amicus brief in January of this year in the case of United States v. Chatrie. Chatrie recently filed an appeal to the United States Court of Appeals for the Fourth Circuit. The civil rights organization filed in support of the appellant and argued that the evidence collected from the geofence warrant should have been suppressed. This paper explained earlier that in Chatrie, Judge Lauck denied the motion to suppress despite the constitutional issues because of the "good faith exception."[155] The ACLU argued that the warrant was too broad and gave extreme discretion to Google and the officers in deciding what location and identifying information to reveal.[156] The organization further claims that geofence warrants highlight the government's history of withholding information from judges about the capabilities and impacts of novel surveillance tools.[157]

Geofence warrants lack probable cause and particularity

A frequent argument against geofence warrants is that they lack probable cause and particularity. They are too broad in scope, location, and time. Chatrie's defense counsel argued in their motion to suppress that geofence warrants are unconstitutional and that the evidence collected from them, in this case, should have been suppressed. They argue that, unlike a traditional warrant, these warrants work in reverse and allow the police broad discretion to sift through large amounts of location data from the 19 devices listed.[158] "This is nothing less than

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[153] *Id.*
[154] *Id.*
[155] *Chatrie*, 590 F. Supp. 3d at 925.
[156] Press Release, ACLU Argues Evidence From Privacy-Invasive Geofence Warrants Should Be Suppressed | American Civil Liberties Union XXXX (Jan. 30, 2023), https://www.aclu.org/press-releases/aclu-argues-evidence-from-privacy-invasive-geofence-warrants-should-be-suppressed (last visited Feb. 22, 2023).
[157] *Id.*
[158] Defendant Okello Chatrie's Motion To Suppress Evidence Obtained From A "Geofence" General Warrant, *United States v. Chatrie*, No. 3:19cr130-MHL (E.D. Va. 2019).

the modern-day incarnation of a 'general warrant,' and it is prohibited by the Fourth Amendment," they argued.[159] They additionally write that the location data that law enforcement obtains is highly personal as it reveals private activities and shows when someone is in a constitutionally protected area like a house.[160] The fact that the police can quickly access individuals' personal data is an expansion of police power and constitutes a search.[161] His lawyers also argue that there was no evidence that Chatrie used an Android device in connection to the crime and that law enforcement searched a trove of private location data on 19 people who happened to be near the location of the bank robbery.[162] Chatrie's lawyers further wrote that the government's broad assumptions about cell phone usage, which lack any concrete links to the alleged criminal activity, are inadequate to establish probable cause.[163] The broad discretion afforded to law enforcement to determine which accounts to search is a clear indication of an unparticularized warrant.[164] The warrant, in sum, is severely overbroad and lacking in particularity.[165]

S.T.O.P., or the Surveillance Technology Oversight Project, is a New York-based non-profit advocacy organization that litigates and advocates for privacy and an end to the government's use of mass surveillance. They seek to ensure that technological advances do not come at the expense of age-old rights. They seek government transparency, accountability, and an end to mass surveillance of the populace.[166] This organization released a press release last March welcoming the ruling against geofence warrants in Chatrie. They also support the proposed bill to ban geofence warrants and reverse keyword search warrants.[167] Albert Fox Cahn, the executive director

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[159] *Id.* at 2.
[160] *Id.* at 13.
[161] *Id.* at 14.
[162] *Id.* at 3.
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] Our Vision — S.T.O.P. - The Surveillance Technology Oversight Project, S.T.O.P. - The Surveillance Technology Oversight Project, https://www.stopspying.org/our-vision (last visited Feb. 22, 2023).
[167] Press Release, S.T.O.P. Welcomes 'Landmark' Ruling Against Geofence Warrants, Renews Call For NY Ban — S.T.O.P. - The Surveillance Technology Oversight Project XXXX (S.T.O.P. Mar. 8, 2023),

of S.T.O.P., said, "We've called geofence warrants 'unconstitutional' for years, and it's great to see the courts catching up. But we can't afford to wait for this question to be litigated before the Supreme Court, and that's why we're calling on New York and other states to outlaw geofence warrants today."[168] He warned that a single geofence warrant could be used to identify anyone who attends a protest, worships at a religious center, or visits an abortion clinic.[169]

Haley Amster, a law clerk at a multinational law firm, and Brett Diehl, a trial attorney from San Diego, both authored an extensive and well-researched law review article for Stanford Law School advocating against the use of geofences. Their article thoroughly examines the technology behind geofences, as well as the legality of these warrants, and concludes that geofence warrants violate the Constitution because they grant the police broad discretion and impermissibly broaden the scope of a warrant.[170] The article's main takeaways are that geofences fall short of probable cause and particularity. They write that probable cause is likely the main obstacle to the constitutionality of geofence warrants in that they simply assert individual users were at the scene of the crime and possessed a cell phone that sends data to Google.[171] The first allegation that an individual was near the scene of the crime is insufficient, as the government must show that a special need beyond general law enforcement activity, like the risk to public safety, is present. The second allegation—that a user has a cell phone that sends data to Google is not a reason to believe that a person has committed a crime.[172] Furthermore, the authors write that before receiving geofence warrant data, law enforcement has little idea which individuals to examine. Every person within the geofence is treated as a suspect, which is contrary to the Fourth Amendment's requirement for individualized suspicion. The Constitution requires that probable cause be established for every individual inside the search area, and an affidavit merely showing that a crime took place in a certain area is not

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https://www.stopspying.org/latest-news/2022/3/8/stop-welcomes-landmark-ruling-against-geofence-warrants-renews-call-for-ny-ban (last visited Feb. 22, 2023).
[168] *Id.*
[169] *Id.*
[170] Haley Amster & Brett Diehl, *Against Geofences*, 74 STAN. L. REV. 385, 386 (2022).
[171] *Id.* at 429.
[172] *Id.*

enough to be granted a warrant by the courts.[173] The article continues listing their major concerns and implications of geofences, and they conclude that without increased judicial scrutiny or legislative action, undemocratic and discretionary corporate policy will shape location history protections.[174]

The Electronic Frontier Foundation is the leading non-profit organization defending civil liberties in the digital world. They were founded in 1990 and champion user privacy, free expression, and innovation through impact legislation, activism, and policy analysis.[175] This organization has written several legal briefs and supported various measures to crack down on technological overreach. The organization filed amicus briefs in two important geofence warrant cases last month. Both cases, People v. Meza[176] and United States v. Chatrie[177] have been appealed by defendants challenging the use of geofence warrants. People v. Meza has been appealed to the California Court of Appeal, whereas United States v. Chatrie, spoken about earlier, has been appealed to the Fourth Circuit Court of Appeals. Jennifer Lynch, writing in this article, chastises law enforcement's use of geofences as unconstitutional. "Unlike traditional warrants for electronic records, a geofence warrant doesn't start with a particular suspect or even a device or account; instead, police request data on every device in a given geographic area during a designated time period, regardless of whether the device owner has any connection to the crime under investigation."[178] She argues that these warrants do not require the police to show probable cause, which gives the police unlimited discretion. She also mentions that innocent people have been

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[173] *Id.* at 430.
[174] *Id.* at 444.
[175] About EFF, Electronic Frontier Foundation, https://www.eff.org/about (last visited Feb. 22, 2023).
[176] Amicus Curiae Brief Of The Electronic Frontier Foundation In Support Of Defendants-Appellants, *People v. Meza*, No.TA150314 (Cal. App. 2d. 2023).
[177] Brief Of Amici curiae technology Law And Policy Clinic At New York University School Of Law & Electronic Frontier Foundation in Support Of Defendant–Appellant, *United States v. Chatrie*, 590 F. Supp. 3d. 901 (E.D. Va. 2022)(No. 22-4489).
[178]Jennifer Lynch, *EFF Files Amicus Briefs in Two Important Geofence Search Warrant Cases*, Electronic Frontier Foundation (Jan. 31, 2023), https://www.eff.org/deeplinks/2023/01/eff-files-amicus-briefs-two-important-geofence-search-warrant-cases (last visited Feb. 22, 2023).

caught by them and that these warrants could impact other fundamental rights, including freedom of speech and association.[179]

United States Supreme Court must rule on this issue

Geofence warrants raise significant and interesting constitutional questions that the courts have struggled to answer. Because of the novelty of this new surveillance tool and the precise way in which it collects an understanding of a person's exact movements, there is very little precedent for courts to follow as to the best way to meaningfully regulate these new warrants. The constitutionality of geofence warrants remains unsettled. Currently, federal courts have struck down most of these warrants as unconstitutional, while a few judicial opinions have upheld these warrants as lawful when they satisfy the Fourth Amendment. There are three pressing questions that the courts are currently struggling to adequately answer concerning geofence warrants: Do smartphone users have a reasonable expectation of privacy with their Google Location History data? Should location history data collected by Google fall under the third-party doctrine? Do geofence warrants as they currently stand sufficiently satisfy the probable cause and particularity requirements? The courts have not satisfactorily answered these questions, which leaves a cloud of ambiguity and uncertainty not only for law enforcement but, most importantly, for the people whose location data is being searched. Without strict constitutional guidelines issued by the courts, the police, in their pursuit of solving crime, will continue to breach the rights of many individuals. The Supreme Court, being the highest court in the land, is well suited to address these concerns and dispel the uncertainty brewing in the courts.

There are critical questions for the Supreme Court to address

The Supreme Court may very well hear a geofence case in the near future. United States v. Chatrie is a federal case in which geofence warrants are being challenged on Fourth Amendment grounds. Chatrie, the defendant, had appealed the Federal District Court's ruling after the judge denied his motion to suppress. The Fourth Circuit Court of Appeals will be hearing arguments later this year. Depending on the outcome of the case, it could make its way to the Supreme Court. If it

[179] *Id.*

does, this could be a great opportunity for the Supreme Court to settle the debate and clear the air surrounding geofence warrants.

When hearing a geofence warrant case, the Supreme Court must weigh arguments from both sides on this issue. The government has a public interest in fettering out crime in society, and law enforcement must use all tools and resources available to them to accomplish this goal. At the same time, the rights and liberties of the public must also be safeguarded, and law enforcement cannot disregard those rights. The Court must strike a balance between the two sides to carefully craft a ruling that satisfies all parties involved. The Supreme Court should not strike down geofence warrants as unconstitutional entirely, but it should institute strict constitutional guidelines for law enforcement to follow in executing geofence warrants. The court must also answer the three questions listed above to clear up the confusion surrounding geofence warrants.

In deciding a potential geofence warrant case, the Supreme Court must answer the three questions previously posed: Do smartphone users have a reasonable expectation of privacy in their Google Location History data? Should location history data that has been collected by Google fall under the third-party doctrine? Do geofence warrants as they stand currently sufficiently satisfy the probable cause and particularity requirements?

Do smartphone users have a reasonable expectation of privacy in their Google location history?

A smartphone user's entire physical movements are collected and stored by Google. Earlier, this article discussed the technology behind this and how users can choose to opt into Location History.[180] Even if a user opts out, Google has been accused of still tracking users,[181] plus the company employs other services to log user data.[182]When answering the question above, the Court should recall its ruling in United States v. Carpenter. In Carpenter, the court ruled that people have a reasonable expectation of privacy in their cell site location information.[183] This means that law enforcement must acquire a lawful

[180] Google Amicus Brief, *supra* note 27, at 5.
[181] Nakashima, *supra* note 18.
[182] Brnovich, *supra* note 34, ¶ 8.
[183] *Carpenter*, 138 S. Ct. at 2217.

warrant if they seek to access that data. The Carpenter ruling was narrow, but this paper argues that the Court should extend Carpenter to cover Google's Location History. By extending Carpenter in this instance, law enforcement would be required to obtain a warrant to search individuals' Location History compelled through Google. The reason for extending Carpenter to cover Google's Location History is that Location History, like CSLI, is detailed, encyclopedic, and effortlessly compiled.[184] Carrying your cell phone with you is a hallmark of 21st-century living. People bring their cell phones with them wherever they travel, be it their house, workplace, or doctor's office. By obtaining a user's Location History, law enforcement can observe a timeline of the user's whereabouts and see how long they spent at a particular place or time. A minimal exposure of a person's Location History can reveal deeply personal information. A Minnesota Deputy Police Chief remarked that Location History shows "the whole pattern of life" and that it was a "game changer for law enforcement."[185] Haley Amster and Brett Diehl write in their article that:

> [w]hether a geofence request is viewed as a search of many individuals, a search of many individual devices, or a search of many homes, a geofence violates the reasonable expectation of privacy of each user swept up in its bounds. It is near axiomatic to say that users today have, or should have, a reasonable expectation of privacy in their sensitive location data.[186]

Location History, as admitted by Google, is more precise than CSLI.[187] Google's Location History, as stated earlier, is like a journal that meticulously catalogs a user's personal movements and whereabouts.[188] Because Location History behaves like a personal journal detailing individuals' movements, it should fall within the Fourth Amendment's understanding of "papers." Letters, telegraphs, phone calls, emails, and text messages are private communications and

[184] *Id.* at 2216.
[185] Valentino-DeVries, *supra* note 12.
[186] *Against Geofences*, *supra* note 166, at 408.
[187] Google Amicus Brief, *supra* note 27, at 10.
[188] *Id.* at 6.

would be treated as "papers" for Fourth Amendment purposes.[189] Likewise, Location History would likely fall under Fourth Amendment protections.[190] Google gives users a personalized experience whenever they use its services, and they can receive real-time traffic updates based on their commutes.[191] In short, by considering all this, the Supreme Court should extend Carpenter to encompass Location History as smartphone users have a reasonable expectation of privacy in their data. The Court's answer to the question above should be yes.

Does Google's Location History data fall under the third-party doctrine?

Next, the second question that the Court must consider is whether Google's Location History falls under the third-party doctrine. As mentioned earlier in the paper, the third-party doctrine traces its origins to United States v. Miller. The doctrine states that individuals have no reasonable expectation of privacy when they choose to give their information to third parties. In Miller, the defendant could not "assert ownership nor possession" of the bank records, as the bank owns them for business purposes.[192] The bank records were "not confidential information, but negotiable instruments to be used in commercial transactions."[193] The Supreme Court in Carpenter rejected the argument brought by the government that the CSLI collected fell under the third-party doctrine. If it did, a warrant would not be required to seize those data records. The Court declined to apply the doctrine in Carpenter for reasons explained earlier in this article.[194] With Location History data, there is an argument to be made about whether it falls under the purview of the doctrine. This article argues that Location History data falls outside the boundaries of the third-party doctrine. Justice Clarence Thomas's dissenting opinion in Carpenter argued that individuals do not have legitimate possession or ownership in CSLI because they do not possess, control, or own the

[189] Michael W. Price, *Rethinking Privacy: Fourth Amendment "Papers" and the Third-Party Doctrine*, 8 J. NAT'L SEC. L. & POL'Y 247, 274 (2015).
[190] Esteban De La Torre, *Digital Dragnets: How the Fourth Amendment Should Be Interpreted and Applied to Geofence Warrants,* 31 S. CAL. INTERDISC. L.J. 329, 340 (2022).
[191] Google Amicus Brief, *supra* note 27, at 6-7.
[192] *Miller*, 425 U.S. at 440.
[193] *Id.* at 442.
[194] *Carpenter*, 138 S. Ct. at 2220.

data. The CSLI records are the "papers" of mobile carriers like Sprint or T-Mobile.[195] These mobile carriers collect CSLI records for their own business purposes.[196] Distinguishing CSLI records from Location History, we see that smartphone users have ultimate control over their Location History.[197] When a user opts into Location History, they can keep track of their locations while in possession of their smartphone. By enabling Location History, a Google user can keep a virtual journal of their whereabouts. This feature is depicted in the "Timeline" feature of Google Maps.[198] The user can see a step-by-step timeline of their movements:

> The Timeline might reflect, for instance, that the user left her home on Elm Street in the morning and walked to the bus stop, took the bus to her office on Main Street, walked to a nearby coffee shop, and back to the office in the afternoon, and then went to a nearby restaurant in the evening before returning home by car.[199]

For Location History to save information about a user's location, they must follow several steps to turn this feature on.[200] With the steps completed, Google can store their location data and personalize their experience. "The user can review, edit, or delete her Timeline and LH information from Google's servers at will."[201] By contrast, smartphone users are unable to control their CSLI data, as the data is automatically generated whenever the phone connects to a cell site.[202] In sum, Google users own and control their personal Location History data, even though it is stored by a third party—Google. Now, there are some doubts about whether users voluntarily consent to having their Location History tracked by Google. As discussed earlier in Section I of this article, Google has been accused of covertly tracking users even when they choose to opt-out.[203] But leaving behind the voluntariness threshold of the third-party doctrine, Google users have sole control

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[195] *Id.* at 2235 (Thomas, J., dissenting).
[196] Id. at 2242.
[197] Google Amicus Brief, *supra* note 27, at 8.
[198] *Id.*
[199] *Id.*
[200] *Id.* at 7-8.
[201] *Id.*
[202] *Id.*
[203] Nakashima, *supra* note 18.

over their Location History. In addition, with the highly personal information in Location History, Google users have a reasonable expectation of privacy in their location data. Taking these two points together, Location History data would not be applicable under the third-party doctrine. In answering this second question, the Supreme Court should declare that Location History falls outside the doctrine.

Do geofence warrants, as they currently stand, sufficiently satisfy the probable cause and particularity requirement?

The final question to be considered is whether geofence warrants, as they currently stand, sufficiently satisfy the probable cause and particularity standards. To answer this question, the Supreme Court must turn its attention to several federal judicial rulings that have struck down several geofence warrants as unconstitutional. Geofence warrants suffer from their lack of individualized suspicion and their broad scope. The expansive search radius of these warrants has opened them up to well-deserved scrutiny by the courts and various civil rights groups. However, these errors do not mean that geofence warrants can never fulfill the constitutional requirements for a search warrant. They can fulfill these requirements if and only if they are reasonably crafted. In their present form, geofence warrants do not satisfactorily fulfill the Fourth Amendment's requirements. If executed correctly, geofence warrants can be an overall net positive in the pursuit of solving investigations that have gone cold. By failing to meet the Constitution's basic standards for warrants, the police are squandering the potential of geofences as an efficient investigative tool. Law enforcement must be able to suitably articulate and establish probable cause while also ensuring that their search area is limited in scope and size. This minimizes the potential for innocent people to inadvertently have their private data investigated. The discretion of the officer must also be limited to only the area described in the warrant. By applying its Fourth Amendment case law, the Court can introduce a lawful guideline for the government to follow in executing a valid geofence warrant. The Court can use the Arson case as a guide while drafting the guidelines. In Arson, as discussed earlier, the magistrate judge granted the government's application for a geofence warrant to investigate a series of arsons.

A proposed guideline for the execution of geofence warrants

When requesting a geofence warrant, probable cause must first be established. The Court can consult Illinois v. Gates. In that case, the Court held that probable cause is a fair probability that contraband or evidence of a crime will be found in a particular place based on the totality of the circumstances:[204]

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.[205]

The Court can then look at the Arson case. There was ample probable cause to believe that a crime had been committed. The Chicago Fire Department determined that on a specific date in July, a commercial lot had numerous cars set on fire in the morning. The authorities investigated further and discovered that the cars were set ablaze due to a flammable liquid being poured on them. The fire department also found two white plastic lighter fluid containers present at the scene.[206] A second commercial lot was also the subject of arson within the same timeframe. Six vehicles were ignited. At the second location, antifreeze and an ignitable liquid were recovered at the scene.[207] Surveillance footage also captured two vehicles circling the first commercial lot near the time of the occurrence. The vehicles were also seen heading to the second location of the arson. One vehicle had a red object that appeared to be consistent with the size and shape of a gasoline container.[208] The two vehicles were also identified at the second location. Later in December, the two same commercial lots were again subjected to the same fires by the same methods previously used.[209] All this information helped the police establish probable cause that the crimes of arson and conspiracy to commit arson had occurred. By searching the location data on the cell phones at the scene of the arson and surrounding areas, additional evidence to support probable

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[204] *Illinois v. Gates*, 462 U.S. 213, 238 (1983).
[205] *Id.*
[206] *Arson*, *supra* note 95, at 354.
[207] *Id.*
[208] *Id.*
[209] *Id.*

cause can be found. Once the location data is produced and examined, the government can then ask Google to produce identifying information to reveal the potential suspects.[210] Although there is no evidence to suggest that the suspects possessed cell phones, the Supreme Court in Carpenter commented on the ubiquity of cell phones and their common usage.[211] Judge Harjani, in this opinion, noted that it would be rare to search an individual in the modern age during the commission of a crime and not find a cell phone on their person.[212] The affiant, in this case, is a 19-year veteran of the ATF. Based on his expertise and experience, he stated that it is common for co-conspirators to use cell phones to coordinate and commit crimes.[213] Because there were two different locations targeted, there was a reasonable probability that the perpetrators carried their phones to coordinate. Finally, after reviewing the traffic videos, interviewing witnesses, and relying upon his training and expertise, the agent concluded that anyone passing near the target locations during the specified timeframe could have been the suspects or witnesses to the arsons.[214] In short, there was a fair probability that acquiring location data from Google would turn up the identities of the perpetrators.

Moreover, the particularity requirement was also met in the Arson case. Particularity makes general warrants impossible and prohibits the broad discretion of the officer when executing a search warrant. The geofence warrant application narrowly identified the place to be searched by time and location. The warrants were limited in time, scope, and location. First, the warrants were limited in time. There were six target locations that the authorities specified in their affidavit. The police narrowed their search to an approximately fifteen to thirty-minute timeframe for each target location where they believed location data would reveal evidence of the crime.[215] The warrant is limited to only the timeframe in which the arsons occurred, not hours or days. The location data is specific and tailored to the time of the arson incidents only.[216] Second, the warrants were limited in their location.

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[210] *Id.* at 355.
[211] *Carpenter*, 138 S. Ct. at 2211.
[212] *Arson*, *supra* note 95, at 356.
[213] *Id.*
[214] *Id.*
[215] *Id.* at 357.
[216] *Id.*

The police restricted each of the target locations captured in the proposed geofence warrant to the commercial lots in which the arsons occurred. Target location 1 is the lot where the cars were stored and were subject to arson. Target location 3 is the location of the second arson. Target locations 2 and 4 are the streets leading to and from the commercial lots. Target location 5 is the first company's commercial lot, and target location 6 is the second company's commercial lot.[217] Each of these target locations was chosen to capture location data from areas at or closely associated with the crime. In each of these locations, there was a fair probability that the location data of the suspects and witnesses to the crime would be revealed.[218] Third, the warrants were limited in scope. The geofence zones have been constructed to focus on the arson sites and the streets leading to and from those sites. Residential and commercial buildings had been excluded. The crimes occurred in the early hours of the morning, when commercial businesses were closed and unoccupied. The streets around the sites would be sparsely populated by pedestrians, and the roads would have few cars driving through them.[219] These constraints strongly minimize the chance that individuals not connected to the crime will be captured in the search.

The Supreme Court, after extending Carpenter protections to include Google Location History and examining the Arson case, can propose a guideline for law enforcement to use when executing a geofence warrant. Because of the novelty of these warrants, there must be strong regulation that imposes checks on police discretion to prevent the abuse of constitutional rights that is currently occurring. The Supreme Court, being the highest judicial body in the land, is best suited to formulate such a guideline. When considering this guideline, federal, state, and local police departments can adjust it to better fit their needs. There are, however, basic tenets that must be followed to ensure that their geofence warrants are valid. An example of what a geofence warrant guideline might entail is listed below.

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[217] *Id.* at 357-58.
[218] *Id.*
[219] *Id.* at 358-59.

Step 1: If any law enforcement agency (whether it be federal, state, or local) seeks to compel Google to turn over cell phone Location History that may be of significant use in a criminal investigation, they are required to go before a magistrate judge and apply for a warrant. By extending Carpenter to Location History, this Court holds that individuals have a reasonable expectation of privacy in their location data. As such, law enforcement will need a warrant to search Location History. As with a traditional warrant, the officer seeking a geofence warrant must articulate that there is a reasonable belief that such location data will produce evidence of a crime. The warrant application must be supported by oath or affirmation.

Step 2: In addition, the geofence warrant must be strongly supported by probable cause. Probable cause must be determined by the totality of the circumstances, the officer's expertise and training, and a fair probability that contraband or evidence of a crime will be found by examining cell phone location data. In Arson, the police were successful in establishing probable cause by looking at surveillance footage, reviewing traffic videos, interviewing witnesses, investigating the crime scene for evidence, and relying on their training and experience. Law enforcement agencies can review the Arson case as a model for establishing probable cause for their investigations.

Step 3: Finally, the geofence warrant must fulfill the particularity requirement. The officer must particularly describe the place to be searched in their geofence. When drawing a geofence zone, law enforcement must consider all surrounding businesses, residences, and commercial establishments before drawing their virtual zone. They must be careful to ensure that innocent bystanders are not caught within their search parameters. Their geofence should only be limited to the crime scene and may include any area immediately surrounding the target location. The geofence must be limited in time and must not extend beyond the specified timeframe of the crime. Once again, law enforcement must review the Arson case as an example to consider when drawing their geofence. Constraints on the time, location, and scope of a proposed geofence warrant are needed to prevent a broad collection of cell phone location data.

By taking these three steps into account, the police can be sure that their warrant will pass constitutional muster. If a police officer can support probable cause and particularity in their affidavit, a neutral and detached magistrate should have no problem granting their request. Law enforcement agencies around the country can include additional steps or slightly modify these steps if necessary to better conform to these rules.

Conclusion

Our current digital age has been marked by remarkable changes in technology that have pushed humanity to evolve past its limits. Chief among these technologies is the smartphone. This small, handheld device may be the greatest piece of technology that humanity has ever devised. With the swipe of a finger, humanity has access to the entire summation of human knowledge. Our phones can do practically anything, from calculating complex mathematical formulas to sending an email to someone halfway around the world. Carrying a smartphone is a hallmark of 21st-century living. Our daily lives are consumed by our smartphones, and younger generations cannot even imagine a time when the phone never existed. Because of the ubiquity of phones, our digital footprints are being logged by massive multinational companies like Google. These companies preserve and store every aspect of our private lives. In doing so, they have a deep knowledge of our whereabouts. Law enforcement now has a resourceful method to solve crimes, as the movements of every person carrying a smartphone are meticulously tracked. The government has a public safety interest in solving crime, and it will use almost anything at its disposal to do so. This explains the rapid use of geofence warrants to solve criminal investigations. But using this new surveillance tool comes at the cost of dragging countless innocent people into crimes they have nothing to do with. The Fourth Amendment's guarantee against unreasonable searches and seizures must not be undermined in the pursuit of fettering out crime. The Constitution is a living document meant to grow and adapt to an ever-changing society. The Supreme Court recognized that in Carpenter and moved to extend the Fourth Amendment's protections to include cell phone location data. Now, the Supreme Court should rule that individuals have a reasonable expectation of privacy in their Location History. By extension, the Court should apply Carpenter protections to cover Location History. If

the Court decides to hear a geofence case, which looks possible, this could be a major opportunity to provide the courts and law enforcement with clear guidelines on geofence warrants. In so doing, the highest court in the land would ensure that technological advances in crime fighting do not overshadow our longstanding constitutional rights.

A POST-*ROE* WORLD: THE DANGERS OF PERIOD-TRACKING APPS AND THE PROTECTION AGAINST SELF-INCRIMINATION

Bethany Boylan

Introduction

It was fifty years ago in January of 1973 that the monumental case of *Roe v. Wade* was decided. Within it, the right to privacy, as derived from the Fourteenth Amendment to the United States Constitution, was applied to a woman's termination of her unborn fetus prior to the end of the first trimester of gestation.[1] Through this decision, the matter of a mother's unborn child preceding viability was designated to her physician's medical judgment.[2] Only subsequent to this period of nonviability could the state regulate such a procedure.[3] A mere seven months before this significant anniversary, the United States Supreme Court effectively overturned the ruling through *Dobbs v. Jackson Women's Health Organization*.[4] The issue of abortion was thenceforth turned over to the states' discretion, as the federal Constitution was determined to hold no bearing on this right.[5] Bans on abortion in thirteen states were immediately triggered following the decision, with more implementing similar restrictions in the ensuing months. Policing of the procedure has only increased, bringing the nation back to a time of surveillance and suspicion that most had considered long over.

With the eradication of the protections ensured by *Roe*, the security of one's online information has come into question, particularly relating to those non-governmental services not required to adhere to state and federal privacy laws. The existence of a technologically advanced

[1] Roe v. Wade, 410 U.S. 113 (1973).
[2] Id. at 163.
[3] Id.
[4] Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).
[5] Id.

nation necessitates a discussion of one's digital footprint – and as it relates to *Roe*'s overturning, concerns have risen over period-tracking apps, used by millions of American women.[6] Information collected from these popular applications has not thus far been used in the prosecution of feticide, yet existing literature expresses a belief in this as a high possibility, as will be discussed. Thus, it is argued here that such garnered information will become the subject of future criminal indictment and will necessitate a conversation on the applicability of the protection against self-incrimination as guaranteed by the Fifth Amendment.

