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NOTES
Brooklyn Law Review (ISSN 0007-2362) is published quarterly (spring, summer, fall, and winter) by Brooklyn Law School, 250 Joralemon Street, Brooklyn, New York 11201, (718) 780-7968. General and editorial offices are located at One Boerum Place, Brooklyn, New York 11201. Annual subscriptions are $30.00 per year. Brooklyn Law Review is printed by the Sheridan Press, in Hanover, Pennsylvania. Periodicals postage paid at Brooklyn, New York and additional mailing offices. Postmaster: Send address changes to Brooklyn Law Review, Attn: Production Editor, One Boerum Place, Brooklyn, New York 11201.

**Subscriptions:** Annual subscriptions are $30.00 per year. Subscriptions are accepted only on a volume basis, beginning with the first issue. All subscriptions are automatically renewed absent timely notice to the contrary. Address changes should include all pertinent information, including ZIP code, and must be made at least two months prior to the publication of a new issue. Address changes or requests for subscription information should be directed to the Business Manager. The Post Office will not forward copies unless extra postage is provided by the subscriber. Duplicate copies will not be sent free of charge.

**Single and Back Issues:** Subject to availability, individual issues can be purchased for $8.00 from Brooklyn Law Review (check must accompany order). Back issues may be ordered directly from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209-1987, by phone at (800) 828-7571, by fax at (716) 883-8100, or by email at order@wshein.com. Back issues can also be found in electronic form on HeinOnline at http://heinonline.org.

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**Citations:** The citations in Brooklyn Law Review conform to The Bluebook: A Uniform System of Citation (19th ed. 2010).

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ARTICLES

The Legislative Response to Mass Police Surveillance

Stephen Rushin†

INTRODUCTION

Over the last two decades, police departments have dramatically expanded the use of advanced surveillance technologies. In 1997, around 20% of American police departments reported using some type of technological surveillance.1 By 2007, that number had risen to over 70%.2 And no longer do police rely exclusively on basic surveillance technologies. The increasingly efficient and technologically advanced law enforcement of the twenty-first century utilizes a wide range of surveillance devices including automatic license plate readers (ALPR),3 surveillance cameras,4 red light cameras,5 speed cameras,6 and biometric technology like facial recognition.7

†  Visiting Assistant Professor, University of Illinois College of Law. I owe a debt of gratitude to the participants in the “Privacy, Surveillance Technologies, and the Fourth Amendment” panel at the Law and Society Association Annual Meeting for their thoughtful feedback.


I have previously called this radical shift in policing the beginning of the *digitally efficient investigative state*. By this, I mean that police today utilize technological replacements for traditional investigations that dramatically improve the efficiency of surveillance. These digitally efficient technologies do not give police any unique extrasensory ability. They merely improve the efficiency of public surveillance. Furthermore, these technologies only collect information on public movements and behaviors. They do not intrude on any constitutionally protected or private space. However, these tools have developed into a form of widespread community surveillance, which presents privacy concerns for many members of the community.

In addressing public surveillance under the Fourth Amendment, the Supreme Court has previously operated under two important presumptions. I call these two general rules the *jurisprudential assumptions of police surveillance*. First, individuals have no reasonable expectation of privacy in any activities they make in public that may be visible to law enforcement. So while officers need probable cause or a warrant to enter a home or automobile, they do not need any

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4 See, e.g., *City Looks at Outside Firm to Oversee Police Surveillance Cameras*, ROCHESTER DEMOCRAT & CHRON., Jan. 4, 2013, (explaining how in cities like Rochester, the installation of over 200 surveillance cameras in the City now requires the hiring of a private company to monitor the cameras).


7 See, e.g., Eric Hartley, *LAPD's 16 San Fernando Valley Surveillance Cameras Go Live*, L.A. DAILY NEWS (Jan. 16, 2013, 9:00 PM), http://www.dailynews.com/general-news/20130117/lapds-16-san-fernando-valley-surveillance-cameras-go-live (mentioning that surveillance cameras used by the LAPD use facial recognition software technology that can identify a person from 600 feet away).


10 This distinction between public and private is important. See United States v. Knotts, 460 U.S. 276, 281-82 (1983) (noting that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another").

11 See, e.g., *Knotts*, 460 U.S. at 281 (determining that a person has no reasonable expectation of privacy in their public movements on roads or highways); *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979) (holding that a person has no reasonable expectation of privacy in the phone numbers they dial); *Katz v. United States*, 389 U.S. 347, 360 (1967) (establishing standard for a reasonable expectation of privacy).
authorization to investigate or record a person’s activities in public. Second, while technologies that give the state an extrasensory ability may violate an individual’s reasonable expectation of privacy, technologies that merely improve the efficiency of otherwise permissible investigation techniques are presumptively permissible. Thus, while officers must obtain a warrant before using some extrasensory technologies, the Court generally does not regulate efficiency-enhancing technologies. These jurisprudential assumptions of police surveillance have been workable in the past because of the limited use and capability of efficiency-enhancing technologies.

I have previously argued, however, that in the age of the digitally efficient investigative state, efficiency-enhancing technologies have become sufficiently intrusive as to demand a new doctrinal path. In United States v. Jones, the Supreme Court considered one such efficiency-enhancing surveillance technology—global positioning systems (GPS). There, law enforcement officers installed a GPS device on a suspect’s car without a valid warrant. The government argued that the police did not need a warrant to install the GPS device because it was merely an efficient replacement for an otherwise legal police investigation tactic—public surveillance. But Antoine Jones claimed that he had a reasonable expectation that all of his movements over the course of a month would not be recorded in great detail by the state, even if they were executed in public.

The Jones case presented the perfect opportunity for the Court to amend one or both of the jurisprudential assumptions of police surveillance, but the Court punted the issue. The majority merely found that the installation of a GPS device violated the Fourth Amendment because of the device’s physical installation on the automobile. Post-Jones, many academics criticized the Court for not addressing the privacy issues raised by police surveillance technologies. I believe the Court will eventually regulate the digitally efficient investigative state in some manner. Indeed, dicta in the concurrences by Justices Sotomayor and Alito

13 Rushin, supra note 8, at 282.
15 Id. at 948.
16 Id. at 949-50.
17 See id.
18 Id. at 953.
suggest that the Court will be receptive to broader regulation of efficiency-enhancing surveillance technology in the near future. Nevertheless, history dictates that any judicial regulation will be limited and likely rely on the often-ineffective exclusionary rule for enforcement. As a result, Congress and state legislators must play a significant role in any future regulation of police surveillance. Given that law enforcement in the United States is highly decentralized, much of this regulation will have to come from state legislatures.

In this article, I present a model statute that a state could enact to regulate the digitally efficient investigative state. This statute adheres to three major principles about the regulation of police surveillance. First, any regulation must provide clear standards that law enforcement can easily understand and apply. Second, as communities differ substantially in their need for public surveillance, any legislation must provide local municipalities with some ability to vary standards to meet their legitimate law enforcement needs. Third, any regulation must articulate the narrow scope of technologies and devices that fall under its regulatory purview. Because technology changes rapidly, this ensures that the law will not be misapplied to future, emerging technologies.

The model statute I offer in this article honors these three important principles. The statute regulates the indiscriminate collection and retention of data by law enforcement surveillance technologies, while also permitting the use of technological surveillance for mere observational comparison. The statute

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20 See, e.g., Jones, 132 S. Ct. at 955 (Sotomayor, J., concurring) (noting that “physical intrusion is now unnecessary to many forms of surveillance. With increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factory- or owner-installed vehicle tracking devices or GPS-enabled smartphones. In cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, the majority opinion’s trespassory test may provide little guidance” (citations omitted)).

21 See Rachel A. Harmon, Promoting Civil Rights Through Proactive Policing Reform, 62 STAN. L. REV. 1, 10 (2009) (noting that the exclusionary rule is “by far the most commonly used means of discouraging police misconduct,” which is ineffective because of its numerous exceptions and narrow scope).


establishes a maximum length of time for data retention. It also limits the sharing of personally identifiable information, and requires that law enforcement demonstrate a legitimate investigative purpose for identifying and accessing data. To enforce these broad regulations, the statute gives the state attorney general the authority to bring lawsuits against police departments that fail to abide by these regulations and excludes from criminal court any locational evidence obtained in violation of the statute.

This statute would not address all of the concerns of the digitally efficient investigative state. After all, no statute can fully predict and control the development of new and emerging technologies. Nevertheless, it would be a major step toward coherency. This legislation would give a police department discretion to craft unique data policies tailored to its community’s specific needs, while also encouraging some level of statewide consistency. To date, only a small handful of law review articles have addressed the unique issues raised by digitally efficient community surveillance technology, such as automatic license plate readers (ALPR).24 Furthermore, none of this work has offered a comprehensive legislative response that could guide future regulation. Thus, this article fills a void in the available legal scholarship.

I have divided this article into four parts. In Part I, I detail the growth and capabilities of the digitally efficient investigative state. I compile the most comprehensive set of data to date on the scope of digitally efficient investigative technologies in American police departments. I also present empirical evidence on the current state of internal departmental regulations. In Part II, I explore the law of police surveillance. In this Part, I further detail the jurisprudential assumptions about police surveillance that have guided the Court in the past. Post-Jones, it appears that these jurisprudential assumptions may no longer be valid, drastically increasing the incoherence of police surveillance law. Part III offers a comprehensive legislative response intended to curb the potentially dangerous effects of

mass police surveillance. I present and defend my proposed statutory regulation. Currently only a few states in the country regulate the use of any type of police surveillance technology.\textsuperscript{25} I argue that this lack of regulation is increasingly indefensible. Both states and the judiciary must eventually take steps to comprehensively limit the use of digitally efficient community surveillance technologies.

I. THE DIGITALLY EFFICIENT INVESTIGATIVE STATE

Two years ago, I theorized on the emergence of a new type of policing that I called the digitally efficient investigative state.\textsuperscript{26} This new type of policing relies on numerous technological surveillance methods that replace traditional policing tactics. Two classic examples of technologies used by the digitally efficient investigate state are video surveillance cameras with biometric recognition and automatic license plate readers (ALPR). I have argued that the advent of these new technologies demands a new type of regulatory response. In the first part of this section, I detail the characteristics of the digitally efficient investigative state.

In the second part of this section, I summarize the most up-to-date empirical data on the expansion of the digitally efficient investigative state. Since I theorized on this emerging institution of social control two years ago, surveys by social science researchers have uncovered important new information about the growth and scope of the use of digitally efficient investigative technologies in American police departments. In this subsection, I also explore the current state of internal departmental regulations of mass surveillance technologies. The available evidence paints a pessimistic picture. Departments rarely self-regulate their collection of data or reveal their data retention policies. This failure to effectively self-regulate presents a cogent argument for legislative action.

A. The Characteristics of the Digitally Efficient Investigative State

I define the digitally efficient investigative state as a technologically advanced form of policing, reliant upon efficiency-enhancing surveillance of an entire community. The digitally efficient investigative state seeks not just to monitor

\textsuperscript{25} See, e.g., ME. REV. STAT. 29-A, § 2117-A (2010); N.H. REV. STAT. ANN. § 236:130 (2011); VA. CODE ANN. § 2.2-3800 (2010).

\textsuperscript{26} Rushin, supra note 8, at 284.
the activities of a single suspicious individual, but instead relies on widespread surveillance of the entire community. Two of the most common technologies used in the digitally efficient investigative state are ALPR and surveillance cameras with biometric recognition. Although most in the public are familiar with the capabilities of surveillance cameras, ALPR and biometric recognition are relatively new additions to the field of police surveillance. ALPR devices use “digital cameras mounted on a law enforcement vehicle or at stationary locations to snap images of passing license plates.”27 ALPR systems then convert these digital images of license plates into text files.28 Once converted, ALPR systems can either “compare[] the plate numbers to available databases, often called hotlists,” or they can store the data into searchable databases.29 Video surveillance cameras have long served as a replacement for traditional, in-person police observation.30 But today these surveillance cameras are increasingly armed with biometric recognition, like facial recognition software, which “permit law enforcement to identify the individuals captured by surveillance cameras” based on their facial features.31

Nine important characteristics define the digitally efficient investigative state. First, this policing technique only involves the collection of information on public behavior made visible to law enforcement. ALPR and surveillance cameras do not intrude into any private or protected space. This is different from other policing technologies like wiretaps or heat sensors. Wiretaps allow police to listen to conversations that were not publicly “broadcast to the world.”32 Heat sensors permit police to see “details of the home that would previously have been unknowable without physical intrusion.”33 Digitally efficient surveillance technologies, conversely, merely record information about observable behavior made visible to the devices. ALPR chronicles license plates as vehicles pass stationary or mobile ALPR cameras, and surveillance cameras record video, and occasionally audio, of public actions. The public nature of digitally efficient surveillance is a primary reason that the judiciary has historically avoided regulating these technologies.

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27 Id. at 285.
28 Id.
29 See id. at 285-86.
30 Id.
31 Id. at 288.
Second, the public information collected by these technologies is often personally identifiable. That is to say, once a digitally efficient surveillance device records an image of a license plate or a pedestrian, law enforcement can often identify the driver or pedestrian. Police using ALPR commonly cross-reference license plate numbers with state records of automobile owners to detect stolen cars or wanted criminals.34 At least “[t]hirty-seven states currently load driver’s license photographs into state databases, which are searchable using facial recognition software.”35 In both cases, police are able to take data collected via these efficiency-enhancing technologies and connect it to a specific individual.

The National Institute of Standards and Technology (NIST) defines personally identifiable information as “any information that can be used to distinguish or trace an individual’s identity . . . and other information that is linked or linkable [to a specific person’s identity].”36 Classic examples of personally identifiable information would be a person’s name, address, and telephone number. 37 The NIST also considers biometric data, including photographic images and videos, vehicle identifiers, and property records, to be personally identifiable.38 Under this broad definition, data recovered by digitally efficient technologies is undeniably personally identifiable information. Police can easily link a car’s license plate number to a specific owner. And police can often use biometric data from surveillance cameras—commonly facial recognition—to identify a pedestrian on the street. Thus, once digitally efficient surveillance technologies collect data, this data can be linked or connected with a specific person through cross-reference to other government databases.

Third, these technologies involve not just narrow observation of a single suspect, but the broad surveillance of an entire community over an extended period of time. This is different than less expansive surveillance technologies

37 Id. at 2-2.
38 Id.
previously considered by the Court, like GPS. A single GPS
device affixed to an automobile can give police detailed
information on the movements of a single automobile for an
extended period of time. A GPS device, however, is limited in
scope. It only monitors and records the movements of a single
criminal suspect at a time. This limits the broad community
impact of GPS surveillance. Police have to identify an
individual as a criminal suspect and then install the device to
facilitate surveillance. By contrast, the technologies I describe
as part of the digitally efficient investigative state broadly and
indiscriminately monitor the public behavior of an entire
community. Surveillance cameras record any and all behavior
made public in front of their lenses. ALPR devices run the
license plates of all automobiles that fall within the device’s
view. Thus, every person in a community becomes a target of
the digitally efficient investigative state, not just pre-identified
criminal suspects.

Fourth, because the digitally efficient investigative state
monitors the entire community, it collects information on
illegal activity as well as innocuous behavior. Some policing
technologies, like red light and speed cameras, have been
narrowly devised to only record images and collect data when a
person violates a traffic law. The digitally efficient investigative
state is different. Devices like ALPR and surveillance cameras
are useful because they collect data on all passing cars and
pedestrians. A single ALPR device or surveillance camera might
replace the efforts of dozens, even hundreds, of individual law
enforcement officers. ALPR, for example, is only useful because
it is an unbelievably efficient replacement for a traditional
policing technique—cross-referencing the license plates of
passing cars with databases of active warrants and stolen
automobiles. But when a device can cross-reference and record
data on up to 1,800 license plates per minute, it will invariably
gather enormous amounts of data on innocent people.

Fifth, the technological tools used by the digitally
efficient investigative state only improve the efficiency of
otherwise permissible surveillance techniques. They do not
offer officers any extrasensory ability. Many technological
developments in policing have been met with suspicion because
they give police a superhuman ability not typically associated

enforcement gathered data on Antoine Jones’s movements in his automobile for 28
days straight).
40 Rushin, supra note 8, at 285.
with public policing. For example, in \textit{Kyllo}, the Court barred the warrantless use of heat sensors that could allow police to see movements inside the walls of the home.\footnote{Kyllo v. United States, 533 U.S. 27, 40 (2001).} ALPR, surveillance cameras, and facial recognition arguably all complete tasks that an individual officer could complete without technological assistance. They just do so with astonishing efficiency.

Sixth, these technologies give officers two distinct capabilities: observational comparison and indiscriminate data collection. Observational comparison refers to the limited and temporary collection of data by a digitally efficient technology for comparison and cross-reference to relevant databases. For example, “[w]hen used for observation comparison, ALPR only retains data on license plates that match known or suspected criminal hotlists.”\footnote{Rushin, supra note 8, at 285.} In the case of surveillance cameras armed with facial recognition, “the collection of data would be limited to individuals whose appearance so closely resembles a known criminal as to create reasonable, individualized suspicion.”\footnote{Id. at 288.} By contrast, indiscriminate data collection refers to data retention practices whereby police indefinitely retain all information collected by digitally efficient technologies, regardless of whether the data is linked to any criminal investigation.

Seventh, advances in data storage capabilities have facilitated and incentivized the use of these technologies for indiscriminate data collection. Traditionally, one of the greatest limitations on long-term government surveillance was the limited data retention capabilities of the state.\footnote{See Jack M. Balkin, \textit{The Constitution in the National Surveillance State}, 93 MINN. L. REV. 1, 14 (2008).} But as the cost of data storage decreases, and the technological feasibility of such storage improves,\footnote{See Patricia L. Bellia, \textit{The Memory Gap in Surveillance Law}, 75 U. CHI. L. REV. 137, 140-42 (2008).} the government has no disincentive to collect as much data as possible on public behavior—so long as this information might be useful to a state.\footnote{See Rushin, supra note 8, at 291.} In the case of law enforcement, information may seem irrelevant at the time of collection, but may end up being extremely valuable in solving future crimes.\footnote{Id. at 286 (describing the hypothetical situation where a child is abducted, and police can immediately turn to surveillance data from the time and location of the suspected abduction).} Indeed, as I discuss in Part I.C, the only empirical evidence suggests that the overwhelming majority of
departments with digitally efficient surveillance technology, like ALPR, use it for indiscriminate data collection.48

Eighth, indiscriminate data collection allows law enforcement to aggregate large amounts of information about a single individual, thereby revealing personal information about habits and behaviors. Five of the justices in Jones noted in two separate concurrences that the accumulation of large amounts of data on public movements transforms normal surveillance into a potentially unconstitutional invasion of individual privacy.49 These extensive records on individual movements might reveal private interests, patterns of behavior, or habits. For example, aggregation of surveillance data of an individual might enable “the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on.”50 Police and the state can use this type of revealing personal information to target unpopular minorities or conduct fishing expeditions.51

Ninth, departments commonly share this personally identifiable information. Police have organized both nationally and regionally to share personally identifiable surveillance data.52 As I explain further in Part I.C, the limited empirical data suggest that departments currently share data collected through digitally efficient surveillance technologies.53 The sharing of this data is understandable and potentially useful. Criminals, like most individuals, often move in and out of different police jurisdictions. Information sharing allows police to efficiently identify not just criminals and stolen property from their jurisdiction, but also those from jurisdictions across the country. In a country like the United States with an extremely decentralized array of policing agencies, this type of data sharing can facilitate cooperation and dramatically increase the likelihood of apprehending criminals and recovering stolen property. For example, Cincinnati is currently building a regional data-sharing network for ALPR data for departments across Southwest Ohio, Southeast Indiana and Northern Kentucky, called SOSINK. The purpose of this regional network is to both apprehend wanted subjects traveling across this regional territory and collect intelligence relevant to

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48 See infra Part I.C.
50 Id. at 956 (Sotomayor, J., concurring).
51 See Rushin, supra note 8, at 299.
52 Id. at 292.
53 See infra Part I.C.
ongoing investigations in departments throughout the area. Maryland law enforcement has developed a similar data-sharing network. The state hopes to eventually have 32 agencies sharing information.

This type of regional data sharing of surveillance data is relatively common; one study found that 43% of surveyed departments share data as part of a regional system. But this type of sharing is also potentially problematic. Such sharing of personally identifiable data may increase the possibility of “secondary use.” As Daniel Solove explains, “[t]he potential for secondary use generates fear and uncertainty over how one’s information will be used in the future, creating a sense of powerlessness and vulnerability.”

The expansion of the digitally efficient investigative state is one of the most important developments in the history of policing. Digitally efficient surveillance technologies expand the reach of American police departments. Emerging evidence over the last two decades suggests that police presence may actually reduce crime by altering situational incentives. One possible way to lower the overall crime rate of a community, then, is to increase the number of law enforcement officers. But local communities must operate on finite budgets, limiting the number of police officers they can hire. Thus, criminologists and policing scholars have found that departments can most effectively reduce crime by allocating more of their staff to high

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57 Id.
59 Id. at 522.
crime neighborhoods, or hot spots. A strong body of empirical case studies shows that such hot spot policing can reduce, and not merely displace, crime.

All of these theories of crime reduction rely upon a principal assumption: police cannot be everywhere at once. Thus, scholars in this field try to find methods to improve the efficiency of police activity. The digitally efficient investigative state radically shifts this fundamental assumption of policing and crime control theory. Early quantitative studies on the effects of digitally efficient technologies have returned mixed results on its crime fighting abilities. But if these technologies do become tools for deterrence, investigation, and criminal apprehension, their crime fighting ability will be virtually unmatched by any other technological development in recent history.

Legal scholars and policymakers should look at this trend in policing innovation as a potential tool for both crime control and a source of potential widespread privacy violations. A growing body of evidence confirms that law enforcement uses these surveillance technologies to target minority groups. Psychological and historical evidence suggests that the availability of pervasive surveillance tools may facilitate law enforcement corruption. With the unregulated ability to monitor an entire community, law enforcement may be incentivized to conduct fishing expeditions that “exacerbate racism, stereotyping, or profiling.” This elevates the risk of false positives and harms citizens’ perceptions of procedural fairness. Thus, while the digitally efficient investigative state may be an important development for crime prevention, it also raises numerous privacy concerns.

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63 See, e.g., Anthony A. Braga, Hot Spots Policing and Crime Prevention: A Systematic Review of Randomized Controlled Trials, 1 J. EXPERIMENTAL CRIMINOLOGY 317 (2005) (finding that the majority of empirical studies support the effectiveness of hot spot policing).
65 See Rushin, supra note 8, at 299.
66 Id. at 300-01.
67 Id. at 300.
68 See id. at 301-02.
B. Empirical Evidence on the Scope of Surveillance Technologies

Despite the importance of the digitally efficient investigative state, no comprehensive research has fully documented the extent to which police departments across the country have adopted these new surveillance technologies. To better illustrate the magnitude of the digitally efficient investigative state, I have gathered survey data from four sources: (1) the Law Enforcement Management and Administration Statistics (LEMAS), (2) the International Association of Chiefs of Police (IACP), (3) the Police Executive Research Forum (PERF), and (4) independent surveys conducted by academics researching police organizations.

The Bureau of Justice Statistics (BJS) publishes the LEMAS data every three to four years as part of a comprehensive survey of approximately 3,000 state and local law enforcement agencies. Because the BJS conducts the LEMAS survey semi-regularly, this data set is useful for observing changes over time in police behavior. But the BJS survey data only gives information on the current use of various surveillance technologies. So far, the BJS has not collected data on departmental policies on surveillance data retention.

The data from the IACP and PERF comes from a handful of one-time surveys. Fewer departments respond to IACP and PERF surveys than BJS requests. Nonetheless, the IACP and PERF studies often include detailed questions on departments’ data retention, usage, and access policies—something the LEMAS study lacks. The IACP and PERF surveys also have included information on future plans for the technology and law enforcement departments’ participation in regional data sharing.

1. Surveillance Cameras and Biometric Recognition

Surveillance cameras are nearly ubiquitous in American police departments. According to the 1997 LEMAS survey, nearly 700—or approximately 20% of all departments responding to the question—responded using some type of surveillance cameras. In the following decade, the percentage of departments increased

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70 LEMAS 1997, supra note 1.
dramatically to 56% in 2000, 67% in 2003, and 71% in 2007.\footnote{U.S. Dep’t of Justice, Bureau of Justice Statistics, Law Enforcement Management and Administrative Statistics (LEMAS): 2000 Sample Surveys of Law Enforcement Agencies (2000) [hereinafter LEMAS 2000], available at http://www.icpsr.umich.edu/icpsrweb/NACJD/series/92/studies/3565; U.S. Dep’t of Justice, Bureau of Justice Statistics, Law Enforcement Management and Administrative Statistics (LEMAS): 2003 Sample Surveys of Law Enforcement Agencies (2003) [hereinafter LEMAS 2003], available at http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/04411; LEMAS 2007, supra note 2.} Between 1997 and 2007, the number of departments using surveillance cameras increased by 189%. The IACP study similarly found that departments regularly employed surveillance cameras. In a 2001 survey of 207 police agencies, around 80% claimed to use some type of surveillance camera.\footnote{Laura J. Nichols, Int’l Ass’n of Chiefs of Police, Cutting Edge of Technology Executive Brief: The Use of CCTV/Video Cameras in Law Enforcement 4, 15 (2001).} Although the IACP survey found that a higher number of departments used surveillance cameras around the turn of the century than the LEMAS survey, this discrepancy can be traced to the demographic profiles of the departments responding to each survey instrument.\footnote{See id. at 14 (explaining the breakdown of the survey pool—including the relative amount of larger departments surveyed).} It is safe to say that, while surveillance cameras were relatively rare two decades ago, they are extremely common today. Figure 1 shows the historical trend in police use of surveillance cameras over time.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1}
\caption{Percentage of Police Departments Using Any Camera Surveillance\footnote{LEMAS 2007, supra note 2; LEMAS 2003, supra note 71; LEMAS 2000, supra note 71; LEMAS 1997, supra note 1. In calculating the data for Figure 1, I group}}
\end{figure}
The actual number of surveillance cameras used by individual departments also varies widely from one department to the next. But overall, the number of cameras employed by the average American police department has increased steadily over the last decade. The LEMAS survey first kept records on the number of surveillance cameras used by departments in 2000, when the average department reported employing around 10 surveillance cameras.\textsuperscript{75} The police in the United States in 2000 operated just under 30,000 total cameras.\textsuperscript{76} By 2007, the average department utilized nearly 27 cameras, or a total of nearly 77,000 nationwide.\textsuperscript{77} This represents a 161\% increase in total cameras and a 170\% increase in cameras per department over a mere seven-year period. Figure 2 graphically illustrates the trend in the average number of surveillance cameras per department over a 10 year period.

\begin{center}
\textbf{FIGURE 2, AVERAGE NUMBER OF SURVEILLANCE CAMERAS PER DEPARTMENT}\textsuperscript{78}
\end{center}

The LEMAS data may also dramatically underestimate the actual number of surveillance cameras used by police in the United States. Many cities, like Chicago, give police access to an integrated network of surveillance cameras—public transit cameras, police cameras, and school cameras. Estimates range together in this calculation three categories of surveillance cameras: fixed cameras, mobile cameras, and cameras mounted on squad cars.

\textsuperscript{75} LEMAS 2000, \textit{supra} note 71.

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} LEMAS 2007, \textit{supra} note 2.

\textsuperscript{78} \textit{Id.; LEMAS 2003, supra} note 71; LEMAS 2000, \textit{supra} note 71.
from 8,000\textsuperscript{79} cameras to 15,000\textsuperscript{80} cameras. When responding to the LEMAS survey, Chicago reported use of only 1,073 cameras in 2007.\textsuperscript{81} In all likelihood, this number only represents the number of cameras installed and operated exclusively by police—not the number of cameras used by the city and monitored in some manner by law enforcement. Thus, the LEMAS conclusions almost certainly underestimate the actual number of cameras that police access regularly.

In other IACP surveys, police departments have also rated surveillance cameras as among the highest priority targets for continued technological investment. A 2005 study of 47 law enforcement departments asked administrators to rate the relative importance of future investments in different investigative technologies.\textsuperscript{82} Video cameras were among the top five most important sources for future technological investment.\textsuperscript{83}

Overall, biometric recognition systems, like facial recognition, seem to be rarely used by the average police department. In the LEMAS survey, only 191 departments claimed to use the technology in 2003 and 98 in 2007.\textsuperscript{84} But according to the IACP study, departments indicated a significant interest in investing in facial recognition technology in the future.\textsuperscript{85} In addition, the majority of law enforcement administrators believe facial recognition will be of high value to departments in the future.\textsuperscript{86}

2. Automatic License Plate Readers (ALPR)

There is less historical data on the adoption of ALPR devices. The LEMAS surveys only recently started asking departments about their use of ALPR. The 2007 LEMAS survey was the first. Only 170 departments or about 19\% of those agencies that responded to the survey question claimed

\textsuperscript{79} NANCY G. LA VINGE ET AL., URBAN INST., EVALUATING THE USE OF PUBLIC SURVEILLANCE CAMERAS FOR CRIME CONTROL AND PREVENTION—A SUMMARY 2 (2011).


\textsuperscript{81} LEMAS 2007, supra note 2.

\textsuperscript{82} INT’L ASS’N OF CHIEFS OF POLICE, LAW ENFORCEMENT PRIORITIES FOR PUBLIC SAFETY: IDENTIFYING CRITICAL TECHNOLOGY NEEDS 2-3 (2005) [hereinafter IACP CRITICAL TECH. NEEDS].

\textsuperscript{83} Id. at 3.

\textsuperscript{84} LEMAS 2003, supra note 71; LEMAS 2007, supra note 2. It is unclear why exactly the number of departments that use biometric technology has not increased like other technologies.

\textsuperscript{85} IACP CRITICAL TECH. NEEDS, supra note 82, at 7 (noting that among the categories of video cameras and biometric technologies, respondents placed fixed surveillance cameras and facial recognition at the top of their relative priority lists).

\textsuperscript{86} See NICHOLS, supra note 72, at 13.
to use ALPR in some capacity.\footnote{ROBERTS & CASANOVA, supra note 56, at 6; LEMAS 2007, supra note 2.} While this initially suggests that ALPR is relatively uncommon in the United States, the breakdown of ALPR by city reveals that large cities commonly employ ALPR. Approximately 48% of departments with over 1,000 sworn officers utilize ALPR, compared to 32% of departments with between 501 and 1,000 officers, and 19% of those with between 251 and 500 sworn employees.\footnote{ROBERTS & CASANOVA, supra note 56, at 6.} California, New York, and Florida had the most agencies that claim to use ALPR, with Texas, Virginia, Colorado, and Georgia not far behind.\footnote{Id. at 19.}

Since the LEMAS data came out, three other surveys have attempted to document the use of ALPR in American police agencies. The IACP published the first of these post-LEMAS studies in 2009 after surveying 444 law enforcement departments in the United States. Of the 305 that responded, 23% reported using ALPR.\footnote{Id.} Like LEMAS, the IACP designed the survey to carefully consider the effect of police organization size on ALPR adoption. Table 1 breaks down ALPR usage by department size.

<table>
<thead>
<tr>
<th>Department Size</th>
<th>Percentage Using ALPR</th>
</tr>
</thead>
<tbody>
<tr>
<td>51+</td>
<td>18.8%</td>
</tr>
<tr>
<td>101+</td>
<td>19.7%</td>
</tr>
<tr>
<td>251+</td>
<td>29.1%</td>
</tr>
<tr>
<td>501+</td>
<td>40.6%</td>
</tr>
<tr>
<td>1001+</td>
<td>48.1%</td>
</tr>
</tbody>
</table>

The sample size of those responding to the IACP survey was smaller than the LEMAS survey, which might partially explain the variation. Nonetheless, the IACP numbers build a compelling case that the usage of ALPR is increasing. In a more recent study, Cynthia Lum, Linda Merola, Julie Willis,
and Breanne Cave surveyed a random but statistically representative sample of 200 police departments. Of the 169 departments that responded, Lum et al. found that 21% used ALPR. Among larger departments of 100 sworn officers or more, the number increased to 37%. This generally comports with the IACP and LEMAS findings. Like the IACP report, Lum et al.’s study finds convincing evidence that ALPR usage has increased since the 2007 LEMAS report, and that ALPR usage depends in large part on department size.

The most recent research on the subject comes from a 2011 survey conducted by PERF. They found that 71% of responding agencies currently use ALPR and 85% of administrators plan to acquire more ALPR devices or increase use in the future. Again, it is worth noting that the sample size in the PERF survey was only 70 agencies—not quite as large as the Lum et al. study and significantly smaller than LEMAS. The distribution of the PERF sample also skews heavily toward large departments. This possibly affects the overall findings, and results in a disproportionately large percentage of departments that report ALPR usage compared to the other surveys. But even when accounting for the somewhat skewed sample, the results are strong evidence that departments have increased ALPR adoption in recent years. Respondents to the PERF survey instrument also noted that they expected to equip 25% of all squad cars in their department with ALPR devices in the next five years.

The LEMAS and PERF reports do not provide detailed information on the exact number of ALPR systems deployed per department, but media reports have uncovered detailed information about the heavy distribution of ALPR devices in some of America’s largest cities. The District of Columbia and surrounding suburbs currently operate over 250 ALPR devices.

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92 LUM ET AL., supra note 34, at 13-14.
93 Id. at 19.
94 Id. at 18-19.
95 PERF, supra note 80, at 1-2.
97 Id. at 3. Further, the median size of the department using ALPR in the PERF study was 336 sworn officers. ROBERTS & CASANOVA, supra note 56, at 7. Thus, the PERF sample size appears to be skewed toward large departments.
98 PERF CHIEF’S PERSPECTIVE, supra note 96, at 9.
The state of Maryland has installed around 300 devices statewide.\textsuperscript{100} New York City had installed 238 by 2011.\textsuperscript{101} Dallas plans to use somewhere between 48 to 68 systems in the near future.\textsuperscript{102} This rapid proliferation was predictable. As early as 2005, a survey of law enforcement conducted by the IACP found that police administrators rated ALPR as the highest priority locational and global position technology for future investment.\textsuperscript{103} Overall, the body of evidence on ALPR suggests that the technology is becoming common in American law enforcement agencies.

In sum, the data from these various sources generally reveal two major trends about the adoption of digitally efficient surveillance technology. First, digitally efficient surveillance technologies are becoming ubiquitous among American police departments—particularly in large, urban departments. Second, this rapid transformation in policing technology has happened in a relatively short period of time. This should come as no surprise. Given the potential criminological and cost benefits of digitally efficient surveillance technologies, departments should be investing in these types of technologies. The next logical question is whether and how departments have internally regulated these technologies after adoption. The next section will summarize the limited empirical work on the state of internal departmental regulations.

\textbf{C. The State of Internal Departmental Regulations}

The empirical evidence on the scope of the digitally efficient investigative state paints a clear and persuasive picture—digitally efficient technologies are becoming increasingly common, particularly in large police departments. This means that departments are often collecting enormous amounts of data on a daily basis. Police agencies in Southern California, for instance, have amassed over 160 million data points from the use of ALPR alone.\textsuperscript{104} Fundamental to the emergence of the digitally efficient investigative state is the ability to retain

\begin{footnotesize}
\begin{enumerate}
\item ROBERTS & CASANOVA, supra note 56, at 28.
\item CITY OF DALL., TEX., REQUEST FOR COMPETITIVE SEALED PROPOSAL: DPD MOBILE AND FIXED AUTOMATIC LICENSE PLATE RECOGNITION (ALPR) SYSTEM 2-4 (2012); ROBERTS & CASANOVA, supra note 56, at 28.
\item IACP CRITICAL TECH. NEEDS, supra note 82, at 7.
\end{enumerate}
\end{footnotesize}
large amounts of data due to improving technological feasibility and decreased cost.  

This means that law enforcement agencies collect data on all recorded activity, not just suspicious or criminal behavior.

Departments have every incentive to keep as much data as possible, if that data could be useful in any way to a future criminal investigation. But the possibility of unregulated data retention on innocent people raises serious privacy concerns. Without regulation, historical and psychological evidence indicates that unregulated surveillance data retention may allow the state to target unpopular minority groups for unjustified surveillance, increase the likelihood of corruption, and facilitate fishing expeditions that could eventually disrupt the lives of the innocent.

New evidence suggests that departments have implemented vastly different internal regulations on the use, retention, and access to data acquired from digitally efficient technologies. The overwhelming majority of departments use these technologies not just for observational comparison, but also indiscriminate data collection. Some departments keep data for a matter of days, while others retain it indefinitely. The BJS does not ask departments about data retention policies in the LEMAS surveys. Thus, the best information on data retention by American law enforcement comes from the pair of studies done on ALPR and surveillance cameras by the IACP in 2001 and 2009 respectively. According to these reports, 96% of departments using surveillance cameras, and 95% of those using ALPR engage in some kind of indiscriminate data collection—not just observational comparison.

Among departments that take part in the practice of indiscriminate data collection, the length of retention varies widely. Among departments using surveillance cameras, the vast majority retain video footage for over a month. Of course, the IACP completed this survey on surveillance cameras over a decade ago, when long-term data storage was less feasible. We may expect that today, departments can affordably store video footage for even longer periods of time.

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105 See supra Part I.A.
106 See Rushin, supra note 8, at 299-302.
107 Id.
108 Nichols, supra note 72, at 9 (defining observational comparison as the presence of a formalized policy permitting no storage of data, according to figure 10); Roberts & Casanova, supra note 56, at 29 (defining observational comparison as the presence of a formalized policing permitting no storage of data, according to table 18).
109 Nichols, supra note 72, at 9.
Table 2 summarizes the IACP data on surveillance camera data retention.

**TABLE 2, 2001 IACP DATA ON SURVEILLANCE CAMERA DATA RETENTION**

<table>
<thead>
<tr>
<th>Maximum Retention</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Observational Comparison</td>
<td>4%</td>
</tr>
<tr>
<td>1 day</td>
<td>2%</td>
</tr>
<tr>
<td>7 days</td>
<td>3%</td>
</tr>
<tr>
<td>30 days</td>
<td>20%</td>
</tr>
<tr>
<td>Over 30 days</td>
<td>71%</td>
</tr>
</tbody>
</table>

The IACP also found that a significant number of departments outsourced the operation of police surveillance cameras, as well as the storage and maintenance of data. Around 47% of all camera operators were found to be sworn police officers.\(^{110}\) Furthermore, while surveillance camera data is generally stored at police facilities, the responsibility for maintenance, collection, and disposal of data falls to non-police officers in 43% of departments.\(^{111}\)

As for ALPR locational data, the typical department retained data for between two and six months.\(^{112}\) But a very substantial portion of police departments—around 28%—admit to having either no policy limiting data retention, or having a departmental policy that mandates indefinite retention.\(^{113}\) Table 3 aggregates the IACP findings on ALPR data retention.

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\(^{110}\) *Id.* at 8 (noting in figure 7 that only 53% of operators are police officers).

\(^{111}\) *Id.* (noting in figure 6 that only 57% of the departments have police manage data, but noting in figure 9 that in 90% of agencies the data is stored at police facilities).

\(^{112}\) ROBERTS & CASANOVA, supra note 56, at 29. I define the typical department as the median department responding to the survey. Although the data is not broken down by case, we can surmise from table 18 that the median is somewhere between two and six months.

\(^{113}\) *Id.*
Civil rights advocates have also attempted to gather more up-to-date information on data retention policies by filing Freedom of Information Act (FOIA) requests with departments all across the country. The ACLU has led this charge by filing 587 requests in 38 states. So far, the ACLU has received responses from 293 departments. Although the ACLU has not yet released the full extent of their data, they have observed that retention policies vary widely from one jurisdiction to the next. Departments commonly keep data for several years, with many departments keeping retained data indefinitely when possible.

While some departments have proactively established internal policies to regulate the use of these technologies, many have not. Further, internal policies on data access, retention, and sharing differ dramatically from one department to the next.

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114 Am. Civil Liberties Union, You Are Being Tracked: How License Plate Readers are Being Used to Record Americans’ Movements (July 17, 2013), https://www.aclu.org/technology-and-liberty/you-are-being-tracked-how-license-plate-readers-are-being-used-record.
115 Id. at 3.
116 Id. at 20.
117 Id.
II. THE LAW OF POLICE SURVEILLANCE

Traditionally, courts have shied away from regulating police surveillance in public spaces. This is because the courts have operated under a set of jurisprudential assumptions of police surveillance. These jurisprudential assumptions were reasonable in the past because of the limited technological efficiency of previous surveillance technologies. In Jones, the Supreme Court had the opportunity to confront these jurisprudential assumptions in light of modern technology. A majority of the justices indicated that these jurisprudential assumptions were increasingly unsupportable in today’s digitally efficient world of policing. But the Court did not alter these doctrinal assumptions in any way, nor did they offer much indication on how they may alter these assumptions in the future. Thus, after the Jones decision, the law of police surveillance today is as incoherent as ever.

I have previously argued that the digitally efficient investigative state does not run afoul of the Fourth Amendment, based on the presence of these jurisprudential assumptions, but dicta in the concurrences of the Jones case imply that these jurisprudential assumptions may not exist for much longer. Even so, there is no clear indication how the Court could establish a default rule that both narrowly limits some uses of digitally efficient technologies without adversely affecting other non-invasive, legitimate uses.

In this section, I evaluate the doctrinal basis for the traditional jurisprudential assumptions about police surveillance. I then spend considerable time analyzing the dicta in the Jones case to predict how the Court may respond to these technologies in the future. I conclude that, while the Court will likely make some effort to rein in the digitally efficient investigative state in the future, any regulation will be limited in capacity. The regulation will almost certainly rely upon an often-ineffective enforcement tool like the exclusionary rule. Thus, even if the judiciary is institutionally capable of controlling the digitally efficient investigative state, the legislature must also take a proactive role in any future regulation.

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A. The Fourth Amendment and Privacy

Almost all legal challenges to surveillance, including the challenge levied in *Jones*, claim that government surveillance amounts to an unreasonable search or seizure in violation of the Fourth Amendment of the United States Constitution. The Fourth Amendment does not bar all searches; instead it merely protects against unreasonable searches and seizures by government agents. In judging whether a tactic qualifies as an unreasonable search or seizure, the Court generally uses a test originally developed in Justice Harlan’s concurrence in *Katz v. United States*. This test asks whether the action violates a person’s reasonable expectation of privacy. An act violates a person’s reasonable expectation of privacy if the person “exhibited an actual (subjective) expectation of privacy,” and such an expectation of privacy is “one that society is prepared to recognize as ‘reasonable.’”

The Court grappled with the jurisprudence of police surveillance for many decades before adopting the *Katz* standard. In a 1928 case, *Olmstead v. United States*, federal prohibition officers used an early version of a wiretap to listen in on the conversation of a criminal suspect. The officers did not obtain a warrant before using the device. Using this technology, law enforcement listened to the suspect’s conversations for many months. They then used the conversations as evidence to justify an arrest and later conviction. The Court upheld this wireless wiretapping as constitutional, arguing that the practice involved no physical intrusion into the person’s home or seizure of tangible property. The Court compared phone lines to public highways, noting that the phone lines “are not part of his house or office any more than are the highways along which they are stretched.” Thus, after *Olmstead*, the Fourth Amendment did not protect against technological surveillance unless the technology

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120 U.S. CONST. amend. IV.
122 *Id.*
125 *Id.* at 442-43.
126 *Id.* at 457.
127 *Id.*
128 *Id.* at 466.
129 *Id.* at 465.
somehow tangibly intruded in a protected place. The Court honored this rigid view of the Fourth Amendment for nearly four decades, permitting law enforcement to use other surveillance technologies like detectaphones and wiretaps without a warrant.

The Court finally reversed track in 1967 in *Katz v. United States*. There, police surreptitiously attached a listening device to a public telephone booth and listened to the conversations of a suspected gambler. Katz appealed his conviction by arguing that the use of a listening device inside a phone booth violated the Fourth Amendment. The Court agreed with Katz, finding that the use of a warrantless wiretapping device on a public phone violated the Fourth Amendment because the “Fourth Amendment protects people, not places, from unreasonable searches and seizures.” Even though the police never physically invaded Katz’s personal property, and even though Katz was using a public phone booth, the Court concluded that he had a reasonable expectation that his words would not be “broadcast to the world.” Justice Harlan’s concurrence in *Katz* set out a two-prong test to determine whether the action of a state agent violates the bar on unreasonable searches and seizures. According to Harlan, courts should ask (1) whether a person exhibited a subjective expectation of privacy, and (2) whether society is ready to recognize that subjective expectation as reasonable. In later cases, including *Jones*, the Court has relied on this test to determine whether a police surveillance technology requires a warrant before use.

### B. The Jurisprudential Assumptions of Police Surveillance

In applying the *Katz* test to emerging surveillance technologies the Court has relied on two important jurisprudential assumptions: first, an individual has no reasonable expectation of privacy in anything they expose to the public or a third party, and second, policing technologies that

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130 Hutchins, *supra* note 12, at 424 (noting that *Olmstead* “recognized a new constitutional threshold for Fourth Amendment protection—tangible physical intrusion by the government”).

131 Goldman v. United States, 316 U.S. 129, 135-36 (1942) (holding that the use of a detectaphone to listen to a defendant’s conversation through an adjoining wall did not require a warrant before use).


133 *Id.* at 354-55 n.14.

134 *Id.* at 348-49.

135 Rushin, *supra* note 8, at 305.

136 *Katz*, 389 U.S. at 352.

137 *Id.* at 361 (Harland, J., concurring).
merely improve the efficiency of otherwise legal policing tactics do not violate a person’s reasonable expectation of privacy. Each of these assumptions was once defensible, but decreasingly so in our technologically efficient state.

1. Assumption One: No Reasonable Expectation of Privacy in Actions Exposed to Others

The first major assumption of police surveillance law is that an individual has no reasonable expectation of privacy in anything they expose to the public or a third party. Historically, the Court has relied on this assumption as a fundamental building block for numerous jurisprudential doctrines, including the open fields doctrine, the third party doctrine, and the misplaced trust doctrine. Today, this assumption grounds the belief that police can observe and record all public behavior—whether that surveillance comes in the form of aerial observation, surveillance of driving movements, or through the use of some other digitally efficient technology.

One of the earliest judicial default rules premised on this presumption is the open fields doctrine. Established in *Hester v. United States* and later reaffirmed in *Oliver v. United States*, this doctrine clarified that individuals have no reasonable or constitutionally protected expectation of privacy in open fields. For example, in *Hester*, two state agents trespassed onto a criminal suspect’s land and observed him in possession of illegal alcohol. The Court held that, even if the officers had unlawfully trespassed onto the suspect’s land, the subsequent observation of liquor was not an unreasonable search in violation of the Fourth Amendment. The agents made these observations from an open field, and the Court held that a person has no reasonable expectation of privacy in observations made from an open field. The Court reaffirmed the open fields doctrine in 1984 in *Oliver*. There the justices found that the open field doctrine does not conflict with the two-prong test handed down in *Katz*. Individuals do not have

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141 *Id.* at 59.
143 *Hester*, 265 U.S. at 57-58.
144 *Id.* at 58-59.
145 *Id.*
146 *Oliver*, 466 U.S. at 179.
a reasonable expectation of privacy in actions executed in open fields because they cannot reasonably expect that such actions will be free from “government interference or surveillance.”  

Implicit in the open fields doctrine is a notion that individuals should not expect privacy in such environments because such locations are often visible to other people. Thus, the open fields doctrine is premised upon a conception of privacy that rigidly distinguishes between private and public. When people make any action public through committing it in a potentially public environment, such as an open field, they thereby expose that behavior to the world. In such scenarios, the Court has historically held that the person loses any reasonable expectation of privacy.

The third-party doctrine also relies on a belief that all information exposed to others deserves no protection under the Fourth Amendment. In United States v. Miller, the Bureau of Alcohol, Tobacco, and Firearms (ATF) acquired bank records related to Miller’s alcohol distillery. The Court held that the ATF did not need a warrant to obtain Miller’s bank records because the records contained “only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.” Thus, Miller stands for the proposition that, even when a person turns over records to a third party for a limited purpose, he assumes the risk that the third party will reveal those records to law enforcement. The Court has since reaffirmed this rule in various different scenarios, including in Smith v. Maryland. There, police installed a device known as a pen register on a criminal suspect’s phone without a warrant. The pen register gave law enforcement a record of every phone number the suspect dialed. The Court found this kind of law enforcement tactic constitutional because it merely recorded the numbers dialed, not the content of the communications. While a person has a reasonable expectation of privacy in their communications over a telephone, they should realize that a phone company has a legitimate business need to record numbers dialed. Thus, by using a telephone, users should reasonably expect that a third party is or could be compiling data on the numbers they dial. In such situations,

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147 Id.
149 Id. at 442.
150 Id. at 443.
152 Id.
153 Id. at 743.
154 Id. at 745-46.
“a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”

The misplaced trust doctrine similarly rests on a presumption that individuals risk observation and investigation every time they reveal any words or behaviors to third parties. Soon after Katz, the Court held in United States v. White that police could legally record conversations between informants and criminal suspects without a warrant; even if a person has every reason to trust that the information shared will be private, he cannot reasonably be certain that such information will stay private. Even if that suspect has a misplaced trust in the informant, the suspect assumes the risk by conveying personal information. This reaffirmed the Court’s holding from an earlier case, Hoffa v. United States, that stated that “[t]he risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.”

Whether you turn over bank records to a financial assistant, phone numbers to a phone company, or confidential information to a supposed friend, you lose virtually any reasonable expectation of privacy. Similarly, if your actions end up being visible to other people, even on your own property, you cannot reasonably expect privacy.

The Court has continued to adhere to this jurisprudential assumption in cases involving advanced technological surveillance by law enforcement. Three of the most prominent pre-Jones cases involving technologically advanced police surveillance mechanisms, Florida v. Riley, Dow Chemical Company v. United States, and United States v. Knotts, all appear to abide by this jurisprudential assumption.

The Riley case involved a police helicopter that flew approximately 400 feet above a suspect’s greenhouse. The owner had partially enclosed the greenhouse and covered the

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155 Id. at 743-44.
159 Smith, 442 U.S. at 743-44.
160 Hoffa, 385 U.S. at 303.
165 Riley, 488 U.S. at 448-49.
top of the greenhouse with corrugated roof panels. The owner had only left about 10% of the roof uncovered by roofing panels. By flying over this structure in a helicopter, a police officer could visually identify marijuana growing inside the greenhouse. The Court ruled that, because the owner would reasonably expect there to be air traffic over this greenhouse, he had to reasonably expect that aircraft flying over the structure could see inside. Adhering to the first assumption of police surveillance law, the Court rejected the suspect’s privacy claim on the basis that he had implicitly made his marijuana farm public to those flying above.

The Court reached a very similar conclusion in Dow Chemical. In that case, the Environmental Protection Agency (EPA) used an aerial camera to photograph a manufacturing facility in Midland, Michigan. The aircraft never left navigable airspace and took photographs from between 1,200 and 12,000 feet. The camera allowed the EPA to gain an extremely close-up look at details in the facility—“a great deal more than the human eye could ever see.” Even so, the resultant pictures were not significantly distinguishable from those used to make maps. While Dow has a reasonable expectation of privacy inside its building facilities, the Court determined that the outside of the facility—particularly when viewed from above—is more akin to an open field. This means that “observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area” does not offend the Fourth Amendment.

Finally, in Knotts, the Court upheld the use of a warrantless radio transmitter tracking device installed inside a chemical drum purchased by a criminal suspect. Police believed that the suspect was using certain chemicals in the production of illegal substances. With the permission of the chemical company, police installed the tracking device on a chloroform

\[166\] Id. at 448.
\[167\] Id.
\[168\] Id.
\[169\] Id.
\[170\] Id. at 450-51.
\[172\] Id. at 229.
\[173\] Id.
\[174\] Id. at 230.
\[175\] Id. at 232.
\[176\] Id. at 239.
\[177\] Id.
container before the chemical company handed it over to the suspect.\textsuperscript{179} The officers then used a radio receiver to acquire occasional signals emitted by the tracker; these signals helped the officials generally follow the suspect, but did not reveal his precise location in the way GPS can today.\textsuperscript{180} The officers used this device to establish probable cause for a warrant.\textsuperscript{181} Upon executing the warrant, police discovered that the suspect was part of an extensive methamphetamine laboratory.\textsuperscript{182} The suspect challenged his conviction by claiming that the tracking device violated his reasonable expectation of privacy.\textsuperscript{183} The Court rejected his claim, arguing that the suspect had a diminished expectation of privacy in an automobile on a public thoroughfare.\textsuperscript{184} The court reasoned that when a car travels in public, “both its occupants and its contents are in plain view”;\textsuperscript{185} the suspect’s “direction[,] . . . stops . . . and . . . final destination” were all “voluntarily conveyed to anyone who wanted to look.”\textsuperscript{186} Consequently, the Court upheld the admission of evidence acquired via the tracking device.\textsuperscript{187}

In sum, the Court has tightly honored the traditional assumption that anything exposed to the public is presumptively outside the bounds of Fourth Amendment protection. Such an assumption has traditionally been workable given the limited scope of investigative technologies. Surveillance technologies—be they aerial photography or radio transmitters—could only collect information on a limited number of suspects over a limited period of time. Police were forced to choose which suspects to surveil, thereby limiting the overall scope of public surveillance efforts. As the digitally efficient investigative state grows in strength, however, this assumption is becoming dangerously unsupportable.

2. Assumption Two: The Courts Should Not Limit Police Efficiency

The second major jurisprudential assumption of police surveillance is that policing technologies that merely improve the efficiency of otherwise legal policing tactics do not violate a

\begin{flushleft}
\textsuperscript{179} Id. at 278.
\textsuperscript{180} Id.
\textsuperscript{181} Id. at 279.
\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} Id. at 281.
\textsuperscript{185} Id. (internal citations omitted).
\textsuperscript{186} Id.
\textsuperscript{187} Id. at 282.
\end{flushleft}
person’s reasonable expectation of privacy. These efficiency-enhancing technologies are typically contrasted with technologies that give police a pervasive, extrasensory ability. The Court has long displayed a reluctance to regulate police efficiency. As early as Dow Chemical, the Court was quick to note that, although an aerial camera can get a very precise view of images below, “[t]he photographs were not so revealing of intimate details as to raise constitutional concerns. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems.”

Indeed, the Court has long distinguished between sense-enhancing technologies and extrasensory technologies. While the Court has restricted the use of certain extrasensory technologies, it has been reluctant to restrict any technologies that merely improve the efficiency of otherwise legitimate police surveillance techniques.

The United States v. Kyllo case typifies the Court’s approach to extrasensory technology, while the White and Knotts cases are examples of the Court’s deference toward efficiency-enhancing technologies. In Kyllo, law enforcement officials suspected the defendant of growing marijuana in his home by using high-intensity lamps. Police knew that such high-intensity lamps would produce a significant amount of heat. From the outside of the house, an officer used a heat-sensing device to scan the inside of the defendant’s house. The device was capable of showing differences in heat within the house. The officer found that the home’s garage was substantially warmer than the rest of the house, which was consistent with the growing of marijuana via indoor heat lamps. Based on this information, police obtained a warrant to search the home and found marijuana inside the garage, which was used to secure a conviction.

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193 Kyllo, 533 U.S. at 29.
194 Id.
195 Id. at 29-30.
196 Id.
197 Id. at 30.
198 Id.
challenged the unwarranted use of the heat sensor by claiming that its use violated his reasonable expectation of privacy. 199 The Court agreed, holding that this type of warrantless, extrasensory surveillance violated the constitution because it was capable of “explor[ing] the details of the home that would previously have been unknowable without physical intrusion . . . .” 200 Justice Stevens, in attempting to justify the warrantless use of this technology in his dissent, tried to categorize heat sensors as an efficiency-enhancing technology: “the ordinary use of the senses might enable a neighbor or passerby to notice the heat emanating from a building . . . .” 201 But the majority of the Court ultimately disagreed, finding the use of a heat sensor without a warrant to be unconstitutionally extrasensory in nature. 202

This contrasts with the White and Knotts cases. In each of those cases, the Court concluded that the police do not need to acquire a warrant before using a technological replacement for everyday police activity. 203 In White, the Court noted that an undercover officer does not violate a suspect’s reasonable expectation of privacy by taking notes on the conversation. 204 Thus, it should come as no surprise that the Court has consistently held that police may engage in warrantless recording of conversations while undercover. 205 As Justice White persuasively argued:

> If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant’s constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks. 206

The Court made the same basic argument in the Knotts case. There, the Court concluded that the warrantless use of a tracking device was nothing more than a digital replacement for traditional observational surveillance. 207 If police had unlimited resources and officers, they could have conceivably tracked the criminal suspect with the same accuracy. The

199 Id.
200 Id. at 40.
201 Id. at 43 (Stevens, J., dissenting).
202 Id. at 40 (majority opinion).
203 Hutchins, supra note 12, at 456 (discussing the difference between sense-augmenting technologies as replacements for police activity and extrasensory technologies).
206 White, 401 U.S. at 751.
digital tracking device was nothing more than an efficiency-enhancing technology. As such, the justices upheld the warrantless use of the technology because the court “never equated police efficiency with unconstitutionality.”

The Court, though, does not always rely upon a complete dichotomy between efficiency-enhancing and extrasensory technologies. The Court does permit the unwarranted use of certain extrasensory technologies, depending on the quantity and type of information revealed by the technology. The Dow Chemical case epitomizes this exception to the rule. Recall that when the state used aerial cameras to zoom into details on the Dow Chemical facility below, the Court acknowledged that no police officer could have seen images in such fine detail without the assistance of the camera. This seems to suggest that the technology was more akin to a heat sensor (extrasensory) than an audio record recorder (efficiency-enhancer). But the Court nonetheless permitted the warrantless use of this technology because of the limited amount of private information it could potentially uncover by photographing a business facility from above. Because the only possible information that the aerial photography could obtain was pictures of an open field, the technology could only minimally invade any person’s reasonable expectation of privacy.

This raises an important question—if a technology could record, through extrasensory methods, evidence of illegal behavior only, would police ever need to obtain a warrant to use this technology? One emerging technology might raise this very question. The United States intelligence community has made a substantial investment in laser-based molecular scanners. The technology is up to ten million times faster and a million times more sensitive than any other technology.

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208 Id. at 284.
209 See Hutchins, supra note 12, at 438.
211 Id. at 236-39 (noting the reduced expectation of privacy because the property was more akin to an open field than the property immediately surrounding a home).
currently available.\textsuperscript{214} It can immediately ascertain everything about a passing person—from small drug residue to gun powder—from up to 50 meters away.\textsuperscript{215} Police can operate this technology without passing pedestrians even knowing it is in operation.\textsuperscript{216} Such a technology is undeniably extrasensory in nature. No human could possibly detect the presence of illegal substances on a molecular level. The technology could theoretically be calibrated to uncover only the presence of illegal substances. The Court has generally held that the use of an extrasensory aid, like a canine, that should only alert officers to the presence of an illegal drug does not require a warrant, or even reasonable suspicion before use.\textsuperscript{217} But the widespread use of a technology like laser-based molecular scanners could someday force the Court to rethink this conclusion.\textsuperscript{218}

To summarize, while the Court has generally upheld the assumption that police may freely use efficiency-enhancing technologies, police must obtain authorization before turning to extrasensory technology. They have tempered this dichotomy in cases where the extrasensory aid can only alert police to the likely presence of illegal behavior. But that assumption may become more and more unjustified in light of technological advancement.

C. \textit{Jones and the Emerging Doctrinal Incoherence}

Before \textit{Jones}, the Court had relied on these two jurisprudential assumptions of police surveillance. But \textit{Jones} forced the Court to consider how these assumptions fit with the increasingly efficient, digital surveillance of the twenty-first century. It is worth mentioning at the outset that the technology at issue in \textit{Jones} is distinguishable from the digitally efficient investigative technologies discussed in this article. The law enforcement agency used the GPS device in \textit{Jones} to only monitor the movements of a single criminal suspect. While the device could efficiently monitor the movements of a single person, it was not part of a dragnet surveillance technique that collected

\begin{itemize}
\item \textsuperscript{214} \textit{Hidden Government Scanners Will Instantly Know Everything About You From 164 Feet Away}, supra note 213.
\item \textsuperscript{215} \textit{Id.}
\item \textsuperscript{216} \textit{Id.}
\item \textsuperscript{217} Florida v. Harris, 133 S. Ct. 1050 (2013); Illinois v. Caballes, 543 U.S. 405 (2005); \textit{but see} Florida v. Jardines, 133 S. Ct. 1409 (2013) (holding that a canine sniff on a person’s home or curtilage is a Fourth Amendment search).
\item \textsuperscript{218} The ability of laser-based molecular scanners to detect any substance on a molecular level makes it many magnitudes more efficient than a traditional, extrasensory aid like a canine. Thus, this could raise the same legal and pragmatic concerns expressed \textit{supra} Part I.A regarding unregulated efficiency.
\end{itemize}
surveillance data on the entire community.\textsuperscript{219} Thus, it is hard to predict how the Court will eventually handle the digitally efficient investigative state based solely on their treatment of GPS devices. Even so, the \textit{Jones} decision gave the Court a clear opportunity to directly confront the jurisprudential assumptions of police surveillance.

In the case, police suspected that nightclub owner and operator Antoine Jones was trafficking narcotics.\textsuperscript{220} The Federal Bureau of Investigation and the D.C. Metropolitan Police Department used a variety of investigation techniques, including the installation of a surveillance camera, pen registers, and a wiretap of Jones’s cell phone.\textsuperscript{221} Based on potentially incriminating information obtained through these measures, law enforcement successfully acquired a warrant to install a GPS device on Jones’s Jeep Cherokee.\textsuperscript{222} The warrant only authorized law enforcement to install the device within a 10-day time period while the automobile was in Washington, D.C.\textsuperscript{223} Rather than following the terms of the warrant, police installed the device “[o]n the 11th day, and not in the District of Columbia but in Maryland . . . .”\textsuperscript{224} Thus, while the police had initially obtained a warrant for the GPS device, the warrant was no longer valid at the time of installation. Police installed the device by attaching it to the underside of the Jeep while it was parked in a public lot.\textsuperscript{225}

Over the next 28 days, police tracked the movement of Jones’s automobile.\textsuperscript{226} The police even replaced the battery on the GPS device at one point while the car was again in a public parking lot in Maryland.\textsuperscript{227} Because the GPS device was only affixed to Jones’s car, the police could only monitor the movement of his car along public thoroughfares.\textsuperscript{228} Still, the police acquired over 2,000 pages of data during this time period, some of which helped build the government’s case against Jones and his co-conspirators for conspiracy to distribute and possession with the intent to distribute cocaine.\textsuperscript{229} Jones challenged the admission of the GPS data in the District Court. But the court permitted

\begin{footnotes}
\item \textsuperscript{219} See Rushin, \textit{supra} note 8, at 317.
\item \textsuperscript{220} United States v. Jones, 132 S. Ct. 945, 948 (2012).
\item \textsuperscript{221} Id.
\item \textsuperscript{222} Id. It is worth noting that the car in question actually belonged to Jones’s wife, although Jones used the vehicle.
\item \textsuperscript{223} Id.
\item \textsuperscript{224} Id.
\item \textsuperscript{225} Id.
\item \textsuperscript{226} Id.
\item \textsuperscript{227} Id.
\item \textsuperscript{228} Id.
\item \textsuperscript{229} Id.
\end{footnotes}
nearly all of this data into evidence, citing *Knotts* for the proposition that an individual has no reasonable expectation of privacy in public movements.\textsuperscript{230} The district court jury found Jones guilty and sentenced him to life imprisonment.\textsuperscript{231}

In a fascinating decision though, the United States Court of Appeals for the District of Columbia overturned the conviction, ruling that the installation and data collection violated the Fourth Amendment.\textsuperscript{232} The D.C. Circuit reached this conclusion by centering their analysis on whether a person has a reasonable expectation that their movements will not be recorded in an extended, uninterrupted manner.\textsuperscript{233} Because the marginal cost of every day GPS surveillance is “effectively zero,” police could monitor a person’s movement cheaply and incredibly efficiently.\textsuperscript{234} In applying a so-called “mosaic theory,” the court noted that “long-term surveillance of an individual reveals important and intimate details about their behaviors.”\textsuperscript{235} The court therefore concluded that police should obtain a valid warrant before using technology that can reveal such intimate and private details of one’s life.\textsuperscript{236}

This was a radical doctrinal shift that fundamentally undermined both of the jurisprudential assumptions of police surveillance. By finding that the recording of personal surveillance data on public movement at some point violates the Fourth Amendment, the D.C. Circuit indicated that it presumably believes that a person can have a reasonable expectation of privacy in public. This undermines the first assumption of police surveillance law, which says that people have no reasonable expectation of privacy in public. The second jurisprudential assumption of police surveillance, that the courts should not limit improvements on policing efficiency, is likewise upended if a technology like GPS can become unconstitutionally invasive based merely on its ability to enhance the efficiency of surveillance.

The Supreme Court unanimously agreed with the D.C. Circuit that the installation of a GPS device violated the Fourth Amendment. The Court, though, split on why this kind of surveillance violated the Fourth Amendment. Five of the justices—Justice Scalia writing the majority with Justices Thomas, Roberts, Sotomayor, and Kennedy joining—held that

\textsuperscript{230} *Id.*

\textsuperscript{231} *Id.* at 949.


\textsuperscript{233} *Id.* at 563-64.

\textsuperscript{234} *Id.* at 565.

\textsuperscript{235} Rushin, *supra* note 8, at 317.

\textsuperscript{236} *Maynard*, 615 F.3d at 562-66.
the installation of a GPS device violated the Fourth Amendment because of the device’s physical installation on the automobile.\textsuperscript{237} These justices were not yet prepared to uphold the mosaic theory advanced by the D.C. Circuit. Instead, they emphasized that, because the attachment of the GPS device amounted to a technical trespass, it violated the original understanding of the Fourth Amendment.\textsuperscript{238} The majority did not discount, though, that the Court might have to reconsider some of the basic jurisprudential assumptions of police surveillance law. Scalia cited \textit{Knotts} in explaining that GPS is a mere technological replacement for traditional surveillance, which has always been upheld as constitutionally permissible without a warrant.\textsuperscript{239} Scalia noted that, while “[i]t may be that achieving the same results through electronic means, without any accompanying trespass, is an unconstitutional invasion of privacy,” the \textit{Jones} case “[d]id not require [the Court] to answer that question.”\textsuperscript{240} The Court has never recognized that long-term surveillance amounts to an unconstitutional search, and the majority argued that attempting to do so now would force the court to unnecessarily grapple with many “vexing problems.”\textsuperscript{241}

Justice Sotomayor wrote separately to note that long-term and efficient technological surveillance might impinge on a person’s reasonable expectation of privacy.\textsuperscript{242} Sotomayor concluded that “it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.”\textsuperscript{243} Nevertheless, Sotomayor felt that this police action could be found unconstitutional based on the trespass of personal property alone.\textsuperscript{244} By contrast, four of the justices—Justice Alito writing the concurring opinion with Justices Kagan, Breyer, and Ginsburg joining—concluded that the installation of a GPS device violated the suspect’s reasonable expectation of privacy by aggregating copious amounts of data on his public actions.\textsuperscript{245} These justices believed that the majority’s focus on the physical trespass of the device was reminiscent of the \textit{Olmstead} era decisions that emphasized physical trespass as a necessity to any claim of unreasonable

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\item \textsuperscript{237} United States v. Jones, 132 S. Ct. 945, 949 (2012).
\item \textsuperscript{238} Id.
\item \textsuperscript{239} Id. at 953.
\item \textsuperscript{240} Id. at 954.
\item \textsuperscript{241} Id.
\item \textsuperscript{242} Id. at 955-56 (Sotomayor, J., concurring).
\item \textsuperscript{243} Id. at 957.
\item \textsuperscript{244} Id. at 955 (noting that the reaffirmation of the trespass principle was sufficient to decide this case).
\item \textsuperscript{245} Id. at 963-64 (Alito, J., concurring).
\end{itemize}
\end{footnotesize}
According to Justice Alito, the majority’s reasoning generally ignores the important privacy interests at stake in the long-term use of GPS tracking, and instead “attaches great significance to something that most would view as relatively minor”—the attachment of a small device to the bottom of a car. Such a viewpoint makes no distinction between the use of GPS tracking for a single day or many years. In Alito’s mind, there is clearly a distinction to be made between brief electronic surveillance and extended surveillance; long-term surveillance reveals detailed information about personal behavior and habits, while short-term does not. But above all, Alito’s concurrence appears to express concern that the majority’s rationale does nothing to address electronic surveillance that does not involve physical trespass.

Alito believes that the Court should look at surveillance techniques on a case-by-case basis and judge whether the electronic surveillance used “involved a degree of intrusion that a reasonable person would not have anticipated.” Using this test, Alito would permit the short-term use of electronic surveillance on public streets, but bar the use of long-term surveillance for most criminal offenses. “For such offenses, society’s expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual’s car for a very long period.”

The Alito recommendation is similar to the proposal I made two years ago. His solution would involve the judiciary limiting the length of data retention for surveillance technologies. He would permit longer retention in cases where police are investigating serious criminal offenses. And he emphasizes that the legislature may be the most appropriate branch to regulate these technologies long-term. Similarly, I argued that the judiciary should regulate the digitally efficient investigative state by limiting the length of data retention.
emphasized the need for the judiciary to not establish a firm limit on data retention and surveillance, thereby giving police latitude to adjust the use of these technologies to the relative seriousness of the crime being investigated and the relative threat posed by the suspected criminal offense.255 I concluded that the “legislatures must play a critical role in developing more nuanced and specific enactments” that elaborate specific regulations for the use of surveillance technology.256 Both my recommended solution and Alito’s represent a limited acceptance of the so-called mosaic theory that recognizes that the aggregation of long-term electronic surveillance data can be so revealing of personal details as to become an unreasonable search or seizure.

After the Jones decision, it seems likely that the Court will someday break away from the two jurisprudential assumptions of mass police surveillance. At least five of the justices showed clear support for the adoption of some version of the mosaic theory. And even the justices that did not officially support the future adoption of such a doctrinal path acknowledged that it might be necessary in the future. But, this raises two important questions—how should we begin to regulate the use of these surveillance devices, and what branch of government should do the regulating?

Scholars are sharply divided on the appropriateness of judicially regulating emerging technologies. Orin Kerr has been perhaps the most outspoken and persuasive critic of judicial policymaking in such cases. Kerr has advanced three important arguments in support of this position: (1) the courts lack the physical and administrative resources to develop comprehensive policies, (2) judges are not technologically sophisticated enough to craft technology regulations, and (3) these judicial regulations rarely hold up in different factual situations.257 After the Jones decision, Kerr also argued that if the Court were to adopt the mosaic theory, it would necessarily have to confront many

255 Id. at 321 (suggesting that “we may prefer more liberal data retention policies for surveillance around national monuments and critical infrastructures in recognition of the threat posed by terrorism”).
256 Id. at 328.
extremely difficult choices. Thus, Kerr believes that the Court should avoid such a path in the future.

I disagree with Kerr’s conclusions on the limited institutional capacity of the judiciary to regulate emerging surveillance technology. But even if the Court does eventually adopt some version of the mosaic theory—as I believe they will—this judicial response will be very limited. Thereafter, state legislatures will ultimately have to develop most nuanced regulations of these devices going forward. In the next section, I develop a model state statute that could address some of the major problems implicated by the digitally efficient state.

III. THE LEGISLATIVE RESPONSE

Any future judicial response must be coupled with state legislation. Even if the judiciary eventually accepts some version of the mosaic theory in interpreting the Fourth Amendment, we should not expect the Court to hand down detailed regulations for the use of these technologies. Justice Alito’s concurrence in Jones is telling. His proposal to regulate the efficiency of surveillance technologies would only control data retention. And the amount of data that a police department could reasonably retain without a warrant would vary from one situation to the next based upon the relative seriousness of the possible crime at issue. This barely scratches the surface of broader problems posed by the digitally efficient state. Under what conditions should we permit extensive data retention? When should we limit this kind of retention? Is data aggregation more acceptable as long as the data is not cross-referenced with other databases, thereby personally identifying individuals? Should we regulate law enforcement’s access to this personal data? And where should this data be stored?

Even my original proposal for judicial regulation of mass police surveillance only addressed a handful of these questions. I recommended that courts require police to develop clear data retention policies that are tailored to only retain data as long as necessary to serve a legitimate law enforcement

259 Id. at 315-16 (pushing instead for the Court to adopt a sequential analysis of search and seizure law, where the Court “take[s] a snapshot of the act and assess[es] it in isolation”).
260 Id. at 328.
262 Id.
purpose.\textsuperscript{263} Like Alito's proposal, such a standard would vary according to the seriousness of the crime under investigation and the individual circumstance. I also argued that in cases where police retain surveillance data without a warrant through electronic means, they should have a legitimate law enforcement purpose before cross-referencing that data with other databases for the purposes of identifying individuals.\textsuperscript{264}

Both the \textit{Jones} concurrence and my previous proposal would establish a broad judicial principle mandating that police regulate data retention according to the seriousness of the crime under investigation and the legitimate need for such retention. This type of judicial response is limited in nature. Legislative bodies would likely need to step in to provide more detailed standards.

The legislative branch has several advantages over the judiciary that make it appropriate for this type of detailed policy building. The legislature has a wider range of enforcement mechanisms than the judiciary. The legislature can mandate in-depth and regular oversight. And it has the resources and tools to develop extensive, complex regulations. As a result, the legislature is the best-positioned branch to address some of the critical issues raised by the digitally efficient investigative state, such as data storage, access, and sharing policies.

In this Part, I offer guidelines for a legislative response to mass police surveillance. I first detail some of the foundational principles that legislative bodies ought to recognize in regulating police use of technology. Next, I give a brief overview of how a handful of states have attempted to regulate these technologies. I conclude by offering and defending my statutory recommendations.

\textbf{A. Foundational Principles for Regulating Police Surveillance Technology}

In making this legislative recommendation, I rely on three foundational principles about legislative regulation of law enforcement technologies. First, any regulation must provide clear and articulable standards that law enforcement can and will easily enforce.\textsuperscript{265} Courts and legislators have often agreed

\begin{footnotesize}
\textsuperscript{263} Rushin, supra note 8, at 318.

\textsuperscript{264} Id.