Section I will describe the new legislation that has followed the *Dobbs* decision and the revised definitions of viability that have been used to justify such shifts. Section II will describe the history of abortion's surveillance and the ways in which it is surveyed today, as well as potential areas of prosecutorial scrutiny in related fields of reproductive loss. In Section III, the potential dangers of period-tracking apps in a nation without the legal protections previously afforded will be explained. Section IV will discuss in more detail the legal risks of data selling and obtainment post-*Roe*. Section V will describe the implications of the Fifth Amendment's protection against self-incrimination in possible prosecutions. Finally, Section VI will propose an image of the future of abortion prosecutions in a post-*Roe* world.

Section I: Trigger Bans and New Legislation

"Trigger" laws can be defined as acts passed by legislative actors to become effective once an amendment to the constitution or ruling by the Supreme Court permits it.[7] In this instance, the decision in *Dobbs* reversed the protections of abortion upheld in *Roe*.[8] Select states – namely Kentucky, Louisiana, South Dakota, North Dakota, Arkansas,

[6] Kaiser Fam. Found., Health Apps and Information Survey September 2019, TOPLINE (2019), https://files.kff.org/attachment/Topline-Health-Apps-and-Information-Survey-September-2019 (reporting that roughly one-third of American women use such period-tracking applications).
[7] Trigger Laws, TEXAS STATE LAW LIBRARY: ABORTION LAWS, https://guides.sll.texas.gov/abortion-laws/trigger-laws (last visited Feb. 17, 2023).

[8] Dobbs, 142 S. Ct. at 9-11.

Idaho, Tennessee, Texas, Alabama, Mississippi, Missouri, Oklahoma, and Wyoming – had implemented these laws prior to *Roe*'s overturning,[9] deeming it a felony act beneath the new legislation.[10] Arkansas, a state whose ban is one of the most restrictive to date,[11] defines abortion as "the act of using, prescribing, administering, procuring, or selling of any instrument, medicine, drug, or any other substance, device, or means with the purpose to terminate the pregnancy of a woman."[12] The states who implemented these restrictive bans on abortion following the *Dobbs* decision all prohibit the procedure from the moment of conception,[13] as opposed to the viability standard determined by *Roe* to allow restrictions only after 24 to 28 weeks of gestation.[14] Some states, such as Arkansas, forbid abortion at any point of gestation except in the case of a medical emergency for the pregnant mother.[15] Such is the case in Kentucky,[16]

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[9] Elizabeth Nash & Isabel Guarnieri, 13 States Have Abortion Trigger Bans—Here's What Happens When Roe Is Overturned, GUTTMACHER INSTITUTE. (June 6, 2022), https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned.

[10] E.g., id. at 1; S.B. 149, 92nd Gen. Assemb., Reg. Sess., at 4 (Ar. 2019); S.B. 174, Gen. Sess. (Utah 2020); H.B. 1280,87th Leg., Reg. Sess. (Tx. 2021); S.B. 612, 58th Leg., 1st Sess., at 2 (Ok. 2021).

[11] See Interactive Map: US Abortion Policies and Access After Roe, GUTTMACHER INSTITUTE, https://states.guttmacher.org/policies/florida/abortion-policies (last visited January 30, 2023)
(categorizing Arkansas' abortion laws within the "Most Restrictive" category, alongside the states Alabama, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia).

[12] S.B. 149, 92nd Gen. Assemb., Reg. Sess., at 4 (Ar. 2019). See also H.R. 56, 66th Leg., Reg. Sess. (Idaho, 2021); H. R. 148, 19th Gen. Assemb., Reg. Sess. (Ky. 2019); H.R. 126, 100th Gen. Assemb., Reg. Sess. (Mo. 2019); S.B. 195, 57th Leg., Reg. Sess. (Ok. 2019); H.R. 1249, 80th Leg. Assemb., Reg. Sess. (S.D. 2005); H.R. 1029, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019); H.R. 1280, 87th Leg., Reg. Sess. (Tx. 2021); H.R. 174, 63rd Leg., Gen. Sess. (Utah 2020).

[13] Kate Smith, New abortion law: Abortion would automatically be illegal in these states if Roe v. Wade is overturned, CBS NEWS (Apr. 22, 2019), https://www.cbsnews.com/news/new-abortionlaw-abortion-clinic-automatically-illegal-roe-v-wade-overturned-2019-04-22/.

[14] Roe, 410 U.S. at 160.

[15] S.B. 149, 92nd Gen. Assemb., Reg. Sess., at 4 (Ar. 2019).

[16] H.R. 148, 19th Gen. Assemb., Reg. Sess. (Ky. 2019).

Louisiana,[17] Texas,[18] Alabama,[19] Oklahoma,[20] Mississippi,[21] Missouri,[22] South Dakota,[23] Idaho,[24] and Tennessee[25] as well. In the lattermost, the previously implemented ban on abortion beyond the detection of the fetus' heartbeat ("detected as early as six (6) to eight (8) weeks gestational age"[26]) was progressed to prohibit any abortion not performed in the instance of a medical emergency – defined similarly to the Arkansas ban as the abortion being "necessary to prevent the death of the pregnant woman or to prevent serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman."[27] This definition notably does not allow for abortion in instances of incest, rape, or significant biological malformations present in the unborn fetus. North Dakota's trigger law is currently on hold following a lawsuit with the Red River Women's Clinic, resulting in abortion remaining legal up to 22 weeks gestational age for the time being.[28] The state's sole abortion clinic has, however, been relocated to Minnesota for an indeterminate period.[29] Wyoming has similarly faced a recent lawsuit over its trigger ban on abortion, which has been suspended indefinitely while its constitutionality is contested in court.[30] It is alleged to be in violation of Article 1, Section 38 of the Wyoming Constitution, claiming that "each competent adult shall have the right to make his or her own health care decisions."[31]

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[17] S.B. 184, Reg. Sess. (La. 2019).
[18] H.R. 1280, 87th Leg., Reg. Sess. (Tx. 2021).
[19] H.B. 314, Reg. Sess. (Al. 2019).
[20] S.B. 195, 57th Leg., Reg. Sess. (Ok. 2019)
[21] S.B. 2391, Reg. Sess. (Ms. 2007).
[22] H.R. 126, 100th Gen. Assemb., Reg. Sess. (Mo. 2019).
[23] H.R. 1249, 80th Leg. Assemb., Reg. Sess. (S.D. 2005).
[24] H.B. 56, 66th Leg., Reg. Sess. (Idaho, 2021).
[25] H.B. 2263, 111th Gen. Assemb. (Tn. 2020)
[26] Id. at 2.
[27] Human Life Protection Act, S.B. 1257, 111th Gen. Assemb., at 2 (Tn. 2019).

[28] Associated Press, North Dakota Supreme Court ruling keeps the state's abortion ban on hold for now, NPR.ORG (Mar. 16, 2023), https://www.npr.org/2023/03/16/1163927465/north-dakota-abortion-ban-court-ruling.
[29] Id.
[30] Pam Belluk, Wyoming Judge Temporarily Blocks the State's New Abortion Ban, N.Y. TIMES (Mar. 22, 2023), https://www.nytimes.com/2023/03/22/health/wyoming-abortion-ban.html.
[31] Wyo. Const. art. I, § 38.

Section II: The Policing of Abortion

Violations of abortion laws have been monitored through a variety of methods, both before and after the *Roe* decision. From the mid-nineteenth century through the 1930s, abortion was policed primarily through the dying confessions of women whose unsafe, illegal abortions resulted in their demise.[32] The "abortionists" who performed the procedures, commonly midwives, were named in the final words of these women after interrogation by the county coroner.[33] The perpetrators were then prosecuted for their part in the illegal practice. This method of prosecution relied on cooperation from the medical practitioners who came to the aid of the dying women[34] – a significant departure from the protections of the *Roe* era ensuring privacy between patient and medical provider.[35] As a result of the coroner's demand for cooperation on this matter and the possibility of poor publicity and prosecution for not complying, doctors began to suspect illegal abortion in any instance of miscarriage.[36]

Subsequent to the 1930s, the implications of social conditions were recognized as significant in the judgment of abortion cases.[37] The Great Depression in particular made the relationship between economics and reproduction impossible to ignore. "Women had abortions on a massive scale. Married women with children found it impossible to bear the expense of another," Reagan states, "and unmarried women could not afford to marry."[38] Abortion procedures became concentrated in the hands of physicians who specialized in the practice and often ran abortion clinics with routine and safe operations.[39] Despite this shift in commonality and attitude regarding abortion, it remained illegal. In order to protect the physicians performing the procedure, swaths of fabric were placed over the eyes of the patients to prevent them from physically identifying the practitioner to law enforcement, and the patients were told to go to no

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[32] LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME 114 (1997).
[33] Id. at 116-118.
[34] Id. at 116.
[35] Roe, 410 U.S. at 163.
[36] Id. at 123.
[37] Id. at 132.
[38] Id. at 133.
[39] Id.

other doctor for assistance in the case of further complications.[40] Police raided clinics suspected of abortion procedures and used public humiliation to penalize the female patients, much as they had in the decades prior.[41] The patients stable enough to aid in the prosecution process, however, were brought as witnesses against the abortionists who performed their procedure[42], testifying to panels of primarily men about the details and circumstances of their pregnancies and abortions.[43] Public attitudes henceforth shifted once again, as societal demands countered the women's labor movements of the 1930s and early 1940s, focusing instead on a woman's position as a homemaker and a mother.[44] As a result, the 1950s saw the revitalization of birth rates and of a woman's role in the home, and conversations surrounding abortion once more took a negative turn.[45]

The modern policing of abortion is, in its most common form, the measures meant to restrict access to the procedure. A legislative bill in Texas serves to go one step further, promising a statutory damage amount of "not less than $10,000" to any private civilian who successfully wages a civil lawsuit against a person who aided in or performed an abortion.[46] The principle behind this act places the policing of abortion in the hands of private citizens while simultaneously monetarily punishing the defendants.

Following *Roe*'s overturning (and during its reign), abortion has been increasingly monitored through technological means. In 2017, a Mississippi woman was charged with killing her infant child after prosecutors located an internet search on her iPhone for how to "buy Misopristol abortion pill online" from 10 days prior.[47] In 2015, an

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[40] Id. at 151.
[41] Id. at 161.
[42] Id.
[43] Id. at 165.
[44] Id. at 163.
[45] Id.
[46] S.B. 8, 87th Leg., Reg. Sess., at 7 (Tx. 2021) (applying this statutory amount for each abortion successfully prosecuted by the plaintiff). See also H.B. 4327, 58th Leg., 2nd Sess., at 5 (Ok. 2022).
[47] Cat Zakrzewski et al., Texts, web searches about abortion have been used to prosecute women, WASH. POST (July 3, 2022, 9:20 AM), https://www.washingtonpost.com/technology/2022/07/03/abortion-data-privacy-prosecution/.

Indiana woman named Purvi Patel became the first American to be charged, convicted, and sentenced for the crime of feticide related to her own unborn fetus following text messages to a friend conveying her consumption of abortion pills.[48] A letter from Democratic congressmen in 2022 urged the CEO of Google, Sundar Pichai, to halt the web browser's storing of cell phone location data that could be used against women found to have visited abortion clinics.[49] The accessibility of online information grants prosecutors a wealth of evidence from which to indict possible offenders, and given the eradication of *Roe*'s protections, this evidence can be used in a broader breadth of cases involving those who would have been legally protected until June of last year.

This policing and surveillance could also have effects on other aspects of reproduction and contraception, such as the legality of in-vitro fertilization (IVF), birth control, and Plan B pills, given the definition of pregnancy by states such as Arkansas as a fertilized egg.[50] This definition, shared amongst its fellow trigger-law states with near-total eradication of the procedure, protects the fetus even before the egg becomes embedded in the uterine wall - what the Plan B pill hopes to prevent.[51] With in-vitro fertilization, embryonic death occurs when a uterine environment is not compatible with or is unable to support an implanted embryo.[52] This loss is often attributed to the age and lifestyle of the mother, the health of the embryo before implantation, issues with the process of implantation, an unfavorable ovarian response, or embryonic chromosomal abnormalities.[53] Given these

[48] Id.
[49] Lauren Feiner, Democrats urge Google to stop collecting location data that could be used to identify people seeking abortions, CNBC (May 24, 2022, 5:12 PM), https://www.cnbc.com/2022/05/24/google-data-collection-could-endanger-abortion-seekers-say-dems.html.
[50] S.B. 149, 92nd Gen. Assemb., Reg. Sess., at 4 (Ar. 2019).
[51] Neelam Patel, Abortion "Trigger" Ban Statutes: Impacts on Plan B, Birth Control, and IVF Treatments, 73 GEO. J. GENDER & L. 1, 1 (2022).
[52] Why Does IVF Fail?, FERTILITY & GYNECOLOGY ACAD. (Sept. 3, 2020), https://www.fertility-academy.co.uk/blog/why-does-ivf-fail/#:~:text=IVF%20can%20fail%20due%20to%20embryos%20that%20have,the%20embryo%20and%20this%20results%20in%20IVF%20failure.
[53] Id.

risks associated with IVF, the procedure could, and often does,[54] result in the death of a fertilized egg, and issues of criminalization may be implicated. Furthermore, the process of IVF also involves the discarding of frozen embryos not selected for implantation. According to a 2003 study, 89.5% of IVF patients choose to discard these additional fertilized eggs.[55] The continuation of this practice by medical facilities in a post-*Roe* America could result in their indictment if the new legislation is indeed interpreted along these lines. Some types of hormonal birth control prevent pregnancy by thinning the uterine lining, thereby inhibiting a fertilized egg from embedding there.[56] The risk of criminalization is therefore a prevalent possibility in this form of contraception, as "viable" embryos are impeded from a full-term pregnancy. Whether the intent of such trigger ban legislation was to criminalize these forms of contraception and fertilization is beside the point: the language utilized in these statutes leaves the door wide open for arguments against them.[57]

Section III: Use and Misuse of Period-Tracking Apps

According to a 2019 survey by the Kaiser Family Foundation, nearly one-third of American women use digital apps to track their menstrual cycles.[58] Most apps also offer predictions of the user's fertile window and day of ovulation based on the information they enter through continued use.[59] These applications also allow users to input if they are trying for a pregnancy, are pregnant, or possibly could be, with these

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[54] Yangyang Wang et al., The number of previous failed embryo transfer cycles is an independent factor affecting implantation rate in women undergoing IVF/ICSI treatment: a retrospective cohort study, 100 MEDICINE 1, 2 (2021) (finding that, between 2017 and 2018, 40% of IVF cycles resulted in successful clinical pregnancy, with 60% of patients still not able to conceive and therefore the embryos in the unsuccessful operations lost).

[55] Kovacs et al., Embryo donation at an Australian University. In Vitro Fertilisation clinic: issues and outcomes, 178 MED. J. AUSTL. 127 (2003), construed in Sheryl de Lacey, Death in the clinic: women's perceptions and experiences of discarding supernumerary IVF embryos, 39 SOC. HEALTH & ILLNESS 397, 2 (2017).

[56] Neelam Patel, Abortion "Trigger" Ban Statutes: Impacts on Plan B, Birth Control, and IVF Treatments, 73 GEO. J. GENDER & L. 1, 4-5 (2022).

[57] Id. at 6.

[58] Kaiser Fam. Found., supra note 6.

[59] Lauren Worsfold et al., Period tracker applications: What menstrual cycle information are they giving women?, 17 WOMEN'S HEALTH 1, 2 (2021).

features aiding those users attempting to conceive, those users hoping to prevent conception, and those users ensuring their menstrual tracking is as accurate as possible.[60]

While many of these period-tracking apps contain privacy protections in their sign-up contracts,[61] several instances of data leaks and users' information exchanging hands have occurred. In the case of the app Maya by Plackal Tech, Privacy International found that information was shared with the social media site Facebook for advertising purposes before the user could even agree to the app's privacy policy, primarily through the reporting of immediate activity such as opening the app.[62] One popular application, Ovia, received criticism in 2019 for its specific provisions to employers, who then granted the app to their employees as part of their healthcare package.[63] Human Resources personnel were then able to access the personal information of these employees (albeit in a "de-identified" form) through Ovia Health's "special version" of the app.[64] In January of 2021, a complaint was brought before the Federal Trade Commission, alleging that the period-tracking app Flo, one of the most popular applications of its kind,[65] sold the health information of its users to several third

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[60] E.g., Flo Pregnancy Mode: Baby Development and Body Changes Info, FLO (Nov. 29, 2018), https://flo.health/faq/pregnancy-mode/useful-info-daily#:~:text=To%20enable%20Pregnancy%20Mode%2C%20click,Click%20%E2%80%9CActivate.%E2%80%9D; AppGrooves, How To Get Pregnant With the Help of the Flo App, MEDIUM.COM (July 22, 2020), https://medium.com/@AppGrooves/how-to-get-pregnant-with-the-help-of-the-flo-app-d1682770210; Melissa Willets, The 8 Best Period and Ovulation Tracker Apps, PARENTS.COM (May 17, 2022) https://www.parents.com/getting-pregnant/ovulation/fertile-days/the-10-best-period-and-ovulation-tracker-apps/.

[61] Laura Shipp & Jorge Blasco, How private is your period?: A systematic analysis of menstrual app privacy policies, 4 SCIENDO 491, 497 (2020).

[62] No Body's Business But Mine: How Menstruation Apps Are Sharing Your Data, PRIVACY INT'L (Oct. 7, 2020), https://privacyinternational.org/long-read/3196/no-bodys-business-mine-how-menstruations-apps-are-sharing-your-data.

[63] Drew Harwell, Is your pregnancy app sharing your intimate data with your boss?, WASH. POST (Apr. 10, 2019, 3:11 PM), https://www.washingtonpost.com/technology/2019/04/10/tracking-your-pregnancy-an-app-may-be-more-public-than-you-think/.

[64] Id.

[65] Complaint, Flo Health, Inc., FTC Docket No. 1923133, 2 (2020), https://www.ftc.gov/system/files/documents/cases/flo_health_complaint.pdf (reporting that the app "Flo" has been downloaded over 100 million times worldwide since 2016).

parties.[66] The most notable of these third parties were stated to be Facebook, Google, and Google's separate marketing resource, Fabric.[67] The menstrual-tracking apps Glow, Clue, Flo, Period Tracker, and My Calendar were all determined to sell consumers' information to third parties.[68]

Beneath the Health Insurance Portability and Accountability Act (HIPAA), only three types of entities are required to follow the privacy regulations it puts forth: health plans, healthcare clearing houses, and "health care provider[s] who [transmit] any health information in electronic form in connection with a transaction covered by…[S]ubchapter [C] [Administrative Data Standards and Related Requirements]."[69] These are referred to as "covered entities" by the act.[70] Period-tracking apps are not included in any of these categories, allowing them to operate without following the HIPAA regulatory requirements. As a result, these organizations are free to monetize the information gathered from their apps as they wish.[71]

Femtech – "software, diagnostics, products, and services that use technology to improve women's health"[72] – is projected to become a $50 billion industry by 2025,[73] with consumers' private information heavily prized for its advertising value. The ability of users to report their pregnancies on these apps grants the associated organizations the ability to turn a significant profit. According to Privacy International,

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[66] Id. at 1.
[67] Id.
[68] Mehak Siddiqui, The Privacy Risks of Period Tracker Apps: Is Your Data Safe?, VPNOVERVIEW.COM (Aug. 8, 2022), https://vpnoverview.com/privacy/apps/privacy-risks-period-tracker-apps/#1-period-tracker-period-calendar
[69] 45 C.F.R. § 160.102 (2013).
[70] 45 C.F.R. § 160.103 (2013).
[71] Bandana Saika & Kosha Doshi, Rethinking Explicit Consent and Intimate Data Collection: The Looming Digital Privacy Concern With Roe v. Wade Overturned, LSE.COM (Dec. 14, 2022), https://blogs.lse.ac.uk/humanrights/2022/12/14/rethinking-explicit-consent-and-intimate-data-collection-the-looming-digital-privacy-concern-with-roe-v-wade-overturned/.
[72] Femtech—Time for a Digital Revolution in the Women's Health Market, FROST & SULLIVAN (Jan, 31, 2018), https://www.frost.com/frost-perspectives/femtechtime-digital-revolution-womens-health-market/.
[73] Id.

"In the US…an average person's data is worth $0.10, while a pregnant woman's will be $1.50."[74]

Data breaches are also a concern following the overturning of *Roe.* Rosas (2019) examines the data breaches that Yahoo experienced in 2014-2015 due to its lack of security measures and unencrypted data that left users' information at risk.[75] Since menstrual-tracking apps are not considered covered entities under the HIPAA Security Rule,[76] their compliance to federally regulated technological security guidelines is not mandatory. As a result, similar data breaches may occur regarding these applications. The healthcare industry as a whole saw the exposure of 249.09 million people's private information between 2005 and 2019.[77] When obtained by hackers, one's medical information can fetch a high price on the black market, with reported profits being 50 times that obtained by selling credit card information.[78]

Section IV: Data Endangerment Post-*Roe*

Without the requirement to keep users' information private, a plethora of information can be obtained in the case of possible prosecution, particularly in a digital age where millions of women record their personal data on largely unprotected databases. Data such as a missed period or a logged pregnancy, followed by a resumption of reported menstruation or the withdrawal of one's online pregnancy status, could be attained by law enforcement and used in the prosecution of suspected abortions. While all states currently hold provisions in their abortion legislation to not prosecute or indict the women who receive

[74] PRIVACY INT'L, supra note 62.
[75] Celia Rosas, The Future is Femtech: Privacy and Data Security Issues Surrounding Femtech Applications, 15 HASTINGS BUS. L.J. 319, 326-327 (2019).
[76] 45 C.F.R. § 160.102 (2013).
[77] Adil Hussain Seh et al., Healthcare Data Breaches: Insights and Implications, 8 HEALTHCARE 1, 2 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7349636/.
[78] Consumer Reports, Hackers can profit greatly by stealing your health data. Are you protected?, WASH. POST (Nov. 9, 2015), https://www.washingtonpost.com/national/health-science/hackers-can-profit-greatly-by-stealing-your-health-data-are-you-protected/2015/11/09/e1f126f6-5181-11e5-933e-7d06c647a395_story.html?utm_term=.ccf13bc3b1c3.

abortions,[79] only the individuals who performed it or provided the medication, this stipulation may be about to change. In Oklahoma, a senate bill introduced in January 2023 seeks to revise the language of the state's abortion restrictions that were implemented in the summer of 2022 by removing the phrasing that would protect patients from prosecution.[80] The bill was assigned to a Senate committee in early February and has not been approved nor denied as of this writing.[81] It is unclear whether the potential removal of this protection from Oklahoma legislation applies only to those pregnant women who manage their own abortions (through medications such as mifepristone and misoprostol, which are becoming increasingly available in pharmacies following a regulatory change by the Food and Drug Administration),[82] or if it also applies to those who receive abortion procedures from designated clinics.[83] In Arkansas, House Bill 1174 seeks to accomplish the same result through the removal of language that would protect the pregnant woman in question from prosecution.[84] Whether these bills will be codified in their respective state legislatures, and whether other states will follow in their stead, remains to be seen. For those seeking to terminate their pregnancies, however,

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[79] MARTÍN ANTONIO SABELLI ET AL., ABORTION IN AMERICA: HOW LEGISLATIVE OVERREACH IS TURNING REPRODUCTIVE RIGHTS INTO CRIMINAL WRONGS, 3 (2021).
[80] S.B. 287, 59 Leg., 1st Sess. (Ok. 2023) (removing section 1.B.3.a).
[81] Hamilton's bills assigned to Senate committees, OKLAHOMA SENATE (Feb. 3, 2023), https://oksenate.gov/press-releases/hamiltons-bills-assigned-senate-committees?back=/press-releases.
[82] See Shefali Luthra, Abortion bans don't prosecute pregnant people. That may be about to change., 19THNEWS.ORG (Jan. 13, 2023), https://19thnews.org/2023/01/abortion-bans-pregnant-people-prosecution/; U.S. Food & Drug Admin., Information about Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation, FDA.GOV (Jan. 24, 2023), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation.
[83] S.B. 287, 59 Leg., 1st Sess. (Ok. 2023). Section 1.B.3.a, removed in the revision that was assigned to a Senate committee in early February 2023, stated that the act in question did not "authorize the charging or conviction of a woman with any criminal offense in the death of her own unborn child." This statement's possible eradication leaves the intended subject of conviction vague and the door open for potential prosecution of any woman whose pregnancy is terminated for non-life saving purposes.
[84] H.B. 1174, 94th Gen. Assemb., Reg. Sess. (Ar. 2023).

this possibility remains a looming threat,[85] and incriminating information gathered from users' online activity by prosecutors could result in felony charges.[86] Women in situations such as Lizelle Herrera of Texas, whose charge of homicide following a self-induced abortion was dropped by prosecutors in April of 2022,[87] could face imprisonment and hefty fines if this legislation is adopted by additional states.[88]

Whether against female patients or providers and administrators of the procedure, the increased prevalence of digital surveillance through the use of period-tracking apps has a strong likelihood of being used as evidence in criminal trials. While the Fourth Amendment of the U.S. Constitution protects against "unreasonable search and seizures,"[89] this protection restricts only governmental agencies, not private parties or organizations. Data willingly sold to governmental agencies is not subject to the protection established under the Supreme Court case of *Carpenter v. United States*,[90] leaving it vulnerable to the "Third-Party Doctrine" generated from *Smith v. Maryland*[91] and *United States v. Miller*.[92] As discussed previously, the online activity of pregnant women has already been collected and monitored by governmental institutions, and while data from period-tracking apps has yet to be held against users in criminal procedures, it would grant prosecutors access to a wealth of information from which to build their cases. Legal personnel have already expressed a fear of this occurrence. Attorney Elizabeth McLaughlin expressed her thoughts in a post on the popular social media platform Twitter: "If you are using an online period tracker or tracking your cycles through your phone, get off it

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[85] See MARTÍN ANTONIO SABELLI ET AL., ABORTION IN AMERICA: HOW LEGISLATIVE OVERREACH IS TURNING REPRODUCTIVE RIGHTS INTO CRIMINAL WRONGS, 3 (2021).
[86] S.B. 612, 58th Leg., 1st Sess. (Ok. 2021).
[87] Christine Vestal, More States Shield Against Rogue Abortion Prosecutions, PEW (May 4, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/05/04/more-states-shield-against-rogue-abortion-prosecutions.
[88] S.B. 612, 58th Leg., 1st Sess. (Ok. 2021).
[89] U.S. Const. amend. IV.
[90] Carpenter v. United States, 585 U.S. __ (2018) (holding that the seizing of cell-site records from cell phone location tracking was in violation of the Fourth Amendment).
[91] Smith v. Maryland, 442 U.S. 735 (1979).
[92] United States v. Miller, 425 U.S. 435 (1976).

and delete your data."[93] Deven McGraw, former director of health information privacy at the Department of Health and Human Services Office for Civil Rights, told KHN News that in states where abortion is a crime, data from period-tracking apps could be "accessed in building a case against you."[94]

Section V: The Protection Against Self-Incrimination

Given the possibility of pregnant people being indicted for their own abortions,[95] the protection against self-incrimination becomes a vital consideration. As found in the Fifth Amendment of the Constitution, this privilege is defined as a person's right to not "be compelled in any criminal case to be a witness against himself."[96] This protection has been further defined and limited by succeeding Supreme Court decisions.

The landmark case of *Boyd v. United States* (1886) found the procurement of one's "private books, invoice and papers" in court to be in violation of the Fifth Amendment.[97] The incriminating evidence of one's own substantive writings was thereby protected beneath this privilege, as such an admission would constitute testimonial evidence against oneself. In 1910, the case of *Holt v. United States* was heard by the Court, in which it was decided that the prohibition against self-incrimination applied only to "the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."[98] The order of the prisoner to try on a blouse implicated in the crime was therefore admissible in court, despite objections that the act of putting on the article had occurred under duress.[99] The case of *Schmerber v. California*, decided in 1966,

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[93] Hannah Norman & Victoria Knight, Should You Worry About Data From Your Period-Tracking App Being Used Against You?, KHN (May 13, 2022), https://khn.org/news/article/period-tracking-apps-data-privacy/#:~:text=Many%20users%20recommended%20immediately%20deleting,said%20in%20a%20viral%20tweet.
[94] Id.
[95] H.B. 1174, 94th Gen. Assemb., Reg. Sess. (Ar. 2023); S.B. 287, 59 Leg., 1st Sess. (Ok. 2023).
[96] U.S. Const. amend. V.
[97] Boyd v. United States, 116 U.S. 616, 616 (1886).
[98] Holt v. United States, 218 U.S. 245, 252-53 (1910).
[99] Id.

held that the drawing of an accused's blood for purposes of chemical analysis also did not violate the Fifth Amendment, as the act of compulsion was not a testimonial communication by the accused.[100] The protection guaranteed by the Fifth Amendment was therefore only applicable to explicit forms of communication, and in the instance of *Schmerber,* the incriminating results were determined to have derived from the chemical analysis, not the petitioner himself.[101]

United States v. Dionisio saw the appeal of a respondent who refused to provide a voice exemplar for comparison purposes to audio conversations entered as evidence on the grounds of the Fourth and Fifth Amendments.[102] The Court decided that the privilege against self-incrimination was not infringed upon, as the act in question was for mere identification purposes, not to attain testimonial or communicative evidence from the content of the exemplar.[103] In this instance, the purpose and content of the collected evidence were vital in the decision of the Court. The District Judge of the lower court compared the evidence of voice exemplars to other non-communicative forms of evidence such as fingerprints or handwriting samples, thereby emphasizing the importance of incriminating content in the Amendment's interpretation, despite the typically communicative nature of spoken word or written notes.[104] Similar to the holdings in both *Holt* and *Dionisio*, *United States v. Wade* decided that physical identifications such as speaking voice and one's bodily characteristics do not constitute compulsions of testimony, and are therefore not protected under the Fifth Amendment.[105] *Gilbert v. California*, decided by the Court in 1967, held that the accused's handwriting exemplars were not privileged against self-incrimination, as, although incriminating, the samples were physically identifying and not substantive in nature, and were therefore not protected under the language of the Amendment.[106]

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[100] Schmerber v. California, 384 U.S. 757, 760-65 (1966).
[101] Id.
[102] United States v. Dionisio, 410 U.S. 1 (1973).
[103] Id. at 5-7.
[104] Id.
[105] United States v. Wade, 388 U.S. 218, 221-23 (1967).
[106] Gilbert v. California, 388 U.S. 263, 266-67 (1967).

The Supreme Court further confined the privilege in question through the "Forgone Conclusion Doctrine," established in the decision of *Fisher v. United States.* This case held that the privilege of the Fifth Amendment may have protected the private documents of the taxpayer petitioners if they had themselves been compelled to produce them.[107] Yet as the taxpayers had relinquished the papers to their attorneys in light of the confidential attorney-client relationship, the compulsion of the attorneys to procure the documents was determined to not be a violation of the privilege against self-incrimination, as the petitioners were not seen as testifying against themselves.[108] The fact of the attorneys acting on behalf of the petitioners did not violate this privilege, as had been previously established in *Couch v. United States*, concerning the petitioner's surrender of their financial documents to their accountant.[109] It was further argued by the opinion in *Fisher* that the mere act of procuring documents, the only act the taxpayers would have been obliged to perform under court order, "would not itself involve testimonial self-incrimination."[110] Thus, the act of procurement ensured by *Boyd* to be protected beneath the Fifth Amendment was revised by *Fisher* to include only those not determined by a "foregone conclusion."[111] Wherein the existence of the incriminating documents is known, the privilege of self-incrimination does not apply to the act of surrender, as no incriminating testimony is communicated by the defendant.[112] The procurement of such documents by subpoena was determined by the Court to confirm only the existence of the papers requested by the order, not their accuracy.[113] This act was therefore determined not to be in violation of the Fifth Amendment.[114]

The privilege's applicability is contingent on the definition of testimonial evidence. *Doe v. United States* (1988) attempted to establish a firm resolution regarding this point. The petitioner, identified in the case as John Doe, invoked his Fifth Amendment right

[107] Fisher v. United States, 425 U.S. 391, 396-401 (1976).
[108] Id.
[109] Couch v. United States, 409 U.S. 322 (1973).
[110] Fisher, 425 U.S. at 411.
[111] Id.
[112] Id.
[113] Id.
[114] Id. at 414.

against self-incrimination following a subpoena attempting to attain his foreign bank records, claiming that his signing of the release forms would incriminate him on the existence of these foreign accounts suspected to contain unreported income.[115] The Court decided that his signing of the consent forms would not confess to the existence of the accounts, nor their control by him.[116] The foreign bank's henceforth provision of the documents did not require Doe to confirm that they were indeed his.[117] The Court therefore affirmed the decision of the lower court, and wrote that alongside the lack of a self-incriminating act in this case, the court has allowed for incriminating evidence to be admitted in the past, citing *Schmerber, Gilbert, United States v. Wade, Dionisio,* and *Holt* on this point.[118] In each of these cases, the privilege of self-incrimination did not apply, as the acts in question did not require the defendant to be a "witness against himself."[119]

The prevalence of technological innovations and the question of one's online privacy has naturally resulted in an intersection with the Fifth Amendment. In *In re Grand Jury Subpoena to Sebastien Boucher*, the defendant was served a subpoena for the password to his computer, known to contain child pornography following a search by an agent from Immigration and Customs Enforcement (ICE) for whom Boucher had willingly unlocked his computer.[120] The majority of the files on the defendant's encrypted "Z" drive, however, were not viewed by the agent at this time.[121] It was decided by the magistrate of the case that as the password was located within the mind of the defendant, compelling it to be revealed would violate the Fifth Amendment's clause prohibiting being a witness against one's self.[122] An appeal of the case brought it to the District Court of Vermont, which thereafter decided that as Boucher had willingly revealed the presence of the documents to the ICE agent upon first detainment, the surrendering of his password via the subpoena would not violate the Fifth Amendment

[115] Doe v. United States, 487 U.S. 201, 202 (1988).
[116] Id. at 217-18.
[117] Id.
[118] Id. at 210.
[119] U.S. Const. amend. V.
[120] In re Grand Jury Subpoena to Sebastien Boucher, No. 2:06-mj-91, 2007 U.S. Dist. LEXIS 87951 at *2-4 (D. Vt. Nov. 29, 2007).
[121] Id. at *15.
[122] Id.; U.S. Const. amend. V.

under the Foregone Conclusion Doctrine.[123] Yet if Boucher had not previously divulged the existence of this file and confessed to the agent that he was indeed in possession of it, it is likely that his motion to quash the subpoena would have stood.[124] *United States v. Kirschner*, heard in the District Court for the Eastern District of Michigan, similarly discussed the protections of password-encrypted files beneath the Fifth Amendment. The defendant, charged with three counts of receipts of child pornography, was handed a subpoena for the passwords to his computer and any associated encrypted files.[125] The defendant then asserted his privilege against self-incrimination.[126] The court decided that in this instance, "the government is not seeking documents or objects—it is seeking testimony from the Defendant, requiring him to divulge through his mental processes his password—that will be used to incriminate him."[127] As a result, the motion for the subpoena was quashed, and the legal protection of private passwords as self-incriminating material was affirmed.

Given the history of law enforcement's surveillance and collecting of related pregnancy and pregnancy loss information from other technological sources, as discussed above, it is argued here that the protection against self-incrimination will become prevalent in future criminal cases of abortion, especially those of self-managed abortions. If the pending legislations in Oklahoma and Arkansas are implemented, the number of applicable cases will only expand. It is deemed entirely likely that prosecutors will attempt to obtain information from period-tracking apps and will encounter infringements of this privilege, especially if the password-protected devices on which the applications are interred are attempted to be breached.[128] The popular app Flo allows users to concoct passwords specific to the application or enable "Face ID" on mobile IOS devices, in which the features of one's face are scanned by the device and used

[123] In re Grand Jury Subpoena to Sebastien Boucher, No. 2:06-mj-91, 2009 U.S. Dist. LEXIS 13006 at *7 (D. Vt. Feb. 19, 2009).
[124] Madelaine Leamon, Unlocking the Right Against Self Incrimination, 64 WAYNE L. REV. 583, 593 (2019).
[125] United States v. Kirschner, 823 F. Supp. 2d 665, 666-667 (E.D. Mich. 2010).
[126] Id.
[127] Id. at 669 (citing United States v. Hubbell, 530 U.S. 27 (2000)).
[128] Id.

as the "key" in unlocking the account.[129] While the privilege against self-incrimination may not be afforded to the latter,[130] it is argued by existing legal scholarship that as numerical or phrasal passwords have been established by the Supreme Court to be self-incriminating if compelled,[131] and as biometric "keys" accomplish the same objectives (and are often used alongside the former), they too should be protected.[132] As it relates to Touch ID, an Apple biometric "key" technology predating Face ID,[133] federal courts remain divided on its ability to be compelled. *Commonwealth v. Baust*[134] and *State v. Diamond*[135] decided that the fingerprints used to unlock the defendants' phones through Touch ID did not require a divulgence of information from the defendants' minds, and therefore, a subpoena for their fingerprints could indeed be served. In *In re Single-Family Home & Attached Garage*, however, the District Court for the Northern District of Illinois decided that compelling a defendant's fingerprint to unlock his or her phone was indeed in violation of the Fifth Amendment, as such an act would confirm the defendant's control of and implicit connection to the device.[136] While the District Court overturned this decision by the magistrate, the analysis on the unconstitutionality of Touch ID being impelled still stands.[137] The similarities between Face ID and Touch ID – and their analogous

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[129] Flo Period Tracker App, FACEBOOK (Sept. 29, 2020, 10:26 AM), https://www.facebook.com/flotracker/posts/how-to-set-a-password-for-your-flo-accountwe-value-users-trust-and-privacy-in-ev/2675424096003100/; Apple, About Face ID advanced technology, SUPPORT.APPLE.COM (Apr. 27, 2022), https://support.apple.com/en-us/HT208108.

[130] See Holt, 218 U.S.; Schmerber, 384 U.S.; Dionisio, 410 U.S.

[131] Kirschner, 823 F. Supp. 2d.

[132] Brittany A. Carnes, Face ID and Fingerprints: Modernizing Fifth Amendment Protections for Cell Phones, 66 LOY. L. REV. 183, 202 (2020); Leamon, supra note 124, at 602-05.

[133] Apple, Use Touch ID on iPhone and iPad, SUPPORT.APPLE.COM (Mar. 17, 2022), https://support.apple.com/en-us/HT201371.

[134] Commonwealth v. Baust, 89 Va. Cir. 267, 270-71 (2014).

[135] State v. Diamond, 890 N.W.2d 143, 150 (Minn. Ct. App. 2017).

[136] In re Single-Family Home & Attached Garage, No. 17 M 85, 2017, U.S. Dist. LEXIS 170184, at *19 (N.D. Ill. Feb. 21, 2017), rev'd in part, In re Search Warrant Application for [Redacted Text], 279 F. Supp. 3d. 800 (N.D. Ill. 2017), construed in Madelaine Leamon, Unlocking the Right Against Self Incrimination, 64 WAYNE L. REV. 583, 593 (2019).

[137] In re Search Warrant Application for [Redacted Text], 279 F. Supp. 3d. 800, at 806-07 (N.D. Ill. 2017).

relationships with legally protected alphanumerical passwords – lends a degree of controversiality to this debate, one that will no doubt further as criminal abortion cases infiltrate courthouses. The U.S. is entering an unprecedented area of technological technicalities, and as such, it is predicted here that the password encryptions on devices containing period-tracking apps will prevent law enforcement officials from obtaining incriminating evidence, and that the implementation of Face ID as a password will become a field ripe for contestation as it relates to participating apps.

While this data can be freely sold by the private companies behind these apps to law enforcement,[138] the de-identification of this information from the associated users by many apps[139] would necessitate a court-ordered subpoena of the identifiable data. The granting of a subpoena relies, however, on its inherent constitutionality; and as the inputted information can be argued to communicate testimony directly from the consumer, its admissibility can be thereby disputed. Written testimony has been established as self-incriminating in several federal cases,[140] including *Boyd*,[141] and period-tracking data interpreted along these lines could indeed become protected under the Fifth Amendment. Even if determined by a federal court to not be directly conveyed, the mere fact of the information being inputted directly by the user could result in its exclusion from the court record. Previous appeals to the Supreme Court based on the nature of the admitted evidence have, for instance, been denied due to the defendant not having compiled the incriminating documents him or

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[138] See Miller, 425 U.S.; Smith, 442 U.S. (establishing the Third Party Doctrine).
[139] See Alisha Haridasani Gupta & Natasha Singer, Your App Knows You Got Your Period. Guess Who It Told?, N.Y. TIMES (Jan. 28, 2021), https://www.nytimes.com/2021/01/28/us/period-apps-health-technology-women-privacy.html (stating that the menstrual tracking app Clue boasts 12 million monthly users as of 2019); see Mehak Siddiqui, The Privacy Risks of Period Tracker Apps: Is Your Data Safe?, VPNOVERVIEW.COM (Aug. 8, 2022), https://vpnoverview.com/privacy/apps/privacy-risks-period-tracker-apps/#1-period-tracker-period-calendar (stating that the app Clue strips their information sold to outside parties of any identifying markers). The app My Calendar by SimpleInnovation also claims the information they sell to not be personally identifiable, supra.

[140] E.g., Schmerber 384 U.S. at 764-65 ("It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take.").
[141] Boyd, 116 U.S.

herself. Such was the case in *Doe v. United States*, wherein the foreign bank's composition of the bank statement spoke only of the bank's belief in its truth, not of their client's recognition as such.[142] Data from period-tracking applications, however, are inputted by the users themselves. If interpreted by a federal court along these lines to be indeed self-incriminating as a result, information obtained from period-tracking apps may qualify under the Fifth Amendment's privilege.

Furthermore, the seizing of incriminating information from period-tracking apps, if indeed protected by the Fifth Amendment privilege, would be difficult to obtain beneath the Foregone Conclusion Doctrine established in *Fisher*.[143] Definitive proof of one's pregnancy loss through abortive measures would be onerous for prosecutors to acquire without access to the suspect's encrypted information, especially given the observable similarities between miscarriages and the results of abortion procedures.[144] According to the National Women's Health Network, medication-induced abortions merely mimic "the body's same natural process for when an early pregnancy ends,"[145] making abortion and early miscarriages practically indistinguishable from one another. While location-based evidence, in which cell phone users are tracked to abortion clinics, is admissible and easily obtained when sold to law enforcement,[146] such circumstantial evidence may not be sufficient to justify the use of the doctrine. As seen in *Fisher* and *In re Grand Jury Subpoena to Sebastien Boucher*, knowledge of the incriminating information contained within protected receptacles is required for them to be compellable.[147] Location-tracking information,

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[142] Doe, 487 U.S. at 214-18.
[143] Fisher, 425 U.S.
[144] Harwell, supra note 63; Jody Ravida, My miscarriage looked like an abortion. Today, I would be a suspect, WASH. POST (June 28, 2022, 4:09 PM), https://www.washingtonpost.com/outlook/2022/06/28/miscarriage-dobbs-roe-abortion/
[145] Consumer Health Info: Medication Abortion and Miscarriage, NAT'L WOMEN'S HEALTH NETWORK (Aug. 15, 2019), https://nwhn.org/abortion-pills-vs-miscarriage-demystifying-experience/.
[146] See Miller, 425 U.S. and Smith, 442 U.S. (establishing the Third-Party Doctrine).
[147] Fisher, 425 U.S. at 411; In re Grand Jury Subpoena to Sebastien Boucher, No. 2:06-mj-91, 2009 U.S. Dist. LEXIS 13006 at *7 (D. Vt. Feb. 19, 2009).

while incriminating, would not permit the seizure of data from period-tracking apps under this precedent.

Section VI: Looking Ahead: The Future of Abortion Prosecution

It is the advice of many data privacy experts and legal professionals for women to delete their period-tracking apps and revert to tracking their cycles through non-digital means.[148] Yet for many, deleting one's period-tracking app is not worth the loss of the vital information offered. A survey-based analysis performed by Levy and Romo-Avilés for BMC Public Health revealed that menstrual-tracking apps are useful for preparing for forthcoming periods, validating one's menstrual experiences, informing healthcare personnel, preventing or increasing the possibility of pregnancy, and identifying irregularities and underlying health issues related to one's cycle.[149] Furthermore, intimate knowledge of one's own reproductive cycle lets women feel in control of their bodies and allows them to monitor and ensure their own health.[150] Deleting one's period-tracking app, therefore, is not always so simple. A mere deletion of the application may also not be enough; according to Grace Howard, a professor at San Jose State University speaking to Huffpost, "People need to use VPNs, private browsers and encrypted chat services when they search for abortion care or discuss it."[151] The cases in which women have been arrested for their incriminating search histories and text messages are evidence of such dangers.[152]

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[148] Hannah Norman & Victoria Knight, Should You Worry About Data From Your Period-Tracking App Being Used Against You?, KHN (May 13, 2022), https://khn.org/news/article/period-tracking-apps-data-privacy/#:~:text=Many%20users%20recommended%20immediately%20deleting,said%20in%20a%20viral%20tweet; Monica Torres, Why People Are Deleting Period Tracker Apps, And How To Do It Right, HUFFPOST (June 27, 2022, 6:54 PM), https://www.huffpost.com/entry/delete-period-trackers-apps-abortion_l_62b5ebf8e4b0cdccbe6b1a06.

[149] Johanna Levy & Nuria Romo-Avilés, "A good little tool to get to know yourself a bit better", 19 BMC Pub. Health 1, 5-7 (2019).

[150] Katrin Amelang, (Not) Safe to Use: Insecurities in Everyday Data Practices with Period-Tracking Apps, in New Perspectives in Critical Data Studies 297, 303 (Palgrave Macmillan, Cham 2022).

[151] Torres, supra note 148.

[152] Zakrzewski et al., supra note 47.

While period-tracking apps are argued here to inevitably be used as sources of incriminating information in the near future, the protection against self-incrimination discussed above will infiltrate the legal field as a result. The prosecution of abortion may also have effects on other related issues of fertility and conception, as discussed previously, such as IVF, hormonal birth control methods, and Plan B medications.[153] Whether the interpretations of the new legislation enacted after the *Dobbs* decision will follow this line of thinking remains to be seen.

Section VII: Conclusion

One headline put it best: "We're not going back to the time before *Roe*. We're going somewhere worse."[154] Unlike the pre-1973 era of abortion prosecutions, widespread digital surveillance is readily available at the prosecution's fingertips and attainable with ease. Technologies ranging from period-tracking apps to location-monitoring software seem unlikely to escape the notice of the State as arsenals of valuable incriminating data.

An influx of new legislation following *Roe v. Wade*'s overturning has permeated recent state congress sessions, many of the most restrictive claiming viability to commence upon fertilization. The implications of this definition have circulated the tables of legal scholars and journalists, with the prediction of increasingly repressive interpretations shared amongst vast swaths of them.

While recent technological innovations such as period-tracking apps are argued here to inevitably appear in court cases on abortion, this cache of information is predicted to face appeals on the constitutionality of its admission, given the potentially self-incriminating nature of the data. Inputted by users who could then face prosecution for missed menstrual cycles or the revocation of their pregnancy status in the app, the question of self-reporting becomes

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[153] Patel, supra note 51.

[154] Jia Tolentino, We're Not Going Back to the Time Before Roe. We're Going Somewhere Worse, NEW YORKER (June 24, 2022), https://www.newyorker.com/magazine/2022/07/04/we-are-not-going-back-to-the-time-before-roe-we-are-going-somewhere-worse.

prevalent, particularly as it relates to written testimony. The protection against forcible procurement of one's passwords could similarly prevent the admission of such data under the Fifth Amendment privilege. This privilege can, and should, be applied to criminal cases of abortion relying on evidence from period-tracking apps to ensure an upholding of constitutional standards and individual liberties. Facing an abyss where the federal protection of abortion once resided, the autonomy of women in America depends on it.

BAIL REFORM: DOMESTIC VIOLENCE VICTIMS CAUGHT IN THE CROSSHAIRS

Hannah Snyder

INTRODUCTION

Marsalee (Marsy) Ann Nicholas was a student at the University of California Santa Barbara studying special education.[1] She was known for her heart of kindness with a lifelong love for animals, the outdoors, and people.[2] On November 30th, 1983, just before her graduation, she was stalked and murdered by her ex-boyfriend.[3] Only one week after Marsy's funeral, her mother, Marcella, was confronted by the killer in the checkout line of a grocery store.[4] She had just finished burying her daughter and was forced to relive her passing by interacting with the murderer in public while he walked freely until his trial.[5] Devastation, shock, and disgust were just a few of the many emotions that flooded Marcella during those harrowing moments in the grocery store that day. Unbeknownst to her, he was released on bail.[6] What Marsy's family experienced four decades ago is the experience that far too many domestic violence victims and their families still endure today. They remain uninformed, unprotected, and uneasy.

Domestic violence was not officially recognized as a crime until 1994, when the Violence Against Women Act was passed.[7] The passage of this act brought forth an official definition that could be used by the judicial system to prosecute this complex category of cases as follows:

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[1] Marsy's Story, Marsy's Law for Wisconsin, https://www.equalrightsforwi.com/marsys_story#:~:text=Marsalee%20(Marsy)%20Ann%20Nicholas%20was,the%20family%20settled%20in%20Malibu (last visited Feb. 4, 2023).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] Domestic Violence, Cornell Law School, https://www.law.cornell.edu/wex/domestic_violence (last updated Sep. 2022).

> The term 'domestic violence'
> includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.[8]

Domestic violence is thus prosecuted under a wide range of crimes, from sexual assault to sexual battery, aggravated stalking, kidnapping, false imprisonment, or any offense that results in injury or death.[9] The United States is no stranger to domestic violence cases. In fact, over ten million adults experience domestic violence annually, most of whom are women, enduring repeated acts of abuse.[10] More than three women are killed each day by a male abuser[11], and access to a firearm increases the chances of femicide[12] by 400%.[13] Most of these crimes involve female victims between eighteen to twenty-four years old, during a period of separation from a spouse or intimate partner.[14] It is important to note that women are not the only victims of domestic violence, with one in nine men experiencing some form of intimate partner violence during their lives.[15] While these are some of the

[8] Violence Against Women Act, U.S.C. § 12291 (1994).
[9] Peter Followill, Florida Domestic Violence Laws, CriminalDefenseLawyer, https://www.criminaldefenselawyer.com/resources/florida-domestic-violence-laws.htm (last visited Feb. 4, 2023).
[10] Domestic Violence, National Coalition Against Domestic Violence (2020), https://assets.speakcdn.com/assets/2497/domestic_violence-2020080709350855.pdf?1596828650457 (last visited Feb. 4, 2023).
[11] Domestic Violence/Intimate Partner Violence Facts, Emory University Department of Psychiatry and Behavioral Science, https://psychiatry.emory.edu/niaproject/resources/dv-facts.html (last visited Feb. 4, 2023).
[12] The killing of a female, most commonly by a male intimate partner
[13] Domestic Violence, *supra,* note 10.
[14] *Id.*
[15] *Id.*

statistics that are known, a majority of cases go unreported meaning the reality of domestic violence in the United States is far worse.[16]

Because the period of separation between the victim and the abuser is uniquely dangerous in domestic violence cases, the pre-trial decision made by a judge has a profound effect on the safety of the victim.[17] Once a member of the judiciary or a grand jury determines that there is probable cause to support a charge, a decision is made about what to do with the defendant.[18] This is done by weighing important factors such as ensuring that the defendant returns to court, does not interfere with evidence, and does not commit additional crimes.[19] Over the past few decades, states have been reevaluating how that pre-trial decision is made and when certain options can be utilized. That reevaluation is known as Bail Reform.

Concerns regarding pre-trial practices can be traced back to the mid-twentieth century when cash bail began to receive criticism due to its disproportionate effect on disadvantaged communities.[20] When Congress passed the Bail Reform Act of 1984, which allows the denial of bail based on the danger that an individual poses to society, the entire landscape of pre-trial decision-making changed.[21] A few years later, in United States v. Salerno (1987) the Supreme Court confirmed the constitutionality of considering future dangerousness when setting pre-trial bail.[22] Since then, states have undergone a significant shift in pre-trial practices to better balance the presumption of innocence with community safety. In furtherance of this goal, this article aims to show that a standardized risk-based approach ought to be implemented to improve the accuracy and effectiveness of pre-trial decision-making.

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[16] Emory University School of Medicine Nia Project, *supra,* note 11.
[17] Hannah Gutenplan, A Fairer, Safer, and More Just System for All New Yorkers: Domestic Violence and New York Bail Reform, 40 Col. J.-G. L. 2, 206 (2021).
[18] Megan Stevenson & Sandra G. Mayson, Academy for Justice, A Report on Scholarship and Criminal Justice Reform 1745 (Erik Luna ed. 2017).
[19] *Id.*
[20] Gutenplan, *supra,* note 17, at 213.
[21] *Id.* at 214.
[22] United States v. Salerno, 481 U.S. 739 (1987)

Section I will be a comparative case analysis of the bail reform approaches utilized in five U.S. states: New York, Maine, Illinois, Massachusetts, and New Hampshire. Section II will be a discussion of the standardized risk-based approach and why it is recommended as the best path moving forward. By implementing this approach across the United States, tragedies like Marsy's will be minimized and prevented on a massive scale.

SECTION I: COMPARATIVE CASE ANALYSIS OF BAIL REFORM APPROACHES

New York, Maine, Illinois, Massachusetts, and New Hampshire have all undergone extensive bail reform. There are two reasons that these states were chosen. First, their approaches are different meaning a comparative case analysis can be performed on them. Second, there is extensive literature on the bail reform approaches of each of these states, allowing for a comprehensive review of them. It is important to note, however, that twenty-one state legislatures have passed a bail reform law of some kind differing in specificity, scope, and impact, all of which have yielded similar results.

New York

In 2019, the New York State legislature passed a bill eliminating cash bail for most misdemeanors and nonviolent felonies.[23] When the bill went into effect in 2020, defendants were either released on their own recognizance (ROR)[24] or released with pre-trial conditions using the least restrictive means to ensure they return for a court appearance.[25] The goal of the reform was to promote fairness and due process in the criminal justice system, reduce mass incarceration, and eliminate the chance that someone would end up in jail due to their inability to

[23] Isabella Jorgensen and Sandra Susan Smith, The Current State of Bail Reform in the United States: Results of a Landscape Analysis of Bail Reforms Across All 50 States, 21 Harv. Ken. RWP 33 (2021).
[24] The release of a defendant without bail, with a written promise that the defendant will return to court at their next assigned court date
[25] Jorgensen and Smith, *supra,* note 23.

pay.[26] The reform made significant changes to the state's prior reliance on cash bail.[27] Prior to making any release decision on a domestic violence case, a judge must consider two factors: history of violations of an order of protection (OOP)[28], and history of firearm possession/use.[29] Judges are still permitted to set cash bail for violent felonies and cases involving criminal contempt, sex offenses, and witness tampering/intimidation.[30] If the felony defendant is ultimately released on cash bail, a judge may enforce electronic monitoring.[31] In sum, a judge may not consider the "dangerousness" of the individual and may release someone who is high-risk.[32] A few months later, the New York State legislature passed an amendment with additional non-monetary conditions that judges may impose for domestic violence offenses, such as pre-trial service programs, but did not provide the funding for such programs.[33]

In 2018 alone, among domestic violence cases in New York City, 83% of misdemeanors, 34% of non-violent felonies, and 41% of violent felonies were released at arraignment.[34] If the current procedure was implemented back then, 78% of all of those cases would require a release on their own recognizance or release with non-monetary conditions.[35] Two primary concerns have been cited regarding these reform laws.

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[26] Bail Reform and Domestic Violence Summary of New York's Reform Law, Center for Court Innovation, https://www.innovatingjustice.org/sites/default/files/media/documents/2019-08/bail_reform_dv_ny_summary.pdf (last visited Feb. 4, 2023).

[27] *Id.*

[28] A document ordered by a court to protect an individual from harassment or abuse by a perpetrator

[29] Center for Court Innovation, *supra,* note 26.

[30] *Id*.

[31] *Id.*

[32] Ames Grawert & Noah Kim, The Facts on Bail Reform and Crime Rates in New York State, Brennan Center for Justice (Mar. 22, 2022), https://www.brennancenter.org/our-work/research-reports/facts-bail-reform-and-crime-rates-new-york-state.

[33] Gutenplan, *supra,* note 17, at 224.

[34] Center for Court Innovation, supra*,* note 26.

[35] Center for Court Innovation, supra*,* note 26.