\textsuperscript{265} David Goetz, \textit{Locating Location Privacy}, 26 \textit{BERKELEY TECH. L.J.} 823, 856 (2011); Pell & Soghoian, \textit{supra} note 23, at 124 (explaining the importance of clear rules for law enforcement); Savage, \textit{supra} note 23, at A12 (quoting Professor Kerr advocating clear standards for law enforcement).
\end{footnotesize}
that police regulations should be easy to apply across many different factual circumstances. 266 If a regulation is unclear, there is a higher probability that law enforcement will, even in good faith, misapply the standard. For example, in Atwater v. City of Lago Vista, Texas state law permitted officers to arrest offenders who violated traffic laws for failure to wear a seatbelt, even though the final punishment for such a violation was a mere fine. 267 In upholding an officer’s decision to arrest a woman for failure to buckle her seatbelt, the Court stressed that police need rules that emphasize “clarity and simplicity.” 268 Earlier regulations have encountered resistance from law enforcement because they were not easily administrable standards. For example, in Arizona v. Gant, the Court upended a longstanding doctrine that said police could search an automobile incident to an arrest of a person in that vehicle. 269 The new standard said that police “may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” 270 Justice Alito found this new standard undesirable compared to the previous standard. In Alito’s mind, the Court should strive for “a test that would be relatively easy for police officers and judges to apply.” 271 While some commentators disagree about the relative importance of clear and simple rules, 272 most judges and policymakers agree that any policymaker should consider the administrability of a mandate.

Clear and simple rules also have another advantage over ambiguous mandates—these kinds of clear directives are less susceptible to organizational mediation. 273 If a state regulation of a policing organization is “vague or ambiguous,” the police organization may “mediate the implementation and impact the law.” 274 Lauren Edelman had demonstrated this

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266 See, e.g., Arizona v. Gant, 556 U.S. 332, 360 (2009) (Alito, J., dissenting) (noting that courts and policymakers should strive to develop “a test that would be relatively easy for police officers and judges to apply”).


268 Id. at 347.

269 Gant, 556 U.S. at 351.

270 Id.

271 Id. at 360 (Alito, J., dissenting).

272 See William J. Stuntz, Local Policing After the Terror, 111 YALE L.J. 2137, 2182 (2002) (claiming that police may actually be better at applying vague rules, contrary to the majority of all comments by courts and commentators).


274 Id.
type of mediation in the case of equal employment and affirmative action laws that are intended to change the behavior of private organizations.275 These initial laws only established broad regulatory goals without offering clear and explicit procedural limitations.276 This type of ambiguous mandate gave private companies room to interpret the laws and construct the meaning of compliance, thereby mediating “the impact of the law on society.”277

In the past, the police have been guilty of organizational mediation of a variety of legal mandates. The general police response to Miranda is particularly demonstrative of this phenomenon. Scholars like Richard Leo and Charles Weisselberg have carefully shown how police have navigated around the limitations of the original Miranda decision to nonetheless engage in seemingly coercive interrogation techniques aimed at acquiring information.278 The original Miranda opinion provided some limitations on interrogations, but the decision and subsequent holdings may have been ambiguous, thereby allowing for departments to navigate around them without technically violating the law. Thus, in crafting rules for police, both the Court and legislatures should aim to create easily administrable law enforcement rules if at all possible, but also laws that are specific enough to avoid organizational mediation.

Second, communities differ in their need for public surveillance. For example, New York City and Washington, D.C. have previously been targets for international terrorism. Given their plethora of high value targets and landmarks, these two cities may have a legitimate need for more public surveillance than other communities.279 In arguing for a malleable standard for local departments, the IACP has suggested that some locations—namely bridges, critical infrastructure, and other high value targets—demand more surveillance and data retention to ensure public safety.280 As an example, the IACP cites the fact that locations targeted on September 11, 2001 were part of a terrorist attack that took many years to plan and execute.281

276 Id. at 1532-33.
277 Id. at 1532.
279 See Rushin, supra note 8, at 321.
280 Id.
281 Int’l Ass’n of Chiefs of Police, Privacy Impact Assessment Report for the Utilization of License Plate Readers 40 n.70 (Sept. 2009) [hereinafter IACP
Thus, certain communities may legitimately need and prefer longer retention periods around certain important targets. Conversely, a medium-sized suburb with low crime that places a higher value on privacy might prefer a bar on the retention of surveillance data all together. While any state statute should establish minimally acceptable requirements on data retention, the law must be sufficiently broad to permit necessary variation at the local level. A one-size-fits-all approach may not be workable, given the unique law enforcement needs of each city.

Third, any regulation must clearly articulate the narrow scope of technologies and devices that fall under its regulatory purview. Because technology changes rapidly, this ensures that the law will not be misapplied to future, emerging technologies. Kerr has previously argued that regulations of technology ought to proceed cautiously until the technology has stabilized. Technology may have unforeseen uses that will take time to develop and understand. For example, in 1988, Congress passed the Video Privacy Protection Act. This law protected the privacy of videotape rental information. Congress passed the law after Judge Robert Bork’s video rental history became public during his Supreme Court nomination process. But in crafting this limitation on video rentals, Congress defined the term “video tape service provider” expansively as “any person, engaged in the business . . . of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual material.”

On one hand, this expansive definition of a videotape service provider is useful because it is broad enough to avoid antiquation. As videotape technology waned in popularity and DVDs became the chosen medium for most movie rental providers, the law maintained its statutory force. But the vague language used by the original drafters of the law left online streaming content providers like Netflix wondering whether the law actually applied to their services. It was also unclear what kind of approval Netflix and other providers had.
to obtain to allow users to share their viewing history on social media platforms like Facebook. After years of ambiguity, Congress recently amended the law to permit users to share content watching habits on streaming sites like Netflix after they have given one-time approval.

Before the law change, Netflix complained that the law’s language was confusing, making them hesitant to adopt social media integration. Similarly, when regulating police technology use, legislative bodies should adopt language that is sufficiently broad to avoid immediate antiquation. They should also be careful not to select language that is so overly broad as to limit the use of new, potentially important technological tools.

The legislative recommendation I make in this Part attempts to follow these three guiding principles: it attempts to (1) clearly define the limited scope of the applicable technologies, (2) be clear and simple for law enforcement to administer, and (3) permit some level of local variation to meet the needs of unique municipalities. My starting point for crafting this model was to analyze the small number of statutes already passed by state legislators. The next section looks at these statutes to demonstrate common trends.

B. Current State Regulations

A handful of states have laid out regulations of the digitally efficient investigative state. These state laws operate by either regulating ALPR and surveillance cameras specifically, or by establishing broad standards for data retention. For example, states like Virginia have passed relatively broad laws that regulate the retention of data by the government in all forms. In other states, like New Jersey, the state attorney general has used state constitutional authority to hand down directives regulating the use of ALPR and establishing limitations on data collection. States like Maine, Arkansas, New Hampshire, Vermont, and Utah have regulated ALPR through legislative measures. Some states, like New York, have also handed down suggested model guidelines to inform

\[288 \text{Id.}\]
\[289 \text{Id.}\]
\[290 \text{Id.}\]
\[291 \text{VA. CODE ANN. § 2.2-3800 (West 2010).}\]
\[293 \text{ARK. CODE ANN. § 12-12-1802 to 1808 (2013); ME. REV. STAT. 29-A, § 2117-A (2009); N.H. REV. STAT. ANN. § 236:130 (2011); UTAH CODE ANN. § 41-6a-2001 to 2006 (2013); VT. STAT. ANN. tit. 23, § 1607 (2013).}\]
In this section, I demonstrate that most of these early efforts to regulate the digitally efficient surveillance technologies share a handful of common concerns. They limit the identification of personal data, the length of data retention, the sharing of information with other departments, and law enforcement access to stored data. These early models also rely on a bevy of enforcement mechanisms. Thus, any model legislation aimed at holistically managing the digitally efficient investigative state should consider the possible solutions offered by existing laws.

First, the laws generally limit the length of data retention in some way. Maine’s law on ALPR limits retention to 21 days. New Hampshire also puts a strict limit on the collection of law enforcement data, barring “retention of surveillance data except for a few, specific situations.” By stark contrast, the New Jersey Attorney General has ordered that data be retained for no more than five years. Model guidelines like those offered by the State of New York do not establish a maximum length of data retention, but the New York recommendations do encourage departments to establish a clear policy on the length of data retention. Arkansas limits retention to 150 days, Utah allows retention by government agents for nine months, and Vermont permits retention for up to 18 months. Each of these statutes reaches a different conclusion on the appropriate length of data retention. The disparity between the New Jersey data retention limit of five years and relatively strict retention limits in states like Maine and New Hampshire is striking. But the Maine law might not be as restrictive as it initially appears. Although it does limit retention in most cases to 21 days, it also makes an exception for cases where law enforcement is engaged in an ongoing investigation or intelligence operation. Overall, state legislatures have reached dramatically different conclusions on the relative threat posed by long-term data retention.

295 ME. REV. STAT. 29-A, § 2117-A(5).
296 Rushin, supra note 8, at 319 (citing N.H. REV. STAT. ANN. §236:130 (2011)).
298 N.Y. STATE DIV. OF CRIM. JUST. SERVS., supra note 294, at 16-17.
299 Id.
300 Ark. code ann. § 12-12-1805 (2013).
301 Utah code ann. § 41-6a-2004 (2013).
Second, a few of the available laws demonstrate a concern for the identification of personal data collected by the state. The New Jersey Attorney General Directive intends in part to limit the “disclos[ure] [of] personal identifying information about an individual unless there is a legitimate and documented law enforcement reason for disclosing such personal information to a law enforcement officer or civilian crime analyst.”

In New York, the model guidelines would also require that officers attempting to query stored data for identifying matches have a legitimate law enforcement purpose for doing so, and that they record their identification procedure. Neither Maine nor New Hampshire has a substantial policy on the identification of data, likely due in large part to their strict limitations on retention. The longer a state legislature permits data retention, the more legitimately concerned it may be about the possibility of this data becoming personally identified. After all, the combination of long-scale retention and data identification procedures may allow law enforcement to create “digital dossiers” on innocent people that reveal private information about their habits, preferences, and daily movements.

Third, the available laws and recommended models tend to put restrictions on the sharing of information with other agencies. The New Jersey directive permits the sharing of ALPR data among police departments in the state, provided that the departments keep records of the data being shared and all departments involved abide by the New Jersey rules. Nonetheless, New Jersey uses regulations on sharing as a way to encourage the development of a consistent and organized state database. The Utah law permits sharing and disclosure only under narrow circumstances. Arkansas, by contrast, strictly prohibits sharing of collected data. Other states, like New York, have been relatively hands-off when it comes to data sharing. They simply urge departments to build procedures for sharing data that are consistent with their overall recommendations on data protection. We may expect states

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305 N.Y. STATE DIV. OF CRIM. JUST. SERVS., supra note 294, at 16-17.
307 Rushin, supra note 8, at 318 (citing Daniel J. Solove, Digital Dossier and the Dissipation of Fourth Amendment Privacy, 75 S. CAL. L. REV. 1083, 1084 (2002)).
309 Id.
310 UTAH CODE ANN. § 41-6a-2004 (2013).
312 N.Y. STATE DIV. OF CRIM. JUST. SERVS., supra note 294, at 17.
to want to encourage departments to share whatever data they can legally retain. By doing so, departments can have access to significantly more information on the potential whereabouts of criminal suspects who travel outside jurisdictional lines.

Fourth, available and model rules document and limit access to stored data. New Jersey’s regulation requires departments to record all user access to stored ALPR data, including the name of the user accessing the data, the time and date of the access, whether the person used automated software to analyze the data, and the name of the supervisor who authorized the access. New York’s model guidelines also suggest that departments document when officers search and analyze stored data. Officers should also only analyze data if they have a legitimate law enforcement purpose for doing so. Additionally, the Maine provision stresses the importance of confidentiality in stored data. That law restricts access to law enforcement officers. And in Vermont, the law explicitly states that access to stored data should be limited to specified or previously designated personnel. Thus, the current array of statutes acknowledges the need for limited access to available data and confidentiality of stored information.

Fifth, some of the model regulations require departments to train employees in the proper procedures for handling data. They also discipline employees who fail to follow policy parameters. The New York suggested guidelines recommend that departments establish a list of designated personnel who are authorized to access ALPR data, and encourage departments to establish a training program to teach officers about the proper use of ALPR technology. The New Jersey directive also requires that departments “designate all authorized users, and that no officer or civilian employee will be authorized to operate an ALPR, or to access or use ALPR stored data, unless the officer or civilian employee has received training by the department on the proper operation of these devices.” Once more, the New Jersey directive mandates that “any sworn officer or civilian employee of the

313 Rushin, supra note 8, at 292-93.
314 State of N.J., supra note 292, at 6-7.
316 Id. at 16.
318 Id.
320 N.Y. STATE DIV. OF CRIM. JUST. SERVS., supra note 294, at 15.
321 Id.
agency who knowingly violates the agency’s policy, or these Guidelines, shall be subject to discipline.” Conversely, neither the Maine nor New Hampshire laws touch on officers’ training in data retention. But this is likely because they do not permit significant data accumulation, thereby making training in data management less imperative. On the whole, those states and entities that do permit large-scale data collection also encourage officer training as a safeguard against abuse.

Sixth, the current array of regulations uses a wide range of enforcement mechanisms. In New Jersey, as a penalty for non-compliance, the Attorney General maintains the authority to temporarily or permanently revoke a department’s right to use ALPR devices. Arkansas provides for civil remedies for individuals when a violation of the law causes them actual harm. Utah, by contrast, simply makes violation of the statute a criminal misdemeanor. Both the New Hampshire and the Maine laws have made the violation of ALPR regulations a criminal act in the state. Although New York’s regulations are non-mandatory, they still recommend that departments begin creating records in case the state someday begins to audit data access and retention records.

In sum, current state statutes and recommended guidelines address a number of concerns related to the digitally efficient state. It is worth noting again that these laws go far beyond anything the judiciary would likely implement. The Supreme Court is institutionally limited in its capacity to develop a response to the digitally efficient investigative state. The variation on the mosaic theory adopted by Alito in his Jones concurrence would only establish a broad principle that long-term data retention by efficient public surveillance technologies may eventually violate a person’s reasonable expectation of privacy. Such a rule is ambiguous and does not touch on data storage, access, and identification. State legislation offers the possibility of establishing detailed and definitive standards.

323 Id. at 15.
325 State of New Jersey, supra note 292, at 16.
326 ARK. CODE ANN. § 12-12-1807 (2013).
327 UTAH CODE ANN. § 41-6a-2006 (2013).
C. Model Statute to Regulate Police Surveillance

The presently available statutes and model guidelines suggest a key set of concerns that any future state legislative body must consider. They demonstrate five common regulatory needs: data retention, identification, access, sharing, and training. The model statutory language I offer includes a possible solution for each of these areas. In doing so, I also try to honor the foundational principles for the regulation of police surveillance identified above. The model statute provides a clear standard that law enforcement agencies can implement. It attempts to give departments some latitude to alter their own policies to meet local needs. But the law also includes specific and detailed regulations in hopes of preventing organizational mediation.

The proposed statute also includes multiple enforcement mechanisms to ensure compliance. The model excludes from criminal court any evidence obtained in violation of this statute, thus removing the incentive for police departments to violate the policy. Of course, evidentiary exclusion is “limited as a means for promoting institutional change” because it is filled with exceptions and is narrower than the scope of police misconduct.330 Thus, I propose two additional enforcement mechanisms. First, the model statute gives the state attorney general authority to initiate litigation against departments that fail to comply with these mandates. Other statutes regulating police misconduct, like 42 U.S.C. § 14141, have used a similar mechanism.331 Second, the model mandates periodic state audits of departmental policies and data records to ensure compliance. Overall, the proposed law broadly addresses many of the problems implicit in the digitally efficient state and establishes a number of enforcement mechanisms to ensure organizational compliance.

1. Applicability, Definitions, and Scope

The first part of the proposed statute defines the scope of the legislation, including the technologies regulated by the statute. In this section of the statute, I tried to reflect the foundational principle of regulating police surveillance technologies by creating a tightly defined scope of presently available technologies that fall under the statute’s regulatory purview. This might make the statute under-inclusive at some point in

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330 Harmon, supra note 21, at 10-11.
331 Id. at 1.
the future, but works to the benefit of avoiding over-inclusivity that can stifle the development of new technologies.332

§1 Applicability, Definitions, and Scope

This statute applies to all community surveillance technologies used by law enforcement that collect personally identifiable, locational data.

“Community surveillance technology” means any device intended to observe, compare, record, or ascertain information about individuals in public through the recording of personally identifiable information. This includes, but is not limited to, surveillance collected with automatic license plate readers, surveillance cameras, and surveillance cameras with biometric recognition.

This scope provision specifically addresses community surveillance devices, such as ALPR and surveillance cameras, as distinguished from traditional surveillance tools like GPS devices and wiretaps. As I have previously argued, “networked community surveillance technologies like ALPR surveil an entire community as opposed to a specific individual.”333 While the use of a GPS device to monitor the movements of one criminal suspect over a long period of time might be constitutionally problematic, such a practice raises an entirely different set of public policy questions. At minimum, the kind of tracking at issue in Jones was narrowly tailored to only affect one criminal suspect. The digitally efficient investigative state uses community surveillance technologies like ALPR and surveillance cameras that can potentially track the movements of all individuals within an entire community regardless of whether there is any suspicion of criminal wrongdoing. Hence, this statute is carefully limited to a small subset of technologies that pose similar risks and thus require similar regulation.

2. Differential Treatment of Observational Comparison and Indiscriminate Data Collection

Next, I propose that state laws should differentiate between observational comparison and indiscriminate data collection.334 The model law permits the use of community

332 See supra Part III.A.
333 Rushin, supra note 8, at 317.
334 See supra Part I.A (defining and distinguishing between observational comparison and indiscriminate data collection).
surveillance technologies for observational comparison. When a department uses these technologies for observational comparison, the device is “an incredibly efficient law enforcement tool that is reasonably tailored to only flag the suspicious.”

§2 Observational Comparison and Indiscriminate Data Collection

Police departments may use community surveillance technologies as needed for observational comparison. But police departments using community surveillance technologies for indiscriminate data retention must abide by data integrity, access, and privacy restrictions outlined in §3 through §6.

“Observational comparison” is defined as the retention of locational or identifying data after an instantaneous cross-reference with a law enforcement database reveals reasonable suspicion of criminal wrongdoing.

“Indiscriminate data collection” is defined as the retention of locational or identifying data without any suspicion of criminal wrongdoing.

This distinction strikes a reasonable balance by facilitating law enforcement efficiency in identifying lawbreakers, but also avoiding the unlimited and unregulated collection of data. When applied to ALPR, this statute would mean that police could use that technology to flag passing license plates that match lists of stolen cars or active warrants. But they could not retain locational data on license plates that do not raise any concerns of criminal activity without abiding by the regulations that follow.

3. Data Integrity, Access, and Privacy

I recommend that the indiscriminate collection of data be subject to four separate requirements that limit the retention, identification, access, and sharing of data. The statutory language below was designed to give law enforcement some leeway to create workable internal policies that meet organizational and community needs. As a result, the policy simply serves as a minimum floor of regulation, above which departments could adopt their own regulations.

335 Rushin, supra note 8, at 285.
§3 Data Retention

Police departments using community surveillance technologies for indiscriminate data collection must establish and publicly announce a formalized policy on data retention. Departments may not retain and store data for more than one calendar year unless the data is connected to a specific and ongoing criminal investigation.

The one-year retention period is the most significant regulation this statute would place on indiscriminate data collection. Even the IACP acknowledges that the “indefinite retention of law enforcement information makes a vast amount of data available for potential misuse or accidental disclosure.”336 Without limits on retention, police surveillance can develop into “a form of undesirable social control” that can actually “prevent people from engaging in activities that further their own self-development, and inhibit individuals from associating with others, which is sometimes critical for the promotion of free expression.”337 At the same time, law enforcement often claim that information that seems irrelevant today may someday have significance to a future investigation.338 Without regulation, there is a cogent argument to be made that police would have every incentive to keep as much data as possible.339 Thus, I recommend that data retention be capped at one year. This would prevent the potential harms of the digitally efficient investigative state that come from long-term data aggregation.

The one-year time window represents a reasonable compromise. The median law enforcement department today retains data for around six months or less.340 But before accepting this retention limit, state legislatures should critically assess their own state needs to determine whether there is a legitimate and verifiable need for retention beyond this point. The next section of the statute addresses identification of stored data.

336 IACP PRIVACY ASSESSMENT, supra note 281, at 36.
337 Id.
338 Id. at 37.
339 Rushin, supra note 8, at 321.
340 See supra Part I.C.
§4 Data Identification

Police employees must have a legitimate law enforcement purpose in identifying the person associated with any data retained by community surveillance technologies.

The limit on data identification is somewhat different than most current statutory arrangements. This measure would, potentially, limit the ability of law enforcement to use the stored data for secondary uses. A secondary use is the use of data collected for one purpose for an unrelated, additional purpose.\(^ {341}\) This kind of secondary use can “generate[] fear and uncertainty over how one’s information will be used in the future.”\(^ {342}\) By limiting the identification of the data, the statute attempts to prevent such secondary use. Another way to avoid secondary use is to limit access to data and external sharing, as I attempt to do in the next portions of the statute.

§5 Internal Access to Stored Data

Departments must establish a formal internal policy documenting each time a police employee accesses community surveillance databases. Departments shall not allow anyone except authorized and trained police employees to access and search these databases.

§6 External Data Sharing

Police departments may share information contained in community surveillance databases with other government agencies, as long as all participating departments honor the minimum requirements established in this statute.

I propose that police limit access to data even among police employees. And each time a police employee accesses data, I require that the department document this event. This achieves two results. First, it creates a record of previous access points that the attorney general or state criminal courts can, theoretically, use to hold police accountable for improper data access. Secondly, and relatedly, this formalized documentation process may prevent nefarious secondary uses of the information. Because some evidence suggests that police retain community surveillance data in databases accessible to


\(^ {342}\) IACP PRIVACY ASSESSMENT, supra note 281, at 15.
private companies and civilians, this would place the impetus on police departments to take responsibility for internal data management. And while the model statute does not limit the sharing of digitally efficient data, it does require that all departments with access to data abide by the statutory limits. This would promote the sharing of data across jurisdictional lines to facilitate efficient investigations, while providing a consistent level of minimum privacy protection in the state.

4. Enforcement Mechanisms

To ensure that departments abide by these minimal regulations, I propose a combination of enforcement mechanisms. The judicial and legislative branches have previously used these three enforcement mechanisms in other contexts to regulate police misconduct. By permitting a wide range of enforcement mechanisms, the statute attempts to avoid the traditional problems associated with police and organizational regulation. The first enforcement mechanism involves evidentiary exclusion.

§7 Evidentiary Exclusion

All evidence acquired by law enforcement in violation of this statute shall be inadmissible in state criminal courts.

The judiciary generally excludes evidence obtained in violation of the constitution. This mechanism is “by far the most commonly used means of discouraging police misconduct and perhaps the most successful.” 344 Empirical evidence suggests that evidentiary exclusion can change law enforcement behavior and incentivize compliance with the law. 345 But the exclusionary rule suffers from several limitations. As Rachel Harmon has explained, the exclusionary rule is “riddled with exceptions and limitations, many of which are inconsistent with using the exclusionary rule as an

343 NICHOLS, supra note 72, at 8 (noting that only 53% of surveillance camera operators are sworn police officers).
344 Harmon, supra note 21, at 10.
345 See, e.g., William C. Heffernan & Richard W. Lovely, Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law, 24 U. Mich. J.L. Reform 311, 339-40 (1991) (arguing that while police often did not always comply with Fourth Amendment protections, they were more likely to do so if the rules were simplified); Myron W. Orfield, Jr., Comment, The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers, 54 U. Chi. L. Rev. 1016, 1017 (1987) (arguing that the exclusionary rule did influence internal policies in the Chicago Police Department).
Thus, if the misconduct happens to fall into one of these many exceptions, the exclusionary rule may not be an effective deterrent. But perhaps more importantly, as Harmon explains, “the scope of the exclusionary rule is inevitably much narrower than the scope of illegal police misconduct.” After all, the exclusionary rule would only work as a mechanism for preventing police misuse of digitally efficient databases if the police intended to use the resulting evidence in a criminal trial. But much of the misconduct I discuss in this article and previous work involves police utilizing retained data for undetermined secondary purposes. The exclusionary rule may do little to prevent this type of misconduct. To remedy this problem, I propose two other enforcement mechanisms.

§8 Attorney General Right of Action

The Attorney General of this state shall have a civil right of action against any police department that engages in a pattern or practice of violating this statute.

§9 State Audit of Departmental Policy

The Attorney General of this state shall have the authority to periodically audit departmental policies to ensure compliance with this statute. The Attorney General will publicly post the results of this audit to bring attention to noncompliant departments.

Two of the statutes currently in operation only classify the violation of data retention and access policies as a minor criminal act. In theory, these laws could result in the prosecution of a police officer who fails to abide by their parameters. But as Harmon concludes, “prosecutions against police officers are too rare to deter misconduct.” This is because juries tend to sympathize with defendant police officers, and the criminal prosecution of minor misconduct is rarely among the top priorities for over-worked prosecutors. Consequently, I avoid establishing criminal liability for officers who violate this statute. Instead, I suggest that the state

346 Harmon, supra note 21, at 10.
347 Id. at 10-11.
348 See supra Part III.B.
349 Harmon, supra note 21, at 9.
350 Id. (explaining how “juries frequently believe and sympathize with defendant officers” and how prosecution of police officers is both inconsistent and “too rare to deter misconduct”).

attorney general office should take on a proactive role in ensuring compliance through suing noncompliant agencies and occasionally auditing departmental policies.

The first alternative enforcement mechanism gives the state attorney general statutory authority to bring suit against departments that engage in a pattern of practice of violating this statute. This is similar to the statutory mandate given to the Department of Justice (DOJ) by 42 U.S.C. §14141.351 Police scholar Barbara Armacost has called §14141 “perhaps the most promising mechanism” for addressing organizational misconduct.352 The late Bill Stuntz even believed that §14141 may be “more significant, in the long run, than Mapp v. Ohio . . . which mandated the exclusion of evidence obtained in violation of the Fourth Amendment.” 353 Pattern and practice litigation, as authorized in §14141, is unique because it permits the DOJ to bring federal suit against police departments that engage in systematic misconduct; in practice, the DOJ successfully ensured the appointment of judicial monitors in targeted cities to oversee organizational and policy reform.354 Although there is only a small amount of empirical research on the effectiveness of §14141 in reducing police misconduct, the available evidence suggests it is one of the most effective means of bringing about organizational change.355 One of the only potential pitfalls of this form of regulation is that the state attorney general may have limited resources.356 If resource constraints make lawsuits unlikely for noncompliant departments, a police agency might rationally calculate that the benefits of noncompliance outweigh the potential costs of litigation.357

To remedy the concern over resource limitations, I propose that the state attorney general have statutory

351 42 U.S.C. § 14141 (2011) (giving the Department of Justice the authority to bring suit against police departments that engage in a pattern or practice of unconstitutional misconduct).


354 Harmon, supra note 21, at 20-21 (explaining that “§ 14141 achieves its intended purpose: it authorizes structural reform litigation”).

355 See SAMUEL WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY 192 (2005) (stating that “[f]ederal pattern or practice litigation has been instrumental in bringing together disparate reform programs into [a] coherent package”).

356 Harmon, supra note 21, at 3 (noting the “limited resources” that “hampered” the implementation and effectiveness of § 14141).

357 Id. (explaining that “according to deterrence theory, a rational actor will engage in conduct when doing so provides a positive expected return in light of the actor’s utility function . . . [meaning that] a police department will adopt remedial measures to prevent misconduct when doing so is a cost-effective means of reducing the net costs of police misconduct or increasing the net benefits of protecting civil rights”).
authority to audit police departments. This would expand the 
regulatory reach of the statute while also harnessing the power 
of public opinion to force police compliance. This would also 
guarantee regular interaction between the attorney general 
and local departments, allowing the attorney general to check 
up on data practices. Rather than facing only the remote 
possibility of a pattern or practice lawsuit, departments would be 
faced with regular, random audits of their data policies. Because 
the results of this regular audit system would be posted online, 
the departments would also be publicly accountable if they fail to 
abide by the statute. This could incentivize administrators to 
follow state law for fear of public embarrassment that could 
threaten their job security. Rachel Harmon has suggested the 
DOJ utilize a similar policy to overcome resource limits and 
expand the potential impact of §14141.358

In sum, these regulations attempt to holistically 
regulate the digitally efficient investigative state by limiting 
data retention and ensuring stored data are handled in a way 
that protects individual privacy, while still leaving ample room 
for legitimate law enforcement purposes. The enforcement 
mechanisms are sufficiently varied to ensure widespread 
compliance. And the statute as a whole follows the foundational 
principles of police surveillance regulations. The regulations are 
clear enough to avoid organizational mediation. They allow for 
individual variation. And they define the scope narrowly to only 
include a small subset of technologies like ALPR and 
surveillance cameras that pose a similar social risk.

CONCLUSION

The digitally efficient investigative state is here to stay. 
The empirical evidence clearly demonstrates that extremely 
efficient community surveillance technologies are an increasingly 
important part of American law enforcement. The language in 
Jones suggests that the judiciary may somehow limit public 
surveillance technologies in the future. To do so, the Court will 
have to confront the jurisprudential assumptions of police 
surveillance. That is no easy task. Much of the Court’s previous 
treatment of police surveillance has rested on the belief that 
individuals have no expectation of privacy in public places, and

358 Harmon describes how the Department of Justice could publish longer lists 
of departments that are suspected of a pattern or practice litigation and notify these 
departments that the worst offending departments will be prosecuted first. This “worst 
first” method would motivate a long list of departments that may be in violation of the 
statute to implement reforms for fear of lawsuit. Id. at 26-28.
that surveillance technologies that merely improve the efficiency of police investigations comport with the Fourth Amendment.

At present, it remains unclear how and when the Court will begin to alter these important assumptions. The language in *Jones* offers little guidance. But even when the Court does eventually broach this subject, the judiciary’s institutional limitations will prevent it from crafting the type of expansive solution necessary to protect against the harms of the digitally efficient investigative state. In the absence of regulation, police departments across the country have developed dramatically different policies on the use of public surveillance technologies. Legislative bodies must take the lead and proactively limit the retention, identification, access, and sharing of personal data acquired by digitally efficient public surveillance technologies. The model state statute proposed in this Article would be a substantial step in reigning in the “unregulated efficiency of emerging investigative and surveillance technologies.”

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359 Rushin, *supra* note 8, at 328.
Fixing Music Copyright

Jamie Lund†

INTRODUCTION

In December 2012, musician Beck Hansen (Beck) released Song Reader, a concept “album” consisting of 20 unrecorded songs in sheet-music form. As one reviewer put it: “There is no CD. No download. No audio. As of this writing, you cannot hear Beck doing an authoritative, this-is-the-song performance.”¹ According to the album’s publisher, “if you want to hear Do We? We Do, or Don’t Act Like Your Heart Isn’t Hard, bringing them to life depends on you, the reader.”²

Beck’s sheet music album was inspired by a 1937 popular music hit called “Sweet Leilani.”³ “Apparently, it was so popular that, by some estimates, the sheet music sold 54 million copies[].”⁴ Beck remarked that “nearly half the country had bought the sheet music for a single song, and had presumably gone through the trouble of learning to play it.”⁵ Beck was hoping to similarly engage his fans with Song Reader,⁶ and, as evidenced by the hundreds of fan performances posted on

† Many thanks to St. Mary’s University School of Law for funding this research and to Golden Gate University Law School for funding conference trips. Special thanks to Phu Nguyen, Justin Righettini, Lucinda Bartlett, Brad Greenberg, Chris Buccafusco, and Sean Pager for their insights; thanks also to my amazing research assistants Michael Butler, Beverly Thornton, Dan Evans, and Clark Swenson.


⁴ Id.

⁵ Id.

⁶ Esther Yi, Is Beck’s Sheet-Music ‘Album’ a Cop-Out, Radical Art, or Both?, ATLANTIC (Dec. 11 2012, 8:45 AM), http://www.theatlantic.com/entertainment/archive/2012/12/is-becks-sheet-music-album-a-cop-out-radical-art-or-both/266125 (“In an ideal world, I’d find a way to let people truly interact with the records I put out,’ Beck said in a 2006 interview with Wired, ‘not just remix the songs, but maybe play them like a videogame.”).
YouTube and other websites, it worked.\(^7\) Other fans, however, have criticized the concept as being pretentious\(^8\) and exclusionary because not everyone can read music or play a musical instrument.\(^9\) “There is an obvious hurdle of musical literacy.”\(^10\) This led one fan to wonder, “Does Beck only want musicians and musically trained fans to enjoy his music?”\(^11\)

The anomaly of Beck’s sheet music album demonstrates the often-elided distinction between a musical composition and the sound recording of its performance; each is separately copyrightable. This article contends that the audience for those two kinds of works—compositions and sound recordings—is different. This insight has significant implications for the test for copyright infringement of musical compositions.

Copyright infringement occurs when one work is substantially similar to the work it copies.\(^12\) In music, substantial similarity is determined by playing recordings of the two works to jurors in the Lay Listener Test.\(^13\) The Lay Listener Test is meant to capture whether the defendant appropriated in his work enough of what in another’s work is “pleasing to the ears of lay listeners, who comprise the audience for whom such popular

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\(^7\) See, e.g., Automatic Toys, Beck—Do We? We Do!, YouTube (Sept. 8, 2012), http://www.youtube.com/watch?v=Zc0fnEY89Co.


\(^10\) Yi, supra note 6.


\(^12\) Assuming the copied work is copyrighted and that the copying is of copyrightable elements in the original work. See, e.g., Aronstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946); McCarthy, J. Thomas et al., McCarth SY S Desk Encyclopedia of Intellectual Property 576-77 (3d ed. 2004).

\(^13\) 4 Charles McMains et al., West’s Federal Administrative Practice § 4009 (3d ed. 1999) (“The ‘ordinary lay observer’ test, used by a number of circuits, was focused by the Fourth Circuit upon an intended audience for the copyright owner’s work and whether that audience has specialized expertise relevant to their purchasing decision.”).
music is composed.” As currently utilized by courts, the Lay Listener Test applies to both musical compositions and the sound recordings of their performances. This general application of the Lay Listener Test fails to acknowledge a fundamental reality—that the audience for musical compositions is different from the audience for musical recordings. The audience for musical recordings is anyone who listens to musical sound recordings, be it on iPods, on the radio, in shopping centers, or via the soundtracks of movies or television shows. In contrast, the audience for musical compositions is not the average listener of music. If we take copyright’s most common definition of a musical composition as “an artist’s music in written form,” then the intended audience for musical compositions, like those in Beck’s Song Reader, would appear to be other musicians who are capable of performing and/or recording musical performances for listeners. This theoretical insight demands that courts change the way they administer the Lay Listener Test when adjudicating suits of alleged copyright infringement of musical compositions.

In this context, the Lay Listener Test prejudices outcomes because it incorrectly targets lay jurors rather than musical performers. For the purposes of this article, an experiment was conducted in which a mock Lay Listener Test was given to two groups: musicians and laypeople. Both groups listened to two pairs of songs. Each pair of songs consisted of the same musical composition performed in different manners; thus, although the composition for each recording was exactly the same, the sound recordings were different. The musicians and laypeople were asked to determine the similarities between the songs in each pair on an ordinal scale (“1 = Not at all similar,” to “5 = Very similar”). When comparing the compositions, the respondents should have answered “5,”

14 Arnstein, 154 F.2d at 468-69, 473.
15 Newton v. Diamond, 204 F. Supp. 2d 1244, 1249 (C.D. Cal. 2002), aff’d, 349 F.3d 591 (9th Cir. 2003), amended on denial of reh’g, 388 F.3d 1189 (9th Cir. 2004), aff’d, 388 F.3d 1189 (9th Cir. 2004) (“A musical composition captures an artist’s music in written form.”).
16 Readers of written music may enjoy a musical composition as a purely notational or quasi-linguistic work.
17 The group of musicians included approximately 40 musical performers (two sections of students in a music theory class).
18 There were approximately 100 music listeners—law students selected from Golden Gate University’s 1L class—who, like a typical jury population, consisted primarily of non-musicians but contained a small percentage of musicians with varying degrees of education and training.
19 Sound clips are available at www.jlundlaw.com/p/experiment.html.
because the compositions were identical. In fact, musicians got much closer to the right answer (4.42) than laypeople (3.60). The musicians’ responses to open-ended questions indicated that they better understood the precise nature and quality of the similarities and differences between the songs than the laypeople respondents. Furthermore, it appears that laypeople cannot be trained in a reasonable time frame to listen with a more discerning ear. In a different iteration of the experiment, laypeople received a 15-minute ear-training exercise yet failed to show any discernible improvement in completing the exercise. Another group of laypeople underwent a semester-long music appreciation class and demonstrated only a slight improvement in completing the exercise. These experimental findings suggest that musicians listen to, and experience, music in distinctively different ways than laypeople, ways that would alter the outcomes of the Lay Listener Test.

This finding is extremely problematic because, as a practical matter, by determining whether a work has been infringed, the Lay Listener Test effectively defines the scope of a copyright. And if musicians and laypeople assess similarity differently, the scope of the copyright will depend on who is asked rather than what the law actually says: a copyright protects others from copying what is “pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed.”

If musical compositions are only accessible to musicians, then musicians should comprise the group that courts probe to determine if there has been a copyright violation. Consequently, this article advocates that courts alter the Lay Listener Test to include proper statistical sampling that captures reactions from a composition’s intended audience—musical performers. This suggestion is not as drastic as it sounds. Courts commonly use consumer surveys (completed by the intended users of a trademarked brand) in trademark infringement actions, and rules ensuring the validity and reliability of trademark surveys

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20 The sound clips were electronically generated to have identical melody, harmony, and rhythm. Participants were asked to compare only the similarities between these elements and to exclude any consideration of genre, style, tempo, and instrumentation.

21 These results were for Song 3 and 4.


can arguably apply equally well in the music copyright context. Under this proposal, survey evidence gathered from musical performers would not serve as conclusive proof of substantial similarity. The jury, as fact finder, would still bear the ultimate responsibility for making a determination of substantial similarity under the court’s watchful eye. Under this framework, the fact finder would weigh the credibility of the evidence of substantial similarity for the intended audience rather than stand in as the intended audience and make a potentially misguided judgment of substantial similarity. In collecting better evidence about how the intended audience actually experiences the work, the substantial similarity analysis would shift from an approach that relies upon judicial guesswork to one that employs more reliable statistical sampling.

Part I of this article explores the origins and reasons for copyright’s distinction between musical compositions and musical recordings. This section discusses the Lay Listener Test’s focus on intended audience and argues that the audience for a musical composition is musical performers, not laypeople. Part II details the experiment and the results underlying this article and demonstrates that musicians understand music differently than laypeople in ways that would alter the outcome of the Lay Listener Test. Part III concludes that the Lay Listener Test should include surveys of the intended audience (musical performers), similar to the way that trademark infringement cases make use of consumer surveys that target the intended audience of the allegedly infringed trademark.

I. MUSICAL PERFORMERS AS THE INTENDED AUDIENCE

In the Lay Listener Test for music copyright infringement, jurors are played songs and asked to determine whether the defendant took enough of what is “pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed,” to constitute a misappropriation. For musical recordings, the intended audience is clear—it is the general public who either buys the recording directly or

24 See J. Michael Keyes, Musical Musings: The Case for Rethinking Music Copyright Protection, 10 MICH. TELECOMM. & TECH. L. REV. 407, 442 (2004) (“Similarly, in cases of music copyright infringement, the ‘reactions’ of listeners is at the heart of the inquiry as to whether there is an infringement. Because surveys ‘create an experimental environment from which to make informed inferences,’ they could be used by the trier of fact in music copyright infringement actions to make the ultimate determination of illicit copying.”); infra Part III.B.

25 Arnstein, 154 F.2d at 473.
consumes it indirectly, such as through the soundtrack of a film or television show. In contrast, a musical composition, defined by copyright law as being roughly what is contained in the sheet music, is not audible in its purest form, but rather is only a component part of any given performance or recording of the composition.26 Musical performers constitute the only constituency that can properly consume musical compositions. As such, the Lay Listener Test should rely on fluent musicians as the intended audience when employed to assess whether an infringement of a musical compositions has occurred.

A. The Distinction Between Musical Composition Copyrights and Sound Recording Copyrights

Under U.S. copyright law, each musical recording can include at least two27 separate and distinct copyrights: (1) a copyright for the underlying musical composition, and (2) a copyright for the sound recording of a musical composition.28 These two copyrights are doctrinally separate: one protects what the other does not. Traditionally, the composition copyright covered what appeared in a typical piece of sheet music (though sheet music itself was not equivalent to the composition)29; melody,30 harmony,31 rhythm,32 and lyrics, if any.33 Congress introduced copyright protection for sound recordings in the

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26 Newton v. Diamond, 204 F. Supp. 2d 1244, 1249 (C.D. Cal. 2002), aff’d, 349 F.3d 591 (9th Cir. 2003), amended on denial of reh’g, 388 F.3d 1189 (9th Cir. 2004), aff’d, 388 F.3d 1189 (9th Cir. 2004) (“A musical composition’s copyright protects the generic sound that would necessarily result from any performance of the piece.”).

27 It is possible that there could be a third copyright—a derivative work copyright in the arrangement of the composition. 17 U.S.C. § 101 (2012) (defining a derivative work as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”).

28 See T.B. Harms Co. v. Jem Records, Inc., 655 F. Supp. 1575, 1576 n.1 (D.N.J. 1987) (“When a copyrighted song is recorded on a phonorecord, there are two separate copyrights: one on the musical composition and the other in the sound recording.”).

29 A musical composition is not necessarily just the sheet music or anything that could be contained in sheet music. Rather, a musical composition consists of “the generic sound that would necessarily result from any performance of the piece.” Newton, 204 F. Supp. 2d at 1249.

30 Melody is “[a] single line of notes heard in succession as a coherent unit.” MARK EVAN BONDS, LISTEN TO THIS 517 (2d ed. 2011).

31 Harmony is “[t]he sound created by multiple voices [or pitches] playing or singing together.” Id. at 516.

32 Rhythm is “[t]he ordering of music through time.” Id. at 518.

33 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05[D], at 2-58 (2013) (“It has been said that a musical work consists of rhythm, harmony and melody—and that the requisite creativity must inhere in one of these three.”).
The copyright for sound recordings protects sounds fixed in a phonorecord, and includes performance choices such as tempo, instrumentation/timbre, key, and genre/style. Others are free to make a different sounding recording, but they are not free to copy or sample that exact recording. As a practical reality, there are musicians who just compose and musicians who just perform. In making its distinction between

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35 Sound recordings are defined as “works that result from the fixation of a series of musical, spoken, or other sounds . . . .” 17 U.S.C. § 101; see also Circular 56, U.S. Copyright Office, http://www.copyright.gov/circs/circ56.pdf (“Generally, copyright protection extends to two elements in a sound recording: (1) the contribution of the performer(s) whose performance is captured and (2) the contribution of the person or persons responsible for capturing and processing the sounds to make the final recording.”); Copyright “Help”, found at http://www.copyright.gov/eco/help-author.html (“A sound recording consists of the contributions of the performer(s) and/or the producer(s)/sound engineer(s). The performance and production form an integrated whole, i.e. a sound recording, and are subject to a single registration. A sound recording is separate and distinct from the underlying work being recorded. For example, a song (words and music) is a separate work from the recording of that song. . . . Performance refers to sound recording authorship fixed by a human performer. The performance of a musical work consists of the particular vocal and/or instrumental recorded rendition of that work.”).
36 Tempo is the speed or rate at which a song is played. See Bonds, supra note 30 at 518 (defining tempo rubato).
37 Timbre is the quality of a sound that makes two instruments or voices sound different from each other. See id. at 353, 518. For instance, one can distinguish between a human voice and a trumpet because of the timbre, or unique sound quality of each. See id. at 360. Timbre can vary within a particular instrument or sound class (for instance, a distorted electric guitar sound versus a classical acoustic guitar sound) or even in the same performance (for instance, when a blues saxophone player “growls” into the instrument or plays with more audible “breathiness”). See id. at 118-19. Perhaps as a result, the Ninth Circuit in Newton v. Diamond concluded that timbre choices were a performance aspect of a sound recording, and not a compositional aspect:

For example, Dr. Dobrian declared that ‘Mr. Newton blows and sings in such a way as to emphasize the upper partials of the flute’s complex harmonic tone, [although] such a modification of tone color is not explicitly requested in the score.’ Dr. Dobrian also concludes that Newton ‘uses breath control to modify the timbre of the sustained flute note rather extremely’ and ‘uses portamento to glide expressively from one pitch to another in the vocal part.’ Dr. Dobrian concedes that these elements do not appear in the score, and that they are part of Newton’s performance of the piece.

Newton v. Diamond, 388 F.3d 1189, 1194 (9th Cir. 2004).
38 Key is where in the musical scale a song is pitched. See Bonds, supra note 30, at 517.
39 17 U.S.C. § 114(b) (“The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.”).
the composition and sound recording copyright, Congress decided to protect each separately.41

Musical compositions first received copyright protection at a time when sheet music sales dominated.42 In the absence of audio reproduction technologies, written sheet music was essentially the only means of fixing a musical composition in a “tangible medium,” as is required under the Constitution43 and the Copyright Act.44 Not only that, the purchase of sheet music

41 See Copyright Act of 1831, ch. XVI, 4 Stat. 436 (1831). Although music was not protected by the first U.S. Copyright Act in 1790, when copyright protection for music was added in the Copyright Act in 1831 it gave a song’s composer “the sole right and liberty of reprinting, publishing and vending such . . . [work] . . . in whole or in part . . . .” Id. This was the start of the composition copyright. The scope of the composition copyright was later expanded in 1897 specifically to include the exclusive right to perform the work publicly. Act of Jan. 6, 1897, 54th Cong., 2d Sess., 29 Stat. 694. In addition, composition copyright holders currently have the right to exclude others from making copies or phonorecords, to prepare derivative works, and to distribute copies, among other rights. 17 U.S.C. § 106 (2012).

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id.

42 Edward B. Samuels, The Illustrated Story of Copyright 31-32, 131, 136 (2000). Music consumers would purchase sheet music of popular songs in books, magazines, or individually. Id. The sheet music could then be performed on a home piano or other instrument. Id.

43 See U.S. Const. art. I, § 8, cl. 8 (authorizing federal copyright protection to apply to “writings”).

44 17 U.S.C. § 102 (2012) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . . .”); id § 101 (“A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”). For a discussion of the technological shift from reproducing compositions in sheet music form to piano rolls for player pianos, see Kurt E. Kruckenberg, Note, Copyright “Band-Aids” and the Future of Reform, 34 Seattle U. L. Rev. 1545, 1548 (2011).
was the primary means of consuming music at the time.\textsuperscript{45} Take, for instance, Beck’s inspiration for his \textit{Song Reader} album—the Bing Crosby 1937 hit “Sweet Leilani.”\textsuperscript{46} Although Bing Crosby had a popular recorded version, the song’s sales came largely through the purchase of its sheet music.\textsuperscript{47}

Though sound recordings became increasingly popular in the 1950s and 1960s, the composition copyright remained the only music copyright.\textsuperscript{48} But in the early 1970s, Congress passed The Sound Recording Act of 1971 (SRA)\textsuperscript{49}. The SRA protected the interests of the music industry by attempting to curtail the rampant unauthorized copying of sound recordings.\textsuperscript{50} Musical industry experts testified that legitimate sound recording owners in 1970 lost at least $100 million in revenue due to this unauthorized copying.\textsuperscript{51} The SRA was later incorporated into the current Copyright Act of 1976,\textsuperscript{52} which defined sound recordings as “works that result from the fixation of a series of musical, spoken, or other sounds.”\textsuperscript{53}

There are both market and legal consequences to the Copyright Act’s distinction between musical compositions and musical recordings. Generally, a composer owns a work’s musical composition copyright whereas a performer—or, more typically, a record label—owns the sound recording copyright.\textsuperscript{54} The composition copyright is generally thought to include only the work’s “rhythm, harmony and melody.”\textsuperscript{55} Although some

\begin{itemize}
\item \textsuperscript{45} Keyes, \textit{supra} note 24, at 410 (“Thus, the music that was consumed by the public of those days was primarily printed sheet music.”).
\item \textsuperscript{46} Dayal, \textit{supra} note 3.
\item \textsuperscript{47} The song sold 54 million copies, according to Beck, or nearly half the country’s population. \textit{Id.}
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (current version at 17 U.S.C. § 101 (2012)). This act gave copyright protection to sound recordings that were made after February 15, 1972. \textit{See id.}
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{54} Arewa, \textit{supra} note 40, at 456 (“Recorded music typically involves two separate copyrights, one in the musical work, generally retained by the composer or songwriter, and one in the sound recording, generally held by recording companies.”).
\item \textsuperscript{55} \textit{Nimmer & Nimmer, supra} note 33, § 2.05[D], 2-58 (“It has been said that a musical work consists of rhythm, harmony and melody—and that the requisite creativity must inhere in one of these three.”); \textit{accord} Bridgeport Music, Inc. v. Still N The Water Publ’g, 327 F.3d 472, 475 n.3 (6th Cir. 2003) (per curiam); Newton v. Diamond, 204 F. Supp. 2d 1244, 1249 (C.D. Cal. 2002), \textit{aff’d}, 349 F.3d 591 (9th Cir.)
\end{itemize}
commentators have argued for the adoption of a more expansive definition of composition copyright that looks beyond these elements, no court has yet expanded the protection of a composition copyright.56

If a music performer made a sound recording of a composition that included additional expressive elements that were both original to that sound recording and that satisfied the Copyright Act’s “modicum of creativity”57 requirement, she would own a copyright over all of that new and original creative expression.58 Original expression in a sound recording of a musical composition could include performance choices like tempo and the overall “sound” of the performance.59 Unlike musical composition copyrights, however, the recording copyright only protects exact replications of earlier recordings (i.e., sampling).60 Others are free to make “sound-alikes.”61 For instance, although they captured the “sound,” “feel,” and even the instrumentation of a Marvin Gaye recording in their hit “Blurred Lines,” performance artists Pharrell Williams and Robin Thicke did not commit copyright infringement of Gaye’s recording because they did not copy the melody, harmony, or rhythm of Gaye’s original recording.62

The distinction between the copyrights is important for one more aspect of copyright infringement litigation: determining the proper audience for a musical composition for purposes of the Lay Listener Test.

2003), amended and reh’g denied by 388 F.3d 1189 (9th Cir. 2004), aff’d by 388 F.3d 1189 (9th Cir. 2004).

56 Jamie Lund, An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement, 11 VA. SPORTS & ENT. L.J. 137, 144 (2011) (arguing that no court has “relied on music performance factors such as tempo, orchestration, key/pitch, or style/genre to sustain a finding of Substantial Similarity in a Composition Copyright case.”).


58 Newton, 388 F.3d at 1193-94.

59 Id. at 1194.

60 17 U.S.C. § 114(b) (2012) (“The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.”); see also Newton, 388 F.3d at 1194 (finding that the composition copyright was not infringed where the defendant had sampled a sound recording consisting primarily of “highly developed performance techniques, rather than the result of a generic rendition of the composition.”).

61 17 U.S.C. § 114(b).

B. Looking to the Intended Audience

Copyright infringement requires a showing of substantial similarity, which, in a musical composition copyright case, is typically assessed by performing the two songs to the jury in what is called the Lay Listener Test.\textsuperscript{63}

Misappropriation of a copyrighted musical composition is a question of fact to be determined by a jury.\textsuperscript{64} A prima facie case of copyright infringement consists of proving: (1) that the allegedly infringed work is copyrighted, (2) that the defendant copied from the copyrighted work, and (3) that the defendant copied enough of the protected expression so as to make the two pieces substantially similar.\textsuperscript{65} To find substantial similarity, the jury must conclude that the defendant misappropriated either a quantitatively large portion of the plaintiff’s original copyrightable expression, or a smaller, but qualitatively significant, portion of the plaintiff’s protected original expression.\textsuperscript{66}

Although a standard for substantial similarity has never been clearly defined, there are several cases that suggest that looking to the opinions of the intended audience is not only relevant, it is the core consideration.

First and foremost, \textit{Arnstein v. Porter}, the source of the Lay Listener Test, suggests that the test is meant to determine the effect on the intended audience:

\begin{quote}
The plaintiff’s legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's
\end{quote}

\begin{footnotesize}

\textsuperscript{64} \textit{Arnstein}, 154 F.2d at 473 (stating that similarity is “an issue of fact which a jury is peculiarly fitted to determine. . . . [E]ven if there were to be a trial before a judge, it would be desirable (although not necessary) for him to summon an advisory jury on this question.” (footnote omitted)).

\textsuperscript{65} Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (“To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”); Dawson v. Hinshaw Music Inc., 905 F.2d 731, 732 (4th Cir. 1990) (“[T]he law has established a burden shifting mechanism whereby plaintiffs can establish a \textit{prima facie} case of infringement by showing possession of a valid copyright, the defendant’s access to the plaintiff’s work, and substantial similarity between the plaintiff’s and defendant’s works.”); Marks v. Leo Feist, Inc., 290 F. 959, 960 (2d Cir. 1923) (“To constitute an infringement of the appellant’s composition, it would be necessary to find a substantial copying of a substantial and material part of it.”).

\textsuperscript{66} \textit{See} Baxter v. MCA, Inc., 907 F.2d 154 (9th Cir. 1990) (unpublished disposition) (affirming trial court’s special verdict form where, after excluding the possibility of quantitative similarity, the form asked: “Is the expression of the musical idea and the music from ‘E.T.’ substantially similar as defined in the instructions to a qualitatively important music expression in ‘Joy’?” (internal quotations omitted)).
\end{footnotesize}
approbation of his efforts. The question, therefore, is whether
defendant took from plaintiff’s works so much of what is pleasing to
the ears of lay listeners, who comprise the audience for whom such
popular music is composed, that defendant wrongfully appropriated
something which belongs to the plaintiff.67

Courts typically only consider questions of appropriate
intended audience when the general public does not constitute
the audience for a work.68 The inquiry of intended audience
particularly arises when the subject matter demand specialized
expertise in order to be understood, as in cases pertaining to
computer code, and, as this article argues, musical
compositions.69

Some, relying on language from Feist Publications, Inc. v.
Rural Telephone Service Co., have argued that courts should not
be concerned with a work’s intended audience. In that case, the
Supreme Court was presented with whether a phonebook was
copyrightable.70 The Court noted that all that is necessary to
show infringement is ownership of a valid copyright and the
“copying of constituent elements of the [copyrighted] work that
are original.”71 This two-pronged requirement suggests that the
jury might play a sort of “Where’s Waldo” to find copied original
expression in the defendant’s work; infringement would arise
whenever the jury finds identical elements between the two
works.

The Supreme Court has never endorsed nor rejected the
Lay Observer Test. (The Lay Listener Test is the Lay Observer

67 Arnstein, 154 F.2d at 473 (footnotes omitted). This quote might be
interpreted in such a way that the phrase “who comprise the audience” modifies the
phrase “lay listeners,” indicating that the intended audience for everything would be
the lay listener. Professors Jeanne Fromer and Mark Lemley make the argument that
the court is using the jury as a substitute for typical consumers of the works based on:
(1) the court’s exclusion of both tone-deaf people from appropriate audience members
and (2) the suggestion that a judge should not attempt to make a decision himself but
should assemble an advisory jury to experience the work. See Jeanne Fromer & Mark
ought to be the audience (even though the Second Circuit cases applying Arnstein
consistently specify a different audience construct, the ordinary observer).”).

68 Fromer & Lemley, supra note 67, at 29-30 (describing the Second Circuit’s
use of intended audience for software copyrights, the Ninth Circuit’s use of intended
audience for computer games, and the Fourth Circuit’s use of intended audience for
church choir music).

69 See, e.g., Whelan Assocs. v. Jaslow Dental Lab., 797 F.2d 1222, 1232 (3d
Cir. 1986) (computer software infringement case where the court admitted evidence
regarding whether a specialized audience of computer programmers would consider the
works to be substantially similar).

71 Id. at 361.
Test; it is “listener” because the comparison is aural). In fact, commentators have criticized the test as improperly departing from Feist’s two-prong test of “copying of constituent elements of the [copyrighted] work that are original.”

There is an inherent appeal to the Feist approach for determining copyright infringement, particularly its ability to be administered in a straightforward fashion by courts and its ease of application by jurors. But what if there is no exact replication of original expression, only attempts to evoke or even paraphrase the expression? Professor Nimmer has argued that “[t]he mere fact that the defendant has paraphrased rather than literally copied will not preclude a finding of substantial similarity . . . . [C]opyright ‘cannot be limited literally to the text, else a plagiarist would escape by immaterial variations.’”

When determining similarity, courts frequently state that two works may be either quantitatively or qualitatively similar. Qualitative similarity addresses the relative significance of the copied portion. In Newton v. Diamond, a Ninth Circuit musical composition copyright infringement case, the dissent opined that “[e]ven passages with relatively few notes may be qualitatively significant. The opening melody of Beethoven’s Fifth Symphony is relatively simple and features only four notes, but it certainly is compositionally distinctive and recognizable.

Insofar as a creative work is “distinctive” and “recognizable,” it can only be so to a particular ear, eye, or other sensory perception. In his 1967 seminal essay “The Death of the Author,” Roland Barthes discusses the essential role of the audience in understanding a creative work. Barthes theorized that the audience—with its various cultural, historical and social contexts—infuses a creative work with constantly renewed meanings. He writes, “The text is a fabric of quotations resulting from a thousand sources of culture.”

72 Id.
73 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][1] (2013) (quoting Nichols v. Universal Pictures Co., 45 F.2d 119, 121 (2d Cir. 1930)).
74 See, e.g., Newton v. Diamond, 388 F.3d 1189, 1195 (9th Cir. 2004) (“Substantiality is measured by considering the qualitative and quantitative significance of the copied portion in relation to the plaintiff’s work as a whole.”).
75 Id. at 1196 (noting that plaintiff had failed to provide sufficient evidence of the “segment’s significance in relation to the composition as a whole” to show qualitative similarity).
76 Id. at 1197.
78 Id.
79 Id.
Barthes, the significance of a creative work lies not in the author but in the audience that enjoys or consumes it.

Barthes’ postmodernist insight has a practical reality in the context of the Lay Listener Test. In asking juries to determine substantial similarity, courts recognize that judgments about the uniqueness, meaning, and cultural or social significance of a work must be obtained from its audience. However, this act of substituting the jury’s judgment for that of a work’s intended audience can be problematic when the jury does not properly represent the constituencies that make up the particular work’s intended audience. Although the members of a lay jury may comprise part of the intended audience for a popular work, this is not always the case.

C. Musical Performers as the Intended Audience

Who constitutes the audience for whom such popular musical compositions are composed? The Second Circuit in Arnstein v. Porter assumed that, for popular music, it was the average juror selected from the general population.80 The plaintiff in that case, Ira Arnstein was a Tin Pan Alley composer who, despite sales of nearly two million for one of his songs, was largely known then—and is only known now—for the series of lawsuits he brought against more successful composers.81 Among other theatrics, Arnstein was known for strolling around the streets of New York City wearing a sandwich board that read, “My songs have been plagiarized by the following writers: Irving Berlin, George Gershwin, Cole Porter, Jerome Kern, Rodgers and Hart.”82 The defendant in the case was Cole Porter, the most prolific and influential of the Tin Pan Alley composers.83

To determine whether there was sufficient “substantial similarity” between Arnstein’s and Porter’s respective compositions to constitute unlawful or illicit copying, the court employed what it called the “ordinary lay hearer” test (i.e., the Lay Listener Test).84 Arnstein would play the songs in open

80 154 F.2d 464, 473 (2d Cir. 1946).
82 Lawrence, supra note 81.
83 See Arnstein v. Porter, 154 F.2d 464, 467 (2d Cir. 1946).
84 Id. at 468 (“[T]he test is the response of the ordinary lay hearer.”).
court, and he was known for playing them in a manner that emphasized similarities.\footnote{See, e.g., Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275, 277 (2d Cir. 1936).}

Arnstein’s lawyer had a piano and fiddle player in court plus huge music charts, an intriguing presentation. The melody line of a song consists of single notes in the clef treble. Arnstein’s chart highlighted notes in both the clef and bass and when the fiddler played only the high-lighted notes . . . lo and behold!—it sounded exactly like our song! Our attorneys spent hours trying to explain this to the judge, but he would only accept what he was hearing.\footnote{Lawrence, supra note 81 (emphasis added). Arnstein continued his practice of performing the compositions in a way that created the impression of greater compositional similarity throughout his many lawsuits. Song Writer Plays Piano for Court, N.Y. Times, Mar. 7, 1939, at 18.}

A musicologist might have helped the judge understand what he was hearing, but unfortunately the Second Circuit in \textit{Arnstein} held that the use of such expert testimony to determine substantial similarity was “irrelevant” and should not be permitted.\footnote{Arnstein, 154 F.2d at 469 (“If copying is established, then only does there arise the second issue, that of illicit copying (unlawful appropriation). On that issue (as noted more in detail below) the test is the response of the ordinary lay hearer; accordingly, on that issue, ‘dissection’ and expert testimony are irrelevant.”).}

The court reasoned that the proper inquiry was “whether defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed . . . .”\footnote{Id. (“The impression made on the refined ears of musical experts or their views as to the musical excellence of plaintiff’s or defendant’s works are utterly immaterial on the issue of misappropriation.”).} It rejected the use of “the refined ears of musical experts” as being irrelevant because “the views of such persons are caviar to the general [public]—and plaintiff’s and defendant’s compositions are not caviar.”\footnote{Id. (“The impression made on the refined ears of musical experts or their views as to the musical excellence of plaintiff’s or defendant’s works are utterly immaterial on the issue of misappropriation; for the views of such persons are caviar to the general—and plaintiff’s and defendant’s compositions are not caviar.”).}

\textit{Arnstein v. Porter} was decided in 1946, just nine years after “Sweet Leilani” became a hit. The decision arose during the peak of an “era when sheet music was king,” a “simpler, seemingly halcyon time, [when] friends would gather around a piano in the
The average music consumer was still buying and playing sheet music, and sheet music sales for hit songs generated millions of dollars in revenue. Today, whether a song is a “hit” is determined not by sales of sheet music, but by record sales. Although the intended audience for popular musical recordings may still be the general public, this article contends that the intended audience for musical compositions is now limited to musicians.

Whereas the general public at the time of Arnstein may have been able to consume musical compositions in their sheet music form, the reaction to Beck’s Song Reader suggests that the general public has lost this ability. A significant portion of the population cannot sing, perform, or read written music, at least not to the level of fluency. Today, musical fluency resides primarily within a population of musical performers. Therefore, the audience for musical compositions is no longer the general public, but musicians with specialized knowledge and experience who can convert the composition into a form for mass consumption.

The modern market for musical compositions exists almost exclusively in copyright licensing. Today’s “music publishers” do not sell sheet music to the public but instead manage the copyrights to the musical compositions they control. The only direct participants in today’s market for composition copyrights are the songwriters that create the compositions; the publishers and performance-rights societies

91 Dayal, supra note 3.
92 Id.

A music publisher works with songwriters to market and promote their songs, resulting in exposure of songs to the public and generating income. Music publishers “pitch” songs to record labels, movie and television producers and others who use music, then license the right to use the song and collect fees for the usage. Those fees are then split with the songwriter.

Id. at 4. The shift in intended audience can be attributed to technological innovations that allowed consumers to listen to sound recordings rather than perform the music themselves:

By the 1950s, the music industry was a multi-dimensional being that had at its disposal many techniques and abilities to reach the consuming public with music. The industry had far outpaced its humble beginnings of simply offering copies of sheet music for sale. Indeed, music publishing was no longer the preeminent method of choice for the music industry to peddle its wares to the masses.

Keyes, supra note 24, at 417.
that manage them; and the performers, recording studios, and sound engineers that obtain licenses to record or perform the copyrighted compositions. The general public is not the intended audience of copyrighted musical compositions in the same way that the average automobile driver is not the intended market for crude oil. Arguably, only performers, music publishers, sound engineers, etc., can properly consume musical compositions. These groups, and not the general public, represent the target market for, and intended audience of, copyrighted musical compositions.

The optimal adjudicatory scenario for musical composition copyright infringement cases, therefore, would be to amass a jury of musicians fluent enough in music theory or performance to be able to understand or consume sheet music. Because this is rarely feasible, courts should allow the introduction of expert testimony that articulates to juries the elements of particular compositions that are substantially similar to one another. Better yet, courts should allow parties to introduce listener test results from statistically reliable samples of actual musicians.

Of course, none of these additional measures would be necessary if laypeople were adequate stand-ins for musical performers, either because they already experience, or could be trained to experience, musical compositions in a similar fashion to musicians for purposes of the Lay Listener Test. Experiments run for purposes of this article suggest that a significant divide separates the way laypeople and musicians experience a musical performance. The results of the experiments indicate that laypeople experience music differently than musicians, and that basic musical training does not improve laypeople’s performance under the Lay Listener Test.

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95 For example, the major music publisher Warner/Chappell Music describes its role and customer base on its website: “[Warner/Chappell’s extensive] catalog makes [it] a natural first stop for A&R executives and record producers, feature film and television production companies and others looking to record or license some of the world’s greatest music.” History, WARNER/CHAPPELL MUSIC, http://www.warnerchappell.com/about.jsp?currenttab=about_us (last visited Sept. 1, 2013).
96 See NAT’L MUSIC PUBLISHERS’ ASSOC., supra note 94 (“Songwriters enter into publishing, co-publishing, or administration agreements with music publishers.”); see also Lydia Pallas Loren, Untangling the Web of Music Copyrights, 53 CASE W. RES. L. Rev. 673, 697-98 (2003).
II. **Musicians Alone Are Capable of Successfully Performing the Lay Listener Test**

Experiments conducted for this article indicate that lay jurors improperly fixate on performance aspects of a recorded song in the Lay Listener Test. The results further indicate that musicians are capable of hearing and comprehending compositional elements of songs in a way that laypeople cannot, even after laypeople receive limited musical training. Specifically, whereas musicians tended to properly focus on similarities in the melody, harmony, and rhythm, a lay participant incorrectly opined, “I think as far as music goes, if it has a different feel to it, it is a different song,”\(^98\) So long as the Lay Listener Test is administered to laypeople in musical composition infringement cases, society can expect results that impermissibly and incoherently “enlarge (or diminish) the scope of statutory protection enjoyed by a copyright proprietor.”\(^99\)

A. **Lay Jurors Improperly Focus on Performance Similarities**

The author performed an earlier experiment to determine whether jurors are unduly swayed by superficial performance similarities when tasked with assessing potential infringement of copyrightable compositional elements.\(^100\) This section will highlight the main findings of that experiment, and provide a new analysis of the jurors’ responses conducted for purposes of this article.

In the prior experiment, 178 mock jurors were asked to compare the plaintiff’s and defendant’s songs from a Ninth Circuit composition copyright infringement case.\(^101\) Half of the jurors heard identical compositions performed similarly, and the other half heard the identical pairs of compositions performed differently. The first half of participants heard both songs (“Songs 1 and 2”) performed as R&B ballads. The other half of participants heard Song 1 performed in a calypso style and Song 2 performed as an R&B ballad. For the purposes of the experiment, the elements of the song protected by the composition copyright were defined as its melody, harmony, and rhythm. Variations in each song were constructed to be

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\(^98\) See experiment responses, on file with author.
\(^100\) Lund, *supra* note 56, at 138.
\(^101\) Swirsky v. Carey, 376 F.3d 841 (9th Cir. 2004).
“compositionally doctrinally identical,” meaning that, although they might differ in performance style, both songs of a given pair had identical melodies, harmonies, and rhythms. In total, the experiment only altered four performance elements of the composition: the tempo, key signature, instrumentation, and genre. All other possible performance elements stayed constant between versions of the same composition.102

Although each group heard performances of the same composition, participants were significantly more likely to believe that the compositions in each pair were similar when they were performed similarly (e.g., when both were performed as R&B ballads).103 In fact, for the first pair of songs, the impression of substantial similarity by one group of participants was almost exactly the inverse of the other’s104:

102 For the experiment, Tempo, key signature, orchestration, and style/genre were chosen because they are all well-accepted elements of performance that can, and do, vary significantly from performer to performer, or even from performance to performance by the same performer.

103 The subjects’ perception of similarity was less affected by performance when the songs had significant structural similarities, including identical harmonies and very similar patterns of pitches and rhythms in the melody. This finding suggests that, although the manner of performance affects listener perception of similarity, it is not so determinative as to eliminate the awareness of actual structural similarities. See generally Lund, supra note 56.

104 Statistical analysis was performed for both musical composition pairs in order to determine the effect, if any, of performance on each of the perception variables (ordinal similarity, ordinal copying, and dichotomous copying). The full results can be found in author’s previous paper. See Lund, supra note 56, at 161-73.
Substantial similarity finding with songs played similarly

- Yes: 86%
- No: 14%

Substantial similarity finding with songs played dissimilarly

- Yes: 15%
- No: 85%
In other words, the mock jury seemed primarily swayed by similarities in performance and not by similarities in the copyrightable elements of a composition. If representative of the real world, the results of the survey indicate a problem: jurors are considering aspects of the works that are not copyrightable. In doing so, they are impermissibly altering the statutory scope of the composition copyright.

This is not surprising, as the performance of sound recordings by its very nature subjects a jury in a musical composition case to irrelevant performance elements. If a musical composition is essentially information recorded on sheet music or the “generic sound that would necessarily result from any performance of the piece,” then only fluent musicians would be able to make a finding of substantial similarity based upon reading—but not playing—and comparing sheet music. Non-musicians would need to hear the music to perceive it. In order for music to be heard, it must be played in time and must therefore have a tempo. The performance, further, must have some sort of tone quality or timbre; it must be performed through

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105 Although these aspects could be part of the recording copyright, the Copyright Act of 1971 protects only the exact recording itself—others are free to copy any performance aspects of the sound recording as long as they make a separate recording (i.e., they do not “sample” or duplicate the original sound recording itself). 17 U.S.C. § 114(b) (2012). (“The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.”).


Thus, because every copyright infringement claim is contingent upon a finding of substantial similarity, resolution of this issue defines the very extent of copyright protection. The relationship between copyright and substantial similarity is analogous to the relationship existing between ownership of land and trespass: in both instances the acts that are deemed to constitute infringement, viz. trespass or substantially similar copying, define the extent of the rights, viz. ownership and copyright, respectively. . . . In the copyright context, if substantial similarity may be found to exist when only a few faint similarities between two works are found, the copyright is of great value. If, on the other hand, virtual identity between the works is required, plaintiff’s copyright is of a more limited nature. It follows that the manner in which courts test for substantial similarity, i.e., by using the reactions of average lay observers or those of a particular audience, is so crucial to defining the extent of copyright protection that the choice of test should reflect a policy consistent with the overall goals of copyright law.

Id. at 389.

107 Newton v. Diamond, 204 F. Supp. 2d 1244, 1249 (C.D. Cal. 2002), aff’d, 349 F.3d 591 (9th Cir. 2003), amended on denial of reh’g, 388 F.3d 1189 (9th Cir. 2004), aff’d, 388 F.3d 1189 (9th Cir. 2004).
a particular instrument or voice. In order for the relationship between the melody and harmony to be maintained, the performance of a musical composition must rely upon a key signature or at least a starting pitch. None of these three categories—tempo, timbre, and key signature—however, are included within a musical composition copyright. Jurors should not be swayed by irrelevant similarities in performance. But, as the experiment demonstrated, they are.

If jurors are not listening to, or unable to identify, compositional similarities in melody, harmony, and rhythm, then what, exactly, are they listening to? For the purposes of this article, further analysis was conducted on the mock jurors’ responses to open-ended questions asking them to explain their reactions to the songs. Questions included: “In thinking about your responses to Questions #1 and #2, what was it about the songs you heard that led you to rate them as you did? In other words, what about the songs led you to conclude they were or were not similar to each other?” Specifically, comments mentioning similarities or differences in performance were twice as prevalent as comments mentioning compositional elements, further suggesting that the mock jurors incorrectly focused upon superficial performance similarities.

The answers provided by the mock jurors were coded and categorized. For instance, if a mock juror had responded, “As they began playing, the melodies where the same. The sounds where also the same,” this response was coded for both “melody” and “instruments.” “Melody” was categorized as a compositional element, along with “beat”, “rhythm,” “song structure,” “harmony,” and “miscellaneous composition.” “Tempo,” “instruments,” “feel,” “key” “style,” “miscellaneous performance” and “miscellaneous indeterminate” were all classified as performance elements. The results are reflected in the bar chart

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108 See Nimmer & Nimmer, supra note 33, § 2.05[D], 2-58 (“It has been said that a musical work consists of rhythm, harmony and melody—and that the requisite creativity must inhere in one of these three.”)

109 Question 1 asked how similar the jurors thought the songs were on an ordinal scale from 1 to 5. See experiment questions, on file with author.

110 Question 2 asked participants, on a scale of 1 to 5, how likely they thought it was that the songs were so similar that one song had been copied from another. See experiment questions, on file with author.

111 See experiment responses, on file with author.

112 “Beat” was a popular term used in responses, but it was not always clear whether respondents were referring to compositional elements or performance elements of the songs. For instance, one comment that was coded for “beat” was “The background music to the beat was very different for both songs, and was what was heard the most, so they didn’t sound so similar.” See experiment responses, on file with author.
When organized by compositional and performance elements, the mock jurors’ answers reveal that their focus centered on superficial, irrelevant performance similarities and not on the elements of the song that composition copyright would protect—similarities that should be ignored when applying the Lay Listener Test to a case of musical copyright infringement.
Other aspects of the participants’ responses indicated that they did not feel comfortable performing the Lay Listener Test. Many participants noted that they were unfamiliar with the genre of music being played. A few mock jurors went so far as to suggest that their lack of familiarity made it difficult to discern similarities or differences between the songs. One participant noted, “[I]t’s hard to construct a survey about these music clips in my opinion. I feel like a guitar/drum combo would be more easily identifiable in terms of similarity perhaps?”113 Another observed, “The music was alright, but made it hard to tell what genres because the songs didn’t sound popular.”114 Many participants complained about the tone quality. One griped, “The electronic versions of the music made it more difficult for me to judge.”115 Another stated, “The ‘instruments’ sounded computerized and there was no definition to them.”116 One participant declined to answer the questions about similarity, simply opining, “Not the type of music I prefer.”117

Mock jurors seemed unsure of how to judge the songs that lacked lyrics upon which they could focus: “It was very interesting on how taking out the lyrics and just listening to the instrumentation can almost sound similar.”118 One participant observed, “I thought it was interesting only instrumental music was used. Similar music with different words would make them seem less similar.”119 Another noted, “I think they sounded similar to me because they were both pretty boring without lyrics.”120 One juror seemed to go so far as to invent possible lyrics to the songs: “Some of the words from the songs came to mind and they were the same for both.”121 One self-identified musician commented, “If there had been lyrics to these songs, I think listeners would have memorized the melody faster and more easily recognized that it had been copied.”122

113 See experiment results on file with author.
114 Id. Interestingly, perhaps because the sound clips were prepared using electronic simulations of instruments such as the flute, cello, etc., many mock jurors incorrectly identified the genre of the music clips as “classical.” The genres used in the first pair were R&B and calypso. For the second pair, the songs were performed in contemporary and jazz big band performance genres.
115 Id.
116 Id.
117 Id.
118 Id.
119 Id.
120 Id.
121 Id.
122 Id. This suggests a possible limitation to this experiment. Most popular music includes lyrics; the experiment’s sound clips did not.
Many participants seemed interested not in particular performance elements, but instead focused on the context in which the music was played or how it made them feel: “The 1st . . . songs for both pairs were upbeat and something I would listen to put me in a good mood. The second songs of both pairs were songs I’d listen to in order to relax or unwind to.” Another participant expressed the same general sentiments more colorfully: “I noticed how in the 1st song pairing[,] [S]ong 1 made me want to dance, drink pineapple juice, and eat fish while [S]ong 2 made me want to hit myself in the head to make the music stop. I enjoyed taking note of the different ways the songs made me feel.”