First, is that the pre-trial period is uniquely dangerous for domestic violence victims and their families. This is because during the pre-trial period, the threat of separation or actual separation from the victim leads to an increased likelihood of homicide perpetrated by the abuser.[36] This phenomenon, known as separation assault, is seldom avoided by orders of protection if the offender is extremely motivated and controlling.[37] Many critics agree that cash bail should not be the mechanism that judges rely on to ensure that a defendant returns to court.[38] On the contrary, they stress the importance of considering the harm that could be posed to the victim during the pre-trial period due to the unique characteristics of domestic violence cases.[39]

Second, is that these reform laws send a dangerous message to domestic violence victims. If a victim takes the risk of coming forward about the abuse that they have endured, but are not protected by the criminal justice system, they will be less likely to speak up in the first place.[40] This message is exacerbated by the fact that domestic violence crimes were historically not taken seriously because they were seen as private matters to be dealt with outside the jurisdiction of the criminal justice system.[41] For example, in 1977, twelve women sued the New York City Police Department for failing to arrest their husbands who had physically abused them.[42] Under the recent NY reform laws, domestic violence crimes such as assault, aggravated harassment, menacing, and stalking, are all considered misdemeanors akin to petty theft.[43] Categorizing these crimes in this way not only exempts them from more stringent pre-trial measures but signals to victims that their assertions are not taken seriously.[44] Because the categorization of these crimes restricts the ability of judges to consider the

[36] Gutenplan, *supra,* note 17, at 233.
[37] Gutenplan, *supra,* note 17, at 234.
[38] Gutenplan, *supra,* note 17, at 237.
[39] *Id.*
[40] Gutenplan, *supra,* note 17, at 238.
[41] Gutenplan, *supra,* note 17, at 236.
[42] Gutenplan, *supra,* note 17, at 239.
[43] *Id.*
[44] *Id.*

dangerousness of the individual, NY bail reform is allowing for the release of high-risk offenders which puts victims in grave danger.

Maine

In 2012, Maine passed a statute requiring a "validated evidence-based domestic violence risk assessment."[45] This risk assessment tool is known as the Ontario Domestic Assault Risk Assessment (ODARA) and must be conducted by police at or shortly after the crime.[46] ODARA was developed by studying 1400 domestic violence arrests in Ontario, Canada, whereby predictors were established that correlated to recidivism[47].[48] The assessment can be completed with up to five questions unanswered, and the score range is between 0 and 13 (0 being a 17% percent chance of recidivism, 13 being a 77% chance of recidivism).[49] Assessment questions are based on the arrestees' criminal history, and circumstances at the scene such as children, alcohol, level of fear, and access to support services.[50]

Since the ODARA statute was implemented, judges are not only required to "consider" the final score when setting bail, but they are prohibited from setting bail for Class A, B, and C domestic violence cases entirely.[51] Additionally, if a defendant violates bail conditions, the judge must make that clear on the record during the bail hearing.[52] With over ten years since its implementation, multiple concerns have been cited regarding its use and efficacy within Maine.

First, is that the ODARA test has been found to not be used in many domestic violence homicide cases.[53] While it is not clear why the test

[45] Mac Walton, Bail Reform and Intimate Partner Violence in Maine, 71 Me. L. Rev. 139, 141 (2019).
[46] *Id.* at 168.
[47] When a convicted criminal reoffends
[48] Walton, *supra,* note 46.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 170.
[52] *Id.*
[53] *Id.*

was not used, there is no specific law enforcement individual or team that is tasked with completing the test. This makes it more likely that the test falls through the cracks when it otherwise would not if it was a designated responsibility.[54] Second, is that the test relies on subjective answers from the victim and interpretations from the police officer.[55] Because just one point on the test has a drastic difference in the risk assessment result, the chance of inaccuracy is high.[56] This is exacerbated by the fact that victim answers might be unclear or inaccurate on the scene, and police can easily score harshly on the test.[57] Third, is that the nature of the test requires a police officer to administer it which means that more police procedures and trainings must be added.[58] This comes with additional financial costs and logistical changes for law enforcement departments and agencies.[59]

When considering ODARA in the context of the original purpose of bail reform and its effects on domestic violence cases, it is clear that the tool falls short. It primes judges to look for risk and turn a blind eye to the lack of risk.[60] Rather than limiting pre-trial detention to those that are statistically dangerous, it expands the pre-trial detention pool to those that are technically not statistically dangerous. At the same time, when the tool is not used, or the inputs are incorrect, dangerous defendants end up released posing an extreme risk to victims.

Illinois

In 2021, Illinois passed what is arguably the most progressive bail reform statute that has been passed in any state up to this point. The statute eliminates cash bail entirely, requiring judges to impose the least restrictive pre-trial conditions to ensure that the defendant returns

[54] *Id.*
[55] *Id.* at 171.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* at 177.

and does not commit additional crimes.[61] If the judge denies the individual release, they must make a written finding as to the reasoning and identify exactly who is at risk.[62] A risk assessment tool can be used but is not required, and it cannot be the sole factor considered by a judge when making a pre-trial decision.[63] Because this statute did not go into effect until 2023, there is not an adequate amount of data to analyze its effects.

In 2017 however, Chief Judge Timothy Evans championed the bail reform effort in Illinois by changing how Chicago judges determined bail through an administrative order.[64] The order required a presumption of release, and if bail was set, it had to be proportionate to what the defendant could pay.[65] Fifteen months later he released a report detailing its effects. Some of the statistics within the report were as follows: the number of defendant's released with a felony charge increased from 26.3% to 52%, 147 of these defendants were subsequently charged with a new violent felony offense, the median amount of bail that needed to be paid in order to be released was 10% (around $1000), and the jail population decreased by 16%.[66]

With much to unpack from Chief Judge Evan's report, many criminologists and media sources did further investigating. The Chicago Tribune identified numerous flaws in the report. They found that twenty-one individuals who were released on bail, went on to commit murder, despite the report only citing three.[67] Additionally, the report only included defendants who were released at their initial hearing, completely leaving out those who were released shortly after.[68] Finally, the definition of violent crime only included murder,

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[61] Jorgensen and Smith, *supra,* note 23, at 26.
[62] Jorgensen and Smith, *supra,* note 23, at 22.
[63] *Id.*
[64] John Paul Wright, Bail Reform in Chicago: Un-Solving Problems in Public Safety and Court Financing, Manhattan Institute (Nov. 22, 2022), https://manhattan.institute/article/bail-reform-in-chicago-un-solving-problems-in-public-safety-and-court-financing.
[65] *Id.* at 2.
[66] *Id.*
[67] *Id.* at 6.
[68] *Id.*

rape, robbery, and aggravated battery, meaning that most domestic crimes were disregarded in the analysis.[69]

Whether crime increased overall following Chief Judge Evan's administrative order, is still up for debate. What is not up for debate is that a large number of aggravated domestic violence cases were dropped following the reform.[70] While there could be many explanations for this trend, one that has been suggested is that defendants intimidated their victims into dropping the charges during the pre-trial period.[71] Only time will tell whether the lasting effects of Illinois' 2021 bail reform law are similar to that of the 2017 Chicago administrative order, specifically with regards to domestic violence cases.

Massachusetts

Massachusetts began to recognize the uniquely complex nature of domestic violence cases in 2014, following an incident where Jennifer Martel was killed by her boyfriend while he was released on bail.[72] The legislature subsequently passed a bill requiring judges to complete regular training on issues related to domestic violence, but they did not stop there.[73] Massachusetts is one of the only states with multiple statutes specifically referencing pre-trial detention for domestic violence offenders.[74] Known as c. 209A[75], the statutes outline the procedures for domestic violence detention hearings, how due process is upheld for defendants, and allow for pre-trial detention to be determined based on the future dangerousness of the individual.[76] In addition, the Massachusetts Trial Court has a published and regularly

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[69] *Id.*
[70] Crime Data Review: Bail Reform Poses Safety Risks, 7 J. O. B. 35, 17 (2020).

[71] *Id.*
[72] Suraji R. Wagage, When the Consequences are Life and Death: Pretrial Detention for Domestic Violence Offenders, 7 Drex. L. Rev. 197 (2015).
[73] *Id.* at 199.
[74] *Id.* at 214.
[75] Comm. Mass. Trl. Ct. Guidelines for Judicial Practice Abuse Prevention Proceedings 20 (Nov. 4, 2021).
[76] Wagage, *supra,* note 72, at 215.

updated document titled, "Guidelines for Judicial Practice Abuse Prevention Hearings." This 275-page document serves as a "one-stop shop" for explanations of what is required from the opening of a domestic violence case, all the way to its closing.

The statutes and guidelines leave out some important details that make it difficult to balance the presumption of innocence with community safety. Firstly, they do not indicate which domestic violence offenses would automatically qualify for a detention hearing, leaving the discretion up to the prosecution and judge.[77] Secondly, no guidance is given on how to determine "that no conditions of release will reasonably assure the safety of any other person or the community."[78] Thirdly, a defendant deemed unfit for release may only be held for up to 180 days. Once that period passes, there is no instruction as to what follows.[79]

These missing details have generated significant pushback from Massachusetts domestic violence survivors, who are urging legislators to pass more protective legislation. Governor Charlie Baker argues, "If you are dangerous enough that you should be held, then you should be held until trial… the fact that you can cut off an ankle bracelet in Massachusetts and basically not even get a slap on the wrist, that's a problem."[80] Adjustments to the statutes in favor of survivors are currently under consideration, but these adjustments are facing pushback from powerful lobbying groups.[81]

New Hampshire

Similar to Massachusetts, New Hampshire has multiple statutes that specifically refer to domestic violence cases, explained in what is

[77] *Id.* at 222.
[78] *Id.* at 223.
[79] Karen Anderson, Massachusetts domestic violence survivors urge lawmakers to take more action to protect victims, WCVB, (Apr. 18, 2022), https://www.wcvb.com/article/massachusetts-domestic-violence-survivors-urge-lawmakers-to-take-more-action-to-protect-victims/39739873.
[80] *Id.*
[81] *Id.*

known as the "Domestic Violence Protocols."[82] These protocols were first established in 1994, revised in 2002, and continue to evolve as federal laws have changed and case law has developed.[83] Numerous notable distinctions exist between Massachusetts domestic violence statutes and New Hampshire domestic violence statutes. First, New Hampshire clearly explains what offenses qualify a domestic violence offender for a detention hearing.[84] With offenses ranging from harassment to unauthorized entry, sexual assault, and criminal threatening, prosecutors are able to encourage denial of bail for a variety of crimes deemed dangerous.[85] Second, New Hampshire provides a list of factors that the court must consider when determining whether no conditions will "reasonably assure" the victims safety.[86] These factors are risk factors that would increase the likelihood of violence perpetrated by the offender against the victim, during pre-trial release. While the aforementioned distinctions fill in some of the gaps that the Massachusetts statutes have, they are missing some important pieces as well. Namely, the procedures of a detention hearing, how to uphold due process for domestic violence defendants, and the role of each judicial actor throughout the process.[87]

A study of the effect of bail reform in New Hampshire was done in 2018 following the passage of a law that allowed judges to hold a defendant without bail if they posed a public safety risk, while at the same time clarifying that no one should be denied bail just because they cannot afford it.[88] In Hillsborough County, the rate of missed hearings rose from 9% to 13%.[89] In Rochester County, the rate of

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[82] Domestic Violence Protocols, New Hampshire Judicial Branch, https://www.courts.nh.gov/our-courts/circuit-court/district-division/protocols/domestic-violence-protocols (last visited Feb. 6, 2023).
[83] New Hampshire Judicial Branch, "Domestic Violence Protocols."
[84] Wagage, *supra,* note 72, at 222.
[85] *Id.* at 223.
[86] *Id.*
[87] *Id.* at 224.
[88] Paul Cuno-Booth, New Hampshire tried to study bail reform's impact. It never happened, NH Business Review (Apr. 7, 2022), https://www.nhbr.com/nh-tried-to-study-bail-reforms-impact-it-never-happened/.
[89] *Id.*

missed hearings rose from 22% to 26%.[90] There is no data on whether or not the bill caused an increase in crime rates, but statewide arrests dropped by 22% between 2018 and 2020.[91]

Citing growing concerns regarding the safety of victims under the 2018 bail reform law, New Hampshire lawmakers are currently pushing for a more stringent bail reform law.[92] This law would require anyone charged with one of thirteen violent offenses, to be denied bail and detained for up to seventy-two hours before a bail hearing.[93] Additionally, anyone who has failed to appear three times in the last three years or committed another offense after being released would be held without bail.[94] Senator Jeb Bradley states, "I want to make sure that the public is protected from the possibility of re-offense when somebody is a danger… and that's why for the 13 crimes that are listed in the bill, there's the requirement that they go before a judge, as opposed to what's happening now, which is pretty automatic."[95]

The fate of bail reform for domestic violence cases in New Hampshire is still in limbo, but regardless, the statutes are still missing some of the important components that the Massachusetts statutes contain.

SECTION II: A STANDARDIZED RISK ASSESSMENT APPROACH

The presumption against bail, statutory rules, protocol guidelines, and stand-alone risk assessment tools, are some of the most common approaches that states are turning to as they begin to reform their bail systems. What began as an effort to reduce pre-trial detention rates, improve racial disparities, and reduce pre-trial crime, resulted in a patchwork of inconsistent, often ineffective solutions. Domestic violence cases have been disproportionately affected by this result due

[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*

to their complexity, and the heightened risk that victims face during the pre-trial period. While no approach is flawless, extensive research demonstrates that a standardized risk assessment approach will best balance presumption of innocence with community safety.

Before discussing this approach in detail, it is important to understand statistics on pre-trial detention under the current patchwork of bail reform in the United States. Pre-trial detainees account for two-thirds of the total jail inmate population with eleven million people admitted to a jail yearly.[96] The U.S. pre-trial detention rate is higher than that of all European and Asian countries, costing over fourteen billion dollars annually.[97] What these statistics mean is that on the whole, pre-trial detention is still dependent on whether one can afford bail.[98] This is not surprising considering the fact that bail hearings are often just a few minutes long with no lawyers present.[99]

The concept behind standardized risk assessment is that improved accuracy and consistency in pre-trial decision-making is crucial to meet the goals of bail reform. Humans are inherently subjective and hold biases, which influence judicial decisions.[100] When this assessment is utilized, the judge is given a statistical assessment of risk for each defendant, guiding them in making a decision on pre-trial intervention. This tool is not just an abstract concept yet to be tested, but it is a concrete tool that has been studied, utilized, and proven successful.

Baradaran and McIntyre analyzed data from seventy-five large U.S. urban counties and found that 25% more felony defendants could have been released, and pre-trial crime would have been reduced, if the decision was made based on statistical risk. [101]Another study focusing on domestic violence cases found that it could reduce the rearrest rate

[96] Stevenson and Mayson, *supra,* note 18, at 2.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 11.
[101] *Id.* at 12.

from 20% to 10%.[102] Finally, Jon Kleinberg studying New York City data found that it could "reduce crime by up to 24.8% with no change in jailing or reduce jail populations by 42.0% with no increase in crime."[103]

It is clear based on these studies that the use of statistical risk assessment tools can reduce pre-trial detention and pre-trial crime, as several tools have been developed for this purpose. The problem, however, is that they all require data from subjective sources, have lengthy scoring procedures, and are limited in their ability to predict.[104] This is where a standardized risk assessment approach comes in as a promising solution, providing objectivity and transparency within the judicial process, and better serving the interests of all constituents in the pre-trial realm.[105]

Standardized risk assessment is distinct in that it uses predictive factors already available in law enforcement records management systems such as suspect characteristics, victim characteristics, and offense characteristics.[106] The FBI's data system, known as NIBRS[107], was used to determine whether a standardized approach could reliably predict domestic violence recidivism.[108] Using just ten items from the NIBRS data system, a large association was found between the result of the assessment and domestic violence recidivism.[109] The strongest predictors were the suspect's criminal history, gender, juvenile arrests, and prior violation of protection orders.[110] The accuracy of the

[102] *Id.*
[103] *Id.*
[104] Kris Henning, Christopher Campbell, Gregory Steward, & Jennifer Johnson, Prioritizing Police Investigations of Intimate Partner Violence Using Actuarial Risk Assessment, 36 J Police Crim Psych. 667 (2021).
[105] *Id.* at 667.
[106] *Id.*
[107] NIBRS, FBI, September 10, 2018. https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/ucr/nibrs.
[108] Henning, Campbell, Steward, & Johnson, *supra,* note 104, at 669.
[109] *Id.* at 674.
[110] *Id.* at 675.

standardized risk assessment tool in this study is comparable to and is actually better than existing risk assessment tools.[111]

A few concerns have been raised regarding the use of risk assessment tools in pre-trial decision making. First, is that these tools are racially biased because they are more likely to predict a higher risk score for black individuals than white individuals.[112] Factors inputted into the tool such as arrests and zip code, will have a disparate impact because they are different across racial groups.[113] Second, is the difficulty inherent in predicting a low-frequency event such as violent crime, with 100% accuracy.[114] Because this predictive tool could be the difference between someone being detained or released, it must be exceptionally accurate. The study of COMPAS[115], a risk assessment tool, found that only 20% of the people predicted to commit future violent crime, actually did.[116] Finally, risk assessment tools cannot describe and defend how it produced its results.[117] This compromises transparency and due process, especially if certain relevant factors are not taken into consideration.

It is important to note that the aforementioned concerns refer to regular statistical risk assessment tools that mainly rely on subjective data, not the standardized risk assessment approach. However, some of these concerns might still be relevant with a standardized risk assessment tool, and numerous steps can be taken to address them. When developing and using the standardized risk assessment tool, the processes and factors must be public to ensure transparency and due process.[118] The factors must be chosen carefully to ensure that they are the most predictive of recidivism, and do not have inherent racial

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[111] *Id.*
[112] Stevenson and Mayson, *supra,* note 18, at 13.
[113] *Id.*
[114] *Id.*
[115] Eugenie Jackson and Christina Mendoza, Setting the Record Straight: What the COMPAS Core Risk and Need Assessment Is and Is Not, Harvard Data Science Review, 2(1). https://doi.org/10.1162/99608f92.1b3dadaa.
[116] *Id.*
[117] *Id.* at 14.
[118] Stevenson and Mayson, *supra,* note 18, at 14.

biases.[119] Actors across the criminal justice field must be on the same page regarding what the tool measures and what statistical risk level warrants pre-trial detention.[120] This means that law enforcement agencies and departments must be in constant communication, closely monitor the use of the tool, and commit to regular data collection and analysis.[121] Lastly, the tool must be utilized consistently for domestic violence cases, bearing in mind that it is a tool to guide the judge's decision, not make the decision for them.

CONCLUSION

Far too many domestic violence victims and their families have been further harmed, and even killed, during the pre-trial period. This unique category of cases poses a challenge to the legal system when it comes to properly balancing the presumption of innocence with community safety. As states have attempted to address this dilemma through a variety of reforms, the results have been seldom successful. A standardized risk assessment approach has proven to be a promising solution in reducing incarceration rates, racial biases in the legal system, and harm to victims during the pre-trial period. If implemented carefully and strategically nationwide, the likelihood of positive changes in all of these realms is high. The presumption of innocence is a principle of our democracy worth fighting for, and so too is the safety of victims who put their lives on the line to speak up about their abuse. The bail reform fight is for Marsy and the many others who have been caught in the crosshairs. That fight is not over.

[119] *Id.*
[120] *Id.* at 15.
[121] *Id.*

MAKING DOMESTIC ELECTRONIC SURVEILLANCE: THE CONSTITUTIONALITY OF INCIDENTAL COLLECTION

Jan Soto

Introduction

Warrantless electronic surveillance[1] of American citizens on domestic soil is almost always prohibited. Courts widely reject that the Executive branch and its actors – in their duty to preserve national security – hold constitutional authority for warrantless electronic surveillance.[2] The lack of constitutional authority marked the Intelligence Community's need for statutory authority. In response, Congress passed the Foreign Intelligence Surveillance Act (FISA) providing guidelines and limitations on government collection of foreign intelligence.[3] Notably, FISA also codified clear limitations on domestic surveillance of American citizens. Congress carved out only one exception: communications between an American and a foreign surveillance target.[4]

Various protections shield Americans from this incidental collection. Courts uphold surveillance under FISA when the requested surveillance follows congressionally mandated provisos: justification that the target is an agent of a foreign power, a reasonable belief that the target of surveillance is abroad, and a personal review by the Attorney General.[5] Further, FISA established the Foreign Intelligence Surveillance Courts (FISC) which provides judicial oversight of any

[1] Warrantless electronic surveillance is defined here as the monitoring or interception of digital communication without judicial approval. This includes phone calls, texts, virtual messaging through social media, along any other electronic communications.
[2] *See, e.g.*, *U.S. v. U.S. Dist. Ct. for E. Dist. of Mich. (Keith)*, 407 U.S. 297 (1972) (refuting any recognition that the President or the Executive branch hold any constitutional authority to "conduct warrantless domestic security surveillance").
[3] Edward C. Liu, Cong. Rsch. Serv., IF11451, Foreign Intelligence Surveillance Act (FISA): An Overview 1 (2021).
[4] 50 U.S.C. §1802 (a). This surveillance exceptions allows for the collection of information from Americans on domestic soil. This collection is hereto referred to as incidental collection.
[5] 50 U.S.C. §1802. This statute is commonly referred to as "Section 702 of the Foreign Intelligence Surveillance" or simply "Section 702."

foreign intelligence surveillance involving an American citizen. Even with these statutory safeguards in place, the public's trust that the government protects the privacy of their digital footprint continues to erode.[6]

The public holds some justification for remaining skeptical. Revelations broadcast by Edward Snowden show a glimpse of the government's underbelly: a place where surveillance laws are bent to satisfy national security needs. Concerned intelligence officials at the Department of Homeland Security (DHS) share in Snowden's concerns, questioning the legality of their domestic-intelligence operations.[7] Yet, the accountability offered by the courts remains locked away under classified tape as requests to the courts sparsely grant public access to their opinions.[8]

The public's cynicism and distrust offer a good opportunity to reconsider electronic surveillance law. How do we balance the public's liberty interests and the government's mission in protecting the nation? Should the government have free license to review wholly domestic electronic communications? The Foreign Intelligence Surveillance Act (FISA)[9] and the subsequent legislation governing incidental collection sought to answer these questions. Nonetheless, bulk surveillance programs under FISA fail to meet modern legal standards.

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[6] *See, e.g.*, *The State of Privacy in Post-Snowden America*, Pew Research Center (Sept. 21, 2016), https://www.pewresearch.org/fact-tank/2016/09/21/the-state-of-privacy-in-america/. *See also* Brooke Auxier et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control over Their Personal Information*, Pew Research Center, at 20-23, 25, https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2019/11/Pew-Research-Center_PI_2019.11.15_Privacy_FINAL.pdf (last visited Apr. 30, 2023).

[7] Betsy Woodruff Swan, *DHS has a program gathering domestic intelligence — and virtually no one knows about it*, POLITICO (March 6, 2023), https://www.politico.com/news/2023/03/06/dhs-domestic-intelligence-program-00085544 ("A key theme that emerges from internal documents is that in recent years, many people working at I&A have said they fear they are breaking the law… some employees worried so much about the legality of their activities that they wanted their employer to cover legal liability insurance.").

[8] Ariane de Vogue, *Supreme Court won't say if secretive surveillance court must disclose opinions*, CNN (November 1, 2021), https://www.cnn.com/2021/11/01/politics/supreme-court-foreign-intelligence-surveillance-court/index.html.

[9] 50 U.S.C. §1802.

Concerns arise with the collection process itself: intelligence agencies collect information in bulk from all sources.[10] American citizens in domestic soil are hereto included through incidental collection.[11] After the information is collected, government agencies can 'query' any individual that reasonably holds foreign intelligence[12] – such widespread collection presents concerns over the weaponization of personal information and the judicial process. Over time, constitutional protections rust when exposed to potential abuse.

This article will address these questions and concerns in three parts. This article begins in Part I by unfolding the historical evolution of electronic surveillance law and exploring the current state of electronic surveillance law. Part II dissects Fourth Amendment concerns arising from the current application of legal procedures surrounding electronic surveillance programs that target Americans. Finally, the conclusion considers potential legislative remedies and points to additional areas of research that can help advance the legal understanding of electronic surveillance in the United States.

Section I: The Current State of Electronic Surveillance Law

Intelligence activities are subject to judicial review across all branches of government. The Supreme Court has recognized that while the security of the nation remains a fundamental function of the government, this does not excuse unconstitutional or unlawful behavior.[13] Judicial review stands as an essential guardian of privacy

[10] Off. Of Dir. Of Nat'l Intel., Annual Statistical Transparency Report Regarding National Security Authorities Calendar Year 2022 2, 20 (2023), https://www.dni.gov/files/CLPT/documents/2023_ASTR_for_CY2022.pdf (discussing the amount of United States citizens whose information was collected under Section 702 surveillance).
[11] *Id.*
[12] *See generally* Off. Of Dir. Of Nat'l Intel., Annual Statistical Transparency Report Regarding National Security Authorities Calendar Year 2022 2, 16 (2023), https://www.dni.gov/files/CLPT/documents/2023_ASTR_for_CY2022.pdf ("A query is a basic analytic step foundational to efficiently and effectively reviewing data lawfully collected and already in the government's possession.").
[13] *See U.S. v. U.S. Dist. Ct. for E. Dist. of Mich. (Keith)*, 407 U.S. 297, 314 (1972) ("Given the difficulty of defining the domestic security interest, the danger of abuse [against constitutional protections and civil liberties] in acting to protect that interest becomes apparent."). *See also New York Times Co. v. United States*, 403 U.S. 713, 716 (1971) ("The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly.").

and liberties interests. Without it, electronic surveillance law reform would stagnate.

Controversy and misfortune are ultimately the driving factors to electronic surveillance law reform. Notably, the September 11 terrorist attacks on the Twin Towers prompted needed revisions in the law and intelligence procedures that allowed for the easy flow of information in federal agencies – hoping to prevent subsequent attacks.[14] One would wish that the government acted proactively to secure constitutional rights, yet history suggests that change is brought forth after damage has been done.

When dealing with electronic surveillance law, Congress behaves more like an object subject to Newton's laws of motion than a body of thoughtful representatives of the American people. Similar to the first law of motion, Congress remains at rest unless acted on by a force: public pushback on leaked information, a catastrophe, or the check and balance of another branch to name a few. In line with the second law of motion, whatever change achieved through legislative amendments is equal to the magnitude and direction of the force that pushed for legislation in the first place. The third and final law of motion - perhaps the most relevant to this Article – dictates that the legislative change enacted is equal in magnitude and opposite in direction to the force exerted: in light of a terrorist attack, Congress is likely to loosen restrictions on intelligence agencies and vice versa.

Electronic surveillance law, and changes to it, emerge under that exchange of motion. Under this convoluted system of surveillance law reform, can the government achieve a stable balance between the nation's security interests to protect the nation from attacks and Fourth Amendment protections against unreasonable searches and seizures without hindering either? The answer, this article suggests, is yes.

History of FISA and Related Legislation

In the 1970s, shortly after a New York Times article uncovered a domestic intelligence operation of unprecedented scale,[15] the United

[14] Edward C. Liu, Cong. Rsch. Serv., IF11451, Foreign Intelligence Surveillance Act (FISA): An Overview 1 (2021).
[15] Seymour M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. Times (Dec. 22, 1972),

States Senate instituted the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities. The committee – commonly referred to as the Church Committee[16] – considered three central questions surrounding intelligence activities. One is of interest here: "whether domestic intelligence activities have been consistent with the law and with the individual liberties guaranteed to American citizens by the Constitution."

Domestic intelligence activities had not been consistent with the law.[17] The committee published an infamous report known today as the Church Committee Report which uncovered years of abuse by the intelligence agencies.[18] The committee had studied the deliberate violations of the law by federal agencies noting that the government's use of surveillance programs negatively affected the capacity to exercise constitutional rights.[19] The Church Committee Report actively forewarn that exponential, technological growth would lead to "more opportunities for misuse [of surveillance programs]."[20] The statutory reform that followed – known today as the Foreign Intelligence Surveillance Act of 1978 (FISA) – echoes the cautionary advice of Chief Justice Robert Jackson:

> I believe that the safeguard of our liberty lies in limiting any national police or investigative organization, first of all to a small number of strictly federal offenses, and secondly to nonpolitical ones. The fact that we may have confidence in the administration of a federal investigative agency under its existing head does not mean that it may not revert again to the days when the Department of Justice was headed by men to

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https://www.nytimes.com/1974/12/22/archives/huge-cia-operation-reported-in-u-s-against-antiwar-forces-other.html.

[16] U.S. House of Representatives, Intelligence Activities and the Rights of Americans: Book II, V (April 26, 1976) ("conduct an investigation and study of governmental operations with respect to intelligence activities and the extent, if any, to which illegal, improper, or unethical activities were engaged in by any agency of the Federal Government.").