There seemed to be some indication that, when confronted with the challenging task of explaining why they found the songs similar or dissimilar, mock jurors focused on the one thing that they could readily perceive—their instinctual feeling about similarity. One commented, “I thought it flowed nicely, quick and easy. It was somewhat difficult to write down in words why I thought pieces were similar. I just felt that that they were.” Another wrote, “I noticed that the songs were different but I didn’t like them so it was difficult to distinguish them.” One juror went so far as to say, “I think as far as music goes, if it has a different feel to it, it is a different song.”

The mock jurors’ sentiments reveal that what may make music “pleasing to the ear[]” of laypeople are facets of a musical recording copyright and not characteristics of a musical composition copyright. The former, for example, protects a song’s

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123 Id.
124 Id.
125 Id.
126 Id.
127 See experiment responses, on file with author.
129 See, e.g., Gaste v. Kaiserman, 863 F.2d 1061, 1068-69 (2d Cir. 1988) (“[W]e are mindful of the limited number of notes and chords available to composers and the resulting fact that common themes frequently reappear in various compositions, especially in popular music. Thus, striking similarity between pieces of popular music must extend beyond themes that could have been derived from a common source or themes that are so trite as to be likely to reappear in many compositions.” (citation omitted)); see also Pyatt v. Raymond, No. 10-CV-8764, 2011 U.S. Dist. LEXIS 55754, at *19 (S.D.N.Y. May 19, 2011) (“While both songs (like millions of others) share the theme of relationships between men and women, this theme is an idea that is not copyrightable. ‘Only the actual expression of those ideas might be protected, and here there is no overlap in the expression of the ideas embodied in the two songs.’” (quoting Currin v. Arista Records, Inc., 724 F. Supp. 2d 286, 293 (D. Conn. 2010))); Pendleton v. Acuff-RosePubl’ns, Inc., 605 F. Supp. 477, 481-82 (M.D. Tenn. 1984) (comparing the lyrics to the two songs and noting that “[t]he existence of similarities limited to the general idea or theme will not, as a matter of law, support a claim for copyright infringement.”).
tempo, genre/style, and instrumentation. The latter, alternatively, protects the song's melody, harmony, and rhythms. The mock jurors' apparent disinterest in the actual composition elements of a song strongly suggests that laypeople do not constitute the intended audience of a musical composition copyright.

B. Musicians Perform Better on the Lay Listener Test

A follow-up experiment compared the results of the Lay Listener Test when performed by laypeople\textsuperscript{130} and music majors in their second or fourth semester of traditional music theory core classes. These classes include music theory, dictation (ear training), sight-singing, and keyboard harmony.\textsuperscript{131} Each group in this experiment heard two pairs of songs. The songs in each pair had identical compositions but the songs were performed differently. For example, Song 1 was performed as a ballad and Song 2, its pair, was performed in a calypso style.\textsuperscript{132} The participants were then asked to rate the similarity of the two songs on an ordinal scale ("1 = Not at all similar," to "5 = Very similar"). The participants were instructed to compare similarities in melody, harmony, and rhythm and to disregard any similarities in instrumentation, tempo/speed, style, genre, or key signature.\textsuperscript{133} The participants received the following definitions: "For purposes of this examination, a song consists of melody, harmony, and rhythm. Melody is defined as a single line

\textsuperscript{130} The 108 laypeople used in this exercise consisted of students from the author's civil procedure classes. Although some of these students are musically trained, some randomly selected jurors would also be musically trained in approximately the same proportions, thus their description as "laypeople" rather than "non-musicians."

\textsuperscript{131} The 33 to 36 musically inclined participants came from a music theory class and a sight singing class. The 138 to 140 laypeople came from civil procedure classes and a copyright class.

\textsuperscript{132} The songs were identical except for their tempo, instrumentation, key, and genre/style. Recordings of each song pair were generated specifically for the purposes of this research by the musical composition software Sibelius. The sound clips were created to be doctrinally identical; that is, each version of a song had the exact same melody, rhythm, and harmony. Sound clips can be found at http://www.jlundlaw.com/p/music-copyright-project.html.

\textsuperscript{133} Specifically, the prompt instructed: "Please circle the number that best expresses how similar you feel the two pieces are to one another, taking into consideration only melody, harmony, and rhythm. Do not consider any performance similarities such as instrumentation, tempo/speed, style, genre, or key signature. (1= Not at all similar to 5= Very similar)." Participants were also asked to assess the likelihood that parts of the songs were copied, and whether any perceived similarity was so great that parts of one song must have been copied from the other. This was also done with a second set of songs. The first two questions (similarity and likelihood of copying) were assessed on a scale from 1 to 5, with 5 being the correct response. The third question was a yes/no question and coded as 1=yes and 0=no.
of notes heard in succession as a coherent unit. Harmony is the sound created by multiple pitches playing together. Rhythm is the ordering of music through time.” Because the song clips were designed to have identical melody, harmony, and rhythm, the correct response to the similarity analysis was “5.” This same test with same instructions was given to the laypeople group.

As expected, the mean response for musicians was much closer to “5” than that of the laypeople:134

Musicians performed significantly better than laypeople in properly assessing the similarity of the song pairs on an ordinal scale.135 The musicians’ answers to open-ended questions136 indicated that they knew exactly what was going on, perhaps even better than their selections on the ordinal scale suggested.137 One musician observed, “The melody was

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134 Although the range for the ordinal scale was 1 to 5, this chart and the subsequent chart are set at a baseline of 3 to more clearly depict differences among participants.

135 A difference in means test was run between musicians and laypeople, setting statistical significance at the 0.1% level (p < 0.001) for all questions in both sets of songs. Musicians were much more likely than laypeople to identify the level of similarity between the songs and the likelihood that parts of one song could have been copied. They were also more confident in stating that parts of one song must have been copied from the other.

136 The question asked, “What about the songs led you to conclude they were or were not similar to each other?”

137 There seemed to be some confusion about what types of rhythm should be considered as part of similarity comparison. Some of the musicians (particularly the more educated musicians in their fourth semester music of music theory classes) noted that there were different rhythms in the harmony or different drumbeats that, although arguably appropriate for the genres, actually made the “rhythm” different from song to song.
exact, harmony was the same. The only difference was the rhythm, style and genre. It’s more likely that #3 is just an up-tempo arrangement of #4 (or #4 is a ballad arrangement of #3).”138 As was observed in the prior experiment, the responses of laypersons from this experiment were not nearly as accurate. Laypeople often relied on irrelevant performance aspects of the songs to distinguish them. As one layperson noted, “The two songs made me feel happy, but different ranges of happy. The first song was more of a calm happy and the second one had more of an energy and bubbly happy.”139

Overall, the data suggests that musicians can understand and experience both the musical composition and musical performance of a song in a way that laypeople cannot.

A second part of the experiment examined whether laypeople performed better in the Lay Listener Test after a brief ear-training exercise. A group of 32 laypeople conducted a similarity analysis without training and then, one month later, performed the same analysis after receiving some training.140 The training consisted of approximately 10 minutes of ear-training exercises, which focused on the compositional similarities and performance differences of “cover” versions of popular songs.141 The ear training did not help:

<table>
<thead>
<tr>
<th>Songs 1 &amp; 2</th>
<th>Similarity</th>
<th>3.73</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>3.64</td>
<td></td>
</tr>
<tr>
<td>Songs 3 &amp; 4</td>
<td>Similarity</td>
<td>3.89</td>
</tr>
<tr>
<td></td>
<td>3.92</td>
<td></td>
</tr>
</tbody>
</table>

### Table 1

<table>
<thead>
<tr>
<th></th>
<th>Without ear training</th>
<th>After ear training</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.00</td>
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<tr>
<td>3.50</td>
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<td>4.00</td>
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<tr>
<td>4.50</td>
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<td></td>
</tr>
<tr>
<td>5.00</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

138 See experiment responses, on file with author.
139 See experiment responses, on file with author.
140 Laypeople were collected from the author’s copyright class. The first part of the exercise was given in the first week of the semester and the second part of the exercise (post-ear training) was given one month later.
141 The ear training focused on listening to cover songs to determine differences and similarities between the different performances of the songs.
As the chart reflects, the group’s performance slipped with Songs 1 and 2 and improved slightly for Songs 3 and 4 after the ear training. Neither change in performance, however, is statistically significant. In other words, there was no meaningful improvement from the brief ear training. Interestingly, many individuals felt that they had performed better when in fact their performance remained unchanged or actually declined. For instance, one participant observed more distinctions during the second round of the experiment; distinctions that did not exist: “After hearing them again, the variances in melodic lines, rhythm, and harmonies have become a little more distinguishable.”

A similar experiment was run with two classes of music-appreciation students to see if one semester of musical training would help laypeople listen to music in the same way that musicians do. The hypothesis was that even a semester of music training would not be enough to hone their ears and that musical performance training is a specialized expertise that takes years to master. Although the results were statistically inconclusive because the sample size was too small, the results were consistent with the hypothesis that a semester of musical training is insufficient. The students participated in an exercise that compared two pairs of identical compositions at the beginning and end of the semester, yet they failed to demonstrate any meaningful improvement. Although they performed slightly better on the first pair of songs, the group of music-appreciation students performed slightly worse on the second pair of songs.

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142 Thirty-two subjects from a copyright class participated in a study involving an ear-training exercise. The students answered the same questions described above before and after the exercise. A paired t-test was run to compare the means of thirty-two subjects’ responses before and after the ear training. In some cases, participants were better able to answer the questions correctly after the ear-training exercise. With one exception, statistical significance was not found among any of the differences in means. After engaging in the ear training, participants were more able to respond that parts of Song 3 or Song 4 must have been copied from each other with a confidence of 95% (p < 0.05). The ear-training exercise had little effect on subjects’ ability to identify the similarity and likelihood of copying between songs, and the practical significance of using a one-time, short ear-training exercise to improve subjects’ performance was negligible.

143 See experiment responses, on file with author.

144 The control group for this experiment comprised musically-untrained civil procedure students that participated in the exercise at the beginning and end of a semester.

145 See experiment response, on file with author.
Even after a semester of basic music training, the music-appreciation students did not perform as well as actual musicians.

These results suggest that trained musicians interact with a musical composition in a unique way, one that even a semester of musical training cannot instill in laypeople. The Lay Listener Test is meant to capture the reactions of the intended audience. If the audience for musical compositions is trained musicians, lay jurors are a poor substitute. It appears that neither brief nor sustained (but still cursory) musical training helps the layperson to approximate the way musicians experience music.
The Lay Listener Test is broken. Lay jurors are equally likely to find infringement when different compositions are performed similarly as they are to find infringement when identical compositions are performed differently. This is a problem because the Lay Listener Test defines the scope of a copyright by determining what types of copying are impermissible. Copying becomes impermissible when the defendant has taken what is “pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed.” In the case of musical compositions, that audience is musicians. The experimental evidence suggests that musicians distinguish songs based on melody, harmony, and lyrics, and laypeople distinguish a song based on the feeling it evokes. Consequently, the Lay Listener Test will yield inaccurate results—both false positives and false negatives—when administered to lay listeners without a musical background.

III. STATISTICAL SAMPLING OF THE INTENDED AUDIENCE

The Lay Listener Test was meant to capture the effect of a work on its intended audience. For musical compositions, the intended audience is musical performers. Because the audience for musical compositions is musical performers, and not the general public, the appropriate jury to apply the Lay Listener Test and resolve a case of alleged infringement of a musical composition copyright would consist entirely of fluent musicians. As this is rarely feasible, other means of capturing the effect of the work on musicians could include the admission at trial of expert testimony or survey evidence that demonstrates how musical performers might perceive the music differently from the typical lay music listener.

A. Courts Accept Evidence from the Intended Audience

In copyright infringement cases where the target audience possesses specialized expertise, the Sixth Circuit has adopted a rule that allows a jury to consider evidence of substantial similarity from the specialist’s perspective. In Kohus v. Mariol, the infringing work at issue was a “drawing[146]

146 Arnstein v. Porter, 154 F.2d 464, 468-69, 473 (2d Cir. 1946).
147 Kohus v. Mariol, 328 F.3d 848, 857 (6th Cir. 2003). The Sixth Circuit made clear that “departure from the lay characterization is warranted only where the intended audience possesses ‘specialized expertise.’” Id. at 857 (quoting Dawson v. Hinshaw, 905 F.2d 731, 737 (4th Cir. 1990)).
of a latch that [locked] the upper rails" of a playhouse.\textsuperscript{148} The court ruled that in cases for copyright infringement in which “the audience for the work possesses specialized expertise that is relevant to the purchasing decision and lacking in the lay observer, the trier of fact should make the substantial similarity determination from the perspective of the intended audience.”\textsuperscript{149} The court suggested that expert testimony “will likely be required” to educate the jury about “those elements for which the specialist will look,”\textsuperscript{150} including “standard industry practices for constructing latches, or safety standards established by organizations like the American Society for Testing Materials and the Juvenile Products Manufacturer’s Association.”\textsuperscript{151}

In \textit{Whelan Associates v. Jaslow Dental Laboratory}, the Third Circuit ruled that the “ordinary observer” test for substantial similarity was insufficient for a complex computer program.\textsuperscript{152} There, the defendant, Jaslow, hired Strohl Co. to develop a computer program called “Dentalab” to enhance the efficiency of its dental prosthetic business.\textsuperscript{153} Whelan, then an employee of Strohl, wrote the program, but she eventually left Strohl to start her own business.\textsuperscript{154} Strohl and Jaslow assigned their respective interests in “Dentalab” to Whelan.\textsuperscript{155} Later that year, Jaslow began working on his own version of the program, “Dentcom.”\textsuperscript{156} Jaslow marketed his product as “a new version of the Dentalab computer system.”\textsuperscript{157} Whelan sued for copyright infringement. The Third Circuit did not use the typical Lay Observer Test to determine substantial similarity. Instead, it adopted a “single substantial similarity inquiry in which both lay and expert testimony would be admissible.”\textsuperscript{158} The court reasoned that the general public is unfamiliar with this type of computer program and that the judgment for such a complex case should be decided by a trier of fact who is familiar with the type of technology at issue.\textsuperscript{159}

\begin{itemize}
\item \textsuperscript{148} Id. at 851.
\item \textsuperscript{149} Id. at 857.
\item \textsuperscript{150} Id. (citing Dawson v. Hinshaw, 905 F.2d 731, 736 (4th Cir. 1990)).
\item \textsuperscript{151} Id. at 856.
\item \textsuperscript{152} Whelen ASSocs. v. Jaslow Dental Lab., 797 F.2d 1222, 1233 (3d Cir. 1986).
\item \textsuperscript{153} Id. at 1225-27.
\item \textsuperscript{154} Id. at 1226.
\item \textsuperscript{155} Id.
\item \textsuperscript{156} Id.
\item \textsuperscript{157} Id. at 1227.
\item \textsuperscript{158} Id. at 1233.
\item \textsuperscript{159} Id.
\end{itemize}
Likewise, in Computer Associates v. Altai,160 another case of alleged copyright infringement of a computer program, the Second Circuit held that the trier of fact need not be limited by its own lay perspective.161 “[W]e leave it to the discretion of the district court to decide to what extent, if any, expert opinion, regarding the highly technical nature of computer programs, is warranted in a given case.”162

Both computer code and musical compositions are in some way “blueprints” for future expression. Neither a computer code nor a musical composition is immediately accessible or marketed to the layperson. This similarity would suggest that the layperson is not the intended audience for a computer program or a musical composition. The best way to determine the value of computer code and musical compositions, then, would be to ask the programmers and musicians directly.

Perhaps the broadest statement advocating for a focus on the intended audience came from the Fourth Circuit in Lyons Partnership v. Morris Costumes.163 The court held that the substantial similarity analysis should focus on the reactions of the intended audience because one of the core purposes of copyright law is to “protect the creators' economic market . . . .”164 Lyons dealt with the copyright to the popular children’s television character Barney.165 Morris Costumes produced a costume of a similar-looking purple dinosaur named “Duffy the Dragon.”166 Adults began renting, buying, and using the costume at children events.167 Lyons, as owner of the Barney copyright, sued for copyright infringement.168

The district court held that the Duffy costume did not infringe Lyons’s copyright because it was not intrinsically similar to the Barney character. In reaching this conclusion, the court viewed the question of substantial similarity from the “perspective of the average adult renter or purchaser of these costumes.”169 Lyons appealed, arguing that the district court misapplied the legal standard for copyright infringement. The

161 Id. at 713.
162 Id. at 713.
164 Id. at 802.
165 Lyons did not license the rights to Barney because of its “inability to police” those rights and because of the risk that individuals might use the images in a “decidedly un-Barney-like manner and tarnish . . . his wholesome reputation.” Id. at 795.
166 Id.
167 Id.
168 Id.
169 Id. at 801 (quotation marks omitted).
Court of Appeals for the Fourth Circuit agreed, finding that the standard applied by the district court was too narrow because it prevented the district court from hearing evidence concerning confusion among children.170

Although adults were making the actual purchases, the intended audience of Duffy’s costume also included children.171 The Fourth Circuit asserted that the relevant issue in determining substantial similarity is “whether the works are so similar that the introduction of the alleged copy into the market will have an adverse effect on the demand for the protected work.”172 Because children accepted the Barney knock-offs as Barney, the court held that “[e]ven if adults can easily distinguish between Barney and Duffy, a child’s belief that they are one and the same could deprive Barney’s owners of profits in a manner that the Copyright Act deems impermissible.”173 Consequently, the Fourth Circuit ruled that the district court should have heard the “substantial evidence” of actual confusion among children,174 which included first-hand accounts from children along with “over 30 newspaper clippings from around the country” in which the Duffy costume was incorrectly referred to as “Barney.”175

Other courts have placed a similar focus on the effect an alleged infringing work has on the market for a plaintiff’s goods.176 Many of these cases rely on Judge Learned Hand’s classic statement that the finding of substantial similarity is based on whether “the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them and regard their aesthetic appeal as the same.”177 At least one commentator has suggested that the test as laid out in Arnstein v. Porter focuses on whether the defendant’s work acts as a market substitute for the plaintiff’s:

[B]y assuming the level of dissection in which a lay listener engages . . . the trier of fact supposedly gains an impression as to whether the defendant has materially and substantially copied the plaintiff’s work so that the plaintiff’s audience would buy the

170 Id.
171 Id.
172 Id. at 802.
173 Id. at 803.
174 Id.
175 Id. at 802.
177 Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).
defendant’s work over that of the plaintiff’s. If this has occurred, the
defendant has improperly appropriated the plaintiff’s work.\textsuperscript{178}

Similarly, in \textit{Mulberry Thai Silks v. K & K Neckwear},\textsuperscript{179} a court in the Southern District of New York found
infringement because the average purchaser of ties could have easily confused the defendant’s necktie with the plaintiff’s.\textsuperscript{180}
The defendant, K&K, a competitor of Mulberry Thai Silks, sought
to create a product as similar as possible to Mulberry’s “without
crossing over into the realm of illegal copying.”\textsuperscript{181} Mulberry sued
for copyright infringement. The court found that the ties were
substantially similar, noting that

[a] tie buyer who had seen one of Mulberry’s Ziggurat collection ties
and wished subsequently to buy the same tie would be likely, upon
seeing K & K’s copy, to buy it in the mistaken belief that the buyer
was purchasing the same tie that the buyer had seen previously—
and \textit{vice versa}.\textsuperscript{182}

This case shows that in order to “protect the creators’
economic market,” which is a primary purpose of copyright law,
the trier of fact needs to represent the market for which the
copyrighted work is intended. In the \textit{Mulberry} case, the market
to be protected was tie purchasers. For musical compositions,
the market to be protected is the sale and licensing of musical
compositions to musical performers.

\textbf{B. Statistical Sampling is the Best Evidence of Intended
Audience}

Although expert testimony may be the most common
solution when the intended audience of a copyrighted work has
specialized expertise, statistically reliable consumer surveys
that target the intended audience may offer litigants and
courts a stronger evidential source to assess substantial
similarity. In the context of musical compositions, such a
survey would ask fluent musicians whether two musical
compositions are substantially similar to each other.

\textsuperscript{178} Michelle V. Francis, Comment, \textit{Musical Copyright Infringement: The
\textsuperscript{179} 897 F. Supp. at 791.
\textsuperscript{180} \textit{Id}.
\textsuperscript{181} \textit{Id}.
\textsuperscript{182} \textit{Id}.
Courts are already accustomed to dealing with survey evidence in trademark disputes.\textsuperscript{183} Statistical surveys are the primary evidentiary method to prove trademark infringement.\textsuperscript{184} Trademark infringement requires a likelihood of consumer confusion.\textsuperscript{185} Trademark litigants routinely submit the results of professionally designed consumer surveys targeted at the relevant market as evidence of consumer confusion.\textsuperscript{186} One court noted the requirements of proper surveys as follows:

The proponent of a consumer survey has the burden of establishing that it was conducted in accordance with accepted principles of survey research, i.e., that (1) a proper universe was examined; (2) as representative sample was drawn from that universe; (3) the mode of questioning the interviewees was correct; (4) the persons conducting the survey were recognized experts; (5) the data gathered was accurately reported; and (6) the sample design, the questionnaire and the interviewing were in accordance with generally accepted standards of procedure and statistics in the field of such surveys.\textsuperscript{187}

The use of survey evidence is also appropriate to resolve cases of alleged infringement of design patents. Infringement of a design patent is found “if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other . . . .”\textsuperscript{188} At least one commentator has opined that the “ordinary observer” test as applied in music copyright infringement cases is “capable of submission to a group of survey interviewees.”\textsuperscript{189}

The concept of using survey evidence for the purpose of proving substantial similarity in copyright litigation is not new.\textsuperscript{190} But “[w]hile there is no per se rule barring survey

\textsuperscript{183} Upadhye, supra note 23, at 555-56. (“[S]trong consumer survey results can counter a defendant’s argument that the plaintiff failed to prove actual confusion.”).

\textsuperscript{184} Id. at 551 (“Because the crux of any trademark infringement case is the infringing mark’s effect on the typical consumer, a survey is normally required to measure that effect.”).


\textsuperscript{186} Larry C. Jones, Developing and Using Survey Evidence in Trademark Litigation, 19 MEM. ST. U. L. REV. 471, 473 (1989) (“When likelihood of confusion is at issue, as it usually is in trademark litigation, evidence of actual confusion may not be sufficient to carry the burden of proof in the absence of a survey.”).

\textsuperscript{187} Tyco, 1987 WL 44363, at *9.

\textsuperscript{188} Gorham Co. v. White, 81 U.S. (14 Wall.) 511, 528 (1871).

\textsuperscript{189} Jones, supra note 186, at 476.

\textsuperscript{190} At least one student note has advocated for its use. See Sitzer, supra note 106, at 423 (“Marketing research, which attempts to measure the market’s reactions to
Courts typically reject the admission of survey evidence because of perceived flaws in the surveys. Two courts, further, have questioned in dicta whether the substantial similarity analysis is too nuanced a legal standard to be successfully surveyed. This belief, however, overlooks that the Lay Listener Test is itself a mini survey; although one that comes without the usual guarantees of statistical reliability that an actual survey would have.

Perhaps the most significant judicial opinion to express a disinclination to use consumer surveys to prove substantial similarity came from the Second Circuit in *Warner Brothers v. ABC*. In that case, Warner Brothers, the owners of DC Comics, claimed that an ABC television show, *The Greatest American Hero*, infringed upon DC Comic’s trademarks and copyrights relating to its Superman property. The television show had adopted many of the quintessential features of Superman, such as tearing away a button-down shirt to reveal an emblem-bearing costume. Warner Brothers stated “that of the 45% of those interviewed who said Hinkley [ABC’s protagonist] reminded them of some other character, 74% (33% of the entire sample) said they were reminded of Superman.”  

Judge Newman, writing for the majority, agreed that the survey responses were “too general” to be probative. The court went on to express its doubts that survey evidence could ever be appropriate in a copyright infringement case because “substantial similarity” is not easily understood by the general populace and that judges are best suited to strike the
“delicate balance between the protection to which authors are entitled under an act of Congress and the freedom that exists for all others to create their works outside the area protected against infringement.” Judge Newman did not elaborate. For example, the Second Circuit did not discuss whether it believed juries would be better (or more careful) at determining substantial similarity than survey participants, whether judges would design less prejudicial questions to ask the jury than survey professionals, or whether judges were particularly well-suited for giving instructions and ensuring that participants complied with those instructions. Despite expressing doubts regarding the admissibility of survey evidence to prove substantial similarity, the court admitted that it “need not” decide this issue definitively.

Interestingly, Judge Newman argued in favor of survey evidence in a copyright case four years later. In Carol Barnhart Inc. v. Economy Cover Corporation, the Second Circuit resolved a copyright dispute concerning whether mannequin torsos are suitable for copyright protection. In a dissenting opinion, Judge Newman argued that the difficult distinction of whether the object was a work of art or design should not be left to the arbitrary values or biases of courts or juries. Instead, Judge Newman stated, “[E]xpert opinion and survey evidence ought generally to be received.” It remains unclear, though, whether Judge Newman actually changed his mind about the use of survey evidence in copyright cases in the four years between writing the majority opinion in Warner Brothers and his dissent in Carol Barnhart. Judge Newman’s solution to handling the nuance of substantial similarity was to restrict it to a courtroom, while his remedy for making the subjective determination of whether a work is art or design was to enlist the help of experts and survey evidence. He neither explains nor notes his apparent inconsistency.

Although no case concerning copyright infringement has definitively excluded survey evidence from ever being

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201 Id.
202 Id. (“We need not and do not decide whether survey evidence of the sort tendered in this case would be admissible to aid a jury in resolving a claim of substantial similarity that lies within the range of reasonable factual dispute.”).
203 Carol Barnhart Inc. v. Econ. Cover Corp., 773 F.2d 411, 423 (2d Cir. 1985).
204 Id.
205 The majority opinion criticized Judge Newman’s test as being “so ethereal as to amount to a ‘non-test’ that would be extremely difficult, if not impossible, to administer or apply.” Id. at 419 n.5.
206 Id. at 422-23.
submitted to assist in the jury’s finding of substantial similarity, courts frequently have excluded surveys for being insufficiently reliable or probative. Arguably, however, the rules for survey evidence in trademark infringement disputes could easily be adapted to assist an analysis of substantial similarity in copyright cases. Trademark surveys carefully target the relevant audience of potential consumers; responses are solicited only from those people whose opinions matter in the purchasing decisions of the trademarked works. Adhering to this principle would be especially important in the copyright infringement domain where, like with musical compositions, the intended audience has a specialized expertise. Furthermore, and perhaps most importantly, these survey standards would produce results that are more accurate and reliable than the impressions of individual judges or lay juries.

To illustrate the representative inaccuracy among a jury, imagine a case involving the alleged infringement of Britney Spears’s song, “. . . Baby One More Time,” a 1999 hit that sold over 10 million records. Assuming that a group of 10 million is the intended audience for the song, a survey seeking to capture the reactions of that population would require a sample size of 1,537 Britney Spears consumers. If the Lay Listener Test uses only a 12-person jury, the jury’s response will likely misrepresent the larger population.

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207 See supra Part III.B; Keyes, supra note 24, at 442.
208 Jones, supra note 186, at 479. In addition to the trademark owner’s current and potential consumers, a survey’s “universe” will include “past purchasers, intended purchasers,” and persons in a position to “influence purchasing decisions.” Id.
210 Although the number of Britney Spears consumers is likely to be higher than 10 million, the appropriate sample size for a population greater than 10 million does not change significantly. Margaret H. Smith, A Sample/Population Size Activity: Is it the Sample Size of the Sample as a Fraction of the Population that Matters?, 12 J. STAT. EDUC. 2 (2004), available at http://www.amstat.org/publications/jse/v12n2/smith.html (“it is the absolute size of the sample, not the size of the sample relative to the population, that matters for our confidence in an estimate”).
211 Results obtained assuming a 95% confidence level and a confidence interval of .025 using the National Statistics Service’s online sample size calculator, available at http://www.nss.gov.au/nss/home.nsf/pages/Sample+size+calculator.
212 The higher the percentage of margin of error, the lower the confidence that the results of the sample’s poll will yield true population values. According the law of large numbers, the probability of accurately measuring population values is unlikely, and the level of precision is lost, in small sample sizes. See ROBERT S. LOCKHART, INTRODUCTION TO STATISTICS AND DATA ANALYSIS FOR THE BEHAVIORAL SCIENCES 164 (1998). The law of large numbers states that “as the sample size increases, differences between the observed proportion and the theoretical probability tend to become smaller and smaller.” Id. at 165.
To illustrate what this means, there may be significant variability among the population of 10 million fans that purchased the song. Spears’s audience, for example, might include middle age bankers who like the song because it has a good beat for their gym playlists, teenage girls who want to emulate Spears’s defiant style, feminists who (perhaps ironically) find the lyrics to be empowering, and many more types of listeners. Each of these audience members will experience Spears’s music differently, and it is not clear that any one of them will adequately represent the typical listener of the song. If we randomly select only 12 people from Spears’s audience of millions, we may happen to select mostly bankers and no teenage girls, or mostly feminists and no bankers. Such a skewed sample would yield an inaccurate picture of the listening experiences of the population. Worse yet, attorneys during voir dire could attempt to intentionally skew the composition of the jury in a way that would grossly misrepresent the audience of the disputed work. If the jury misrepresents the audience for the song, it likely would bias the results of the Lay Listener Test.

Even if all 12 jurors were part of the audience for the work, the sample size is still too small to make accurate projections about what the typical audience member values. If jurors voted yes for substantial similarity, we could not be confident that the larger population would agree. Further, it is likely that we would not get a comparable result if we assembled another jury of 12 and asked them the same question. Indeed, there would be a margin of error of 28% among a 12-person jury purporting to represent a population of 10 million people, in this case 10 million Britney Spears fans.  

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213 Variability among the target population, and therefore the sample, affects the statistical measurement of the outcomes of interest. Variability describes the amount of homogeneity or heterogeneity of the population and how much a sample may deviate from the average results of the general population. *Id.* at 130-33, 136-37.

214 This figure is calculated at the standard 95% confidence level, a random sample of 12 jurors, assuming a 50% chance of answering either yes or no to the questions for maximum variability (see below), for a population of 10,000,000. A confidence interval calculator can be found at http://www.surveystem.com/sscalc.htm.

The sample size is calculated using the equation below and is taken from William G. Cochran, *Sampling Techniques* 75 (2d ed. 1963).

\[ n_0 = \frac{Z^2pq}{e^2} \]

Where \( n_0 \) is the sample size, \( Z \) is the value of the area found under the normal curve (e.g., 1.96 for 95% confidence level), \( p \) is the estimated variability in the proportion of an attribute found in the population (if variability is unknown, assume \( p = .5 \) for maximum variability see below), \( q \) is 1-\( p \), and \( e \) is the confidence interval expressed as a decimal (margin of error; e.g., .03 = ±3).
Compare this incredible margin of error with a typical Gallup poll, where the margin of error typically ranges between two or three percent.\textsuperscript{215} In other words, if 50% of a jury of 12 voted for substantial similarity, the true population response in favor of substantial similarity could be as low as 22% and as high as 78%.\textsuperscript{216} In other words, our sample tells us little about the true opinions of the population. To put the margin of error in terms of its impact upon a jury’s determination, if the test was repeated with another jury, as few as three jurors (6 – (12\times0.28)) or as many as nine (6 + (12\times0.28)) might find substantial similarity between the two works.\textsuperscript{217} Whether your client wins or loses would be based in part on how many outliers you draw from your jury pool.

Obviously, the problem of misrepresentation increases considerably with a decrease in sample size. Imagine a sample size of three. How easy would it be to have a jury of three bankers, or three teenage girls, or three feminists? The inclusion of a single banker on this three-person jury might significantly misrepresent the target population if, for instance, the target population from which jurors are drawn includes only a handful of bankers.

Now imagine a sample size of one. How likely is it that a single person could properly represent the opinions of a larger population? Imagine further that the single person has chosen to ignore findings of the larger population, and instead decides to rely on his or her own listening of the song. How accurate will the finding be then?

These numbers were not chosen randomly. They correspond with the sample size engaged in the Lay Listener Test on a motion for summary judgment (a single judge), or on

The equation for estimating confidence intervals solves for $e$.

$$e = \frac{Zpq}{\sqrt{n}}$$

When variability is unknown, the maximum probability must be assumed, although practically speaking the variability would depend on the two songs at issue. With the unrepresentative sample of the jury and the use of dichotomous yes/no responses for juror determinations (giving a 50-50 probability the juror will respond either yes or no), the variability would need to be estimated at maximum, and worst, value of 50% for most cases of similar description to the Britney Spears example. As stated in the sample size equation, the maximum variability is 50% or $p = .5$.


\textsuperscript{216} See supra note 214. The standard of error was calculated using a standard 95% confidence level.

\textsuperscript{217} See supra note 214.
appeal from a motion for summary judgment (a panel of three appellate judges). Although judges who reject consumer surveys in the Lay Observer Test have doubted whether a jury should be replaced by a “public opinion poll,” they frequently rely on their own private assessments of the works in question to decide on summary judgment whether two works are substantially similar.

The advantage of deploying well-constructed surveys is clear. Surveys properly define and target the relevant “universe” or audience of the work. These surveys can adhere to rigid methodological standards, standards that bolster the argument in favor of admitting such evidence at trial. These standards include: clear precise, and non-leading questions posed to participants; expert, impartial administration; accurate reporting; sound analysis done in accordance with settled statistical principles; and ubiquitous objectivity in all facets of the survey’s production. To establish that these standards were met, the survey’s proponent typically proffers to the court a comprehensive statement of objectives, the raw data collected from the survey presented in a manner that represents the entirety of the results, and a thorough explanation of how the proponent used its methods to reach its conclusions. Furthermore, the experts attaching their name to any survey would be subject to cross-examination on any of these points.

The primary difficulty in constructing a consumer survey to show copyright infringement is that there is no clear understanding of what constitutes substantial similarity. Issues include: (1) what question(s) should be asked by the survey, and (2) how would a survey’s results sufficiently demonstrate whether there is substantial similarity?

Case law does not provide much clarity on what would be the most relevant questions to ask copyright consumers, fluent musicians. One option would be to give consumers a brief jury instruction about substantial similarity and see what percentage of the consumers find in favor of substantial similarity. Another possibility includes asking survey

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219 Upadhye, supra note 23, at 559.
220 Jones, supra note 186, at 490.
221 See id. at 489.
222 See supra Part I.B.
223 Id.
participants questions aimed at market substitution. For example, one question might be whether the juror would consider purchasing the defendant’s work instead of the plaintiff’s. A third possibility (consistent with the *Feist* interpretation of copyright infringement analysis) would be to ask participants if they see any copyrightable expression from the plaintiff’s work in the defendant’s work. All three of these types of questions have the potential to be leading (or even misleading). The consumer-survey approach mirrors the Lay Listener Test (making it perhaps more palatable to courts) and, so long as the population of survey respondents is large enough, would produce a statistically accurate depiction of the intended audience.

The second major difficulty is determining how many survey results in favor of substantial similarity are needed for a court or jury to find that a work has been infringed. In trademark law, the parties use consumer surveys to show the likelihood of consumer confusion. Although the exact number is debated, it has been suggested that a surveyed rate of consumer confusion exceeding ten percent is sufficient to show a likelihood of consumer confusion and that a trademark may have been infringed.

Unfortunately, in copyright, there is no established quantitative threshold to constitute a finding of substantial similarity. Jeanne Fromer and Mark Lemley address the problem in their recent article:

Defining the consumer as the audience requires us to make judgments about how many consumers must agree on something, and how we are to account for the views of the remainder. A plausible measure is whether a majority of the defined audience would find infringement. The majority requirement aligns with the “preponderance of the evidence” standard plaintiffs must meet on the issue of infringement. If the audience is a hypothetical consumer, the alignment is perfect: the plaintiff must show that it is more likely than not that this hypothetical consumer would believe the defendant infringed. But even if the consumer invoked as infringement audience is a real one, a reasonable translation of the preponderance of the evidence standard might be that more people in the audience would find infringement than would not.

224 Id.
225 Id.
227 Fromer & Lemley, supra note 67.
Under their proposal, a survey would tend to show substantial similarity if its results demonstrated that more than 50% of participants found substantial similarity between the litigated works. Although the application of a 50% threshold would have the benefit of clarity as applied to a copyright consumer survey, the threshold is unlikely to quantitatively mirror the actual standard of substantial similarity currently employed by courts. Abandoning the current standard for determining substantial similarity as espoused by decades of case law has the potential of enlarging or reducing the scope of billions of current copyrights. If the Lay Listener Test were abandoned in musical composition infringement cases in favor of using survey evidence of the intended audience at trial, a definitive threshold for substantial similarity must first be established. In other words, we must first quantify the current standard of substantial similarity.

One possible solution would be to recreate the substantial similarity analysis for the last 10 years of copyright cases in which substantial similarity was actually litigated and decided. For each case, a statistically significant sample of randomly selected mock jurors would be asked to compare the plaintiff’s and defendant’s works and determine substantial similarity based on a standard jury instruction. The sample would be randomly selected as opposed to targeted (i.e. laypeople v. musicians) to recreate past results, which were reached entirely by randomly selected juries. For some cases the sample might reach a different conclusion than the actual jury, however as long as a sufficient number of cases are recreated, general patterns should emerge. Once a baseline level for substantial similarity level of past cases is established, courts and litigants should be able to recreate a comparable analysis in all future copyright infringement cases. In other words, once the results of the mock jurors provide a similarity threshold, courts and juries would have a benchmark against which to compare the similarity results produced by well-constructed surveys. Such a system would have several advantages over the current system. First, the comparison of survey results to past cases is clear and easy to apply. Second, the reliance on statistical and scientific methods promotes greater certainty and predictability. Armed with such tools, parties would be able to assess the merits of a case before initiating costly litigation. Judges, too, will gain a more reliable standard to apply when considering a copyright case on a motion for summary judgment.
Although the use of consumer survey evidence to show substantial similarity in a copyright infringement case is not without problems, a well-constructed sampling of the intended audience would be far superior to the existing alternatives. When deciding whether to admit survey evidence, courts should consider the questionable accuracy of the alternative—reliance upon an insufficient sample size of jurors or, in the case of summary judgment, reliance upon the opinion of a single judge. As Judge Newman of the Second Circuit has noted:

Courts have an important responsibility in copyright cases to monitor the outer limits within which juries may determine reasonably disputed issues of fact. If a case lies beyond those limits, the contrary view . . . of a particular jury cannot be permitted to enlarge . . . the scope of statutory protection enjoyed by a copyright proprietor.228

The results of the experiments conducted for this article, however, suggest that Judge Newman’s concern has manifested itself under the current application of the Lay Listener Test. Between the option of consumer surveys and relying upon a jury that does not represent the intended audience for a work, well-designed surveys are the better option. As in the trademark context, juries using survey evidence in a copyright infringement case would still be responsible for making the ultimate determination of substantial similarity. Rather than serve as a stand-in for the intended audience and pass judgment, a jury would instead weigh the credibility of the evidence of substantial similarity as provided by the actual intended audience of the work. This shift from playing armchair statistician to assessing the credibility of evidence helps realign the jury’s function to tasks that it is particularly well suited to undertake.229

CONCLUSION

Musical performers are the correct audience for the Lay Listener Test when musical compositions are under review. The easiest way to assess the opinions of fluent musicians would be via a properly constructed survey. Such a survey

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would be more statistically sound than administering the Lay Listener Test to a jury or panel of judges. Musical compositions require specialized knowledge to understand. Some courts have allowed expert testimony for the substantial similarity determination when the works in question require the jury to understand idiosyncratic concepts or to have the perception skills of a specialized audience. Though it seems counter to common sense, experimental evidence suggests that laypeople may not be able to hear music the way that fluent musicians do, even after receiving ear training. Furthermore, even when administered by a jury comprising members of the work’s intended audience, the Lay Listener Test relies on too small a sample size to properly embody the sentiments of the intended audience. To counter these problems, a statistically significant sample of intended audience members should evaluate the similarity of two works. It is common practice among trademark law to employ as evidence consumer surveys produced by the intended audience. Jurors would retain the ultimate responsibility for making a determination of substantial similarity, but they would be aided by much more accurate evidence than their own hunches and intuitions.
Mis-Concepcion

WHY COGNITIVE SCIENCE PROVES THE EMPERORS HAVE NO ROBES

John Campbell

Every judge comes to the bench with personal experiences. If you assume that your personal experiences define the outcome, you’re going to be a very poor judge, because you’re not going to convince anybody of your views . . . . We have to know those moments when our personal bias is seeping in to our decision-making. If we’re not, then we’re not being very good judges. We’re not being fair and impartial.1

Justice Sonia Sotomayor

People make choices for reasons unknown to them and they make up reasonable-sounding justifications for their choices, all the while remaining unaware of their actual motives and subsequent rationalizations.2

Joshua D. Greene

INTRODUCTION

In a blunt article appearing in The New Republic, Judge Posner criticized Justice Scalia asserting that he is not really a textual originalist at all, and that instead, he relies on whatever canon of construction will allow him to support his conservative views on abortion, states’ rights, guns, and other issues.3 Indirectly, Judge Posner suggested that Scalia is either unwilling or incapable of engaging in the personal reflection

† Lawyering Process Professor – University of Denver Sturm College of Law. Thanks to Justice Posner for the inspiration that led to this piece—both for his article and for his comments to me and other attorneys years ago regarding arbitration. Thanks to Alicia Campbell and Erich Vieth.


that Justice Sotomayor suggests is essential to decision making.\textsuperscript{4} The title of Judge Posner’s article alone would be enough to raise eyebrows; Posner titled his work: \textit{The Incoherence of Antonin Scalia}.\textsuperscript{5} For many who have wrestled with some of Scalia’s decisions—both those he wrote and those in which he joined the majority—Posner’s words echoed their own criticisms that Scalia is prone to inaccuracy in his recitation of case law, that his commitment to textual originalism is questionable, and that in all, Scalia seems to use his “interpretative principles” to reach results that fit more with his political and social views than they do with the law he claims he relies upon.\textsuperscript{6} These same assertions are often made more broadly about the conservative majority of the United States Supreme Court (Justices Scalia, Thomas, Roberts, Alito, and Kennedy).\textsuperscript{7}

This article asks two questions that grow out of this discussion. First, is there any evidence that the conservative majority is actually bending the law to the majority’s common business-friendly beliefs? And second, if Judge Posner is right, and it applies to more than Scalia, why and how is this happening? To get at these questions, this article examines two split decisions in which the conservative majority won the day: \textit{Stolt-Nielsen S.A. v. AnimalFeeds International Corp.},\textsuperscript{8} and \textit{AT&T Mobility LLC v. Concepcion}.\textsuperscript{9} The first opinion was written by Justice Alito\textsuperscript{10} and the second by Justice Scalia.\textsuperscript{11} An analysis of these cases leads to one conclusion: these opinions are fundamentally, legally unsound.

But this article offers more than a mere conclusion that the “emperors have no robes.” As the title suggests, the article employs cognitive science to attempt to explain why the conservative majority got it so wrong, and, maybe more importantly, why the conservative majority did not seem to notice. It addresses how the opinions can cite precedent extensively if it is indeed true that they are inconsistent with it. The somewhat surprising conclusion, at least to those who would

\textsuperscript{4} Id.
\textsuperscript{5} Id.
\textsuperscript{6} Id.
\textsuperscript{9} AT&T Mobility LLC. v. Concepcion, 131 S. Ct. 1740, 1743 (2011).
\textsuperscript{10} See Stolt-Nielsen, 130 S. Ct. at 1763.
\textsuperscript{11} See Concepcion, 131 S. Ct. at 1743.
simply bash the majority, is that it is entirely possible that those in the majority believe they are being rational, considering both sides of the argument, and following precedent when in reality they are being driven by intuition and emotion. This is true because many cognitive errors, some of which are discussed below, are invisible to those who fall prey to them.

Analyzing the Court’s opinions from a legal standpoint is doable, but scrutinizing them as to why the majority missed the mark is more difficult. A powerful tool for rooting this out lies in cognitive science. It is useful because it provides (1) an explanation for how beliefs could drive rationalizations, and (2) some hints on how to identify when this is happening.

A growing body of literature regarding decision making concludes that intuition drives reason. In fact, the emotive process, which is wrapped up with intuition, often drives our fundamental beliefs, but because we live in a social world and because we must defend our beliefs, we construct rationales for them. The result is that humans are prone to provide reasons for beliefs in a manner that suggests the reasons caused the beliefs, even though, in truth, the beliefs caused the reasons. This article coins a phrase for this phenomenon, calling it “intuition rationalization” or “IR.”

Cognitive science goes beyond identifying the phenomenon. It also suggests that highly intelligent people are especially adept at constructing post hoc justifications for these intuitive beliefs, making it more likely that others with the same underlying beliefs can latch onto the purported “justifications.” This is a possible explanation for why the majority’s opinions are at least facially rational and why they can garner majorities. Finally, cognitive science teaches that when people engage in intuition rationalization, they genuinely believe that they are working through the problem; it is not a ruse or a lie, it is a form of self-talk that leads to self-delusion.

But, if it is true that IR can and does occur everywhere, including legal opinions, and if it is equally true that, at least on its face, it looks like rationality, how can it be identified? Relying on cognitive science, this article identifies a checklist for

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13 Id. at 38.
14 Id. at 39.
15 See id. at 46.
16 See id.
17 See generally id. at 39.
some of the most common traits of IR. This list is the first of its kind to be applied to legal reasoning. These markers prove useful for testing Posner’s hypothesis that Justice Scalia’s reasoning is really a malleable act of intuition rationalization,18 and for testing the broader hypothesis that the conservative majority is engaging in post hoc reasoning to justify opinions that align with their fundamental goals and beliefs. The telltale signs of IR include:

- Strained reasoning – because post hoc reasoning is a justification, not a driving force for the actual belief, the justifications offered for the belief are often logically flawed or inconsistent. This is especially true when the belief is driven by a response to taboo or deeply held, but never examined, beliefs;19

- Confirmation bias – a tendency to cherry-pick facts that support an already-formed belief;20

- Substitution – substituting an easy question that can be answered for more complex, difficult questions;21

- Creation of “my-side” arguments – the creation of supporting arguments without a parallel effort or ability to consider “other-side” arguments.22 Interestingly, the ability to create longer and longer “my-side” lists correlates positively with intelligence, but intelligence does not produce longer “other-side” lists;23

- Persistence (or stubbornness) – a belief that persists in the face of counterarguments that should be persuasive;24 and

- Overconfidence – often displayed by unnecessarily strong wording, a failure to identify weaknesses, or a willingness to disregard other opinions or ideas out-of-hand.25

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18 See Posner, supra note 3.
19 See Haidt, supra note 12 at 39.
20 Daniel Kahneman, Thinking, Fast and Slow 81 (2011).
21 See id. at 97-98.
22 Haidt, supra note 12 at 80-81.
23 See id. at 94.
24 See id. at 69.
25 Kahneman, supra note 20 at 87.
If the opinions written by Justices Alito and Scalia are a product of IR, that is, if they are intuition dressed as cold rationality, then a close examination of the opinions should reveal some or all of the indicia described above. To this end, Stolt-Nielsen and Concepcion, both handed down within the last two years, provide ideal specimens for dissection.

These opinions are particularly well-suited for analysis for several reasons. First, they both produced business-friendly results, which some allege is a fundamental belief of the conservative majority. Second, the opinions are suitable because they, at least on their face, announce no fundamental alteration to existing precedent. Instead, they are written as if they are the inevitable result of the application of immutable principles. Third, some scholars have already suggested that they are fundamentally inconsistent with existing law. Fourth, the opinions each include a vigorous dissent. These dissents serve as both a means for considering how the majority dealt with potential counter-arguments, and as a check on whether it omitted information that would have called the conclusions into question. Finally, the opinions fit nicely in my knowledge base and skill set. I briefed, and in some cases argued, appellate cases dealing with both opinions at a variety of appellate courts, including the United States Supreme Court. As a result, I am intimately aware of the precedential value ascribed to the two selected decisions by those who seek to use them to insulate businesses from class actions, and I am aware of the real world results the opinions have produced.

Before going further, I offer a few concessions. First, I readily concede that IR is not limited to conservative jurists.

26 See Mark Koba, Chamber of Commerce Keeps Scoring With High Court, CNBC (June 28, 2013, 6:00 AM), http://www.cnbc.com/id/100846493.
29 See Concepcion, 131 S. Ct. at 1756; Stolt-Nielsen, 130 S. Ct. at 1777.
30 The most obvious example of my involvement in cases that turn on questions of arbitrability is Brewer v. Missouri Title Loans, 364 S.W.3d 486 (Mo. Cert. Denied, 2012). In that case, I served as lead counsel representing a putative class of borrowers who received high interest title loans. The case ultimately led me to argue before the Missouri Court of Appeals once and the Missouri Supreme Court twice. It also required two separate sets of filing and review by the United States Supreme Court. The case involved arbitration and presented the tension between Missouri’s dislike for some class action waivers in arbitration clauses and the Court’s approval of arbitration.
Anyone can certainly find intuition dressed as reason in liberal opinions, and if one digs hard enough, they may find indicia of IR in this article. The point is not to condemn IR; it is part of human cognition. Rather, the purpose is to identify IR and to begin to address its existence. I focus on the conservative majority because its members purport to engage in pure reasoning based on where the appropriate legal precedent, statutory language, and Constitutional provisions lead. I feel comfortable suggesting that Justice Scalia would adamantly dispute that he engages in cognitive shortcuts, is driven by his beliefs rather than by textual analysis, or that his interpretative principles are really more like loose guidelines. But, as I prove in this article, IR is deeply embedded in at least the two conservative majority’s opinions examined in this article. I contend that identifying this truth is useful for examining errant decisions and understanding how those decisions went off the rails. I also contend that until judges recognize that they, like everyone else, could be subject to IR, they will remain blind to it. This leads to overconfidence in decisions as impersonal acts of cold reason, which, as demonstrated in this article, can lead to fundamentally unsound decisions with dangerous real world impacts. I leave for others to discuss what the proper judicial interpretation methods should be; for now, I am content to assert only that it merits illumination if judges contend they employ pure reason, but in reality they do not.

The remainder of the article unfolds by first considering Posner’s critiques, then putting them in the context of principles of cognitive science. Next, I apply legal analysis and cognitive science to evaluate the conservative majority opinions in Stolt-Nielsen and Concepcion. I note that this treatment is relatively detailed. This proved necessary to do justice to the legal reasoning required to unravel the decisions and to reveal enough about the decisions to flesh out how IR was at play. Finally, I offer some takeaways from the analysis and offer some suggestions for training judges to better consider the role of IR in their thinking and decisions.

Part I sets out in more detail some of Posner’s critiques. These are useful because they provide a thoughtful third-party take on the reasoning of Scalia, considered by many to be the ringleader of the conservative majority. Because Posner’s article describes a number of perceived fallacies in Scalia’s reasoning and then concludes that these are evidence that Scalia is bending reason to his will, Posner’s article serves as a starting
point for observing in action some of the telltale logical fallacies that are the markers of IR.

Part II provides an intellectual underpinning for Posner’s article by correlating the flaws Posner identified with cognitive science. The purpose is to familiarize the reader with common cognitive fallacies and to identify theories on how gut-feelings and moral beliefs drive reasoning. To do this, I rely heavily on the work of Daniel Kahneman, the author of *Thinking, Fast and Slow*,\(^{31}\) and Jonathan Haidt, the author of *The Righteous Mind: Why Good People Are Divided by Politics and Religion*.\(^{32}\) These works are extraordinary because they are written in plain English for the non-cognitive science reader and they draw their conclusions from hundreds of other studies. As a result, by relying on these two texts, I was able to learn from the wisdom of dozens of other cognitive and behavioral scientists, while relying on Kahneman and Haidt to do the hard work of pulling the studies together.

Part III examines the test cases, and then it identifies IR within those cases. First, I summarize the holdings of the two test cases, *Stolt-Nielsen* and *Concepcion*. Then I put on my lawyer hat in order to analyze a variety of holdings and sub-holdings in the cases in light of the substantive law that should have been applied. I conduct my investigation by treating the decisions as if they were a law school exam answer. What was the applicable law? What did the majority say? Does this analysis hold water? I conclude that the majority often reached conclusions that were not supported by fact, applied the wrong law, applied the right law wrongly, or implicitly overruled past Supreme Court precedent without acknowledging that it did so. I also note that the decisions produce both illogical and inequitable results in the real world, adding support to the conclusion that they are products of IR. After each section in Part III, I correlate the legal analysis to my identified markers of IR. In doing so, I establish that the reasoning of the majority is rife with indicia of IR. The results are discussed, and then provided in a simple table for reference.

Because I conclude that IR is at play, this suggests that emotion and intuition are driving the decisions. In Part IV I venture a suggestion as to what may be driving the conservative majority. Some basic data regarding how the cases have affected

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\(^{31}\) See generally *KAHNEMAN*, supra note 20.

\(^{32}\) See generally *HAIDT*, supra note 12.
filing rates of class actions is considered as well as the views of some other scholars who have considered the opinions.

Part V briefly discusses the implications of my findings, suggesting that since IR is at play in the conservative majority’s decisions, and since IR is a common human condition, it should be further studied. I pose a list of questions—a research agenda of sorts—for future authors (including me). I also suggest that identifying IR explicitly and incorporating cognitive science lessons into judicial training would be wise.

I. POSNER’S CRITIQUE OF “THE INCOHERENT ANTONIN SCALIA”

Posner’s article created a buzz in the legal community. It isn’t every day that an intellectual heavyweight like Posner, who is also considered a conservative jurist by many, takes a swing at a sitting Supreme Court Justice who happens to be undoubtedly conservative. For this article, Posner’s criticisms serve as a warm-up. Although he did not relate his conclusions to cognitive science, they match up nicely with many of the markers identified herein and help introduce the concepts. For example, Posner says that Scalia cherry-picks information, ignores counterarguments, displays internal inconsistencies, and writes opinions that are overconfident but under-supported. Part II will show that these characteristics are predicted by cognitive science.

Judge Posner’s article was written in response to a book written by Scalia and the well-known legal writing expert, Bryan Garner. In the book, titled Reading Law: The Interpretation of Legal Texts, Scalia and Garner claim to set out a defense for textual originalism. They describe originalists as those who “look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters’ extratextually derived purposes and the desirability of the fair reading’s anticipated consequences.” To this end, they applaud cases that apply literal meaning, and they somewhat idly speculate about how to interpret everyday language, such as a sign at the

33 Posner, supra note 3.
34 Id.
35 See generally ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); see also Posner, supra note 3, ascribing the name “textual originalism” to Scalia and Garner’s work.
36 SCALIA & GARNER, supra note 35 at xxvii; see also Posner, supra note 3.
entrance to a butcher shop that reads “No dogs, cats, and other animals allowed.”37 Along the way, they also invoke the name of well-known Justices who they claim were also originalists, and in general, they decry the work of the “so-called consequentialist[,]” who they assert inappropriately engages in the practice of asking, “is this decision good for the little guy?”38

The book might be considered a tour de force by conservatives but for the work of Judge Posner. Unfortunately for Scalia and Garner, Judge Posner chose to read the book as only he could. He apparently was not impressed. In his critique, he refutes most of the positions advanced in the book.39

To begin, he points out that although professing to believe in originalism, Scalia and Garner set out no less than 57 principles of interpretation.40 He documents that many of the judges who were alleged “originalists” actually relied on common sense, legislative history, and other resources that should be anathema to Scalia and Garner.41 And perhaps most interestingly, he carefully examines the wide range of cases set out by Scalia and Garner and determines that many of them simply do not say what Scalia and Garner say they do.42

Posner recounts the moment when he decided to start putting the authors to their proof.43 He writes:

Scalia and Garner ridicule a decision by the Supreme Court of Kansas (State ex rel. Miller v. Claiborne) that held that cockfighting did not violate the state’s law against cruelty to animals. They say that the court, in defiance of the dictionary, “perversely held that roosters are not ‘animals.’” When I read this, I found it hard to believe that a court would hold that roosters are not animals, so I looked up the case. I discovered that the court had not held that roosters are not animals. It was then that I started reading the other cases cited by Scalia and Garner.44

From this starting point, Posner reviewed several more cited cases and concluded they were inconsistent with how Scalia and Garner presented them.45 In some cases he notes that although Scalia and Garner criticize the decision, it could

37 Posner, supra note 3. A literal reading of this sign could prohibit humans from entering.
38 Id.
40 Posner, supra note 3.
41 See id.
42 See id.
43 Id.
44 Id.
45 Id.
be justified by textual originalism.\textsuperscript{46} In others, he points out that Scalia and Garner, to advance their assertions, ignore other rationales provided by courts.\textsuperscript{47} In all, Posner suggests, not too subtly, that Scalia and Garner have not faithfully read or recited the cases.\textsuperscript{48}

Perhaps emboldened, or annoyed, by this fact, Posner also turns to the authors’ treatment of other interpretive theories.\textsuperscript{49} He calls the authors’ characterization of these theories “disingenuous.”\textsuperscript{50} And finally, in a compelling set of paragraphs, Posner chronicles how Scalia and Garner, in only a few pages in their books, flip flop between embracing “dynamic” interpretation to repudiating it, to embracing it again.\textsuperscript{51}

All this leads Posner to a conclusion that reads more like a rather serious accusation. Posner writes:

A problem that undermines their entire approach is the authors’ lack of a consistent commitment to textual originalism. They endorse fifty-seven “canons of construction,” or interpretive principles, and in their variety and frequent ambiguity these “canons” provide them with all the room needed to generate the outcome that favors Justice Scalia’s strongly felt views on such matters as abortion, homosexuality, illegal immigration, states’ rights, the death penalty, and guns.\textsuperscript{52}

Put plainly, Posner asserts that Scalia’s commitment to textual originalism is a sham, used to justify results that are in keeping with Scalia’s political and personal opinions. Posner concludes his article with a jab:

Justice Scalia has called himself in print a “faint-hearted originalist.” It seems he means the adjective at least as sincerely as he means the noun.\textsuperscript{53}

Judge Posner’s article is a powerful critique, and it cries out for follow-up. But piling on is of no value. Instead, I see in Posner’s article the seeds of a larger understanding of how Scalia, the conservative majority, and many other judges can believe they are employing reason when in reality they are acting as slaves to their own deeply held beliefs. I use Posner as a jumping-off point for this work, in no small part because he points out

\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
many of the same IR characteristics identified in the introduction and described in the following section.54

II. DECISION MAKING

Two of the most profound books on how we form beliefs and how we justify them were written in the last two years.55 The first is titled *Thinking, Fast and Slow*, by Daniel Kahneman.56 The second, written by Jonathan Haidt, is titled *The Righteous Mind: Why Good People Are Divided by Politics and Religion*.57 Kahneman’s book focuses largely on decision making and the many mistakes humans make in forming their decisions.58 Haidt covers some of the same ground, but his orientation is different. He examines not only how people make decisions, but how this relates to reason and peoples’ ability, or inability, to relate to those who have differing views.59 In the following paragraphs, the literature of Haidt and Kahneman is examined. Along the journey, as we come across markers of IR, they are gathered and noted.

Haidt advances the Social Intuitionist Model, in which intuitions come first and reasoning is usually produced after a judgment is made, in order to influence other people.60 He does not suggest that reason can never influence judgment or intuition, but he suggests it is rare.61 He proves this a number of ways, including by interviewing people and asking them about things they will almost certainly think are morally wrong, but that they cannot reasonably support.62

I examine findings by authors below in order to identify IR markers used throughout the rest of this article.

A. Strained Reasoning

In an especially clever study, Haidt and his colleagues presented people with scenarios they knew are “disgusting” but in which it is hard to suggest, at least based on reason, that the

54 Id.
55 Haidt, supra note 12; Kahneman, supra note 20.
56 Kahneman, supra note 20.
57 Haidt, supra note 12.
58 See Kahneman, supra note 20.
59 See Haidt, supra note 12, at 221-22.
60 Haidt, supra note 12, at 55.
61 Id.
62 Id. at 42-48.
people in the stories did something objectively wrong. For example, in one study, subjects were told a story about Jennifer.63

Jennifer works in a hospital pathology lab. She’s a vegetarian for moral reasons—she thinks it is wrong to kill animals. But one night she has to incinerate a fresh human cadaver, and she thinks it’s a waste to throw away edible flesh. So she cuts off a piece of flesh and takes it home. Then she cooks it and eats it.64

Only 13% of the people surveyed said that what Jennifer did was acceptable.65

In another study, people were presented with a brother and sister pair traveling together in France.66 The two were alone in a cabin one night and decided to have sex.67 They told no one, they were safe, and they agreed to never do it again.68

Only 20% of the survey participants deemed the behavior of the brother and the sister appropriate.69 But, Haidt reports that people struggled with providing reasons.70 When people did provide reasons, they were often strained.71 For instance, regarding the brother and sister, a study subject argued that children from incest were more likely to be deformed. When the experimenter pointed out that birth control and condoms were used, the subject strained to answer why incest was still wrong.72 The same subject wondered aloud if the brother or sister were too young (apparently considering statutory rape), then recognized they weren’t, and seemed disappointed.73 When pushed for another reason, the subject said, “I mean, there’s just no way I could change my mind but I just don’t know how to – how to show what I’m feeling, what I feel about it.”74

Haidt illustrates the paradox of intuition driving reasoning by discussing the rider and the elephant.75 In this metaphor, the elephant is our intuition, and the rider is reason.76 Haidt points out that the elephant has been developed

63 Id. at 45.
64 Id.
65 Id.
66 Id. at 38.
67 Id. at 45.
68 Id.
69 Id.
70 Id.
71 Id. at 45-46.
72 Id. at 46.
73 Id. at 46-47.
74 Id. at 47 (emphasis added).
75 Id. at 53.
76 Id.
over hundreds of millions of years of evolution.\textsuperscript{77} It is very good at doing most things.\textsuperscript{78} However, it is not all that good at being steered by reason.\textsuperscript{79} Haidt suggests that although the rider can sometimes help the elephant anticipate problems or make decisions that are better in the long term, all too often, the rider is used to “fabricat[e] post hoc explanations for whatever the elephant . . . wants to do next.”\textsuperscript{80}

Haidt’s work draws from the findings of others to support his conclusion. For example, in \textit{The Secret Joke of Kant’s Soul}, Joshua Greene of Princeton relies upon neuroscience to demonstrate that people make decisions through emotional processing, not careful reasoning.\textsuperscript{81} In his experiments, Greene presented people with the opportunity to prevent harm to a group of people by causing harm to another, single person.\textsuperscript{82} Many of his experiments were variations of the “trolley dilemma.” In the trolley dilemma, subjects are asked whether or not they would push one person off a bridge and onto a track in front of a trolley if it were the only way to stop the trolley from running off the track and killing five people.\textsuperscript{83} Testing this and other variations, Greene learned through MRIs that with few exceptions, the regions of the brain related to emotional processing showed greater activity, activating almost immediately.\textsuperscript{84} The author concluded that “across the various stories, the relative strength of these emotional reactions predicted the final moral judgment.”\textsuperscript{85}

Greene further established the role of emotional processing by altering the design so that the subject could, instead of shoving someone onto the tracks, simply flip a switch that would divert the trolley onto a safer track, but would eventually terminate at a spot where one person was on the track, thereby killing them.\textsuperscript{86} Greene found that people were more willing to flip the switch than they were to shove a person off a bridge.\textsuperscript{87} This is presumably because flipping a switch triggered a far less intense initial, emotional response.\textsuperscript{88} This clarified that

\begin{itemize}
\item \textsuperscript{77} Id.
\item \textsuperscript{78} Id.
\item \textsuperscript{79} Id. at 53-54.
\item \textsuperscript{80} Id. at 54.
\item \textsuperscript{81} Id. at 76-78.
\item \textsuperscript{82} Id. at 76.
\item \textsuperscript{83} Id.
\item \textsuperscript{84} Id. at 77-78.
\item \textsuperscript{85} Id. at 77.
\item \textsuperscript{86} Id.
\item \textsuperscript{87} Id.
\item \textsuperscript{88} Id.
\end{itemize}
emotion—such as an aversion to directly shoving another to her death—drove decision making. A purely rational mind would conclude that whether you shove a person onto the track or flip a switch, the result is the same.\textsuperscript{89} One life is lost in order to save five. But that is not what the study revealed, suggesting that emotion plays a powerful role in decision making.\textsuperscript{90}

Perhaps most interestingly, when Greene talked to the subjects, they did not relate their decisions to intuition or emotion.\textsuperscript{91} Instead, they sought to provide rational justifications for their decisions.\textsuperscript{92} Of course, these justifications were often strained, as they were not the real reason for the belief. Again, \textit{strained reasoning} is one of the markers of IR.

Greene summarized these studies:

\begin{quote}
We have strong feelings that tell us in clear and certain terms that some things simply cannot be done and that other things simply must be done. But it's not obvious how to make sense of these feelings, and so we . . . make up a rationally appealing story.\textsuperscript{93}
\end{quote}

These findings paint a picture. Subjects react emotionally, especially to things they find taboo or disgusting. Then, they use reason to justify their initial response. The point is not that people could never think of a reason why eating human flesh or incest is wrong. As a lawyer, one may immediately think of laws against desecrating bodies, the tort of conversion, statutory rape, etc. The point is that the initial reaction as to whether what was done was wrong or right was not intellectual. It was intuition.\textsuperscript{94} Only after the belief was formed did the intellect kick in to justify the emotional response. Or as Haidt explains, “[t]he intuition launched the reasoning, but the intuition did not depend on the success or failure of the reasoning.”\textsuperscript{95}

\textbf{B. Persistence}

Building on his conviction that decision making is rooted in emotive processing and intuition, Haidt turns again

\begin{itemize}
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} \textit{Id.}
\item \textsuperscript{91} \textit{Id. at 76-79.}
\item \textsuperscript{92} \textit{Id.}
\item \textsuperscript{93} \textit{Id. at 78.}
\item \textsuperscript{94} I'm careful here to use “intuition” and not emotional. As Haidt later explains, “moral judgment is a cognitive process, as are all forms of judgment. The crucial distinction is really between two different kinds of cognition: intuition and reasoning.” \textit{Id. at 53.}
\item \textsuperscript{95} \textit{Id. at 51.}
\end{itemize}
to cognitive science to prove the next reasonable inference: if the mind is not driven by reason, then carefully articulated arguments probably will not change people’s minds. This provides us with another of the fundamental markers of intuition-based decision making: persistence. A decision that is formed through IR is rarely altered through counterarguments. Even when study subjects were not to respond immediately, but were instead given two minutes to consider their decision and reasoning, most participants went with their original conclusion, and often had thought of stronger support arguments.

C. My-Side Arguments

Haidt identifies yet another related marker. He recounts an experiment in which subjects were asked to think of a social issue, such as whether schools should receive more funding. The people were asked to write down their initial judgment and then to write down all the arguments for and against their position. These “my-side” and “other-side” arguments were then counted. Unsurprisingly, people came up with far more “my-side” arguments than “other-side” arguments. Perhaps even more importantly, the higher the IQ of the participant, the more “my-side” arguments they created. Significantly, however, IQ did not improve one’s ability to think of “other-side” arguments. And here we find another marker of IR: creation of my-side arguments. The study suggests that intuition-based decision making might include a significant number of supporting arguments, but it will probably do a poor job of fairly considering “other-side” arguments and dealing with them.

Haidt is not alone in suggesting that most of our decision making is intuitive rather than calculative. In Thinking, Fast and Slow, Daniel Kahneman reaches similar
Kahneman illustrates the separation in the mind between snap-judgments and reason by talking about System 1 (intuition) and System 2 (complex reasoning). He provides examples of what each system does. System 1 work includes: detecting hostility in a voice, determining which object is closer, answering the question, “What is 2+2,” and driving a car on an empty road. “System 2 engages in things like searching the memory to identify a surprising sound, comparing two washing machines for overall value, or checking the validity of a complex logical argument.” Kahneman asserts, based on extensive research, that engaging System 2 requires serious work. In one simple example, Kahneman suggests an experiment anyone can try. He says that the next time you are walking with a friend, ask that friend to multiply 17 x 24 in her head. Your friend will almost certainly stop in her tracks. People do this because we struggle to use System 1 while engaging System 2.

But, why does it matter that System 2 requires work? It matters because Kahneman’s research and study suggests that we will not use System 2 any more than we have to because we prefer “cognitive ease.” We are perfectly content to rely on intuition (System 1) in many cases. He suggests a new term—the “law of least effort.” This “law” states that people typically take the path of least resistance in solving problems. He concludes that in order for us to manage the thousands of decisions that we face every day, we rely heavily on heuristics. Throughout the rest of his book, he proves that this “laziness” and reliance on our intuition, although effective in many ordinary situations, means that in other settings we make decisions in irrational ways that lead to irrational results. From Kahneman’s work, we are able to identify several more markers of IR.

107 KAHNEMAN, supra note 20, at 80-81.
108 Id. at 20-21.
109 Id.
110 Id. at 21.
111 Id. at 22.
112 Id. at 24.
113 Id. at 39.
114 Id. at 20, 39-40.
115 Id. at 39-40.
116 Id. at 25, 59.
117 Id. at 35.
118 Id.
119 Id.
120 Id. at 31, 49, 81.
D. Confirmation Bias

Kahneman suggests that one of the most pervasive cognition errors is the “confirmation bias.”\(^ {121}\) Kahneman explains that the confirmation bias is a “deliberate search for confirming evidence . . .”\(^ {122}\) He writes that “contrary to the rules of philosophers of science, who advise testing hypotheses by trying to refute them, people (and scientists, quite often) seek data that are likely to be compatible with the beliefs they currently hold.”\(^ {123}\)

Kahneman also chronicles a phenomenon he calls, What You See Is All There Is, or WYSIATI.\(^ {124}\) He describes this as the mind’s willingness, even preference, to focus on the information readily available without reference to what is missing.\(^ {125}\) For example, the leader of a non-profit organization might search for an event planner in the hopes of putting on a lecture series.\(^ {126}\) The planner’s references are good, and at the meeting with the planner, the planner is prepared and smart. The planner points out that her last three non-profit events have led to significant fundraising. Based on this information, the leader selects the event planner. But, think what the leader may not have considered. How does the event planner’s price compare to what other event planners charge? Are there other event planners with more experience? Were the past fundraisers that the event planner mentioned successful because of the event planner, or were the charities well-established with a plethora of wealthy donors? Considering what the event planner and event will cost, what else could the non-profit do to raise funds for the same or less money? These are all valid questions, but they were not in the field of mental vision of the leader. Instead, the non-profit leader made a decision that felt like it was fully informed, based only on what was seen.\(^ {127}\) The non-profit leader, in selecting the event planner, engaged in WYSIATI.\(^ {128}\)

Because WYSIATI is the other-side of the confirmation bias coin, in this article, I use the term confirmation bias to describe both. In other words, I treat the confirmation bias as both the

\(^{121}\) Id. at 81.
\(^{122}\) Id.
\(^{123}\) Id.
\(^{124}\) Id. at 85.
\(^{125}\) Id.
\(^{126}\) See generally id. at 85-88.
\(^{127}\) Id. at 85-88.
\(^{128}\) Id.
desire to find confirming information and the willingness to ignore other information, or more importantly, gaps in information.

E. Substitution

Kahneman identifies another intriguing indicator of IR. He suggests that when System 1 is being relied upon instead of the careful thinking of System 2, individuals tend to engage in substitution.129 Specifically, when individuals are asked to answer difficult questions that would require lengthy deliberation, they often simply substitute a simpler question and answer it.130 Kahneman suggests this substitution is invisible to the person who does it.131

For example, Susan is asked if Candidate Davis would make a good president. This requires detailed analysis. To answer this question, Susan needs to know the detailed history of Candidate Davis, she needs to know and understand the problems facing the country, she needs to know Candidate Davis’s proposed solutions to those problems, and many other facts. Then she needs to consider all the information together. This could take months of thinking. What Susan might do instead is substitute the question. For example, she may ask, “Is Davis a Democrat?” If he is, and Susan is too, she may decide he’d make a good president. Or she might ask, “Is Davis a nice guy,” or as some studies suggest, “Is Davis good looking?” This substitution of one question for another is seamless, and it creates cognitive ease. As Kahneman explains, “the target question is the assessment you intend to produce. The heuristic question is the simpler question that you answer instead.”132

Finally, although not a definitive marker of IR, Kahneman provides a predictor of when heuristics in general are especially likely to be deployed in place of System 2 reasoning. He suggests that “[t]he dominance of conclusions over arguments is most pronounced where emotions are involved.”133 Although this is not a marker in and of itself, it does suggest IR might be marked by an overall tone, or perhaps more subtle signs, of emotion. It also suggests that Posner might be right: if IR is most likely to arise in conjunction with emotion, topics like abortion, homosexuality, and gun control could certainly trigger it.

129 Id. at 97-99.
130 Id.
131 Id. at 99.
132 Id. at 97.
133 Id. at 103.
With these principles in mind and with our markers identified, Part III engages in a legally rigorous analysis of the conservative majority’s conclusions.

III. ANALYZING THE CONSERVATIVE MAJORITY

In this part I examine the conservative majority’s conclusions and reasoning in *Stolt* and *Concepcion*. First, I analyze the decisions from a legal perspective. Following the analysis, I note and discuss the markers of IR. The analysis begins with two substantive areas of law that play a significant role in the cases: the standard of review for arbitration decisions and preemption. These are particularly fruitful because they are fully developed and established bodies of law. For each, I discuss the applicable law, explain the majority’s opinion, and then scrutinize the majority’s decision under existing law. This discussion serves as a medium for identifying IR markers. I then turn to other aspects of the decisions. Specifically, the majority’s factual and legal assertions about class arbitration are considered. Relying on my own reasoning and drawing from the dissents’ arguments, I analyze the majority’s justification, again with an eye out for IR’s fingerprints. Finally, I examine the majority’s opinions to determine if they are consistent with past precedent.134

A. Overview of Stolt-Nielsen and Concepcion

This section provides a general summary of *Stolt-Nielsen* and *Concepcion*. The summary is not meant to be comprehensive. Rather, more specific parts of the holdings are included as appropriate through the remaining analytical sections. The purpose of this section is only to familiarize the reader with the basic facts and holdings.


*Stolt-Nielsen* was written by Justice Alito.135 It was a 5-3 decision.136 Justice Ginsburg wrote a vigorous dissent that was

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134 I considered organizing by case instead of by topic. However, because the cases relate to one another and have significant topical overlap, it was more efficient to organize in that way.
136 *Id.* at 1763.
joined by Justices Breyer and Stevens.\textsuperscript{137} The essential facts and legal holdings follow.