[17] *Id.* at 290 (1976) ("Domestic intelligence activity has threatened and undermined the constitutional rights of Americans to free speech, association, and privacy. It has done so primarily because the constitutional system for checking abuse of power has not been applied.").

[18] *Id*.

[19] *Id.* at 291 (1976).

[20] *Id.* at 289 (1976).

> whom the investigative power was a weapon to be used for their own purposes.[21]

Congress etched Chief Justice Jackson's words and their own recommendations into FISA. The then novel regulation sought to prevent future violations of the law by posting constitutional safeguards around the government's domestic surveillance. This was achieved, in part, by a special court sworn to secrecy – the Foreign Intelligence Surveillance Court (FISC)[22] – that reviews any requests to engage in electronic surveillance, providing for continued congressional oversight, and limiting foreign intelligence investigations from exceeding domestic Fourth Amendment requirements.[23] Yet, the balance struck by Congress between the government's interest in securing the nation and protecting constitutional liberties proved problematic at best.

Congress married criminal and foreign intelligence investigations, bringing with it all the baggage of an investigation under the Fourth Amendment. The inclusion of Fourth Amendment requirements on domestic electronic surveillance was not a surprise: the Supreme Court had reaffirmed these requirements for all domestic investigations[24] and the Church Committee had focused almost exclusively on investigations concerning domestic electronic surveillance. Congress tried to encode the existing jurisprudential requirements. The limits within FISA led the Foreign Intelligence Surveillance Court of Review (FISCR)[25] to bar federal investigative agencies from sharing information collected under FISA with criminal investigators.[26]

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[21] Robert H. Jackson, The Supreme Court in the American System of Government (New York: Harper Torchbook, 1955, 1963), pp. 70-71.
[22] 50 U.S.C. §1802.
[23] Foreign Intelligence Control Act of 1978, 50 U.S.C. §1802.
[24] *See U.S. v. U.S. Dist. Ct. for E. Dist. of Mich. (Keith)*, 407 U.S. 297, 313 (1972) (holding that for any domestic investigation to be constitutional, it must show probable cause and receive a warrant).
[25] This court decides on all appeals stemming from the FISC courts.
[26] *See United States v. Smith*, 321 F.Supp. 424, 425-26 (DC Cal. 1971); *See also Camara v. Municipal Court*, 387 U.S. 523, 534-535 (1967) ("In cases in which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. . . . In determining whether a particular inspection is reasonable —and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.").

On June 11, 2001, officials from the Central Intelligence Agency (CIA) and the Federal Bureau of Investigation (FBI) met to discuss the effect of the FISCR ruling on two separate yet related investigations.[27] The FBI opened a criminal investigation against the architect of a suicide bombing on the *U.S.S. Cole* – a fairly large embarkment of the United States Navy - and the CIA engaged in a foreign intelligence investigation concerning potential terrorist agents.[28] At the time of the meeting, they were particularly concerned with how to implement the "Chinese wall" [29] requirements which barred agencies from sharing information discovered for foreign intelligence purposes with criminal investigators.[30] The Chinese wall requirements imposed by the FISCR did not allow them to communicate one key fact: they were both investigating the same person.[31]

Khalid Al-Mihdhar – an ally to Osama bin Laden's cause – was the subject of both investigations and hijacked American Airlines flight 77 which ultimately crashed into the Pentagon on September 11, 2001.[32] While the construction of FISA did not alone prevent federal authorities from thwarting the September 11 attacks, FISCR's ruling caused federal agencies to navigate restrictive guidelines. As the Office of the Inspector General notes in their investigation on the FBI's handling of intelligence information related to the September 11 attacks:

> The wall - or "maze of walls" as one witness described it - significantly slowed the flow of intelligence information to criminal investigations. The unintended consequence of the wall was to hamper the FBI's ability to conduct effective counterterrorism investigations because the FBI's efforts were sharply divided in two, and only one side had immediate and complete access to the available information.[33]

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[27] Office of the Inspector General, A Review of the FBI's Handling of Intelligence Information Related to the September 11 Attacks (Nov. 2004).
[28] *Id.*
[29] A Chinese wall is a term of art that refers to the separation of information between two parties for legal purposes.
[30] Foreign Intelligence Control Act of 1978, 50 U.S.C. §1802.
[31] Office of the Inspector General, *supra* note 27.
[32] *Id.*
[33] Office of the Inspector General, A Review of the FBI's Handling of Intelligence Information Related to the September 11 Attacks 344 (Nov. 2004).

Though it is unclear whether FISCR's ruling misled federal agencies, or the agencies misinterpreted the need for a Wall to exist in the first place, said restriction besieged the nation's security. It overstressed constitutional protections where there was little to no risk of harm to the privacy of United States citizens. Even if some concern about Fourth Amendment protections existed, sharing information between criminal and foreign intelligence investigations to prevent a national catastrophe was held constitutional years prior to the creation of FISA and the ruling by FISCR.[34]

Controversy and misfortune continued to drive electronic surveillance law reform moving forward. A month after the attacks, the legislature convened to discuss the failures of the federal agencies and FISA's statutory role in that failure. Provisions of FISA that limited the exchange of information were no longer seen as the guardians of Fourth Amendment protections, but burdensome restrictions that created vulnerabilities nationwide. Congress prescribed the USA Patriot Act of 2001[35] as the antidote for "system failure" – amendments to FISA equal in magnitude yet opposite in direction to the ones made by the Church Committee. The pendulum had reacted to the September 11 attacks and Congress changed directions in reaction to the force of its failure.

If the members of the Church Committee could comment on these changes, they would likely stand uneasy reminding us that "abuse thrives in secrecy" - which the federal government operated in.[36] The courts would eventually disagree. The Foreign Intelligence Surveillance Act Courts of Review (herein referred to as the FISA

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[34] *See U.S. v. U.S. Dist. Ct. for E. Dist. of Mich. (Keith)*, 407 U.S. 297, 309 (1972) ("Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. In the discharge of this duty, the President—through the Attorney General—may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government.[9] The use of such surveillance in internal security cases has been sanctioned more or less continuously by various Presidents and Attorneys General since July 1946.").

[35] Uniting And Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act Of 2001.

[36] U.S. House of Representatives, Intelligence Activities and the Rights of Americans: Book II, 292 (April 26, 1976).

Court of Review)[37] held that Chinese walls were never required by the Constitution or FISA in the first place.[38] In turn, this fell in line with the Supreme Court's holdings that Congress could now divorce the baggage of criminal investigations from foreign intelligence investigations while retaining the capacity to share information between the two.[39] This departure from the norm was the first glimpse that Fourth Amendment protections, and its limitations on an investigation, were not necessary in foreign intelligence investigations as the technology grew.

As Senator Patrick Leahy noted, "[t]his bill [authorized] the expanded sharing with intelligence agencies of information collected as part of a criminal investigation, and the expanded use of foreign intelligence surveillance tools and information in criminal investigations."[40] Whereas before Congress moved towards expanding constitutional protections, now Congress focused on expanding national security capabilities. The pendulum had reacted to the September 11 attacks and Congress changed directions – enacting the Patriot Act and the 2008 Amendments to FISA.

Both FISA amendments are renowned amongst the legal community as being essential to the nation's security interests. Another perspective declares that these amendments actively work against constitutional liberties. The amendments solve many of the Fourth Amendment concerns by authorizing investigations that have an international component and prohibiting investigations targeting American citizens.[41] Yet to the cries of many, they allowed for the creation of multiple programs that incidentally collected American's information at an unprecedented scale. These programs were ultimately devastating for the people's trust in the government's actions.

The Foreign Intelligence Surveillance Act Courts of Review (herein referred to as the FISA Court of Review) reaffirmed the Supreme

[37] This court considers all appeals stemming from the Foreign Intelligence Surveillance Court. Nonetheless, based on information made publicly available by FISA
[38] In re Sealed Case, 310 F.3d 717, 720 (2002).
[39] *See U.S. v. U.S. Dist. Ct. for E. Dist. of Mich. (Keith)*, 407 U.S. 297 (1972).
[40] Congressional Records, S10992 (Oct. 25, 2001).
[41] 50 U.S.C. §1802

Court's decision in *Keith* by holding that Chinese walls were never required by the Constitution or FISA in the first place.[42]

If the members of the Church Committee could comment on these changes, they would likely stand uneasy by the secrecy which they allowed the federal government to work under. Edward Snowden - working with The Guardian[43] in early 2013 - uncovered thousands of documents which evidenced government sanctioned programs that captured the telephone metadata from calls originating within the United States. Additional programs worked with the major internet companies to monitor and search any number of video and audio chats, photographs, emails, and documents located throughout the Internet.[44] This was in direct violation of FISA which specifically limited any collection of data in which the sender and the receiver of that information were known at the time to be located within the United States.[45] The pendulum swung back once more – moving from expanding national security capabilities to protecting personal privacy interests. No Church Committee was instituted in Congress to investigate these abuses though. The FISC court then resolved these Fourth Amendment concerns by looking back at the existing jurisprudence.

National Security and Electronic Surveillance Jurisprudence

The Fourth Amendment safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures."[46] Nonetheless, this right is not absolute.[47] Federal, state, or local law enforcement regularly receive warrants to search and seize "persons, houses, papers, and effects."[48] The process to acquire a warrant from the FISC court for national security purposes requires weighing the interests at stake: the privacy interest of the people against the government's duty to protect against a threat to the nation.[49]

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[42] *In re Sealed Case*, 310 F.3d 717, 720 (2002).
[43] Glenn Greenwald, *NSA collecting phone records of millions of Verizon customers daily*, The Guardian (June 6, 2013), https://static.guim.co.uk/images/favicon-32x32.icov.
[44] *Ibid.*
[45] 50 U.S.C §1802
[46] U.S. Const. amend. iv (emphasis added).
[47] *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 314 (1972).
[48] U.S. Const. amend. iv.
[49] *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 314-315 (1972).

In weighing personal interests against government interests, the FISC court – or any other court approving a warrant – must be aware of how the government defines their interest. The government's definition of their interest must accurately describe the circumstances which lead to the request in the first place. A general interest to protect national security is not enough to meet this standard.[50]

The Supreme Court in *United States v. Robel*, 389 U.S. 258 (1967), stated that the concept of national security cannot be in itself an interest.[51] Chief Justice Warren questions whether there would be something left to protect in this nation if we were to sacrifice our constitutional liberties: "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties… which makes the defense of the Nation worthwhile."[52]

There are certain exceptions that go around the warrant requirement. The Supreme Court includes as exceptions the seizure of contraband goods stored in vehicles,[53] a compelling ongoing emergency, [54] or other exceptional circumstances.[55] However, the Supreme Court held that a general exception to the Fourth Amendment warrant requirement for national security does not exist.[56]

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[50] *See United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 314 (1972) ("The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'").
[51] *United States v. Robel*, 389 U.S. 258, 264 (1967) ("Yet, this concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal").
[52] *Id*.
[53] *Carroll v. United States*, 267 U.S. 132, 153 (1925) ("contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant").
[54] *McDonald v. United States*, 335 U.S. 451, 454 (1948) (describing a scenario where shots being fired would satisfy the absence of a warrant).
[55] *Johnson v. United States*, 333 U.S. 10, 14-15 (1948) (There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with).
[56] *See* United States v. United States District Court (Keith), 407 U.S. 297, 320 (1972) ("Thus, we conclude that the Government's concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance.") *See also* Peter G. Machtiger, *Updating the Fourth Amendment Analysis of U.S. Person Communications Incidentally Collected Under FISA Section 702*, HARVARD LAW SCHOOL NATIONAL SECURITY JOURNAL, 8, https://harvardnsj.org/2021/02/updating-the-fourth-amendment-analysis-of-u-s-

This remains true even when technological advancements outpace the speed by which the bench reacts to those advancements. In *Carpenter v. United States*, 138 S. Ct. 2206 (2018), Chief Justice Robert echoes the sentiments of Chief Justice Jackson and the Church Committee to prevent unreasonable government electronic surveillance with the rapid use of new technologies:

> When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents. If the choice to proceed by subpoena provided a categorical limitation on Fourth Amendment protection, no type of record would ever be protected by the warrant requirement… [P]rivate letters, *digital contents of a cell phone*—any personal information reduced to document form, in fact—may be collected by subpoena for no reason other than "official curiosity…" leaving open the question whether the warrant requirement applies "when the Government obtains the modern-day equivalents of an individual's own 'papers' or 'effects,' even when those papers or effects are held by a third party."[57]

While these words were applied to tracking a person's movement through the collection of cell phone information, [58] it also applies to the general collection of other metadata.[59] In fact, wireless carriers actively record the cell-site location information and other metadata of over "400 million devices in the United States – not just those belonging to persons who might happen to come under investigation."[60] The Supreme Court ultimately safeguarded cell-site location information under warrant from government surveillance in 2018 because it allows the government to "achieve near perfect surveillance… access[ing] a category of information otherwise unknowable."[61]

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person-communications-incidentally-collected-under-fisa-section-702/ (last visited Feb. 2, 2022) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)).

[57] Carpenter v. United States, 138 S. Ct. 2206, 2222 (2018) (emphasis added).
[58] *Id.* at 2216.
[59] Crystal Thorpe, *Metadata: The Dangers of Metadata compel issuing Ethical Duties to "Scrub" and Prohibit the "Mining" of Metadata,* 84 N.D. L. Rev. 257, 261 (2008) (proposing that metadata may be defined as all electronic surveillance collecting the origin, usage, and validity of digital exchanges of information).
[60] Carpenter, 138 S. Ct. at 2218 (2018).
[61] *Id*. at 2218.

The Supreme Court prohibited searching individual's phones even when they are detained.[62] In *Riley v. California*, 573 U.S. 373 (2014), the Supreme Court found that most cell-phone users in the United States store sensitive information in their devices that deserve Fourth Amendment warrant protections. Thus, the physical and electronic searches of an individual's cell phone information – regardless of whether they are suspected of committing any unlawful and perhaps dangerous acts – remain protected under warrant.[63]

Justice Kennedy's dissent in *Carpenter* mirrors Justice Black's historic dissent in *Katz v. United States*, 389 U.S. 347 (1967). Both Justices criticize the opinions of their fellow justices for expanding Fourth Amendment warrant requirements to modern tools of electronic surveillance.[64] They instead suggest that Congress already weighed the privacy interests: "The Court should be wary of upsetting that legislative balance and erecting constitutional barriers that foreclose further legislative instructions."[65] Regardless, the Supreme Court remains as the ultimate balance test in Fourth Amendment questions.[66] Yet, the Foreign Intelligence Surveillance Court misapplies the Supreme Court's rulings and expands FISA's coverage beyond the prescribed constitutional limits.

Section II: The Problems with the Application of Existing Law

In applying the existing jurisprudence to incidental collection under FISA, FISC overlooks the Supreme Court's holdings: the necessity of a clear interest[67] and adherence to several narrow exceptions.[68] This Article will address each in order, discuss how FISC's application of the existing jurisprudence fails to pass constitutional muster. FISC has

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[62] *See* Riley v. California, 573 U.S. 373, 401 (2014) ("Our holding… is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest.).
[63] *See supra* note 57.
[64] *See* Carpenter v. United States, 138 S. Ct. 2206, 2233 (2018) (Kennedy, A., dissenting) ("[D]uring periods of rapid technological change… and where the governing legal standard is one of reasonableness, it is wise to defer to legislative judgements…"). *See also Katz v. United States*, 389 U.S. 347, 373 (1967) (Black, H., dissenting) ("I will not distort the words of the Amendment in order to 'keep the Constitution up to date' or 'to bring it into harmony with the times.'").
[65] *Carpenter*, 138 S. Ct. at 2233 (citing *Ontario v. Quon*, 560 U.S. 746, 759 (2010)).
[66] *See* case cited *supra* note 44.
[67] *See supra* note 51.
[68] *See* cases cited *supra* notes 48-51.

only published three opinions,[69] but this Article will consider them in the foregoing analysis.

First, the necessity of a clear interest.[70] The Supreme Court held in *Robel* that national security cannot be an interest in itself.[71] Cases like *Keith* further reaffirmed that if the Government attempts to act under the interest of "protect[ing] domestic security,"[72] the Government would have ample discretion to weaponize that interest against any number of targets.[73] A national security interest alone does not meet the constitutional burden.

Regardless, FISC held in *In re Directives*, 551 F.3d 1004 (2008), that a national security interest is enough for the government to constitutionally request the phone records of any number of service providers.[74] They fail to provide any other description of the interest or additional details that may further describe the totality of the situation involved. This shrouds government actions in secrecy opening the door to potential abuses like the mass surveillance programs broadcast by Snowden – maintaining a database of incidentally collected information.[75]

FISC justifies their reasoning under the permissible-acquisition's doctrine. This doctrine – stemming from the FISCR's opinion on the constitutionality of incidental collection – states that "incidental collections occurring as a result of constitutionally permissible acquisitions do not render those acquisitions unlawful."[76] Simply put, if a warrant was provided, anything collected under that warrant is

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[69] *See supra* note 5.
[70] *See supra* note 51.
[71] *See United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 314 (1972).
[72] *See* United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 314 (1972).
[73] *See* United States v. U.S. Dist. Court (Keith), 407 U.S. 297, 314 (1972). ("Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.'").
[74] *See* In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act (In re Directives), 551 F.3d 1004, 1012 (FISA Ct. Rev. 2008) ("Here, the relevant governmental interest—the interest in national security—is of the highest order of magnitude.") (citing Haig v. Agee, 453 U.S. 280, 307 (1981); In re Sealed Case, 310 F.3d 717, 746 (2002).)
[75] *See supra* note 39.
[76] In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1015 (FISA Ct. Rev. 2008). *See also* United States v. Mohamoud, 843 F.3d 420 (9th Cir. 2016) (holding that because a warrant was not required for the incidental collection of Americans communications, it is a constitutional practice).

justified. The FISC Court of Review goes on to state that because the government "assures us that it does not maintain a database of incidentally collected information of non-targeted U.S. persons," Fourth Amendment protections are not violated. [77]

The government's assurance would not withstand Fourth Amendment scrutiny. The government must prove to a "neutral and detached magistrate" [78] that the search is not baseless.[79] In his concurrence in *Keith*, Justice Douglas described an innocent phone caller being flagged in a government's database as "the very evil to which the Warrant Clause was directed."[80] Here, the simple expression that national security is at stake runs contrary to the Supreme Court's jurisprudence.

Second, FISC must adhere to several narrow exceptions to the warrant requirements.[81] FISC rightly acknowledges that several exceptions exist, yet none remain applicable to the facts of the three published cases.[82] So, they go on to create their own exception: the aptly named foreign intelligence exception.[83] This exception allows the government to evade the warrant requirements "when surveillance is conducted to obtain foreign intelligence for national security purposes."[84] The foreign intelligence exception, when applied exclusively to domestic surveillance, is nothing more than an exception for national security purposes[85] - which runs afoul of Supreme Court holdings declaring a simple national security exception as unconstitutional.[86]

These two reasons alone – the lack of a clear interest beyond "national security" and the creation of a foreign intelligence exception which both create existing databases of American's private information – raise significant concerns for constitutional protections. Two courts agree with this conclusion to varying degrees.

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[77] *Id*.
[78] *See* United States v. U.S. Dist. Court (Keith), 407 U.S. 297, 316 (1972).
[79] *Id*.
[80] *Id*. at 326. (Douglas, W., concurring).
[81] *See supra* notes 48-51.
[82] *See e.g.*, In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1010 (FISA Ct. Rev. 2008).
[83] *Id*.
[84] *Id*. at 1012.
[85] This exception remains constitutionally sound for international purposes.
[86] *See supra* note 52.

The Ninth Circuit Court of Appeals agrees. Circuit Judge Berzon, writing in *United States v. Moalin*, 973 F.3d 977 (2020), begins his opinion regarding the constitutionality of evidence submitted from government databases by declaring that the government violated FISA: "We conclude that the government may have violated the Fourth Amendment and did violate the Foreign Intelligence Surveillance Act ("FISA") when it collected the telephony metadata of millions of Americans…"[87] The court of appeals relies on the Supreme Court's holding in *Carpenter* that cell phones, and the information stored within them, deserve ample Fourth Amendment protections.[88] Thus, the Ninth Circuit Court of Appeals concludes that the incidental collection program which harbored American's metadata in multiple databases is unconstitutional.

Finally, in a now redacted 2011 FISC case, FISC concedes that incidental collection in its current form does not comply with the Fourth Amendment.[89] The court, after discovering that databases with Americans' incidentally collected information exist, held that the quantity and quality of the incidental collection of Americans' information significantly impacted Fourth Amendment protections:

> In sum, NSA's collection of MCTs results in the acquisition of a very large number of Fourth Amendment- protected communications that have no direct connection to any targeted facility and thus do not serve the national security needs underlying the Section 702 collection as a whole. Rather than attempting to identify and segregate the non-target, Fourth Amendment protected information promptly following acquisition, NSA's proposed handling of MCTs tends to maximize the retention of such information and hence to enhance the risk that it will be used and disseminated. Under the totality of the circumstances, then, the Court is unable to find that the government's proposed application of NSA's targeting and minimization procedures to MCTs is consistent with the requirements of the Fourth Amendment.[90]

Conclusion

[87] *See U.S. v. Moalin,* 973 F.3d 977, 984 (2020).
[88] *See* Carpenter v. United States, 138 S. Ct. 2206, 2222 (2018).
[89] *See Redacted*, 2011 WL 10945618 (2011) (only Westlaw citation available).
[90] *Id*. at 28.

No discussion of intelligence surveillance practices is complete without acknowledging the challenges in commenting on these programs. Much of the information surrounding FISA, bulk collection programs, and legal practices within the intelligence communities stands behind classified markings. Simply put, a complete review of these practices requires significant security clearances and should be kept within intelligence agencies. Regardless, none of these challenges should stand in the face of protecting individual liberties.

Congressmembers agree. Various legislators have submitted reauthorization proposals that seek to strike a balance between constitutional safeguards and national security interests. Some suggest strict reporting requirements to the FISC whenever information of American citizens is swept up in these surveillance practices.[91] Others call for increased sentence penalties for those who download or removed classified information of American citizens from these databases.[92] All of these suggestions seem fitting on their face – research that reviews the various legislative remedies previously proposed seems promising.

On the intelligence community, adjacent agencies, and their actors: the work you do is invaluable to the nation and its security interests. Nonetheless, the defense of the nation is only worthwhile when there is something worthwhile to defend. Without personal liberties and privacy, national security defends nothing worthwhile. National security is best served when the constitutional rights of the people are protected.

The evolution of electronic surveillance law is a pendulum that sways back and forth between constitutional safeguards and national security interests. To strike an adequate balance between the two interests, the eye-raising constitutional concerns surrounding incidental collection must be addressed to preserve Fourth Amendment protections. This article helps shed a light on this tight balancing act and push the conversation towards potential solutions.

[91] S. 2010, 115th Cong. (2017).
[92] *Id.*

HOW *MERRILL v MILLIGAN* WILL BE THE SUPREME COURT'S NEXT STEP IN DISMANTLING THE VOTING RIGHTS ACT OF 1965

Scott Buksbaum

I. Introduction

Voting is held by most Americans to be a sacred right – yet the Constitution upon which this nation's democracy is founded is eerily silent on the matter. While the Constitution does not specifically safeguard voting rights for the masses, it instead regulates the ability of the states to provide voting to its constituents. The initial mentality surrounding voting when the constitution was drafted limited it to property-owning, taxpaying white males over the age of twenty-one, however, due to various amendments and court decisions, only the age requirement, though loosened, remains as a restriction.[1] As the nation developed and new states became incorporated, the sentiment of the masses shifted to secure voting as one of those unalienable rights that were fought for in the revolutionary war, some states going on to include it in their constitution.[2] Kentucky, the fifteenth state in the nation, was the first, specifically stating in its constitution:

Every citizen of the United States of the age of eighteen years who has resided in "the state one year, and in the county six months, and the precinct in which he offers to vote sixty days next preceding the election, shall be a voter in said precinct…"[3]

While Kentucky took the leap to state the right to vote in its constitution, the nation's own has no similar verbiage. Instead, the matter is left to the states, while the United States Constitution only

[1] Pamela S. Karlan *, "BALLOTS AND BULLETS: THE EXCEPTIONAL HISTORY OF THE RIGHT TO VOTE," University of Cincinnati, 71, 1345 (Summer, 2003). https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4B36-HHB0-00CW-50KG-00000-00&context=1516831.

[2] Morgan Marietta , "The Right to Vote Is Not in the Constitution," The Conversation, December 22, 2021, https://theconversation.com/the-right-to-vote-is-not-in-the-constitution-144531.

[3] KY. Const. §145.

interjects to protect voter eligibility based solely on demographic. This silence serves as the foundation for a pattern of different groups arguing for equal access to voting so they can be included in the decision-making process to determine policies that impact everyone. Constitutional amendments exemplify the progress made and have served to ensure that voting rights cannot be limited based on race, color, prior status as a slave,[4] sex,[5] or age.[6] Yet the amendments never explicitly guarantees that one is allowed to vote. Thus, even though these amendments expand on who is permitted to vote, there is little in the constitution to stop other efforts to prevent votes from being cast. Looking at the demographics of the modern world, few truly remain that meet all the original criteria of a voter, yet their voice is the loudest. The efforts by the rest, to remove subversive policies that curtail their vote, is an ongoing struggle.

The Voting Rights Act (VRA) of 1965 is a major limiting force on voter suppression, targeting states with historically suppressive practices and processes, regarded as the most effective civil rights law in United States history.[7] In 2022, the Supreme Court of the United States was once again faced with a question that could impact the efforts of the VRA to ensure that every citizen has an equal voice in the government. The case of *Merrill v. Milligan* challenges the recent Alabama redistricting plan on the basis of not allowing African Americans to have a viable chance to elect representatives in the state government proportional to their population in the state.[8] As *Merrill* came before the Roberts Court, the strength of the Voting Rights Act of 1965 was once again in danger. With a trend of Supreme Court decisions that have gradually pacified the VRA and removed its enforceability, the decision in *Merrill* may culminate in the next blow to the Voting Rights Act and bring it one step closer to complete dismantlement.

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[4] U.S. Const. amend. XV.
[5] U.S. Const. amend. XIX.
[6] U.S. Const. amend. XXVI.
[7] Gabby Means, "The Latest Threat to the Voting Rights Act: Merrill v. Milligan" LEAGUE OF WOMEN VOTERS (Dec 8, 2022), https://www.lwv.org/blog/latest-threat-voting-rights-act-merrill-v-milligan.
[8] Merrill v. Milligan 595 U. S. ____ (2022).

This article will first look at the history regarding the Voting Rights Act, then an analysis of relevant Supreme Court Cases and the trend of the VRA's dismantlement, a brief background of *Merrill*, before finishing with a projection of the effect of the *Merrill* decision.

II. The Voting Rights Act

The struggle for voting rights can be traced back to the origins of the American Revolution and the concept of "taxation without representation." The main issue of colonial America was that they were being forced to pay for policies in which they had no say and therefore lacked self-determination.[9] This was the beginning of a long battle towards voting rights, starting with a select minority who held the ability to vote and then slowly expanding who had the right to vote over time. The first sign of racial enfranchisement was during the Nineteenth Century, when, following the Civil War, the Fifteenth Amendment was passed, forbidding the denial and abridgement of the right to vote based on race.[10] While the right to vote was guaranteed, the amendment did not protect blacks from various efforts made by the disagreeing majority to pressure or to discount the vote and voice of blacks. Such efforts included violence, voting fraud, racial gerrymandering, suffrage restrictions, and preventing blacks from holding offices, all of which stifled political participation.[11] These efforts remained for the latter half of the Nineteenth Century and the process to rectify such barriers did not begin until the start of the Twentieth Century. In the early 1900s, the NAACP had their first major legal victory, getting Oklahoma's grandfather clause, which allowed white citizens to circumvent reading/writing requirements to vote when they had a grandfather who could vote, therefore disproportionately affected black citizens, declared unconstitutional.[12] These steps to enfranchise black voters culminated in a push for black voter registration in Selma, Alabama, that became the national platform which symbolically represented the black struggle to vote and

[9] Timothy K. Kuhner, The Next American Revolution, 39 W. New Eng. L. Rev. 477 (2017), http://digitalcommons.law.wne.edu/lawreview/vol39/iss4/3.
[10] U.S. Const. amend. XV.
[11] Chandler Davidson. "The voting rights act: A brief history." CONTROVERSIES IN MINORITY VOTING 7 (1992) 10.
[12] Guinn & Beal v. United States, 238 U.S. 347 (1915).

was presented nationwide across various media platforms.[13] A combination of the non-violent method of protestors, the police's sheer brutality, and extensive injuries and casualties led to a shift in public opinion, which allowed President Lyndon B Johnson to present a voting rights bill to Congress. The president instructed his Attorney General to write the "toughest" voting bill possible, and the public sentiment permitted it to pass through Congress with minimal resistance.[14] It was meant to be impervious to all the legal loopholes that had allowed restrictions to pass constitutionality under the Fifteenth Amendment.[15] There are three key sections of importance for this discussion: Section 2, Section 4 and Section 5.