Stolt-Nielsen S.A. (Stolt) served much “of the world market for parcel tankers—seagoing vessels with compartments that are separately chartered to customers,” such as respondent (AnimalFeeds), who “wish[] to ship liquids in small quantities.”\textsuperscript{138} “AnimalFeeds ship[ped] its goods pursuant to a standard contract known in the maritime trade as a charter party.”\textsuperscript{139} The charter party that AnimalFeeds used contained an arbitration clause.\textsuperscript{140} AnimalFeeds brought a class action antitrust suit against Stolt for price fixing, and that suit was consolidated with similar suits brought by other charterers.\textsuperscript{141} After a court ruling on arbitrability, the parties agreed that they “must arbitrate their antitrust dispute.”\textsuperscript{142} AnimalFeeds sought arbitration on behalf of a class of purchasers of parcel tanker transportation services.\textsuperscript{143} The parties agreed to submit the question whether their arbitration agreement allowed for class arbitration to a panel of arbitrators bound by class rules developed by the American Arbitration Association following \textit{Green Tree Financial Corp. v. Bazzle}, 539 U.S. 444 (2003).\textsuperscript{144}

One of the Class Arbitration Rules at AAA required an arbitrator to determine whether the arbitration clause permitted class arbitration.\textsuperscript{145} The parties selected an arbitration panel, designated New York City as the arbitration site, and stipulated that their arbitration clause was “silent” on the class arbitration issue.\textsuperscript{146} The panel determined that the arbitration clause allowed for class arbitration.\textsuperscript{147} AnimalFeeds filed for the court to vacate the arbitrators’ award.\textsuperscript{148}

The district court vacated the award.\textsuperscript{149} It concluded that the arbitrators’ award was made in “manifest disregard” of the law, asserting that had the arbitrators conducted a choice-of-law analysis, they would have applied the rule of federal maritime law requiring “contracts be interpreted in light of

\begin{thebibliography}{99}
\bibitem{137} Id. at 1777.
\bibitem{138} Id. at 1764.
\bibitem{139} Id. (footnote omitted).
\bibitem{140} Id. at 1764-65.
\bibitem{141} Id. at 1765.
\bibitem{142} Id.
\bibitem{143} Id.
\bibitem{144} Id.
\bibitem{145} Id.
\bibitem{146} Id. at 1765-66.
\bibitem{147} Id.
\bibitem{148} Id.
\bibitem{149} Id.
\end{thebibliography}
custom and usage.” The Second Circuit reversed, holding that “because petitioners had cited no authority applying a federal maritime rule of custom and usage against class arbitration, the arbitrators’ decision was not in manifest disregard of federal maritime law”; and that the arbitrators had not “manifestly disregarded New York law,” which had no established rule against class arbitration.

The conservative majority held that imposing class arbitration on parties who have not explicitly agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act. Justice Alito wrote that the arbitration panel “exceeded its powers” by imposing its own policy choice “instead of identifying and applying a rule of decision derived from the FAA or [from] maritime or New York law.” He asserted that the arbitration panel rested its decision on AnimalFeeds’s public policy argument for permitting class arbitration under the charter party’s arbitration clause instead of determining “whether the FAA, maritime, or New York law contain[ed] a ‘default rule’ permitting an arbitration clause to allow class arbitration absent express consent.”

The majority acknowledged that under FAA § 10(b), it could direct a rehearing by the arbitrators on the issue, but it concluded that since there could be only one possible outcome based on the facts, there was no need to direct a rehearing by the arbitrators.

2. AT&T Mobility LLC v. Concepcion

Here, the majority opinion was written by Justice Scalia. Justice Thomas wrote a concurrence and joined in the majority’s decision. Justice Breyer wrote the dissent. The decision was 5-4.

The cellular telephone contract between the Concepcions and AT&T “provided for arbitration of all disputes,” but did not permit classwide arbitration. After the Concepcions were

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150 Id.
151 Id. at 1766-67.
152 Id. at 1775.
153 Id. at 1770.
154 Id. at 1768-69.
155 Id. at 1770.
157 Id. at 1740.
158 Id. at 1756.
159 Id.
160 Id. at 1744.
charged sales tax on the retail value of phones provided free under their service contract, they sued AT&T in a California federal district court. Their suit was consolidated with a class action alleging that AT&T “engaged in false advertising and fraud by charging sales tax” on “free” phones. The district court denied AT&T’s motion to compel arbitration. “[R]elying on the California Supreme Court’s [Discover Bank] decision,” it found the arbitration provision unconscionable because it disallowed classwide proceedings. The Ninth Circuit agreed that the provision was unconscionable under California law and held that the Federal Arbitration Act (FAA), which makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,” did not preempt its ruling.

Justice Scalia wrote the majority opinion, which reversed in full. The majority concluded that because the Discover Bank rule “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . [it] is preempted by the FAA.”

B. Reviewing an Arbitrator’s Decision – Standard of Review

In this section, the majority’s opinion in Stolt is analyzed with an eye toward the standard of review. In Stolt, the majority concluded that the arbitrators exceeded their authority in reaching their conclusion. The dissent criticized the majority for applying what the dissent characterized as a *de novo* review. The dissent also pointed out that the Court reviewed the arbitrators’ decision despite the fact that it was not a final judgment. This section examines whether the majority deferred to the arbitrators as the law required, or if it instead sat as the arbitrator, engaging in the *de novo* review the dissent suggested.

161 *Id.*
162 *Id.*
164 Concepcion, 131 S. Ct. at 1745 (citing Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005)).
165 *Id.*
166 *Id.* at 1753.
168 *Id.* at 1777 (Ginsburg, J., dissenting).
169 *Id.* at 1778.
170 *Id.* at 1777.
1. The Law Relating to Review of an Arbitrator’s Decision

The most detailed description of how courts typically reviewed the award of an arbitrator prior to Stolt is, ironically, found in the Second Circuit decision handed down in Stolt that was ultimately reversed. The Second Circuit details that at law there were two paths recognized to overturn an arbitrator’s decision. The first set of reasons to overturn an arbitrator’s decision was rooted in Section 10 of the FAA. That section provides:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

Courts have also recognized that an arbitrator’s award can be vacated if the arbitrator demonstrates a “manifest disregard for the law or exceeds his authority.” “Arbitrators exceed their powers when . . . they issue an award that is completely irrational.” Either way, both standards required extreme deference to the arbitrator.

In fact, prior to the final decision in Stolt, the idea of overturning an arbitrator’s decision was somewhat novel. For example, the Second Circuit in Stolt summarized the law regarding the review of an arbitrator’s decision as follows:

The party seeking to vacate an award on the basis of the arbitrator’s alleged “manifest disregard” of the law bears a heavy burden. Our review under the [judicially constructed] doctrine of manifest

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172 Id. at 90-91.
174 See, e.g., GMS Group, LLC v. Benderson, 326 F.3d 75, 81 (2d Cir. 2003).
175 Bosack v. Soward, 586 F.3d 1096, 1104 (9th Cir. 2009).
disregard is severely limited. It is highly deferential to the arbitral award and obtaining judicial relief for arbitrators’ manifest disregard of the law is rare. The manifest disregard doctrine allows a reviewing court to vacate an arbitral award only in those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent.176

The Second Circuit cited to other courts that suggested even more extreme deference to arbitrators. For example, the Seventh Circuit held:

> It is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not. When parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration award he perforce does so not on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate, as by corruption, evident partiality, exceeding their powers, etc.—conduct to which the parties did not consent when they included an arbitration clause in their contract. That is why in the typical arbitration, . . . the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all, for only then were they exceeding the authority granted to them by the contract’s arbitration clause.177

After reviewing the law, the Second Circuit landed on a deferential standard, holding that there need only be “a barely colorable justification for the outcome reached.”178

This standard was not new, and had previously proved to be an almost insurmountable hurdle for those who sought to overturn an arbitrator’s decision. For example, in a previous opinion, the Second Circuit stated that since 1960 it considered arbitral awards in 48 cases, and vacated all or part of the award in only four.179

The extreme deference shown to arbitrators should be anything but surprising to those who practice in the field. It is widely acknowledged by those who handle arbitrations that if a client loses in arbitration, the case is all but over.180 Courts generally do not second-guess arbitrators even when the

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176 Stolt-Nielsen, 548 F.3d at 91-92 (citations omitted) (internal quotation marks omitted).
178 Stolt-Nielsen, 548 F.3d at 92.
180 9 U.S.C. § 10 (2012) details when arbitration can be overturned and it is typically only in cases of severe wrongdoing.
The arbitrator’s decision is truly mindboggling. Instead, arbitration’s very efficiency has often been attributed to streamlined procedures and the fact that there is essentially no court review.\textsuperscript{181} Or as the Second Circuit articulated the rationale prior to \textit{Stolt}, “[t]o interfere with [the arbitral] process would frustrate the intent of the parties, and thwart the usefulness of arbitration, making it the commencement, not the end, of litigation.”\textsuperscript{182}

It was based on this law that the Second Circuit held that the arbitration panel’s decision to allow class arbitration in \textit{Stolt} was appropriate.\textsuperscript{183} The court reasoned that although there may be arguments against the interpretation given by the arbitration panel, it was certainly at least “colorable” and therefore passed muster.\textsuperscript{184}

2. The Majority’s Opinion Reviewing the Arbitration Panel’s Decision

The majority opinion reversed the Second Circuit outright, and then concluded that although the Court certainly could send the case back to the arbitrators with guidance to apply the proper standard, there was no need because “there [was] only one possible outcome” under the facts.\textsuperscript{185}

Justice Alito began the majority analysis by explaining the general standard of review.

It is not enough for petitioners to show that the panel committed an error—or even a serious error. It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable. In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator exceeded his powers, for the task of an arbitrator is to interpret and enforce a contract, not to make public policy.\textsuperscript{186}

It is worth noting here that the Court did not mention manifest disregard at all. Instead, the Court addressed manifest disregard only in a footnote, suggesting that it did not decide whether the standard of review survived, but then asserting

\textsuperscript{181} Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 648-49 n.14 (1985) (Stevens, J., dissenting) (“Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution.”).
\textsuperscript{182} Duferco Int’l Steel Trading, 333 F.3d at 389 (internal quotation marks omitted).
\textsuperscript{183} Stolt-Nielsen, 548 F.3d at 99.
\textsuperscript{184} Id.
\textsuperscript{186} Id. at 1767 (citations omitted) (internal quotation marks omitted).
that if it did survive, the test was met.\textsuperscript{187} It characterized the manifest disregard test, based on AnimalFeeds’s brief, as requiring a showing that the arbitrators “knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it.”\textsuperscript{188} As such, in reversing the arbitration panel, the Court held that the arbitration panel “willfully flouted the governing law by refusing to apply it.”\textsuperscript{189}

It did so by concluding that the panel rested its decision on a “public policy” argument, thereby exceeding its authority.\textsuperscript{190} The Court stated that the arbitrators’ job was to look into the appropriate law to apply, but that it made no such undertaking.\textsuperscript{191} The Court chastised the arbitrators for reading \textit{Green Tree Financial Corp. v. Bazzle}\textsuperscript{192} as allowing for class arbitration and suggested that the arbitrators never looked at the FAA, maritime law, or New York law.\textsuperscript{193}

To reach its result, the Court noted that state law did not apply.\textsuperscript{194} This was a necessary move by the majority because state law might have allowed class arbitration (which allegedly would have violated the spirit of the FAA).\textsuperscript{195} With state law put aside, the majority held that no party could be coerced into class arbitration and found that the parties did not agree to class arbitration.\textsuperscript{196}

\section*{3. Analyzing the Conservative Majority’s Reasoning}

A close look at the majority opinion reveals it to be fundamentally flawed. As the dissent points out, it fails in at least three significant ways. First, it is essentially \textit{de novo} review.\textsuperscript{197} Second, the majority engaged in the review of an arbitral decision that was not a final judgment because the arbitrator had not even considered a motion for class certification yet, much less made any decisions on the merits.\textsuperscript{198} And third, rather than remanding the case to the arbitrator to decide the issue (even if one agrees

\begin{flushleft}
\textsuperscript{187} \textit{Id.} at 1768 n.3.
\textsuperscript{188} \textit{Id.} (internal quotation marks omitted).
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{Id.} at 1767-68.
\textsuperscript{191} \textit{Id.}
\textsuperscript{194} \textit{Id.} at 1773.
\textsuperscript{195} \textit{Id.}
\textsuperscript{196} \textit{Id.} at 1775.
\textsuperscript{197} \textit{Id.} at 1777 (Ginsburg, J., dissenting).
\textsuperscript{198} \textit{Id.} at 1778.
\end{flushleft}
the Court was right to vacate), the Court inserted its judgment, something the parties never agreed to.\footnote{\textit{Id.} at 1782.}

The dissent also provides information that suggests that Justice Alito may have cherry-picked facts to support his argument. Indeed, the dissent points out that although the majority claims the arbitrators’ decision rested on “policy,” the word policy is “not so much as mentioned” in the arbitrators’ award.\footnote{\textit{Id.} at 1780.} What is mentioned, in direct contradiction to Justice Alito’s fundamental reason for reversing the arbitration panel, is an explicit consideration of New York and maritime law.\footnote{\textit{Id.} at 1768-69 (majority opinion).}

Specifically, the dissent points out that far from ignoring these sources of law, the arbitration panel wrote that “[c]oncentrating on the wording of the arbitration clause . . . is consistent with New York law as articulated by the [New York] Court of Appeals . . . and with federal maritime law.”\footnote{\textit{Id.} at 1781 (Ginsburg, J., dissenting) (citing App. to Pet. for Cert. 49a).}

Under the deferential review required, these facts alone should have ended the inquiry. The decision by the panel cannot be called wacky, and it certainly did not intentionally disregard the law. Instead, the contract interpretation decision appears reasonable. Although it is beyond the scope of this article to dive into the contract analysis fully, it is black letter contract law that ambiguous terms (such as “arbitration”) can be and are interpreted by decision makers.\footnote{In fact, if the term is ambiguous, common law generally requires that the term be construed against the drafter. \textit{Mastrobuono v. Shearson Lehman Hutton}, Inc., 514 U.S. 52, 62-63 (1995).} There is nothing improper about that. This fact, combined with even a common sense consideration of the case, suggests that there was at least a “colorable justification” for reading the arbitration clause to allow for class arbitration.

After all, the parties were sophisticated entities. They had to know about class arbitration, and they should have known that only a few years earlier the United States Supreme Court suggested that class arbitration could be appropriate.\footnote{\textit{Green Tree Fin. Corp. v. Bazzle}, 539 U.S. 444, 451-52 (2003).} In addition, the parties agreed to have their disputes resolved under the AAA Class Arbitration Rules. The willingness by Stolt to have the claim resolved in such a forum, and the stipulation that the clause was “silent” as to class arbitration—as opposed to prohibiting it—meant that the arbitrator certainly could have concluded that when the parties referred to “arbitration,” they...
were referring to all arbitration, not just individual arbitration. This was supported all the more by the fact that the arbitration clause's language was broad, covering "any dispute arising from the making, performance or termination of this Charter Party."205

As such, if the question the United States Supreme Court considered in Stolt was whether there was a "colorable justification" for the arbitration panel's decision, then the panel's express reference to appropriate facts and applicable law coupled with the common sense conclusion that the word "arbitration" might include all forms of arbitration should have been enough to affirm the decision.

Affirming the Second Circuit should have been routine. This would have been in step with the purpose of arbitration—to avoid extensive judicial entanglement.206 Yet, here, after agreeing to let the arbitrator decide what the term "arbitration" meant, the majority allowed Stolt to back out of the deal, go to court, and obtain a de novo review.207

To make sure the arbitration panel did not get any more ideas about making Stolt engage in class arbitration, the majority reversed in full rather than allowing the arbitration panel to consider the applicable law.208 These errors are hard to justify. If the Stolt case were a law school exam, it likely would have been considered by the professor administering it as one of the easier questions. But the majority got it wrong.

4. Indicia of IR Are Present Throughout the Court's Reasoning

This section builds upon the analysis above by looking for indicia of IR. All six indicia noted in the introduction are found.

a. Confirmation Bias

The majority opinion is rife with examples of confirmation bias. As noted, the majority cherry-picked information about the dangers of class arbitration but failed to note the benefits.209 This included ignoring the potential efficiencies of class arbitration and ignoring the fact that many businesses view arbitration in

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205 Stolt-Nielsen, 130 S. Ct. at 1781 (Ginsburg, J., dissenting) (internal quotation marks omitted).
206 Id. at 1773.
207 See generally id.
208 Id. at 1777.
209 Id. at 1775.
general as an efficient way to resolve significant disputes. Similarly, the majority ignores the fact that the parties stipulated to the class rules of AAA even though this suggests the parties knew that arbitration could include class arbitration.\(^{210}\) And finally, the Court chose small quotes from the arbitration panel to suggest that “policy” drove decision making, but failed to include portions of the award that suggested the panel considered the proper law.\(^{211}\)

\(b.\) Substitution

The majority’s analysis also provides one of the clearest examples of substitution. In *Stolt*, the majority was supposed to be deciding whether the arbitration panel completely disregarded the facts and the law in reaching its conclusion.\(^{212}\) The majority was supposed to consider the fact that even if the arbitrator got it wrong, that isn’t enough to reverse.\(^{213}\) In fact, the Court should have recognized that even if the arbitrators’ decision was only “colorable,” it was enough to withstand scrutiny.\(^{214}\)

However, after a quick recitation of these rules, the majority never mentioned them again.\(^{215}\) Instead, as the dissent suggests, the majority engaged in what was really a *de novo* review.\(^{216}\) This facilitated cognitive ease because it let the majority substitute an easy question for the much more difficult questions described above.\(^{217}\) Specifically, it let the majority ask, “Do we agree with the arbitration panel?” The answer was “no,” and so the majority vacated the arbitrators’ award. In keeping with the way substitution typically works,\(^{218}\) the majority did not acknowledge the switch. Instead, it plugged in the answer to the easy question as if it were the answer to a series of far more difficult ones.

\(^{210}\) *Id.* at 1765.

\(^{211}\) *Id.* at 1767-68.

\(^{212}\) *See id.* at 1766.


\(^{214}\) *Stolt-Nielsen*, 548 F.3d at 92.

\(^{215}\) *Stolt-Nielsen*, 130 S. Ct. at 1766-67.

\(^{216}\) *Id.* at 1777.

\(^{217}\) *See KAHNEMAN, supra* note 20, at 97-98.

\(^{218}\) *Id.*
c. Creation of My-Side Arguments

As discussed, the majority built an impressive list of things the arbitration panel did wrong.219 However, the majority was unable to recognize the many things that the arbitration panel seemed to do right, such as considering maritime law and New York law, and engaging in a fair recitation of the facts and an application of general contractual principles regarding the interpretation of ambiguous terms. Given the appropriate standard of review, which required the majority to affirm if the arbitrator made a good faith effort to consider the law and the facts, the inability to list and consider “other-side”220 arguments led the majority to the wrong decision.

d. Strained Reasoning

Strained reasoning is the hardest indicia of IR to define precisely, but as the Supreme Court once famously wrote, “I know it when I see it.”221 At a minimum, strained reasoning collapses under logical consideration. It is certainly evident from the analysis above.

For example, the majority suggested that the arbitration panel made a policy decision.222 Yet, to justify this conclusion the majority had to assert that the arbitration panel ignored various bodies of law and instead substituted its own “policy” judgment.223 In reality, the dissent demonstrated that the opposite was true: the arbitration panel specifically referenced the applicable law while never using the word “policy.”224 Similarly, the majority displayed an unwillingness to even decide on a standard of review. Rather than state whether or not “manifest disregard” is the official test, the majority relegated the standard to a footnote.225 It then asserted that the test for reversal, which it did not adopt or analyze, was met.226 It is strained reasoning to decide a case based on an undecided standard of review.

219 Stolt-Nielsen, 130 S. Ct. at 1772.
220 HAIDT, supra note 12, at 94.
221 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
222 Stolt-Nielsen, 130 S. Ct. at 1768.
223 Id.
224 Id. at 1780 (Ginsburg, J., dissenting).
225 Id. at 1768 n.3 (majority opinion).
226 See id. at 1777.


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e. Persistence

The majority opinion demonstrated persistence. The dissent pointed out that this was not a final judgment, that the majority was showing no deference to the arbitration panel, and that even the alleged justifications for the decision were belied by the factual record. But the majority was not swayed by the requirements for appellate review, the law, or any facts inconsistent with its conclusions.

f. Overconfidence

The majority could have let the arbitrators consider the case in light of the Court’s guidance. Even if the majority thought the arbitrators applied the wrong law, it did not have to substitute its judgment for the arbitrators’, especially since the parties affirmatively agreed to have the question of what the word “arbitration” meant resolved by the panel. Yet, the Court vacated, holding that there was no other possible result. This is classic overconfidence.

In sum, the scorecard for this section looks like this:

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<tr>
<th>Confirmation Bias</th>
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<tr>
<td>Substitution</td>
<td>X</td>
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<tr>
<td>Creation of “my-side” arguments</td>
<td>X</td>
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<tr>
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<td>Persistence</td>
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<tr>
<td>Overconfidence</td>
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C. Preemption

In this section, I examine the majority’s conclusion in Concepcion that the Federal Arbitration Act preempts California’s Discover Bank rule and can preempt some general contract law defenses.
The *Discover Bank* rule was developed based on California’s unconscionability law. However, its primary application was to arbitration clauses. The rule invalidated a clause if it prohibited class actions in a context in which it was alleged that there was widespread illegality that resulted in small damages to each class member. The rule articulated these requirements, but it was rooted in the holding in *Discover Bank* that enforcing arbitration clauses in the consumer context when damages are small but the illegal behavior is class-wide would provide the defendant a “get-out-of-jail-free” card. In short, California concluded that class action waivers were unconscionable because they kept consumers, as a class, from pursuing their rights.

1. Scalia’s Preemption Analysis

I now turn to the majority’s preemption analysis. When possible, the majority is not paraphrased so that there is no chance for distortion. However, it is worth noting at the outset that very little preemption law or preemption principles can be quoted from the majority opinion. Justice Scalia, writing for the majority, simply did not include them. Instead, Scalia began by acknowledging that the FAA contains a significant carve out from any preemptive power it might have.

The final phrase of § 2, however, permits arbitration agreements to be declared unenforceable “upon such grounds as exist at law or in equity for the revocation of any contract.” This saving clause permits agreements to arbitrate to be invalidated by “generally applicable contract defenses, such as fraud, duress, or unconscionability,” but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.

These preliminary statements are important because they recognize that the plain language of Section 2 contains a clear and unequivocal savings clause that allows states to refuse to enforce arbitration clauses if they run afoul of general state contract law. This is consistent with the idea that the

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233 *Id.* at 1108-09.
234 *Id.* at 1108.
235 *Id.* at 1110.
236 *See generally Concepcion*, 131 S. Ct. at 1746.
237 *Id.*
238 *Id.*
purpose of the FAA was to put arbitration clauses on “equal footing” with other contracts.\\(^{239}\) Justice Scalia continued:

When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. In \textit{Perry v. Thomas}, for example, we noted that the FAA’s preemptive effect might extend even to grounds traditionally thought to exist “at law or in equity for the revocation of any contract.” We said that a court may not “rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.”\\(^{240}\)

This is where things get interesting. Within a page of having acknowledged that the FAA allows for state law defenses, Justice Scalia articulated that perhaps even those defenses are subject to preemption.\\(^{241}\) In keeping with this, he ultimately concluded that California’s \textit{Discover Bank} rule is preempted because it falls too heavily on arbitration clauses.\\(^{242}\) He rejected the argument that although the rule is typically applied to arbitration clauses, it also applies to any contract that prohibits class actions regardless of whether or not the contract contains an arbitration clause.\\(^{243}\)

Scalia asserted that “the overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”\\(^{244}\) Scalia rooted his conclusion in the text of the FAA, which he noted often refers to enforcing the terms of the arbitration agreement.\\(^{245}\) Then, in an important moment, he argued with the dissent that the purpose of the FAA is more than just enforcing an agreement according to its terms. He asserted that it is clear that there is a second goal—to produce efficient resolution of disputes.\\(^{246}\) He stated that “a prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results . . . .”\\(^{247}\)

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\\(^{239}\) \textit{Id.} at 1745.\\(^{240}\) \textit{Id.} at 1747.\\(^{241}\) \textit{Id.}\\(^{242}\) \textit{Id.} at 1748.\\(^{243}\) \textit{Id.} at 1750-51.\\(^{244}\) \textit{Id.} at 1748.\\(^{245}\) \textit{Id.}\\(^{246}\) \textit{Id.} at 1749.\\(^{247}\) \textit{Id.} (internal quotation marks omitted).
Having laid out these principles, Scalia concluded that "California’s Discover Bank rule . . . interferes with arbitration." He asserted that the rule would essentially allow any consumer to demand class arbitration because the rule would work to strike the class action ban. He argued that the requirement that damages be small in order for the Discover Bank rule to apply is too malleable and that the requirement that there be assertions of class-wide harm means nothing because it only requires an allegation. He asserted that attorneys will no longer seek to resolve individual claims if they can resolve class claims and earn “higher fees.” He argued that businesses will no longer resolve individual claims either if they are faced with class arbitrations.

He also responded to the dissent’s assertion that enforcing the arbitration clause would prohibit consumers from pursuing their claims, because each would be forced to pursue a small dollar claim individually. He wrote:

The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.

Based on these arguments, Justice Scalia concluded that “[b]ecause it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, California’s Discover Bank rule is preempted by the FAA.”

2. Analysis

Justice Scalia’s analysis has some serious holes. The first curious thing to note is that Justice Scalia did not cite the basic law addressing preemption.

The basic law that one would have expected to find in the opinion is uncontroversial. When addressing questions of express or implied preemption, a court should begin its analysis with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” That assumption applies

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248 Id.
249 Id. at 1750.
250 Id.
251 Id.
252 Id.
253 Id. at 1753 (citation omitted).
254 Id. (citation omitted).
with particular force when Congress has legislated in a field traditionally occupied by the States. Thus, when the text of a preemption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption.255

However, it is true that just because a clause contains a “savings clause,” exempting some areas of law from preemption, this does not mean that conflict preemption cannot be found. “We now conclude that the saving clause . . . does not bar the ordinary working of conflict preemption principles.”256 This is especially true if enforcing the savings clause would allow state law to interrupt complex federal regulation.257

It is curious that none of this basic language appeared in the majority opinion at all. Since the law makes clear that preemption is especially inappropriate when (1) there is a direct savings clause;258 (2) the body of law being considered is a field typically left to states;259 or (3) there is no reason to believe that the operation of state law would interfere with any federal regulatory scheme,260 and since in Concepcion each of these traits was present, failing to even mention them is hard to explain.

However, giving Scalia and the majority their best day, perhaps they assumed that everyone knows the law, and so only an analysis regarding conflict preemption was needed. To this end, the majority held that although the savings clause would normally allow state contract law defenses, there was a risk that the clause would be read so broadly that it would conflict with the purpose of the FAA.261 There is some reasonableness to this argument. It is certainly true that too broad a reading of the savings clause could allow states to effectively prohibit all arbitration clauses by, for example, making it general state law that all disputes must be resolved by a jury or must allow for a full appeal.

As a result, to determine the proper result in Concepcion, one must consider the purpose of the FAA and what result enforcing the Discover Bank rule would produce. In other words, does Discover Bank really conflict with the FAA?

257 Id.
258 Id.
260 Geier, 529 U.S. at 870.
The majority made clear what it believed the purpose of the FAA is by disputing the dissent’s position. Specifically, the majority argued that in addition to enforcing arbitration agreements, the FAA has a second goal—to promote the expeditious resolution of disputes. This recognition of the second goal is certainly more in line with the statute’s text. If the FAA were merely designed to enforce all arbitration clauses as written, there would be no need for a savings clause. The FAA could directly state that all arbitration clauses are enforceable, or at a minimum, the FAA could omit the savings clause. This did not happen, and that implies that the drafters of the FAA intended, at a minimum, to let states weed out especially offensive arbitration clauses.

This also seems to be what the United States Supreme Court indicated in the past when it held that the FAA put arbitration clauses on equal footing with other contracts. In this framework, states retained the right to protect consumers from duress, unconscionability, and other basic defenses to contracts, but they could not generally view arbitration clauses, merely because they were arbitration clauses, with hostility.

Taking the majority at its word then, the purpose of the FAA is to enforce arbitration agreements in order to encourage the efficient resolution of disputes. If this is true, all that remains is to determine if the *Discover Bank* rule somehow thwarted this purpose.

The *Discover Bank* rule allowed for class arbitration. So, as a starting point, it is a given that if the majority had enforced the *Discover Bank* rule, then the case would have proceeded to arbitration with the possibility of class certification. To be fair, certification was not guaranteed, as the class arbitrators consider all the typical class action factors in considering a motion for class certification, and the burden of proving the elements rests with the party filing the arbitration. But, assuming the class was certified and either a settlement was reached or a decision was reached by the arbitrator, the

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262 Id. at 1749.
263 Id. at 1743.
265 *Concepcion*, 131 S. Ct. at 1749, 1758.
266 *Discover Bank* v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005), abrogated by *Concepcion*, 131 S. Ct. 1740.
claims of thousands, or maybe hundreds of thousands of people, would have been resolved.

As a result, enforcing the Discover Bank rule would have encouraged the efficient resolution of disputes in many consumer claims involving small damages and allegations of widespread fraud. Conversely, the majority’s decision guaranteed that any dispute that was resolved would be resolved individually, and it guaranteed that tens of thousands of claims, if resolved at all, would have taken tens of thousands of arbitrations and arbitrators, instead of just one. Of course, in truth, it also guaranteed that most claims would never be resolved at all, as individuals will rarely pursue claims for small amounts of money due to a variety of factors including the cost of an attorney, missed work time, travel time, and the very limited potential reward for the effort spent.²⁶⁸ Consequently, the second goal, of encouraging the efficient resolution of disputes, weighs in favor of enforcing the Discover Bank rule, not striking it down.

Scalia might counter that class arbitration is not efficient. However, this argument does not hold water. According to data in Concepcion, the average class arbitration takes about 600 days, whereas the average in-person individual arbitration takes about six months.²⁶⁹ Reason dictates then, that 10 individual arbitrations would require 60 months of arbitrator time (and 10 arbitrators in most cases), whereas resolving the claims of 10,000 individuals in class arbitration would take about 20 months (and one to three arbitrators, depending on the rules). It is tough to justify demanding individual arbitration in the name of efficiency.

Based on the facts, the result is not in doubt. By enforcing AT&T’s arbitration clause as written, Justice Scalia squelched the efficient resolution of thousands or hundreds of thousands of claims.²⁷⁰ He ensured that even if AT&T were

²⁶⁸ There is good evidence that consumers cannot pursue individual arbitrations in a small damage setting. For example, in a case in which I was lead counsel, discovery revealed that a payday lender who was charging over 400% interest on loans had over 200,000 customers. See Woods v. QC Fin. Servs., Inc., 280 S.W.3d 90, 98 (Mo. Ct. App. 2008). The arbitration clause prohibited class actions. The business had never engaged in a single arbitration. Experts in the case testified that consumers would never find representation for claims of only a few hundred dollars. A Missouri court struck the class action waiver as unconscionable because it would keep people from pursuing claims. This is still the law of Missouri, but under AT&T, that law can no longer apply to arbitration clauses, meaning they are on decidedly unequal footing from other contracts.
²⁶⁹ Concepcion, 131 S. Ct. at 1751.
²⁷⁰ Id. at 1759-60.
breaking the law, it would not answer to most of the people it harmed. He fractionalized what resolution would occur into individual arbitrations that will be private so that there is no precedent for others to follow and there is no reporting of the result that could encourage others to pursue their claims. And finally, since not all consumers know the law, by eliminating a chance for class notice, Justice Scalia ensured that most consumers would simply remain in the dark, with no knowledge that their rights may have been violated.

Justice Scalia and the majority did all this in the name of enforcing the purpose of the FAA. But it is hardly consistent with the goal of encouraging the resolution of disputes to stop the resolution of disputes. It is also strange that although Justice Scalia lauds the efficiency of individual arbitration, his decision guaranteed that individual arbitrations will not occur.

Concepcion is also unsound from another perspective. Justice Scalia, as mentioned early in this article, claims to be a textual originalist. He derides those who would put the purpose they ascribe to an act over the actual text of the act. Yet, he does just that. The text of the FAA explicitly exempts general state contract law defenses from preemption. As such, the purpose of the FAA cannot merely be to enforce all arbitration clauses. Instead, the purpose is to enforce clauses when they are consistent with general state contract law. Similarly, the purpose is limited, as Scalia admitted, by the desire to encourage the resolutions of disputes, not to stymy them. Yet, Justice Scalia used the “purpose” of the FAA to override its plain language. He held that because the FAA says it does not preempt general state contract law, it sometimes does. Reading the purpose of the law to be something other than what its text states is a difficult decision for a textual originalist to defend.

It should also be noted that in order to reach the conclusion that what California asserts as general state contract law is not really general state contract law, and is instead a law that is hostile only to arbitration, the majority

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271 Id. at 1753.
272 Id. at 1751.
273 Posner, supra note 3.
275 Id.
276 Concepcion, 131 S. Ct. at 1748.
277 Id.
had to second-guess the California legislature and the California Supreme Court. It is hard to imagine a reading of the FAA that puts federal judges in the position of deciding what state law really is. It is even stranger that Scalia, a states’ rights advocate, engaged in such second-guessing.278

These inconsistencies did not escape the dissent. Justice Breyer wrote:

The Federal Arbitration Act says that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (emphasis added). California law sets forth certain circumstances in which “class action waivers” in any contract are unenforceable. In my view, this rule of state law is consistent with the federal Act’s language and primary objective. It does not “stan[d] as an obstacle” to the Act’s “accomplishment and execution.”279

Justice Breyer also explained that by striking down the Discover Bank rule, Justice Scalia did the opposite of what the plain language of Section 2 requires. “[I]nsofar as we seek to implement Congress’ intent, we should think more than twice before invalidating a state law that does just what § 2 requires, namely, puts agreements to arbitrate and agreements to litigate ‘upon the same footing.’”280

In sum, the majority’s discussion regarding conflict preemption failed to set out the appropriate preemption law. The majority also reached a conclusion at war with its own stated rules. While professing that arbitration clauses should be on equal footing with other contracts, Concepcion privileges arbitration clauses in California, ensuring that in the future, a class action waiver in an arbitration clause will be treated differently than the same clause in a contract.281 Similarly, Justice Scalia, who believes in focusing on the actual language of a statute, managed to use the “purpose” of the statute to overrule its own text, causing one to wonder how the purpose can be different than the plain language.

These fundamental flaws in reasoning suggest that on the issue of preemption, the majority got the question almost entirely wrong. The decision reflects a significant departure from existing preemption precedent, it runs afoul of the plain language

279 Concepcion, 131 S. Ct. at 1756 (Breyer, J., dissenting).
280 Id. at 1758.
281 Id. at 1761.
of the very FAA that the majority says it is relying upon, and it ignores the upside down results the decision produces.

3. Indicia of IR Abound

a. Confirmation Bias

The confirmation bias is probably most evident in Justice Scalia’s failure to include any of the law about preemption that would have undercut his arguments. As discussed above, there is a significant body of law that would suggest preemption is disfavored based on the facts of Concepcion. At a minimum, one would have expected the majority opinion to at least confront this law. Justice Scalia does not. Instead, his opinion gravitated toward anything and everything that could be used to support his result. Similarly, when discussing the inefficiencies of class arbitration, Justice Scalia picked only facts that support his argument while completely failing to consider or acknowledge data that suggest class arbitration is more efficient than class actions or that a single class arbitration is more efficient than multiple individual claims about the same underlying facts.

b. Substitution

The preemption issue required the majority to ask a number of questions. For example, the majority should have asked:

1) Is this an issue that relates to a field typically policed by states?
2) Does the FAA contain a savings clause?
3) Is there any federal regulatory scheme that the Discover Bank rule interferes with?
4) What is the purpose of the FAA?
5) What impact will the Discover Bank rule have on the FAA’s purpose?
6) Is it possible that class arbitration will serve the FAA’s purpose?
7) What does our past arbitration precedent teach about how to handle a clause that, if enforced, will ensure some people cannot pursue their claims?
Instead, it appears the majority simply asked, “Do businesses like class arbitration,” and then answered with a definitive “no.” This provides an explanation for why the majority dove headfirst into describing the problems with class arbitration and then concluded that enforcing the *Discover Bank* rule would be unacceptable. The majority concluded that businesses do not want to go to class arbitration and substituted that as an answer to a series of far more difficult questions about preemption.

c. Creation of My-Side Arguments

With relation to preemption, the majority did not produce a significant number of “my-side” arguments. Instead, it provided very little direct support for preemption at all. The only exception is the majority’s list of all the ways that class arbitration is fundamentally different from bilateral arbitration. This list of my-side arguments is discussed in the following section, which focuses exclusively on the majority’s treatment of class arbitration in both decisions.

d. Strained Reasoning

The clearest example of strained reasoning in *Concepcion* is Justice Scalia’s abandonment of his own principles. When a textual originalist overrules the text of an act, thereby turning an act that is anti-preemptive on its face into a preemptive one, IR is apparent. There is no explanation for how a carve out for states’ rights could lead to a conclusion that the FAA preempts states’ rights other than the fact that the majority engaged in its reasoning only after it reached its decision.

There is also a fundamental inconsistency in the majority’s reasoning. Although it argued that the goal of the FAA is to put arbitration clauses on an equal footing with contracts, in reality, the decision privileges arbitration clauses. California law explicitly allowed for a determination that any contract or clause within it was unconscionable; this was generally applicable law that could apply to arbitration clauses but did not target them. Yet, after *Concepcion*, if a business prohibits class actions in an arbitration clause, the provision is

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282 *Id.* at 1750.
283 See *id.* at 1750-51.
284 *Id.* at 1750.
enforceable. If the same company were to ban class actions in a contract, the provision would fail. As such, the majority opinion violates its own guidelines by favoring arbitration clauses.

e. Persistence

Persistence is especially prevalent in the majority’s consideration of preemption. The dissent forcefully pointed out that the majority’s decision (1) will stop people from resolving disputes, and (2) is in conflict with a plain reading of the statute.286 The majority said the first concern does not matter and never even addressed the second issue. The majority’s inability to meaningfully consider points that reasonably challenged the alleged rationale for its opinion is a classic marker of IR.

f. Overconfidence

The majority’s opinion displays a certitude that is hard to justify. Perhaps the most telling sign of overconfidence is the majority’s need to state that many class actions are in terrorem.287 The assertion that many class actions are just a way to extort money from businesses through frivolous claims is completely unnecessary in the case. If the majority knew that its result was shaky, it would almost certainly avoid any language that would suggest that the opinion was driven by a bias against class claims. However, the majority was so convinced that its reasoning was sound that it included superfluous language. This displays the majority’s lack of awareness of the logical fallacies in its argument.

In the end, the scorecard looks like this:

| Confirmation Bias | X |
| Substitution | X |
| Creation of “my-side” arguments | |
| Strained reasoning | X |
| Persistence | X |
| Overconfidence | X |

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286 Concepcion, 131 S. Ct. at 1757-62 (Breyer, J., dissenting).
287 Id. at 1792 (majority opinion).
D. The Majority’s Unsupported Remarks Regarding Arbitration

In both Stolt and Concepcion, the majority discussed (1) why class arbitration is so fundamentally different from arbitration, and (2) why a business could not possibly desire class arbitration.\(^{288}\) In making these arguments, the majority departs from reasoning that is supported by the facts, providing some of the starkest examples of IR.

1. The Majority’s Statements Regarding Class Arbitration and Class Actions

The majority began its critique of class arbitration in Stolt. Close on its heels came Concepcion, which, relatively gratuitously, returned to the topic of class arbitration. Along the way, the majority also managed to assert that class actions are often frivolous and an unfair burden to businesses.\(^{289}\)

a. The Majority’s Assertions in Stolt

In Stolt, Justice Alito wrote for the majority that “[a]n implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties’ agreement to arbitrate.”\(^{290}\) In doing so, as discussed above, he took the issue away from the arbitrator, where the parties agreed it would be decided, and made it an issue for the Court to decide. He supported his assertion that class arbitration can never be inferred from the word arbitration by suggesting that class arbitration changes the very “nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.”\(^{291}\) Alito explained further:

In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties’ mutual consent to resolve disputes through class wide arbitration.

\(^{289}\) Stolt, 130 S. Ct. at 1776.
\(^{290}\) Id. at 1775.
\(^{291}\) Id.
Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. Under the Class Rules, “the presumption of privacy and confidentiality” that applies in many bilateral arbitrations “shall not apply in class arbitrations,” thus potentially frustrating the parties’ assumptions when they agreed to arbitrate. The arbitrator’s award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. And the commercial stakes of class-action arbitration are comparable to those of class-action litigation even though the scope of judicial review is much more limited.292

The quoted text above, giving the majority its fair due, identifies three specific reasons why class arbitration is so different that it would be irrational to assume any party would ever agree to it. (The majority actually lists four, but the first and third—that the arbitrator considers and decides the claims of more than one person—are exactly the same thing.)

The issues identified are:

1) An arbitrator “no longer resolves a single dispute.” Instead, the decision could apply to hundreds or thousands of disputes.293

2) Under the class rules, there is less of a presumption of privacy and this could frustrate the will of the parties.294

3) The stakes of a class arbitration are like those of a class action, but there is less judicial review of a class arbitration.295

b. Analyzing the Majority’s Assertions in Stolt

The first thing that may jump out at a reader is that while the majority couched its concerns about class arbitration in terms of frustrating the intent of the parties, what the majority really meant is that they will frustrate the defendant. The plaintiff in this case was asking for class arbitration, suggesting it would not have been frustrated at all. Below, each alleged problem with class arbitration is considered in turn.

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292 Id. at 1775-76 (citations and references omitted).
293 Id. at 1776.
294 Id.
295 Id.
i. Resolution of Multiple Disputes

As discussed in the section relating to preemption, arguing that resolving multiple claims at once is somehow worse than resolving individual claims one-by-one is strange. If it is true that the goal of the FAA is to enforce agreements to facilitate informal, streamlined proceedings, then why would it be assumed that when a party refers to arbitration, that party can never mean arbitration of more than one dispute at a time? At a sheer mathematical level, class arbitration is far more efficient at resolving disputes than individual arbitration.

But the majority might respond by suggesting that although it may be good policy to encourage class arbitration, what matters is what the parties intended. Does this argument win the day? If we are to assume that the parties included an arbitration clause in order to resolve disputes quickly and efficiently, then why would we assume the parties eschewed class arbitration? This assumption seems even stranger given that class arbitration was becoming common by the time Stolt was decided, meaning parties certainly must have known it existed. In the end, the assertion that no one could think arbitration includes class arbitration is dubious at best.

ii. The Presumption of Privacy Is Eroded in Class Arbitration

Justice Alito suggested that the lack of privacy could “potentially” frustrate the parties. This tepid statement was as far as he could go. In truth, not all parties demand privacy in arbitration and although AAA rules require the publication of the class action complaint and final award, they do not require the publication of most documents, including the most potentially sensitive documents, such as dispositive motions or motions for class certification. Similarly, the right to seal documents exists in arbitration, just as it does in court. As a result, the suggestion that the parties “potentially” could be worried about privacy is largely advisory.

Alito’s focus on the potential frustration of the actual parties in Stolt was especially strange. This is because in Stolt,
the parties agreed to have their dispute resolved under the AAA Class Arbitration Rules. Those rules provide for limited disclosures. Apparently, neither of the parties was troubled by this because if they were, they did not have to stipulate to it. Why, then, did Justice Alito step in and express a concern the parties did not and could not have had?

Finally, the willingness to worry about “potential” problems, even though they were not proven, is new to the Court. In a previous case, the Court was asked to invalidate an arbitration clause that required a mobile home purchaser to arbitrate. In that case, the plaintiff argued that the costs of arbitration could overwhelm her and prevent her from pursuing her statutory rights. The Court rejected her challenge, holding that “[t]he ‘risk’ that [Plaintiff] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.” Why is an individual plaintiff’s fear of high arbitration costs speculative if the invented fears of a company like Stolt are sufficient to merit the Court’s attention? In the end, the majority’s concerns about limited privacy prove more fiction than fact.

iii. The Stakes Are High in Class Arbitration and There Is Not Sufficient Judicial Review

The final concern about class arbitration is that there is simply no way businesses would agree to class arbitration because it is not subject to judicial review but could involve large sums of money. This argument is probably the hardest of the trilogy of less-than-convincing reasons to defend. First, the mere assertion that arbitration is insufficient to handle some claims was roundly rejected as a losing argument in Gilmer v. Interstate Johnson, in which the Court struck down a challenge to an arbitration clause, explaining that concerns about the arbitrator’s qualification, lack of process, or discovery were inconsistent with the FAA. As such, when the majority argued that the stakes are too high in class arbitration, it is

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299 A M. ARBITRATION ASS’N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS, §§ 9 & 10 (effective Oct. 8, 2003).
301 Id.
302 Id. at 91.
303 AT&T Mobility LLC. v. Concepcion, 131 S. Ct. 1740, 1752 (2011) (asserting that the risks of class arbitration are too significant for defendants).
essentially stating a position hostile to arbitration, and this is a position the same majority has consistently said is preempted by the FAA.305

There are additional concerns. The majority implicitly expresses a belief that class arbitration is almost never attractive to businesses because it would require risking too much with too little judicial review.306 This is an inherently biased position. The majority is concerned that businesses would never agree to class arbitration given the stakes, but where was this reasoning in any case in which an individual was being compelled to arbitrate?

Assume a female is fired from her job. She believes it is because she refused to have sex with her manager. She wants to sue to either get her job back or recover damages because she cannot find work and has two kids. However, the employer asked her to sign an arbitration clause when she began working. It applies to “any and all disputes.”

Can anyone honestly suggest that for this mother, the stakes of her arbitration are lower than those of the parties in Stolt? She gets one shot at her claim. Winning might be the difference between long-term unemployment (and all that comes with it) and gainful employment. The arbitrator might not be that qualified. There is no meaningful judicial review. Discovery might be limited. And if anything goes wrong, she has no other options for pursuing her rights. Yet, the Supreme Court has routinely held that these concerns, far from being barriers to enforcing the clause, are actually questions that are hostile to arbitration and are therefore preempted. If the stakes do not matter when the party is a person, why do they matter when the party is a business?

In any event, even if there is reason to have sympathy for businesses that might lose too much in class arbitration, the assumption that no business would agree to high stakes arbitration is simply unsupportable. Many businesses view arbitration as a reasonable forum where large claims can be resolved once and for all.307 The growth of international

305 Id. at 30. “Such generalized attacks on arbitration ‘res[...] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,’ and as such, they are ‘far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.’”

306 Id. at 32 n.4.

arbitration to resolve business disputes is well documented. Justice Breyer pointed out other examples. For example, he noted in his dissent that several businesses voluntarily entered into arbitrations in which the stakes exceeded $500 million and in one case topped $1 billion.

In the end, the majority’s concerns about the risks of class arbitration reveal more about the majority than about class arbitration. The reasons given for conclusively holding that no business would ever read the word “arbitration” to include class arbitration are unsound and unpersuasive.

c. The Majority’s Statements about Class Arbitration in Concepcion

The majority returned to its discussion of class arbitration in Concepcion. While making some of the same observations as in Stolt, Justice Scalia took the opportunity to add a few new statements about class arbitration. He asserted that “the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.” He argued that this is true because in class arbitration the arbitrator has to decide whether the class will be certified, whether the named parties are sufficiently representative (which is actually just one of the elements of class certification), and how discovery will occur.

The first two concerns articulated by Scalia are the same thing said two different ways; both relate to the need for the arbitrator to decide if class certification is appropriate. The fact that the arbitrator engages in rigorous analysis as to whether class certification is appropriate is only a concern if one agrees with Justice Scalia that making sure a class is appropriate, as opposed to certifying all cases as class actions, is somehow harmful to businesses. Of course, in reality, the very mechanisms Justice Scalia criticized actually provide procedural safeguards. Similar procedural matters can and do occur in individual arbitrations. For example, motions to compel

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310 Id.
311 Id. at 1751.
312 Id.
discovery, motions to dismiss, and even motions for partial summary judgment are entertained in some complex individual arbitrations.\footnote{International arbitration is complex and can involve only two “individuales.” \textit{But see} Commercial Arbitration Rules & Mediation Procedures Including Procedures for Large, Complex Commercial Disputes. \textit{See} AM. ARBITRATION ASS’N, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES (2009), available at http://www.adr.org/ (follow “Rules & Procedures” and “Search Rules” to access rules) referencing discovery, depositions and other features common to litigation.}

The next concern articulated by Scalia is that the arbitrator must oversee discovery.\footnote{\textit{Concepcion}, 131 S. Ct. at 1747.} However, this is no different than in many individual arbitrations. For example, some individual arbitrations are between two giant, multinational companies. These will often involve a panel of three arbitrators and have complex rules for administering the claim.\footnote{For example, Dow Chemical recently announced it received almost $2.5 billion in an international arbitration, demonstrating that even complex international matters with high dollar stakes are often resolved by businesses via arbitration. \textit{Dow Announces Closure of Proceedings in K-Dow Arbitration}, INVESTOR CENTER (Mar. 4, 2013 8:35 AM), http://www.dailyfinance.com/2013/03/04/dow-announces-closure-of-proceedings-in-k-dow-arbit/.} Justice Scalia omitted this information.

As mentioned previously, he suggested that a “cursory” review of bilateral versus class arbitration reveals that class arbitration takes longer.\footnote{\textit{Concepcion}, 131 S. Ct. at 1751.} He complained that no AAA class arbitrations, at the time \textit{Concepcion} was handed down, had resulted in final judgments.\footnote{\textit{Id.}} These are strange criticisms. First, the amount of time spent per claim resolved is obviously lower in class arbitrations. If a class arbitration resolved a meager 100 claims in 600 days, that is six days per claim. There was no evidence that any individual arbitration lasts only six days; instead, evidence before the Court suggested that the average individual arbitration takes six months.\footnote{\textit{Id.}} The dissent also provided reason to believe Scalia’s data was incomplete. The dissent pointed to AAA’s amicus brief in \textit{Concepcion}, in which AAA provided proof that class arbitrations are resolved faster than class actions in courts.\footnote{\textit{Id.} at 1759 (Breyer, J., dissenting).} This apples-to-apples comparison, instead of comparing an individual arbitration to a class arbitration, suggests that class arbitration provides the same efficiencies that individual arbitration does.

But the majority opinion ignored all of this. Just as in \textit{Stolt}, the majority’s errors seem to derive from the fact that the
majority focused exclusively on the defendants’ perspective, not on the claimant and class, all of whom would almost certainly be happier with class arbitration.

Justice Scalia also bemoaned the fact that class arbitration “requires procedural formality.” Specifically, he cited the fact that the class would need to receive class notice. Besides the fact that class notice often lets people recover damages without participating in the day-to-day litigation of the case—the most efficient resolution of claims possible—it is also a safeguard for all involved. Class notice lets people object to bad settlements, and it lets people who do not want to be involved in a lawsuit against a business opt out. In this light, Justice Scalia’s concern with procedural formality was at war with the majority’s criticism in Stolt—namely that businesses were being asked to risk too much with too little protection. In the end, the majority criticized class arbitration on the one hand for having too much procedure, and on the other hand, for having too little.

But these concerns were merely precursors. It is Scalia’s “third” set of concerns, as he numbers them, that is most confounding. Justice Scalia overtly stated that “class arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected.” This criticism, that businesses will be at risk, echoes the criticism Justice Alito raised in Stolt. It is, by all measures, inappropriate. For two decades before Concepcion, the Court explicitly prohibited individuals from suggesting arbitration was not a good place to resolve some claims.

The Court, including Justice Scalia, suggested that such challenges to the very nature of arbitration were preempted by the FAA, as they demonstrated hostility toward arbitration. Yet, when Justice Scalia feared that businesses might be forced to face the realities of arbitration, he openly conceded that arbitration can cause errors and then sought to let the business escape from the very system he previously lauded.

Scalia’s inconsistencies did not stop there. He then suggested that because businesses could seek appellate review of

320 Id. at 1751 (majority opinion).
321 Id.
322 Id. at 1752.
323 See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991). In Gilmer, the plaintiff argued that arbitrators might be biased, that they were not trained to handle some matters, that discovery was limited, and that there was no written decision required. The Court rejected each of these arguments as running afoul of the FAA’s presumption in favor of arbitration.
class certification in court under a de novo review, but under arbitration rules the review would be severely limited, businesses are further prejudiced. He argued that the Court can almost never effectively review an arbitration decision because it must show extreme deference to the arbitrator. This irony is palpable. In Stolt, issued only one year earlier, the Court vacated an arbitrator’s decision, showing seemingly no deference at all. It is equally ironic that the very thing that Justice Scalia previously said makes arbitration efficient (lack of judicial involvement) quickly became one of his arguments for why businesses should not have to arbitrate at all.

In all, the majority’s treatment of class arbitration is shifting sand. The majority suggested businesses would never choose class arbitration despite proof that they do so all the time.\textsuperscript{324} The majority simultaneously lamented the lack of procedural review in class arbitration and then criticized its procedural protections relating to class certification.\textsuperscript{325} The majority asserted that class arbitration is inefficient, but then failed to compare class arbitration to class actions in court, instead comparing it to the resolution of one individual claim. These inconsistencies, and many more, suggest that something besides cold rationality is going on in the decisions.

2. Markers of IR

\textit{a. Confirmation Bias}

Confirmation bias consumes the majority’s discussion of class arbitration. For example, the majority focused on statistics provided by AAA to prove class arbitration takes longer than an individual arbitration.\textsuperscript{326} Although these facts, presented in isolation, might support the majority’s conclusion, it is clear the majority ignored the other statistics, also from AAA, that noted class arbitrations were faster than class actions.\textsuperscript{327}

Similarly, Scalia’s decision to criticize class arbitration for having procedural safeguards like discovery or a class certification hearing was illogical. The conservative majority suggested in Stolt and again in Concepcion that one of the problems with class arbitration was that businesses were not

\textsuperscript{324} Concepcion, 131 S. Ct. at 1750.
\textsuperscript{325} Id. at 1752.
\textsuperscript{326} Id. at 1751 (citing Hall Street Assocs. LLC v. Mattel, Inc., 552 U.S. 576, 578 (2008)).
\textsuperscript{327} Id. at 1759 (Breyer, J., dissenting).
protected. Under this logic, giving a business real discovery and requiring the plaintiff to prove all the elements of class certification would ensure a fairer result. And for this reason, this extra “procedure” should be a positive. Scalia did not see this. Instead, he was focused on anything that might support his argument.

The same is true of the lists of “facts” about class arbitration that were provided by the majority. The first explained why no business would choose class arbitration. The second list is similar, and detailed just how different class arbitration is from bilateral arbitration. The first list completely ignored the potential benefits of resolving large claims quickly and with arbitrators specifically trained in the area of law at issue. The second list ignored a host of ways that class arbitration is exactly like bilateral arbitration.

Finally, the majority grasped for supporting arguments in Concepcion when criticizing characteristics of arbitration, such as an arbitrator’s potential lack of understanding of the law or subject matter and the lack of the right to a full appeal. As discussed, the Court explicitly rejected these arguments in earlier decisions. They should have been preempted, as they express hostility toward arbitration.

b. Substitution

The Court, to its credit, does not engage in substitution when talking about class arbitration.

c. Creation of “My-Side” Arguments

Some of the most obvious examples of creating “my-side” arguments exist in the discussion of class arbitration. As discussed, in Stolt the majority produced a list of four different things about class arbitration that made it unlikely anyone would agree to it. However, an examination of the list reveals that one reason was listed twice (that the arbitrator considers and decides the claims of more than one person), another was a concern that the parties could not reasonably have (that class arbitration could allow the disclosure of some information about the arbitration), and the third was inherently biased and inaccurate (that the company just has too much to lose to ever agree to class arbitration). As cognitive science predicts, smart

328 Id. at 1749 (majority opinion).
people like the members of the majority are adept at producing ever-longer lists of support for their beliefs, but they are not good at producing or considering “other-side” arguments.\textsuperscript{329}

This one-sided discussion of the merits of arbitration is painfully obvious because even spending a few minutes thinking about class arbitration reveals a bevy of reasons a business might chose it. For example, unlike in court, parties in arbitration are able to vet arbitrators at AAA.\textsuperscript{330} They can strike people they think would be unfair after reviewing their resumes and the cases they have worked on in the past. Similarly, many businesses might benefit from finality instead of prolonged litigation costs. And certainly the somewhat limited nature of discovery in arbitration could actually benefit a business that is facing a class action. Similarly, Justice Alito never acknowledged that AAA requires all arbitrators who handle class arbitrations be specially trained in this area, unlike courts, which do not require judges be specifically trained in class action litigation to handle such cases in court.

Justice Scalia engaged in the same one-sided argument creation in \textit{Concepcion}. He provided a list of all the ways that class arbitration fundamentally changes arbitration.\textsuperscript{331} Yet, he did not acknowledge even one of the ways that class arbitration is identical to bilateral arbitration (unless it was to suggest that suddenly the trait was bad). For example, he could have created an “other-side” list that recognized the following similarities between bilateral arbitration and class arbitration: less formal rules of evidence, arbitrators trained in the specific field that the case involves, narrower discovery, limited judicial review, lack of precedent, informal hearings (including phone hearings, etc.), and faster resolution times than similar cases in court. If Justice Scalia had acknowledged how very similar class arbitration is to individual arbitration, the analysis might have been much different.

d. Strained Reasoning

Strained reasoning appeared throughout the discussion of class arbitration. It appeared when Justice Alito asserted that businesses hate arbitration when it is high stakes but failed to mention that some businesses choose arbitration to resolve

\textsuperscript{329} Haidt, supra note 12, at 80-81.
\textsuperscript{330} AM. ARBITRATION ASS’N, INTERNATIONAL ARBITRATION RULES (2009).
\textsuperscript{331} Concepcion, 131 S. Ct. at 1748.
enormous business-to-business disputes.\(^{332}\) Similarly, faulty reasoning occurs when the majority carefully considered the risks businesses face in class arbitration, but never considered the risks individuals face when their entire claim is before an arbitrator. Strained reasoning occurred when the court invented arguments for businesses (like concerns about privacy that could not have been present in *Stolt*) or when it actually criticized class arbitration for having procedural safeguards but then argued class arbitration is bad precisely because it does not have more procedural safeguards in the form of appeals. Similar contradictions occurred when the majority criticized class arbitration for resolving multiple claims at once, while simultaneously arguing that the purpose of the FAA is to promote efficient resolution of claims. And one cannot help but wonder how the majority can argue that arbitrators might not be qualified to handle class arbitration when this argument (1) was not only hostile to arbitration and therefore preempted but also (2) completely ignored the fact that some courts are unqualified whereas arbitrators at AAA are trained in class arbitration.

\(e\). Persistence

The dissent pointed out that class arbitration is faster than a class action and that in the absence of class arbitration, consumers will not resolve their disputes at all, much less efficiently do so.\(^{333}\) The majority never even addressed the first point, and as for the second, it suggested that it does not matter whether consumers can vindicate their rights, because even a concern like that cannot get in the way of enforcing the purpose of the FAA.\(^{334}\) This provides another example of when a thoughtful counterargument is totally ignored, consistent with IR.

\(f\). Overconfidence

Although it is clear the majority thinks it is right, there is not an overt showing of overconfidence when discussing class arbitration.

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\(^{333}\) *Concepcion*, 131 S. Ct. at 1758 (Breyer, J., dissenting).

\(^{334}\) *Id.*
In the end, the scorecard looks like this:

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E. Concepcion Overrules Past Precedent, But It Never Acknowledges It

This section briefly outlines the “vindication of rights” doctrine that existed in Supreme Court decisions since at least 1985.335 This section concludes that although the vindication of rights doctrine would have suggested that the Discover Bank rule was legally appropriate, Justice Scalia did not even mention it. This section also concludes that his decision effectively overrules the vindication of rights doctrine. This is problematic because Justice Scalia was part of the majority who recognized the doctrine in the past.336

1. Vindication of Rights

As late as the 1970s, the United States Supreme Court treated arbitration as appropriate to resolve contract disputes in the labor setting, but inappropriate for almost anything else. For example, in Alexander v. Gardner-Denver, the Court held that “if an arbitral decision is based solely upon the arbitrator’s view of the requirements of enacted legislation, rather than on an interpretation of the collective-bargaining agreement, the arbitrator has exceeded the scope of the submission.”337 In other words, an arbitrator was not supposed to serve as an interpreter of complex statutory law; an arbitrator was limited to deciding the rules of the shop.338 This led the Court to the conclusion that

336 See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991), in which Scalia joined the majority opinion, including the section that asserted that “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”
338 Id.
even if an employee arbitrated discrimination claims, the employee was still free to pursue those claims in Court, as courts were the final word on such important issues.339

This view held sway until the 1980s and was not fully eradicated until 1991—the date when the Supreme Court began to regularly demonstrate its adoration of arbitration. It was then that Gardner-Denver was essentially overruled. This happened in Gilmer v. Interstate/Johnson Lane Corp., in which the Supreme Court was asked to consider whether it should enforce an arbitration clause that would require the plaintiff, a securities trader, to arbitrate his employment dispute.340 In the opinion, the Court specifically rejected assertions that the arbitrator might be biased, that discovery was too limited in arbitration, and that the lack of a written opinion was problematic.341 Instead, the Court strongly held that claims, even serious ones, could be resolved in arbitration.342 In a footnote, the Court implicitly overruled Gardner-Denver. It wrote:

The Court in Alexander v. Gardner-Denver Co., . . . expressed the view that arbitration was inferior to the judicial process for resolving statutory claims. That mistrust of the arbitral process, however, has been undermined by our recent arbitration decisions. We are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.343

For support, the Court cited to Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, (1985).344 This change from suspicion of arbitration to a full embrace of its use in all settings is important because although the Court decided that any claim could be sent to arbitration, it did reiterate a safeguard.345 Again citing to Mitsubishi, the Court noted that an arbitral forum was appropriate for all sorts of claims, but only “[s]o long as the prospective litigant effectively may vindicate [its] statutory cause of action in the arbitral forum . . . .”346

This safeguard was critical. It meant that arbitration was acceptable for any claim, no matter how serious, but this

339 Id. at 59-60.
341 Id. at 30-32.
342 Id. at 26.
343 Id. at 34 n.5.
344 Id.
345 Id. at 26, 28.
346 Id. at 28 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)).
presumption was qualified by the recognition that if an arbitration clause prevented a party from vindicating statutory rights, the clause could fail. This seemed reasonable since arbitration was supposed to be an alternative method of resolving disputes, not a place where disputes could not be resolved at all.

The “vindicating of rights” doctrine was reiterated in subsequent cases. For example, in Green Tree Fin. Corp.–Alabama v. Randolph, the plaintiff asserted that the cost of arbitration would prohibit her from pursuing her claim. The Court rejected her assertion as unsupported by evidence. However, the Court’s opinion strongly suggested that the “vindicating of rights” theory was alive and well. The Court concluded that “a party seek[ing] to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs.” This statement implicitly recognized that if proven, the inability to vindicate rights is a bar to enforcing arbitration clauses.

This doctrine was reinforced by state court decisions. This included the California Supreme Court, when it handed down Discover Bank. In Discover Bank the California Supreme Court explained that consumers could not pursue small dollar claims individually. The Court noted that lawyers could not afford to take such small claims, and similarly, it would often be irrational for consumers to pursue such claims. The problem, as the court aptly noted, was that if no one could sue businesses for small dollar claims, then businesses could profit from illegality.

Class action and arbitration waivers are not, in the abstract, exculpatory clauses. But because, as discussed above, damages in consumer cases are often small and because a company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit the class action is often the only effective way to halt and redress such exploitation.

Based on this reasoning, the California Supreme Court struck the arbitration clause because it was unconscionable. However, what is clear is that the California Supreme Court’s reasoning also fit well with the vindication of rights doctrine.

348 Id. at 90-92 & n.6.
349 Id. at 92.
350 See id.
352 Id. (citations omitted) (internal quotation marks omitted).
The California Supreme Court concluded that if it enforced the clause, consumers could not enforce their rights. Calling this unconscionable, or concluding that it bars the vindication of rights, are really two sides of the same coin.

Other courts more explicitly made this connection. For example, in Whitney v. Alltel, a Missouri court stated:

“Even claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute serves its functions.” However, in some instances, where the arbitration provision is so prohibitive as to effectively deprive a party of his or her statutory rights, the arbitration agreement may be invalidated.353

That court went on to find a class action waiver unconscionable after concluding that the waiver would deprive consumers of the right to pursue their claims.354

Subsequent to Whitney and Discover Bank, many other states also struck down class action waivers after concluding that they would exculpate defendants from liability.355 As a result, when Concepcion reached the Supreme Court, many believed that the Discover Bank rule was merely a rephrasing of the vindication of rights doctrine and therefore, rather than being preempted, advanced the purpose of the FAA.

2. Scalia’s Position in Concepcion

Despite what some viewed as an alignment between California’s law and the vindication of rights doctrine, in Concepcion the majority concluded that California law stood as a barrier to enforcing the purpose of the FAA.356

The dissent’s response was to point out that since any customer who arbitrated against AT&T was likely to receive about $30, enforcing the class action waiver would simply ensure that no one pursued claims against AT&T.357 In essence, the dissent was invoking the vindication of rights doctrine. This argument is persuasive. But Justice Scalia dismissed it out of

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354 Id.


357 Id. at 1760-61.
hand. He wrote: “The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”\footnote{Id.at 1753 (citation omitted).} And with those two sentences, Justice Scalia wrote away the dissent and struck the \textit{Discover Bank} rule.

3. Analysis

What is interesting to note at the outset is that Justice Scalia never mentioned the vindication of rights doctrine at all in \textit{Concepcion}. Much like he did with the preemption issue, he simply left out huge pieces of law as if they did not exist. This relieved him of explaining how it would advance the purpose of the FAA to stymy valid claims. Instead, without explanation, and ignoring the dissent’s point, Justice Scalia either (1) overruled the vindication of rights doctrine without admitting it, or (2) forgot it existed.

By any measure, failing to reference an established doctrine and then dismissing the same doctrine when raised by the dissent is an example of reasoning infected by IR. The result is a decision with troubling implications. By ignoring binding precedent about the vindication of rights doctrine, Justice Scalia made the FAA stand as a tool for eliminating claims, not efficiently resolving them. He made the FAA a tool for businesses who seek to avoid answering to thousands of plaintiffs at once—a result that hardly seems consistent with the purpose of the FAA. The result is that now businesses include beautifully written arbitration clauses in their contracts, not with the purpose of using them, but with the assurance that such clauses can eliminate class actions altogether.

4. Indicia of IR

\textbf{a. Confirmation bias}

The majority displayed confirmation bias by selecting language from the FAA about the value of arbitration without paying any attention at all to the vindication of rights doctrine. Specifically, the majority is quick to quote law that says that there is a “liberal federal policy favoring arbitration,”\footnote{Id. at 1745 (citation omitted).} but it fails to consider the Court’s own recent assertions that an arbitration
clause is enforceable “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum.”

b. Substitution

The majority did not engage in substitution. It never addressed the question of whether its decision was in line with the vindication of rights doctrine.

c. Creation of My-Side Arguments

My-side arguments abound in the majority’s opinion. The majority invented many reasons why striking the class action waiver would hurt AT&T. And it invented multiple justifications for how consumers could try to resolve their claims individually. For example, the majority asserted that it is unlikely the claims will go unresolved because AT&T’s clause obligates it to pay a large sum of money if the settlement award exceeds AT&T’s settlement offer. Similarly, the majority pointed out AT&T’s clause requires it to pay attorney fees and lets consumers file their claims online for free. Yet, the majority never discussed the fact that most consumers will never find representation, that it is economically irrational for consumers to pursue $30 claims, or the fact that consumers have to read and understand AT&T’s complicated arbitration clause to even know their rights to begin with.

Although dozens of arguments that support enforcing the Discover Bank rule spring to mind, the majority failed to acknowledge or think of even one. Indeed, while the majority invented a parade of horrible events for companies if they are forced to class arbitrate, the majority never even discussed the detailed findings in the Discover Bank case, namely that if class action waivers are enforced in small damage consumer cases, consumers will lose their rights while businesses, because they can print their own “get-out-of-jail-free card,” will make millions even if their behavior is demonstrably illegal. All of this points to one-sided thinking that blinded the majority to a litany of arguments that would have undermined its holding.

361 Concepcion, 131 S. Ct. at 1752.
362 Id. at 1751.
363 Id. at 1753.
364 Id. at 1744.
365 Id. at 1760-61 (Breyer, J., dissenting).
d. Strained Reasoning

There is little reasoning more strained than reaching a decision that implicitly overrules decades of precedent without even mentioning the relevant precedent or recognizing the tension in the law. And it is certainly hard to square the argument that the purpose of arbitration is to resolve disputes efficiently with the majority’s decision, which essentially assured that far fewer arbitrations will occur, and of those that do, they will always resolve only one claim at a time.

e. Persistence

The dissent specifically asserted that the majority decision would prevent consumers from pursuing their claims—a violation of the vindication of rights doctrine and the fundamental purpose of the FAA. The majority should have been persuaded, but instead it implicitly asserted that the vindication of rights doctrine did not matter. This was overt evidence that reason could not change the majority’s mind, as it had already made a decision.

f. Overconfidence

Completely failing to mention an entire body of law that is precisely on point, and then refusing to do so even when faced with it by the dissent, is extreme overconfidence.

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IV. What Is This Really All About?

If by now you are convinced that the majority’s decisions in Stolt and Concepcion are examples of the elephant leading the rider, that is, examples of intuition rationalization at work, then the only remaining question is what swayed the elephant.366

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366 HAIDT, supra note 12, at 79-80.
Some scholars have suggested the answer, implying that it was the majority’s distaste for class actions and its sympathy for businesses (really two sides of the same coin) that drove the decision. For example, Alan Scott Rau wrote an article that details the new limits on arbitrable power.\textsuperscript{367} In his article, he notes that Scalia and the majority seem to have a “visceral” response to class actions.\textsuperscript{368} He also remarks that businesses do not include arbitration clauses because they like resolving disputes or because they fear judicial review; instead, they include them to avoid claim aggregation in which they could be required to answer to multiple consumers.\textsuperscript{369} He suggests that Justice Scalia was sympathetic to this goal, and points to Scalia’s mention of “in terrorem” class actions—which Justice Scalia suggests are class actions that force businesses to settle what are essentially frivolous claims.\textsuperscript{370}

In addition to pointing out this language in \textit{AT&T}, Rau notes how unusual the result in \textit{Stolt} truly is.

One would have to invest a good deal of time and effort before being able to identify cases—which in the end amount only to a trivial number—in which the Supreme Court has been willing to mandate or approve the annulment of an arbitral award. (And before now these have been strictly outliers, grounded either on the lack of any agreement at all, or on some impropriety in the composition of the arbitral tribunal). But then we come to \textit{Stolt-Nielsen}: It can hardly be accidental that the specter of class relief in arbitration is just about the only feature of the arbitration process that has been anathema to the business community—or that this rare decision restrictive of arbitral power happens, wonder of wonders, to be one in which a business-oriented court manages more or less to relieve it of any such anxiety.\textsuperscript{371}

Following up on this assertion, Rau also suggests that “\textit{Stolt-Nielsen} is in this sense entirely unprincipled” because “avoidance of class relief is the engine driving the machine.”\textsuperscript{372}

Rau has it right. The common threads in the opinions are (1) a dislike for class actions and class arbitrations and (2) a genuine concern for businesses and their well-being. And the opinions do far more than express the majority’s feelings. The decline of class actions saved, and will continue to save, businesses millions of dollars per year, all at the expense of individual

\begin{footnotes}
\item[368] Id. at 545-46.
\item[369] Id. at 543.
\item[370] Id.
\item[371] Id. at 484-85.
\item[372] Id. at 485.
\end{footnotes}
consumers.\textsuperscript{373} \textit{Stolt} largely eliminates class arbitration and \textit{Concepcion} eviscerates many contract-based class actions, including claims that might arise in any lending context or employment setting. As a result, businesses can now include an arbitration clause that prohibits class actions and be almost certain it will be enforced. Businesses are immunized from certain liabilities, even for crystal clear violations of the law.

Considering the real world results of \textit{Stolt} and \textit{Concepcion} drives home the detrimental impact on class action litigation. Because of these decisions, although many states have cases and statutes recognizing that some class action waivers are unconscionable, these laws cannot be enforced in the arbitration context. The result is that an arbitration clause is treated differently from other contract provision. This is a legal absurdity that encourages businesses to pile their most questionable provisions into arbitration clauses, where it seems they will receive special treatment.

A shining example of this exists in a case I have worked on for six years. In \textit{Brewer v. Missouri Title Loans}, Plaintiff asserted that Defendant was violating Missouri law relating to title loans.\textsuperscript{374} Missouri Title Loan’s contract contained an arbitration clause that prohibited class actions.\textsuperscript{375} Plaintiff conducted discovery, hired experts, and proved to the trial court that the class action waiver would create immunity for the defendant because consumers could not find representation to bring individual claims for only a few hundred or a few thousand dollars.\textsuperscript{376} The defendant produced no contrary evidence.\textsuperscript{377} The Missouri Supreme Court affirmed the trial court’s holding that the class action waiver was unconscionable.\textsuperscript{378} The Missouri Supreme Court also noted that the clause was a \textit{de facto} exculpatory clause and failed under general Missouri law.\textsuperscript{379} The result was clear: in Missouri, if there was evidence that a contract provision would prevent a consumer from pursuing his or her

\textsuperscript{373} See John Campbell, \textit{Unprotected Class: Five Decisions, Five Justices, and Wholesale Changes to Class Action Law}, 13 Wyo. L. Rev. 463 (2013) (discussing how decisions by the conservative majority of the United States Supreme Court have dramatically reduced the number of class actions that can be pursued, even when the activity is demonstrably illegal).
\textsuperscript{374} Brewer v. Mo. Title Loans, 364 S.W.3d 486, 488 (Mo. 2012), cert. denied, 133 S. Ct. 191 (2012).
\textsuperscript{375} Id. at 487.
\textsuperscript{376} Id. at 493-94.
\textsuperscript{377} Id. at 494.
\textsuperscript{378} Id. at 496.
\textsuperscript{379} Id. at 487-88.
rights, then it was too one-sided—and thus unconscionable—to be enforced. 380

However, after Concepcion, the United States Supreme Court vacated the decision. 381 On remand, the Missouri Supreme Court struck the arbitration clause because it contained a number of other offensive provisions, but it did not and could not rely upon the existence of the class action waiver. 382 Indeed, on the same day, the Missouri Supreme Court was forced to remand a different case for further consideration because the trial court had rested its finding of unconscionability on the existence of a class action waiver. 383 The result was that the case was remanded to the trial court and was never pursued as a class action.