Section 2 of the Voting Rights Act is a restatement of the Fifteenth Amendment. This section utilizes clearer language to allow more breadth in its application during suits brought forward in court. Section 2, subsection A states:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b[16]

The aforementioned section 1973b was added to the Voting Rights Act in an amendment made by Congress in 1982. This amendment mainly set forth the "totality of the circumstances" test, whereby a multitude of factors can be looked upon by the court when determining whether a breach of Section 2 occurred. There is not a particular number of factors that must be proven in order for a breach to be considered.[17] This idea was further expanded upon by the court, developing a 3-prong test to prove that voting dilution, a direct breach of Section 2 of the VRA, occurred. The *Gingles* test requires that the minority be

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[13] Supra note 11, at 15.
[14] Id. at 17.
[15] Id. at 18.
[16] 42 U.S.C. § 1973.
[17] "Section 2 of the Voting Rights Act." The United States Department of Justice, November 8, 2021. https://www.justice.gov/crt/section-2-voting-rights-act#:~:text=Section%202%20of%20the%20Voting%20Rights%20Act%20of%201965%20prohibits,)(2)%20of%20the%20Act.

compact enough to form a single member district and have racial bloc voting of the minority and of the majority populations.[18] It is voting dilution and racial gerrymandering that the respondents of *Merrill* accused the 2021 Alabama redistricting plan of. It is not required to prove that the districts being drawn was the intended result of racial discrimination, only that the effect of voter dilution is present.[19] This judicial stance, however, does not require that states draw lines to maximize the number of majority-minority districts, where the minority group makes up the majority voting population,[20] in fact it states that prioritizing race or utilizing it as the sole basis for designing district lines is also unconstitutional as it violates the Fourteen Amendment.[21]

Section 4 of the Voting Rights Act developed a formula by which states or political subdivisions that have a history of discriminatory voting practices are deemed "covered jurisdictions."[22] These states or political subdivisions are subject to the vast "special provisions" that provide the federal government with the authority to dismantle the various methods of disenfranchisement upon minority populations.[23] In 2013, this section was found by the court to be unconstitutional[24] as it conflicted with the equal sovereignty of all states. Specifically, the "bail-out" offered to northern states to exempt them from failing to meet specific factors indicates prejudicial targeting of ex-Confederate states who were held accountable to the same factors.[25] It is this targeting effect which was determined to conflict with the state's equal sovereignty.

Section 5 of the Voting Rights Act enacted the "preclearance" concept. This section requires that covered jurisdiction receive preclearance

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[18] Thornburg v. Gingles, 478 U.S. 30 (1986).
[19] Tofighbakhsh, Sara. "RACIAL GERRYMANDERING AFTER RUCHO V. COMMON CAUSE</Em>: UNTANGLING RACE AND PARTY." Columbia Law Review 120, no. 7 (2020): 1885–1928. https://www.jstor.org/stable/26958734.
[20] Johnson v. De Grandy, 512 U.S. 997 (1994).
[21] Shaw v. Reno, 509 U.S. 630 (1993).
[22] Richard L Engstrom, The Voting Rights Act: Disfranchisement, Dilution, and Alternative Election Systems, 27 POLIT. SCI. POLIT. 685 (1994).
[23] Supra note 11, at 18.
[24] Shelby County v. Holder, 570 U.S. 529 (2013).
[25] Blacksher, James, and Lani Guinier. "Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote Shelby County v. Holder." Harv. L. & Pol'y Rev. 8 (2014): 43.

from federal courts before enacting any changes to their voting rules and laws.[26] The jurisdiction must prove that the change does not have the purpose nor the effect of abridging the right to vote on account of race or color.[27]

III. Supreme Court Trend of Dismantlement of the VRA

This section will address the contemporary trend of the Supreme Court dismantling the Voting Rights Act, specifically focusing on the analysis of three key cases, the decisions of which directly impact voting rights and the effectiveness of the VRA.

The trend can be noticed based on the challenges brought under the VRA and the results of these cases.[28] A meta-analysis of cases brought under the VRA from 1982 to 2021, a clear correlation is established between voting dilution claims becoming less successful and state voting laws becoming more common, indicating a weakening of the VRA.[29] Three cases that demonstrate this trend are *Shelby County v. Holder* (2013), *Abbott v. Perez* (2018), and *Brnovich v. Democratic National Committee* (2021).

In the case of *Shelby*, a county that had previously been identified as a covered jurisdiction, challenged the constitutionality of Section 4 and the formula.[30] The formula used to determine which political subdivision are "covered jurisdictions" was found to be unconstitutional due to relying on factors and data that were no longer viable as predominating factors in the contemporary voting environment.[31] Such factors include past census data regarding the participation of voting age in the 1964 election as well as the employment of a test or device restricting voting opportunity during

[26] "About Section 5 of the Voting Rights Act." The United States Department of Justice, November 29, 2021. https://www.justice.gov/crt/about-section-5-voting-rights-act.
[27] Id.
[28] Ellen D Katz et al., To Participate and Elect: Section 2 of the Voting Rights Act at 40.
[29] Id.
[30] Supra note 24.
[31] Shelby County v. Holder, Oyez, https://www.oyez.org/cases/2012/12-96 (last visited Feb 15, 2022).

the 1964 election.[32] While the year and election of reference was updated multiple times when the act and section was renewed, the year was not updated past the 1972 election.[33] Since the information utilized in the formula is outdated, the formula had become an unnecessary burden on the power to regulate elections specifically given to the states in the constitution.[34]

This decision is important as it nullifies the "covered jurisdictions" designation, therefore making all the other sections of the VRA, especially Section 5 dealing with preclearance, inapplicable to any political subdivision.[35] This decision did not find that Section 4 was unconstitutional, only that the specific formula by which "covered jurisdictions" was determined was no longer applicable and therefore unconstitutional. Congress is still able to develop a new formula by which "covered jurisdictions" can be found,[36] however, lacking the same bipartisanship that was present during the initial push for the Voting Right Act, it is unlikely that a new formula will ever be agreed upon. This means that Section 5 of the VRA will likely lack enforceability forever.[37]

This decision has had both immediate and long-term consequences. Immediately following the decision in *Shelby*, Texas put into immediate effect a stringent voter identification law,[38] which was later followed by Mississippi and Alabama, passing laws that had been previously block by preclearance.[39] In the long-term, the years after *Shelby* were faced with numerous extensive voter purges in previously

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[32] "Section 4 of the Voting Rights Act." The United States Department of Justice, May 5, 2020. https://www.justice.gov/crt/section-4-voting-rights-act.
[33] Id.
[34] Id.
[35] Michael J. Burns, Shelby County v. Holder and the Voting Rights Act: Getting the Right Answer with the
Wrong Standard, 62 Cath. U. L. Rev. 227 (2013). 235.
[36] Liptak, Adam. "Supreme Court Invalidates Key Part of Voting Rights Act." New York Times, June 25, 2013. https://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html.
[37] Richard L. Engstrom (2014) Shelby County v. Holder and the gutting of federal preclearance of election law changes, Politics, Groups, and Identities, 2:3, 530-548, DOI: 10.1080/21565503.2014.940545.
[38] Supra note 36.
[39] "The Effects of Shelby County v. Holder." Brennan Center for Justice, August 6, 2018. https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder.

"covered jurisdictions" through the use of stringent voting laws that targeted primarily minorities, making them ineligible to vote,[40] as well as broader effects to racial equality. This included the expansion of the wage gap and general erosion of black socioeconomic status.[41] The meta-analysis highlights an increase in the amount of Section 2 voter disenfranchisement challenges brought within jurisdictions previously encompassed by Section 5 preclearance requirement directly following the decision of *Shelby*. The analysis discovered a statistically significant increase in the percentage of failed challenges compared to before the *Shelby* decision.[42] Section 5 in conjunction with Section 2 of the VRA work to protect minority voting rights from discrimination both in a preemptive and reactionary manner.[43] However, because *Shelby* attacked the underlying preconditions in Section 4, the preemptive defense against discriminatory practices is rendered useless.

In *Abbott*, minority group advocate challenged Texas' redistricting plans in 2011, accusing the state legislature of disregarding the impact of minority populations on state population growth, not acting to achieve population equity, and purposefully diluting the vote of minority groups.[44] Some plaintiffs argued that the state failed to create all the majority-minority districts required by Section 2 of the Voting Rights Act.[45]

This decision is important as it shifts the burden of proof in cases regarding Section 2 of the Voting Rights Act and increases the standard to which the burden must be met. More specifically, the court

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[40] Catalina Feder, and Michael G. Miller. "Voter Purges after Shelby." American Politics Research 48, no. 6 (2020): 687–92. https://doi.org/10.1177/1532673x20916426.
[41] Aneja, Abhay P., and Carlos F. Avenancio-León. "Disenfranchisement and Economic Inequality: Downstream Effects of Shelby County v. Holder." AEA Papers and Proceedings 109 (2019): 161–65. https://doi.org/10.1257/pandp.20191085.
[42] Katz et al., supra note 28.
[43] Chang, Ailsa, Ashley Brown, and Alejandra Marquez Janse. "The Right to Vote: The Impact of Shelby County v. Holder on Voting Rights." NPR. NPR, July 13, 2021. https://www.npr.org/2021/07/13/1015754818/the-right-to-vote-the-impact-of-shelby-county-v-holder-on-voting-rights.
[44] Abbott v. Perez, 585 U.S. ___ (2018).
[45] "Abbott v. Perez." Brennan Center for Justice, August 2, 2019. https://www.brennancenter.org/our-work/court-cases/abbott-v-perez.

found that there was a lack of presumption of good faith which must be offered to the state legislature. This means that the plaintiff must prove that the state acted with discriminatory intent and failed to follow the proper factors when drawing district line.[46] The court acknowledged the vast amount of complex factors which must be taken into consideration when redrawing district lines, and therefore, when examining a challenge to a districting plan, the good faith of the legislature must be assumed.[47]

The consequences of this case are a more indirect attack of Section 2 of the VRA in that it raises the bar that potential plaintiffs have to meet in order for a breach to be determined. This decision makes it harder for any minority to assert that there has been a breach of Section 2 by raising the standard for burden of proof. First and foremost, it clearly puts the burden on the plaintiff[48] so instead of the state proving that they did not act in a discriminatory manner, the plaintiff must prove that there is clear racial discrimination. Along the lines of the presumed good faith, the evidence must be "clear and convincing."[49] The clear and convincing standard requires the individual with the burden, in this case the plaintiff, to have "an abiding conviction that the truth of its factual contentions are highly probable."[50] This court has in the past stated that there is an aversion to finding contrary to good faith, therefore requiring that it would take indisputable proof in order to overcome good faith.[51] The real difficulty comes from the fact that in order to overcome good faith, the accused must be proven to act with discrimination based on race, religion or other arbitrary factors,[52] which is subjective. This subjective mindset must then be proven to the clear and convincing standard, which is extremely difficult to prove with irrefutable evidence.[53] There is added difficulty when applying this line of reasoning to redistricting cases as the legislature

[46] Abbott v. Perez, Oyez, https://www.oyez.org/cases/2017/17-586 (last visited Feb 15, 2022).
[47] Supra note 44.
[48] Aaron J. Horner, How Difficult Is it to Challenge Lines on a Map?: Understanding the Boundaries of Good Faith in Abbott v. Perez, 72 Baylor L. Rev. 370 (2020).
[49] Id.
[50] Colorado v. New Mexico, 467 U.S. 310, 316 (1984).
[51] Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239 (Fed. Cir. 2002).
[52] United States v. Armstrong, 517 U.S. 456, 464 (1996).
[53] Wood v. Strickland, 420 U.S. 308, 319–22 (1975).

must follow an extensive list of factors when considering drawing district lines that are complex enough to entitle good faith,[54] which would mean that it would need to be proven that race was prioritized over the entire list. While the decision in this case did not invalidate Section 2, it makes it harder for such a breach to be proven, therefore weakening the reactive defense to discriminatory voting practices.

In the case of *Brnovich v. Democratic National Committee*, a 2016 voting procedure legislation in Arizona was challenged under Section 2 of the Voting Rights Act for being enacted with discriminatory intent.[55] House Bill 2023 criminalized the collection and delivery of another person's ballot, which the DNC believed to be targeting minorities which utilized third parties to collect and drop off voted ballots.[56] The Supreme Court found that the voting restriction was not in violation of Section 2 of the Voting Rights Act as it did not apply.[57]

This decision is important as it changed the judicial procedure surrounding cases dealing with Section 2 of the Voting Rights Act. While explicitly stating that the court is not creating a test to determine Section 2 applicability, the opinion of the court established a persuasive 5-tenet guideline for analysis on the lower level.[58] These guidelines utilize factors that have not been historically or traditionally considered when examining Section 2 issues[59] and also provides weight to some factors over others when the court is faced with the "totality of the circumstances."[60] For instance, the 5th guidepost, "the strength of the state's interest"[61] – was weighed as extremely important in analysis, while overlooking, as noted in Justice Kagan's

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[54] Supra note 46.
[55] Brnovich v. Democratic National Committee, 594 U.S. ___ (2021).
[56] Brnovich v. Democratic National Committee, Oyez, https://www.oyez.org/cases/2020/19-1257 (last visited Feb 16, 2022).
[57] Supra note 55.
[58] Id.
[59] Goitein, Elizabeth, Theodore R. Johnson, Michael Waldman, Michael Li, Harsha Panduranga, and Carlton Miller. "Brnovich v. Democratic National Committee." Brennan Center for Justice, Feb 15, 2022. https://www.brennancenter.org/our-work/court-cases/brnovich-v-democratic-national-committee.
[60] "Brnovich: A Significant Blow to Our Freedom to Vote." Brnovich: A Significant Blow to Our Freedom to Vote | League of Women Voters, Sep 2, 2021. https://www.lwv.org/blog/brnovich-significant-blow-our-freedom-vote.
[61] Supra, note 55.

dissent,[62] the third guidepost about disparities in impact to different minorities.[63]

The use of new factors in addition to what is already required to prove a Section 2 violation does not eliminate the Section as a viable challenge to discriminatory voting regulations but makes it more difficult to utilize. The court decision set a higher standard to which the challenges needs to be proven, drastically impeding on Section 2 strength and effectiveness.[64] More directly, since the Supreme Court did not find discriminatory intent in a statute that has a statistical impact on minorities in a negative way, it gives a pass to other states to enact more restrictive voter laws that could disparately affect minorities, even if not directly targeting minority populations.[65] Since *Brnovich* is still a relatively recent case, any sustained long term effects are yet to be seen. However, it seems likely to follow the trend of *Abbott* and *Shelby* by decreasing federal intervention in state voting legislation, allowing for discriminatory voting practices to reemerge.

IV. *Merrill v. Milligan*

The main contention of the issue brought forward in the *Merrill v. Milligan* suit is whether the Alabama districting lines employ voting dilution in violation of Section 2 of the Voting Rights Act.[66] Of the seven congressional districts in Alabama, which have remained generally constant since the redistricting effort of 1992, only one district has the capability to elect a minority representative, despite the minority population percentage in the state being approximately 27%.[67] The dilution occurs through subtle gerrymandering so that the districts are viable yet do not permit African American populations to have a large enough representation in the district to elect their desired representative by being spread between districts. Multiple lawsuits were brought forward challenging the 2021 redistricting plan stating

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[62] Id.
[63] Supra, note 60.
[64] Supra, note 59.
[65] Supra, note 60.
[66] Supra note 8.
[67] Ian Millhiser, "A New Supreme Court Case Could Make It Nearly Impossible to Stop Racial Gerrymanders," Vox (Vox, Feb 1, 2022), https://www.vox.com/2022/2/1/22910909/supreme-court-racial-gerrymander-alabama-merrill-singleton-milligan.

that Section 2 of the Voting Rights Act requires there to be two congressional districts with a black majority population. The U.S. District Court for the Northern District of Alabama filed an injunction barring the state from utilizing its 2021 redistricting plan in any congressional election and granted the state legislature fourteen days to develop a remedial plan containing two congressional districts with a black majority population.[68] The state filed an application for a stay of the injunction pending an appeal preventing the federal appeals court's decision from being enforced prior to a Supreme Court final decision. The stay pending an appeal was granted by the Supreme Court on February 7, 2022.[69] The case is currently under review and is now under the name *Allen v. Milligan* due to a change in the Alabama Secretary of State.

V. The Effect of *Merrill v. Milligan*

There will be a two-fold effect of *Merrill*. First, the refusal of finding a clear violation of Section 2 of the VRA gives rise to a future court decision that will thoroughly remove the bulk of racial gerrymandering protection in the VRA. Second, the use of *Purcell v. Gonzalez*[70] as justification to permit the implementation of the challenged Alabama districting plan sets a dangerous precedent that could stifle the evolution of voting legislation.

It was clear that the redistricting plan of Alabama was meant to dilute the votes of the black minority, specifically by not acknowledging their population growth and therefore their owed respective representation. Within the population of Alabama, black Americans make up approximately 27% of the population, yet translated to congressional representation, only receive 14%.[71] The redistricting plan maintains this level of congressional representation, squishing the majority of the black population into one district that stretches down the middle of the state to include two of Alabama's biggest cities, and then distributing the rest through the remaining 6 districts.[72] This

[68] Supra note 8.
[69] Id.
[70] Purcell v. Gonzalez, 549 U.S. 1 (2006).
[71] Supra note 67.
[72] Stern, Mark Joseph. "Scotus Just Blew up the Voting Rights Act's Ban on Racial Gerrymandering." Slate Magazine. Slate, Feb 8, 2022. https://slate.com/news-and-

districting plan, when challenged and brought before a three judge panel, including two conservative Trump appointees, was found to be overtly racial gerrymandering.[73]

The argument presented by the Alabama government, which swayed the Supreme Court enough to overlook the blatant racial gerrymandering, does not bode well for the remaining protections in Section 2 of the VRA. Two key ideas are particularly dangerous to the voting rights of minority populations. First, Alabama asserts, based off of Justice Thomas's claim in a previous case, that minorities in a properly constructed district, no matter how convoluted, have their vote duly counted, it is simply that they cannot control their elected posts, where the less popular candidate is not elected.[74] This statement was made in a concurring opinion, so while non-binding, serves as the basis for Alabama's argument and is a danger to voting rights of minorities. This stance makes it so that absent clear gerrymandering, racial disproportions in congressional representation is not due to discriminatory practices but instead the inability of a minority candidate to garner enough support in the area which they represent. This stance would serve to remove any obligation to ensure equal representation in politics as the minority vote is still cast and heard, only that it failed to achieve the desired goal.

The premise also serves as the foundation of the second dangerous idea in Alabama's argument, a proposition of a new rule that would pacify all attempts of plaintiffs to assert racial gerrymandering has occurred. The basis of the plaintiff's argument is that it is possible for there to be two congressional districts that follow standard district line drawing procedures that have two majority-minority populations, as required by the Supreme Court in *Cooper v. Harris*.[75] However, this was done by inputting race as a factor when drawing the district lines. The new rule Alabama proposes, based on Justice Thomas' premise, is that race should be completely discounted from all district line

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politics/2022/02/supreme-court-alabama-racial-gerrymander-roberts-kavanaugh.html.

[73] Millhiser, Ian. "The Supreme Court's Newest Attack on Voting Rights, Explained." Vox. Vox, Feb 8, 2022. https://www.vox.com/2022/2/8/22922774/supreme-court-merrill-milligan-alabama-brett-kavanaugh-racial-gerrymandering-voting-rights-act.

[74] Holder v. Hall 512 U.S. 874 (1994).

[75] Cooper v. Harris 137 S.Ct. 1455 (2017).

drawing efforts.[76] Alabama accused the plaintiffs of prioritizing racial factors above other race-neutral factors which normally are considered during the district line drawing process.[77] This would damage any case where a plaintiff tries to assert racial gerrymandering exists, as it would leave them unable to achieve the requested goal under *Cooper* of proving that such districts can exist as racial districts cannot be proven without looking at race as a factor. On top of that, if it was confirmed that of the many proposed potential district maps found by algorithms, some meet the racial profile required for equal representation in congress, the sheer quantity of alternative plans without race would detract from the weight of importance of the racial plan. The plan that factors race is unimportant compared to extensive alternative options when the only distinction is race.

The use of *Purcell v. Gonzalez* to justify the removal of the injunction in *Merrill* sets a dangerous precedent that if adopted as rule, would undermine not just the Voting Rights Act but the judicial system's ability to regulate voting rights in general, too. The Supreme Court in *Purcell* warns that the Court should avoid making orders that impact elections as the elections draw closer due to the risk of voter confusion and the consequential incentive to not vote.[78] As the time since *Purcell* increased, the more conservative Supreme Court utilized the warning equal to precedent and cited it as reasoning for halting lower court orders that would have made it easier for elections to occur during the COVID-19 pandemic.[79] While this justification is made within a concurring opinion to *Merrill*, it is made by Justice Kavanaugh, who holds the median ideological seat in the current Supreme Court, making him the swing decision and giving his voice slightly more power.[80] This does not guarantee but gives the potential for the *Purcell* warning to become binding rule.

The dangerous part of the *Purcell* application is the length of time between the decision and the actual election. Notably, the decision occurred in early February with the election taking place in November,

[76] Supra note 8.
[77] Id.
[78] Supra note 70.
[79] Supra note 73.
[80] Id.

a sixth-month difference.[81] Even the closest primary is approximately three months from the decision, and the original plan was introduced almost a full year prior, making the line for what is considered too proximal to an election extremely broad and far-reaching.[82] Should not only the *Purcell* application be put into rule, but also Kavanaugh's interpretation of *Purcell* be accepted, then it would make any challenge to a new state election legislation wait until at least one election cycle has taken place.[83] This would effectively remove any strength that the court has to strike down discriminatory voting legislation prior to its enactment, waiting until the damage is done before taking action.

VI. Conclusion

Within the past decade, there has been a new surge in voter regulation, or in fact federal voting deregulation that some are ascribing to be a wave of voter suppression.[84] This trend shows the Supreme Court periodically diminishes the effectiveness of the Voting Rights Act of 1965 by either stripping the authority of Congress to enact certain provisions, as in the case of *Shelby*, or by raising the burden of proof put on the plaintiff to prove a violation of the other provisions, as in the case of *Abbott* and *Brnovich*. *Merrill v. Milligan* is simply the next court case in this trend of both subtle and overt dismantling of the Voting Rights Act and the pacifying of federal protections for minority voting rights.

While *Merrill* has yet to be decided on its merits in the Supreme Court, their reluctance to use the interpretive methods used in recent antidiscrimination cases, alongside recent sentiments against the disparate impact theory of discrimination, stating that discrimination

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[81] Supra note 8.

[82] Steve Vladeck. "Brett Kavanaugh's Defense of the Shadow Docket Is Alarming." Slate Magazine. Slate, February 8, 2022. https://slate.com/news-and-politics/2022/02/the-supreme-courts-shadow-docket-rulings-keep-getting-worse.html.

[83] Elie Mystal. "No Attack on Voting Rights Is Too Racist for This Supreme Court." The Nation, February 11, 2022. https://www.thenation.com/article/society/supreme-court-alabama-voting/.

[84] Jeffrey Rosen, Richard L Hasen, and Ilya Shapiro. Brnovich v. DNC, the Supreme Court, and Voting Rights. Other. Interactive Constitution. National Constitution Center, July 8, 2021. https://constitutioncenter.org/interactive-constitution/podcast/brnovich-v-dnc-the-supreme-court-and-voting-rights.

exists when there is effect without intent, acts to predict how the Court will approach similar future critical antidiscrimination statutes with equal hostility.[85] As of June 2022, there has already been an application of the similar *Purcell* reasoning to keep another redistricting plan that the lower court has deemed blatant voter dilution in Louisiana despite the length of time until the next election.[86] The disparate application of *Purcell*, however, is even more alarming. Taking a more partisan application, the court summarily reversed the Wisconsin Supreme Court's ruling requiring district lines to be redrawn to include another majority black district. [87] This decision occurred only two months following that of *Merrill,* and yet the decision is absent of any mention of *Purcell*, providing a deadline for the reversal so that it can be implemented prior to the upcoming election.[88]

The Voting Rights Act is not the only method of fighting discrimination that challengers have, with another tool being the Fourteenth Amendment, which was brought into question under one of the consolidated cases beneath *Merrill*. The Supreme Court, following this trend, did address the Fourteen Amendment and weaken its application to voting regulation in the case of *Crawford v. Marion County Election Board*.[89] Further analysis needs to be done to examine to what extent recent Fourteenth Amendment cases fit into this trend of federal voting deregulation.

This trend also shows an increasingly hands-off approach that mirrors a more conservative ideological stance, and this *laissez faire* position from the federal government has allowed for more restrictive voting regulation on the state's end. Some ascribe this regulation as being directed towards those who are likely to vote for Democrats,[90] which matches Justice Alito's sentiment in his *Abbott* opinion and reiterated

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[85] "Brnovich v. Democratic National Committee." 135 Harv. L. Rev. 481 (November 10, 2021): 481–90.
[86] Erwin Chemerinsky, Making it Harder to Challenge Election Districting, 1 VOTING RIGHTS DEMOCR. FORUM 13 (2022).
[87] Carolyn Shapiro, The Limits of Procedure: Litigating Voting Rights in the Face of a Hostile Supreme Court, SSRN ELECTRON. J. (2022), https://www.ssrn.com/abstract=4188054 (last visited Feb 20, 2023).
[88] Id.
[89] Crawford v. Marion County Election Bd., 553 U.S. 181 (2008).
[90] Supra note 84.

in his *Brnovich* opinion, delineating between partisan and discriminatory intent.[91] Alito also notes how sometimes racially polarized bloc voting can blur the lines, but they do not elicit the same protections and responses.[92] Further research must be done to examine the disparate impacts on minorities, both in voting rights and other aspects of society, that remain under the façade of partisan legislation.

While the Voting Rights Act was aimed towards racial discrimination in voting, Justice Alito made it clear: voting regulation is a partisan issue and not a racial issue, no matter the impact. This means that the solution to the downfall of the VRA lies not in safeguarding racial challenges to discriminatory regulations, but instead with safeguarding voting rights as a general principle. With this pressing issue, all is not yet lost; steps towards a solution are possible on both the state and federal levels. With the trend focusing on lessening federal regulation on the state's ability to manage elections and the ability to vote, states have an important role in saving voting rights. State legislatures must begin passing laws that do the opposite of the challenged regulations: statutes that expand voting rights and strengthen the election process.[93] This is not a partisan issue either, as states can follow the lead of traditionally red states such as Kentucky and Nevada to pass similar bills. Both states have recently expanded the voting process to minorities like Native American and disabled citizens[94] while securing the elections from fraud,[95] one of the chief concerns expressed within the Supreme Court cases as the state's interest. Additionally, reform efforts for voting from the past could have a place in modern society. By changing the state district system to include multi-seat districts, and then shifting to either cumulative or limited voting systems,

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[91] Supra note 56.
[92] Id.
[93] Jocelyn Benson, Joanna Lydgate, and Christine Todd Whitman. "Congress Failed to Pass Voting Rights Legislation but We Can Still Save Our Democracy." TheHill. The Hill, Feb 14, 2022. https://thehill.com/opinion/civil-rights/594123-congress-failed-to-pass-voting-rights-legislation-but-we-can-still-save.
[94] Jackie Valley. "Sisolak Celebrates Bills That Expand Voting Access during Ceremonial Signing." The Nevada Independent. The Nevada Independent, Jun 11, 2021. https://thenevadaindependent.com/article/sisolak-celebrates-bills-that-expand-voting-access-during-ceremonial-signing.
[95] Snyder, Alec. "Kentucky Gov. Beshear Signs into Law Bipartisan Elections Bill Expanding Voting Access." CNN. Cable News Network, Apr 8, 2021. https://www.cnn.com/2021/04/07/politics/kentucky-voting-bill-signed-beshear/index.html.

minority groups would have a higher likelihood of electing representatives that are proportional to their population in spite of efforts to dilute their voices.[96] These voting systems would allow for individuals to cast numerous votes (less than the amount of seats in the district) for different candidates, or cast multiple votes in favor of one candidate, providing strength to the vote in spite of gerrymandering.[97] More investigation needs to be done into these alternative voting systems, as there are still potential problems that can prevent the desired outcome, such as vote splitting, as well as considerations of how the system will mesh with constitutional values.[98]

On a federal level, a new wave of reforms is needed, standardizing and protecting key elements of voting rights. There was a potential bill up for a vote in early 2022, the "Freedom to Vote: John R. Lewis Act," that would have made Election Day a federal holiday and standardized both mail-in ballots and voting-ID rules, superseding many state effects to enact these discriminatory voting regulations.[99] While this act did end up getting voted down in the Senate,[100] it serves as an extreme example for what needs to be done. Reforms, maybe not in the all-at-once nature like the John Lewis Act, but one step at a time, allowing for compromise, will move us towards the safeguarding the citizen aspect of voting rights. Reforms can also be targeted from a top-down approach by standardizing and enforcing legal protections on finalizing procedures for elections, such as the Electoral Count Act, which would safeguard the government's obligation to voting rights.[101] The Supreme Court may ensure that the Voting Right Act of

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[96] Engstrom, supra note 22.
[97] Limited Voting, Cumulative Voting and Choice Voting: A Comparison of Three Alternative Voting Systems (no date) Limited voting, cumulative voting and choice voting: CVD Factbook. Available at: http://archive.fairvote.org/factshts/comparis.htm (Accessed: Mar 1, 2023).
[98] Id.
[99] Panetta, Grace. "What's in the Major Voting Rights Bill That Senate Republicans Voted to Block." Business Insider. Business Insider, Jan 20, 2022. https://www.businessinsider.com/freedom-to-vote-act-john-lewis-voting-rights-bill-explainer-2022-1.
[100] Beauchamp, Zack. "Democrats' Voting Rights Push in Congress Is over. the Fight for Democracy Isn't." Vox. Vox, Jan 20, 2022. https://www.vox.com/policy-and-politics/22876361/freedom-to-vote-act-senate-filibuster-what-next.
[101] Id.

1965 is doomed, but it is still possible to fight discriminatory voting practices and safeguard voting rights for all.

SECTION 230 REFORM: A WORK IN PROGRESS

Rishteen Halim

Introduction

Section 230 of the Communications Decency Act (herein referred to as Section 230) has often been hailed as the statute that created the Internet we know today and for providing greater free speech rights than the First Amendment.[1] Section 230 protects platforms and websites from being held liable for harmful or illegal user-generated content.[2] Courts have regularly interpreted Section 230 as providing websites with broad immunity, making them practically untouchable when faced with lawsuits.[3] However, in recent years, there has been a rise in debate surrounding this statute and calls for legal reform due to the harmful behaviors and speech it allows on the Internet. Many argue that reforming Section 230 and limiting the immunity it provides would result in violations of the First Amendment,[4] while others see the reform as necessary to protect online privacy and public safety.[5]

These arguments raise important questions regarding Section 230: Why do the Courts interpret its immunity shield to be so broad? Is it meant more to protect websites or to protect Internet users? Does it offer Big Tech companies too much protection? Would any of the proposed reforms actually be beneficial to users, or could they possibly backfire on them and be too limiting on their freedom of speech?

The purpose of this Article is to address these types of questions by showing that reforming Section 230 and imposing liability on websites in certain circumstances could constitutionally limit harmful content and hate speech without obstructing other forms of free speech. Section II provides necessary background and past court interpretations of Section 230. Section III will

[1] *E.g.,* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019).
[2] See 47 U.S.C. § 230(c)(1).
[3] *E.g.*, Zeran v. AOL, Inc., 129 F.3d 327, 330 (4th Cir. 1997) ("By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.").
[4] Jonathan Turley, *Harm and Hegemony: The Decline of Free Speech in the United States*, 45 Harv. J.L. & Pub. Pol'y 571 (2022).
[5] Nancy S. Kim, *Website Design and Liability,* 52 Jurimetrics J. 383 (2012).

look at commonly proposed reforms, such as certain immunity exemptions, and analyze whether they could be constitutionally effective. Lastly, Section IV will discuss specific examples of legislation currently being drafted and ongoing cases that could potentially change Section 230 as we know it, while analyzing the effectiveness and constitutionality of their possible outcomes.

Background

The Purpose of Section 230 and Its Immunity Shield

Section 230 was enacted by Congress on February 8,1996 in response to the rapid development and increased use of the Internet. It set out clear purposes including to promote continued development of the Internet and technologies, and "to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer."[6]

The driving force behind the passage of Section 230 was the case, *Stratton Oakmont, Inc. v. Prodigy Services Co.*[7], in which the New York Supreme Court held that online service providers could be held liable for user-generated content. The Court considered Prodigy a publisher on the basis that it exercised editorial control over the messages posted to its bulletin boards.[8] This meant that any website that tried to regulate its content in any way, even just by having community guidelines, would be liable for any content posted by users.

The decision in *Stratton* caused great controversy among early proponents of Internet free speech for the crushing liability it inflicted on service providers. In response to this backlash, Section 230 was enacted less than a year later. Because of its origins, it is clear that Section 230 – specifically the "Good Samaritan" protection – is meant to mainly protect service providers rather than users, although it does apply to both.

The most cited part of Section 230 is the "Good Samaritan" protection, which provides that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by

[6] *See* 47 U.S.C. § 230(b)
[7] Stratton Oakmont v. Prodigy Servs. Co., 23 Misc. 1794 (N.Y. Sup. Ct. 1995).
[8] *Id.*

another information content provider."[9] This is the immunity shield often utilized by Big Tech companies that makes them immune to nearly any lawsuit. As described by Chief Judge Wilkinson in *Zeran v. AOL*, the first federal case to interpret Section 230: "By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."[10]

Judicial Interpretations of Section 230

There have been many cases involving Section 230, most being lawsuits brought against Big Tech companies but to no avail due to the "Good Samaritan" protection. However, this section will focus on just a couple of the most important cases that defined Section 230.
Zeran v. AOL.

Zeran v. AOL was the first federal court of appeals decision to interpret the scope of Section 230's immunity shield. Kenneth Zeran sued AOL for false advertisements that were posted to the website using his information, arguing that AOL unreasonably delayed removal of the defamatory messages posted by a third party and failed to screen for similar defamatory posts thereafter.[11] The U.S. Fourth Circuit Court of Appeals ruled that AOL was not liable for the false advertisements under Section 230, as Section 230's "Good Samaritan" protection provides broad immunity to websites from libel suits.[12] This interpretation has since been largely adopted by other federal courts of appeals, making *Zeran v. AOL* the most important case in relation to Section 230.
The Court interpreted Section 230's immunity shield so broadly because of the statute's plain language.[13] Section 230 was intended to be broad to protect Internet service providers from libel claims while still moderating their websites. This immunity shield, however, protects both good and bad actors. It has also allowed for the rise of Big Tech companies who are immune to virtually any lawsuit arising from content on their platforms. The inability to hold Internet service providers liable paired with little to no

[9] *See* 47 U.S.C. § 230(c)(1)
[10] Zeran v. AOL, Inc., 129 F.3d 327, 330 (4th Cir. 1997).
[11] *Id*. at 328.
[12] *Id*. at 330.
[13] Zeran v. AOL, Inc., 129 F.3d 327, 330 (4th Cir. 1997) ("By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.")

incentive for them to properly moderate harmful content posted to their websites has caused more harm to users and provided too much protection for Internet service providers and Big Tech companies.

Fair Housing Council of San Fernando Valley v. Roommates.com

The first case to set restrictions on Section 230 was heard by the Ninth Circuit Court of Appeals in *Fair Housing Council of San Fernando Valley v. Roommates.com*.[14] Roommates.com, a website designed to assist individuals in finding prospective roommates, required new users to fill out a questionnaire that included user's personal preferences regarding a roommate's age, gender, sexual orientation, and number of children.[15] These answers would be publicly displayed in users' profiles for other users to search through.[16]

The Fair Housing Council argued that Roommates.com had violated the Fair Housing Act (FHA), which prohibits advertisements for sales or rentals of dwellings that indicate any discrimination based on certain characteristics, including sex and familial status.[17] Roommates.com argued in defense that the content displayed in the users' profiles was user-generated content, hence Section 230 would bar any liability.[18] The Ninth Circuit rejected this argument, reasoning that Roommates.com, not its users, created the questionnaire.[19] The Court held that "a website helps to develop unlawful content … if it contributes materially to the alleged illegality of the conduct."[20]

However, this case was later revisited due to confusion as to whether the FHA could be applied to roommate selection.[21] The Ninth Circuit ultimately found that the FHA does not apply to roommate selection, therefore, it is not unlawful to use discrimination in selecting a roommate.[22] Hence, Roommates.com's discriminatory roommate searches actually did not violate the FHA, and Roommates.com was not liable for unlawful content.

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[14] Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).
[15] *Id.* at 1161.
[16] *Id.* at 1162.
[17] *Id.*
[18] *Id.* at 1166.
[19] *Id.* at 1165.
[20] *Id.* at 1168.
[21] Fair Hous. Council v. Roommates.com, LLC, 666 F.3d 1216 (9th Cir. 2012).
[22] *Id.* at 1222.

Although Roommates.com was ultimately not held liable for the discriminatory content, the holding of the Court regarding Section 230[23] still stands. A website could be treated as a publisher and held liable for unlawful content if it is involved beyond just hosting user-generated content. While this restriction on Section 230 is definitely important, it still allows websites full immunity as long as they do not *directly* contribute to unlawful content. For example, a website could be aware of unlawful content on its platform but choose not to take combative measures against the unlawful content, even when they have the authority to do so. A website's inaction contributes heavily to the flourishment of harmful content online, yet they face no repercussions for it. It seems that Section 230 allows a few too many loopholes that offer Big Tech companies too much protection, which ultimately ends up being harmful to users as websites have no obligation to protect them.

III. Proposed Reforms

Proponents of Section 230 reform argue that the reform is necessary in order to protect Internet users from harmful content online and protect users' privacy. But with how broad the protections of Section 230 are, the immunity shield makes it virtually impossible to force Internet service providers to do something about the harmful content on their platforms.

Now, with an understanding of just how broad the immunity shield of Section 230 is, what are some of the most commonly proposed methods of reforming it? The Department of Justice has identified four general categories of potential Section 230 reforms: (1) incentivizing online platforms to address illicit content, (2) clarifying federal government civil enforcement capabilities, (3) promoting competition, and (4) promoting open discourse and greater transparency.[24] The goal of these reforms is to more fully and clearly meet the objectives set out in Section 230 by incentivizing online platforms to police content responsibly while still encouraging an open and competitive online environment.[25] Rather than having the broad

[23] Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1168 (9th Cir. 2008) (holding that "a website helps to develop unlawful content … if it contributes materially to the alleged illegality of the conduct.")
[24] U.S. DEP'T OF JUST., SECTION 230 – NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY? 3 (2020).
[25] *Id*.

immunity previously interpreted by the Courts, online platforms will instead have to meet certain standards to be granted immunity, and the immunity will be conditional with certain exemptions in specific types of cases.

Incentivizing Online Platforms to Address Illicit Content

This category of Section 230 reforms proposes incentivizing platforms to address illicit content on their sites, while still providing these platforms with immunity.[26] To do this, the Department of Justice has established three potential exceptions to Section 230's immunity shield.

The first exception is the "Bad Samaritan Carve-Out."[27] This would emphasize Section 230's goal to protect *responsible* platforms by denying immunity to those that purposefully facilitate or solicit criminal content or activity by a third-party.[28] Rather than only moderating criminal content or activity, this could be taken a step further to also include addressing harmful behaviors, such as bullying and harassment, in very serious cases. Even though online platform operators are in the best position to prevent and deter harmful content and activity on their sites, they often lack incentive to do so because of the broad immunity for user-generated content provided by Section 230.[29] The conditional immunity of the proposed "Bad Samaritan Carve-Out" puts more obligation onto the platforms to conform to federal standards, forcing them to address illicit and harmful content, while still being granted immunity for the content itself as long as the platform moderates the content responsibly.

Another exemption from immunity that the Department proposes is cases involving child abuse, terrorism, and cyber-stalking.[30] Again, this exemption would encourage online platform operators to be more vigilant in monitoring the content on their sites. These "Carve-Outs for Child Abuse, Terrorism, and Cyber-Stalking" would also enable victims to seek civil redress without the Section 230 immunity shield blocking them.[31] This could be especially beneficial in combination with a takedown policy, which would require that

[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] Kim *supra* note 4, at 388.
[30] U.S. DEP'T OF JUST., *supra* note 23.
[31] *Id.*

nude photos that have been posted without the consent of the pictured individual (e.g., revenge porn) be removed upon their request.[32]

Lastly, the Department supports "Case-Specific Carve-Outs for Actual Knowledge or Court Judgments."[33] This proposes that Section 230 immunity would not apply to cases where a platform knew that the third-party content at issue violated federal criminal law or where the platform was issued a court judgment that the content is unlawful.[34] The platform must demonstrate a respect for public safety by ensuring it is able to identify unlawful content, and by also assisting government authorities to obtain content, if needed.[35]

Section 230 generally establishes that a website cannot be held liable for any user-generated content unless the website contributes materially to the content. For example, in *Jane Doe v. Facebook Inc.*, 15-year-old Jane Doe was lured by an adult, male sexual predator through Facebook, who raped, beat, and trafficked her for sex.[36] The Texas court held that Doe's claims against Facebook were barred by Section 230's immunity shield, even though Facebook knows that its system allows sex traffickers to identify and lure victims, yet has not taken any steps to mitigate the issue.[37]

But the Department's proposed reforms restrict websites' immunity if they contribute to illicit content on their platforms, as well as restrict immunity in specific cases. In the case of *Jane Doe v. Facebook Inc*., Facebook would not have been granted Section 230's immunity as the case involves child abuse ("Carve-Outs for Child Abuse, Terrorism, and Cyber-Stalking"), and Facebook's system arguably facilitated the illicit content and activity ("Bad Samaritan Carve-Out"). Facebook was also knowledgeable of sex traffickers taking advantage of its system to lure victims but did not take any presentative actions ("Case-Specific Carve-Outs for Actual Knowledge of Court Judgments").
While this category of Section 230 reforms would incentivize platforms to moderate user-generated content more thoroughly, the moderation would be limited to only the specific types of content, such as criminal content and

[32] Kim *supra* note 4, at 408.
[33] U.S. DEP'T OF JUST., *supra* note 23.
[34] *Id.*
[35] *Id.* at 15.
[36] Doe v. Facebook, Inc., 142 S. Ct. 1087 (U.S. 2022).
[37] *Id*. at 1088.

activity, child abuse, and terrorism. Users' speech would only be limited by this proposed reform if they were posting one of the specific forms of illicit content mentioned, so an increase in content moderation would not violate their First Amendment rights or obstruct free speech.

Clarifying Federal Government Civil Enforcement Capabilities

The second category of Section 230 reforms seeks to amend the immunity as it applies to the federal government. The Department argues that Section 230 immunity should not apply in any case brought by the federal government, criminal or civil.[38]
Because Section 230's immunity shield is so broad and makes Big Tech companies virtually invincible to lawsuits, there is a rational fear that that much power could put Big Tech companies almost on the same level or above the federal government. This reform would strip immunity in cases brought by the federal government, as the federal government needs to be able to act on behalf of the country as a whole and ensure public safety in online spaces as well, which Section 230, as it stands now, actively prevents them from doing.

Again, this is meant to mainly restrict and impose more liability on websites, although it does apply to users as well. However, like the previously mentioned Carve-Outs proposed by the Department, this reform would not restrict users' free speech unless they are involved in a federal case for violating any federal civil or criminal law. With these reforms, users basically have to be criminals, or nearly criminals, to have their content censored or their access to an online platform restricted.

Promoting Competition

In order to promote competition, the Department proposes that federal antitrust claims should not be covered by Section 230 immunity.[39] Allowing Big Tech companies this immunity would make little sense since liability is based on harm to competition, not on third-party speech.[40] This could also be helpful to users who want safer online spaces, or whose speech has been

[38] *Id.* at 19.
[39] *Id.* at 4.
[40] *Id.*

banned or restricted by Big Tech platforms.[41] Promotion of competition will open up new avenues for users by allowing more businesses to compete against these platforms.

The purpose of this reform is to reinstate one of Section 230's original purposes and expand the Internet further by promoting competition and growth of new platforms. For example, rather than just the few Big Tech companies that control most online spaces, this reform would allow for smaller platforms to build their business and compete with the Big Tech companies. Again, promoting competition and taking away Section 230 immunity for federal antitrust claims would mostly affect Big Tech companies rather than users. Though, the increase in safe online spaces would actually be beneficial to users and allow greater free speech, especially for some who have been banned or restricted on other platforms owned by Big Tech companies.

Promoting Open Discourse and Greater Transparency

This category of reforms consists of ways to clarify the text of Section 230 and reinstate its original purpose to promote free and open discourse online and greater transparency between platforms and users.[42]

This would involve replacing vague terminology and focusing the broad immunity shield for content moderation decisions on reducing content harmful to children.[43] In turn, however, a platform's ability to remove content for other reasons will be more limited, especially if the content removal is arbitrary or inconsistent with its terms of service,[44] in order to protect users' free speech from being unconstitutionally censored.

The Department also proposes providing a statutory definition of "good faith" to prevent platforms from wrongfully censoring content and restricting users' access.[45] Having a statutory definition will require platforms to state plainly the criteria in its content-moderation practices, and any censorship or restrictions will need to fall within that criteria.[46] This will help to promote

[41] *Id.* at 20.
[42] *Id.* at 4.
[43] *Id.* at 4.
[44] *Id.* at 4.
[45] *Id.* at 22.
[46] *Id.* at 22.

transparency between platforms and users in order to both protect users' free speech and encourage platforms to be accountable instead of hiding behind Section 230's immunity shield.[47]

Another goal of this Section 230 reform is to stay consistent with the overturning of *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*[48] by making it clear that a platform's decision to moderate content does not automatically render it a publisher or speaker for all of the content posted to its service.[49] Again, this protection encourages platforms to actually moderate content without having to worry about being held liable for it, which will also contribute to a safer online space for users.

By providing specific criteria and more clearly defining Section 230, the Department's proposed reform protects both platforms and users. Platforms can comfortably moderate specifically outlined harmful content without having to risk losing their immunity. On the other hand, users will benefit from platforms having to follow stricter guidelines, lessening censorship of content not specifically mentioned in Section 230. Like the Department's other proposed reforms, this is more limiting on Big Tech companies, while also ensuring that users' free speech is protected in a safer online space.

IV. Potential Future of Section 230

As Section 230 has been a hot topic of debate lately, lawmakers have been working diligently writing new legislation to either revise or completely replace Section 230. At the time of writing this, the Supreme Court of the United States has also granted certiorari in *Gonzalez v. Google LLC*[50] and *Taamneh v. Twitter, Inc.,*[51] both cases arguing over whether or not Internet service providers are liable for content promoting terrorism, or if Section 230's immunity shield protects the Internet service providers from this liability. These cases will mark the Supreme Court's first time to address Section 230.

Platform Accountability and Consumer Transparency Act (PACT Act)

[47] *Id.* at 4.
[48] Stratton Oakmont v. Prodigy Servs. Co., 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995) (holding that Prodigy was liable as the publisher of all content created by its users because it moderated content posted to its bulletin boards).
[49] U.S. DEP'T OF JUST., *supra* note 23 at 22.
[50] Gonzalez v. Google LLC, 2 F. 4th 871 (9th Cir. 2021).
[51] Taamneh v. Twitter, Inc., 343 F. Supp. 3d 904 (N.D. Cal. 2018).

The PACT Act is a Senate bill that requires Internet platforms to publish their terms of service or use explaining what types of content are permissible, while also providing a system for users to submit complaints about content that may be illegal or violate terms of service or use.[52] These platforms will also need to establish a process for removal of such content and publish a report on it every six months.[53] Platforms will lose certain aspects of immunity if they have actual knowledge of illegal content on its service and does not remove it within a certain time frame.[54]

This bill is directly in line with the U.S. Department of Justice's reform proposals to incentivize online platforms to address illicit content[55] and to promote greater transparency.[56] While the PACT Act is a bit stricter for requiring companies to regularly publish reports on their content removal, it still takes the same "Bad Samaritan Carve-Out" approach that removes protection from platforms who knowingly allow or fail to remove criminal content or activity from their services.

Gonzalez v. Google LLC* and *Taamneh v. Twitter, Inc.

Both *Gonzalez v. Google LLC* and *Taamneh v. Twitter, Inc.* arise from the same set of facts. Nohemi Gonzalez was a 23-year-old student who was killed in the 2015 ISIS Paris Attacks. Now her family is seeking damages pursuant to the Anti-Terrorism Act, alleging that Google, Twitter, and Facebook are both directly and secondarily liable for the ISIS attacks.[57] Plaintiffs argue that the social media platforms are an essential part of ISIS' recruitment process, allowing them to post content to promote their group's message, radicalize new recruits, and further their mission; therefore, aiding and abetting ISIS in committing the attacks.[58]

[52] PACT Act, S. 797, 117th Cong. (2021).
[53] *Id.*
[54] *Id.*
[55] U.S. DEP'T OF JUST., *supra* note 23.
[56] *Id.*
[57] Gonzalez v. Google LLC, 2 F.4th 871, 879 (9th Cir. 2021).
[58] *Id.* at 880.

Both the district court and the Ninth Circuit Court have granted Google's motion to dismiss, arguing that most claims made by Plaintiffs are barred by Section 230.[59]

Gonzalez and *Taamneh* will be the first time the Supreme Court has even heard a case involving Section 230 after multiple courts have consistently upheld and adopted the broad immunity interpretation of Section 230.

Taamneh v. Twitter, Inc.

Taamneh focuses on the question of whether or not the platform knowingly provided substantial assistance in the terrorist attacks by not taking more meaningful action to prevent the terrorism-related content.[60]

If this issue was brought up under the "Carve-Outs for Child Abuse, Terrorism, and Cyber-Stalking" reform proposed by the Department of Justice,[61] Twitter would be exempt from immunity. Twitter knew that terrorism-related content was being posted and shared by users but did not take any action against it besides responding to reports by other users.[62] They demonstrated that they have little respect for public safety by knowingly allowing the promotion of terrorism on their platform. This would also strip Twitter's Section 230 immunity under the Department's "Case-Specific Carve-Outs for Actual Knowledge or Court Judgments," which proposes that immunity would not apply to cases where a platform knew of unlawful content on its site.[63] The Department's proposed reforms of Section 230 would hold platforms liable for terrorism-related content, such as that in *Taamneh*, and force platforms to take combative and preventative measures toward harmful content.

Taamneh could be a great example to show how reforming Section 230 and restricting immunity of platforms would be beneficial to users and contribute to safer online spaces if the Supreme Court decides to rule in favor of Taamneh.

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[59] *Id. at 882.*
[60] Taamneh v. Twitter, Inc., 343 F. Supp. 3d 904, 907 (N.D. Cal. 2018).
[61] U.S. DEP'T OF JUST., SECTION 230 – NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY? 3 (2020).
[62] Taamneh v. Twitter, Inc., 343 F. Supp. 3d 904, 907 (N.D. Cal. 2018).
[63] U.S. DEP'T OF JUST., *supra* note 23.

Gonzalez v. Google LLC

The issue of *Gonzalez v. Google LLC* is whether Section 230 provides immunity to platforms when they make targeted content recommendations provided by another information provider.[64] This case could be a great opportunity for the Supreme Court to specify how Section 230 applies to platforms' algorithms, which is not specifically mentioned in the statute itself.

If the Supreme Court rules in favor of not providing complete immunity to platforms in this situation, it will provide a better outline of how Section 230 should be applied. They could possibly describe more specific exemptions as well to narrow the immunity shield that makes Big Tech companies nearly untouchable in almost any lawsuit. A win for Gonzalez in this case could open the door to huge changes in Internet speech and conduct, and possibly make it a smoother process for legislative reforms of Section 230 to be enacted.

Conclusion

Section 230 of the Communications Decency Act has long provided Internet service providers and social media platforms with a nearly impenetrable immunity shield that protected them from most forms of liability in relation to third-party content. But, with the rapid development of the Internet and the harmful speech and conduct that has arisen from it, Section 230 is long overdue for change. Having been created in direct response to cases that inflicted liability on websites, Section 230 was mostly meant to protect websites rather than Internet users. On top of this, courts have interpreted Section 230's immunity shield broadly because of its plain language lacking any specificity. This has led to Big Tech companies and other websites having too much protection from harmful content on their platforms that they should be held liable for, while Internet users are left to deal with unsafe online spaces. Legal reform of Section 230, such as the reforms proposed by the Department of Justice, can be done without unconstitutionally censoring free speech, and instead offering safer online spaces and greater platform accountability.

[64] Gonzalez v. Google LLC, 214 L. Ed. 2d 12 (U.S. 2022)

PARENTS ARE THE PROBLEM?

Julian Cope

Introduction

On Monday, October 24, 2022, fifteen-year-old Ethan Crumbley pled guilty to twenty-four charges, including one count of terrorism and four counts of first-degree murder.[65] Less than a year had passed since he came to Oxford Michigan High School with a semi-automatic pistol and 50 rounds of ammunition to open fire.[66] He murdered four students, Madisyn Baldwin, Tate Myre, Hana St. Juliana, and Justin Shiling.[67] Six other students and one teacher were injured before Ethan Crumbley surrendered to authorities.[68] Where Ethan Crumbley will likely face a life sentence with the possibility of parole,[69] national attention has turned to his parents, James Crumbley and Jennifer Crumbley, who are each charged with four counts of involuntary manslaughter.[70] If found guilty, the parents could each face a maximum sentence of sixty years in prison and a fine of up to 30,000 dollars.[71]

Their guilt rests on the concept of parental liability, and on the responsibility they owed to society and the victims to prevent their son's violent crime. Notably, James Crumbley purchased the pistol for Ethan the weekend before the school shooting, and on the day of, Ethan was caught drawing a handgun pointed at a person with the words, "the thoughts won't stop help me."[72] The school officials then held an immediate meeting with Ethan and his parents, wherein the officials recommended he go home and seek counseling within

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[65] Kim Bellware, Marisa Iati, & Praveena Somasundaram, *Suspect in Oxford school shooting pleads guilty, including to rare terrorism count*, THE WASHINGTON POST (Oct. 24, 2022), https://www.washingtonpost.com/nation/2022/10/24/oxford-shooter-pleads-guilty/.
[66] Aya Elamroussi, *The shooter 'methodically and deliberately' fired at students. A timeline of a school shooting tragedy,* CNN (Dec. 4, 2021), https://www.cnn.com/2021/12/04/us/michigan-oxford-high-school-shooting-timeline/index.html.
[67] See *id.*
[68] See *id.*
[69] See *id.*
[70] Bellware, Iati, & Praveena, *supra* Note 1.
[71] Ray Sanchez, *Prosecutors seek to introduce evidence Michigan school shooter's parents created pathway to violence*, CNN (Oct. 28, 2022), https://www.cnn.com/2022/10/28/us/ethan-crumbley-parents-michigan-hearing/index.html.
[72] Elamroussi, *supra* note 2.

48 hours.[73] James Crumbley and Jennifer Crumbley declined to take their son out of school, and Ethan returned to class with the gun in his backpack.[74]

While extreme violent crimes engender support for stricter parental liability (or responsibility) laws, the relationship between a parent's misconduct and the resulting child's misconduct is not always so direct. For example, thirteen-year-old Randall Snow's parents sued fourteen-year-old Mark Nelson's parents after Mark accidentally hit Randall in the eye while the boys played a ball game using croquet mallets together on their street.[75] While indeed an accident, Mark lost one eye, his sense of smell, and his sense of taste; subsequently, Mark's parents sought $135,000 in damages from Randall's parents.[76] Should the Nelsons be held responsible for their son's damages in the same manner as the Crumbleys?

Though the desire to allot blame is natural, legislating blame is not always appropriate nor fair. This article seeks to address both the advocacy for and against parental liability statutes. Part I introduces the types of statutes. Part II speaks to the common critiques of these statutes. And Part III turns to an analysis of how the fundamental right to parent comports with parental liability statutes.

I. Part I: Types of Parental Liability Statutes

Every state imposes some sort of statutory liability onto parents for the delinquent acts of their children,[77] even if the typical statute only allows for damages recoverable up to a low dollar amount.[78] There are three types of parental liability laws: the common law, civil parental liability statutes, and criminal parental liability statutes.