The result in Missouri is now clear. If a party presents decisive evidence that a contract term prevents him from pursing his legal rights, that term is unconscionable. This is true for class action waivers in small damage cases. However, despite the fact that this is general Missouri law, if the business is clever enough to put the class action waiver under the heading of “arbitration,” the clause magically becomes enforceable. This holds true no matter how much evidence there is that enforcing the clause will prevent the resolution of disputes. While in private practice, my class action team alone passed on dozens of cases in which we concluded that businesses were acting unethically but that a class action wavier in an arbitration clause would prevent us from pursuing the claim.

This included claims against businesses like payday lenders, who in Missouri, charge over 400% interest on loans. 384 This is a salient example of the need for class actions because, prior to the errant decisions of the majority, two payday lenders in Missouri were sued in class actions. They settled the lawsuits for over $30 million in cash and debt relief to the affected individuals. 385 These lawsuits impacted about 200 payday loan stores, but there are roughly 1,000 payday lenders in Missouri. 386 It is an absolute certainty that more lawsuits

380 Id. at 493-95.
382 Brewer, 364 S.W.3d at 490-91.
385 Hooper v. Advance America, 589 F.3d 917 (8th Cir. 2009); Woods v. QC Fin. Servs., Inc., 280 S.W.3d 90 (Mo. Ct. App. 2008).
386 Letter from Richard Weaver, supra note 384.
would have been filed to challenge the practices of the other payday lenders, but Concepcion intervened, and in doing so ensured that payday lenders could continue to engage in questionable legal practices with no concern that they would ever have to answer to all their customers. Further, no individuals were likely to pursue claims because the payday loans were only $500 or less.387

These results are not anomalous. A year after the Supreme Court handed down Concepcion, Public Citizen, a group that monitors a variety of constitutional and national issues impacting citizens, wrote a report entitled Justice Denied, in which it chronicled the impact Concepcion had on class actions.388 The report concluded that “the decision provided corporations with a tool to insulate themselves from facing meaningful accountability for cheating large numbers of consumers out of amounts too small to make pursuing individual cases economically feasible.”389 The report used Westlaw’s KeyCite function to identify 76 potential class actions that were dismissed by courts who cited to Concepcion.390 And of course, the report could not capture the hundreds of cases that were not filed or were voluntarily dismissed for the same reason.

To further illustrate how the Concepcion immunity blanket works, consider a hypothetical. A national cell phone company with 20 million customers includes a class action waiver in its arbitration clause in its contract with each customer. That company could, tomorrow, add a $1 questionable fee to each customer’s bill. The fee would generate roughly $20 million dollars in revenue the next month. If the fee were illegal, each customer’s only choice would be to file an arbitration action for $1 in damages. Under the majority’s holdings in Stolt and Concepcion, there is simply no way to hold this company accountable for all the potentially illegal gains. As a result, a company is far more likely to test the boundaries of illegality. If it gets it wrong and breaks the law, it is almost certain to answer to no one. Even if a few zealots do file individual

387 Id.
389 Id. at 4.
390 Id.
claims, the company’s gains still greatly exceed the money it pays to settle claims—cheating becomes profitable business. These results are ironic. Because the majority eliminated both class arbitration and class actions in many contexts, and because this was accomplished by favoring arbitration clauses that require individual arbitration, arbitrations are less likely to happen, and the purpose of the FAA has been eroded. Yet all of this occurred in the name of the FAA. As a result, a statute designed to encourage the resolution of disputes now stands as an obstacle to pursuing the claims at all. Because of this, the prophecy of Discover Bank is now entirely true:

Class action and arbitration waivers are not, in the abstract, exculpatory clauses. But because, as discussed above, damages in consumer cases are often small and because a company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit . . . the class action is often the only effective way to halt and redress such exploitation.

V. MOVING FORWARD

The analysis above highlights the dangers of unchecked IR. It suggests that decisions with wide-ranging implications can be hijacked by IR without judges even knowing it. In the test cases, the majority asserted, and probably believed, that it reached an inevitable result driven by immutable reason. It was blind to its own IR. And as discussed above, this led to Court decisions that should immediately be overruled because they do not display the legal reasoning one should demand from the highest court in the United States and because they produce real world results that are equally out of step with the law.

But this is not an article about reversing two court cases. It is an article about the broader implications of IR. If IR truly pops up most when strong emotions are present, then IR can be expected to turn up in some of the most contentious and important cases in the country. Debates over abortion, gun rights, whether companies can give money to political campaigns, whether companies can be held responsible for their human rights behavior in other countries, the rights of

391 For more on the Court’s wholesale changes to class action law since 2010, see Campbell, supra note 373.

homosexuals, and even who should be named President could all be (and may have already been) compromised by IR.

What can be done? I see two initial steps. First, there is already a great deal known about cognitive science and decision making in particular. This field of inquiry needs to be pointed out more precisely to the judiciary. Presently, although there are increasing numbers of scholars studying how jurors are impacted by a variety of cognition principles, I am aware of few large scale studies to determine how judges reach their conclusions. Parsing out the role IR already plays in decision making, and doing this with some empirical rigor, would be a significant advance.

But identifying what role IR is playing in decision making is only a beginning. There are larger questions implicated. Justice Scalia criticizes judges who ask, “Is this decision good for the little guy?” But my analysis reveals that Scalia asks similar questions, at least internally, such as, “Is this decision good for big business?” Serious debate could and should be had about what role emotion and moral value determinations should play in decision making. In other words, is it necessary to eliminate emotion, or is it simply necessary to overtly name it when it plays a role? After all, if deeply held beliefs will, at least in some cases, play a role even when unacknowledged, it may be that transparent discussion of these beliefs is the better course.

The question above will be informed by yet another query. Can IR be eliminated? Can people be taught to avoid it? There is already some literature on this, but I know of none in the judicial realm. Controlled studies in which people are educated about IR, then asked to engage in cognitive tasks, could reveal how much IR can be tamed. These studies could prove especially interesting if applied to judges. Imagine educating judges about IR, then asking them to review their own past decisions.

At a minimum, cognitive science should have a seat at the table in judicial training programs. Judges are in the business of making decisions; they should be acutely aware of the cognition challenges that all people face when doing so. If this education occurs, could judges identify IR in their own decisions? Would they recognize a need for peer input to at least curb the influence

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393 See, e.g., Christopher Tarver Robertson, Blind Expertise, 85 N.Y.U. L. Rev. 174, 176 (2010). Bernard Chao, a colleague of mine, Christopher Robertson, and I are also working on an article that will study the anchor effect on jury verdicts.

394 SCALIA & GARNER, supra note 35, at 18.
of their own feelings? These are unanswered questions that demand answers.

My intuition (and I recognize the irony) is that education about IR is like what many defenders used to say about Michael Jordan. “You can’t stop him, you can only hope to contain him.” We cannot eliminate cognitive errors, especially in the fast-flow of everyday life. But, in judicial opinions—which can be considered and revised—we can hope to reduce IR’s influence by making it more transparent. This would produce more consistent judicial opinions, reduce the risk that opinions are driven by quiet undercurrents, and, in all, be more consistent with the common law tradition.

CONCLUSION

IR abounds. We all engage in it, and this includes the conservative majority. These are important truths. Many have lambasted the conservative majority for business-friendly decisions, but more is needed. Beyond conservative or liberal viewpoints, we must understand what drives judicial decision making. We must ask why and how?

IR is most likely to appear when deeply held beliefs are at issue, and that has serious implications for the work of judges, whether they sit in trial courts or on the Supreme Court. An analysis of Stolt and Concepcion reveals that IR binds and blinds, bringing those with like views together and then preventing them from seeing their own logical fallacies. In doing so, it lets the elephant run amok, reducing the rider to a post hoc justifier. As discussed, this can have real world consequences of immense proportions.

The solution is to study the IR undercurrent, to educate those who are most impacted by it, and hopefully in doing so, to heed the advice of Justice Sonia Sotomayor. It is only by knowing and understanding when “personal bias is seeping in to our decision-making” that we can hope to be “fair and impartial.”

395 Interview by Gwen Ifill with Sonia Sotomayor, supra note 1.
Comprehensive Protection of Genetic Information

ONE SIZE PRIVACY OR PROPERTY MODELS MAY NOT FIT ALL

Anya E.R. Prince†

INTRODUCTION

Genetic information is uniquely personal—it helps define what characteristics one will develop, what traits individuals could pass on to their offspring, and, given recent advances in science, it increasingly helps one to learn about medical predispositions and disease treatment options. The medical definition of genetic information is the heritable information coded in an individual’s genes or DNA. Given both the personal nature of this information and the potential jackpot of valuable medical data, individuals have an important interest in maintaining control over their genetic information. Genetic information, however, is simultaneously uniquely individual and inexorably entwined with family members. Additionally, genetic information in the aggregate provides colossal potential to advance medical research and public health outcomes. Thus, laws that give individuals rights over their genetic information must balance the competing interests of the personal nature of the information against the informational power of genetic data. Current state laws in this arena generally grant individuals either a property interest or a privacy interest in genetic data. This article examines these state laws and argues that sweeping rights to genetic information under either a property or a privacy model are often overbroad and miss the mark, especially given the complexities of familial relationships and the societal implications arising out of genetic data.

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The number of genetic tests available has ballooned to over 2,000 tests in use in the clinical setting. Additionally, in the future, more healthcare professionals will utilize wide-scale genetic testing in clinical practice as the cost of whole genome sequencing drops to below $1,000 per test. As the use of genetic testing increases in the clinical setting, powerful information about predispositions to disease and implications for offspring will emerge in patient files and medical records. While this information can greatly improve treatment options and public health, it also implicates privacy and discrimination concerns for the patients themselves.

Information gathered from genetic tests and family medical history can provide a patient with vital information about his or her propensity to develop a disease such as cancer, diabetes, or Alzheimer’s. It can also provide information about whether a parent is a carrier of a gene that can lead to a genetic disorder in offspring, such as Tay-Sachs or cystic fibrosis. This knowledge gives power to the individual to plan for the future, establish treatment options, and practice preventive care. For these reasons, genetic information is personal and complexly intertwined with self-identity and family. Despite the individuality of genetic information, the information that is beneficial to the patient may also be desirable knowledge for other actors—precisely because of its identifying power.

Therefore, it is essential to examine how current laws address concerns over control of genetic information, what the best model is for protection of individuals’ rights, and how protections need to be improved for the future. Currently, the premier law in the United States at the federal level regarding genetic privacy is the Genetic Information Nondiscrimination Act of 2008 (GINA). GINA bans health insurance companies and employers from discriminating against individuals based on genetic information. Additionally, absent a few limited exceptions, GINA prohibits health insurance companies and employers from collecting the genetic information of individuals.

While GINA has helped to alleviate some fears over misuse of genetic information, it is relatively narrower in scope

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4 Id.
than other civil rights acts because it only regulates health insurance companies and employers. With the burgeoning use of genetic testing and advances in understanding hereditary links for disease, laws need to address how the broader society—from government to educational institutions to researchers to nosy neighbors—can use an individual’s genetic information in contexts outside of health insurance and employment.

There has been a recent increase in genetic rights legislation as states have begun to grapple with the question of what rights individuals have to their genetic information.\(^5\) Most states have enacted legislation regulating third party use of genetic information; however, the majority of these statutes mirror GINA in that they only address health insurance companies and employers. Fifteen states have passed broader legislation that endows individuals with more comprehensive control over their genetic information.\(^6\) Of these states, five provide individuals with a property interest\(^7\) in their genetic data and 10 grant a privacy interest.\(^8\) This article argues that the laws are so broadly written that they may become unworkable in practice and therefore will fail to adequately protect individuals and their genetic interests. State legislatures would benefit from a narrowly-tailored model law that addresses individuals’ concerns. Additionally, states should create regulations for areas such as newborn screening, paternity testing, and law enforcement biobanks\(^9\) to ensure full protection for individuals in all situations.

Part I of the article discusses the varying definitions of genetic information and how these variations affect individual rights over genetic information. Part II examines property rights and privacy rights in the context of genetic information. This part highlights the benefits and concerns of these two models, and evaluates how the differences in their underlying theories affect the protections and control individuals have.

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\(^6\) Given the wide range of types of protections available, this number could vary depending on how comprehensive legislation is viewed. This article counts those states whose laws apply broadly across society—not those whose legislation applies to more limited cases of insurance, employment, or family codes. See infra Parts III.B–C.

\(^7\) These states include Alaska, Colorado, Florida, Georgia, and Louisiana. See infra Part III.B.

\(^8\) Delaware, Illinois, Iowa, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, and South Dakota. See infra Part III.C.

\(^9\) Law enforcement biobanks are databases housing the biological and genetic information of arrestees and criminals. See infra Part III.D.3.
Part III analyzes state and federal laws that have expanded the rights individuals have over their genetic information and examines proposed state laws that seek to do the same. The section also comments on important exemptions that should be written into model legislation, such as newborn screening, paternity testing, and law enforcement biobanks. Finally, Part IV sets forth essential provisions that model state legislation must have in order to guarantee comprehensive genetic rights for individuals. Accordingly, model legislation for genetic information should include prohibitions on discrimination in major areas of the law, criminalize surreptitious genetic testing, create a private right of action for the unwanted disclosure of genetic information, and require that doctors and scientists provide subjects with an “advance research directive” to ensure that individuals will have greater control over the use of their genetic information in research.

I. PIN THE TAIL ON THE DEFINITION: GENETIC INFORMATION, GENETIC CHARACTERISTICS, AND GENETIC MATERIAL

Due to the patchwork nature of laws in this arena, there are varying definitions of genetic information at the state and federal level. This article focuses upon genetic information—intangible information that comes from DNA analysis, family medical history, test results, and other sources. It is beyond the scope of this article to discuss in detail the regulation of physical genetic material, such as tissue, blood samples, or other physical biological specimen, as this topic has been analyzed in other academic works.10

In 2008, Congress greatly expanded protection against genetic discrimination at the federal level by broadly defining genetic information in GINA. Under GINA, genetic information is

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information about [an] individual's genetic tests[,] the genetic tests of family members of such individual, and [] the manifestation of a disease or disorder in family members of such individual[,] . . . any request for, or receipt of, genetic services, or participation in clinical research which includes genetic services, by such individual or any family member of such individual.11

Prior to GINA, a patchwork of federal and state laws covered genetic discrimination. The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of a disability in employment. The U.S. Equal Employment Opportunity Commission (EEOC) had indicated that the ADA could be used to bring an action for genetic discrimination, but this was never tested in court prior to the passage of GINA.12 Additionally, in 2000, President Clinton signed Executive Order No. 13145 banning genetic discrimination against federal employees.13

The protections in the health insurance context were even sparser than in employment. The Health Information Portability and Accountability Act (HIPAA) prohibits group health insurers from using medical information in underwriting. HIPAA, however, does not prevent health insurers from charging a higher premium based on medical conditions. While some states had laws that regulated the use of genetic information in employment and health insurance, the bills were not consistent across the country. GINA filled many gaps in the law that existed prior to its passage.

Additionally, prior to GINA, many states had a narrow definition of genetic information, creating a confusing patchwork of coverage at the state level. The varying state definitions of genetic information were mostly limited to genetic test results or information directly gathered from deoxyribonucleic acid (DNA) analysis.

An examination of three states shows the breadth of definitions that exist at the state level. Nebraska’s concise definition of genetic information is “information about a gene, gene product, or inherited characteristic derived from a genetic test.”14 New Mexico’s slightly broader definition includes information gathered from “genetic testing, genetic analysis, DNA composition, participation in genetic research or use of genetic services.”15 And finally, under Tennessee law, genetic

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14 NEB. REV. STAT. ANN. § 71-551(6)(a) (West 2007).
information must stem from genetic test results and also be linked to genes that are associated with a specific disease predisposition, a requirement that is not explicitly included in all state definitions of genetics. The varying state definitions of genetic testing can be confusing for many, especially individuals who may move from one state to another and have varying levels of protection, or for genetic researchers who work with research subjects from multiple states. Model legislation for this area would help to minimize confusion and increase consistency of protection.

Increased legislation at the federal level can help to create a trickle-down use of definitions at the state level. By including family medical history and use of genetic services in its definition, GINA has begun to alter society’s conception of genetic information. For individuals with family histories of hereditary diseases, actual legal protection is very limited if genetic information based on test results is protected, but information of family medical history is not. For example, an insurance company that asks extensive questions about an individual’s family medical history of cancer can gain vital information about that person’s predisposition to cancer without having a definitive genetic test result, such as a BRCA1 or BRCA2 mutation test for breast cancer, or an HNPCC (hereditary non-polyposis colorectal cancer) test for colon cancer. Therefore, to ensure more complete protection of individual rights, the definition of genetic information should include not just genetic test results, but also family medical history.

Since GINA’s passage, states have begun to use this broader definition of genetic information. For example, California has moved from laws regulating “genetic characteristics” to laws regulating “genetic information.” Prior to GINA, the California legislature had enacted a number of laws regulating the use of genetic characteristics. California defined genetic characteristics as

Any scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, [or inherited characteristic that may derive from the individual or family member], that is known to be a cause of a disease or disorder in a person or his or her offspring, or that is determined to be associated with a statistically increased

18 Id. at 183.
risk of development of a disease or disorder, and that is presently not associated with any symptoms of any disease or disorder.19

The definition did not explicitly include family medical history or use of genetic services. After GINA’s passage, California enacted a law, termed Cal-GINA, which incorporated GINA’s more expansive definition of genetic information.20 This example illustrates what is likely to be a growing trend among states to expand the definition of genetic information to incorporate family medical history.

The definition of genetic information is varied, especially at the state level. Sometimes there is variation even within a state depending on which section of the code is defining genetic information.21 Unless otherwise noted in this article, genetic information will refer to the broad definition of genetic information found in GINA that includes family medical history and use of genetic services.

II. LAYING THE FOUNDATION: UNDERLYING LEGAL THEORIES FOR CURRENT STATE LEGISLATION

A. Why Examine State and Not Federal Efforts

A comprehensive federal bill governing individual genetic rights would be ideal in the United States—especially because family members who share genetic information often live across many different states. This article, however, focuses on the state level for a number of reasons. First, given the current political landscape, it is unlikely that Congress will pass broad-based genetic rights legislation in the near future. After passing healthcare reform—formally the Patient Protection and Affordable Care Act—in 2010, Congress has become increasingly polarized surrounding healthcare policy. 22 Beyond healthcare,

19 CAL. GOV’T CODE § 12926(i)(2) (West 2013).
21 See, e.g., ARIZ. REV. STAT. ANN. § 20-1379 (2009) (definition of genetic information in health insurance to include information about genes, test results, and family histories) and ARIZ. REV. STAT. ANN § 20-448 (2009) (definition of genetic condition as a specific chromosomal or single-gene condition in life and disability insurances); N.Y. EXEC. LAW § 292 (McKinney 2012) (definition of genetics in employment that requires the gene alteration to be specifically linked to a disease or condition) and N.Y. CIV. RIGHTS LAW § 79-i (McKinney 2012) (definition of genetics limited to genetic testing in insurance).
22 For example, the House of Representatives has voted to repeal healthcare reform at least 30 times since its passage. See Tamara Keith, GOP To Make 31st Attempt To Repeal Obamacare Act, NPR (July 09, 2012), transcript available at http://www.npr.org/2012/07/09/156474493/gop-to-make-31st-attempt-to-repeal-obamacare-act.
Congress’s bill-passage rate has been at an all-time low.\textsuperscript{23} Given this climate, it is unlikely that Congress will act in the near future to pass the overarching comprehensive legislation that is needed to protect individuals in this arena.

In contrast, states have increasingly begun to pass broad genetic rights legislation.\textsuperscript{24} In the future, there will likely be continued legislative efforts across other states to fill the gaps in genetic rights. Additionally, state legislatures will likely look to existing laws of other states as a model for their legislation. For this reason, it is essential to carefully examine state efforts to date and make suggestions for future state efforts.

Finally, if and when the federal government does address broad genetic rights, it may look to state legislation for inspiration. “[A] ‘single courageous State’ [can] serve as a laboratory for experiments that might lead to advances for society as a whole.”\textsuperscript{25} State action in this area can be a catalyst to prompt Congress to act. If enough states adopt comprehensive genetic legislation, it could be a tipping point that compels the federal government to adopt similarly comprehensive legislation. Therefore, providing guidance for current state legislatures acting in this field is beneficial for society and individual genetic rights overall.

\textbf{B. Harms to be Avoided}

State legislatures must address four harms to create an appropriately tailored comprehensive genetic framework. First, individuals are often worried about negative consequences that stem from bad actors having access to genetic information—they are scared of genetic discrimination. As mentioned, GINA has vastly improved protections against discrimination in the employment and health insurance context, but has left gaps in the system for other areas such as life, long-term care, and disability insurance; housing; and education. Second, there is concern over possible surreptitious testing of genetic material. For example, in a political race, a candidate’s genetic


information could be secretly tested and used against that person to show that he or she would not be fit for the office. While some state laws prohibit this testing, many do not. Third, individuals are concerned with the unwanted disclosure of their genetic information. This can stem from fear of discrimination and frustrations with lack of control over research, but there is also an inherent concern in wanting to keep genetic information private. Finally, due to the uniquely personal nature of genetic information, there is some desire to not have the information used for certain purposes, such as research that an individual does not agree with.

Current state models tend to focus on either a property or privacy model to address individual concerns about genetic information. The next sections will introduce the underlying legal theories of the property and privacy models as well as introduce implications of genetic information to the self, family, and society. Understanding these bases will help with analysis of whether these frameworks are addressing the harms to be avoided.

C. Current Models of Genetic Rights

Property law grants positive ownership rights over an item, which are firmly “enshrined in the United States Constitution” under the Fifth and Fourteenth Amendments. Property rights are traditionally understood to encompass a bundle of rights, which, in this case, includes the ability for individuals to regulate the possession and transfer of their genetic information. Additionally, property provides litigants with a definitive cause of action for the taking of the information. Therefore, states that grant a property right to

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28 Weeden, supra note 10, at 650-51.
genetic information enable their citizens to protect against the taking or misuse of genetic information.\textsuperscript{31}

While theoretical underpinnings of property rights began in the physical realm, over time, the model has been expanded to include intangible concepts and ideas through advances in patent and copyright law. Its use in regulating nontangible data can be tricky in the area of medical records. Even without adding a layer of genetic information, there is not a clear ownership right over patient medical data.\textsuperscript{32} For the most part, physical medical records are the property of the health care provider, but the data inside is not; this is similar to owning a book, but not owning the ideas contained inside.\textsuperscript{33} Thus, if property rights attach to genetic information the model may look more like copyright law, rather than pure physical ownership law. As with copyright law in books and music, there are many more violations of property rights in these realms of easily transferable data, than when physical ownership is at issue.\textsuperscript{34} Therefore, property law has many of the tools available to regulate ownership in genetic information, although enforcement may potentially be at issue.

While property theory encompasses positive rights, privacy theory imposes negative rights upon others. Privacy interests developed separately from property interests, and were intended to protect an individual’s control over personal information and decision-making. Privacy theory emerged from both common and constitutional law, and the constitutional roots of privacy have been applied to medical data over time.\textsuperscript{35} The Supreme Court, for example, has held that a privacy interest in medical information does implicate the constitutional right to privacy, to the extent that there is one.\textsuperscript{36} Additionally, some states have recognized a constitutional right to privacy in their own state constitutions.\textsuperscript{37}

\textsuperscript{31} Michael J. Markett, Note, Genetic Diaries: An Analysis of Privacy Protection in DNA Data Banks, 30 SUFFOLK U. L. REV. 185, 226 (1996); Weeden, supra note 10, at 617.

\textsuperscript{32} Marc A. Rodwin, Patient Data: Property, Privacy & the Public Interest, 36 AM. J. L. & MED. 586, 587 (2010).

\textsuperscript{33} Id. at 588.


\textsuperscript{35} Sonia M. Suter, Disentangling Privacy from Property: Toward a Deeper Understanding of Genetic Privacy, 72 GRO. WASH. L. REV. 737, 762-67 (2004).

\textsuperscript{36} Id. at 766.

\textsuperscript{37} E.g., CAL. CONST. art. 1, § 1.
Protecting an individual’s control over personal information is an essential part of privacy theory.\textsuperscript{38} Many argue that the privacy model best serves to protect this interest in control specifically with regard to genetic information.\textsuperscript{38} “Our genetic information is unique to us and therefore can identify us. It has a familial component, revealing links with relatives and something about our reproductive risks. Genetic information is therefore deeply connected to us.”\textsuperscript{40} Thus, by protecting an individual’s control of personal information and decisions, a privacy model helps to protect the sanctity of the self.

D. Balancing Competing Interests: The Benefits and Detriments of Various Models on the Individual, Family, and Society

Defining a personal interest in genetic information—whether as a property right or a privacy right—can have lasting effects on many groups. Genetic information is simultaneously individual, familial, and societal information. Therefore, it is important to consider how a privacy or property interest would affect each of these levels.

1. Implications for the Self

An individual’s interest in the control over, and confidentiality of, genetic information is grounded in protecting the self-identity of a person. Control of genetic information goes beyond merely protecting the secrecy of the information. It extends to give an individual control over the manner in which others use this information, whether others can learn this information about them, and how others can interfere in personal decisions.\textsuperscript{41} Personal control over genetic information can allow an individual to preserve his or her self-identity, while avoiding stigmatization and discrimination.

Because genetic information is inherently entwined with an individual’s concept of self, many commentators have noted that recognizing a property interest in parts of the body

\textsuperscript{38} ALAN F. WESTIN, PRIVACY AND FREEDOM 324-25 (1967); Charles Fried, Privacy, 77 YALE L.J. 475, 482-83 (1968).
\textsuperscript{39} See, e.g., Suter, supra note 35, at 739-40.
\textsuperscript{40} Id. at 739.
\textsuperscript{41} Id. at 739-40.
falls at odds with morality.\textsuperscript{42} Therefore, they argue that privacy rights are preferred over property interests because such rights allow control over information without commodifying body parts and “disaggregat[ing] the parts from the self.”\textsuperscript{43} Under a property model, genetic information is a commodity rather than something in which we have a personal interest. While property interests connote a certain control over genetic information, they also can have a negative effect. Privacy, on the other hand, does not treat the person as its “constituent parts,” but rather “understands it holistically,” which better protects our integrity.\textsuperscript{44}

Courts that have addressed property rights in an individual’s body parts have expressed “distaste for the possibility of treating human body parts as a form of property.”\textsuperscript{45} The legal system does not promote commodification of body parts. For example, it is illegal to buy or sell organs, which instead must be donated. Some argue that bestowing these property rights on individuals will turn bodies into commodities,\textsuperscript{46} allowing exploitation of the needy, who will sell their cells even when it may harm their health.\textsuperscript{47} However, criticisms against the commodification of body parts are mostly limited to physical tissue samples and organs, not personal data. Some have argued that the worry over commodification of the self is inapposite when only genetic information, not physical material, is at issue.\textsuperscript{48} But the concerns of disaggregating the self into pieces, rather than the whole, can still come into play when information about the self is introduced. As Professor Jessica Roberts has written,

> Allocating jobs, educations, or other social goods and privileges based on genetic traits fails to acknowledge that, while genetic information might reveal some aspects of a person’s identity—such as elements of her appearance, her health risks, or even her talents and

\textsuperscript{43} Suter, supra note 35, at 737.
\textsuperscript{44} Id. at 763.
\textsuperscript{46} See, e.g., Suter, supra note 35, at 746-47.
\textsuperscript{47} See Feldman, supra note 45, at 1384; Hildebrand & Klosek, supra note 30.
tendencies—it is incapable of capturing the essence of that person in her entirety.49

Proponents of maintaining privacy rights, therefore, argue that privacy law is more suitable because it recognizes the “integrity and continuity of the self,”50 and is specifically made to protect individuals and their identities.51

Use of an individual’s genetic information also has moral implications where the use of the information can undermine the specific values and beliefs of the individual.52 “For instance, individuals may oppose research on the genetics of certain behavioral or other traits, like intelligence or sexual orientation.”53 In addition, some people may believe that genetic information should not be patented. Without personal rights over their genetic information, they lack any control over what their DNA is used for, which can conflict with their beliefs.54 This right to decide what one’s body and its parts are used for is a fundamental right that therefore deserves the utmost protection—protection that goes beyond monetary compensation and requires informed consent from the individual. This informed consent plays a vital role in protecting individual interests in genetic information and respecting human dignity.55

Genetic information often implicates a person’s sense of personal identity. A privacy model, which stops others from accessing this information, may help an individual maintain his or her sense of self. Individuals may lose their sense of security or autonomy if others in society can access information that is so complexly entwined with personal identity.

2. Effect on the Family

Beyond self, genetic information is unique in its ability to provide enlightening information about an individual’s family.56 There is an increasing movement to expand the definition of genetic information from individual genetic test

50 See Suter, supra note 35, at 763.
51 See id.
53 Id. at 125-26.
54 Id. at 126.
55 Id.
56 Comparative Law, supra note 48, at 810.
results to include family medical history and the genetic test results of a family member. Under the expanded definition, a mother’s genetic information is also her children’s genetic information. But assigning personal control of genetic information can create complications for family members who may want access to that information or to ban its dissemination. As society embraces the inclusion of family medical history in genetic information, and states change their legal definitions of the term, regulation over control of genetic information must take family member rights into account.

Assigning a property interest in genetic data may create a complicated realm of dual ownership of certain medical information. Property law envisages the possibility of joint ownership in goods, real estate, copyright, and other realms of possession. For example, easements or licenses provide certain individuals with the right to use another’s private property. Thus, some analysts argue that a property framework is an effective model for handling joint genetic information. But joint ownership may create difficulties for family members. For example, if there is a dispute about what to do with a jointly owned piece of property, such as a house, the common legal recourse is to sell the property and then split the profits among all the joint owners. This, of course, is not a practical framework for genetic information. Ownership in genetic data can more appropriately be analogized to joint licensing under copyright law. However, this is not an ideal framework for genetic information among family members either. Under joint authorship, for example, an author can often give license to third parties to use the work.

This does not necessarily play out smoothly in a situation regarding genetic information. Imagine, for example, a politician with a family history of Alzheimer’s running for office. A newspaper columnist wants to write an exposé about the politician, but the Alzheimer’s information is only known within the family. Under joint ownership, a brother could sell his portion of the genetic information to the author for publication without permission from the politician. The politician would have no recourse, even though she is arguably the target for the information and deeply connected to the

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57 See supra Part I.B.
58 Weeden, supra note 10, at 653.
59 Comparative Law, supra note 48 at 816.
60 Id. at 815 (discussing the multiple stakeholders involved in privacy interests of genetic information and the complexities that the law must address).
genetic information of her brother. Therefore, while a property model envisions joint ownership possibilities, it does not necessarily address all concerns of individuals because it does not protect the privacy of the data or who the data is given to.

Other analysts have suggested that control of genetic information in the medical field should be seen as a “joint account model” rather than as an individualized notion. Under this model, genetic information of one individual would be made available to all family members unless there are compelling reasons not to do so. While this may seem at odds with the individualized privacy rights model entrenched in the system, this concept is enshrined in the mainstay of United States health privacy law: the Health Insurance Portability and Accountability Act. Although it is a widely unacknowledged provision, the Preamble to the privacy rule of HIPAA notes that medical information can be disclosed without violating HIPAA, even for the treatment of another individual—not the individual whose medical information is being disclosed. The U.S. Department of Health and Human Services notes that this can be helpful when a family member is deceased and another family member could benefit from medical information for their own treatment. This exception within HIPAA could have huge implications in the field of genetic privacy and shows that the federal government already predicts a framework where the health privacy of an individual is not absolute when it comes to the familial unit.

Courts have also grappled with joint privacy interests among family members. The cases have varied in addressing issues of privacy among individuals; however a joint right of privacy is not an absolutely foreign concept to United States courts. In Vescovo v. New Way Enters, a daughter sued for invasion of privacy because her mother had placed a lewd classified advertisement in the paper. The court held that this invaded the daughter’s right to privacy when men, in response to the ad, came to the house she and her mother shared. In

61 See Weeden, supra note 10, at 653, (citing Who Should Genetic Information Belong To?, HEALTH & MED. WK. (Aug. 9, 2004)).
62 See Weeden, supra note 10, at n.181.
65 Vescovo v. New Way Enters., Ltd., 130 Cal. Rptr. 86, 89 (Ct. App. 1976); see also Comparative Law, supra note 48, at 815-16.
other circumstances, however, United States courts have generally not “impose[d] a duty of confidentiality [in] interpersonal relationships.”

In the context of genetics, there has been some movement by courts to require healthcare professionals to disclose medical information in the context of hereditary disease. For example, in Safer v. The Estate of Pack, a father was treated by a doctor for colon polyps and eventually passed away due to colon cancer when the patient’s daughter, the plaintiff, was ten. Thirty-six years later, the daughter experienced abdominal pain and was eventually diagnosed with multiple polyposis. She sued her father’s doctor for failure to warn her of the hereditary nature of the illness. The Superior Court of New Jersey held that a physician has a duty to warn a patient’s immediate family members who are at risk of avoidable harm from genetically transmissible conditions. This case shows that courts could move toward a model where certain third parties have a duty to warn and breach individual privacy rights where a disease has known hereditary causes.

If we return to the example of the politician above, under a privacy rights model we see that there are difficulties as well. The newspaper columnist would have a harder time arguing that the brother got informed consent to disclose the information because it violates the politician’s privacy rights and its value is tied to the politician. Thus, a privacy model may better protect the interests of an individual and allow him or her to avoid stigmatization and exploitation.

The line becomes more blurred in other circumstances. For example, imagine a situation where a doctor speaks to a local Boy Scout group, with permission and informed consent of a patient, about the patient’s family history of Alzheimer’s disease. The doctor’s talk is meant to teach the group about heredity diseases. But if the patient’s cousin is connected to the group, then the doctor has just shared the cousin’s information as well. This situation would also pose problems under a property rights model because the patient could give the doctor permission to use the data in the same manner as under a privacy model.

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68 Id.
3. Consequences for Society

In the aggregate, genetic information also has implications for society as a whole. Researchers use the combined genetic information of many individuals to study the genetic mutations associated with certain diseases or traits. Without vital access to the genetic information of many individuals, researchers will not be able to properly compute trends and connections between proteins, DNA, and diseases. Due to this global benefit, some argue that genetic information should be owned by society as a whole. Proponents of this theory note that the public should have access to genetic information because public money funded the Human Genome Project that created value in genetic information in the first place. While it is very difficult to simultaneously balance privacy or property interests for both individuals and society as a whole, it is important to consider how genetic research would be implicated by having a personal property interest, a personal privacy interest, or an altogether different interest in genetic information.

There is an overarching policy argument in genetic rights legislation regarding the need to encourage individual participation in genetic research. For example, Congress passed GINA to ease individual fear of genetic discrimination and therefore promote participation in genetic testing and research. Similarly, property interests in genetic materials can incentivize patient participation because patients can bargain for pecuniary reimbursement.

Conversely, the current property rights regime may discourage individual participation in research because researchers are not required to consider a donor’s rights when using his or her cells. A substantial amount of tissue used in biotechnology research has been obtained without paying compensation, and even without informing the cell donors that their cells can potentially generate economic returns. Furthermore, if individuals are given property rights in their

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70 Id.
71 See id.
73 Lin, supra note 10, at 229.
74 See Gitter, supra note 42, at 280.
75 See id. at 270-71 (citing Julia D. Mahoney, The Market for Human Tissue, 86 VA. L. REV. 163, 182 (2000)).
cells, researchers may be hampered if they are required to follow the chain of title in each piece of genetic material they obtain and if they are fearful of liability for mistakes.76

This potential negative effect on research may be overstated. Some authors argue that recognizing a property interest in an individual’s genetic materials may, in fact, have a positive effect on research by providing individuals with an incentive to donate information.77 Generally, when individuals are not compensated or are not given a small payment for a good that they provide, they will be less willing to provide that good, whether or not providing it places a high burden on them, or even any burden at all.

Despite the argument that the possibility for monetary compensation will encourage participation in genetic research, this may not hold true for both genetic material and genetic information. Some have argued that while a property interest in physical genetic material can promote research, a property interest in genetic information that stems from this material can actually hinder research because researchers would not be able to fully utilize the information in public datasets.78

Overall, both a privacy model and a property model could stymie essential public health research about the genetic links to disease. If research is hindered, this could slow the public health benefits of genomic advances.

E. Effect on Enforcement and Front-End Protections

Choosing either a property or a privacy model for protecting genetic information changes how an individual can enforce violations of those rights. Laws that merely establish a privacy right against the release of genetic information to employers and insurance companies arguably provide less protection than laws that give individuals a property right in their genetic information.79 In states that grant a privacy interest, people “have some rights in relation to the cells of their body . . . . [T]hose rights, however, generally are grounded in notions of the fiduciary duty that a doctor owes to a patient and are frequently centered on the doctor’s obligation to obtain

76 See id., at 280.
77 See Hildebrand & Klosek, supra note 30.
78 Rodwin, supra note 32. Note, however, that Rodwin is not speaking of individual ownership of their genetic information, but of private database ownership.
79 See Weeden, supra note 10, at 628.
informed consent.” Additionally, because property rights are grounded in the Constitution and privacy rights are grounded in common law torts, some argue that this puts privacy rights on “weak ground.” Un fortunately, an action against a physician for violation of his or her fiduciary duty may not be a sufficient deterrent for doctors to protect their patients’ cells and the genetic information contained within.

These proponents argue that a property right is stronger because of its Constitutional basis and that patients therefore may be able to better enforce any potential violations. Property interests may be beneficial in cases like Moore v. U.C. Regents of the University of California, where a patient brought suit against his doctor to recover money the doctor earned using the patient’s genetic material, but did not share any profits with the patient. However, the privacy framework may be more adept at preventing some of the unwanted harms from the outset. In the case of genetic information, much of the concern stems from preventing the information from being released in the first place. Privacy is a stronger preventive framework, but is not as strong in enforcement. Once an individual’s genetic information has been leaked, compensation for a violation of privacy rights is likely insufficient, especially if the individual loses his or her job or is unable to obtain health insurance. Therefore, in order to best protect individual concerns, it is important to consider not only which framework is the strongest for enforcement, but also which framework is best for prevention. This is especially true because many individuals, unfortunately, do not have the resources to file a civil court case even if their rights were violated under either a property or privacy model.

III. BUILDING THE FRAMEWORK: AN EXAMINATION OF STATE EFFORTS TO DATE

A. Need for Broad Coverage

While there has been some movement at the state level to legislate regarding rights to genetic information, most of these efforts have been narrowly focused. For the most part,

See Feldman, supra note 45, at 1380.

Comparative Law, supra note 48, at 817.

793 P.2d 479 (Cal. 1990). In Moore, a doctor turned the cell line of a patient undergoing treatment for hairy cell leukemia into a commercialized line—without the patient receiving monetary benefit. Id.
states have genetic privacy legislation related to health insurance and employment—just as GINA only covers these realms at the federal level. These laws, therefore, leave a gap for entities outside of the health insurance and employment arena that might be interested in obtaining an individual’s genetic information. While health insurance and employment are certainly important areas, genetic progress implicates broader concerns such as education, banks, government entities, biobanks, restaurants, and more. For example, in 2012 a student at Jordan Middle School in Palo Alto, California was required to transfer schools because he had the genetic mutation for cystic fibrosis. The student was not diagnosed with the disease, but given his genetic make-up, the school felt that he may be a health risk to two other students who were diagnosed with cystic fibrosis. Although he was allowed to return to school after an appeal by his parents, this example shows the potential for use of genetic information in realms outside of insurance and employment. To date, however, most states have limited genetic information legislation to only those two arenas. Forty-seven states and the District of Columbia have genetic information legislation that pertains to employment or insurances only, while three states—North Dakota, Mississippi, and Pennsylvania—have no regulations at all.

Nineteen states have genetic information statutes that are broader than just health insurance and employment and extend to cover life, long-term care, or disability insurances. Two states have limited scope statutes regulating areas beyond only employment and insurance. Arkansas, for example, has the Genetic Research Studies Nondisclosure Act, which prohibits disclosure of tissue samples in genetics research only if the samples have been made anonymous or if that patient has given informed consent. This law does not explicitly address whether the data that stems from the tissue or blood samples are similarly

84 Roberts, supra note 49, at 648.
86 Id.
87 See infra Appendix, Table 1.
88 See infra Appendix, Table 1.
89 Ark. Code Ann. § 20-35-103 (2001); Note Arkansas is not included in the table as a state with regulation since only the physical specimen, not the DNA or information is regulated, see infra Appendix, Table 1.
protected. Similarly, Texas state law covers employment and insurance, but also forbids genetic discrimination in licensing.\footnote{TEX. OCC. CODE ANN. § 58.051 (West 2003).}

Several states, however, have broad reaching statutes regarding genetic rights. The next section will examine these statutes and examine which choose a property interest and which opt for a privacy interest.

B. Broad Coverage through a Property Interest

Five states—Alaska, Colorado, Georgia, Louisiana, and Florida—have passed legislation that provides individuals with a property interest in their genetic information, although other states have proposed legislation in this area.\footnote{See, e.g., Jennifer K. Wagner & Dan Vorhaus, \textit{On Genetic Rights and States: A Look at South Dakota and Around the U.S.}, GENOMICS L. REP. (Mar. 20, 2012), www.genomicslawreport.com/index.php/2012/03/20/on-genetic-rights-and-states-a-look-at-south-dakota-and-around-the-u-s/; \textit{See infra} Appendix, Table 1.} Overall, the legislation among these states follows similar patterns. First, these statutes tend to cover genetic materials or limited genetic information. If they cover genetic information at all, it is the information that derives specifically from a genetic test, not broad genetic information such as family history.\footnote{See, e.g., COLO. REV. STAT. ANN. § 10-3-1104.7(1) (2010).} Therefore, most of these states do not raise questions of joint ownership of genetic information, assuming they are read narrowly to only pertain to the genetic test results of the individual being tested. Second, these statutes provide exemptions for specific areas of genetic information collection.

In Alaska, “a DNA sample and the results of a DNA analysis performed on the sample are the exclusive property of the person sampled or analyzed.”\footnote{ALASKA STAT. § 18.13.010(a) (2004).} The law requires written, informed consent for the collection, analysis, retention, or disclosure of information, with exceptions for law enforcement biobanks, paternity, newborn screenings, and emergency medical treatment.\footnote{Id.}

Colorado’s provisions are quite sweeping and declare that “genetic information is the unique property of the individual to whom the information pertains,” although there are exceptions to the confidentiality requirements of the information for use in law enforcement, research (if the information is anonymous), paternity suits, and public health.\footnote{COLO. REV. STAT. ANN. § 10-3-1104.7(1)(a).}
Georgia’s law also uses Colorado’s “unique property” language, with exceptions for law enforcement and anonymous research.96 The law is housed in the insurance section of the Georgia code and certain insurances, such as life, disability, and Medicare supplemental plans, are exempt from the genetic testing chapter.97 Therefore, it is unlikely that Georgia’s law would apply outside the insurance context as a result of the law’s location in the code.

Louisiana’s legislation in this area is also housed under the insurance code and states that “[a]n insured’s or enrollee’s genetic information is the property of the insured or enrollee.”98 Under the law, authorization is required for anyone else to retain genetic information, unless it is for a criminal investigation or to determine paternity.99 The statute defines genetic information broadly to include genetic test results of both the individual and family members, as well as manifested diseases of family members.100 Due to the sweeping definition of genetic information under Louisiana law, this is one state where seemingly innocuous and routine events could violate the law. For example, the legislation states that “no person shall retain an insured’s or enrollee’s genetic information without first obtaining authorization from the insured, enrollee, or their representative” and person is defined to “include a family, corporation, partnership, association, joint venture, government, governmental subdivision or agency, and any other legal or commercial entity.”101 Under the broadest reading of this, a healthcare professional could not store information about a mother in her medical records without getting authorization from her children and other family members or without violating the family member’s property interest. This expansive reading is unlikely given that the rules are contained in the insurance code and speak directly to the genetic information of the insured or enrollee. Thus, although “person” is defined very broadly, Louisiana’s law most likely is much narrower and only covers the insurance context. As a result, the strong and important property rights regarding individuals’ genetic information in Louisiana are not as powerful as needed because genetic rights implicate other areas beyond insurance.

97 Id. § 33-54-7.
99 Id.
100 Id. § 22:1023 (A)(8).
101 Id. §§ 22:1023 (A)(13), (E).
The legislation passed in Florida states that “results of such DNA analysis . . . are the exclusive property of the person tested” and must remain confidential without the consent of the person tested except in the case of law enforcement biobanks and paternity testing. Florida’s law is the only one of the five statutes that has been specifically tested in a court, although the ruling is limited as it was not in the highest court in the state. In *Doe v. Suntrust Bank*, a plaintiff brought suit to determine the identity of a deceased man’s children in order to properly distribute the man’s trust among his descendants. Doe, the decedent, had two known children, and two alleged children. The trial court ordered the known children of Doe to submit to DNA testing to assist in the determination of the putative children’s parentage. The legitimate children relied upon Florida’s code to argue that they could not be compelled to provide genetic data to the court without informed consent. There is an exception in the Florida statute for paternity, but this exception only applies to the testing of “the child, mother, and alleged fathers,” not to alleged siblings. In its opinion on the motion to quash decision, the Second District Court of Appeal of Florida held that

> the primary purpose of the statute is to protect individuals who undergo DNA analysis by requiring informed consent before the analysis is performed, by providing confidentiality for the results, including exempting the results from disclosure as a public record, by providing control over how the results are disclosed, and by requiring notification that the analysis was performed and how it was used.

Nevertheless, the court also noted that the exceptions listed in the statute are not the only times that a court can order an individual to submit to a genetic test.

The dissent in *Suntrust* argues that the court’s opinion devalues the privacy interest in one’s DNA composition and undermines the legislative intent in § 760.40. “The majority, under the guise of discovery rules, would allow circuit courts to order DNA testing if the testing is arguably relevant to the pending matter, thereby ignoring the legislative determination

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103 Doe v. Suntrust Bank, 32 So. 3d 3d at 133, 135 (Fla. Dist. Ct. App. 2010), appeal denied, 46 So. 3d 47 (Fla. 2010).
104 *Id.* at 135.
105 *Id.* at 137.
107 *Suntrust*, 32 So. 3d at 138.
108 *Id.*
protecting an individual’s privacy rights to his or her own DNA.”

This difference between the majority and dissenting opinions illustrates not just the difficulty of writing comprehensive legislation surrounding genetic rights, but also the difficulties in court enforcement.

Although *Suntrust* raises questions about whether DNA testing falls within one of the exceptions to genetic testing, it did not specifically address the children’s property right in the genetic information. Thus, across all states with a genetic property model, this right remains untested in the courts.

C. Broad Coverage through a Privacy Interest

There is more variation among states that focus upon a privacy interest than those that focus on a property model. As mentioned above, one reason for this is that some of the privacy laws tend to be narrow and focus only on employment and insurance, but even among broader state laws, there is greater variation. Ten states have generally broad privacy-based laws regarding individual rights to genetic information: New Jersey, Delaware, Minnesota, Illinois, Iowa, New Hampshire, New Mexico, New York, Oregon, and South Dakota. These state laws cover broader privacy rights of individuals and tend to establish rules for the collection, retention, and disclosure of genetic information. These laws generally include informed consent provisions, although the nature of the informed consent is altered depending on the state. As with the property states, these states also incorporate areas of exceptions into the law.

New Jersey’s law—the Genetic Privacy Act—had one of the most interesting journeys through the legislative process. The bill, as originally passed by the state legislature, created a property right in genetic information; however Governor Whitman vetoed the bill because “the creation of a new statutory property right could lead to a proliferation of litigation in New Jersey—litigation that could have a chilling

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109 Id. at 143.
110 In the analysis of state laws, statutes that applied to limited circumstances, such as in the family code for paternity testing, or to employment or insurance only were not included. This section focuses on some of the states whose statutes may have broader implications.
111 See supra Part III.A.
112 See infra Appendix, Table 1; Nebraska is discussed below, but is not included in the total count because the provision is limited to physicians and therefore does not count as comprehensive.
effect on scientific research.”113 The final bill signed into law was narrower, but is still considered one of the earliest broad genetic information laws to be passed.114 Under the codified Genetic Privacy Act, genetic information cannot be collected, retained, or disclosed without authorization from the individual, although there are exceptions for anonymous research and other categories.115 The law has been heralded as a model for other states, and most other state laws focusing on genetic privacy in broader categories have followed New Jersey’s example to regulate genetic information at multiple stages—collection, retention, and disclosure.

Delaware prohibits, with some exceptions, obtaining genetic information from an individual without obtaining informed consent.116 Delaware’s definition of genetic information does not explicitly include family medical history, but it does not explicitly exclude that information either.117 Therefore, a broad reading of the law would require informed consent to gather family history; however, a strict reading of the law only requires informed consent when performing a genetic test. Delaware’s statute is also notable because it requires genetic samples to be destroyed promptly after use unless retention is necessary for criminal proceedings, authorized by court order, authorized by the individual, or anonymized for use in research.118

Minnesota, Illinois, and Iowa are similar in that genetic information may only be collected, used, and stored in the manner for which an individual has given written informed consent.119 Additionally, in Minnesota, written informed consent regarding dissemination of genetic information is only valid for a maximum of one year, but a lesser period can be specified in the consent agreement.120 Therefore, after the period of informed consent had expired, healthcare professionals, researchers, and other actors would have to obtain informed consent again to disseminate genetic information to a third party.

New Hampshire also requires written informed consent to perform a genetic test, except for a few limited situations, including...
paternity, newborn testing, and criminal investigations.\textsuperscript{121} The information cannot be distributed to anybody not approved of in writing, although there is an exception for disclosure by a physician within the medical practice or hospital.\textsuperscript{122}

New Mexico, like New Hampshire, requires informed and written consent to obtain and retain genetic information, with exceptions for the original medical records of patients.\textsuperscript{123} New Mexico’s law also has a provision similar to Delaware’s that genetic information must be destroyed upon request of the individual, with some exceptions.\textsuperscript{124}

New York law is similar with regard to the requirement for informed consent for collection, retention, and disclosure; however, there are some unique provisions under New York law.\textsuperscript{125} For example, one provision states that

\begin{quote}
no person who lawfully possesses information derived from a genetic test on a biological sample from an individual shall incorporate such information into the records of a non-consenting individual who may be genetically related to the tested individual; nor shall any inferences be drawn, used, or communicated regarding the possible genetic status of the non-consenting individual.\textsuperscript{126}
\end{quote}

However, this provision essentially terminates at death, because genetic testing may be performed on deceased individuals if informed consent is obtained from next-of-kin.\textsuperscript{127} These provisions have immense implications for how family members can use their own genetic information—family medical history—in their personal healthcare.

Oregon has a provision similar to New York when the genetic information of a deceased person is in question. Oregon law requires informed consent to obtain, retain, and disclose genetic information.\textsuperscript{128} There is, however, an exception to the rule for obtaining genetic information when it is “for the purpose of furnishing genetic information relating to a decedent for medical diagnosis of blood relatives of the decedent.”\textsuperscript{129} Unlike New York’s version of this provision, informed consent of the next-of-kin is not required in Oregon.

\begin{footnotes}
\textsuperscript{121} N.H. REV. STAT. ANN. § 141-H:2 (2012).
\textsuperscript{123} N.M. STAT. ANN. § 24-21-3(A) (West 1998).
\textsuperscript{124} Id. § 24-21-5(B).
\textsuperscript{125} N.Y. CIV. RIGHTS LAW § 79-l (McKinney 2012).
\textsuperscript{126} Id. § 79-l (3)(b).
\textsuperscript{127} Id. § 79-l (11).
\textsuperscript{128} Or. REV. STAT. ANN. § 192.531(1) (West 2009).
\textsuperscript{129} Id. § 192.531(1)(d).
\end{footnotes}
Finally, South Dakota and Nebraska have requirements to obtain informed consent prior to genetic testing.\[130\] Nebraska limits the requirement to physicians, but has an interesting provision whereby properly obtained informed consent is a bar on a civil suit against the physician for failure to inform.\[131\]

Overall, the states that follow a privacy model focus on individual control of genetic information, specifically regarding collection, storage, and dissemination of genetic information. Most of these state laws apply broadly across populations, but each includes exceptions for various reasons.

D. Common Exceptions to the Rule

Across the states, exceptions to genetics rights legislation continue to emerge—both in a privacy and a property model. It is important to examine these exceptions to see why these areas should potentially fall under different rules. Each of these exceptions are covered in full articles themselves.\[132\] This article argues that given the complexity of each of these areas, they should be exempted from this model state legislation. Given their unshakable implications for individual rights and privacy, states should address each of these in turn to truly establish comprehensive genetic rights for citizens. However, it is beyond the scope of this article to recommend model laws for these areas. Instead, this section gives a brief primer on the issues to highlight the complexities and illustrate why the exceptions exist.

1. Newborn Screenings

Most babies in hospitals are required to go through this common routine: “a small prick to the heel and a few drops of

\[130\] S.D. CODIFIED LAWS § 34-14-22 (2013); NEB. REV. STAT. ANN. § 71-551 (West 2007).

\[131\] NEB. REV. STAT. ANN. § 71-551(4).

blood collected on a piece of paper.” The tests done on this blood sample are part of one of the nationwide Newborn Screening (NBS) programs. Each state tests newborns for a number of genetic conditions and disorders. The number and type of tests vary among the states. One example of a common newborn screening measure is the test for phenylketonuria (PKU). This test checks whether a baby can process phenylalanine, an amino acid found naturally in many foods containing protein. If it cannot, the phenylalanine will build up in the body and can cause brain damage. If caught early, PKU can be treated through simple dietary changes. In this way, NBS programs help detect otherwise undiagnosed genetic disorders, but they also do much more. In many cases, there is a likelihood that a baby’s blood sample, called a bloodspot, will sit in a biobank where scientific researchers may be granted access to these samples.

One of the salient problems with NBS programs is their lack of regulations. Most NBS programs do not have a formalized consent process; only Maryland, Wyoming, and the District of Columbia require informed consent from the parents. Most of the other states use an opt-out form of consent, which “assumes that unless the parents specifically ask for the bloodspot to be destroyed, they have consented to the continued storage and presumed use of those bloodspots in research studies approved by the state.” This can be problematic because parents, who would not have consented to storage of their child’s bloodspot, may not be aware that they need opt out. “The mandatory data collection under opt-out programs and potential use of newborn samples in later research implicate a myriad of legal and ethical issues, particularly for programs with no requirements for any parental education regarding the screening program.”

Some argue that states should have the burden of ensuring that parents have given the state consent to have

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133 D’Arminio, supra note 132, at 753.
136 D’Arminio, supra note 132, at 753-54.
137 Id. at 754 n.7.
138 Id. at 759.
139 Rachel L. Schweers, Note, Newborn Screening Programs: How Do We Best Protect Privacy Rights While Ensuring Optimal Newborn Health?, 61 DEPAUL L. REV. 869, 870 (2012) (footnote omitted).
their child’s information.140 States argue that consent is not required because NBS involves a public health issue, but when the state’s interest in identifying the disease no longer exists—either because the child does not have a disease or because the child has been treated—the state’s only interest with the DNA is for research purposes.141 Opt-in programs can be beneficial because they respect parents’ and patients’ right to privacy and their choice in medical treatment and care, require physicians to educate their patients about the available options, and may result in greater research use of the samples currently available.142

Statutory guidelines are necessary to safeguard the privacy rights of newborns. One possible consequence of not protecting newborns’ privacy and not requiring informed consent is that parents may opt out of screening their children. “This prevents their children from [receiving] the diagnosis and lifesaving treatment they may need, and the state’s public health interest is no longer being met.”143 Given the complications of balancing the privacy interests of newborns and families with the public interest in decreasing the number of children suffering or dying from genetic conditions such as PKU, this area should be addressed with specific legislation.

2. Law Enforcement Biobanks

Another common exception in genetics rights legislation relates to the question: to what extent should DNA sampling be used by law enforcement? Genetic analysis can be a powerful tool for law enforcement and criminal courts because DNA profiling serves as a more reliable form of identification than fingerprinting and matches individuals to hair, skin cells, or other cells containing DNA at the scene of a crime. As such, many law enforcement agencies at the state and federal levels have begun to collect DNA samples in biobanks. This allows investigators to cross check evidence from a wide variety of crimes with DNA samples within the biobank. Due to the ability for these biobanks to be such powerful tools for law enforcement, the laws governing DNA sampling in the criminal context has been rapidly expanding. For example, Virginia initially required only certain sex offenders and certain violent

140 D’Arminio, supra note 132, at 759.
141 Id. at 760.
142 Schweers, supra note 139, at 872-73 & n.23.
143 D’Arminio, supra note 132, at 760.
felons to provide DNA samples for the state’s DNA biobank.\textsuperscript{144} But within a year, the law was expanded so that all newly-convicted felons must provide DNA samples for the state DNA biobank and that all felons in Virginia prisons must provide DNA samples upon their release.\textsuperscript{145} Other states that require DNA samples from all convicted felons, violent or non-violent, include Alabama, New Mexico, Virginia, and Wyoming.\textsuperscript{146}

Felons are not the only ones at risk of having their DNA samples collected. By simply being arrested, an individual may be required to provide his or her DNA sample. In California, individuals arrested on felony charges are required to provide a DNA sample for analysis and inclusion in a biobank.\textsuperscript{147} DNA databases not only reveal genetic information about the individual who has DNA on file, but also information about his or her close relatives.\textsuperscript{148} One of the most prominent examples of this is the case of the “Grim Sleeper” in California. In 2010, the police were able to arrest a man linked to 10 murders in the Los Angeles area—dating as far back as 1985—through a familial DNA search.\textsuperscript{149} This was possible because law enforcement officers had arrested the Grim Sleeper’s son and collected his DNA sample. Standard tests revealed that his DNA partially matched DNA evidence from the unsolved murders. The partial match indicated that a family member would be the culprit.\textsuperscript{150} This example highlights one of the most controversial aspects of California’s—and other jurisdictions’—biobanking DNA collected from arrestees, not just convicted individuals. In this case, the young man may not have even committed the crime he was arrested for, but simply by being arrested he unwittingly gave the police evidence of his father’s crime. Some may argue that this also shows the benefit of the law enforcement biobanks because 10 unsolved murders were resolved and future murders were potentially thwarted. Nevertheless, policymakers should take the privacy concerns of arrestees and their family members into consideration because of these situations.

\textsuperscript{144} Hibbert, supra note 132, at 774.
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} ALA. CODE § 36-18-24 (1994); N.M. STAT. ANN. § 29-16-6 (West 2006); VA. CODE ANN. § 19.2-310.2 (2011); WYO. STAT. ANN. § 7-19-403 (2010).
\textsuperscript{147} CAL. PENAL CODE § 296(a)(2)(C) (West 2008).
\textsuperscript{148} Hibbert, supra note 132, at 782.
\textsuperscript{150} See \textit{id.}
At the federal level, law enforcement is allowed to collect DNA from arrestees without a warrant and place this information in the Combined DNA Index System (CODIS).\textsuperscript{151} If cleared of the crime, arrestees can seek expungement; however, the federal government is not required to grant such a request.\textsuperscript{152} This begs the question: why should individuals who were wrongly arrested have their DNA profile in the federal database, and why is it their responsibility to have the information removed? Some argue that DNA sampling is the next natural step to fingerprinting, but DNA sampling is very different from fingerprinting. Making DNA sampling a part of the same routine as fingerprinting is problematic. Courts have upheld arrestee DNA sampling because they reason that law enforcement has the right to be certain of the identity of the arrestee.\textsuperscript{153} But this reasoning “is undermined by the fact that there has [been no evidence] that an individual’s fingerprints can be altered,” whereas “DNA evidence can be successfully fabricated.”\textsuperscript{154} More importantly, fingerprinting is an ideal way to determine who a person is because fingerprints do not offer any other personal information.\textsuperscript{155} On the other hand, DNA samples contain all sorts of revealing information beyond that of the individual’s identity. Although some argue that the DNA that is collected for this purpose is only “junk” DNA and does not reveal medical information of individuals, this idea has been challenged.\textsuperscript{156}

Given the complexities of rules surrounding collection of genetic information for law enforcement purposes, it is important to address these concerns separately from a general genetics model. States must consider from whom DNA can be collected, how and for how long it should be stored, and what purposes the information in the biobanks can be used for.

\footnotesize
\begin{itemize}
\item \textsuperscript{151} Ashley Eiler, \textit{Arrested Development: Reforming the Federal All-Arrestee DNA Collection Statute to Comply with the Fourth Amendment}, 79 Geo. Wash. L. Rev. 1201, 1202 (2011).
\item \textsuperscript{152} \textit{Id.}
\item \textsuperscript{153} Corey Preston, \textit{Note, Faulty Foundations: How the False Analogy to Routine Fingerprinting Undermines the Argument for Arrestee DNA Sampling}, 19 Wm. & Mary Bill Rts. J. 475, 484 (2010).
\item \textsuperscript{154} \textit{Id.} at 484-85.
\item \textsuperscript{155} \textit{Id.} at 490-91.
\item \textsuperscript{156} Cory Doctorow, \textit{Court to Hear Argument on the Privacy Implications of ‘junk’ DNA Databases}, Boing Boing (Sept. 19, 2012, 7:00 AM), http://boingboing.net/2012/09/19/court-to-hear-argument-on-the.html.
\end{itemize}
3. Paternity

Many states have excluded paternity testing from statutes regarding genetic testing.\textsuperscript{157} In fact, many of the family law statutes in states have specific rules over the usage of genetic testing in the context of paternity testing.\textsuperscript{158} The use of genetic testing to determine paternity is generally less controversial than its use in law enforcement biobanks and newborn screening—likely for two main reasons. First, scientific testing to determine paternity has been occurring since the 1930s, beginning with ABO blood type testing.\textsuperscript{159} Second, given the wide availability of direct-to-consumer paternity testing,\textsuperscript{160} a person can get tested for paternity without concerns about inappropriate storage and use of genetic material attached to his or her name. There are other public policy concerns with wide availability of direct-to-consumer genetic testing;\textsuperscript{161} however, the ability to send anonymous samples often eases concerns about privacy, thus making paternity testing less controversial. Despite the minimal controversy in this area, full comprehensive legislation of genetics rights needs to ensure that there is proper regulation of genetic information use in paternity testing that meets societal goals while maintaining privacy.

4. Anonymous Data

The final common exception in state statutes for individual genetic rights is for anonymous data. In an effort to protect individuals' privacy, researchers have tried to “anonymize” data. Anonymization is a technique researchers use to protect the privacy of individuals in large databases by deleting or changing personal, identifying information.\textsuperscript{162} “Data may be anonymized by not collecting or completely removing identifiers, by aggregating data into groups and ranges and not reporting individuals' identities, or by micro-aggregating the


\textsuperscript{158} See, e.g., FLA. STAT. ANN. § 742.12 (West 2010).

\textsuperscript{159} See O'Neil Andrews, supra note 132, at 428.


\textsuperscript{162} Ohm, supra note 132, at 1701.
data into pseudocases representative of the real population.”

However, some policy analysts argue that this is not a sufficient protection because it is not difficult to “reidentify” or “deanonymize” individuals. The copious amount of information contained within DNA makes identification possible. A second strategy is to keep research participant information confidential by keeping identifying information separate from other research data and assigning a meaningless code to the research data. There would remain a “key” that could link information back to the identity of the participant, but only certain researchers would have access to the key.

Neither method—anonymization nor confidentiality—can completely guarantee privacy. Two of the most striking examples of this come from a recent study where researchers identified men in an anonymous gene registry based on publicly available information, and a computer science professor identifying the “anonymous” medical records of the governor of Massachusetts through publicly available information. Additionally, even if individual anonymity is somewhat protected, biobank data can identify members of discrete populations. This can be extremely problematic when the collection of data deals with highly sensitive information, such as HIV infection, mental illness, or alcoholism.

Many states that have laws granting a privacy or property interest in genetic information specifically exempt anonymous data from the protections. But given the inability to make genetic information completely anonymous in research, states should not include anonymous data as an exception.

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165 Henry T. Greely, The Uneasy Ethical and Legal Underpinnings of Large-Scale Genomic Biobanks, 8 ANNU. REV. GENOMICS HUM. GENET. 343, 349 (2007).
166 Id.; see also Woodage, supra note 66, at 703-04.
168 Greely, supra note 165, at 352.
170 Id. at 521.
171 While many states specifically exempt anonymous data from genetic rights statutes, some states have taken steps to try to ensure the privacy rights of individuals of anonymized data. For example, in Oregon, the Oregon Privacy Act requires someone to notify patients that their tissue may be used for anonymous genetic research. See Ken M. Gatter, Genetic Information and the Importance of Context: Implications for the
Thus, genetic rights protections for genetic information should include both general genetic information and anonymized genetic information. The next section outlines the ideal model for this legislation.

IV. DETERMINING THE IDEAL: ESSENTIAL COMPONENTS OF THE STATE MODEL

A. Dangers of Statutes that are Overbroad

Although a broad individual interest in genetic information is an important right—especially given the personal and familial nature of genetic information—many of the current laws end up being so broad as to be unworkable in some circumstances. There are two main concerns with overbroad laws in this area which may inhibit free speech and chill potential research. First, if not carefully written, legislation can unintentionally result in making certain common activities illegal. For example, states that have made disclosure of genetic test results illegal without written informed consent from the individual potentially make some journalism unlawful. In 2008, several news outlets published stories about actress Christina Applegate’s cancer diagnosis and her decision to get a double mastectomy given that she carries the BRCA-1 mutation and had a higher-risk of developing cancer again in the future.172 These news outlets would have violated multiple state laws assuming that they did not get informed consent from Ms. Applegate that met the legal requirements in each state—even though Ms. Applegate is open about her BRCA status and has started the Right Action for Women foundation, an organization that provides high-risk women with access to breast screenings.173

As states begin to incorporate a broader definition of genetic information into their laws, the concern over disclosure of information, leading to the breadth of laws in this area, will be somewhat exacerbated. For example, in California, the Genetic Information Privacy Act has been introduced in the

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173 In fact, this article may violate a number of state laws by disclosing her genetic status, helping to show how truly broad these restrictions can be.
state senate. This proposed legislation includes an expanded definition of genetic information and requires written informed consent to obtain, analyze, or disclose genetic information. Thus, under this law, for example, writing about how President Obama’s mother had ovarian cancer could be a violation. At the broadest level, telling a coworker that a friend’s father has high blood pressure would be a violation of the law unless written informed consent was first obtained from the friend and his father. Therefore, under both examples of broad interpretations of the law, there may be violations that were not meant to be legislated by the states. Yet these laws still provide important and essential protections for individuals in a growing area of privacy: The solution would not be simply to not pass these laws, but to carefully word and tailor protections necessary to avoid these expansive violations.

Second, there is a concern that overbroad laws will hinder scientific innovation and research. In both the property and privacy models, there is potential to obstruct important public health research if scientists have to follow a chain of title for genetic information or have to get informed consent for each new research protocol. Therefore, because genetic information in the aggregate can have immense societal and public health implications, it is important to strongly consider the implications on research when establishing the laws.

B. Addressing the Concerns

Current state law genetic information privacy and property models tend to be overbroad in their protections. Nevertheless, these frameworks often fail to address some issues related to family disclosure of genetic information, implicate additional concerns about commodification of the self, and hinder research participation. Therefore, a different model designed to address these additional concerns is necessary.

As mentioned above, there are four main concerns for individuals in the realm of genetic rights: fear of discrimination, surreptitious genetic testing, unwanted disclosure of genetic information, and control over how personal information is used in research.

175 Id.
176 See supra Parts II.B–C.
1. Fear of Discrimination: Need for Comprehensive Ban on Discrimination

Fear of discrimination is a major concern for individuals seeking genetic testing. For many, the interest in genetic privacy stems from concerns that genetic test results will be misused. While GINA has expanded protections against genetic discrimination at the federal level, it only extends that protection in the context of employment and health insurance. Thus, individuals are not protected from discrimination at the federal level in other areas—most notably in the context of life, long-term care, and disability insurances. While the majority of literature has focused on gaps in federal law regarding life, long-term care, and disability insurances, there is also the potential for misuse of genetic information in other realms, such as education, licensing, mortgage lending, and public accommodations. Due to the broad range of areas in which genetic information can be inappropriately used, a comprehensive law protecting genetic information must include broad anti-discrimination protections.

Additionally, these laws must completely ban the use of genetic information in these realms, rather than simply regulate the use of genetic testing. Currently, some states have laws that protect against the use of genetic information in life, long-term care, and disability insurance, but these laws generally regulate how genetic information is collected and used. For example, in Maryland, a long-term care insurer can only use genetic information in coverage or premium decisions if it is based on actuarial justification. This is a common state trend to ban only “unfair” discrimination that is not based on actuarial principles. This does not, however, provide sufficient protection for individuals who have genetic predispositions to certain conditions or chronic diseases because it can effectively bar them from getting access to these insurances—having a predisposition to a disease will likely have strong actuarial justification for increased premium rates or denials. Therefore, anti-discrimination laws must be expanded to ban the use of genetic information in a variety of areas at the state level.

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177 Roberts, supra note 49, 603.
179 See id.
California is one of the first states to provide strong, comprehensive protections against genetic discrimination in a broad range of arenas. In 2011, California passed “Cal-GINA,” which protects individuals against genetic discrimination in many of these areas. As Senator Padilla, the author of the bill noted, “SB 559 [(Cal-GINA)] will include genetic information as a prohibited basis for discrimination in the areas of housing, employment, education, public accommodations, health insurance coverage, life insurance coverage, mortgage lending, and elections.” Cal-GINA amends California’s civil rights statute, the Unruh Civil Rights Act, to make genetic information a protected class. Unruh is very broad and applies to “all business establishments of every kind whatsoever.” Comprehensive legislation at the federal level or in other states must also be this broad in order to truly protect individuals from having their genetic information misused.

2. Control of Genetic Material: Banning Surreptitious Testing

Another concern for individuals seeking genetic testing revolves around unauthorized access to their genetic information. Due to the personal nature and potential misuse of genetic information, individuals often have a strong interest in keeping their genetic information private. Two major concerns stemming from this are fears that somebody may gather genetic information without an individual’s knowledge and concern about inappropriate disclosure of that information. These fears can be addressed with properly tailored legislation regarding surreptitious genetic testing and disclosure. As mentioned above, many of the current laws attempting to protect genetic privacy in this area are too broad. Therefore, the laws must be more narrowly tailored to avoid unintended consequences. This does not mean that the laws should lose their comprehensive protections—a properly tailored law can give broad protections without making innocuous behavior illegal.

The first step toward narrowly tailoring genetic privacy legislation is to explicitly make surreptitious genetic testing

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183 Unruh Civil Rights Act, CAL. CIV. CODE § 51(b) (West 2013).
184 See supra Part IV.A.
illegal. With the ever-increasing number of direct-to-consumer testing sites available, it is becoming much easier for somebody to collect another individual’s genetic material and send it to a lab for analysis.\textsuperscript{185} Testable genetic material can be pulled from strands of hair, discarded cups, or used cigarettes.\textsuperscript{186} This practice of surreptitiously testing another person’s DNA without their knowledge is not illegal in many states. In a recent survey, the Genetics and Public Policy Center found that only 10 states restrict surreptitious collection for both health and non-health related purposes.\textsuperscript{187} Other states regulate specific areas, such as health-related testing, paternity testing, and employment, but 21 states have no laws relating to surreptitious testing.\textsuperscript{188} Even among those states with laws regarding genetic testing without an individual’s knowledge, the laws may not provide strong enough protections to cover all circumstances.\textsuperscript{189}

Accordingly, a comprehensive model of genetic rights must prohibit intentionally taking or collecting an individual’s genetic material, without written informed consent, for the purpose of analyzing, disseminating, or disclosing genetic information. This portion of the model state law should explicitly deal with the collection of genetic material—not the collection of genetic information overall. As the definition of genetic information expands to include family medical history and use of genetic services, it is essential to clarify that this broad definition does not apply to the surreptitious testing portion of a model law. It is not practical to require written, informed consent each time somebody asks about a family member’s condition or about a test result.

Commentators have suggested criminalizing surreptitious genetic testing.\textsuperscript{190} A prospective criminal law should have three elements. First, the law must be broad enough to encompass collection from discarded items, such as cigarette butts, as well as direct collection of DNA samples.

\begin{itemize}
\item \textsuperscript{186} Id.
\item \textsuperscript{187} State Laws Pertaining to Surreptitious DNA Testing, GENETICS & PUB. POLY CENTER (Jan. 21, 2009), http://www.dnapolicy.org/resources/State_law_summaries_final_all_states.pdf.
\item \textsuperscript{188} Id.
\end{itemize}
through saliva, blood, or tissue. Therefore, the language of the law must be broad enough to include a ban on collecting discarded genetic material, as well as taking genetic material directly from a person. For example, New York state law bans genetic testing on a sample “taken” from an individual without informed consent. But this prohibition may not encompass all surreptitious testing because it may not apply to “abandoned” items. Second, if genetic material is collected from an individual, written, informed consent should be required. While some have argued that there should be exceptions for law enforcement and healthcare professionals, this article argues that there should only be an exception for law enforcement. Especially given the concerns about research, discussed below, there are compelling reasons why patients should have to give written, informed consent when undergoing genetic testing in the healthcare setting. Finally, the law must only ban collection of genetic information if the collectors intend to analyze or disseminate the information. This helps to tailor the law so as not to make it overly broad.

In some circumstances, intent can be difficult to prove. While protective laws are important, not every person has equal access to the judicial system and not every violation of the law is easy or possible to prove. Therefore, state laws can add additional protections that will help to thwart surreptitious testing from occurring in the first place. For example, genetic testing facilities should be prohibited from extracting genetic information from anything other than a blood sample, buccal swab, saliva test, or other generally accepted laboratory practice. This regulation would prohibit testing to be done off of discarded samples, such as drinking glasses or cigarette butts—thus making surreptitious testing more difficult to complete. As in the case of a criminal law against surreptitious testing, there should be an exception for law enforcement purposes. However, this is one area where paternity testing should not be exempt from the state comprehensive law. Surreptitious testing for parentage determinations is one of the main areas of concern for policy

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192 See, e.g., Rothstein, supra note 189, at 560-61.
193 See, e.g., Joh, supra note 190, at 691-92.
194 See infra Part IV.B.4.
195 See, e.g., Joh, supra note 190, at 690 (noting that intent is essential to avoid criminalizing the purchase of celebrity mementos that may have DNA on them when the individual has no intent to analyze the DNA).
196 See, e.g., Rothstein, supra note 189, at 575.
analysts in this arena.\textsuperscript{197} There is concern that women will test unknowing men to determine if they are the fathers of children, or men will take genetic material from children to determine whether they are their fathers. The rights of men and children to not be surreptitiously tested should remain intact. This is an area, however, where it may be appropriate to create an exception for court-ordered testing.

3. Maintenance of Privacy: Avoiding Disclosure of Genetic Information

A ban on surreptitious genetic testing alone will not provide adequate protection for the privacy rights of individuals. In addition to banning secret testing, states also need to legislate regarding disclosure of genetic information. The statute should prohibit disclosure of genetic information with the intent to harm the individual whose information was disclosed, or with the intent to give personal gain to the discloser. This requirement is especially important when genetic information includes not only test results, but an individual’s family history. A ban on surreptitious testing may help to avoid covert analysis of genetic material, but this does not preclude an individual from collecting and disclosing sensitive family history. Because family medical history has the potential to reveal information about an individual’s propensity to a disease, this information must be regulated in order to fully protect an individual.

Legislating against disclosure of genetic information has a strong basis in common law and some state tort doctrines. For example, in many states, the common law right to privacy includes both the rights to be free from intrusion upon an individual’s seclusion or solitude, and from public disclosure of embarrassing private facts.\textsuperscript{198} But common law itself does not provide sufficient enough protection in this area because it is not clear that courts will apply these principles to disclosure of genetic information.\textsuperscript{199} For purposes of comprehensive genetic rights legislation, the public disclosure of private facts should be banned. Further, the elements of this violation should be altered from the general common law definition in order to be effectively protective.

\textsuperscript{197} See, e.g., Katsanis & Javitt, supra note 185.
\textsuperscript{198} \textit{Restatement (Second) of Torts} §§ 652A-652E (1977); see also Rothstein, \textit{supra} note 189 (discussing how states have adopted pieces of the restatement).
\textsuperscript{199} Rothstein, \textit{supra} note 189, at 548-53.
First, at common law in many states, the disclosure of private facts must be embarrassing in nature.\textsuperscript{200} There are pieces of genetic information, however, that may be positive or neutral, but that an individual still maintains a desire to keep private.\textsuperscript{201} Additionally, due to the familial nature of genetic information, a neutral disclosure about one person may implicate family members. For example, if an individual tests negative for Huntington’s Disease, this is not “embarrassing” for the individual, but indicates that other family members did have the disease—hence the need to be tested. Therefore, legislation in this area should make clear that disclosure also means any private genetic information that the individual does not want disclosed—not only those that a reasonable person would find embarrassing.

Second, under the tort of disclosure of private facts, the revelation must be given to the public. Therefore, a line must be drawn that clarifies what constitutes public disclosure. If an individual gossips to two other coworkers about the genetic information of their boss, does this rise to the level of public disclosure? If a public blog that only has 10 followers publishes the family history of a local political candidate, is this sufficient to count as public disclosure? Courts have varied in interpretations of how many people it takes to constitute public disclosure.\textsuperscript{202} In order to create the most comprehensive protections at the state level, legislatures should define public disclosure broadly to include giving information to a small number of individuals.

Third, states must decide whether and how they will define the “newsworthy” or “noteworthy” exception to the public disclosure tort. Often, an individual is allowed to disclose private facts if it is of legitimate concern to the public.\textsuperscript{203} This means that it will be more difficult for a public figure to win under the disclosure law than a private individual. This exception is enshrined in First Amendment jurisprudence, and may therefore be difficult to alter. It is important to note in the law—to the extent possible—where this line may be drawn. An exception for newsworthy or noteworthy disclosure may leave a gap in protection for public individuals whose genetic information is disclosed—such as a

\textsuperscript{200} Id. at 548.
\textsuperscript{201} Id. at 551-52.
\textsuperscript{202} See id. (discussing the court split between whether disclosure to a small number of coworkers rises to the level of public disclosure).
candidate’s genetic information. Nonetheless, this model framework fixes two current problems in the realm of public figures. First, because it bans surreptitious testing, it makes it more difficult to legally gather information from the outset. Second, this law corrects the concerns about criminalizing some journalism about individuals such as Christina Applegate by tailoring the anti-disclosure laws more narrowly.

These broad changes in the tort elements should be coupled with an additional intent element. While intent can be difficult to prove in some circumstances, this addition creates an appropriate balance between allowing the free-flow of information in journalism, research, healthcare, and daily life, while protecting privacy interests of individuals. Therefore, the statutory ban on disclosure in a state comprehensive genetics bill should ban the disclosure of genetic information with the intent to harm the individual or family member or with the intent to obtain personal gain for the discloser. Including an intent requirement would avoid banning most daily conversations, but would make illegal the disclosure of genetic information to harm an individual, create sensational news, or give one individual’s private information simply to harm a family member. This ban on disclosure of all genetic information—including family history—coupled with the ban on surreptitious testing can offer comprehensive privacy of genetic information without creating overbroad privacy or property rights.

The addition of the intent requirement will make some public disclosure of private facts not actionable—even some disclosures that may be offensive or upsetting to the individual. For example, the Boy Scout example would most likely not be actionable under this model. Still, this solution creates a more desirable balance than the current state laws in this area that are overbroad and make illegal many innocuous conversations. Laws that protect every possible unwanted disclosure of genetic information will be overbroad and significantly hinder important daily activities, journalism, and research. The balance drawn between individual protection and efficiency is best when state laws ban surreptitious testing and simultaneously prohibit certain intentional disclosure of genetic information

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204 Green & Annas, supra note 26.
205 See supra Part II.D.2.

The final area of concern for many individuals in genetics rights is research data. Many individuals have their genetic material and genetic information stored in biobanks where researchers can collect data for research projects. These individuals may not even be aware that their genetic information is stored. In other situations, individuals may have given permission for their tissue sample or information to be used for one type of research, but are unaware that their data has been stored for other research in the future. Many biobanks store data in a deidentified or anonymous manner; but, as discussed above, there is no such thing as truly “anonymous” data in this arena. Due to the uniquely personal nature of genetic information, individuals may not want their information used for research that they find offensive. There are a variety of harms that can come from unwanted participation in genetic research, such as possible reidentification of “anonymous” data, objectionable uses, and harms to discrete groups.

Once an individual’s data is housed in a biobank, it is rare that a person will be contacted again to give informed consent for subsequent research. However, “information or material collected for one purpose may have tremendous value for additional purposes, particularly if analyzed by techniques not previously available.” Indeed, restricting the use of genetic material to single tests would be impractical and greatly hinder the benefits and ease of use of biobanks. In some cases, an individual has signed loose informed consent documents for the initial research that they enrolled in, but these documents do not adequately give information regarding subsequent research or the possibility of reidentification of anonymous data. In order to give individuals comprehensive rights to their genetic information, a state law must provide some amount of individual

206 See supra Part III.D.4.
207 See supra Part II.B.
208 Mark Rothstein, Is Deidentification Sufficient to Protect Health Privacy in Research? 10 AM. J. BIOETHICS 3, 5-7 (2010).
210 Greely, supra note 165, at 357.
control over research without hindering the research and public health benefits of population databases and biobanks.

Giving an individual a meaningful informed consent opportunity when genetic information is first gathered for research is an essential step toward individual control. Note, however, that this will not solve the dilemma of how to regulate the large amount of genetic information already housed in biobanks across the country. In the past, scholars in this field have suggested mechanisms such as a newsletter or specialized review board to keep individuals informed of research, especially in cases of controversial research.\(^{212}\) These systems can help to ensure continued individual involvement in research, but this article will focus on informed consent at the initial collection point.

Informed consent documents are difficult to create in a manner that will truly inform patients of future research and future uses,\(^{213}\) but, when properly conducted, informed consent ensures that individuals understand their rights regarding their genetic information. Studies have found that individuals generally view societal benefits as a positive reason to enroll in research and discrimination or abuse of information as deterrents.\(^{214}\) Thus, effective informed consent may encourage further participation in research. However, meaningful informed consent is difficult to give in this arena.

If the creation of these database resources is to be practicable, the materials and information will need to be available to investigate many diseases and many target genes. But that kind of broad availability will make it impossible for researchers to give the kind of full information about the potential risks and benefits of specific research that existing law seems to require for informed consent.\(^{215}\)

Therefore, states may need to alter the way in which informed consent is provided for research to ensure a balance between individual protection and research benefits.

Most importantly, informed consent needs to include information, not just about risks and benefits of current research, but also about potential future research. Laws regarding informed consent should apply to both research and clinical settings—both arenas may lead to future research

\(^{212}\) Greely, supra note 165, at 358.

\(^{213}\) Erika Check Hayden, A Broken Contract, 486 NAT. 312, 312 (2012).

\(^{214}\) See, e.g., Henderson et al., Great Expectations: Views of Genetic Research Participants Regarding Current and Future Genetic Studies, 10 GENETICS MED. 193 (2008).

\(^{215}\) Greely, supra note 209, at 741.
using initial sample collection. In a 1999 report, the National Bioethics Advisory Commission (NBAC) recommended that informed consent for research should be obtained separately from informed consent for clinical procedures. This article does not contradict that recommendation, as the recommendation speaks to when informed consent should be gathered, not the fact that informed consent should be collected. Comprehensive state laws should require informed consent for all initial contexts in which an individual’s genetic material and information will be used for research—whether stemming from clinical care or from direct enrollment in research.

It is impractical, for both individuals and researchers, to require new informed consent for every subsequent research protocol performed with an individual’s genetic information. But current informed consent forms do not adequately inform individuals of future research and potential risks and benefits of that research. Therefore, a balance in the middle of these extremes must be created. One option would be to allow individuals to complete an informed consent document that acts as an “advance healthcare directive” for the use of genetic material—an “advance research directive.”

In most states, advance healthcare directives have multiple sections for an individual to fill out and make decisions about their health decisions in case of incapacity. For example, the California advance healthcare directive includes parts that relate to: (1) naming a “power of attorney for healthcare,” (2) establishing individual wishes for treatment, (3) delineating guidelines for organ donation, (4) designating a primary care physician, and (5) signing the form. Informed consent documentation should be established to follow a similar model.

In particular, there should be five main sections of informed consent in an advance research directive: (1) delineating options for future research, (2) clarifying views on “anonymous” research, (3) listing family members, (4) designating a primary care physician, and (5) signing the form.

While newborn screening is often an exception to state laws in this area, informed consent in newborn screening has been increasingly in the spotlight in recent years. States considering legislation in this area may need to specifically address newborn screening informed consent. See, e.g., Hayden, supra note 213, at 312.

Greely, supra note 165, at 357.

Hayden, supra note 213, at 312.

a. **Options for Future Research**

The first section of informed consent should give individuals the space to delineate what type of research they consent to for future use of their genetic information. The NBAC suggested this concept in its 1999 report. ²²¹ For samples collected in the future, the NBAC recommended that “consent forms be developed to provide potential subjects with a sufficient number of options to help them understand clearly the nature of the decision they are about to make.” ²²² The report lists six sample options:

[1] refusing use of their biological materials in research,

[2] permitting only unidentified or unlinked use of their biological materials in research,

[3] permitting coded or identified use of their biological materials for one particular study only, with no further contact permitted to ask for permission to do further studies,

[4] permitting coded or identified use of their biological materials for one particular study only, with further contact permitted to ask for permission to do further studies,

[5] permitting coded or identified use of their biological materials for any study relating to the condition for which the sample was originally collected, with further contact allowed to seek permission for other types of studies, or

[6] permitting coded use of their biological materials for any kind of future study. ²²³

Another option would be to allow individuals to opt-in, or out, of research for a particular type of disease or condition. For example, an individual could state that his or her genetic information could be used for any research, except for research regarding Alzheimer’s disease. In that case, there would be the potential that an individual’s instructions do not clearly line up with research resulting in confusion for researchers as to whether consent was truly given. However, this potential lack of clarity also exists in the context of advance healthcare directives. No advanced method is truly perfect, but allowing for patient choice is important. Under this system researchers would at least have some guidance and individuals would have more control.

²²¹ Nat’l Bioethics Advisory Comm’n, supra note 217, at 65.

²²² Id.

²²³ Id. Two commissioners argued that the last two options should not be made available to the public. Id.
Additionally, this potential lack of clarity can be mitigated by providing some guidance to individuals. For example, some advance healthcare directives specifically give options for feeding tubes or palliative care, but also provide a free-form section for individuals to write more specific instructions. Similarly, informed consent for research could list common diseases, conditions, or behaviors that may be studied—especially controversial potential research areas such as behavioral genetics or the genetics of homosexuality—and also leave space for individuals to write in more specific instructions.

Allowing individuals this control over their genetic information will make use of biobanks more difficult for researchers. The researchers must create a system to code for individual’s desires and only use the genetic information in each project of individuals who have consented to that type of research. This creates work to create such a system, and the possibility that fewer genetic samples will be available for studies. This is still preferable to those current state laws that have the potential to make research nearly impossible by requiring new informed consent documentation for each use of genetic information. Given the uniquely personal aspect of genetic information, this system creates a fair balance between individual control and research functionality. Additionally, researchers have begun to use models like these for returning research results to participants and therefore, may be able to be modified for use at the front end research participation.

b. Anonymity

As mentioned above, there is almost no way to make genetic data both useful and truly anonymous. Therefore, informed consent documents must explain this to individuals. The procedures for how patient information will be made as anonymous as possible should be delineated. In this section, individuals will sign that they understand the limitations of the anonymity of data. If they do not want research done where anonymity cannot be guaranteed, they should be able to note this in the first section above.

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224 See supra Part III.D.4.
c. Family Members

Due to the familial nature of genetic information, individuals should have the option of designating a family member or family members to contact in the event that there are research results that could be returned, but the individual is no longer accessible. This would be similar to appointing a power of attorney for healthcare decisions, but would appoint a family designee to obtain relevant research findings.

d. Primary Care Physician

Individuals should also have the opportunity to provide the name of a primary care physician from whom to receive research results. As more biobanks are determining how to best return research results to their subjects, some individuals may decide that they do not wish to hear this information directly from the researcher. In some circumstances, individuals may prefer to have their doctor share this information with them so that they have the opportunity to ask questions and to determine next steps for clinical care. Therefore, the advance research directive should include a space to provide contact information for a primary care physician.

Other laws in the genetic arena have acknowledged the advantages of having a doctor, rather than another party, disseminate the information to the originator of genetic information. For example, in Minnesota, a life insurance company can notify an individual of genetic test results by releasing information to either the individual or their designated physician. "If the individual tested has not given written consent authorizing a physician to receive the test results, the individual must be urged, at the time that the individual is informed of the genetic test result described in this subdivision, to contact a genetic counselor or other health care professional." New Jersey, New York, Maine, and Texas all have similar provisions in their codes.

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225 It is beyond the scope of this paper to discuss returning research results and implications of duty to warn family members, but the creation of a comprehensive informed consent document provides an opportunity to address some of these concerns at the front end.


227 Id.

Allowing individuals to include a physician on their advance research directive may increase participation in research because it may help to alleviate individual fears regarding knowledge of predispositions. Speaking to a trusted physician about a test result, rather than receiving information through a researcher or computer print-out, may be more palatable to some individuals.

CONCLUSION

As the use of genetic testing rises, many states are beginning to pass legislation aimed at filling the gaps in GINA and providing comprehensive genetic rights to individuals. Comprehensive genetic rights are essential to encourage the use of testing, ensure participation in research, and strengthen individual rights in a deeply personal and familial realm. However, many state efforts to date provide overbroad property or privacy rights in genetic information and are not sufficiently tailored to create truly comprehensive rights. An article in the Genomics Law Report summarizes the trend in its review of a proposed South Dakota bill.

In under 200 words, the South Dakota bill, if passed, would (1) grant property rights to individuals in their DNA samples and genetic information, (2) prohibit surreptitious testing, (3) call into question many forensic and law enforcement uses of DNA, (4) eliminate newborn blood spot screening without explicit consent and (5) impose broadly worded informed consent requirements on all collections and uses of individual genetic data.229

Genetic rights are too complicated to fully protect with a law containing fewer than 200 words. The growing trend among states to make overbroad laws in this arena jeopardizes individual rights because it waters down the law, makes innocuous behavior illegal, and makes it harder to pass corrective legislation the second time around.

In order to provide comprehensive genetic rights for individuals, states should make broad laws that are specifically tailored to address the four major concerns of individuals in the genetic arena—fear of discrimination, surreptitious genetic testing, unwanted disclosure of genetic information, and control over how personal information is used in research. To do this, states should expand anti-discrimination laws to ban the use of genetic information in all businesses and

229 Wagner & Vorhaus, supra note 91.
government practices, prohibit surreptitious genetic testing, forbid intentional disclosure of genetic test results for personal gain or to harm an individual or family member, and create meaningful informed consent in research by creating an advance research directive for individuals whose genetic information will be used in research. Only with tailored components of a broad genetic rights bill will individuals truly be given comprehensive rights over their genetic information.
APPENDIX

OVERVIEW OF STATE LEGISLATION REGARDING GENETIC INFORMATION

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**Notes**

2. ALASKA STAT. § 21.36.480 (2009) (requiring health insurance companies to comply with GINA); ALASKA STAT. § 18.13.010(a) (2004) (creating a property interest).
5. CAL. CIV. CODE § 51(b) (West 2012); CAL. GOV'T CODE § 129986(e)(2) (West 2013).
6. COLO. REV. STAT. ANN. § 10-3-1104.7(1) (West 2010).
7. CONN. GEN. STAT. ANN. § 38a-816 (West 2012) (regulating insurance); CONN. GEN. STAT. ANN. § 46a-60 (West 2009) (regulating employment).
8. DEL. CODE ANN. 16 § 1202(a) (West 2012) (establishing a privacy interest); DEL. CODE ANN. 18 § 2317 (1998) (regulating insurance); DEL. CODE ANN. 19 § 711 (West 2013) (regulating employment).
10. FLA. STAT. ANN. § 760.40(2)(a) (West 2010); FLA. STAT. ANN. § 627.6561 (West 2011).
16. IOWA CODE ANN. § 729.6 (West 2010).
18. KY. REV. STAT. ANN. § 304.12-085(2) and (3) (West 2013) (regulating health and disability insurances).
xxii MAss. GEN. LAws ANN. ch. 151B, § 4 (West 2013) (regulating employment); MAss. GEN. LAws ANN. ch. 175, § 108H (West 2011) (regulating health insurance); id. § 108I (West 2011) (regulating disability and long-term care insurances); id. § 120E (West 2011) (regulating life insurance).

xxiii Mich. Comp. LAws ANN. § 37.1202 (West 2013) (regulating employment); Id. § 500.3407b (regulating health insurance).

xxiv M ich. COMP. LAWS ANN. § 37.1202 (West 2013) (regulating employment); Id. § 500.3407b (regulating health insurance).

xxv Ml. Comp. LAws ANN. § 37.1202 (West 2013) (regulating health insurance); Id. § 375.1306 (regulating employment).

xxvi MONT. CODE ANN. § 33-18-903 (2013) (regulating health insurance); id. § 33-18-206 (regulating life, long-term care, and disability insurance under the more narrow definition of genetic condition).

xxvii Neb. Rev. Stat. ANN. § 44-7,100 (2012) (regulating health insurance); id § 48-236 (regulating employment); id. § 71-551(6)(a) (granting a limited privacy right only in the context of physicians).

xxviii Nev. Rev. Stat. ANN. § 695C.207 (LexisNexis 2012) (regulating health insurance); id. § 613.345 (regulating employment); id. § 629.151 (requiring informed consent in the healing arts).


xxx N.J. Stat. ANN. § 17B:26-3.2 (one of several provisions regulating genetic information in health insurance); id. § 17B:30-12 (regulating life and disability insurance).


xxxvi Okla. Stat. ANN. tit. 36 § 3614.1 (West 2013) (regulating health insurance); id. § 3614.2 (regulating employment).


xxviii R.i. GEN. LAws §§ 27-18-52 (2002) (one of several provisions regulating health insurance); id. § 28-6.7-1 (regulating employment).


xxviii Wis. Stat. §§ 111.32-.335 (2010) (regulating employment); id. § 631.89 (regulating health, life, long-term care, and disability insurance).

NOTES

The Twin Perils of the al-Aulaqi Case

THE TREASON CLAUSE AND THE EQUAL PROTECTION CLAUSE

“Civis Romanus sum”1

INTRODUCTION

During March 2013, a legal question dominated the U.S. news cycle: “Does the President have the authority to use a weaponized drone to kill an American not engaged in combat on American soil?”2 This inquiry represents the paramount question in American constitutional balancing: the total deprivation of a citizen’s life, liberty, and property3 by secret,

1 In Rome, a citizen accused of any crime would need merely utter “civis Romanus sum,” “I am a Roman citizen,” to avoid judicial process as a non-citizen. See Acts 22, 27 (King James). While preaching in Damascus, the apostle Paul avoids being immediately whipped by a centurion for zealous demagoguery by asserting his citizenship and, in subsequent chapters, is afforded appellate process—all the way to Caesar. Id. at 22-28.


3 For example, the Government handling of Anwar al-Aulaqi resulted in the deprivation of: his life, by virtue of his death by droning; his liberty, e.g., by the restriction on his right to travel; and his property, by the subjection of his assets to total seizure and forfeiture (and to the disinheritance of his heir working a prohibited corruption of blood). Mark Mazzetti et al., Two-Year Manhunt Led to Killing of Awlaki in Yemen, N.Y. TIMES (Sept. 30, 2011) (describing al-Aulaqi’s droning by U.S. order and process), available at http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?pagewanted=all; see infra Part V.A.2.b (discussing the restrictions on liberty of movement by virtue of governmental lethal targeting in Yemen); Designation of ANWAR AL-AULAQI Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594, 75 Fed. Reg. 43233-01 (July 23, 2010) [hereinafter al-Aulaqi Designation]: infra Parts I.A.3 & IV.B (discussing the constitutional guarantee that a traitor’s forfeited assets will go to the traitor’s heirs).
unreviewable executive order weighted against the presidential
duty and power to defend the people from warlike assault. In
responding to this question, Attorney General Eric Holder denied
that the President had this authority to kill Americans without
process, but his response contained the seemingly innocuous
qualifier that “[the American must] not [be] engaged in
combat.” Moreover, on March 4, 2013, Holder affirmed that in
response to circumstances like the Pearl Harbor or September
11 attacks, the President may “authorize lethal force, such as a
drone strike, against a U.S. citizen on U.S. soil, and without
trial.” The distinction between when the President may and
may not so deprive a citizen’s liberty appears to hinge upon
whether the citizen is conducting a war or engaging in combat
against the United States.

While drawing this important distinction, Holder likely
was cognizant of the favorable case law on the federal power to
conduct drone strikes—case law that would almost
undoubtedly permit the unreviewable, executively ordered
droning of CIA designated terrorist suspects on U.S. soil without
trial, and that absolutely permits doing so on foreign soil.
Federal case law defines terrorist acts by enemy combatants as
“levying war [against the United States],” and declares the
lethal targeting of terrorist subjects a nonjusticiable political

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4 Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 46-47 (D.D.C. 2010) (finding that the
lethal targeting of U.S. citizen Anwar al-Aulaqi is a nonjusticiable political question).
5 U.S. CONST. art II, § 1, cl. 8; 3 (“I do solemnly swear (or affirm) that I will
faithfully execute the Office of President of the United States, and will to the best of
my Ability, preserve, protect and defend the Constitution of the United States,” and
respectively, “take care that the laws be faithfully executed.”).
6 March 7 Holder Letter, supra note 2.
7 Letter from Eric H. Holder, Attorney General to Sen. Rand Paul (Mar. 4,
8 Al-Aulaqi, 727 F. Supp. 2d at 46-47 (applying the political question
doctrine); John C. Dehn & Kevin John Heller, Debate, Targeted Killing: The Case of
9 See Al-Aulaqi, 727 F. Supp. 2d at 46-47.
10 United States v. Rahman, 189 F.3d 88, 149-60 (2d Cir. 1999) (per curiam),
cert. denied, 528 U.S. 1094 (2000); accord United States v. Augustin, 661 F.3d 1105,
1117 (11th Cir. 2011), cert. denied, 132 S. Ct. 2444 (2012); United States v. Awadallah,
349 F.3d 42, 59 (2d Cir. 2003), cert. denied; Awadallah v. United States, 543 U.S. 1056
(2005) (“The particular governmental interests at stake therefore were the indictment
and successful prosecution of terrorists whose attack, if committed by a sovereign,
would have been tantamount to war, and the discovery of the conspirators’ means,
contacts, and operations in order to forestall future attacks”); United States v.
The legal basis for this power was recently affirmed in the 2010 case *al-Aulaqi v. Obama*.

On September 30, 2011, Anwar al-Aulaqi was struck “by a barrage of Hellfire missiles” fired from a [predator] drone.” At the time, he was traveling by car on a deserted Yemeni highway with fellow U.S. citizen, and “proud” traitor, Samir Khan. The killing followed a fact-finding and a legal determination by the CIA that al-Aulaqi should die. No U.S. court ever found al-Aulaqi guilty of any violent crime.

Nevertheless, the President ordered al-Aulaqi’s killing because he was the “leader of external operations” in the terrorist organization al-Qaeda in the Arabian Peninsula (AQAP), al-Qaeda’s “most active operational affiliate.” Al-Aulaqi’s killing prompted his family to bring two federal lawsuits as representatives, *al-Aulaqi v. Obama* and *al-Aulaqi v.*

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11 Al-Aulaqi, 727 F. Supp. 2d at 46-47 (applying the political question doctrine).
12 Id. at 1.
13 Anwar’s last name has been spelled many ways, most commonly “al-Awlaki,” “Awlaki,” “al-Awlaqi,” or “al-Aulaki.” Mazzetti et al., supra note 3 (quoting Samir Khan). This note uses “al-Aulaqi” because this is how the family and the District Court for the District of Columbia spells the name. See, e.g., *Al-Aulaqi*, 727 F. Supp. 2d at 1; Complaint at ¶ 9, *Al-Aulaqi*, 727 F. Supp. 2d 1 (No. 1:10-cv-01469) [hereinafter *Al-Aulaqi* Complaint].
15 Mazzetti et al., supra note 3 (quoting Samir Khan).
17 See infra note 97 and accompanying text (describing the entirety of al-Aulaqi’s criminal record).
19 Mazzetti et al., supra note 3 (“The death of Awlaki is a major blow to Al Qaeda’s most active operational affiliate . . . [al-Aulaqi took] the lead role in planning and directing the efforts to murder innocent Americans.” (quoting Barak Obama, President, Remarks at the Swearing-In Ceremony for Chairman of the Joint Chiefs of Staff Gen. Martin E. Dempsey (Sept. 30, 2011))).
20 These lawsuits were filed by family members purporting to be the representatives of the individuals allegedly placed on the CIA’s kill list, see *Al-Aulaqi* Complaint, supra note 13, at ¶ 9 (asserting third party standing); however, the question of third-party standing to bring such challenges, like the merits of the challenge, remains open. Complaint at ¶¶ 10, 41-3, *Al-Aulaqi* v. Panetta, No. 1:12-cv-01192-RMC (D.C. Cir. 2012) [hereinafter Panetta Complaint]. The implications of third-party standing are discussed infra at Part IV.B.
Panetta. The first of these suits, **al-Aulaqi v. Obama**, sought to enjoin the CIA from placing al-Aulaqi on a “kill list.” The suit posed novel questions regarding the constitutionality of using such force against U.S. citizens overseas. **Al-Aulaqi v. Panetta** has not yet been resolved. Many scholars have questioned the Executive’s unilateral—and apparently unreviewable—power to order the targeted killing of citizens who have not been found guilty of any crime by any U.S. court.

Fear over the abuse of government power to execute citizens for capital offenses motivated the inclusion of the Treason Clause in the Constitution:

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21 See generally, e.g., **Al-Aulaqi**, 727 F. Supp. 2d 1; **Panetta** Complaint, supra note 20.

22 **Al-Aulaqi**, 727 F. Supp. 2d at 11.

23 See **Al-Aulaqi**, 727 F. Supp. 2d at 8 (“Stark, and perplexing, questions readily come to mind, including the following: How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to defendants, judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death?”); see also N.Y. Times Co. v. U.S. Dep’t of Justice, 915 F. Supp. 2d 508, 515-16 (S.D.N.Y. 2013) (“[T]he Government . . . cannot be compelled by this court of law to explain . . . the reasons why its actions do not violate the Constitution and laws of the United States. The Alice-in-Wonderland nature of this pronouncement is not lost on me; but after careful and extensive consideration, I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules—a veritable Catch-22. I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch . . . to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for its conclusion a secret.”).

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.\(^25\)

Enshrined in the Constitution is a single, necessary and sufficient definition of what acts constitute treason. The word “traitor” is a powerful epithet that conjures images of historic villains like Benedict Arnold, Ephialtes,\(^26\) or Judas Iscariot. It is this animus—and the historically demonstrable potential for tyrannical abuse of a government’s power to punish treacherous wrongdoers\(^27\)—that galvanized the Founding Fathers to include the “fundamentally restrictive” Treason Clause\(^28\) and to tout it as an instrument of liberty.\(^29\)

It is, however, unclear precisely what the Treason Clause demands in a situation like al-Aulaqi’s.\(^30\) All other things equal,

\(^{25}\) U.S. CONST. art. III, § 3.


\(^{27}\) Larson, supra note 24 at 873 (quoting James Wilson) (“This punishment [execution], and the description of this crime, are the great sources of danger and persecution, on the part of government, against the citizen. Crimes against the state! and against the officers of the state! History informs us that more wrong may be done on this subject than on any other whatsoever.”); JAMES WILLARD HURST, THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS, 143 (Stanley I. Kitler, ed., 1971) (quoting Rufus King). As to animus, one merely needs to look at the statute to understand the severity society attaches to this crime. 18 U.S.C. § 2381 (2012) (codifying that traitors “shall suffer death”).

\(^{28}\) HURST, supra note 27, at 132.

\(^{29}\) See, e.g., THE FEDERALIST NO. 43 (James Madison), reprinted in PENN STATE, Electronic Classics Series, The Federalist Papers (2001) (“As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.”).

\(^{30}\) Compare, e.g., Dreyfuss, supra note 24, at 273 (“[G]uarantee of a jury trial is a protection available if the designated individual decides to avail himself of it. With regard to targeted killings, the Constitution, however, does not demand that a person who is a military threat to the United States remain at large because he is good at avoiding arrest.”), with Ramsey, supra note 24 at 869-70 (“Absent exigent circumstances, the Constitution provides a specific way for acting against U.S. citizens . . . [like al-Aulaqi]: the Treason Clause.”), and Larson, supra note 24 (arguing that the Treason Clause provides for criminal process of how U.S. citizen-enemy combatants should be treated).
the Constitution discriminates between citizens and non-citizens who levy war against the United States by affording citizens additional procedural protections beyond, and, as a constitutional due process constraint, preceding what the Fifth Amendment provides. Al-Aulaqi engaged in terrorist activities, but he was also a citizen—a citizen-terrorist. It is possible, therefore, that his actions constituted treason. It is also possible that his actions merely constituted speech protected by the First Amendment, as it is curious how a supporter of George W. Bush—who addressed a Pentagon luncheon for the Department of Defense in February 2002—could become the global leader of al Qaeda’s newest form by 2010. However, this note presumes all facts favorable to the government, in an attempt to isolate the issues of law from issues of fact.

Commentators have discussed the broad Treason Clause claim generated by the unique circumstances of the al-Aulaqi situation: the restrictive intent behind the Treason Clause means it is constitutionally appropriate to treat citizen-terrorists as traitors. However, by broadly focusing on the

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31 It is a settled matter of constitutional law that the Treason Clause applies only persons owing allegiance, a category that includes every U.S. citizen and those non-citizens who owe allegiance. See infra note 125.

32 Cf. Ex parte Quirin, 317 U.S. 1, 39 (1942) (per curiam) (finding Article III protections not “enlarge[d]” by additional amendments to the Constitution).

33 Compare U.S. Const. art. III, § 3 (providing specifically for the unique requirement of two witnesses to the same overt acts as a procedural protection), with id. at amend. V (providing for “due process” in all other crimes).

34 The use of “citizen-terrorist” throughout this note serves as shorthand for U.S. citizens conducting politically or religiously motivated war against the United States in connection with a terrorist organization. In the most convenient definition, citizen-terrorists are the class of people affected by the al-Aulaqi case based on factually similar positioning. See generally Richard H. Fallon, As-Applied and Facial Challenges and Third Party Standing, 113 Harv. L. Rev. 1321 (2000); id. at 1368 (“as-applied challenges reflect entrenched though often unarticulated presuppositions that the full meaning of a statute frequently is not obvious on the occasion of its first application, but can be left to emerge through case-by-case specification . . . .”). Portions of those notes may arguably apply to non-citizens owing allegiance, and indeed the arguments that relate solely to the Treason Clause indubitably would. This note, however, does not explore the effect of the Equal Protection Clause in the context a non-citizen-terrorists owing allegiance.

35 Jeremy Scahill, Dirty Wars: The World Is a Battlefield 36, 45 (Nation Books, 2013). For a general description of the narrative were al-Aulaqi was hounded by the government—unfairly and in violation of his rights—into finally fighting against his country, see generally id. at chs. 2, 5, 18, 23, 33, 34, 37, 38, 44, 50, 55, 57.

36 Emily C. Kendall, Guy Fawkes’s Dangerous Remedy: The Unconstitutionality of Government-Ordered Assassination Against U.S. Citizens and Its Implications For Due Process in America, 45 J. Marshall L. Rev. 1121, 1136 (2012) (arguing that “[t]he Treason Clause is the constitutionally appropriate remedy for bringing domestic terrorists to justice”); see also, e.g., Larson, supra note 24, at 863 (“The Article also argues that many terrorist actions are appropriately punished as treason, either as acts of levying war against the United States or of adhering to their
general restrictive intention, this scholarship overlooks the more basic threshold question: is it even constitutionally permissible for the Government to treat citizen-terrorists differently than traitors?

Considering the al-Aulaqi killing in conjunction with a reading of either the Treason Clause or, in most cases, the Equal Protection Clause of the Fourteenth Amendment makes clear that the answer to this question is no. The Supreme Court has consistently held that the prosecution of criminals without the procedural and substantive protections of the Treason Clause under a crime that is substantively treason, but differently named, is an unconstitutional prosecution for a constructive treason offense. Similarly, in *Skinner v. Oklahoma ex rel. Williamson*, the Supreme Court held that under the Equal Protection Clause of the Fourteenth Amendment, the Government may not “lay[] an unequal hand” on criminals who have committed “intrinsically the same . . . offense.” In that case, the Court considered a lesser right than the right to life, the right to reproduce.

In *Hamdi v. Rumsfeld*, a plurality of the Supreme Court addressed the liberty of Guantanamo detainees and held that citizen-terrorists (even those termed enemy combatants in the War on Terror) are entitled to due process. The actions considered by the Supreme Court, if committed by citizens, would be punishable as treason. Thus, there are twin perils confronting any court adjudicating a modern terrorism case where the defendant is a U.S. citizen. First, a court must avoid the temptation to draw immaterial distinctions between the constitutional definition of treason and modern statutes.
criminalizing terrorism or else it risks ignoring the prohibition against prosecuting constructive treasons. Then, it must take care to avoid the second peril of ensuring that any differential treatment of a citizen-terrorist and a traitor does not violate the Equal Protection Clause. Courts have yet to confront the second peril because every court to consider the interplay between the Treason Clause and citizen-terrorists to date has faltered at the first peril. Therefore, and based on citizenship alone, the execution of a U.S. citizen without judicial process—even for committing terrorist acts—violates the prohibitions of both the Treason Clause and the Equal Protection Clause.

In Part I, this note briefly summarizes jurisprudence surrounding the two constitutional provisions relevant to the issues raised by al-Aulaqi: the Treason Clause and the Equal Protection Clause. Part II reviews the relevant facts of the al-Aulaqi case. Part III examines the elements of the crimes of treason by levying war and terrorism, and establishes that when committed by a citizen, treason by levying war and terrorism are essentially the same offense with only immaterial and legally inconsequential variances. In Part IV, this note discusses the first peril of al-Aulaqi: that the law of treason precludes the Government from charging citizens with terrorism offenses that are not materially different from treason, yet fails to provide the constitutional protections afforded to traitors. Part V discusses the second peril: that denying citizen-terrorists the same constitutional protections as traitors violates the Equal Protection Clause and would therefore subject the Government’s actions in al-Aulaqi’s case to strict scrutiny review. Finally, this note concludes that the Treason Clause precludes the Executive from issuing kill orders against citizen-terrorists without being processed by an Article III court. It further suggests a specific remedy.

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43 See infra Part V.A.
44 See infra Part V.B.
I. TWIN PERILS OF THE AL-AULAQI CASE

THE UNITED STATES

A. The Law of Treason

1. The Treason Clause and the Rule Against Constructive Treasons

American treason law borrows heavily from English treason law, as evinced by the influence of the then-prevailing English treason statute upon the constitutional drafters. Before the Statute of Edward III codified a restrictive definition of treason, the English courts had the power to create what James Madison called a “new-fangled and artificial treason[].” Madison was referring to an English court’s power to invent a constructive treason by expanding the common law definition of treason to accommodate novel facts. That is to say, the courts had the power to declare acts treasonable that had never been so before.

Madison further described constructive treasons as “the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other.” In Revolutionary Era England, this malignity typically took the form of public hanging, drawing, and quartering. Not surprisingly, the abusive use of constructive treason became disfavored in England; and the Statute of Edward III altered the law, codifying the definition of treason and requiring that novel treason cases must go before Parliament, instead of the courts.

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45 Treason Act, 1351, 25 Edw. 3, c. 2.
46 Cramer v. United States, 325 U.S. 1, 67 (1945) (Douglas, J., dissenting) (“The most relevant source of materials for interpretation of the [T]reason [C]lause of the Constitution is the statute of 25 Edw. III, Stat. 5, ch. 2 (1351) and the construction which was given it.”); Hurst, supra note 27 at 138-40; Larson, supra note 24, at 870 (“No provision of the Constitution is as rooted in English legal history as the Treason Clause. It would likely surprise most Americans to learn that a portion of the United States Constitution is taken almost verbatim from an English statute [25 Edw. 3 c. 2] enacted when Geoffrey Chaucer was eight years old. The phrases ‘levying war’ and ‘adhering to their enemies, giving them aid and comfort’ in the Treason Clause come directly from the treason statute of 25 Edward III, enacted in 1351.”).
47 See The Federalist No. 43, supra note 29; see also Hurst, supra note 27, at 143.
48 Hurst, supra note 27, at 139.
49 Id.
50 See The Federalist No. 43, supra note 29.
51 Treason Act, 1351, 25 Edw. 3, c. 2; United States v. Rahman, 189 F.3d 88, 112 (2d Cir. 1999) (per curiam) (citing 4 William Blackstone, Commentaries *92).
52 Hurst, supra note 27, at 139.
While the Statute of Edward III was certainly an improvement over the use of constructive treasons by a handpicked judiciary serving at the pleasure of the King, the Founding Fathers thought that this was not enough protection for treason defendants. Mindful of their status as traitors while fighting the rule of England, they sought to eliminate the potential for abusive prosecution of treason against groups with public grievances by including systemic, constitutional restrictions. First they created a fixed, restrictive definition of treason by limiting it to the two offenses enumerated in the Constitution—levying war and adhering to the enemy. Second, they deliberately moved the Treason Clause to its final position in Article III from its draft position in Article I so that the Judiciary would “administer the clause” and Congress would have no power with respect to the scope of the offense. Third, they established an evidentiary requirement that two witnesses testify to the same overt treasonous act, which further reflected the “fundamentally restrictive attitude” behind the Drafters’ inclusion of the Clause. Finally, regarding the scope of the punishment, corruption of blood, the forfeiture of the convicted traitor’s estate and disinheritance of successors, were prohibited entirely. In the broadest sense, the Drafters sought to disable the Government from either amending the definition of treason, or from punishing traitors without first satisfying a high burden of proof.

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53 Black’s Law Dictionary 439 (9th ed. 2009) (defining “Curia Regis,” the King’s court of appeals); see also Alford, supra note 24, at 1205-06, 1215.
55 Rodriguez, 803 F.2d at 320 (“The reason for the restrictive definition is apparent from the historical backdrop of the treason clause. The framers of the Constitution were reluctant to facilitate such prosecutions because they were well aware of abuses . . . .”).
56 The language in the Treason Clause intentionally reflects that of the prevailing English treason statute, the Statute of Edward III, in order to limit the definition of the crime to the “old terms.” Hurst, supra note 27, at 131; see also Jon Roland, Hurst’s Law of Treason, 35 UWLA L. REV. 297, 297-98 (2003).
57 Hurst, supra note 27, at 139.
58 Id., at 132.
59 “[A] ‘corruption of blood’ is the perpetual forfeiture of the convicted person’s estate to the disinheritance of his or her heirs or children.” See infra note 77 and accompanying text.
60 See infra note 77.
61 U.S. Const. art. III, § 3 (requiring two witnesses to the same overt act); Hurst, supra note 27, at 130 (“At one stroke, the basis of the restrictive policy had been laid: all authority is taken from any other agency to define the extent of the crime . . . .”).
Interpreting the Clause with an eye toward its restrictive nature, Chief Justice Marshall acknowledged in *Ex parte Bollman* that:

To prevent the possibility of those calamities...that great fundamental law which defines and limits the various departments of our government has given a rule on the subject both to the legislature and the courts of America, which neither can be permitted to transcend.

Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.62

Accordingly, the Court created a doctrinal rule to reflect the comprehensive yet precisely circumscribed treason definition enshrined in the Constitution: from *Bollman* in 1807 to *Cramer v. United States* in 1947, the Court has consistently held that treason may not be extended beyond its constitutional definition.63 By virtue of this rule against constructive treasons, merely immaterial variations in the elements of treason that leave the gravamen of the offense intact will not create a separate offense which avoids bringing the additional procedural protections of the Treason Clause into play.64

2. Separation of Powers: The State’s Role in Crimes against the State

Although the relocation of the Treason Clause from Article I to Article III was intended to constrain the legislature, “The treason clause[] [is] clearly [a] limitation[] upon all the agencies of government, instead of...the legislative branch

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62 *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125-26 (1807) (emphasis added) (quoting U.S. Const. art III, § 3) (holding that conspiracy to levy war is a separate offense from that of treason by levying war, and is not subject to the constitutional restrictions of Article III); see also infra note 70 and accompanying text.

63 *Bollman*, 8 U.S. (4 Cranch) at 127 (“[T]he crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide.”); see also id. at 118 (“The intention of having a constitutional definition of the crime, was to put it out of the power of congress to invent treasons.”); *Cramer v. United States*, 325 U.S. 1, 45 (1945) (“[The Court does not]...intimate that Congress could dispense with the two-witness rule merely by giving the same offense [treason] another name.”); *Hurst, supra* note 27, at 239 (stating that the Drafters “[A]cknowledged that the [T]reason C[lause]...set the exclusive definitions of treason; Congress might not vary the elements of treason or escape the substantive constitutional definition...by attaching a different label to [treason].”).

64 See supra note 63.
only.” Congress only has the power to prescribe a limited punishment and has no power to redefine treason as such or to expand that category of behavior that falls within the ambit of “treason.” The Judiciary is given the responsibility to administer the law of treason, yet cannot expand the definition of treason. The Executive has no express grant of responsibility with respect to treason, but one may reasonably presume that the President’s Article II “take care” powers would encompass, for example, the incidental role of serving as prosecutor, custodian, or executioner. The Constitution’s lack of any express grant should be read as giving the President the least authority in the administration of treason.

Further, in Ex parte Garland, the Supreme Court read the prohibition against corruptions of blood as a constitutional charge to the Judiciary: “[T]herefore, to still further guard against this odious form of punishment, it is provided, in section three of article iii, concerning the judiciary [that Congress may not work a corruption of blood]. . . .” This reading by the Court—that the placement of the Treason Clause and its prohibition on corruptions of blood in Article III charges the Judiciary to guard against its use—further bolsters the conclusion that the placement of treason within Article III textually commits the role of administering treason law to the Judiciary. This reading of Article III as a separation of powers regarding the administration of treason law was most recently

65 Huest, supra note 27, at 165; see also Alford, supra note 24, at 1215; infra Part V.A.
66 U.S. Const. art. III, § 3.
67 Huest, supra note 27, at 165.
68 U.S. Const. art. II, § 3.
69 See Alford, supra note 24, at 1215 (“The fact that the Constitution prohibits bills of attainder and not royal proclamations of attainder (by then long obsolete), should not be taken as evidence that the Framers endorsed the idea ex silentio that the president should have the power of judging [citizens guilty of treason]—especially since Hamilton felt that this would mean that there would be ‘no liberty.’ This absence merely indicated that in 1787 this idea had already been expressly rejected. By then it was the consensus position that the common law could not countenance such an anti-constitutionalist idea, and the idea was hardly worth mentioning.”); cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (“When the President acts in absence of [ ] a . . . denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and . . . [another branch] may have concurrent authority, or in which its distribution is uncertain.”).
71 See supra Part I.A.2.
affirmed in the 2013 case New York Times Co. v. U.S. Department of Justice. 72

3. The Evidentiary Requirement and the Protection against “Corruptions of Blood”

The Treason Clause contains a stringent, disjunctive evidentiary requirement that is clear in its meaning—either the Government must produce two witnesses to the same overt act of treason, or the traitor must confess in open court. 73 The strict requirement of two witnesses to the same overt act is unique to American treason jurisprudence. 74 No federal defendant has exercised the open confession option, but courts likely will interpret it by its plain meaning. 75

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72 915 F. Supp. 2d at 523 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting) and citing Larson, supra note 24 (internal citations omitted)) (“Interestingly, the Treason Clause appears in the Article of the Constitution concerning the Judiciary—not in Article 2, which defines the powers of the Executive Branch. This suggests that the Founders contemplated that traitors would be dealt with by the courts of law, not by unilateral action of the Executive. As no less a constitutional authority than Justice Antonin Scalia noted, in his dissenting opinion in Hamdi, ‘Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime.’ ”). For a discussion of how this separation of powers principle affects Political Question Doctrine analysis, see infra Part IV.D.

73 U.S. CONST. art. III, § 3. Notably, nowhere in the text of the Treason Clause is there a guarantee of trial and, in fact, such a blanket requirement may seriously hinder the President’s ability to act in self-defense. The drafters did, however, include an exhaustive enumeration of the specific procedural protections afforded to traitors. Under the expressio unius est exclusio alterius canon of construction, this would mean that the Treasury Clause then excludes the specific protection of a jury trial for traitors. But see Ramsey, supra note 24, at 869-70 (citations omitted) (“The Treasury Clause requires that they be brought to trial under specific conditions . . . .”). Conversely, under noscitur a sociis (it will be known by the company it keeps), the drafters at the time were also likely cognizant of the immediately preceding text in Article III, Section ii, providing that “The Trial of all Crimes . . . shall be by Jury.” However, this right clearly would apply to treason for reasons discussed, infra, Part V.A.2.a. For a thorough discussion of the right to a jury trial in a civilian jurisdiction for traitors, see Larson, supra note 24. Larson argues very convincingly that “[u]nder the constitutional law of treason, any person who is potentially subject to an American treason prosecution must be tried in a civilian court and may not be detained by the military as an enemy combatant or subjected to military tribunals.” Id. at 867.

74 Originally, in the 1695 Statute of William III, The Treason Act 1695, 7 & 8 Will. 3, c. 3, English law required that there be two witnesses to the crime of treason, but not to the same overt act. The Founding Fathers, presumably finding this to be insufficient, made the requirement stricter in American law. This particular requirement has proven to be difficult for prosecutors. For example, in the trial of Aaron Burr, Burr was acquitted based on the fact that there were no two witnesses to the same overt act of treason by levying war. United States v. Burr, 25 F. Cas. 2, 13-15 (Marshall, Circuit Justice, C.C.D. Va., 1807) (No. 14692a); United States v. Burr, 25 F. Cas. 55, 181 (Marshall, Circuit Justice, C.C.D. Va., 1807) (No. 14693).

75 See Lamie v. U.S. Trustee, 540 U.S. 426, 534 (2004) (“It is well established that when the statute’s language is plain, the sole function of the courts—at least
The Treason Clause also creates a unique protection for property interests. A traitor’s assets may only be subjected to temporary forfeiture, not perpetual forfeiture: “[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”76 In the context of treason, a “corruption of blood” is the perpetual forfeiture of the convicted person’s estate to the disinheritance of his or her heirs or children. 77 Corruptions of blood were particularly disfavored, both by the drafters of the Constitution78 and in England at the time that Blackstone wrote his Commentaries.79 Many state constitutions also showed an express disfavor for corruptions of blood.80

During the Reconstruction Era, the Supreme Court faced several challenges relating to disposition of government-confiscated Confederate property.81 In Wallach v. Van Riswick,82 the Court interpreted the 1862 Confiscation Act.83 The Court discussed the meaning of the Act and its relation to the Article III bar on perpetual forfeitures: “[B]oth

where the disposition required by the text is not absurd—is to enforce it according to its terms.” (internal quotation marks omitted); Caminetti v. United States, 242 U.S. 470, 485 (1917) (Day, J.) (“Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.”); see also Cramer v. United States, 325 U.S. 1, 39, 44, 60-61, 65-66 (1945) (giving dicta about the two-witness rule).

76 U.S. CONST. art. III, § 3.
77 See Ex parte Garland, 71 U.S. (4 Wall.) 333, 387 (1866); see also BLACK’S LAW DICTIONARY 397 (9th ed. 2009) (defining “corruption of blood” as “[a] defunct doctrine, now considered unconstitutional, under which a person loses the ability to inherit or pass property as a result of an attainder . . . .”).
78 Max Stier, Note, Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter, 44 STAN. L. REV. 727, 730-31 (1992). The reasons for the disfavor are clear: it harms innocent children. Wallach v. Van Riswick, 92 U.S. 202, 210 (1876) (“What was intended by the constitutional provision [The Treason Clause] is free from doubt. In England, attainters of treason worked corruption of blood and perpetual forfeiture of the estate of the person attainted, to the disinheritance of his heirs, or of those who would otherwise be his heirs. Thus innocent children were made to suffer because of the offence of their ancestor. When the Federal Constitution was framed, this was felt to be a great hardship, and even rank injustice.” (emphasis added)).
79 Stier, supra note 78, at 729-30; id. at 729 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *254).
80 See id. at 731-32 & nn. 35-36 (compiling an impressive list of similar state prohibitions).
81 E.g., Bigelow v. Forrest, 76 U.S. (9 Wall.) 339, 343-46 (1869) (interpreting the forfeiture clauses of the 1862 Confiscation Act).
82 92 U.S. 202 (1876), modifying Bigelow, 76 U.S. (9 Wall.).
83 An Act to Suppress Insurrection, To Punish Treason and Rebellion, To Seize and Confiscate the Property of Rebels, and For Other Purposes, 12 Stat. 589, 589-92 (1863). Originally, the Act was interpreted in 1869 in Bigelow v. Forrest, 76 U.S. (9 Wall.) at 339. However, Van Riswick later refined the “incautious[ ] Bigelow language. 92 U.S. at 211.
have the same meaning, and both seek to limit the extent of forfeitures . . . . [a]nd there is no reason why one should receive a construction different from that given to the other." 84 The Court held that, although it is constitutionally permissible to subject a convicted traitor’s estate to complete divesture upon conviction and to eliminate a traitor’s property interests, 85 the Government’s interest is limited to the natural life of the traitor; at the cessation of which, the estate divests completely from the Government and passes on to the decedent traitor’s successors in interest. 86

B. The Equal Protection Clause and Skinner

In *Skinner v. Oklahoma ex rel. Williamson*, the Supreme Court considered a Fourteenth Amendment equal protection challenge to a statute that mandated the forced sterilization of one class of criminals—common thieves—but not embezzlers, a class of criminals that committed essentially the same crime. 87 The *Skinner* Court left behind a very simple and powerful legacy regarding equal protection under the law: “[W]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.” 88 By charging citizen-terrorist defendants under terrorism statutes that impermissibly distinguish between the criminal classes of traitors and terrorists, the government works a constructive treason. Moreover, by not affording the additional protections granted to defendants, the government disparately impacts each defendant.

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84 Wallach v. Van Riswick, 92 U.S. 202, 209-10 (1876).
85 Id. at 211 (“The [Bigelow] language was, perhaps, incautiously used. We certainly did not intend to hold that there was anything left in the person whose estate had been confiscated. The question was not before us. We were not called upon to decide anything respecting the quantity of the estate carved out; and what we said upon the subject had reference solely to its duration.”).
86 Id. at 209.
88 *Skinner*, 316 U.S. at 541.
II. TINKER, TERRORIST, CITIZEN, TRAITOR: A STORY OF ANWAR AL-AULAQI

Born in America\(^9\) to a Yemeni father,\(^90\) Anwar al-Aulaqi was a dual American and Yemeni citizen at birth.\(^91\) Al-Aulaqi lived in the United States until he was seven years old, when his family returned to Yemen.\(^92\) In 1991, he returned to the United States, where he earned a bachelor’s degree at Colorado State University, wed a Yemeni cousin, and later received a master’s degree in Educational Leadership from San Diego State University.\(^93\) Al-Aulaqi permanently departed from the United States in 2002.\(^94\) He spent two years in the United Kingdom before finally settling in Yemen in 2004.\(^95\) Al-Aulaqi remained a U.S. citizen until he died.\(^96\)

Before his departure from the United States, al-Aulaqi was not a dangerous criminal. His U.S. criminal record contains two charges in San Diego from 1996 and 1997, both for soliciting prostitution.\(^97\) The Government never indicted

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\(^90\) Nasser al-Aulaqi is a Yemeni National. Al-Aulaqi Complaint, supra note 13, at ¶ 9.


\(^92\) Scott Shane & Souad Mekhennet, From Condemning Terror to Preaching Jihad, N.Y. TIMES, May 9, 2010, at A2. His father was a prominent Yemeni figure, serving as chancellor of two universities and a government official. Id.

\(^93\) Al-Aulaqi, 727 F. Supp. 2d at 10; Kannof, supra note 24, at 1415-16. “Peculiarly, despite his family’s relative wealth, al-Aulaqi falsely claimed that he was born in Yemen, rather than the United States, in order to receive $20,000 in scholarship money from a U.S. government program for which . . . (even as a dual citizen), he should not have been eligible.” Id. (citations and quotation marks omitted).

\(^94\) Kannof, supra note 24, at 1416.

\(^95\) Al-Aulaqi, 727 F. Supp. 2d at 10; see also Kannof, supra note 24, at 1416.


\(^97\) Al-Awlaki: Who Was He?, CNN (Sept. 30, 2011, 7:56 AM), http://security.blogs.cnn.com/2011/09/30/al-awlaki-who-was-he/. In 1999, the FBI took notice of his role in an Islamic charity assumed to be funneling money to terrorists. Shane & Mekhennet, supra note 92, at A2. He was questioned about his association with Khalid al-Midhar and Nawaq Alhazmi, both of whom were 9/11 Hijackers. Id. The FBI released him and no action was taken because they determined his contacts were “random” and the “inevitable consequence of living in the small world of Islam in America.” Id. The FBI did, however, consider invoking the Mann Act to prosecute al-Aulaqi, as he “had been observed crossing state lines with prostitutes in the D.C. area.” Joseph Rhee & Mark Schone, How Anwar Awlaki Got Away, ABC NEWS (Nov. 30,
him for any “terrorism-related crimes.”98 Al-Aulaqi transformed into a traitor and a terrorist during his time in Yemen.99 While al-Aulaqi was there, the United States grew increasingly concerned and requested that the Yemeni authorities hold him in custody. After his 18-month detainment in a Yemini prison between 2006 and 2007 at the behest of U.S. authorities—without trial—al-Aulaqi became a violent, active jihadist.100

In 2009, al-Aulaqi became a leader in AQAP, assuming an operational role in the group and purportedly inspiring more than a dozen terrorist plots with his clerical rhetoric.101 He provided “instructions” to Umar Farouk Abdulmutallab for his attempted bombing of a Christmas-day Northwest Airlines flight;102 exchanged e-mails with Major Nidal Hasan, the U.S. soldier who perpetrated the Fort Hood Massacre in 2009;103 and influenced Faisal Shahzad, the attempted May 2010 Times Square Bomber.104 Al-Aulaqi was accused of attempting to send bombs via the U.S. mail in October 2010.105

Al-Aulaqi “made numerous public statements [as a cleric and AQAP leader] calling for ‘jihad against the West,’ praising the actions of ‘his students’ Abdulmutallab and Hasan, and asking others to ‘follow suit.’”106 His public statements included many YouTube videos that reached a wide, English-speaking audience.107 Al-Aulaqi called for a holy war against
the United States, claiming that “America is evil . . . . [J]ihad against America is binding upon myself just as it is binding on every other Muslim . . . .” 108 He also proclaimed “that he ‘[would] never surrender’ to the United States.”109

In classified proceedings, the CIA secretly approved al-Aulaqi as the target for a “lethal operation” in April 2010.110 Al-Aulaqi was termed a “Specially Designated Global Terrorist” by the Treasury Department in July 2010.111 In the summer of 2010, the CIA tried to eliminate al-Aulaqi through the creative use of a Croatian video-order bride, a predator drone, and a Danish double agent.112 Nasser al-Aulaqi, Anwar’s father, filed a complaint in the District Court for the District of Columbia seeking to enjoin the lethal targeting of his son.113 On December 7, 2010, the matter was dismissed on a motion for summary judgment for a lack of standing.114 After failing to kill al-Aulaqi in a drone attack in May 2011,115 the United States ended his life when, on September 30, 2011, a drone fired a “barrage of Hellfire missiles” at his car.116 In July 2012, the ACLU re-filed the case as al-Aulaqi v. Panetta, asserting standing based on Nassar al-Aulaqi’s status as executor of his son’s estate.117

109 Al-Aulaqi, 727 F. Supp. 2d at 10-11 (citations omitted).
111 Al-Aulaqi Designation, supra note 101, at 43233-34.
112 Paul Cruickshank et al., The Danish Agent, the Croatian Blonde and the CIA Plot to Get al-Awlaki, CNN WORLD (Oct. 15, 2012), http://www.cnn.com/2012/10/15/world/al-qaeda-cia-marriage-plot/index.html. In sum, the CIA used a Danish double agent to arrange a marriage between al-Aulaqi and a blonde Croatian devotee who interacted with him via video. Id. When al-Aulaqi and his fiancée were to meet up, her luggage was to be bugged and then the CIA would send in a drone to kill the entire party, likely with Hellfire missiles; however, her luggage was separated and the plot failed. Brian Ross & Lee Ferran, Report: CIA Arranged Bride for Terrorist in Plot to Kill Him, ABC NEWS (Oct. 15, 2012), http://abcnews.go.com/Blotter/report-cia-arranged-bride-terrorist-plot-kill/story?id=17437763#.UjSHWml27-Y. The marriage, however, was successful. Id. al-Aulaqi’s widow, after deciding against going on a revenge suicide bombing, is currently an editor for the al-Qaeda publication Inspire. Id.
113 See generally Al-Aulaqi Complaint, supra note 13, at ¶ 6.
114 Al-Aulaqi, 727 F. Supp. 2d at 28, 30.
115 Mazzetti et al., supra note 3.
116 Id.
117 Panetta Complaint, supra note 20, at ¶¶ 6, 10, 41-3. Samir Kahn’s family joined the lawsuit. Id.
III. THE CRIMES OF TREASON BY LEVYING WAR AND TERRORISM

A. Treason by Levying War: The Offense

James Willard Hurst, author of the seminal treatise The Law of Treason in the United States, defined treason through levying war as the “direct effort to overthrow the government, or wholly to supplant its authority in some part or all of its territory.” The law of levying war has been subject to several constructions that parse the law into three components: the actus reus element, the mens rea element and attendant allegiance requirement, and the geographic bounds. Levying war requires that an assemblage of men make an overt act of force to execute a treasonable design. The overt act requirement may be met where the assembly itself is forceful.

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118 Hurst, supra note 27. This work is considered the “classic legal treatise on this constitutional topic.” Roland, supra note 56, at 297.
119 Hurst, supra note 27, at 199.
120 Whether the force used is tantamount to levying war is a question of fact. Ex parte Bollman, 8 U.S. (4 Cranch) 75, 118 (1807) (“[I]t [i]s impossible to define what should in every case be deemed a levying of war. It is a question of fact to be decided by the jury from all the circumstances.”). Fortunately, however, the sparse federal treason jurisprudence can offer some direct and quite blunt light on the relationship between acts of levying of war and terrorism. In deciding the fate of the 1993 World Trade Center bombers, the Second Circuit held in Rahman, that terrorist acts (factually analogous to those al-Aulaqi was engaged in) are “ample evidence . . . [of] levy[ing] war.” 189 F.3d 88, 149-61 (2d Cir. 1999) (per curiam); see id. at 149-60 (affirming that facts such as calling for jihad and participating in the 1993 World Trade Center bombing were sufficient evidence for sustaining a conviction of seditious conspiracy to levy war and that the sentencing guidelines for treason by levying war were the “most analogous.”); accord United States v. Augustin, 661 F.3d 1105 (11th Cir. 2011), cert. denied, 132 S. Ct. 2444 (2012); United States v. Rodriguez, 803 F.2d 318 (7th Cir. 1986), cert. denied, 480 U.S. 908 (1987).
121 Originally, Chief Justice Marshall defined the actus reus of treason by levying of war as “an assemblage of persons for the purpose of effecting by force a treasonable purpose.” Bollman, 8 U.S. (4 Cranch) at 75 (Marshall, C.J.). He later clarified this part of his Bollman opinion, holding that an assembly is a precondition for the overt act and, if the assembly is in force, then it will constitute the overt act itself. United States v. Burr, 25 F. Cas. 2, 13 (Marshall, Circuit Justice, C.C.D. Va., 1807) (No. 14692a) (discussing the meaning of the Supreme Court in Bollman); see also Opinion on The Motion To Introduce Certain Evidence in the Trial of Aaron Burr, For Treason, United States v. Burr, 8 U.S. (4 Cranch) 455, 487 (1807) (Marshall, Circuit Justice) (“[A]n assemblage of men which should constitute the fact of levying war, must be an assemblage in force [as Chief Justice Marshall understands his opinion in Bollman] . . . .”). The likely reason for this distinction is that peaceable assemblies also exist. See U.S. Const. amend. I. Justice Story’s later interpretation of the actus reus of treason in 1842 upholds this distinction. In re Charge to Grand Jury – Treason, 30 F. Cas. 1046, 1047 (Story, Circuit Justice, C.C. D.R.I. 1842) (“To constitute an actual levy of war, there must be an assembly of persons, met for the treasonable purpose, and some overt act done, or some attempt made by them [the assembly] with force to execute, or towards executing, that purpose.”).
The assemblage portion of the actus reus element requires that there be more than one participant assembled to levy war because, historically, levying war alone would have been factually impossible—a single person was “not in a condition to levy war.” Although this assumption has been questioned in the wake of technological advances in the destructive potential of modern weapons, an assemblage remains an element of treason.

Turning to the mens rea element: “The character of the intention . . . rather than any difference in the overt acts, marks the line between riot and treason by levying war.” The mens rea element has two prongs: first, one must betray an owed allegiance to the United States; second, the actor must have a treasonable, or public, purpose or intent. The first prong requires a pre-existing allegiance; there can be no betrayal without an initial allegiance. Further, to betray, one must intend “to benefit the enemy’s war effort and to harm that of the United States.” An intent to betray may be inferred by presuming the actor intended the natural consequences of his or her actions. The treasonable design or purpose prong can be established through the demonstration that an alleged traitor had a non-private motive to disrupt Government administration of laws, or to coerce or change its policy. Holy war likely is not a private motivation.

123 Larson, supra note 24, at 913-14 (“[S]uch a person can be said to levy war against the United States; it would strain all credulity to assert, for example, that there must be at least two people in the cockpit of the plane in order for war to be levied.”).
124 HURST, supra note 27, at 290.
125 Cramer v. United States, 325 U.S. 1, 29 (1944); accord Augustin, 661 F.3d 1105; Rahman, 189 F.3d 88; Rodriguez, 803 F.2d 318; HURST, supra note 27, at 193.
126 HURST, supra note 27, at 244.
127 Cramer, 325 U.S. at 32 (“Since intent must be inferred from conduct of some sort, we think it is permissible to draw usual reasonable inferences as to intent . . . . The law of treason . . . assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts.”).
129 See John Brown’s Speech to the Court at His Trial, NAT’L CTR. FOR PUB. POL’Y RESEARCH, http://www.nationalcenter.org/JohnBrown%27sSpeech.html (last visited Jan. 15, 2013) (internal citations omitted) (“[T]he Bible [t]hat teaches me that all things whatsoever I would that men should do to me, I should do even so to them. It teaches me, further, to remember them that are in bonds, as bound with them. I endeavored to act up to that instruction. I say I am yet too young to understand that God is any respecter of persons. I believe that to have interfered as I have done—as I
Regarding geography, courts have consistently held that treason may be committed anywhere by anyone who owes allegiance to the United States. That is to say, there is no place where acts constituting treason would be immunized from prosecution.

B. The Crime of Terrorism in the Era of the War on Terror

Terrorism is defined in a variety of U.S. statutes. Many of these laws contain nearly identical text. This note will consider two definitions of terrorism: the most popular one, the FISA definition, and the definition of the “Federal crime of terrorism.”

The FISA definition contains three elements: an actus reus, a violent crime that is a violation of the laws of the United States or its individual states; the proper mens rea, an intent to “influence the policy of a government by

have always freely admitted I have done—in behalf of His despised poor was not wrong, but right. Now, if it is deemed necessary that I should forfeit my life for the furtherance of the ends of justice, and mingle my blood further with the blood of my children and with the blood of millions in this slave country whose rights are disregarded by wicked, cruel, and unjust enactments—I submit; so let it be done!). Despite his religious motivations, John Brown was executed for treason against the State of Virginia. Id.

130 Kawakita v. United States, 343 U.S. 717, 734-35 (1952) (citing Ex parte Bollman, 8 U.S. (4 Cranch) 75, 126 (1807)).


132 Compare, e.g., 50 U.S.C. § 1801(c) (2011) (defining “international terrorism”), with 18 U.S.C. § 2331(1) (defining “international terrorism” with a slightly different jurisdictional element in subsection (C) than the one at 50 U.S.C. § 1801(c)(3)). For a thorough discussion of the prevalence of this language in terrorism definitions, see Perry, supra note 131, at 256-57.

133 Perry, supra note 131, at 256.

134 The statute reads in relevant part:

(5) the term “Federal crime of terrorism” means an offense that—

(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and

(B) is a violation of—

(i) . . . [relating to various violent crimes]

(ii) . . . [relating to atomic weapons crime]

(iii) . . . [relating to various aircraft crimes]

(iv) . . . [relating to narco-terrorism].

18 U.S.C. § 2332b(g)(5).

135 Id. § 1801(c)(1).
and the requirement that the act occurs “outside the United States, or transcend[s] national boundaries.” The federal crime definition has two elements: an actus reus, a violent crime; and the mens rea requirement that the act be “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”

C. The Same Offense: Treason By Levying War and Terrorism

Although Equal Protection Clause and Treason Clause decisions use different language—“intrinsically the same quality of offense” and immaterially varying the substance of treason, respectively—both sets of language mean that analysis under either is triggered if the two offenses are substantively the same.

Comparing the actus reus of treason by levying war and that of the two terrorism definitions, there is obvious commonality. Both require some sort of violent act or force. Although the FISA definition stands apart in requiring that the act be criminal, this distinction does not create a material difference between the definitions of treason by levying war and terrorism. Most violent acts are criminal; or, more specifically, any act that is tantamount to terrorism would be tantamount to levying war. Therefore, FISA’s additional requirement does not narrow the scope of acts that fall within the definition of terrorism.

Comparing the mens rea element—the most important element—it becomes even clearer that the crimes are substantively indistinguishable. Treason by levying war requires the intent to coerce or force change in government policy, or to usurp government power in all or part of its territory. FISA’s terrorism definition requires the intent to

136 Id. § 1801(c)(2)(B).
137 Id. § 1801(c)(3).
138 Id. § 2332b(g)(5)(A)–(B).
140 See supra note 63 and accompanying text.
141 Compare Part III.A (discussing the actus reus of treason by levying war, the violent force of levying war), with Part III.B. (discussing the elements of terrorism, including the actus reus of force).
142 HURST, supra note 27, at 200.
143 Id. at 199; see also In re Charge to the Grand Jury – Treason, 30 F. Cas. at 1047 (Story, Circuit Justice, C.C. D.R.I. 1842); United States v. Hanway, 26 F. Cas. 105, 115 (C.C. E.D. Pa. 1861).
influence or to coerce the policy of government by force. The “Federal crime” definition of terrorism requires that the act “is calculated to influence or affect the conduct of government by intimidation or coercion . . . .” The FISA definition’s failure to specify the U.S. government is of no consequence as applied to citizen-terrorists—in this case persons conducting jihad against the United States in the ongoing War on Terror. Thus, in the context at issue, there is no material difference between the mens rea requirements of treason and terrorism.

There is no basis for distinction between the two crimes with respect to the elements, or lack of elements, regarding geography, assemblage, and allegiance. First, the geographical limitation in the FISA definition does not, by itself, make that offense materially different from treason because treason may be committed anywhere. Therefore, the potential geographic range of the two crimes overlap such that all FISA terrorism is treason but not all treason is FISA terrorism. Further, the argument that geographic limitations by themselves create substantively different offenses leads to absurd conclusions. Imagine if Congress were to create two crimes, A and B, which, with the exception of adding geographic limits, mirror the crime of treason by levying war. Crime A only punishes acts performed within the boundaries of the United States; crime B only punishes acts performed outside of the boundaries of the United States. The Government would never need to indict any citizen for treason to punish treasonous acts, because in all cases it could achieve the same result by prosecuting the citizen under either crime A or B. Therefore, the government would not be constrained by the administratively cumbersome evidentiary and substantive protections afforded to the accused at a treason trial because any instance of treason could be punished under either A or B. That is to say, by dividing the world into whatever arbitrary components it found desirable, Congress could dodge the restrictive definitions of the Treason Clause. This is precisely the result that the Framers sought to avoid in drafting the Treason Clause; the Constitution will not allow the introduction of a geographical

144 § 1801(c)(2)(B).
145 § 2332b(g)(5)(A).
146 Kawakita v. United States, 343 U.S. 717, 734-35 (1952). In Kawakita, the Court held that an American-Japanese dual citizen owed allegiance to the United States even while domiciled in Japan during World War II and thus, his acts in Japan were treason. Id.; see also Carlisle v. United States (The Carlisle Case), 83 U.S. (16 Wall.) 147, 154-55 (1873).
147 See infra note 183 and accompanying text.
limitation to create a crime distinct from treason. When a
citizen commits an act of terrorism, geographical limitations in
the definition of terrorism cannot form a basis for
differentiating it from treason when they are substantively the
same in all other material aspects.

Second, although the traditional notion of treason
requires an assemblage, there are three reasons why this
unique facet does not intrinsically distinguish treason from
terrorism in the context of al-Aulaqi. First, although one
person may commit terrorism and only an assemblage may
levy war, as applied to a citizen-terrorist conducting jihad
against the United States in tandem with a terrorist
organization, that terrorist has clearly assembled in force. The
same reasoning would apply to any such citizen-terrorist, so the
express requirement in treason of multiple persons would be a
distinction without a difference. For example, in making the
decision to issue a kill order against al-Aulaqi, the President
took specific note of al-Aulaqi’s operational role in AQAP, a
group that is easily described as an enemy assemblage of
persons levying war against the United States.\textsuperscript{148} This fact
permits the inference that al-Aulaqi’s association with an
assemblage of men levying war against the United States
informed the decision to target him for death. Second, the
assemblage element is outdated and outmoded, reflecting a
court determination that one man levying war is a factual
impossibility—modern terrorists have shown that is no longer
an impossibility.\textsuperscript{149} Therefore, the assemblage element creates
no distinction in War on Terror cases such as al-Aulaqi’s, and
the common-law inclusion of the element could not survive
review on its merits.

Third, although treason requires a betrayal of a pre-
existing allegiance to the United States, this distinction from
terrorism is similarly immaterial within the context of\textit{al-
Aulaqi}. By definition, a citizen owes allegiance to his or her

\textsuperscript{148} Mazzetti et al., \textit{supra} note 3 (quoting President Barack Obama) (“The
death of Awlaki is a major blow to Al Qaeda’s most active operational affiliate . . . [al-
Aulaqi took] the lead role in planning and directing the efforts to murder innocent
Americans.”).

\textsuperscript{149} See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-
terrorist provision); Larson, \textit{supra} note 24, at 913-14 (“[S]uch a person can be said to
levy war against the United States; it would strain all credulity to assert, for example,
that there must be at least two people in the cockpit of the plane in order for war to be
levied.”); \textit{see also supra} note 73 and accompanying text (discussing Larson and
assemblage); \textit{infra} note 182 and accompanying text (discussing Larson and
assemblage).
country.\textsuperscript{150} Owing an allegiance to the United States is a factual precondition for the commission of treason.\textsuperscript{151} Further, as a matter of construction, the omission of an express allegiance requirement does not in any degree affect the analysis of a court construing a statute for similarity to treason.\textsuperscript{152} For example, a person owing allegiance only to Russia could not be charged with treason against the United States even if the U.S. treason statute at issue lacked an allegiance element. While comparing the treason and misprision of treason statutes, Chief Justice Marshall observed in \textit{United States v. Wiltberger}:

> The 1st section defines the crime of treason, and declares, that if any person or persons owing allegiance to the United States of America shall levy war,” & c. “such person or persons shall be adjudged guilty of treason,” & c. The second section defines misprision of treason; and in the description of the persons who may commit it, omits the words “owing allegiance to the United States,” and uses without limitation, the general terms “any person or persons.” Yet, it has been said, these general terms were obviously intended to be limited, and must be limited, by the words “owing allegiance to the United States,” which are used in the preceding section.

It is admitted, that the general terms of the 2d section must be so limited; but it is not admitted, that the inference drawn from this circumstance, in favour of incorporating the words of one section of this act into another, is a fair one. Treason is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary. The words . . . “owing allegiance to the United States,” in the first section, are entirely surplus words, which do not, in the slightest degree, affect its sense. The construction would be precisely the same were they omitted. When, therefore, we give the same construction to the second section, we do not carry those words into it, but construe it as it would be construed independent of the first. There is, too, in a penal statute, a difference between restraining general words, and enlarging particular words.\textsuperscript{153}

Thus, in light of \textit{Wiltberger}, the omission of an allegiance requirement from the terrorism definitions is a distinction from treason without a difference.

By definition, as a citizen, al-Aulaqi owed allegiance to the United States. His operational involvement in a professed holy war against the United States while maintaining

\begin{footnotesize}
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\item \textsuperscript{150} Kawakita, 343 U.S. at 721-23 (holding that citizens owe allegiance regardless of where they are domiciled). This allegiance is owed even if the individual holds a dual citizenship. \textit{Id.}
\item \textsuperscript{151} United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 96-97 (1820).
\item \textsuperscript{152} \textit{Id.}
\item \textsuperscript{153} \textit{Id.} (interpreting the treason statute, which is now codified at 18 U.S.C § 2381).
\end{itemize}
\end{footnotesize}
citizenship permits the inference that he intended to betray that allegiance by acts tantamount to levying war. Al-Aulaqi’s conduct that led to his killing involved citizens operating with terrorist organizations: he influenced and encouraged others, which is action taken in tandem with an assembly. Further, terrorist acts analogous to those in which al-Aulaqi was engaged have been described as “ample evidence . . . of levying war” by the Second Circuit and similarly by its sister Circuits. Therefore, al-Aulaqi was both a traitor and a terrorist.