Common Law

The basic premise of parental responsibility laws, to make the victim whole, is rooted in the common law of torts. Historically, common law standards did

[73] *Id.*
[74] *Id.*
[75] Snow v. Nelson, 450 So.2d 269 (Fla. Dist. Ct. App. 1984).
[76] *Id.*
[77] Pamela K. Graham, *Parental Responsibility Laws: Let the Punishment Fit the Crime*, 33 LOY. L.A. L. REV. 1719, 1726 (2000) ("all fifty states have statutes imposing some type of vicarious tort liability on parents for damages resulting from acts of their children").
[78] *Id.*

not recognize the parent-child relationship as a guarantee of responsibility,[79] which precluded victims from relying on Vicarious Liability[80] or Strict Liability.[81] In other words, where an employer is responsible for the actions of their employee due to the nature of their relationship, the common law does not recognize the parent as inherently responsible for the actions of their child. Thus, under common law standards, a plaintiff must demonstrate all of the elements of general negligence, which are "duty, breach, the requisite causal connection between the parents' negligence and the harm suffered, and resulting damages," in order to receive remedy.[82] But the first element was in itself hard to prove— common law duty depends on the presence of a foreseeable victim and on "nonfeasance" (failure to control a child which results in the failure to protect another).[83] Thus parents could frequently escape fault given the difficulty of proving both foreseeability of the plaintiff and the failure of a parent to conduct themself in a certain manner.[84]

However, the common law does allow courts to recognize a "Special Relationship" between parties, which creates an inherent duty.[85] For example, courts have recognized the psychiatrist-patient relationship,[86] which imposes a duty on the psychiatrist to control their patient or provide warning of the patient's violent capabilities. If courts were to recognize the parent-child relationship, it would furnish the parent with an inherent duty to protect foreseeable victims from their child.[87] But generally, courts don't do this, and the common law negligence standards leave victims with limited

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[79] Rhonda V. Magee Andrews, *The Justice of Parental Accountability: Hypothetical Disinterested Citizens and Real Victims' Voices in the Debate Over Expanded Parental Liability*, 75 TEMP. L. REV. 375, 388-400 (2002).
[80] *Vicarious Liability*, BLACK'S LAW DICTIONARY (2nd ed. 1910) ("Obligation rising from a parties relationship with each other.").
[81] *Strict Liability*, BLACK'S LAW DICTIONARY (2nd ed. 1910) ("When a plaintiff makes a motion to prove harm has occurred without having to show how or why to collect damages.").
[82] Andrews, *supra* note 15, at 388.
[83] *Id.* at 390.
[84] *Id.*
[85] *Id.*
[86] Tarasoff v. Regents of the University of California, 17 Cal.3d 425 (1976) (holding that "when a psychotherapist determines that his patient presents a serious danger of violence to another he incurs an obligation to use reasonable care to protect the intended victim against such danger").
[87] Amy L. Tomaszewski, From Columbine to Kazaa: Parental Liability in a New World, 2005 U. ILL. L. REV. 573, 577.

opportunities to recoup their damages from insulated parents and their destitute troublemakers.[88]

Civil Statutes

Faced with dissatisfaction in the common law system and a rising juvenile crime rate in the 1950s and 60s,[89] states took to civil statutes to punish parents into exerting greater supervision over their children by imposing liability based on the parent-child relationship.[90] Compared to the boundaries of the common law, typical civil liability laws do allow victims to seek vicarious and strict liability,[91] however, these civil statutes are still well-equipped with issues of their own. Most States place a cap on the dollar amount of recoverable damages,[92] which often leaves compensation too small to fully recoup victims, and by the same stroke too large for the marginalized families that are more often held at fault.[93] Some states exclusively protect property damage.[94] For example, Florida specifically, civilly punishes parents whose children willfully destroy or steal property, but leaves other injuries to the mercy of common law standards.[95] On the other hand, some states bar victims from seeking multiple types of claims; in Tennessee a person who seeks remedy under civil liability may not additionally seek remedy through the common law standards.[96] Nonetheless, civil liability statutes do provide greater opportunity for victims to recoup their damages than the common law does.

Criminal Statutes

Most states have historically recognized CDM statutes, which are criminal liability statutes for "contributing to the delinquency of the minor."[97] Where these laws do provide a route to punish parents, realistically they are a

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[88] Andrews, *supra* note 4, at 391 (Even the 1965 codification of parental liability through the Restatement (Second) of Torts reflected "the common law's reluctance to find a duty on the part of parents.").
[89] Graham, *supra* note 13, at 1721-26.
[90] See *id.*
[91] Andrews, *supra* note 15, at 398.
[92] Tomaszewski, *supra* note 23, at 579 ("Almost all States have a cap on damages, which range from $800 to $25,000.").
[93] Graham, *supra* note 13, at 1725.
[94] Andrews, *supra* note 13, at 398 ("Most CPLs apply primarily (and in some states, exclusively), to property damage claims, and limit the amount of the total possible liability to dollar amounts in the low thousands.").
[95] FLA. STAT. § 741.24 (2022).
[96] Tomaszewski, supra note 23, at 579.
[97] Graham, *supra* note 13, at 1731.

general criminalization of any person that causes a child to act unlawfully, and they are not the subject of this article.[98] Less endorsed than CDM statutes are criminal parental liability statutes, which focus specifically on the parent-child delinquency relationship.[99] These criminal statutes punish parents for their passive conduct, such as failing to supervise or effectively supervise their child.[100] They "lessen the mens rea needed to establish guilt," and thus parents are held responsible despite not intending to allow the child to commit the crime.[101]

The expansive variety between the types of parental liability statutes, each state's respective state laws, and the individual context pertaining to each case of child delinquency renders the concept of parental liability very broad, and truly subject to the judicial interpretation of each respective state court. Still though, the basic thrust of parental liability laws remains the same: that parents should be punished for the delinquent acts of their children in order to protect society and reduce juvenile crime.[102]

The Critic's Complaints

In the age of high profile, violent, juvenile crime, like school shootings, parental liability laws are gaining attention,[103] and people have a lot to say—both in support and opposition. Proponents of parental liability laws, like Professor Andrews, believe "imposing liability on parents on a strict or vicarious basis at common law would promote fairness and corrective justice… [because] parents [have] ultimate moral and social responsibility for their children's behavior."[104] Opponents to expanding parental liability, such as Dr. Tomaszewski, believe imposing strict and vicarious liability would further existing issues: "creating statutes that fail to account for a link between the child's behavior and a parent's action or, alternatively, lack of action, have not been shown to decrease juvenile delinquency nor encourage parents to take a more active role in their child's life."[105] The following subsections detail the common critiques of parental liability laws from both the proponents and the opponents.

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[98] Tomaszewski, *supra* note 23, at 581.
[99] Graham, *supra* note 13, at 1732-35.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 1733, ("if parents are punished, or threatened with punishment, they will become 'good' parents to avoid such punishment").
[103] Graham, *supra* note 13, at 1742.
[104] Andrews, *supra* note 15, at 436.
[105] Tomaszewski, *supra* note 23, at 598.

Insufficient Victim Protection

Professor Andrews turns to the case of *J.L. v. Kienenberger* to demonstrate the insufficiency of these laws.[106] Thirteen-year-old Jaret raped twenty-eight-year-old J.L. in her own home.[107] J.L. civilly sued the parents, but the Court took a limited liability approach and as such J.L. received no remedy for the psychological and physical harm she suffered.[108] Professor Andrews biggest critique of this holding and its similar counterparts is that J.L. would have had her damages recouped if Jaret had simply burglarized her home.[109] Under Montana law, Jaret's mother could have been required to pay up to $2,500 for willfully and maliciously destroying her property.[110] To Professor Andrews, Montana's lack of care for J.L.'s grave bodily and psychological damage signifies "that the law generally values 'things' more than it does human life."[111]

However, opponents of expanding parental responsibility laws disagree, pointing the lack of coverage for significant crimes to the fact that the link between parental actions and juvenile delinquency is lacking.[112] Even when attenuation is low, this group argues that courts are resistant, but willing, to protect property damages because it is firstly a low amount, and secondly because someone should. Unfortunately, as a crime's violence increases, without increase in parental negligence, that attenuation grows even more significant, and it becomes even more uncomfortable for courts to punish parents for the rape or murder of a person. The logical next step these critics take though, is that punishing parents simply because "someone should be responsible," is too far removed from the original legislative intentions of these laws.[113]

The Nexus Between Juvenile Delinquency and a Parent's Actions

A facial assumption of parental responsibility laws suggests that bad parenting causes juvenile crime. While legislatures may have enacted such laws with good intentions, scholars have turned to precisely locate the

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[106] Andrews, *supra* note 15, at 392.
[107] J.L. v. Kienenberger, 257 Mont. 113 (Mont. 1993)
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] Andrews, *supra* note 15, at 436.
[112] Tomaszewski, *supra* note 23, at 586 ("there is little evidence that parental liability laws have affected juvenile delinquency").
[113] *Id*. at 582.

connection between a parent's actions and a juvenile's interaction with society. There are several explanatory psychological theories at hand.

Beginning with Control Theory, this theory suggests that a child's actions within society depends on their relationship to society;[114] additionally, Control Theory suggests that parents have the greatest role (responsibility) to establish this bond between society and child, and that the bond requires four elements: "(1) an attachment to various persons and institutions within society; (2) a commitment to obeying the rules of society through fear of consequences; (3) an involvement in conventional activities such as school work and hobbies; and (4) an assumption that the child buys into the rules of society."[115] To be clear, this theory purports that internal structures (familial relationships) are the most explanatory variables of juvenile crime.[116] But even within this theory, parents lack complete control to guarantee that their child engineers these bonds because there are other factors that weigh significantly on a child, especially as they age.[117]

These additional factors, such as biological processes, socioeconomic issues, peers, and media intrusion, speak to both the external and internal structures that cause juvenile crime.[118] The Anomie Theory explains a child's behavior by their group interaction and socialization (this theory also heavily considers a child's socioeconomic status to determine what the circumstances of their socialization are).[119] Here, a parent's actions are less significant than the actions and beliefs of the child's surrounding society (their friends, teachers, and influences).[120]

The Office of Juvenile Justice and Delinquency Prevention perhaps puts it best: "research findings support the conclusion that no single cause accounts for all delinquency and that no single pathway leads to a life of crime."[121] In circumstances where a parent does not exhibit readily distinguishable negligence, the affiliation between the parent's actions and the child's

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[114] *Id.* at 583.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] Tami Scarola, *Creating Problems Rather Than Solving Them: Why Criminal Parental Responsibility Laws Do Not Fit Within Our Understanding of Justice*, 66 FORDHAM L. REV. 1029, 1035-1038 (1997)
[119] *Id.*
[120] *Id.*
[121] *Program of Research on the Causes and Correlates of Delinquency*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, (Dec. 1, 2022), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/jjbulletin/9810_2/program.html

delinquency is simply an elusive connection. Yet this reality leads to two completely separate schools of thought. Because the link is so limited, critics of expanding parental liability laws believe "the only fair and constitutional way to ensure proper administration of parental liability is through the common law."[122] Conversely, proponents of parental liability laws see the loose link between any cause and delinquency as further reason to saddle parents with complete responsibility: "the decision to parent should not be made lightly," and, once made, a parent should expect to take responsibility for all of her child's actions.[123]

Implications for Marginalized Groups

Lastly, critics of expanding parental responsibility statutes, like Dr. Allen-Kyle, point to the effects of these laws on marginalized individuals, namely, those below the poverty line, single mothers, and minorities.[124] Legal Financial Obligations, or LFOs, are the costs of the Court; they take the name of fines, restitution charges, attorney's fees, filing costs, and administrative expenses.[125] For example in the State of Florida, an accused person must pay a $50 application fee for indigent status to qualify for a public defender.[126] LFO's have had an ever growing presence within the court system, growing from $260 million in 1985 to $145 billion in 2014.[127] Additionally, they are widely acknowledged to be significantly detrimental to the emotional and psychological wellbeing of indigent people.[128]

Dr. Allen-Kyle finds grave issues with the "discriminatory effects" of parental liability laws.[129] Critics similar to her believe that where a two parent, two income household may certainly experience a delinquent juvenile, the poor, single parent household is more severely affected by parental liability laws and LFOs.[130] "Parents that cannot afford counseling for their troubled teen or who cannot be home consistently to provide

[122] Tomaszewski, *supra* note 23, at 598.
[123] Andrews, *supra* note 15, at 417.
[124] Portia Allen-Kyle, *Women at the Forefront: Laissez-Faire Sexism, Mother Blaming, and Parental Responsibility Laws*, 36 WOMEN'S RTS. L. REP. 164, (2015).
[125] Jack Furness, *Willful Blindness: Challenging Inadequate Ability to Pay Hearings Through Strategic Litigation and Legislative Reforms*, 52 COLUM. HUM. RTS. L. REV. 957, 964-76 (2021).
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] Allen-Kyle, *supra* note 60.
[130] *Id*. at 187-93.

adequate supervision due to burdens of employment would be more apt to fail the 'reasonable control' requirement than wealthier parents."[131]

There is also the fact that minorities and single mothers are disproportionately represented within the juvenile justice system,[132] and following this state of affairs, critics believe minority parents and single mother parents could additionally be disproportionately punished under these laws. Notably, women as a class are more likely to be single parents,[133] and public opinion has historically recognized women as the child-raiser.[134] It follows that "the few cases that have relied upon parental responsibility statutes to prosecute parents have overwhelmingly involved mothers."[135] Dr. Allen-Kyle believes each of these factors renders punishment inherently more punitive for these marginalized groups, and because expanding parental liability laws would further add difficulty to the lives of this class, parental liability laws are resultingly bad for society.[136]

Part II: Parental Liability Laws and the Substantive Due Process Clause

For all the debate the between proponents and opponents of parental liability laws, the one conversation often and oddly left out is that of their constitutionality. Can the government punish parents for parenting "incorrectly?" The answer to this question lies within the Fourteenth Amendment's protection of fundamental rights.

The Right to Parent Reaffirmed and Expanded

Under the Due Process Clause of the Fourteenth Amendment, statutes that infringe on a fundamental right are subject to strict scrutiny from the courts, and rarely survive.[137] While the precise standard for identifying new fundamental rights is clouded, one of the oldest and most recognized fundamental liberty interests is the right of parents in the care, custody, and control of their children.[138] Originally recognized by the Supreme Court in

[131]Tomaszewski, *supra* note 23, at 589.
[132] *Id*.
[133] Allen-Kyle, supra note 60, at 181&187.
[134] *Id.* at 187.
[135] *Id.* at 181-82.
[136] *Id*. at 201.
[137] Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, (2007).
[138] E.g., Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1975).

Meyer v. Nebraska, this right has repeatedly proven to be closely guarded by the Fourteen Amendment.

Meyer v. Nebraska (1923) and Peirce v. Society of Sisters (1925)

The right "of the individual to establish a home and bring up children" was first recognized to be fundamental by the Supreme Court in *Meyer v. Nebraska*.[139] There, the Supreme Court held a Nebraska law prohibiting the teaching of foreign languages before the 8th grade unconstitutional because it unreasonably interfered "with the power of parents to control the education of their own."[140] Then merely two years later, the Court affirmed the fundamental right of parents and guardians to direct the upbringing and education of children under their control in *Peirce v. Society of Sisters*.[141] The Oregon Statute in *Peirce v. Society of Sisters* failed judicial review because it required all children aged eight through sixteen to attend public school even if their parents desired to send their children to a private school or preparatory academy.[142] Together, *Meyer v. Nebraska* and *Peirce v. Society of Sisters* fundamentally established the right to bring up children how a parent sees fit.

***Wisconsin v. Yoder* (1972)**

In *Wisconsin v. Yoder*, the Supreme Court expanded "the fundamental interest of parents … to guide the religious future and education of their children."[143] Here, the Supreme Court found a Wisconsin law unconstitutional as it applied to the Amish students who had completed the Eighth grade because it unconstitutionally interfered with the parents' opposition to conventional formal education.[144] Wisconsin's interest in public education was not enough to abrogate the desire of the parents, who preferred to educate their children in a vocational, Amish setting, away from the "worldly influences" that a person encounters at school.[145] The Court deferred heavily to the Amish parent's beliefs, demonstrating the traditional American value that parents know what is best for their own children.[146]

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[139] Meyer, 262 U.S. at 396-403.
[140] *Id*. at 401.
[141] Peirce, 268 U.S. at 529-36.
[142] *Id*.
[143] Yoder, 406 U.S. at 207-36.
[144] *Id*.
[145] *Id*.
[146] *Id*. at 232.

Parham V. J.R. (1979)

In *Parham v. J.R.*, the Supreme Court precisely recognized the American presumption that fit parents act in the best interests of their children.[147] There, the Supreme Court upheld Georgia's state procedure of permitting parents to voluntarily commit their children to state mental hospitals, and explained why we defer to parental judgement: "the law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgement required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."[148] Stated simply, American law believes parents act in the best interest of their children, therefore the law protects the fundamental right to parent.

Troxel v. Granville (2000)

Finally, *Troxel v. Granville* best demonstrates the supremacy of the fundamental right to parent and where it leaves us today.[149] *Troxel v. Granville* affirmed the fundamental right to parent and held that a State may not infringe on this right simply because it believes a better parenting decision could be made.[150] Washington Statute 26.10.160(3) allowed the paternal grandparents of Isabelle and Natalie Troxel to sue the girls' mother, Tommie Granville, for greater visitation rights (Ms. Granville preferred for the Troxel grandparents to see their grandchildren once per month).[151] The Washington Superior Court mandated Ms. Granville increase visitation to one weekend per month, one week during the summer, and four hours on both the grandparents' birthdays, finding "that visitation was in Isabelle's and Natalie's best interests."[152] In 2000, the Supreme Court affirmed the lower court's holding, which voided the visitation order, because the Washington Superior Court "gave no special weight at all to Granville's determination of her daughter's best interests" and therefore "directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child."[153] The Supreme Court said, "the Due Process Clause does not permit a State to infringe on the fundamental right of parents

[147] Parham v. J.R., 442 U.S. at 584 (1979)
[148] *Id*. at 602.
[149] Troxel v. Granville, 530 U.S. at 60-75 (2000).
[150] *Id*.
[151] *Id*. at 60-62.
[152] *Id*.
[153] *Id*. at 69.

to make child rearing decisions simply because a state judge believes a 'better' decision could be made."[154]

Thus, the American legal system ultimately believes parents are the most fit to parent, and therefore protects their right to do so, even when others may believe there is a better way to bring up the child. As stated in *Troxel v. Granville*, "[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[155]

The Tension Between Parental Liability Statutes and the Fundamental Right to Parent

Recall the purpose of parental liability laws—to provide victims with restoration and to reduce juvenile crime by threatening parents into parenting better. Supporters of parental liability laws make this premise clear, as they "insist that the laws will control and even reduce juvenile delinquency by forcing more effective parenting through threat of punishment."[156] These laws exist under the rationale that "the 'bad' parents should be disciplined," so that there are less "bad" parents. But parental liability laws never define "bad" parenting. Rather, "bad" parents are identified by their children. If your child is a delinquent, you are a "bad" parent, and you should be punished either civilly or criminally so that you are motivated to change the way you parent. If your child is not a delinquent, you are a good parent! Congratulations, please do not change! These laws inherently seek to encourage the behavior of "good parenting," without ever specifying what exactly "good parenting" is. By nature, the purpose of these laws is to *alter* the way parents parent so that society is better protected from delinquent youth. The attempt to alter (through criminal and civil sanctions) the way a parent raises their child positions these laws at fundamental odds with the constitutional understanding of the right to parent.

As previously stated, the Supreme Court has repeatedly affirmed the supremacy of the fundamental right of parents in the care, custody, and control of their children.[157] It is parents, not the state, who are trusted to

[154] *Id*. at 63.
[155] *Id*. at 66.
[156] Tomaszewski, *supra* note 23, at 579.
[157] E.g., Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1975).

know what is in the best interest of their child, and act upon it.[158] Thus, the state is rarely legally allowed to alter parental decision-making. Parental liability laws stand contrary to this typically American law conception. Parental liability laws imply that bad parents *do not* know or act upon what is in the best interest of their child, which is why they *should* change the way they parent. Is this fair? Should parents with delinquent juveniles lose the states' deference to their judgement simply because their child is a delinquent? Regardless of whether parental liability laws are fair, they exist, and they are therefore at tension with the fundamental right to parent because they inherently attempt to alter the decision-making of parents with delinquent children.

But of course, the fundamental right to parent is not universal, and there are exceptions to it. Since parental liability laws are at tension with the fundamental right to parent, perhaps they fall under one of these exceptions.

Exceptions to the Fundamental Right to Parent

There are three exceptions to a parent's fundamental right to make decisions concerning the care, custody, and control of their child, i.e., there are three scenarios in which this right may be violated. I will explain each exception, and then discuss whether parental liability laws may fall under it.

Scenario 1: Parental Decisions that Jeopardize the Health and Safety of the Child

In *Prince v. Massachusetts*, the Supreme Court recognized that neither the free exercise clause nor the right to parent are beyond limitation.[159] "[I]f it appears that parental decisions will jeopardize the health or safety of the child," they may be subject to some limitation.[160] As stated by the Court, "Parents may be free to become martyrs themselves. But, … they are [not] free … to make martyrs of their children."[161]

Parental liability laws cannot fall under this exception to the right to parent because parental liability laws do not themselves prohibit parental actions that jeopardize the health and safety of the child. They do not mandate a

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[158] *Id*.
[159] Prince v. Massachusetts, 321 U.S. 158 (1944) ("Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance,[9] regulating or prohibiting the child's labor,[10] and in many other ways.")[11]
[160] Yoder, 406 U.S. at 234.
[161] Prince, 321 U.S. at 170.

child attend school, forbid child labor, or require children to receive vaccination against communicable diseases. Rather, these laws punish parents for the illicit conduct of their children. Additionally, while proponents of parental liability laws may argue that they do in fact punish parents for making decisions that jeopardize the health and safety of a child, I disagree. If these laws were to do that, they would criminalize and punish a specific action. Instead, these laws are incredibly broad and merely punish parents for "bad" parenting in general, and thus this first exception cannot apply.

Scenario 2: Termination of Parental Rights

"Termination of parental rights is the most severe form of state interference with the parent-child relationship."[162] Such termination occurs to preserve the welfare of the children; it may be voluntary or involuntary, but it is often permanent.[163] Because it is such an extreme deprivation, for both the parent and the child, termination requires a stricter standard than the typical preponderance of the evidence standard.[164] To prove that a child's welfare would be preserved and promoted by the deprivation of parental rights, the courts require clear and convincing evidence.[165]

Additionally, the federal government's Adoption and Safe Families Act of 1997 (ASFA) sets forward a national standard, which is further upheld by complying state law.[166] The ASFA requires a state agency to seek termination of parental rights when:

> (1) a child has been in foster care for fifteen of the most recent twenty-two months; or (2) a court has determined that a child is an abandoned infant, or that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, 'aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or another child of the parent.[167]

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[162] Joleen Okun, *Termination of Parental Rights*, 6 GEO J. GENDER & L. 761, 761 (2005).
[163] *Id*. at 761-62.
[164] *Id*. at 766
[165] *Id*.
[166] *Id*. at 762.
[167] *Id*.

Given the fact that parental liability laws do not seek termination of parental rights, parental liability laws cannot fall under this exception to the fundamental right. Parental liability laws are additionally different from termination because of their burden of proof; in termination, the right to make decisions regarding the care, custody, and control of one's child is violated only after the steep burden of clear and convincing evidence is met. Conversely, statutes that impose strict or vicarious liability on parents do not meet any burden before they punish and in turn alter the way a parent decides to engage with their child, which is a violation of the fundamental right to make decisions regarding the care, custody, and concern of one's child.

Scenario 3: Statutes that Pass Strict Scrutiny

Because parental liability laws do not apply to neither the first nor the second exception, they must fall within this third and final section. The last exception to the fundamental right to make decisions concerning the care, custody, and control of a child is when the violating government statute passes strict scrutiny. Strict scrutiny is high burden to meet; it requires statutes to "serve a compelling government interest, which objectives cannot be achieved by any less restrictive measures" (which is also known as a statute that is "narrowly tailored to a compelling government interest").[168] And although there are parental liability laws in every state,[169] parental liability laws have never been subjected to strict scrutiny. In fact, only one State Supreme Court has addressed whether parental liability laws violate a parent's due process rights.[170]

In *Hensler v. City of Davenport*, the Iowa State Supreme Court held that Davenport city's "Parental Responsibility" law did not infringe on the fundamental right to parent "enough," and therefore rational basis review should apply.[171] While the Iowa Supreme Court certainly recognized the interest of parents in the care, custody, and control of their children as a fundamental right, the court held that "an alleged infringement on a familial right is unconstitutional *only* when an infringement has a direct and substantial impact on the familial relationship."[172] They found that the law in this case did not "in some way attempt to override or at least limit the

[168] Fern L. Kletter, *Validity of Parental Responsibility Statutes and Ordinances Holding Parents Liable for Criminal Acts of Their Children*, 74 A.L.R.6TH 181, (2012).
[169] Tomaszewski, *supra* note 23, at 579 ("All states have adopted some version of a civil liability statute.").
[170] Kletter, supra note 104.
[171] Hensler v. City of Davenport, 790 N.W.2d 569 (Iowa 2010).
[172] *Id*. at 583

decision of a parent with respect to the care, custody, and control over his or her child," therefore the infringement was not direct and substantial.[173] Because the infringement of a fundamental right was not direct and substantial, the Iowa Supreme Court applied rational basis review and the statute was of course upheld.[174]

I disagree with this holding. Substantive due process jurisprudence, and specifically precedent regarding the fundamental right to parent, has never focused on whether a fundamental right was violated "enough."[175] While the Iowa Supreme Court is correct in pointing out that past cases have involved situations wherein the state "substituted its decision making for that of the parents,"[176] the fact that the state has not imposed its own decision-making does not reduce the fact that the state does alter parental decision-making through parental liability laws. In fact, the very purpose of the Davenport city ordinance makes this clear. It states, "those who neglect their parenting duties should be encouraged to be more diligent, through civil sanctions, if necessary."[177] The fundamental nature of the statute is to compel parents to be diligent, to alter the decision-making of parents into a state that better protects society. While I certainly see the altruistic goal of the statute, I cannot ignore the fact that it is a violation of the historically protected and complete right to parent, even if it is a "low-level" violation.

Recommendation

The fundamental right to parent is both deeply rooted in American history and implicit in the concepts of ordered liberty. It has been affirmed time and time again over the last 100 years because the right to raise a child without interference from the state is a foundational liberty required to maintain a free and democratic society. Of course, there are exceptions to this right so that both the health of children and of society may be safeguarded. But these exceptions are always tested by the Court against some burden of proof to prevent arbitrary violations of the right to parent. The fact that parental liability laws have not and are not being subjected to strict scrutiny tests suggests that these laws may be arbitrary and therefore unconstitutional.

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[173] *Id*.
[174] *Id*. at 583-85.
[175] See, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1975).
[176] Hensler, 790 N.W.2d at 582.
[177] *Id*. at 575.

The fundamental right of parents in the care, custody, and control of their children is too important, too fundamental, to allow parental liability laws to go untested. The tension between parental liability laws and the fundamental right to bring up a child would be resolved if courts subjected their state laws to strict scrutiny. If this were to happen, only the parental liability laws that are narrowly tailored to a compelling government interest would be allowed to continue interfering with the fundamental right to parent, and this interference would be warranted and rational, converse to its current, questionable state. To be more clear, parental liability laws will always meet the first burden of seeking to serve a compelling government interest because the interest of public safety is always a compelling state interest.[178] Where some state's parental liability laws may fail is within the second prong of strict scrutiny—in proving that the statute is *narrowly tailored* to the compelling interest of public safety. Courts must be required to find that parental liability laws do in practice reduce juvenile crime by compelling or encouraging parental action. Only the state parental liability laws that demonstrably reduce juvenile crime will survive strict scrutiny and prove that they do not arbitrarily violate the right of parents in the care, custody, and control of their children, remediating the tension that currently exists.

Conclusion

Ultimately, the prevalence of parental liability laws in each state across the nation confirms that these laws are here to stay. And as juvenile, violent crime garners more attention in the media spotlight, the civil and criminal functions of parental liability laws will continue to impact parents, children, and American society at large. Thus, it is paramount that lawmakers and adjudicators examine all sides of the conversation—the nexus between parental action and juvenile delinquency, the effect of these laws on marginalized groups, the necessity of recouping victim damages, and above all, the fundamental right to parent.

If courts continue to fail to apply scrutiny to these laws, parental liability laws will arbitrarily injure parents and potentially violate the Fourteenth Amendment. While someone should compensate victims for the injuries caused by juveniles, this alone cannot warrant arbitrary exceptions to the fundamental right to parent, especially when the nexus between delinquent juveniles and parental actions is so attenuated. Parenting is a hard job, and parental liability laws should not serve to make this job harder.

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[178] Neil S. Siegel, Reva B. Siegel, *Compelling Interests and Contraception*, 47 CONN. L. REV. 1025, (2015).

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