IV. THE FIRST PERIL: THE TREASON CLAUSE

The Supreme Court has held for over 150 years that creating merely artificial distinctions between treason and another crime may not circumvent the Treason Clause’s specific protections. Because the crimes of treason and terrorism (when committed by a citizen) are essentially indistinguishable, either the punishment of citizens for terrorism or the adjudication of them as a terrorist should invoke Treason Clause protections by virtue of the rule against constructive treasons. This part discusses applications of the rule against constructive treasons and how it applies to al-Aulaqi’s case. This section concludes that the rule against constructive treasons is violated in the case where the defendant is a citizen-terrorist charged with terrorism offenses.

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154 See supra Part II (calling for jihad against the United States, encouraging terrorism, and planning and assisting in the operations of a terrorist organization that has claimed responsibility for attacking the United States); see also Dreyfuss, supra note 24, at 269-70 (stating that al-Aulaqi had levied war).

155 United States v. Rahman, 189 F.3d 88, 149-61 (2d Cir. 1999) (per curiam) (affirming that facts such as calling for jihad and participating in the 1993 World Trade Center bombing were sufficient evidence for sustaining a conviction of seditious conspiracy to levy war and that the sentencing guidelines for treason by levying war were the “most analogous.”), cert. denied, 528 U.S. 1094 (2000); accord United States v. Augustin, 661 F.3d 1105 (11th Cir. 2011), cert. denied, 132 S. Ct. 2444 (2012); United States v. Rodriguez, 803 F.2d 318 (7th Cir. 1986), cert. denied, 480 U.S. 908 (1987); see also supra note 120.

156 See supra note 63.

157 These exceptions include, e.g., the two-witness evidentiary requirement and the prohibition on corruptions of blood, U.S. CONST. art. III, § 3, all due criminal procedural rights, and the right to trial by jury. See Baldwin v. New York, 399 U.S. 117, 119-20 (1970). The Bollman opinion also notes that the bench-warrant issued against Aaron Burr was illegal because a grand jury had not been presented with the matter, and the offense was not committed in the presence of the court. 8 U.S. (4 Cranch) 75, 113-14 (1807). For a discussion of the right to a jury trial in treason cases, see infra Part V.A.2.a.
A. The Rule Against Constructive Treasons Revisited

The rule against constructive treasons must be applied to al-Aulaqi’s case, as terrorism and treason are essentially the same offense. 158 Unfortunately, the lack of treason cases 159 leaves very few applications of the rule against constructive treasons. The resulting doctrinal underdevelopment and courts’ use of loose and amorphous terms, such as “vary[ ]” 160 to describe alterations to treason has created interpretive problems. This looseness in language has led to at least one drastic misapplication of the rule in Supreme Court precedent and several questionable Circuit decisions. 161 The resulting doctrinal ambiguity has eviscerated the constructive treason defense, the assertion by defendants that their prosecution under a particular crime is a prohibited constructive treason prosecution. This section discusses the contours of the rule, its misapplication by the Supreme Court and Circuit Courts, and provides a reading that harmonizes Supreme Court precedent, while providing a solid precedential basis for reversing the Circuits and restoring the defense against constructive treason.

1. Three Formulations of the Rule

Upon close reading and as identified in this note for the first time, Supreme Court precedent reveals that three particular methods of manipulating the treason definition are prohibited under the rule against constructive treasons. Taken in tandem, these forms of the rule provide a cohesive framework for analyzing any variance from or manipulation of the definition of treason. The rule against constructive treasons may thus be formulated in three different ways, termed mirroring, additive, and subtractive.

The mirroring formulation of the rule prohibits Congress from creating a constructive treason by mirroring the elements of treason and merely changing the name of the crime. Under the Constitution, treason by any other name remains

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158 See supra Part III.C.
159 HURST, supra note 27, at 187 (“There have been less than two score treason prosecutions pressed to trial by the Federal government.”).
160 Id. at 239.
161 See infra Part IV.A.3.
trea

The Court expressly adopted this formulation in Cramer.163 Under the additive formulation of the rule, Congress may not create a constructive treason by inventing a new crime that would otherwise be treason but for the addition of immaterial elements. For example, Congress could not pass a statute that mirrors treason but for an additional element that the overt act must be done while wearing a red hat. That law would only alter treason by an immaterial element.164 Adding immaterial requirements to treason and thus merely relabeling it creates a constructive treason. In Bollman, the Court held that the addition of a conspiracy element creates a crime materially distinct from treason itself, and thus, because the addition makes the crime substantively distinguishable, conspiracy to commit treason by levying war does not carry Article III protection.165 The Bollman opinion thus shows that the addition of a materially different element—the actus reus of agreement rather than a violent act—creates a separate crime from treason.166

The subtractive formulation of the rule is somewhat more nuanced than the others. Congress may not codify an offense that provides for harsher punishment than that permitted by Article III, but in its description merely subtracts an element of treason and, as applied to a particular defendant,  

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162 Cramer v. United States, 325 U.S. 1, 45 (1945) (“[The Court does not] . . . intimate that Congress could dispense with the two-witness rule merely by giving the same offense [treason] another name.”).
163 See Cramer, 325 U.S. at 45.
164 For an example of a statute that is materially different enough from treason by levying war to avoid this rule, see the Espionage Act of 1917, 40 Stat. 217 (1917).
165 See Ex parte Bollman, 8 U.S. (4 Cranch) 75, 126-28 (1807) (“To conspire to levy war, and actually to levy war, are distinct offences . . . it has been determined that the actual enlistment of men to serve against the government does not amount to levying war . . . . [T]he crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide . . . a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war . . . .”); cf. Ex parte Quirin, 317 U.S. 1 (1942). While the reasoning is discussed infra, Part IV.A.3, Quirin actually is an example of the Court applying this sort of reasoning.
166 This reading of Bollman is subject to the alternative reading that there is both an addition and a subtraction to the crime of conspiracy to levy war crime: the addition of an overt act of agreement and the subtraction of force requirement. However, this is a nominal distinction. If the subtraction itself were the material difference, the crime would have been subject to the subtractive formulation below, yielding a different result. The addition of the different actus reus created a separately cognizable offense in all cases. The formulations may operate in conjunction and the aim is to find material distinction.
would be treason.167 As the Supreme Court held in Wiltberger, a citizen may not constitutionally be punished under a congressionally created statute that mirrors treason but omits the allegiance requirement and provides for process inconsistent with Article III protections.168 Because, by default, a citizen owes an allegiance to the country, the actions for which that citizen is to be punished would be indistinguishable from treason. To permit such a manipulation would eviscerate the Treason Clause of any meaning. This formulation is more limited than the other two. The subtractive formulation only invalidates a statute as applied to circumstances where all the elements of treason are satisfied—it can never render a statute facially invalid. Although the hypothetical statute is perfectly valid as applied to those who do not owe allegiance, it would constitute a constructive treason if applied to a citizen. This formulation is more of a cannon of construction, where, as applied, a statute must be construed to avoid creating a constructive treason.

In light of these formulations, the rule against constructive treasons may seem expansive at first impression. But there is a limiting principle: the gravamen of the offense must be materially the same as that of treason, and the conviction must not have been in accord with Treason Clause protections.169 Thus, the crime alleged to be a constructive treason must punish “a direct effort to overthrow the government [by one owing allegiance], or wholly to supplant its authority in some part or all of its territory”170 for a non-private motive.171 For example, an offence criminalizing a direct effort to overthrow the Government or to supplant its authority for solely private motives is not a constructive treason, but more properly construed as espionage because of the lack of a public motivation.172

Although the rule against constructive treasons prohibits the use of a law that immaterially varies from treason to punish a citizen, a citizen may be punished under a statute that, although overlapping in elements, materially differs from

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167 See supra note 153 and accompanying text; see also Cramer, 325 U.S. at 45.
169 See Ex parte Bollman, 8 U.S. (4 Cranch) 75, 127 (1807) (“[T]he crime of treason should not be extended by construction . . . . [C]rimes not clearly within the constitutional definition, should receive such punishment as the legislature . . . may provide.”); see also supra note 63.
170 HURST, supra note 27, at 186, 199.
171 Charge to the Grand Jury – Treason, 30 F. Cas. at 1047.
172 See HURST, supra note 27, at 239-40 (discussing the Rosenberg case that was before the Second Circuit. 195 F.2d 583, 610-11 (2d Cir. 1952)).
If any single difference is material, then the crime is substantively distinguishable from treason, and the offense is not subject to the restrictions of the Treason Clause.174

2. The Three Formulations Applied

An application of the three formulations of the rule against constructive treasons reveals that neither the FISA nor the Federal crime definition of terrorism may be constitutionally applied to citizens. Both the FISA and Federal crime definitions of terrorism punish the same actus reus and mens rea as treason.175 Because both definitions of terrorism omit treason’s allegiance requirement and the FISA definition imports a geographical limitation,176 the mirroring formulation of the rule against constructive treasons is not implicated.177 However, the omission of the allegiance and assemblage requirements from both definitions implicates the subtractive formulation of the rule, and the geographic limitation within the FISA definition implicates the additive formulation.

As discussed above in Part IV.A.1, the omission of an allegiance element is immaterial because, when applied to a citizen, there is no material difference between acts that could be prosecuted as treason, and those that could be prosecuted as terrorism.178 Further, in Wiltberger, the Supreme Court expressly stated that the omission of an allegiance element does not affect the construction of treason when comparing the requirements of the treason statute to the requirements of other laws.179

The omission of an assemblage element is likewise immaterial when the terrorism definitions are applied to al-Aulaqi’s conduct. First, in al-Aulaqi’s case, his role as “leader of external operations” in AQAP 180 requires an assemblage. Second, as applied to any citizen who is conducting jihad against America in connection with a terrorist organization, the shared jihad of the movement constitutes an “assemblage

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173 See Bollman, 8 U.S. (4 Cranch) at 126-27.
174 See id. at 127.
175 See supra Part III.C.
176 See supra Part III.C.
177 See supra Part I.
178 See supra Part IV.A.1.
180 Mazzetti et al., supra note 3 (“The death of Awlaki is a major blow to Al Qaeda’s most active operational affiliate . . . [al-Aulaqi took] the lead role in planning and directing the efforts to murder innocent Americans.”).
in force.” Third, the circumstances that underpinned Marshall reading an assemblage requirement into the definition of treason have unraveled in the wake of advances in modern weapons technology.\footnote{Opinion on The Motion To Introduce Certain Evidence in the Trial of Aaron Burr, For Treason, United States v. Burr, 8 U.S. (4 Cranch) 455, 487 (1807) (Marshall, Circuit Justice) (Fed. Cas. Number 14692a); see also supra note 121.}

The imposition of a geographical limitation on the act of terrorism cannot, under the additive formulation, create a crime distinct from treason. If the acts are committed by a citizen, as discussed above, such a holding leads to absurd conclusions. The Court may not permit the arbitrary geographic petitioning of treason to create a distinction from terrorism where none exists.\footnote{The Supreme Court has recognized before that a change in technology or other circumstance may render irrelevant a previous understanding of a constitutional provision. For example, in Planned Parenthood v. Casey, the Court noted:}

It would be absurd to claim, for example, that Benedict Arnold would be an international terrorist under the FISA definition and not a traitor if all of his treacherous acts took place in Britain, rather than West Point.\footnote{See Kawakita v. United States, 343 U.S. 717, 734-35 (1952) (holding that a treasonous act may be committed by a citizen extraterritorially).} Or, more narrowly, that he might not be afforded Treason Clause protections under the Constitution because of the geographical distinction.

So what is the effect of this analysis in al-Aulaqi’s case? The rule against constructive treasons would apply to all state
actions, including those of the CIA—an agency within the executive branch—and the Executive. Thus, although the determination to place al-Aulaqi on a kill list was made by the CIA and not the Judiciary, the same rule against constructive treasons constrains the CIA's ability to draw immaterial distinctions between treason and another crime in deciding to kill al-Aulaqi without Article III process.

3. The Problematic Case of *Ex parte Quirin*

The rule against constructive treasons has been called into question by commentators based on dicta in a controversial 1942 Supreme Court case, *Ex parte Quirin*. However, these commentators fundamentally misread the dicta from that case.

a. The Quirin Problem: Herbert Haupt, Nazi Saboteur and U.S. Citizen

U.S. citizen Herbert Haupt and six other Nazis sought a writ of habeas corpus to avoid trial under military jurisdiction. Haupt and his crew were caught by the FBI after they landed by submarine in Florida and arrived in New York City dressed as civilians. The *Quirin* Court addressed whether a U.S. citizen acting as a Nazi saboteur could lawfully be tried for unlawful belligerency—a crime under the “Hague Convention and the law of war” incorporated by an Act of Congress—rather than treason. The Court held that an additional requirement—

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185 Hurst, supra note 27, at 165 (“[T]he treason clause[] is clearly [a] limitation[ ] upon all the agencies of government, instead of . . . the legislative branch only.”).

186 Larson, supra note 24, at 894-900; James Willard Hurst, *Treason in the United States*, 58 Harv. L. Rev. 395, 421 (1945) (“On the other hand, where the defendant is charged with conduct involving all the elements of treason within the constitutional definition, and the gravamen of the accusation against him is an effort to subvert the government, or aid its enemies, it would seem in disregard of the policy of the Constitution to permit him to be tried under another charge than ‘treason.’ However, the decision in *Ex parte Quirin* casts considerable doubt on the validity of this analysis.”), rpt’d in Hurst, supra note 27 at 147; see also *Ex parte Quirin*, 317 U.S. 1 (1942).

187 Quirin, 317 U.S. at 18-19, aff’d 47 F. Supp. 431 (D.C. Cir. 1942) (finding that a writ of habeas corpus may not issue for Quirin and six others), aff’d on other grounds, Hamdi v. Rumsfeld, 542 U.S. 507, 516, 548-49 (2004) (citations omitted) (affirming the general ability of the Government to treat enemy belligerents as such in a “foreign theater of war”; however, not affirming the interpretation that *Quirin* allows for no limitation on the Government power based on citizenship: “Ex parte Quirin . . . may perhaps be claimed for the proposition that the American citizenship of such a captive does not as such limit the Government's power to deal with him under the usages of war.”).

188 Quirin, 317 U.S. at 1.

189 Id. at 18-19.

190 Id. at 37-8.
that the actor not be wearing a military uniform—differenced unlawful belligerency from treason. This distinction arguably called into question the rule against constructive treasons. No doubt because of the seemingly obvious immateriality of the addition of the no-uniform requirement to what would otherwise be treason.

Commentators have asserted that *Quirin* is contrary to the rule against constructive treasons. Because *Quirin* permitted Congress to enact a crime that added presumably immaterial elements to the crime of treason, it does appear to be a departure from the Court’s longstanding adherence to the rule against constructive treasons. However, instead of casting doubt on the rule itself, *Quirin* merely represents a questionable application of the rule, to which commentators have ascribed too much weight. This is especially true in light of its narrow applicability and the availability of a reading of *Quirin* that does not negate the rule.

There are five convincing reasons why *Quirin* should not be construed as contrary to the rule against constructive treasons and why, instead, it should be limited to its facts. First, *Quirin*’s language regarding treason is merely “dicta” as no treason charge was before the Court. It is well-settled that the Court “will not bind [itself] unnecessarily to passing dicta.” Second, *Quirin* is a wartime case. As Court precedent from this era, a “time of war and of grave public danger,” shows, wartime cases often make bad law. The Court at that time was known for giving significant latitude to the Government during war that may not be acceptable boundaries of conduct today. Third, the *Quirin* dicta has received decidedly

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191 Id. at 38.
192 Id. (addition of a uniform is “irrelevant” to treason).
193 United States v. Rahman, 189 F.3d 88, 113 (per curiam) (1999) (stating that the *Quirin* “dictum” suggests that “citizens could be tried for an offense against the law of war that included all the elements of treason.”); HURST, supra note 27, at 147; Larson, supra note 24, at 894-900 (stating that *Hamdi* repeats the error of *Ex parte Quirin* in eviscerating the Treason Clause of meaning).
195 *Rahman*, 189 F.3d at 113 (comparing *Ex parte Quirin* with *Cramer*).
197 *Ex parte Quirin*, 317 U.S. 1, 25 (1942).
199 See, e.g., ERWIN CHERMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 715 & n.45 and accompanying text (4th ed. 2011) (citing Rostow, supra note
negative reviews from both well-regarded commentators200 and Supreme Court Justices.201 Fourth, Herbert Haupt’s “mission was to act as a secret agent, spy[,] and saboteur for the German Reich.” These sorts of overt acts are relegated to the realm of adhering to the enemy by giving aid and comfort, not the levying of war.202 Fifth, Quirin’s reliance on the powers of the President under the usages of war was severely limited by the 1957 decision, Reid v. Covert. Covert causes a crime under the “Hague Convention and the law of war” and incorporated by an Act of Congress to subordinate to the requirements of the Constitution generally, and thus, of import to this note, the Treason Clause.203

Even assuming the Quirin dicta stood as good law, a close reading does support a negation of the rule against constructive treasons. The language at issue in Quirin is a very terse treatment of the issue of treason versus unlawful belligerency:

> Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.

The argument leaves out of account the nature of the offense which the Government charges and which the Act of Congress, by incorporating the law of war, punishes. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when with that purpose they entered—or, having so entered, they remained upon-our territory in time of war without

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200 E.g., Hurst, supra note 27, at 147-48; Larson, supra note 24, at 894-900.
201 Hamdi v. Rumsfeld, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting) (internal citations omitted) (“The case was not this Court’s finest hour. The Court upheld the commission and denied relief in a brief per curiam issued the day after oral argument concluded . . . a week later the Government carried out the commission’s death sentence upon six saboteurs, including Haupt. The Court eventually explained its reasoning in a written opinion issued several months later.”).
203 Reid v. Covert, 354 U.S. 1 (1957) (plurality) (Black, J.).
uniform or other appropriate means of identification. For that reason, even when committed by a citizen, the offense is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other.204

Upon close reading, the Court is applying the rule against constructive treasons to two variations of “the crime of treason defined in Article III, § 3 of the Constitution”205: the addition of the “absence of uniform”206 requirement and the subtraction of a citizenship or allegiance requirement. The Court found that the addition of a no-uniform requirement was an essential element and, “[f]or that reason, even when committed by a citizen, the offense is distinct from the crime of treason.”207 In fact, the assertion that the offense is not distinct from treason “leaves out of account the nature of the offense [of unlawful belligerency].” 208 In applying the rule, the Court should have focused on the irrelevancy of a uniform element to treason rather than the relevancy of it to unlawful belligerency, as elements are added to treason in this formulation209: “since the absence of uniform essential to [unlawful belligerency] is irrelevant to [treason].”210 In essence, therefore, the Court employed the additive formulation of the rule against constructive treasons and merely misapplied it, rather than contradicting the rule.211

In 1945, the Supreme Court reaffirmed its commitment to the rule against constructive treasons in Cramer v. United States, further making clear that the Supreme Court did not intend to upend the rule against constructive treasons. 212 Cramer was an appeal from the treason trial of one of Haupt’s co-conspirators. Based on the same set of facts and less than three years later, the Court again affirmed its commitment to the rule against constructive treasons in a significantly deeper treatment of the topic than in Quirin.213 It clarified that it did

204 Ex parte Quirin, 317 U.S. 1, 37-8 (1942) (citations omitted) (emphasis added).
205 Id. at 38.
206 Id.
207 Id.
208 Id.
209 Cf. Ex parte Bollman, 8 U.S. (4 Cranch) 75, 125-26 (1807).
211 See United States v. Rosenberg, 195 F.2d 583, 610-11 (2d Cir. 1952) (“[T]he absence of uniform in Quirin was an additional element”).
212 Cramer v. United States, 325 U.S. 1, 45 (1945).
213 Id.; see also Haupt v. United States, 330 U.S. 631 (1947) (holding that Haupt’s father, who never donned a Nazi uniform, was guilty of treason by giving aid and comfort).
not “intimate that Congress could dispense with . . . [Article III protections] by giving the same offense another name.”

Additionally, and more directly toward the facts of Quirin, there is another, later Supreme Court case about the trial of Haupt’s father, Hans, a co-conspirator to the same plot, which supports this reading and for the limiting Quirin when the exigencies of war disappeared. Hans was convicted at trial of treason and appealed. The Court’s 1947 case regarding that appeal, Haupt v. United States, confirms this reading of Quirin as a materiality-of-individual-elements analysis utilizing the additive formulation. Haupt was an appeal from the treason trial of Haupt’s father, Hans, another co-conspirator. While both father and son were part of the same Nazi conspiracy, the father never donned a Nazi uniform—the uniform that made the difference between unlawful belligerency and treason in Quirin.

Application of a rule—even with questionable analysis—cannot be said to signify abandonment of the rule itself. Therefore, the problem with Quirin is not that the Court has abandoned the rule against constructive treasons, but instead that the Quirin framework is inapt; similar to how Korematsu—if still cited today—would be an unsuitable framework for the application of strict scrutiny to facial racial classifications. Thus, Quirin properly rests within treason law as a Korematsu-like wartime aberration. Albeit Quirin is lesser in magnitude, is still similarly is not a contradiction of the rule against constructive treasons. The Court did not reject the restrictive rule; it merely applied it incorrectly.

The Quirin Court did not need to reach the issue of whether the subtraction of either the citizenship or allegiance requirement would create a material difference because any single material variation makes an offense distinct from

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214 Cramer, 325 U.S. at 45.
215 Haupt, 330 U.S. at 631.
216 Id. at 631.
217 E.g., Korematsu v. United States, 323 U.S. 214 (1944) (applying questionable-at-best strict scrutiny to facial racial classifications while not invalidating strict scrutiny for facial racial classifications).
219 Contra Larson, supra note 24, at 894-900; but see Hurst, supra note 186, at 421.
220 The questionable application is similar—albeit lesser in magnitude—to the application of strict scrutiny for facial racial classifications in Korematsu. See generally Rostow, supra note 198.
trend. Rather, the Court seems to assume such a variation would create a constructive treason\textsuperscript{221}: the Court’s precedent in \textit{Wiltberger} expressly shows that the recitation of an allegiance requirement does not affect the construction of treason.\textsuperscript{222}

\textit{b. The Quirin Problem in the Circuits}

The Second, Seventh, and Eleventh Circuits have had the occasion to weigh in on the link between terrorism and treason by levying war. To date, each court has fallen into the first peril. As a result of the \textit{Quirin} problem, the courts have drawn an immaterial distinction between treason and would-be constructive treasons.

In 1952, in \textit{United States v. Rosenberg}, the Second Circuit became the first court to recognize the potential for incongruous “inferior court[]” results from and the severe criticism of the \textit{Quirin} decision:

This ruling has been criticized. But this ruling binds inferior courts such as ours. In the \textit{Quirin} case, the absence of uniform was an additional element, essential to [unlawful belligerency] although irrelevant to . . . treason; in the Rosenbergs’ case, an essential element of treason, giving aid to an ‘enemy,’ is irrelevant to the espionage offense.

. . .

. . . [T]he \textit{Quirin} case had the unavoidable consequence of permitting death sentences to be imposed upon the citizen-saboteurs for crimes other than treason.\textsuperscript{223}

The \textit{Rosenberg} case dealt with the appeal from the conviction for the espionage-related offenses of the most infamous Soviet atomic spies.\textsuperscript{224} The Rosenbergs asserted that espionage offenses are a constructive treason under the giving aid and comfort definition of treason.\textsuperscript{225} The \textit{Rosenberg} court’s denial of the defense and reasoning would prove to be prescient.

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\textsuperscript{221} \textit{Ex parte Quirin}, 317 U.S. 1, 38 (1942) (“For that reason, even \textit{when committed by a citizen}, the offense is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other.” (emphasis added)).

\textsuperscript{222} United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 96-97 (1820).

\textsuperscript{223} United States v. Rosenberg, 195 F.2d 583, 610-11 (2d Cir. 1952) (internal citations omitted); see \textit{id.} at nn. 44-45; see also United States v. Drummond, 354 F.2d 132, 152-53 (2d Cir. 1965).

\textsuperscript{224} \textit{Rosenberg}, 195 F.2d at 588-90, 611; see also \textit{Drummond}, 354 F.2d at 152-53.

\textsuperscript{225} \textit{Rosenberg}, 195 F.2d at 588-90, 610; see also \textit{Drummond}, 354 F.2d at 152-53.
In 1986, in *United States v. Rodriguez*, the Seventh Circuit decided the appeal brought by a convicted member of Fuerzas Armadas de Liberación Nacional Puertorriqueña (FALN), “an armed clandestine terrorist organization seeking independence for Puerto Rico.” Rodriguez was convicted of seditious conspiracy to levy war for his role in the attempted bombing of U.S. military facilities in Chicago. The appellant challenged the seditious conspiracy statute on the grounds “that [it] [was] merely a ‘constructive treason’ statute that dispense[d] with the constitutional requirement[s].” Comparing seditious conspiracy to treason, the court engaged in analysis of what “requirements” differed between treason and seditious conspiracy, and of the different interests in criminalizing the conduct. The court held “that [seditious conspiracy] does not conflict with the [T]reason [C]lause. [Seditious conspiracy] protects a different governmental interest and proscribes a different crime.” Among other things, the Rodriguez court contended that seditious conspiracy lacked an allegiance element. The court did not clearly decide whether the absence of an allegiance element, by itself, would make a material difference because it focused on the cumulative differences between the elements of treason and seditious conspiracy.

In 1999, in *United States v. Rahman*, the Second Circuit affirmed the use of “analogous” sentencing guidelines for treason by levying of war when deciding the punishment for the participants in the 1993 World Trade Center bombing. The defendants were convicted of conspiracy to commit sedition by levying war. The court held that, with respect to the constructive treason defense raised, “[The] Treason Clause does not apply to the prosecution. The [Treason Clause] applies to prosecutions for ‘treason.’” Further, “[The defendants] 226

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226 United States v. Rodriguez, 803 F.2d 318, 319 (7th Cir. 1986).
227 *Id.*
228 *Id.* at 320.
229 *Id.*
230 *Id.*
231 *Id.*
232 *Id.*
234 *Id.* at 103.
235 *Id.* at 113 (“Nosair suggests that allegiance to the United States is not an element of treason within the contemplation of the Constitution. He concludes that, for constitutional purposes, the elements constituting seditious conspiracy by levying war and treason by levying war are identical, and consequently that prosecutions for seditious conspiracy by levying war must conform to the requirements of the Treason Clause.”).
were not charged with treason. Their offense... seditious conspiracy... differs from treason not only in name and associated stigma, but also in its essential elements and punishment.” 236 The Rahman court reasoned that seditious conspiracy is distinct from treason for two primary reasons.237 First, the seditious conspiracy statute subtracts an allegiance element; and second, a seditious alien is less stigmatized in his home country than a treasonous citizen.238 The Rahman court, however, citing Quirin, noted that “the question [of] whether the [Treason] Clause applies to offenses that include all the elements of treason but are not branded as such” remains open.239

In 2011, in United States v. Augustin, the Eleventh Circuit cited the Second Circuit’s Rahman decision and the Seventh Circuit’s Rodriguez decision in denying the appeal of Augustine (not Augustin), an al-Qaeda operative.240 Augustine asserted a constructive treason defense during his trial where he was charged with providing material support to a terrorist organization.241 The Eleventh Circuit noted that “neither... statutes under which Augustine was convicted—include allegiance to the United States as an element of the offense.” Therefore, it had “no trouble concluding that these offenses, as defined by Congress, do not fall within the ambit of the Treason Clause.”242

Although the Rodriguez, Rahman, and Augustin courts all reached the right result regarding seditious conspiracy, they did so by basing their decisions on the wrong premise. While they impermissibly focused upon the presence or absence of an allegiance requirement—especially because Wiltberger expressly proscribes that construction—they ignored the existence of a unique, and materially different, element in seditious conspiracy: the conspiracy. As explained by the Supreme Court in Bollman, conspiracy to levy war is a separate and distinct

236 Id. at 112 (emphasis added).
237 Id. at 112-13.
238 Id. at 112-13, n.9 (noting that seditious conspiracy is a “lesser offense,” thus, “[w]ether any of the defendants in fact owed allegiance to the United States and thus could have been prosecuted for treason if the other requirements to make such a prosecution were satisfied is immaterial”). Whether the necessary and sufficient nature of the treason definition affects the merging of offenses under the Doctrine of Lesser Included Offenses has not been addressed.
239 Id. at 113 (citing Quirin, 317 U.S. at 37-38).
241 Augustin, 661 F.3d at 1117 (citing Rahman, 189 F.3d at 113; Rodriguez, 803 F.2d at 320).
242 Id.
offense from treason because it adds a unique material element: conspiracy itself.\footnote{Ex parte Bollman, 8 U.S. (4 Cranch) 75, 125-26 (1807).} Treason by levying war requires overt acts tantamount to levying war, not merely overt acts in furtherance of the conspiracy.\footnote{Id.} Applying the \textit{Bollman} reasoning to seditious conspiracy produces the same result reached by the Circuits, but it does so without the need for an elemental inquiry that was performed over 200 years ago.\footnote{See id. at 127. Compare 18 U.S.C § 2384 (2012) (seditive conspiracy), with 18 U.S.C § 2381 (treason).}

Additionally, the Circuits have fundamentally misapplied \textit{Wiltberger}'s holding regarding the allegiance or citizenship requirement of treason. In \textit{Wiltberger}, Chief Justice Marshall compared the treason statute with the misprision (failing to report actual knowledge of) of treason statute.\footnote{United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 96-9 (1820). The Court reprinted the statutes in question at footnote “a.” Id. at 80 n.a. The language of the treason statute is substantially the same except for the possibility of lesser punishment. Compare id. (defining the crime of treason in 1820), with 18 U.S.C § 2381 (modern treason statute).} As Marshall noted, “The words . . . ‘owing allegiance to the United States’ [in the treason statute] . . . are entirely surplus words, which do not, in the slightest degree, affect its sense.”\footnote{Wiltberger, 18 U.S. (5 Wheat.) at 97 (interpreting the treason statute, which is now codified at 18 U.S.C § 2381).} The Circuits certainly understood the material necessity of allegiance, as discussed in \textit{Wiltberger},\footnote{E.g., United States v. Rahman, 189 F.3d 88, 113 (2d Cir.1999) (quoting Wiltberger, 18 U.S. (5 Wheat.) at 97) (“[T]reason is a breach of allegiance, and can be committed by him only who owes allegiance.”).} but they failed to recognize that a recitation of allegiance is neither material nor necessary. \textit{Wiltberger} held that, when comparing the treason statute to another statute, the express inclusion of an allegiance element in the treason statute has no effect.\footnote{Wiltberger, 18 U.S. (5 Wheat.) at 97 (interpreting the treason statute, which is now codified at 18 U.S.C § 2381).} If the allegiance element were omitted from the treason statute—such that the language of the statute precisely mirrored the constitutional clause—then the flaws in the elemental analysis performed by the Second, Seventh, and Eleventh Circuits are clear. Therefore, to give effect to \textit{Wiltberger}, courts must construe the treason statute as if allegiance were not an element, but rather a mere factual precondition necessary for the mens rea.\footnote{Wiltberger, 18 U.S. (5 Wheat.) at 96-97.} The principal idea is that a person must owe an allegiance to commit treason, so when someone owing an allegiance does what is substantively treason, his or her act is treason and not some other crime.\footnote{See supra notes 153-55 and accompanying text.}
Notwithstanding flaws in their reasoning, each of these Circuits—and even the Supreme Court in *Quirin*—has indicated an inclination to engage in the mirroring, additive, and subtractive analysis for detecting substantive differences between treason and the statute in question. In addition to expressly affirming the mirroring formulation in *Cramer*, the Supreme Court used the subtractive formulation in *Wiltberger*, the additive formulation in *Bollman*, and—questionable result aside—in *Quirin*. But without guidance from the Supreme Court on how to conduct such analysis, the constructive treason defense is doomed because of the *Quirin* problem. The Seventh Circuit analyzed whether the elements of the crime differed from that of treason by listing each and every semantic distinction that occurred to them, but it failed to consider the materiality of those distinctions. The Second Circuit began to consider the materiality of the differing elements, but, in contradicting *Wiltberger*, it concluded that the lack of an allegiance element in the seditious conspiracy statute was an essential distinction from treason. The Eleventh Circuit compared the elements, but stopped its inquiry after noting that seditious conspiracy lacked an allegiance requirement, and relied on its sister circuits’ decisions on point rather than applying *Wiltberger*. Thus, the Supreme Court would merely need to synthesize its previous rulings into these three coherent formulations to resolve the analytical portion of the *Quirin* problem.

c. The Solution: “*Korematsu*” *Quirin*

If *Korematsu*—the first Supreme Court case expressly to apply strict scrutiny to facial classifications on the basis of race—were considered to be the framework for applying strict scrutiny today, a cogent Equal Protection Clause jurisprudence would not exist. The similarly aberrant, wartime application of the even more well-established rule against constructive treasons should not constitute the framework for modern application. Giving effect to *Wiltberger, Bollman, Cramer*, and the above formulations of the rule against constructive treason would fix the analytical problems faced by the Circuits in applying the rule against constructive treasons post-*Quirin*. But

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251 See supra Part IV.A.1 & note 165.

252 United States v. Rodriguez, 803 F.2d 318, 320 (7th Cir. 1986).

253 United States v. Rahman, 189 F.3d 88, 111-13 (2d Cir. 1999) (per curiam).

the uniform issue remains. How may terrorists, like al-Aulaqi, who presumably never wear military uniforms, avoid the specific holding of *Quirin*? And are certain acts committed by a citizen treasonous only if committed while wearing a uniform?255

There is one very simple and commonsense way to avoid the confusion created by *Quirin*, at least in the context of targeted killing: limit *Quirin* to its facts. As Judge McMahon noted in granting summary judgment for the Government in *New York Times Co. v. U.S. Department of Justice*:

Both *Quirin* and *Hamdi* involved individuals who were in United States custody. *Quirin* remains the lone case upholding the right to try a United States citizen before a military commission; it said nothing at all about killing a United States citizen without any sort of trial. *Hamdi* addressed the right of a United States citizen detained in the United States as an enemy combatant to challenge his confinement via habeas corpus. Again, there was no suggestion that Mr. Hamdi was to be executed without some kind of trial.256

Justice Scalia’s *Hamdi* dissent provides additional jurisprudential support for reading *Quirin* as narrowly holding that the Government has a right to exercise military jurisdiction over a U.S. citizen in certain, extreme circumstances.257

Moreover, according to the *Quirin* court, and on the facts before it, a uniform was an “appropriate means of identification.”258 Today, however, the Government could not claim, with any validity, that the absence of a uniform affects its ability to identify al-Aulaqi. The cases of Herbert Haupt and Anwar al-Aulaqi arose in very different contexts. Haupt took up a uniform in serving Nazi Germany,259 a well-organized enemy with a central government, and was captured on U.S. soil.260 Al-Aulaqi never wore a uniform, did not work for an enemy that could be described as an effectively organized central government, and was stalked by a predator drone in

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255 See *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942). The Supreme Court’s opinion in *Hamdi* may be read as signaling that it is uncomfortable with the result in *Quirin*. *Hamdi* v. Rumsfeld, 542 U.S. 507, 548-49 (2004) (plurality opinion) (O’Connor, J.) (“*Ex parte Quirin* may perhaps be claimed for the proposition that the American citizenship of such a captive does not as such limit the Government’s power to deal with him under the usages of war.” (citations omitted) (emphasis added)); see also id. at 569-72 & n.4 (Scalia, J., dissenting).


257 Id. at 523 (citing *Hamdi*, 542 U.S. at 554 (2004) (Scalia, J., dissenting); see also *Hamdi*, 542 U.S. at 569-72 & n.4 (Scalia, J., dissenting).

258 *Quirin*, 317 U.S. at 38.

259 Id. at 21.

260 Id. at 21-22.
In Haupt’s case, a Nazi uniform would have helped the U.S. government to identify its enemy as he walked along the beaches of Long Island and the streets of New York City (and in fact an abandoned one did). In al-Aulaqi’s case, by way of contrast, the targeted nature of the drone strike \(^{262}\) permits the inference that the Government had no trouble identifying al-Aulaqi, even from the sky, well before striking. Although a uniform may assist in the identification of terrorists in some cases, in the circumstance of targeted killing, where the Government has already identified and located its target, it does not. Therefore, *Quirin*, as well as *Hamdi*’s reliance on *Quirin*, is inapposite to cases of targeted killing. This line of reasoning is particularly damning to the Justice Department’s legal position on the matter, as what has been revealed of the government’s legal justification relies almost exclusively on *Hamdi*. \(^{263}\)

### B. A Corruption of Blood and Citizen-Terrorist Property Interests: Disparate Treatment

Prosecution under a differently named crime that affords the protections of the Treason Clause is a harmless constructive treason because the Treason Clause was complied with in all but name. \(^{264}\) That is to say, if a prosecution for terrorism was in fact a prosecution for constructive treason, but the defendant was afforded the processes due to a traitor, the error would be harmless. \(^{265}\) In al-Aulaqi’s case, there are numerous obvious ways that his treatment did not comport with the Treason Clause. This section focuses on the one example of the disparate treatment between terrorists and traitors: the corruption of blood. Rather than being treated as a traitor’s assets, al-Aulaqi’s assets were treated as a non-citizen terrorist’s assets. \(^{266}\) They were subject to total forfeiture and

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261 See supra Part II (discussing how al-Aulaqi worked for AQAP, a non-state terrorist organization notable for deceptive and nefarious tactics).

262 See supra Part II (discussing the precision drone strike that killed al-Aulaqi).

263 See infra note 298.

264 United States v. Drummond, 354 F.2d 132, 152 (2d Cir. 1965) (“[I]t is also settled that an offense must incorporate all the elements of treason in order for the two-witness rule to apply.”); see United States v. Rahman, 189 F.3d 88, 111-13 (2d Cir. 1999) (per curiam) (“[The defendant’s] conviction was not supported by two witnesses to the same overt act. Accordingly the conviction must be overturned if the requirement of the Treason Clause applies to this prosecution.”); see also United States v. Rosenberg, 195 F.2d 583, 610-11 (2d Cir. 1952).


seizure by order of the U.S. Department of the Treasury. In light of Van Riswick, and because al-Aulaqi is properly characterized as a traitor, those assets must divest completely from the Government and pass on to al-Aulaqi’s successors in interest. If any assets seized pursuant to al-Aulaqi’s designation as a Specially Designated Global Terrorist, or forfeited under 18 U.S.C. § 981(a)(1)(G), have not yet divested completely from the Government, then the bar against corruptions of blood is violated.

Incidentally, this particular form of asset protection provides relief for the standing issue that predicated the dismissal in al-Aulaqi v. Obama. By creating an injury in fact to al-Aulaqi’s estate (unlawful seizure of Anwar’s assets under Treasury Department terrorism procedures), the government thus confers third-party standing on the executor. Further, the petitioners in al-Aulaqi v. Panetta employed executory interest as the basis for standing; the ACLU asserts standing for Nasser al-Aulaqi not as father, but as executor. If Nasser al-Aulaqi is able to demonstrate his credentials as executor, then the case will likely address the merits of the case.

C. Remedy for Violations of a Citizen’s Treason Clause Rights

Courts have treated failure to abide by the Treason Clause as structural error, which demands automatic reversal on appeal without a showing of prejudice. However, there are

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269 § 981(a)(1)(G) (providing that all of a terrorist’s assets, real or personal, foreign or domestic, are subject to forfeiture).
271 Judge Bates hinted that the ACLU may be able to surmount the standing issue by asserting official executory interest. See Al-Aulaqi, 727 F. Supp. 2d at 25-26 (citing Saunders v. Air Florida, Inc., 558 F. Supp. 1233, 1235 (D.D.C. 1983) (“The D.C. wrongful death statute does not provide a basis for plaintiff’s alleged legally protected interest in preserving his relationship with his adult son, as it only protects persons who are ‘officially appointed executors or administrators of the child’s estate’. . . . There is no evidence in the record to suggest that plaintiff is the ‘executor or administrator’ of Anwar Al-Aulaqi’s estate, and the Court is aware of no other possible statutory basis for plaintiff’s alleged legally protected interest.”)).
272 Panetta Complaint, supra note 20, at ¶ 6.
273 Defs. Motion to Dismiss at 4-5, Al-Aulaqi v. Panetta, 1:12-cv-01192-RMC (D.C. Cir. 2012) (contesting standing on the narrow grounds that plaintiffs “failed to properly alleg[e]” that they are “decedents’ personal [estate] representatives” because the plaintiffs must have previously “file[d] with the Register a copy of the appointment as personal representative.”).
valid arguments for a different standard of review. The guarantees of the Treason Clause have never been subjected to a standard of review such as those employed in due process or equal protection cases. The Supreme Court has never addressed the question of whether all violations require immediate reversal or if there may be circumstances in which a state’s interests outweigh the harm of the deprivation.

Supreme Court precedent indicates that automatic reversal results from the deprivation of any of the procedural protections afforded by the Treason Clause. In United States v. Burr, Justice Marshall dismissed the High Treason charge against Aaron Burr because, as an evidentiary matter, the Government had not provided two witnesses to the same overt treasonous act.275 Hundreds of years later, in Rahman, the Second Circuit stated that “[i]t is undisputed that [the defendant]’s conviction was not supported by two witnesses to the same overt act. Accordingly, the conviction must be overturned if the requirement of the Treason Clause applies to this prosecution for seditious conspiracy.”276

The Judiciary is responsible for ensuring that the Government does not abuse its power by declaring a person an enemy of the state in order to suppress that person’s political activities.277 The procedural protections in the Treason Clause do not exist simply to make prosecution more challenging. Rather, they exist to safeguard against improper accusations, which would be manifest miscarriages of justice were they brought to trial. A court can tell the difference between a treason prosecution for the purpose of suppressing minority political activity and one to address a security threat without

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275 Burr, 25 F. Cas. at 13 (Marshall, Circuit Justice, C.C.D. Va., 1807) (No. 14692a) (“[Treason] . . . must be proved by two witnesses . . . . Under the control of this constitutional regulation, I am to inquire whether the testimony laid before me furnishes probable cause in support of this charge.”); see also United States v. Burr, 25 F. Cas. 55, 180 (Marshall, Circuit Justice, C.C.D. Va., 1807) (No. 14693) (“This opinion does not comprehend the proof by two witnesses . . . .”).

276 Rahman, 189 F.3d at 112.

277 The matter that concerned the Founding Fathers was really the use of treason convictions by political factions to “[wreak] alternate malignity on each other.” The Federalist No. 43, supra note 29. For example, if al-Aulaqi were not in any way related to the operations of AQAP and publically spoke as a cleric against policies of the United States, then his actions wouldn’t be treason by levying war, but likely political speech covered by the First Amendment. But cf. Brandenburg v. Ohio, 395 U.S. 444, 449-50 (1969). Depending on the specific content of the speech, however, if it “incite[d] his listeners to imminent lawless action,” it would forfeit First Amendment protection. Id.
entering into deep and exhaustive inquiry. Where the government kills traitors without process to address a clear, imminent security threat, no such miscarriage exists, and procedural defects should be subject to less stringent review.

D. Treason Clause Externalities: A Brief Discussion of the Effect of Article III, Section iii on the Political Question Doctrine

A court scrutinizing the Government action in *al-Aulaqi v. Obama* would need to determine if al-Aulaqi was a military threat. This turns on the question of how a court could qualify a threat to determine the appropriateness of the responding force.\(^{278}\) As the judge in *al-Aulaqi v. Obama* held, such an inquiry is the traditional hallmark of a non-justiciable political question.\(^{279}\) But some commentators have argued that it is not.\(^{280}\) The application of the political question doctrine in *al-Aulaqi v. Obama* was mere dicta: the court had already held that the plaintiffs lacked standing and it did not need to reach the issue of political question nonjusticiability.\(^{281}\) Nevertheless, with respect to a constructive treason defense, consideration of two of the six factors considered in political question jurisprudence—a textually demonstrable commitment to a coordinate branch of the Government, and the lack of a judicially manageable standard of determination—is informative as the analysis of these factors changes significantly when the Treason Clause comes into play.\(^{282}\)

The Judiciary is not allowed to intrude upon issues where there is a textually demonstrable commitment to a

\(^{278}\) Ex ante determinations on the appropriateness of military decisions like this traditionally have been relegated to the realm of non-justiciable political questions. See, e.g., *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 46-47 (D.D.C. 2010). The Court, however, has clearly signaled that it will entertain challenges to actions under the war power. See, e.g., *United States v. Robel*, 389 U.S. 258 (1967); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

\(^{279}\) *Al-Aulaqi*, 727 F. Supp. 2d at 46-47.

\(^{280}\) E.g., Dehn & Heller, *supra* note 8.

\(^{281}\) *Al-Aulaqi*, 727 F. Supp. 2d at 35 (standing); *id.* at 52 (justiciability).

\(^{282}\) *Baker v. Carr*, 369 U.S. 186, 217 (1962) (plurality opinion) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.").
coordinate branch of government because “[t]he nonjusticiability of a political question is primarily a function of the separation of powers.” The fact that the Treason Clause appears in Article III, and not Article I or II, reveals no such textual commitment. Rather, it represents a textually demonstrable commitment to the Judiciary to administer treason law. Thus, the al-Aulaqi court’s reliance on the textual delegation of foreign affairs and war-making authority to the Executive and Congress would be inapposite in a Treason Clause challenge.

While such an interpretation may seem overly textual, the Government, in moving to dismiss the al-Aulaqi v. Panetta suit, used a parallel reading. The ACLU complaint alleged that “[the Government’s] actions constituted an unconstitutional act of attainder because [the Government] designated Anwar Al-Aulaqi for death without the protections of a judicial trial . . . .” Bills of attainder are always unconstitutional under Article I. The Government asserts that “the Bill of Attainder Clause applies to bills: legislative acts—not executive ones” because “[the] clause is found in Article I of the Constitution, the article addressing the powers of Congress.” The Government’s position is correct insofar as Supreme Court jurisprudence states, attainders are a “category of Congressional actions which the Constitution barred.” However, if the court accepts the Government’s textual argument that the prohibition on attainders does not apply to the Executive because of its placement in Article I, then it must analogously construe the Treason Clause’s judicial restrictions and responsibilities.

Further, the CIA Counterterrorism Center legal team has created a “judicially discoverable and manageable standard.” “These [counterterrorism] operations are conducted in strict accordance with American law and are governed by legal

284 See supra Part I.A.2 (discussing separation of powers); see also N.Y. Times Co. v. U.S. Dep’t of Justice, 915 F. Supp. 2d 508, 523 (S.D.N.Y. 2013) (discussing the separation of powers regarding treason law and the role of the judiciary).
286 Panetta Complaint, supra note 20 at ¶ 43.
287 U.S. CONST. art. I., § 9 cl. 3. The Government’s motion to dismiss also asserts several cases to support its proposition.
289 United States v. Lovett, 328 U.S. 303, 315 (1946) (emphasis added); see also Paradissiotis v. Rubin, 171 F.3d 983, 988 (5th Cir. 1999); Global Relief Found., Inc. v. O’Neill, 315 F.3d 748, 755 (7th Cir. 2002); Walmer v. U.S. Dep’t of Defense, 52 F.3d 851, 855 (10th Cir. 1995).
290 Baker v. Carr, 369 U.S. 186, 217 (1962); see supra Part V.A.2.a (describing the trial-like adjudication by the CIA).
guidance provided by the Department of Justice.”

Thus, the basis for CIA adjudication and approval of citizen-terrorists for lethal operation is a “legalistic and carefully argued” analysis.

In fact, in February 2013, the Department of Justice released a presumably redacted version of its “al-Aulaqi White Paper,” which provides the previously classified “legal framework for considering the circumstances in which the U.S. government could use lethal force in a foreign country outside the area of active hostilities . . . against a U.S. citizen who is a senior operational leader of . . . an associated force of al-Qa’ida.”

The standard is a three-part inquiry, and asks whether:

1. an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States;
2. capture is infeasible, and the United States continues to monitor whether capture becomes feasible;
3. the operation would be conducted in a manner consistent with the applicable law of war principles.

291 McKlevey, supra note 16.

292 Id.

293 A.k.a., “the drone memo,” “the al-Qulaqi white papers,” etc. Many names have been used to refer to this DOJ unsigned white paper in the press and in scholarship. See, e.g., Charlie Savage, Secret U.S. Memo Made Legal Case to Kill a Citizen, N.Y. TIMES (Oct. 8, 2011), http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all&_r=0.

294 Obviously, the white paper has been at least partially declassified. Judge McMahon’s finding in N.Y. Times Co. that the Government had not waived the classified status of the entire “al-Aulaqi White Paper” because, with respect to the public disclosures by Attorney General Holder that would have been the basis for such a waiver, N.Y. Times Co. v. U.S. Dep’t of Justice, 915 F. Supp.2d 508, 537 (S.D.N.Y. 2013) (citing Eric Holder, U.S. Att’y Gen., Speech at the Northwestern University School of Law (Mar. 5, 2012)), was based on such disclosure being “a far cry from a legal research memorandum.” Id. It is no longer the case that the Obama Administration’s disclosures on that topic are a far cry, but are in fact exactly such a memorandum, which purportedly “reveal[s] the exact legal reasoning behind the Government’s conclusion that its actions comply with domestic and international law.” Id. at 536-37 & n.29. See generally DEP’T OF JUSTICE, WHITE PAPER: LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE 1 (2013). Therefore, the rest of the White Paper, Savage, supra note 293 (describing the document as approximately fifty pages), might discuss the Government position on the Treason Clause and has been a change in circumstances which may demand a change in Judge McMahon’s findings and compel full publication. Cf. N.Y. Times Co., 915 F. Supp.2d at 535-36 (citing Halpern v. F.B.I., 181 F.3d 279, 294 (2d Cir. 1999)); Public Citizen v. Dep’t of State, 11 F.3d 198, 201 (D.C. Cir. 1993); Dow Jones & Co., Inc. v. Dep’t of Justice, 880 F. Supp. 145, 150-51 (S.D.N.Y. 1995)). The D.C. Circuit Court of Appeals, however, held contrary to Judge McMahon. See generally ACLU v. CIA, No. 11–5320, 2013 WL 1003688 (D.C. Cir. Mar. 15, 2013) (Garland, C.J.).

295 AL-AULAQI WHITE PAPER, supra note 294, at 1.

296 Id. at 1, 6.
Hence, the al-Aulaqi holding that no such standard is intelligibly discernible is in error. It strains all credulity to believe that the CIA lawyers and the Department of Justice are more capable than a court in applying an “extremely robust” rule with “a solid legal foundation” to determine if a citizen should die for acts that may be constitutionally punished only if the Judiciary has discharged its Article III responsibility. It is particularly true that courts are more capable when the standard is “[b]ased on generations-old legal principles and Supreme Court decisions handed down since WWII, as well as during this current [War on Terror].”

Therefore, with respect to the essential inquiry of the political question doctrine—the textually demonstrable commitment that separates a power from coordinate branches of government—the assertion of a constructive treason defense in al-Aulaqi-type cases allocates the Government’s responsibility of administering treason law to the Judiciary, rather than either the

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298 See N.Y. Times Co., 915 F. Supp. 2d at 525-26 & nn.13, 15 (describing the well-developed standard). However, there is an obvious flaw in the Government’s standard: the reliance on Hamdi alone as a jurisprudential basis for the framework. Al-Aulaqi WHITE PAPER, supra note 294, at 6 (citing Hamdi v. Rumsfeld, 542 U.S. 507, 534-35 (2004) (plurality opinion)). As Judge McMahon in the Southern District of New York notes, the Hamdi and al-Aulaqi cases are readily distinguishable: “Hamdi addressed the right of a United States citizen . . . to challenge his confinement . . . there was no suggestion that Mr. Hamdi was to be executed without some kind of trial.” N.Y. Times Co., 915 F. Supp. 2d at 526 n.13. Or, as the government states in the Panetta legislation, “Hamdi involved the habeas claim of a U.S. citizen challenging his military detention in the United States, a context wholly distinct from the alleged use of lethal force abroad to target a leader of an armed enemy group.” Defs. Reply Brief at 6, Al-Aulaqi v. Panetta, 1:12-cv-01192-RMC (D.C. Cir. 2012) (citation omitted). Thus, the standard relies on a case decided in a significantly different context, where the right to life was not at issue in the Mathews balancing performed by the Court. Hamdi, 542 U.S. at 534-35. The larger issue is that this standard, while being touted as “extremely robust” and “[b]ased on generations-old legal principles and Supreme Court decisions handed down during WWII, as well as during this current conflict,” relies erroneously on Hamdi and Quirin. See New York Times Co., 915 F. Supp. 2d at 525 n.15. Either the standard is developed enough where some manageable legal standard exists for making for these sorts of determinations, or the determinations are arbitrary and capricious actions, which would fail even rational basis review, and which even more strongly demands judicial intervention to grant relief to citizens being deprived of their right to life by unconstitutional state action. See supra notes 256-57 and accompanying text (discussing this footnote).
300 McKlevey, supra note 16.
301 N.Y. Times Co., 508 F. Supp. 2d at 527 (quoting Eric Holder, U.S. Att’y Gen., Speech at the Northwestern University School of Law (Mar. 5, 2012)).
Executive or Congress. Further, there is a judicially manageable standard by which a court may do so.

V. THE SECOND PERIL: THE EQUAL PROTECTION CLAUSE

Even if a court reviewing an al-Aulaqi-like case avoids the first peril, it must ensure that its treatment of the defendant does not violate the Equal Protection Clause. Because there is no substantial difference between treason by levying war and terrorism when committed by a U.S. citizen; the two crimes are intrinsically the same offense within the meaning of *Skinner*. Thus, the Government has made an “invidious . . . discrimination” that must pass strict scrutiny if it “lays an unequal hand” on the two classes of offenders.303

A. Lays An Unequal Hand: Different Treatment of Citizen-Terrorists and Traitors with Respect to Legal Process and Access to the Judiciary

A comparison of the legal protections afforded to terrorists and traitors reveals significant differences with respect to the legal process provided prior to a determination to end the individual’s life, and with respect to access to the Judiciary. One’s status as either a traitor or terrorist will shape the accused’s access to the courts and legal process.

1. The Right to Life

Many commentators have discussed the unprecedented nature of the al-Aulaqi killing with respect to his right to life, albeit not in an equal protection context. Yet the fact remains that no other criminal in the United States has ever been sentenced to death by drone without a trial.

Although the federal statute for treason prescribes a sentence of death, it also gives significant latitude to the sentencing judge. This latitude permits that the traitor “be imprisoned not less than five years and fined . . . not less than $10,000.” By contrast, the terrorism statute mandates a sentence much less severe than capital punishment. Thus,
had al-Aulaqi been tried before an Article III court and found guilty of treason, he could have had a chance to plea for a lesser sentence than the one the CIA imposed. Additionally, and perversely, had al-Aulaqi been found guilty of treason, the court would have had a stronger constitutional basis for imposing a death sentence.

2. Access to the Judicial System

The availability of these alternative punishments, however, presupposes access to the courts. Accused traitors are given the full rights of any person accused of a capital offense in a federal prosecution, such as the right to a jury trial and the right to appeal. Additionally, the accused would benefit from the special requirements of treason prosecutions: its evidentiary requirement and its prohibition on corruptions of blood. The Supreme Court has vigilantly protected these treason rights, so to speak, since the early founding of the Republic. When a terrorist target like al-Aulaqi is approved for a lethal operation, he or she likely will be executed. That is to say, terrorists may be killed without trial or appeal, but traitors may not be killed without either.

a. Trial by the CIA Rather Than by Jury

In Ex parte Bollman, the Supreme Court determined that the question of whether an accused traitor has levied war is a matter of fact for a jury to decide. In al-Aulaqi’s case, the determination that he was a terrorist who deserved death came from a different source: the CIA. In such circumstances, the

308 E.g., U.S. CONST. amend. VI (granting, among other things, the right to confront witnesses); 18 U.S.C. § 3005 (providing for the right to counsel in federal capital cases).
309 U.S. CONST. art. III, § 2, amend. VI; see also Baldwin v. New York, 399 U.S. 117, 119-20 (1970) (“[T]he federal right to jury trial attaches where an offense is punishable by as much as six months imprisonment. I think this follows both from the breadth of the language of the Sixth Amendment, which provides for a jury in ‘all criminal prosecutions,’ and the evidence of historical practice.”). Treason, being punishable by a minimum of five years and a maximum of death, clearly has the right to a jury trial attached. 18 U.S.C. § 2381.
311 U.S. CONST. art III, § 3.
312 See supra note 63 and accompanying text.
314 Ex parte Bollman, 8 U.S. (4 Cranch) 75, 118 (1807) (“[I]t [i]s impossible to define what should in every case be deemed a levying of war. It is a question of fact to be decided by the jury from all the circumstances.”).
315 Miller, supra note 110.
CIA is not making a routine administrative decision; it is conducting a trial-like adjudication.\textsuperscript{316} Even where an agency, rather than a court, makes a determination, some due process rights attach. Where “a relatively small number of persons [is] concerned, who [are] exceptionally affected [by the agency action at issue], in each case upon individual grounds,” a hearing is required.\textsuperscript{317}

An individual must meet the CIA’s legal standard to be classified as a terrorist subject to targeted killing.\textsuperscript{318} Pursuant to a secret 50-page Department of Justice white paper outlining the terrorist classification process,\textsuperscript{319} approximately 10 CIA Counterterrorism Center attorneys receive a “two page document,” along with ‘an appendix with supporting information, if anybody want[s] to read all of it.”\textsuperscript{320} The attorneys then prepare a “cable” that “often run[s] up to five pages.”\textsuperscript{321} Senior attorneys will review the cable for errors, such as if “the justification in approving a person for lethal operation] would be that the person was thought to be at a meeting [but was not].”\textsuperscript{322} The cable is then sent to the CIA’s General Counsel for approval.\textsuperscript{323} At any given time, there are about 30 individuals approved for targeting.\textsuperscript{324}

The CIA determined that al-Aulaqi was an appropriate target of a lethal operation because he was the “leader of external operations”\textsuperscript{325} in AQAP, and, accordingly, he was a terrorist and a military threat.\textsuperscript{326} It is undisputed that al-

\textsuperscript{316} Dreyfuss, supra note 24 (“When an agency makes a binding decision on the rights of a particular party by reference to historical facts, it is conducting an adjudication.” (citations omitted)).

\textsuperscript{317} Bi-Metallic Inv. Co. v. State Bd. Equalization, 239 U.S. 441, 446 (1915). Undoubtedly, a single person facing the prospect of death by Hellfire missile would be a sufficiently small number of persons: to say that he would be exceptionally affected by the adjudication is an understatement.

\textsuperscript{319} McKlevey, supra note 16. For the purposes of this note, we will assume that al-Aulaqi was subject to these standards, albeit that the relevant action was the final determination by the Obama Administration. Islamist cleric Anwar al-Awlaki killed in Yemen, B.B.C. NEWS (Sept. 30, 2011), http://www.bbc.co.uk/news/world-middle-east-15121879.

\textsuperscript{320} Id. (quoting John A. Rizzo).

\textsuperscript{322} Id.

\textsuperscript{324} Id.

\textsuperscript{325} Mazzetti et al., supra note 3, at A1 (quoting President Obama).

\textsuperscript{326} According to Scott Shane, the Government’s legal basis for lethal operations approval is as follows:

First, he posed an imminent threat to the lives of Americans, having participated in plots to blow up a Detroit-bound airliner in 2009 and to bomb
Aulaqi levied war.\textsuperscript{327} His actions conformed to the definition of treason: he assembled with others to commit overt acts to usurp the Government’s authority for non-private motives; and importantly, he was a citizen who owed allegiance to—and therefore betrayed—the United States.\textsuperscript{328} Thus, because he was a traitor, his guilt and punishment were questions for a jury, not for the President and his men.\textsuperscript{329}

\textit{b. Equal Access to Appellate Courts}

The right to appeal for indigent classes is protected by the Equal Protection Clause.\textsuperscript{330} In \textit{Douglas v. California}, the Supreme Court held that a state cannot invidiously discriminate by providing different appellate processes to protected classes.\textsuperscript{331} In \textit{Douglas}, the discriminatory classification at issue was the more mundane classification of wealth.\textsuperscript{332} In al-Aulaqi’s case, the different treatment between citizen-terrorists and traitors is a product of invidious discrimination between two classes of alleged criminals who committed intrinsically the same
offense, resulting in different treatment with respect to appeals as a matter of right.

The President takes the position that he may order killings of citizen-terrorists, a stance that is not subject to judicial review under the political question and state secrets doctrines. In *al-Aulaqi v. Obama*, the presiding judge noted that it is constitutionally peculiar that executive decisions regarding wiretapping citizens abroad were subject to judicial review, but what were effectively kill warrants were not. The judge ultimately agreed that the issuance of kill warrants is an unreviewable political question.

Additionally, the judge accepted the Government’s claims that al-Aulaqi, or a person in a similar situation, could avail himself of the courts, for example, by peaceably surrendering at an embassy. This claim, however, presumes two things. First, it presumes that there is a matter over which to surrender. While al-Aulaqi was clearly a traitor, he was never charged with any “terrorism-related crimes” or treason. The Government’s position here begs the question: why would al-Aulaqi surrender on non-existent charges in order to appear in court? The lack of a criminal indictment and the secret nature of the CIA kill list negates any possibility that al-Aulaqi could have received notice of the specific crimes or terrorist attacks for which he was expected to surrender and stand trial.

Second, the Government’s claim that al-Aulaqi could have accessed courts presumes that surrender presents itself as a realistic option. The Government’s position, as accepted by the court, essentially would have required al-Aulaqi to travel to the U.S. embassy in Yemen. Likely possessing invaluable information about his associates’ international criminal conspiracy of terror, al-Aulaqi would have had to betray and evade the murderous AQAP members, comrades that had kept

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333 See supra Part III.C.
336 Id. at 8.
337 Id. at 46.
338 Id. at 17-18.
339 Al-Aulaqi Complaint, supra note 13 at ¶ 24.
340 Which, the ACLU properly recognized. *Al-Aulaqi*, 727 F. Supp. 2d at 18 (citing Pl.’s Opp. at 9) (arguing that deciding that al-Aulaqi needs to avail himself of the judicial system decides the Government’s contention that “[al-Aulaqi was at the time] a participant in an armed conflict against the United States.”).
341 Dreyfuss, supra note 24, at 273.
him and that information safe from the Yemeni authorities.\textsuperscript{342} He would have needed to travel through Yemen when he was wanted for a crime for which he was sentenced \textit{in absentia}.\textsuperscript{343} And, he would have needed to do all of this while evading the freely flying predator drone force of the U.S. government.\textsuperscript{344} Essentially, al-Aulaqi was facing the same choice of Ben Richards, the protagonist of \textit{The Running Man}.\textsuperscript{345}

Although some of these considerations are unique to al-Aulaqi’s case, and will not apply to all citizen-terrorists, the first presumption stands as a legal point independently of the second. If the Government adopts some form of notice system, the second consideration must be at least examined when discussing the concept of surrender. Thus, with respect to Al-Aulaqi, the court erred in holding that “[a]ll U.S. citizens may avail themselves of the U.S. judicial system if they present themselves peacefully, and no U.S. citizen may simultaneously avail himself of the U.S. judicial system and evade U.S. law enforcement authorities.”\textsuperscript{346}

Further, and most importantly, the judge did not realize the full implication of his conclusions that the targeting of al-Aulaqi was a political question.\textsuperscript{347} As John C. Dehn notes, “[t]argeted individuals thus might turn themselves in only to find their status [as targeted for death] unreviewable as a political question.”\textsuperscript{348} The surrender option thus guarantees no actual judicial relief to the \textit{Running Man} conundrum under \textit{al-Aulaqi v. Obama}.\textsuperscript{349}

\textsuperscript{342} See, e.g., Savage, supra note 294. Al-Aulaqi evaded Yemeni commando authorities for some time with the assistance of his terrorist associates. \textit{Id}.

\textsuperscript{343} See supra note 97.

\textsuperscript{344} The U.S. has permission from Yemen to patrol with drones. Savage, supra note 294.

\textsuperscript{345} See generally RICHARD BACHMAN, \textit{THE RUNNING MAN} (1982). Ben Richards competes in a game show, \textit{The Running Man}, ostensibly to make some money for his family. \textit{Id}. The object of \textit{The Running Man} is to survive: the participant is declared an enemy of the U.S. government and elite hit men are sent to kill him in a thirty-day worldwide excursion. \textit{Id}. Richard Bachman is a pen name for Stephen King.

\textsuperscript{346} \textit{Al-Aulaqi}, 727 F. Supp. 2d at 18.

\textsuperscript{347} \textit{Id}. at 46.

\textsuperscript{348} Dehn & Heller, supra note 8, at 185; accord \textit{Al-Aulaqi}, 727 F. Supp. 2d at 46 (“Judicial resolution of the ‘particular questions posed by plaintiff in this case would require this Court to decide: . . . whether there are ‘means short of lethal force’ that the United States could ‘reasonably’ employ to address any threat that Anwar Al-Aulaqi poses to U.S. national security interests . . . it becomes clear that plaintiff’s claims pose precisely the types of complex policy questions that the D.C. Circuit has historically held non-justiciable under the political question doctrine.” (emphasis added) (citation omitted)); see also \textit{id}. at 52 (discussing the court’s lack of capacity). Cognizing any real limitation on the Government’s power to deal with “any threat,” \textit{id}., posed by an individual infamous for devious and treacherous suicide bombing attempts seems to be an impossible task.
Consequently, although the Constitution guarantees traitors more than a full spectrum of rights, citizen-terrorists do not equally enjoy the right to a jury trial or an appeal of their capital sentence. Furthermore, and more troubling, in the sole case to consider questions about the rights of those determined to be CIA targets, the D.C. district court shielded this invidious discrimination behind the political question doctrine. Therefore, the Government has made, and a court has sanctioned “as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment” and has “la[id] an unequal hand” upon al-Aulaqi.

B. Strict Scrutiny Applied

As in any circumstance where an invidious discrimination is present, the Government’s differential treatment of two classes of criminals who have committed intrinsically the same offense must be “[narrowly] tailored to serve a compelling governmental interest.”

While the general rule in criminal law is that “what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor’s discretion,” and that “a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution,” that rule is inapposite in treason cases. The Drafters of the Constitution specifically wrote the Clause to circumscribe the state’s discretion in even creating crimes that encroach on the gravamen of the offense of treason. Thus, prosecutorial and legislative discretion is uniquely at constitutional ebb when the Treason Clause comes into play, as it is exactly the state’s almost unbridled discretion in criminal prosecution that the Founder’s feared.

1. The Compelling Governmental Interest: National Security

The Supreme Court has declared that the Government, and specifically the Executive, has a compelling interest in
preventing acts tantamount to levying war against the United States.\footnote{Korematsu v. United States, 323 U.S. 214, 217-20 (1944) (citing Executive Order No. 9066, 7 Fed. Reg. 1407) ("[T]he successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities."); see also Hirabayashi v. United States, 320 U.S. 81, 99 (1943).} In Korematsu v. United States, the Court noted:

[H]ardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.\footnote{Korematsu, 323 U.S. at 217-20 (applying strict scrutiny to the question of whether, under its war powers, the Government, based on race alone, may intern the entire population of West Coast Japanese-Americans during WWII).}

While a court considering the facts of Korematsu would undoubtedly reach a different result today,\footnote{See CHEMERINSKY, supra note 199 at 715 n.45 and accompanying text (citing Rostow, supra note 198) ("Korematsu is objectionable because the government used race alone as the basis for predicting who was a threat to national security and who would remain free.").} the principle of the case stands: when the Government is claiming its war powers justify an action, even an action “inconsistent with our basic governmental institutions,”\footnote{Korematsu, 323 U.S. at 220.} that action is constitutionally permissible under strict scrutiny so long as it is proportional to the threat.\footnote{United States v. O’Brien, 391 U.S. 367, 376-77 (1968) (permitting infringements on free expression under Congress’ war power, but “no greater than is essential to the furtherance of that interest”).}

The Skinner equal protection analysis tends to allow the Government significant “play in its joints.”\footnote{Skinner, 316 U.S. at 540 (quoting Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931) (Holmes, J.).}} However, in United States v. Robel, the Supreme Court signaled that “the phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of . . . power which can be brought within its ambit. [E]ven the war power does not remove constitutional limitations safeguarding essential liberties.”\footnote{United States v. Robel, 389 U.S. 258, 264 (1967) (internal citations omitted) (alteration in original) (citing Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 426 (1934)).} Although the Robel Court was discussing congressional war powers and not executive war powers, it would be absurd to claim that even
though Congress’ war powers are limited, the Executive may use its powers as a talismanic incantation to eviscerate the Constitution of all legal protections. Thus, the fact that the Government invoked the Executive’s war powers under the AUMF and the President’s Commander-in-Chief powers in *al-Aulaqi v. Obama* [360] does not foreclose the consideration of whether a compelling government interest exists to justify the killing of al-Aulaqi.

Al-Aulaqi constituted a perpetual terrorist threat between the time he became a leader in AQAP in 2007, and his execution in 2011. During the period where al-Aulaqi was “leader of external operations [for AQAP],” [361] he was linked to over a dozen terrorist plots or treasonable designs and their overt acts—such as the Fort Hood Massacre, the Times Square Bomber, and the 2009 Christmas Day Bomber. [362] He was especially dangerous because of his intimate knowledge of U.S. culture and his ability to reach a widespread, English-speaking audience. [363] Therefore, under a deferential standard of review and assuming facts favorable to the government, al-Aulaqi could be considered a continuing threat to the security of the United States that created a compelling government interest in his elimination. A drone is not much different than a bomb in terms of its effect and, thus, its proportionality.

[360] Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum in Support of Defendants’ Motion to Dismiss at 4-5, V. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 1:10-cv-01469) (“More broadly, the Complaint seeks judicial oversight of the President’s power to use force overseas to protect the Nation from the threat of attacks by an organization against which the political branches have authorized the use of all necessary and appropriate force, in compliance with applicable domestic and international legal requirements, including the laws of war. See Authorization for Use of Military Force (AUMF), Pub. L. No. 107 40, 115 Stat. 224 (2001) (Joint Resolution of Congress signed by the President). In addition to the AUMF, there are other legal bases under U.S. and international law for the President to authorize the use of force against al-Qaeda and AQAP, including the inherent right to national self-defense recognized in international law (see, e.g., United Nations Charter Article 51). Plaintiff asks the Court to issue *ex ante* commands to the President and his military and intelligence advisors about how to exercise this authority [as commander-in-chief] . . . .”).


[362] *See supra* notes 101-05 and accompanying text (detailing al-Aulaqi’s terrorist career).

2. Narrowly Tailored

As commentators have observed, al-Aulaqi was targeted because “there was no feasible way to arrest him” and because “he posed an imminent threat to the lives of Americans.”\(^{364}\) Therefore, and in light of the increased deference shown by the courts to the Executive in times of war,\(^ {365}\) issuing a kill order would likely be found a narrowly tailored action. Additionally, the manner in which the kill order was executed was appropriately narrowly tailored; there is hardly a more precise and exact killing machine than a predator drone.\(^ {366}\) Because the asserted government interest was elimination of a security threat,\(^ {367}\) the Government initiated a specific military response to completely eliminate the threat.\(^ {368}\)

**CONCLUSION**

The Constitution discriminates between citizens and non-citizens who levy war against the United States by giving a restrictive yet exhaustive definition of treason. The defined crime may only be committed by citizens and entitles only citizens to specific due process protections.\(^ {369}\) The Constitution strips from Congress and the Executive the power to define the crime of treason or to alter its scope, and enshrines this in Article III, for the Judiciary to guard against encroachment of the protections provided for in the Treason Clause.

Two centuries later, by combination of executive action, secret agency adjudication, and congressional authorization, a citizen may be executed for levying war against the United States with none of the constitutional protections afforded by the Treason Clause. The Judiciary has shielded challenges to this process as a nonjusticiable political question when the text of Article III demonstrably commits treason administration to

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\(^{364}\) Shane, supra note 326.


\(^{366}\) For a thorough discussion of targeted killing processes, see Geoffrey S. Corn, Targeting, Command Judgment, And a Proposed Quantum of Information Component: A Fourth Amendment Lesson in Contextual Reasonableness, 77 BROOK. L. REV. 437 (2012).

\(^{367}\) See supra note 326 (detailing the security threat of al-Aulaqi).

\(^{368}\) Vlasic, supra note 14, at 330 (citing Mazzetti et al., supra note 3); see supra note 14 and accompanying text.

\(^{369}\) It is a settled matter of constitutional law that only persons owing allegiance, like citizens, are covered by the Treason Clause. See supra note 125. Rhetorical point aside, it would also apply to persons such as legal resident aliens.
the Judiciary. Further, the Supreme Court has not corrected its *Quirin* problem, which has resulted in questionable conclusions by the Circuits. For example, some Circuit courts have interpreted allegiance as essential to treason by levying war, but permitted those owing allegiance to be processed without Treason Clause protections. They have done so because the crimes charged, while substantively the same as treason by levying war, were indiscriminate with respect to allegiance. It seems as though courts have eschewed the reasoning that predicated the inclusion of the Treason Clause in the Constitution and ignored the maxim, “[w]hen anything is prohibited directly, it is also prohibited indirectly.”

As a policy matter, al-Aulaqi was driving in a car on a deserted highway at the time that he was executed. Not every U.S. citizen that preaches jihad is a military threat to the United States. Looking forward, how does one resolve this issue of whom the government may kill via a drone strike?

The coordinate branches of government may resolve these issues by adopting the following suggestions. The Court may solve the *Quirin* problem in the Circuits by adopting the readings of *Bollman*, *Wiltberger*, *Quirin*, and *Cramer* proposed in this note. As to the policy question, this note supports the proposal that the CIA is allowed to carry out its macabre task, but not unilaterally. The issue is not with these operations being carried out, but with who orders them to be carried out. Some court must approve petitions for kill warrants of U.S. citizens. The Judiciary must satisfy its Article III obligations, such as the requirement of two witnesses to the same overt act, instead of delegating them to another branch’s agencies. Exercising its Article III power over the jurisdiction of the federal courts, Congress may pass a statute that creates a judicial process where secret, *ex parte* review is given to wartime kill order cases like that of al-Aulaqui. Thus, the Government may be able to maintain secrecy where necessary and the Judiciary may discharge its Article III obligations before action is taken against a citizen.

If nothing else, the Treason Clause—and its specific allocation of the responsibility for resolving treason cases to every branch other than the Executive—means that the President, and those who serve at his pleasure, should not act as prosecutor, defense counsel, judge, jury, and executioner,

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370 BLACK’S LAW DICTIONARY 1863 (9th ed. 2009) ("*Quando aliquid prohibitetur ex directo, prohibitetur et per obliquum.*").
especially in secret. There needs to be some action to curtail the incipient erosion of Treason Clause protections, lest the United States revert to the state of treason law in England before the Statute of Edward III: the assignment of unreviewable death sentences by unilateral executive whim.

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“One Giant Leap [Backwards] for Mankind”¹

LIMITED LIABILITY IN PRIVATE COMMERCIAL SPACEFLIGHT

INTRODUCTION

In 2014, six people aboard Virgin Galactic’s SpaceShipTwo will likely become the first paying customers to fly on a private commercial spacecraft.² Passengers on that historic two-and-a-half hour flight³ will see “spectacular views”⁴

¹ This is an abbreviated version of Neil Armstrong’s iconic first words as he “became the first person ever to step onto another planetary body.” Neil Armstrong: 1930-2012, NASA (Aug. 25, 2012), http://www.nasa.gov/topics/people/features/armstrong_obit.html. Armstrong’s words in their entirety were: “That is one small step for (a) man, one giant leap for mankind.” Id.


³ The flight will be suborbital, which is “spaceflight where the spacecraft reaches outer space, but does not have sufficient energy to complete a full revolution around the Earth before reentering the atmosphere.” KLEINMAN ET AL., supra note 2, at 30. While “there is no international agreement on where outer space begins,” see von der Dunk, supra note 2, at 424, for the limited purposes of this discussion, suborbital flight, when it exceeds the Kármán Line, a distance 100 km above sea level, will be termed as spaceflight. KLEINMAN ET AL., supra note 2, at 3. The Kármán Line is the “most commonly accepted demarcation between atmosphere and outer space.” Id.

of Earth and experience six minutes of weightlessness\(^5\) in what promises to be a life-changing experience.\(^6\) In that time, the spaceflight participants will be free to unstrap from their seats and “float, tumble, even get married.”\(^7\) But no amount of enthralment can prevent the inevitable corollary to the private sector’s maiden spaceflight: the first commercial spaceflight-related lawsuit.\(^8\)

As with any lawsuit, the ultimate issue will be liability.\(^9\) And as with any previously unlitigated issue, the proceedings to determine liability will likely be “messy, expensive, and unpredictable.”\(^10\) Given the high costs of the initial flights,\(^11\)


\(^6\) See Overview: Experience, supra note 4 (“[Y]ou know that life will never quite be the same again.”).

\(^7\) Warmflash, supra note 5. But some warn that permitting customers to freely maneuver in the cabin during suborbital flights could be dangerous. See, e.g., id. (“Unstrapping and re-strapping in such a short time frame would be a risky endeavor,’ says the company’s [XCOR, a private spaceflight company] communications representative, Mike Masse.”).

\(^8\) See, e.g., Simon Adebola et al., GREAT EXPECTATIONS—AN ASSESSMENT OF THE POTENTIAL FOR SUBORBITAL TRANSPORTATION: MASTERS 2008 FINAL REPORT 105 (2008), available at http://isulibrary.isunet.edu/opac/doc_num.php?explnum_id=95 (“From an operator’s perspective, it is nearly inevitable that an accident will occur, and companies will be sued.”); Paul Bertorelli, Space Tourism: Big Market, Big Risks, AVWEBINSIDER (Mar. 24, 2012), http://www.avweb.com/blogs/insider/AVWebInsider_Spacetourism_206368-1.html (“Sooner or later, one of these operators will probably [suffer a catastrophic accident] and it’s more likely to happen the higher and faster you fly in untried machines.”).


and the high net worths of the prospective spaceflight participants, legal action against a private commercial spaceflight company could result in million-dollar losses, which could potentially bankrupt the company. Moreover, as a result of the relatively untested technology and risks involved, safety is a major concern. Indeed, approximately four percent of all people who have flown in space have perished. According to Virgin Galactic CEO Richard Branson, “a private program can’t afford to lose anybody.”

The anticipated problems of private commercial spaceflight are compounded by a statutory and regulatory regime that, even before any legal challenges have arisen, has been widely deemed unworkable. The existing system is a mishmash

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15 “Spaceflight is an inherently risky endeavor. Harm can occur at every stage of flight.” KLEINMAN ET AL., supra note 2, at 103-04 (detailing instances of death during thepreflight, launch, and reentry phases, and also the possibility for harm to non-participants). See generally KAYSER, supra note 9, at 5-8.

16 Jeff Foust, Weighing the Risks of Human Spaceflight, SPACE REV. (July 21, 2003), http://www.thespacereview.com/article/36/1. Former astronaut Rick Hauck explained his methodology for coming to this conclusion during a May 2003 address at the Woodrow Wilson International Center for Scholars in Washington, DC: 18 out of 430 people who have flown in space died, including 14 on United States operated Space Shuttles, and four on Soviet Union operated Soyuz spacecraft. Id. Additionally the Space Shuttle program has had a “40% vehicular failure rate.” Carol Pinchefsky, 5 Horrifying Facts You Didn’t Know About the Space Shuttle, FORBES (Apr. 18, 2012), http://www.forbes.com/sites/carolpinchefsky/2012/04/18/5-horrifying-facts-you-didnt-know-about-the-space-shuttle/ (explaining that two out of the total fleet of five Space Shuttles suffered fatal destruction).

17 Buchanan, supra note 14.

18 To be sure, lawsuits concerning events that relate to outer space have been litigated. However, they concerned matters such as the enforceability of liability waivers in satellite launch malfunction cases. See, e.g., Appalachian Ins. Co. v. McDonnell Douglas Corp., 214 Cal. App. 3d 1 (Ct. App. 1989); Martin Marietta Corp. v. Int’l Telecommc’n’s Satellite Org., 991 F.2d 94 (4th Cir. 1992). Additionally, courts issued “opinions that address aerospace activities, among other contexts, in terms of contract, tort, property, patent, and even tax law.” Timothy M. Ravich, 2010: Space Law in the Sunshine State, 84 FLA. B.J. 25, 25 (2010) (citations omitted).

19 See, e.g., GÉRARDINE MEISHAN GOH, DISPUTE SETTLEMENT IN INTERNATIONAL SPACE LAW: A MULTI-DOOR COURTHOUSE FOR OUTER SPACE 3, 7 (2007); Frans. G. von der Dunk, Too-Close Encounters of the Third-Party Kind: Will the Liability Convention Stand the Test of the Cosmos 2251-Iridium 33 Collision?, SPACE &
of international agreements, federal statutes and regulations, and state laws which combine to form an asynergistic regime that is simultaneously outdated and untested.

Accordingly, this note will argue that the current body of law governing private commercial spaceflight in the United States is structured in a manner that harms two seemingly inapposite but coterminous interests: (1) the ability of victims to recover damages, and (2) the healthy development of the commercial spaceflight industry. Instead of supporting those interests, the U.S. space law regime encourages short-term economic goals that are ultimately self-defeating.

Space law is rooted in a victim-oriented tradition that dates back to its origins. Since then, the United States Congress has reaffirmed its obligations under international agreements to uphold those ideals as applied to private commercial spaceflight, and high-ranking government officials have expressed their commitment to minimizing risks to individuals involved in these activities. Nevertheless, Congress, by leaving gaps in federal law, has constructively pushed states to pass limited liability statutes, which have the purpose of protecting spaceflight operators from lawsuits at the expense of potential victims. This represents, at the minimum, an abrogation of the longstanding victim-oriented approach that the U.S. pledged to uphold, and that other States have relied upon. Congress should pass legislation that removes limited liability.

Additionally, limited liability statutes impair industry development. The commercial spaceflight industry must grow

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"N.B. For the purposes of this note, the capitalized "State" refers to nation states, as traditionally used in the field of international relations. The uncapitalized "state" refers to one of the fifty federated states of the United States of America."

"See Ravich, supra note 18, at 32 ("[A]erospace operators will require counsel to navigate them through the current patchwork of space law, i.e., dated international treaties, 'soft law' resolutions, different state laws, multiple executive national space policy statements, and conflicting government instructions and directives."); see, e.g., von der Dunk, supra note 19, at 200, 205-06; Brian Weeden, 2009 Iridium-Cosmos Collision Fact Sheet, SECURE WORLD FOUND. 2 (Nov. 10, 2010), available at http://swfound.org/media/6575/2009_iridium-cosmos_factsheet.pdf."

"See infra Part I.B."

"See infra Part I.B.2."


"See infra Part II."
beyond its current customer base of very high-net-worth individuals to realize long-term expansion and profitability. However, to support that growth, private commercial spaceflight companies must first create a track record of safe flights. The limited liability model inhibits this process by discouraging the risk-averse mass-market customer, thereby restricting the potential client base. This effectively mortgages the commercial spaceflight industry’s overall development to further the immediate needs of the space tourism business, which is a mere subset of the industry. As a result, other segments of private commercial spaceflight—like point-to-point operations, which is projected to provide ultra-fast transportation between any locations on Earth in two hours—suffer.

Part I of this note gives an overview of the existing law relevant to private commercial spaceflight, and argues that there is overwhelming international agreement and a longstanding policy recognizing that victims of injuries arising from spaceflight should have mechanisms for recovery. While international law imposes some restrictions on U.S. policy, it is, on balance, only a minor factor. The key issue is deficiencies in federal statutes and regulations that permit states to pass limited liability laws. Part II argues that Congress should pass legislation preempting state limited liability statutes to satisfy the dual goals of preserving the victim-oriented heritage of international space law, and promoting the healthy and prolonged growth of the commercial spaceflight industry. In light of the increasing promulgation of state limited liability statutes, Congress must act quickly.

26 See von der Dunk, supra note 2, at 407.
27 For an overview of the different types of prospective businesses that encompass the commercial spaceflight industry, see von der Dunk, supra note 2, at 403-10 (listing orbital space tourism, suborbital space tourism, suborbital private spaceflight, hotels in orbit, and private flights to the moon).
28 Point-to-point space transportation involves “climbing to an altitude outside of most of the atmosphere, maintaining a speed of Mach 5 to Mach 10 for a period of an hour or more, and then landing at a destination different from the launch point.” Jacksonville Aviation Authority, Cecil Spaceport Master Plan (Draft) 1-2 (Mar. 2012), available at http://www.flyjacksonville.com/Cecil/Spaceport/spaceport-mp.pdf.
29 Buchanan, supra note 14.
I. THE DEVELOPMENT OF PRIVATE COMMERCIAL SPACEFLIGHT LAW

A. Overview

Private commercial spaceflight in the United States is governed by international, federal, and state law.30 The overarching field of space law was first institutionally recognized by the international community in 1958 when the United Nations General Assembly created the Committee on the Peaceful Uses of Outer Space to address the legal issues in space activities.31 The United Nations originally formed the Committee on an ad hoc basis in response to the Soviet Union’s launch of Sputnik, the first artificial satellite placed into Earth’s orbit,32 and soon converted it into a permanent committee.33 Following years of negotiations, the Committee recommended, and the United Nations unanimously voted to adopt, the landmark Outer Space Declaration of 1963.34 Most of that nonbinding resolution was formalized shortly thereafter by the ratification of the Outer Space Treaty of 1967,35 which has been described by commentators as “the foundation of . . . space law [that] . . . set the framework and cooperative tone . . . in outer space activities.”36 This landmark document was well-received by a

majority of the world, having been ratified by 101 States.\(^\text{37}\) Indeed, the Outer Space Treaty is so widely accepted that it is part of customary international law,\(^\text{38}\) and may therefore apply even to countries that are not signatories.\(^\text{39}\) Accordingly, the “international community gives great weight to the commitments under the treaty and expects States to adhere to them.”\(^\text{40}\)

But by 1979, the “original euphoria”\(^\text{41}\) that fed the early development in the field had been “exhaust[ed].”\(^\text{42}\) and no additional space law treaties have come into force since.\(^\text{43}\) Indeed, the last of these treaties, the Moon Agreement,\(^\text{44}\) has only been ratified by 13 States, none of which are major space powers.\(^\text{45}\) Accordingly, although the Moon Agreement “has frequently featured prominently in debates on international law,” the International Law Association’s Commission on Space Law did not support the treaty’s ratification.\(^\text{46}\)

37 Wessel, supra note 32, at 292.


39 Kleinman et al., supra note 2, at 58; Wessel, supra note 32, at 297; see Andrei D. Terekhov, UN General Assembly Resolutions and Outer Space Law, Proceedings of the International Institute of Space Law 97, 103 (1997), reprinted in SPACE LAW (Francis Lyall and Paul B. Laren eds., 2007).

40 Kleinman et al., supra note 2, at 31, at 20.

41 Id.

42 Id.


Ravich, supra note 18, at 32 n.1 (citations omitted); see also Wessel, supra note 32, at 292-94.

44 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 18, 1979, 1363 U.S.T. 3 [hereinafter Moon Agreement], reprinted in UNITED NATIONS TREATIES AND PRINCIPLES ON OUTER SPACE 27-35, supra note 34.

45 Wessel, supra note 32, at 293.
space law, it has not had a large practical impact”46 and is now considered to be “dormant.”47

Following that period of progress, the United Nations General Assembly, in the absence of any meaningful international support for additional treaties,48 returned to passing declarations of principles.49 These declarations operate as “the first stage in the lawmaking process, serving as a basis for negotiating international agreements on the given subjects, and as an initial formulation of future provisions of the respective treaties.”50 They are not binding “and do not create norms of international law.”51 Nevertheless, those declarations are “generally followed by spacefaring nations and may have attained the status of customary international law, although this has not been tested judicially.”52 In all, there have been five declarations, the last of which was passed in 1996.53

In 1984, the United States Congress, recognizing the need for “promoting the commercial space sector,”54 began “developing a framework for commercial space transportation.”55 The federal legislative and regulatory system is incomplete,56 however, and the five states most directly impacted by spaceflight have passed limited liability laws in order to fill gaps in the national structure.57 The last major holdout, California, finally relented in 2012.58 Today, almost every state

46 Id. at 293-94.
47 KLEINMAN ET AL., supra note 2, at xviii.
49 Wessel, supra note 32, at 294.
50 Kopal, supra note 31, at 19.
51 Terekhov, supra note 39, at 97.
52 KLEINMAN ET AL., supra note 2, at 67.
54 KLEINMAN ET AL., supra note 2, at 76.
55 Id.
56 Federal legislation does not address whether spaceflight companies are liable to flight crews, spaceflight participants or their heirs. Accordingly, those issues “must instead be addressed by [s]tate law . . . .” KLEINMAN ET AL., supra note 2, at 107.
57 Those states—Virginia, Florida, New Mexico, Texas, and California—either have institutional ties to government-sponsored spaceflight, or have attracted investment from the private commercial spaceflight industry. See infra Part I.C.
58 See Assemb. B. 2243, Ch. 416 (Cal. 2012); Joe Weichman, Remaining Competitive: Extending Spaceflight Protections 10 (May 2013), available at
with a strong interest in the development of commercial spaceflight has passed legislation on the matter.59

B. International Law Foundations for the Victim-Oriented Approach of Commercial Spaceflight

1. The Outer Space Treaty60

Referred to as a “constitution for outer space” by some commentators,61 the Outer Space Treaty was never truly intended to address commercial activity.62 It is well supported that the drafters were principally concerned with matters of global security, including the “prevention of the arms race in outer space.”63 Given the highly contentious nature of the Cold War era, it should come as no surprise that avoiding war took precedence.64 Nevertheless, commercial activity was “to a small extent envisioned . . . [and] [t]he idea of private actors was not completely ignored.”65 To that point, Article VI of the Outer Space Treaty provides in pertinent part that:

Parties to the Treaty shall bear international responsibility for national activities in outer space . . . whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of nongovernmental entities in outer space . . . shall require authorization and continuing supervision by the appropriate State Party to the Treaty.66

Additionally, Article VII of the treaty provides that:

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60 Outer Space Treaty, supra note 35.
62 See generally Vlasic, supra note 61. It was meant to codify the Outer Space Declaration, which also did not concern private activity. KAYSER, supra note 9, at 37.
63 Vlasic, supra note 61, at 512; see, e.g., Blount, supra note 48, at 517-18.
64 Ravich, supra note 18, at 26.
65 Blount, supra note 48, at 518.
66 Outer Space Treaty, supra note 35, art. VI.
Each State Party to the Treaty that launches or procures the launching of an object into outer space . . . and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air space or in outer space . . . 67

Remarkably, signatories of the treaty agreed to be responsible and liable68 for the actions of private actors under their governance for their space activities.69 Accordingly, Articles VI and VII serve to promote governmental regulation of private action because of, among other things, the risk of derivative liability.70 Given the high expense of spaceflight at the time,71 however, it was virtually unimaginable that any

67 Id. art. VII (emphasis added).
68 For an explanation of the difference between “responsibility” and “liability,” see Kayser, supra note 9, at 31 (quoting Bin Cheng, Article VI of the 1967 Space Treaty Revisited: “International Responsibility,” “National Activities,” and “The Appropriate State”, 26:1 J. SPACE L. 7, 9 (1998) (“Responsibility means essentially . . . answerability for one’s acts and omissions, . . . for their consequences, . . . for compliance with his or her legal duties, and for any breaches thereof . . . . [L]iability is . . . the obligation to bear the consequences of a breach of a legal duty, in particular the obligation to make reparation for any damage caused, especially in the form of a monetary payment.”)). Professor Peter P.C. Haanappel analyzes the terms in the following manner:

The English text of space law treaties and other texts uses the terms “responsibility” and “liability,” and the corresponding adjectives “responsible” and “liable.” Other languages, especially the Latin ones (such as French and Spanish) only have one term, from the same source as the English “responsibility.” It is submitted that where, taking English as a guideline, “responsibility” or “responsible” is used, this essentially means “to have a duty” (the debitum from Roman law); where “liability” or “liable” is used, this essentially means “to have an obligation to repair, to pay damages (the obligatio from Roman law).

Haanappel, supra note 33, at 8 n.48. Other scholars note that “[t]he term ‘responsibility’ has been variously defined, sometimes equated with and sometimes distinguished from the term ‘liability.” Bender, supra note 30, at 282.

69 Blount, supra note 48, at 518.
70 See Benjamin Perlman, Note, Grounding U.S. Commercial Space Regulation in the Constitution, 100 GEO L.J. 929, 934 (2012); see also Zhao Yun, A Legal Regime for Space Tourism: Creating Legal Certainty in Outer Space, 74 J. AIR L. & COM. 959 (2009).
71 Claude Lafleur, Costs of US Piloted Programs, SPACE REV. (Mar. 8, 2010), http://www.thespacereview.com/article/1578/1. NASA’s Mercury program, which operated six flights from 1959 to 1963, cost the equivalent of $2.1 billion in 2013 dollars, which equals $342.8 million per flight. Id. NASA’s Gemini program, which operated ten flights from 1962 to 1967, cost $9.1 billion in 2013 dollars, which equals $910.3 million per flight. Id. NASA’s Apollo program, which operated eleven flights from 1959 to 1973, cost $107.5 billion in 2013 dollars, which equals $9.8 billion per flight. Id. Finally NASA’s Space Shuttle program, which operated 134 flights from 1972 to 2012, cost $198.5 billion in 2010 dollars, which equals $1.4 billion per flight. Id. All preceding 2013 dollar amounts were calculated using the US Inflation Calculator, a website that “uses the latest US government CPI [consumer price index] data published on Sept. 17, 2013 to adjust for inflation and calculate the cumulative
non-governmental entity could participate in space activity, at least for the foreseeable future. Lack of technical expertise notwithstanding, the average cost per flight in 1967, over $600 million, would have been unaffordable.72

While the treaty laid the groundwork for commercial space activity, there was no realistic possibility for that industry to emerge in the foreseeable future.73 Accordingly, the drafters had no reason to seriously consider addressing issues related to commercial spaceflight.74 Instead, the Outer Space Treaty should be understood to provide only general principles for subsequent lawmakers to rely and build upon.75 Most notably, the treaty does not address the key issues of enforceability and dispute resolution.76

2. Convention on International Liability for Damage Caused by Space Objects of 1972 (Liability Convention)77

The Liability Convention is an extension of Articles VI and VII of the Outer Space Treaty.78 As the five-year gap between the two treaties suggests, coming to an agreement regarding the specific legal issues addressed by the Liability Convention was a deliberate affair that required accounting for the differences among the drafters’ legal systems.79 There was a general consensus that the treaty was essential,80 but the

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72 The average price for the Mercury flights was $342.8 million, and the average price for the Gemini flights was $910.3 million, which, if averaged, gives an average flight cost of $626.6 million. See supra note 71.

73 GOH, supra note 19, at 163.

74 See Blount, supra note 48, at 518.


76 GOH, supra note 19, at 29.


78 Liability Convention, supra note 77; see also Kayser, supra note 9, at 33; Hurwitz, supra note 75, at 9.

79 See Kayser, supra note 9, at 33.

80 Hurwitz, supra note 75, at 13.
necessary detailed legal work\textsuperscript{81} precluded a repeat of the speedy drafting process of the Outer Space Treaty.\textsuperscript{82} And although the spacefaring nations clearly had an interest in the matter, non-space powers were also eager to bring about an agreement that would protect them in the event of accidents they believed were certain to arise.\textsuperscript{83} The final product reflected those concerns, and supports the view that the Liability Convention is “victim oriented.”\textsuperscript{84} Therefore, by ratifying the Convention, the United States implicitly recognized that activities in outer space, while important, are dangerous and must provide injured parties with a means for compensation.\textsuperscript{85}

To accomplish its framers’ victim-oriented goals, the Liability Convention sets forth a regime to govern liability for damage inflicted during space activities.\textsuperscript{86} The drafters expanded upon the Outer Space Treaty by clarifying formerly uncertain terms and ideas.\textsuperscript{87} Also, the Convention provides parties with a mechanism to adjudicate disputes and grant relief.\textsuperscript{88} Although it is arguable that the Liability Convention’s additions to the Outer Space Treaty have thus far not resulted in tangible, or even theoretical, benefits for victims,\textsuperscript{89} it nevertheless still represents the international community’s collective intent to “restore injured parties to their pre-accident condition.”\textsuperscript{90}

\textbf{a. Damages}

Article I of the Liability Convention defines damages—a previously undefined term in space law—as the “loss of life, personal injury or other impairment of health; or loss of or damage to property of States or of persons, natural or juridical, or property of international intergovernmental organizations.”\textsuperscript{91} In regard to personal injuries, Article I encapsulates both

\begin{footnotesize}
\begin{enumerate}
\item See Kayser, supra note 9, at 33.
\item See Vlasic, supra note 61, at 507.
\item See Hurwitz, supra note 75, at 10.
\item Id. at 9-10.
\item See generally id. at 10-11 (discussing the compensation scheme developed); see also Kayser, supra note 9, at 47-52 (discussing the agreement among the international community that victims are entitled to means for recovery in incidents related to outer space activities).
\item Liability Convention, supra note 77; see also Hurwitz, supra note 75, at 9-10; Kayser, supra note 9, at 33.
\item See Kayser, supra note 9, at 33.
\item Liability Convention, supra note 77.
\item See, e.g., Goh, supra note 19, at 2-3; von der Dunk, supra note 19, at 200, 205-06.
\item Bender, supra note 30, at 313.
\item Liability Convention, supra note 77.
\end{enumerate}
\end{footnotesize}
direct damages—physical injuries and illnesses—and also indirect damages, such as lost wages, pain and suffering, and humiliation.92 While the treaty text does not explicitly include indirect damages in its definition of damages, most scholars agree that victims can recover for them.93 Indeed, allowing for recovery of indirect damages would comport with both the victim-oriented heritage of outer space law,94 and also with other, similar international law.95 No similar debate exists regarding the comparatively straightforward area of both direct and indirect property damage.96

b. Liability

Next, the Convention addresses liability in several places. Article II provides that “[a] launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight.”97 Article I, Section C defines launching State in four ways:

(1) “[a] State which launches . . . a space object;”98
(2) “[a] State which . . . procures the launching of a space object;”99
(3) “[a] State from whose territory . . . a space object is launched;”100 and
(4) “[a] State from whose . . . facility a space object is launched.”101

Additionally, “[t]he term ‘launching’ includes attempted launching.”102 Read together with Article VI of the Outer Space Treaty, under Article II of the Liability Convention, a
government is both internationally responsible and strictly liable for damages inflicted below Earth’s orbit\(^{103}\) by a private actor, such as a private commercial spaceflight company, so long as that government qualifies as a launching State.\(^{104}\)

While Article I, Section C makes it clear that a State is responsible for its own activities in space, when it comes to determining who is liable for damages arising out of private commercial spaceflight, the “launching State” designation can become a source of controversy.\(^{105}\) It is uncertain what private actions will trigger State liability under the procurement, territory, and facility clauses of Article I, Section C.\(^{106}\)

For instance, an expansive reading of the procurement clause would find that there is State liability even when its “nationals have [merely] financed or ordered the launching.”\(^{107}\) Under this scenario, a private actor could be making his or her State liable “against its will.”\(^{108}\) Alternatively, it may be argued that no State “proctors the launching” when a private company contracts with another private company for a space launch, but without any government involvement.\(^{109}\)

This issue also arises under the facility clause because of the advent of privately-owned spaceports,\(^{110}\) which calls into question whether they may legally be designated as State facilities.\(^{111}\) It is more settled, on the other hand, that when the facility is State-owned, liability is proper whether it is located in “foreign countries . . . outer space, on the high seas or the

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\(^{103}\) See Outer Space Treaty, supra note 35; Liability Convention, supra note 77.

\(^{104}\) von der Dunk, supra note 2, at 410.

\(^{105}\) See id. at 410-11.

\(^{106}\) Id.

\(^{107}\) HURWITZ, supra note 75, at 22.

\(^{108}\) Id.

\(^{109}\) See von der Dunk, supra note 2, at 411.

\(^{110}\) “A spaceport is the infrastructure at either the origin or destination of a spaceflight. It provides the essential infrastructure and related ground processing operations needed for space access as well as the facilities, organizations, and operations required to safely manage spaceflight.” ADVANCED SPACEPORT TECHNOLOGIES WORKING GROUP, BASELINE REPORT: CHARTING AMERICA’S PATH TOWARDS LOW-COST, ROUTINE ACCESS TO SPACE vii (Nov. 2003), available at http://weboflife.nasa.gov/shuttle/nexgen/Nexgen_Downloads/ASTWG/. “Many states have developed or are developing commercial spaceports, including New Mexico, Florida, Texas, Oklahoma, Virginia, Alaska, Colorado and California.” Partnerships to Advance the Business of Space: Hearing Before the Senate Committee on Commerce, Science and Transportation, Subcommittee, 113th Cong. 3 (2013) (testimony of Capt. Michael Lopez-Algeria), available at http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=18d37b64-8339-4680-a443-aeb6b4e47c009.

\(^{111}\) See von der Dunk, supra note 2, at 411.
ocean floor, or in other territories outside the national jurisdiction of any State.”

Finally, the territory clause is relevant in regard to assigning liability for launches that occur in territories outside any jurisdiction, such as international waters. It is uncertain how the Liability Convention would apply to this type of launch because “[h]aving ‘territory’ in the international legal sense of the word is exclusively reserved for [S]tates.” In sum, as a result of the uncertainties arising from the launching State designation, it would be reasonable for “concerned [S]tates to exercise their national jurisdiction to control private spaceflight in an effort to guard against liability and any obligation to pay for the damage caused.”

Under the victim-oriented perspective of the Convention, the advantage of having these four definitions is clear: it gives an injured party more options for recovery. Articles IV and V advance this objective by providing for joint and several liability for States that jointly launch a space object. Moreover, Article V forecloses potential loopholes by declaring that “[a] State from whose territory or facility a space object is launched shall be regarded as a participant in a joint launching.” Accordingly, a State that permits use of its territory or facilities cannot escape liability under the Convention.

Additionally, the strict liability regime is justified on the grounds that the resulting damage will likely concern causes of action that are difficult to prove under a traditional negligence theory. Despite huge advances in the field, private commercial spaceflight is still in its infancy and dangerous, and the technologies involved are “shrouded in a web of secrecy.”

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112 HURWITZ, supra note 75, at 22.
114 See von der Dunk, supra note 2, at 411 & n.42.
115 Id. at 411.
116 HURWITZ, supra note 75, at 22.
117 Liability Convention, supra note 77, art. IV.
118 Id. art. V.
119 See id.
120 See KYASER, supra note 9, at 50-51.
121 See HURWITZ, supra note 75, at 28.
implications of this are two-fold. First, because injured parties will likely be unable to obtain the secret information, they will encounter unjustly burdensome difficulties in proving an otherwise meritorious case. Second, the industry is still untested, and there exists neither adequate legislative clarity nor jurisprudence to provide guidance to litigants regarding how to succeed in an outer space negligence suit. In sum, [strict] liability shows the maturity of society . . . [It] shows that society recognizes the benefits of technology and the fact that it cannot be regulated due to the many unknown dimensions involved with its development and exploitation. Yet, the overriding importance of the technology for society means that development must continue and therefore the danger is accepted under the condition that (a) the danger will, with time, fall to an acceptable (normal) level, and (b) until that time, the operator of the technology will be liable to pay compensation for damage caused by such a technology without the victim having to prove negligence.

In the end, the drafters determined that strict liability was appropriate given the danger involved both on Earth and in outer space. In addition to supporting the imposition of strict liability, the dangerous nature of space activities also justifies the Convention not capping compensation recoverable against a launching State. To be sure, the negotiating States did consider a limit on compensation, but could not settle on an amount that was “sufficiently high to ensure that the victim would be fully compensated.” Nevertheless, Article VI provides exceptions to strict liability in two limited situations. First, exoneration from strict liability may apply if the injured party acted with “gross negligence.” Second, if the injured party, “with intent to cause damage,” acted or failed to act, then exoneration may apply. In essence, this shifts the system to one that is more akin to fault liability. However, a launching State that failed to comport

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122 See id. at 29.
123 See id.; see also supra note 18 and accompanying text.
124 See HURWITZ, supra note 75, at 36 (alteration in original).
125 Id. at 28-29.
126 See KAYSER, supra note 9, at 51.
127 HURWITZ, supra note 75, at 56 (quoting 1969 U.N.Y.B 47) (discussing the expressions of the Argentina, Iran, and Lebanon delegations to the united nations).
128 Liability Convention, supra note 77, art. VI.
129 Id.
130 Id.
131 HURWITZ, supra note 75, at 41.
with relevant international law may be precluded from exercising that exemption.\textsuperscript{132}

The liability scheme also changes to common-law fault liability when damage is caused by one space object to another when both are in outer space.\textsuperscript{133} Article III of the Liability Convention provides that:

In the event of damage being caused elsewhere than on the surface of the Earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible.\textsuperscript{134}

Because the drafters were predominantly concerned with non-commercial spaceflight,\textsuperscript{135} they intended for Article III to apply only to “a collision between space objects in outer space.”\textsuperscript{136} Moreover, the desire to protect victims that is expressed in other parts of the Convention\textsuperscript{137} is absent in Article III, which operates on the theory that all parties able to achieve spaceflight are sufficiently sophisticated to overcome the hurdles that impact non-space-faring parties.\textsuperscript{138} Additionally, they “have assumed the risks of conducting these activities: none should be a privileged victim.”\textsuperscript{139} Nevertheless, the launching State is still liable for the damages caused by those “persons for whom it is responsible.”\textsuperscript{140} Although that term is not explicitly defined,\textsuperscript{141} it may be inferred that certain parties who fall within the definitions set forth in Article I, Section C qualify.\textsuperscript{142} This means that even for damages caused by non-government actors in orbit and beyond, the State may be liable, albeit not absolutely.\textsuperscript{143}

Additionally, States can find some relief from liability in Article VII, which bars some individuals from bringing a claim under the Liability Convention.\textsuperscript{144} Specifically the Convention does not apply to “[f]oreign nationals during such time as they are participating in the operation of that space object... or

\textsuperscript{132} Liability Convention, supra note 77, art. VI.
\textsuperscript{133} See id. art. III. See supra note 3 (delineating when an object is in outer space).
\textsuperscript{134} Liability Convention, supra note 77, art. III.
\textsuperscript{135} See id.; GOH, supra note 19, at 163.
\textsuperscript{136} HURWITZ, supra note 75, at 32-33.
\textsuperscript{137} See supra notes 82-88 and accompanying text.
\textsuperscript{138} See HURWITZ supra note 75, at 34.
\textsuperscript{139} See KAYSER, supra note 9, at 51.
\textsuperscript{140} Liability Convention, supra note 77, art. III.
\textsuperscript{141} HURWITZ, supra note 75, at 35.
\textsuperscript{142} See id.; Liability Convention, supra note 77, art. I(c).
\textsuperscript{143} Liability Convention, supra note 77, art. II-IV.
\textsuperscript{144} Id. art. VII.
during such time as they are in the immediate vicinity of a planned launching or recovery area as the result of an invitation by that launching State."\textsuperscript{145} The drafters’ reasoning for this carve-out follows their Article III logic that a consenting party should not be given privileged victim status.\textsuperscript{146} However, even in this situation, questions regarding the Convention’s applicability may arise in cases where foreign tourists become injured during a spaceport visit to observe launch activities.\textsuperscript{147} Given the trend toward making spaceports major tourist destinations,\textsuperscript{148} this could be a void in the international law field.\textsuperscript{149} In that situation, foreign nationals may simply bring suit outside of the provisions of the Liability Convention.\textsuperscript{150}

c. Dispute Resolution and Recovery

The Liability Convention does not allow for a private cause of action.\textsuperscript{151} Instead, under Article VIII, the right to bring claims is exclusive to “[a] State which suffers damage, or whose natural or juridical persons suffer damage.”\textsuperscript{152} This means that in any incident, up to three States may have a cause of action: “the State where injury or damage occurs, the State of nationality of the individual victim(s), and the State of permanent residence of the individual victim(s).”\textsuperscript{153} Under this system, a hierarchy of decreasing priority prevents overlapping claims.\textsuperscript{154} Accordingly, the “[s]econd and third ranked States cannot present claims unless the preceding State chooses not to exercise its right to do so.”\textsuperscript{155} Moreover, the claim must be presented to “a launching State.”\textsuperscript{156}

For a private spaceflight company, one of the most constraining aspects of the Liability Convention’s claim process is that it must rely on a State to bring a claim, or petition the State to act.\textsuperscript{157} Worse still is that the only proper target of a suit

\textsuperscript{145} Id. art. VII.
\textsuperscript{146} Hurwitz, supra note 75, at 44-46.
\textsuperscript{147} Id.
\textsuperscript{148} See Jesse McKinley, Spaceport America Eyes the (Near) Future, N.Y. TIMES (Sept. 7, 2012), http://travel.nytimes.com/2012/09/09/travel/spaceport-america-eyes-the-near-future.html (“[O]fficials say they expect to draw as many as 200,000 visitors a year to see the spaceport.”).
\textsuperscript{149} Hurwitz, supra note 75, at 44.
\textsuperscript{150} Id.
\textsuperscript{151} Liability Convention, supra note 77, art. VIII; von der Dunk, supra note 2, at 413.
\textsuperscript{152} Liability Convention, supra note 77, art. VIII.
\textsuperscript{153} Hurwitz, supra note 75, at 49.
\textsuperscript{154} Liability Convention, supra note 77, art. VIII.
\textsuperscript{155} Hurwitz, supra note 75, at 49.
\textsuperscript{156} Liability Convention, supra note 77, art. VIII.
\textsuperscript{157} See Kayser, supra note 9, at 52-53; Hurwitz, supra note 75, at 50.
under this system is another State. Outside those options, the private spaceflight company has “neither any recourse nor accountability under the . . . Convention.” Further, because of the required involvement of State actors, the decision to bring suit is an inherently political decision with potential diplomatic ramifications. In fact, Article IX requires that claims be “presented to a launching State through diplomatic channels.” The State action requirement is exacerbated by the one-year statute of limitations set forth in Article X. Although a time limit on the presentment of claims is not per se unreasonable, it certainly qualifies as a source of uncertainty for the private actor. Even if the private company is able to persuade its government to bring a claim, the procedures set forth by the Convention are unwieldy and untested. Article XIV states that the dispute will be settled by a Claims Commission, a three-member, ad hoc, quasi-judicial body whose decisions are only “final and binding if the parties have so agreed.” Absent such an agreement, a decision is merely advisory. Additionally, the Liability Convention does not provide for any meaningful procedural rules. Instead, Article XVI only directs that “the Commission shall determine its own procedure,” and that it “shall determine the place or places it shall sit and all other administrative matters.” Furthermore, if the suit is successful, there is no explicit requirement for the State to transfer its award to a victim. As a testament to the drafters’ own uncertainty over whether States would adopt the claims

158 Liability Convention, supra note 77, art. II-V.
159 Yun, supra note 70, at 966.
160 See HURWITZ, supra note 75, at 50-51.
161 Liability Convention, supra note 77, art. IX (emphasis added).
162 Id. art. X.
163 See GOH, supra note 19, at 37.
164 Id.
165 To date, no claims have been fully adjudicated via the Claims Commission procedures of the Liability Convention. Weeden, supra note 21, at 2. In fact, the 2009 collision between a U.S. satellite, the Iridium 33, and a Russian satellite, the Cosmos 2251, which seemed to present a storybook opportunity to test the Liability Convention, had its one-year statute of limitation under the Liability Convention pass without any party bringing a claim. Id.
166 Liability Convention, supra note 77, art. XIV.
167 Id. art. XIX. As the Brazilian delegation to the United Nations astutely observed, “it was doubtful that a provision in any convention would become binding merely because it was said to be binding.” HURWITZ, supra note 75, at 59.
168 GOH, supra note 19, at 38.
169 Liability Convention, supra note 77.
170 Id. art. XVI.
171 Id.
172 HURWITZ, supra note 75, at 50.
procedures, Article XI does “not require the prior exhaustion of any local remedies,” nor does it “prevent a State, or natural or juridical persons it might represent, from pursuing a claim in the courts or administrative tribunals or agencies of a launching State.”

3. The International Community’s Collective Intent

The Outer Space Treaty and Liability Convention, read in conjunction, illustrate a major tenet of existing international space law that must translate into commercial space law as well: the State has obligations to uphold, including maintaining the victim-oriented system that it has supported for decades. As applied to commercial spaceflight, that means a State should, at a minimum, recognize the fault liability regime, if not a strict liability regime, and also the possibility of recovery for indirect damages. Additionally, as the lack of use and the confusing rules of the Liability Convention’s claims process make clear, that portion of the treaty’s relevance in the commercial realm is questionable. Accordingly, it is proper for the State to take a more direct approach in regard to adjudicating disputes, while still adhering to the victim-oriented tradition established in international law.

C. United States Federal Law Continues the Victim-Oriented Tradition

1. Commercial Space Launch Act (Launch Act)

Prior to 1984, no agency was explicitly authorized to regulate private commercial spaceflight. The example of Space Services, Inc. is instructive. In its successful efforts to achieve the first launch of a space object by an American company without direct government participation, Space Services negotiated with over a dozen federal agencies over a

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173 Liability Convention, supra note 77, art. XI.
174 See Kayser, supra note 9, at 33; Hurwitz, supra note 75, at 9-10.
175 See Bender, supra note 30, at 313-14.
176 See von der Dunk, supra note 19, at 200, 205-06.
177 See von der Dunk, supra note 2, at 411 (“[C]oncerned [S]tates [should] exercise their national jurisdiction to control private spaceflight in an effort to guard against liability and any obligation to pay for damage caused.”).
179 Kayser, supra note 9, at 79.
period of six months\textsuperscript{180} to gain government approval.\textsuperscript{181} Among other agencies, NASA, the Coast Guard, Central Intelligence Agency, Department of Defense, Department of State, Federal Aviation Administration, Federal Communications Commission, and Internal Revenue Service all had a hand in regulating a private launch.\textsuperscript{182} The process was slow, unpredictable, expensive, and not conducive to smooth business operation.\textsuperscript{183}

Accordingly, Congress passed the Launch Act in 1984 to promote the commercial spaceflight industry.\textsuperscript{184} Additionally, it sought to simultaneously develop a system to protect the public, principally via the licensing of spaceflight operators.\textsuperscript{185} Moreover, Congress intended to create a favorable climate for private actors by dramatically cutting down on bureaucratic hurdles and centralizing all authority to regulating the commercial spaceflight industry to the Secretary of Transportation.\textsuperscript{186} To that end, Congress granted the Secretary of Transportation oversight of the recently created Office of Commercial Space Transportation\textsuperscript{187} and control over licensing agreements with private actors.\textsuperscript{188} Nevertheless, the Secretary must act in a manner that is “consistent with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign nation.”\textsuperscript{189}

Congress subsequently amended the Launch Act in 1988 to reflect “the necessity [of compensating] individuals for damages incurred in the course of space exploration.”\textsuperscript{190} Under the updated statute, there is a three-tier risk allocation structure\textsuperscript{191} that creates a guaranteed government fund in the event that private insurance is insufficient to cover all of the damages.\textsuperscript{192} In the first tier, a private spaceflight operator is
liable up to its maximum probable loss, a case-by-case determination “capped at $500 million in 1988 dollars [that is] adjusted for inflation.” Compensation in excess of the maximum probable loss is governed by the second tier, which is paid through a public fund maintained by the federal government. Under the third tier, once liability exceeds $2 billion in 1988 dollars, the private actor is again responsible for payment. In doing so, Congress effectively protects private actors from unlimited liability via its allocation of up to $1.5 billion toward damages.

This addresses one of the chief criticisms of the Liability Convention—the lack of a cap on compensation—although the State is still subject to unlimited liability. By agreeing to the creation of the second tier of repayment, however, “[t]he United States has . . . committed itself to pay for negligence claims to which it was not even a party.” This practice comports with the victim-oriented view of space law originally espoused by the Liability Convention, and represents a tacit agreement to its ideals by the United States Congress while still promoting private development. Indeed, “[i]n the interconnected world of the twenty-first century, the ‘one-nation-go-it-alone’ model . . . is becoming increasingly anachronistic.”

2. Commercial Space Launch Amendments Act of 2004 (CSLAA)

Congress’s passage of the Commercial Space Launch Amendments Act of 2004 signaled to aerospace companies that the federal government supported the efforts of the private sector to carry passengers into space. Specifically, the CSLAA

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193 KLEINMAN ET AL., supra note 2, at 105.
194 Id. at 106.
195 Id.
196 Id.
197 See KAYSER, supra note 9, at 51.
198 Bornemann, supra note 190, at 532.
201 Id.
202 See National Space Policy of the United States of America (June 28, 2010), available at http://www.whitehouse.gov/sites/default/files/national_space_policy_6-28-10.pdf (recognizing that “a robust and competitive commercial space sector is vital . . . . The United States is committed to encouraging and facilitating the growth of a U.S. commercial space sector.”).
“authorized private individuals to pay for, and commercial space entities to provide, space travel.”

The CSLAA imposes only minimal requirements on space flight participants, the most important of which, arguably, is that they give “written informed consent.” The CSLAA’s requirement for informed consent is a logical extension of the Launch Act’s licensing scheme in that both operate as preventative measures that attempt to improve safety. Because of the multitude of risks associated with space travel, it is reasonable to assume that the required waivers will be exceedingly comprehensive and cautiously drafted to avoid liability. Indeed, some spaceflight operators will go to extreme lengths to demonstrate the validity of waivers. For example, Space Adventures, the “first and only company” to have sent non-astronauts into space, explicitly includes a “waiver signing ceremony” in its default suborbital spaceflight itinerary.

3. The U.S. Congress’s Failure to Act

The Launch Act and CSLAA continue where the Outer Space Treaty and the Liability Convention leave off by addressing unresolved issues in commercial spaceflight and liability. Additionally, Congress crafted legislation that maintains the spirit of those two treaties by providing for a fund that supplements the insurance requirements while simultaneously

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203 KLEINMAN ET AL., supra note 2, at 80.
204 See id. at 95-97.
205 51 U.S.C. § 70102(c)(13)(c). Though not explicitly regulated by statute, an area of increasing relevance is whether the FAA’s hands-off approach regarding passenger fitness to fly is adequate, because the current rules leave the “medical screening process up to the commercial space vehicle operators.” Julielynn Wong, Doc, Am I Fit to Fly Into Space?, FORBES (Jan. 10, 2013), http://www.forbes.com/sites/singularity/2013/01/10/doc-am-i-fit-to-fly-into-space/.
206 51 U.S.C. § 70102(a)(12)-(15)
207 See supra notes 15-17 and accompanying text.
208 See, e.g., Pamela L. Meredith & Marshall M. Lammers, Commercial Spaceflight: The “Ticket to Ride”, 25 No.1 AIR & SPACE LAW. 4 & n.56 (2012) (citing N.M. Laws 8, § 4 as a sample exculpatory clause: “WARNING AND ACKNOWLEDGMENT: I understand and acknowledge that under New Mexico law, there is no liability for injury to or death sustained by a participant in a space flight activity provided by a space flight entity if the injury or death results from the inherent risks of the space flight activity . . . .”).
addressing unlimited liability for private actors.\footnote{See 51 U.S.C. §§ 50901-50923 (2011).} But in failing to specifically address liability for amounts less than $500 million and more than $2 billion in the CSLAA, Congress has ceded the issue to the states.\footnote{Id. § 70112.} This inaction, when combined with the various states’ limited liability statutes,\footnote{See infra Part I.C.} represents a symbolic derogation of the United States’ preexisting obligation under the Liability Convention to allow for victims to recover from harm.\footnote{See BENDER, supra note 30, at 313.}

D. State Limited Liability Statutes Are Contrary to the Victim-Oriented Regime

Because spaceflight operators are still liable for an amount up to the maximum probable loss, states have passed limited liability statutes completely absolving spaceflight operators from liability, in a race to the bottom.\footnote{See Bender, supra note 2, at 107-13.} As a supplement to the federal requirement for waivers, several states have passed laws limiting the liability of companies offering human spaceflight services.\footnote{Id. at 109-10.} Fittingly, those states—Virginia,\footnote{VA CODE ANN. §§ 8.01-227.8-.10 (2007).} Florida,\footnote{FLA. STAT. § 331.501 (2012).} New Mexico,\footnote{N.M. STAT. ANN. § 58-31-1 to -17 (West 2013).} Texas,\footnote{TEX. LOC. GOV'T CODE ANN. § 507.103 (West 2013).} and California\footnote{CAL. GOV’T CODE § 13999.3 (West 2013).} (collectively, the “space states”)—also tend to have privately funded and operated spaceports.\footnote{KLEINMAN ET AL., supra note 2, at 108-09.} Additionally, businesses have proposed to build spaceports in Alabama, Washington, Hawaii, Wisconsin, Wyoming, Indiana, and multiple locations in Texas,\footnote{Id.} all of which are the headquarters, states of incorporation, or anticipated expansion sites of the major private spaceflight companies.\footnote{Id.} The motivation is clear: companies with existing space operations want limited liability

\footnote{See Bender, supra note 2, at 107-13.}
States rightly believe that they can attract private operators by passing limited liability laws.226 In broadly analyzing the five state statutes, it is apparent that they share many similarities with only minor differences.227 Each state specifies the necessary language that a waiver must contain to limit a spaceflight operator’s liability, as per the CLSAA’s requirement.228 And while the statutes all limit liability, none of them exempt gross negligence or intentional torts.229 In fact, Florida, New Mexico, and California also include carve-outs for when the operator had “actual knowledge” or “should have known” of the danger.230

As a result of most states not having limited liability laws, choice of law issues will likely apply in the event of a spaceflight accident.231 Nevertheless, a majority of jurisdictions in the United States generally enforce exculpatory clauses.232 Therefore, even if a plaintiff can win on the choice of law issue, and convince a court to apply the law of a jurisdiction other than the state of contract formation, the plaintiff may still lose on the merits.233 This is because courts will likely treat the spaceflight industry more like expeditions to Mount Everest or

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226 KLEINMAN ET AL., supra note 2, at 108. See Edward Helmore, Virgin Threatens to Pull out of Projected Spaceport, GUARDIAN (Jan. 12, 2013), http://www.guardian.co.uk/science/2013/jan/13/branson-virgin-space-tourism-threat (“A spokeswoman for Virgin Galactic said: ‘Without the legislation in place, [the state] will be perceived as a place that is less friendly to space business . . . .’”); Mark Whittington, New Mexico Space Tourism Dependent on Passage of “Informed Consent” Bill, EXAMINER.COM (Jan. 4, 2013), http://www.examiner.com/article/new-mexico-space-tourism-dependent-on-passage-of-informed-consent-bill (“A group of trial lawyers succeeded in watering down [limited liability] legislation in California, which some suggest led to XCOR moving some of its operations to Midland, Texas [which confers greater protections to spaceflight companies].”)

227 KLEINMAN ET AL., supra note 2, at 110.

228 Id.; see, e.g., Meredith & Lammers supra note 208.

229 KLEINMAN ET AL., supra note 2, at 110.

230 F LA. STAT. § 331.501 (2012); S.B. 9, 49th Leg., Reg. Sess. (N.M. 2010); Assemb. B. 2243, Ch. 416 (Cal. 2012); Meredith & Lammers, supra note 208, at 6-7.

231 See Meredith & Lammers, supra note 208, at 6-7.

232 See, e.g., Appalachian Ins. Co. v. McDonnell Douglas Corp., 214 Cal. App. 3d 1 (Ct. App. 1989) (rejecting argument that exculpatory clause was neither unconscionable nor unenforceable in a case involving the failure of a telecommunications satellite to reach its desired orbit).

233 See Meredith & Lammers, supra note 208, at 6-7.
Antarctica and less like the commercial airline industry, and bar recovery against operators.234

Despite differences between the states’ various limited liability statutes and enforcement, their very existence goes against the principles and ideals set forth in the Liability Convention and Launch Act.235 As a general matter, the state laws bar a plaintiff from recovery once they have been informed of the risk and consented to be a spaceflight participant.236 A provision of that sort is absent from the Liability Convention, which recognizes only strict and common-law fault liability.237 Even when the Convention refuses to grant “privileged victim” status on the theory that a party has assumed the risk of spaceflight, fault liability, at a minimum, still applies.238 The space states, in their attempt to promote business development, have acted against the shared international ideals that the United States, via Congress, agreed to.239

II. FEDERAL PREEMPTION AS A MEANS TO COMPENSATE VICTIMS AND FOCUS INDUSTRY GROWTH

The current system of international, federal, and state law should ideally operate to promote two goals. First, the international and United States systems of space law should ensure that victims of spaceflight accidents are properly compensated for the damages they suffer.240 Second, the U.S. federal and state systems of space law should encourage the growth of commercial spaceflight operations.241

On its face, victim compensation and business growth seem to be not only incompatible goals, but polar opposites. Indeed, if the short-term economic gains that are to be achieved through space tourism are the goal, then that assessment is likely correct. Current space tourism, which only consists of

234 See id. But cf. Rob Coppinger, Space Tourism: Fly at Your Own Peril, FlightGlobal (Apr. 11, 2009), http://www.flightglobal.com/news/articles/space-tourism-fly-at-your-own-peril-324978 (quoting Virgin Galactic president Will Whitehorn’s opinion on this issue: “Informed consent has worked quite well in scuba diving, but in other industries it hasn’t. You still have to build your business on the basis [that] those protections don’t exist because you’re talking about people’s lives. That is the commercial aviation background coming to the fore.”) (alteration in original).


236 Kleinman et al., supra note 2, at 108.

237 Liability Convention, supra note 34, art. II, IV.

238 Id.

239 See Kleinman et al., supra note 2, at 107.


241 See supra Part I.B–C.
sending customers on a short two-hour trip to the lower fringes of outer space with a return to the original launch site, benefits from laws that limit liability. Those flights are more akin to extreme sports, which are generally immune from lawsuits when participants sign waivers. Moreover, it is inarguable that those individual companies have an interest in limiting their financial liability if at all possible.

But focusing so closely on crafting a legislative regime that supports only this type of space tourism specifically, and not commercial spaceflight generally, is a gamble. By allowing for limited liability, the United States risks being burdened with an inflexible statutory structure that may no longer support the originally intended business model. If space tourism is the only prospective use of the technologies being developed, then it is perhaps conceivable to maintain the limited liability system. That is not the case, however. To wit, emerging technologies, including point-to-point transport, hotels in outer space, and long-distance voyages, are currently under development, all of which envision different goals and require different governmental intervention. In fact, analysts speculate that they may “eventually even supplant” the space tourism market.

242 A more complete definition of space tourism would encompass both the above-mentioned sub-orbital space tourism, but also orbital space tourism. von der Dunk, supra note 2, at 403-08. Examples of orbital space tourism include visits to the International Space Station by private citizens Dennis Tito in 2001, Mark Shuttleworth in 2002, Greg Olsen in 2005, Anousheh Ansari in 2006, and Charles Simonyi in 2007. Id. at 404.


245 See supra Part I.D.

246 This would also include point-to-point spaceflight, hotels in orbit and in space, and trips to the moon. See von der Dunk, supra note 2, at 407-11.

247 Id.

encompass the universe of private commercial spaceflight, it may be necessary to dismantle the limited liability model and attempt to impose an alternative that better reflects the direction of the industry.\textsuperscript{249} Imposing a system of law so focused on just one facet of the industry, and potentially at the expense of the others, is ill-advised.

Regardless which of these emerging technologies develops first, the industry must prioritize safety in order to achieve marketplace success.\textsuperscript{250} As then-Virgin Galactic President Will Whitehorn explained, his company’s goal with its space tourism business is to first establish a safety record of no more than one accident per 50,000 flights, which would represent a statistic on par with the commercial airline industry.\textsuperscript{251} After accomplishing that goal, Virgin can then transition to offering point-to-point flights,\textsuperscript{252} presumably because they view it as a profitable enterprise.\textsuperscript{253} Additionally, this system of flights could find acceptance in the cargo transport industry and by the U.S. military,\textsuperscript{254} markets that space tourism cannot fill. At Virgin’s current expected rate of progress, however, it will take decades to log the number of flights necessary to institute an ideal safety record.\textsuperscript{255}

Accordingly, space tourism companies should increase the amount of flights they offer to more quickly reach the goal of offering point to point flights. Beyond demonstrating safety, they must simultaneously dispel the perception that their product is reserved for the wealthy, and build mass market appeal. However, making more flights available is counterproductive if there are not enough people to fill the seats. As it stands, market research shows that today’s dominant potential customer base is predominantly male, in his mid-fifties, and wealthy.\textsuperscript{256} But if ticket prices decrease, more people will be

\begin{footnotesize}
\textsuperscript{249} Grossman, supra note 244 (quoting Professor Matthew Schaefer: “Once we get to 1000 flights a day for point-to-point suborbital travel, New York to Tokyo in an hour and a half . . ., then you may need a different regulatory structure[,]”).
\textsuperscript{251} von der Dunk, supra note 2, at 407-08.
\textsuperscript{252} Id. at 408.
\textsuperscript{253} See BEARD & STARZYK, supra note 248, at 66.
\textsuperscript{254} Jeff Foust, First Steps Towards Point-to-Point Spaceflight, THESPACEREVIEW.COM (Feb. 23, 2009), http://www.thespacereview.com/article/1311/1.
\textsuperscript{255} von der Dunk, supra note 2, at 408.
\textsuperscript{256} See BEARD & STARZYK, supra note 248, at 1-2.
\end{footnotesize}
increasingly willing to travel, thereby expanding the market.\textsuperscript{257} Although it seems counterintuitive, for spaceflight to reach that wider audience, the industry must reduce prices, shed its playboy status, and become boring, mundane, and safe.\textsuperscript{258}

State limited liability statutes may therefore be more acceptable if the only issue was promoting space tourism at the expense of properly informed and consenting participants. Advocates of that position would still need to justify circumventing the United States’ international obligations under the ideals of the Outer Space Treaty and the Liability Convention, but the position may nevertheless be defensible in the interest of economic development. However, the space states are focused on crafting a narrow response to a singular issue—space tourism—whereas there exists an entire commercial spaceflight industry that encompasses several different, but related sectors. That means those limited liability statutes may have the actual effect of hurting the industry. By taking away a potential plaintiff’s ability to bring suit, the states are foreclosing a class of customers, the risk-averse, to the spaceflight industry. This also necessarily lessens a company’s ability to create a track record of safety, thereby slowing the path to the potentially more profitable mass market,\textsuperscript{259} and a more diversified private commercial spaceflight business. Because the states’ limited liability statutes arguably impact both victims and the spaceflight companies negatively, Congress should enact national standards that disallow their existence.

Because the space states are all self-interested in attracting businesses, it is unrealistic to expect that they will unilaterally repeal their limited liability statutes,\textsuperscript{260} particularly because some of those businesses are arguably committed solely to remaining space tourism companies.\textsuperscript{261} In this sense, the states and those companies are similar in that they are willing to benefit at the expense of an overarching goal. The states wish to enrich themselves in favor of national and international goals, and the dedicated space tourism companies wish to enrich themselves in favor of the continued healthy

\textsuperscript{257} Id. at 20-21.
\textsuperscript{258} See ADEBOLA ET AL., supra note 8, at 36-37, 77.
\textsuperscript{259} See BEARD & STARZYK, supra note 248, at 52, 59.
\textsuperscript{260} See, e.g., Grossman, supra note 244; Whittington, supra note 213.
\textsuperscript{261} To the author’s knowledge, of the major space tourism companies, Virgin Galactic is the only company that has discussed plans of point-to-point transport. See von der Dunk, supra note 2, at 407-08.
growth of the industry at large. Accordingly, federal preemption is the most sensible solution in that it has the ability to be sufficiently far-seeing to ignore those short-term interests.

Regardless of the plan that Congress adopts, it must, at a minimum, modify or eliminate the limited liability spaceflight statues as they currently exist in the space states. As a starting point, Congress may consider amending the Launch Act’s three tier recovery system by lowering the first tier damage cap of $500 million to an amount that would adequately compensate a victim, but would not bankrupt a spaceflight company. As a supplement to that, Congress could create an “obligatory insurance regime, or [a national] compensation fund” supported by fees collected from private parties.262

Even if Congress does not accept the premise that eliminating limited liability is in the country’s best interests, a uniform national law would provide certainty for commercial spaceflight companies. As the commercial spaceflight industry continues to develop and mature, the necessity of implementing changes to the current legislative regime will only grow. If the United States is to remain the leader in outer space activities, Congress must act sooner, rather than later.

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262 See Hurwitz, supra note 75, at 57-58.
† A.B., Cornell University, 2008; J.D. Candidate, Brooklyn Law School, 2014. Thank you to my parents, who emigrated from China with nothing in their pockets and worked tirelessly to give their children the opportunity to succeed. 我愛你們, 爸爸媽媽. Please send any questions or comments to <michaelstse@gmail.com>.
Stop and Frisk City

HOW THE NYPD CAN POLICE ITSELF AND IMPROVE A TROUBLED POLICY

INTRODUCTION

The Fourth Amendment to the United States Constitution provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”1 The “stop and frisk”2 policy employed by the New York City Police Department (“NYPD”)3 challenges our understanding of those constitutional rights.

Since 1968, the Supreme Court has condoned the practice of stop and frisk.4 But lower courts have “eroded the force” of the original Terry standard in such a way that police departments have little idea of what a sound stop and frisk policy should look like.5 As a result, there are few checks on the tremendous discretion given to the NYPD in the stop and frisk context. In 2012 alone, “New Yorkers were stopped by the police 532,911 times. 473,644 were totally innocent (89%), 284,229 were Black (55%), 165,140 were Latino (32%), [and] 50,366 were White (10%).”6 These statistics suggest that some incidents of stop and

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1 U.S. CONST. amend. IV.
2 “Stop and frisk” is a practice that permits a police officer to stop any individual if the officer has reason to believe “criminal activity may be afoot.” Terry v. Ohio, 392 U.S. 1, 30-31 (1968). Further, a police officer may frisk that individual if the officer has reason to believe “that the persons with whom [the officer] is dealing may be armed and presently dangerous.” Id.
4 See Terry, 392 U.S. at 27.
frisk may be racially motivated. By updating the policy that controls an individual officer’s discretion and disclosing that policy to the public, the NYPD could make a good faith effort to eliminate the disparate racial impact that the stop and frisk policy has had in New York City. Further, given the recent opinion by U.S. District Court Judge Scheindlin that the NYPD’s stop and frisk policies “violate[e] the plaintiffs’ Fourth and Fourteenth Amendment rights,” the NYPD should update its stop and frisk policy to limit the discretion given to individual officers. “[E]xcessive or unnecessary discretion can and should be eliminated, and . . . necessary discretion should be properly controlled.”

To appropriately regulate officer discretion, the NYPD should adopt and implement clear police policies and procedures so officers can enforce the law without infringing upon citizens’ constitutional rights. The need for setting clear standards within the department is only heightened by the ambiguous standards set forth by the courts. The current NYPD stop and frisk standard “perpetuates the morally ambiguous nature of police work in its literal sense—that which line police officers do.” The consequences of this ambiguity spread throughout the entirety of the police force, for if the upper ranks of the NYPD are unclear as to how to apply discretion, then it is likely that officers implementing the procedures will also be unsure as to how to legally utilize stop and frisk discretion.

The NYPD has stated that the purpose of stop and frisk is to reduce crime and the number of guns in New York City.
“Reducing crime is a worthy goal, but along with decreases in crime may come other, less desirable consequences,” such as due process violations. The Department’s failure to set forth a clear policy has damaged the NYPD’s reputation and could open the city up to extensive litigation for violations of constitutional rights.

Moreover, given the depressed economy, severe lack of resources that plague New York City, and recent stop and frisk decision in federal court, the City and the NYPD must update the department’s stop and frisk policies. Because “[t]he police are among the most important policy-makers of our entire society[,] [a]nd . . . make far more discretionary determinations in individual cases than any other class of administrators,” the NYPD must take the initiative to update its policies.

One way for the NYPD to update its stop and frisk policy is through the use of internal rulemaking. The NYPD should adopt rules that include: (1) updating the stop and frisk percent of all stops did not result in an arrest or a summons being given. Contraband was found in only 2 percent of all stops. The NYPD claims their stop and frisk policy keeps weapons off the street—but weapons were recovered in only one percent of all stops. These numbers clearly contradict that claim.” Id.


16 “When failing to wrestle with the complex moral and legal issues of social policies, departments risk litigation, the outcome of which can seriously jeopardize current and future departmental efforts to deal with serious problems.” KELLING, supra note 12, at 15 (citations omitted).


19 See Henry Goldman, New York City Council Seeks to Limit Police Stop-and-Frisks, BUS. WK. (Oct. 10, 2012), http://www.businessweek.com/printprinter/articles/341450?type=bloomberg (“New York spent $633 million settling and paying judgments on thousands of lawsuits alleging police abuse and civil-rights violations from 2006 to 2011.”); see also NYPD Lawsuits Rise Dramatically; Lawsuits Against New York City Cost $550.4 Million in Last Fiscal Year, HUFFINGTON POST (Dec. 27, 2012, 12:19 PM), http://www.huffingtonpost.com/2012/12/27/nypd-city-lawsuits-rise-70-new-york-city-resident_n_2370111.html (“In the 2011 fiscal year alone, New York City paid out a staggering $550.4 million—or about $70 per New York resident—to settle a litany of lawsuits ranging from personal injury claims to medical malpractice. A large chunk of that over half a billion dollar figure—a five percent increase over the year before—stems from lawsuits brought against the New York Police Department. Lawsuits against the NYPD cost city taxpayers $185 million, more than any other city agency.”).

20 KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 222 (1969); see also Goldstein, supra note 18.

21 See generally DAVIS, supra note 9.
section of the NYPD manual,22 (2) eliminating the quota system,23 (3) amending the NYPD Unified Form 250 ("UF-250") that officers are required to fill out following any stop and frisk encounter,24 (4) increasing the responsibility of middle management,25 and (5) revising the reprimand system.26 Using proactive administrative tools would allow the NYPD to make clear to the public and individual police officers the specific purpose of the NYPD's stop and frisk policy.27 “Proponents of rule making assert that in the absence of rule making, subordinates at or near the bottom of the organization reformulate and refine public policy goals—and that street-level officers make policy on the basis of intuition and superficial guesswork rather than studies and investigations by qualified specialists.”28 By utilizing this opportunity to update its stop and frisk policy, the NYPD can limit such sporadic policy making by controlling the discretion given to individual officers. Implementing these restrictions is important, because “much [of] police policy making is of such low visibility that it is exempt from review both within and outside the organization.”29

The NYPD stop and frisk policy must be continually addressed for it to stay up-to-date and relevant.30 Because the NYPD has received little guidance from the courts prior to Floyd v. City of New York in 2013, the police department has had tremendous discretion as to how to update its policy.31 “‘[G]reater participation by the police in the making of rules for their own guidance . . . embraces the prospect . . . of progressively higher elevations in the quality of police performance . . . .’”32

22 See infra Part IV.A.
23 See infra Part IV.B.
24 See infra Part IV.C.
25 See infra Part IV.D.
26 See infra Part IV.E.
29 Id.
30 See KELLING, supra note 12, at 45 (“Policy development is ongoing. It is a repetitive, never-ending aspect of police work . . . . Changing conditions, laws, traditions, and standards require continual updating of police guidelines.”).
31 See AARONSON ET AL., supra note 28, at 49 (“[P]olice chiefs and their administrative staffs have considerable discretion to ‘red[ef]ine’ or alter the intent of a policy through: (1) their direct access to policy formulators [and] (2) their control over the formal networks of organizational communication (e.g., police general orders, content of training manuals, reward structure) . . . .”).
32 DAVIS, supra note 9, at 125-26 (quoting Judge Carl McGowan, Rule-Making and the Police 70 MICH. L. REV. 659, 674 (1972)). In fact, Judge Scheindlin is requiring the NYPD's participation in the development of remedies to ensure that its stop and frisk policies are constitutional. See generally Floyd v. City of New York, No. 08 Civ. 1034(SAS), 2013 WL 4046217 (S.D.N.Y. Aug. 12, 2013).
Therefore, the process of defining the practices and limits of stop and frisk should not simply be left to the NYPD’s legal staff. Top officials, individual officers, and community members alike need to participate in this development to ensure that everyone affected understands the updated policy.33

This note details the history of stop and frisk and argues that the NYPD should internally amend its stop and frisk policy to better limit the discretion given to individual officers. Part I outlines a brief history of stop and frisk. Part II examines the inadequacy of the current remedies available to those who feel their Fourth Amendment rights have been violated by stop and frisk. Part III contends that the NYPD needs to update its stop and frisk policy. Finally, Part IV outlines administrative solutions the NYPD should implement in order to reduce constitutional violations of individual rights. These updates are incredibly important both for the NYPD and the citizens of New York City, who have increasingly pressured the City to change its procedures.34 Given the uproar in New York City and around the country over stop and frisk, as well as the recent decision declaring the NYPD’s stop and frisk tactics unconstitutional, the NYPD should be receptive to updating its policy.35

I. THE HISTORY OF STOP AND FRISK

Generally, when police officers conduct searches or seizures, they must do so with a search warrant, founded on probable cause and consisting of the requisite particularity.36 Stop and frisk, however, has created a major exception to the warrant requirement.37 Under stop and frisk, police officers need only “specific and articulable facts” to stop an individual.38 Consequently, by significantly decreasing the standard required by the Fourth Amendment from probable cause to reasonableness, the

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33 See generally AARONSON ET AL., supra note 28, at 207; see also Floyd, 2013 WL 4046217, at *12-14.
34 See Goldman, supra note 19.
36 U.S. CONST. amend. IV.
37 See Terry, 392 U.S. at 21.
38 Id.
Supreme Court “radically changed the standard for allowing searches and seizures.”

The U.S. Supreme Court first authorized this departure from the text of the Fourth Amendment when it declared stop and frisk constitutional over 40 years ago in *Terry v. Ohio*. In its decision, the Court noted that in order for a police officer to stop an individual on the street without probable cause, which is required under the text of the Fourth Amendment, the officer must have reason to believe “in light of his experience that criminal activity may be afoot.” In order to then conduct a frisk, it must be apparent that “a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” The Court, anticipating the need to limit the discretion given to individual police officers and to give lower courts guidance in their evaluation of police discretion, explained that “in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.” As a result, the Court held:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

By outlining such a vague stop and frisk standard, the Court significantly reduced the individual protections laid out in the Fourth Amendment and simultaneously expanded police power.

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40 392 U.S. 1, 27 (1968).
41 Id. at 30.
42 Id. at 27.
43 Id.
44 Id. at 30-31.
That expansion of police power is furthered by the limited role of judicial review in overseeing police conduct. In most circumstances, a court could review police officers' administrative decisions...for abuse of discretion, which is commonly measured by whether officials have (1) considered something they should not have considered, (2) not considered something they should have considered, (3) given improper weight to something they should have considered, or (4) decided without sufficient evidence. These criteria suggest both that a court may not substitute its own judgment on what the right decision would be for that of the official exercising discretion and that the official decision-maker is subject to a check on the basic fairness and reasonableness of the way he or she went about making the decision.45

Because of the immediacy of decision-making during a stop and frisk, however, these commonly considered factors are not as applicable.46 While it may be that the Court tried to create an applicable standard of review in stop and frisk cases, applying the “reasonably prudent” standard47 has proven to be difficult for lower courts and police forces alike.48 Moreover, because the officer only needs to show that he had a reasonable suspicion, judicial review is not the most effective means to protect Fourth Amendment rights. Indeed, the Court has been unable to create a clear stop and frisk standard. On the same day that the Court decided Terry, it decided two similar stop and frisk cases—Sibron v. New York49 and Peters v. New York50—but came to different conclusions in each case. The Court held in Sibron that the police violated Sibron’s Fourth Amendment rights by seizing drugs on his person without any articulable facts as to why the police officer believed he was armed and dangerous.51 The Court held differently in Peters and found that the officer had reason to believe that Peters was armed and dangerous, thereby permitting

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46 It is difficult for courts to review stop and frisk incidents under these common factors because of the inherent nature of stops. Stops are intended to occur on the move, as a result of an officer’s belief that criminal activity is afoot. The unplanned and high-stakes nature of stops, therefore, makes it difficult to apply a common set of factors to evaluate an officer’s judgment. Further, because each incident is fact specific, with the potential for post hoc rationalizations by officers, judicial review is difficult.
47 Terry, 392 U.S. at 27.
48 See Harris, supra note 5, at 975-76.
51 Sibron, 392 U.S. at 64; see also Conroy, supra note 39, at 161-62 (citations omitted).
the officer to search Peters for weapons.\textsuperscript{52} It appears that the Court has not yet “develop[ed] a standard that can be consistently applied by lower [courts] in stop and frisk cases.”\textsuperscript{53}

Though the United States Constitution sets the floor for individual rights, states may add more protective provisions under their individual state constitutions.\textsuperscript{54} As such, in response to the \textit{Terry} standard, the New York Court of Appeals declared its own four-level stop and frisk standard, in hopes of creating a clearer guide for both courts and police forces.\textsuperscript{55} The lowest two levels of intrusion which do not reflect standards required on the federal level, consist of the following:

The most minimal police intrusion regulated by the court is a request for information, which can involve “basic, nonthreatening questions regarding, for instance, identity, address or destination.” To justify this conduct, the police must possess “some objective credible reason for [the] interference not necessarily indicative of criminality.” The next level of police intrusion is a common-law right to inquire. The Court of Appeals has determined that police contact ceases being a request for information and transforms into a common-law inquiry once an officer asks “more pointed questions that would lead the person approached reasonably to believe that he or she is suspected of some wrongdoing and is the focus of the officer’s investigation.” In order to conduct the common-law right to inquire, the police must have a “founded suspicion that criminal activity is afoot.”\textsuperscript{56}

Levels three and four of the New York stop and frisk model reflect the federal constitutional requirements. Under “the third level, police may make a ‘forcible stop and detention’ of a person when they possess ‘reasonable suspicion that [that]

\textsuperscript{52} Peters, 392 U.S. at 66; see also Conroy, supra note 39, at 161-62 (citations omitted).

\textsuperscript{53} Conroy, supra note 39, at 161-62 (citations omitted).


\textsuperscript{55} See \textit{People v. De Bour}, 40 N.Y.2d 210 (1976). New York later codified those standards in its Criminal Procedure Law at CPL § 140.50(1), declaring that: “A police officer may stop a person in a public place located within the geographical area of such officer’s employment when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct.” N.Y. CRIM. PROC. LAW § 140.50(1) (McKinney 2010). Moreover, “[w]hen upon stopping a person under circumstances prescribed in subdivisions one and two a police officer or court officer, as the case may be, reasonably suspects that he is in danger of physical injury, he may search such person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons. If he finds such a weapon or instrument, or any other property possession of which he reasonably believes may constitute the commission of a crime, he may take it and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.” \textit{Id.} § 140.50(3).

particular person has committed, is committing or is about to commit a felony or misdemeanor.’” 57 Lastly, under level four “an officer may arrest and take into custody a person when he has ‘probable cause to believe that person has committed a crime, or offense in his presence.’” 58 Though the New York standard is considerably more specific than the federal stop and frisk standard, it still allows for a great deal of police discretion. 59

II. INADEQUACY OF REMEDIES FOR STOP AND FRISK VIOLATIONS

By stopping an individual when no justifiable purpose exists, police officers violate citizens’ Fourth Amendment rights. Such violations, however, are difficult to prove. Given that the nature of stop and frisk does not typically result in “the recovery of evidence, and because the qualified immunity doctrine shields most police action from scrutiny, few stop and frisks are ever reviewed by courts.” 60 Further, because these encounters are rarely reviewed and the nature of the encounters reflects a quick and ongoing exchange with likely limited witnesses, abuse of police discretion in stop and frisks is rarely discovered. 61 The NYPD has adopted a number of policies in an attempt to control abuse of citizens’ constitutional rights, but most of these procedures are inadequate.

A. UF-250 Forms

According to NYPD policy, when a police officer has conducted a stop and frisk, he or she is required to complete a UF-250 Form. 62 The UF-250 Form requires an officer to detail “the timing and location of the stop, descriptive and identifying characteristics of the person stopped, the reason for the stop, whether the person was frisked, and whether the person was

57 Sack, supra note 54, at 522 (citations omitted) (alterations in original).
58 Id.
59 See Eterno, supra note 15, at 62 (quoting Judge Harold J. Rothwax, Guilty: The Collapse of Criminal Justice 40-41 (1996) (“The problem is, the law is so muddy that the police can’t find out what they are allowed to do even if they wanted to. If a street cop took a sabbatical and holed himself up in a library for six months doing nothing but studying the law on search and seizure, he wouldn’t know any more than he did before he started. The law is totally confusing, yet we expect cops to always know at every moment what the proper action is.”)).
61 See Sack, supra note 54, at 513.
62 Id. 547-48.
issued a summons or arrested.”63 A supervisor then reviews the details.64

The form is problematic for a number of reasons, including the opportunity, after the incident occurred, for an officer to create justifiable reasons for a stop. Because the form consists of boxes for an officer to check that could justify the stop, the form has taken the accountability away from the officer. Theoretically, an officer is supposed to detail his or her reasons for stopping an individual. “In practice, however, officers do not in fact record the factors justifying a stop . . . and supervisors do not address this deficiency.”65

B. State and Federal Civil Rights Actions

Recently the New York City Council attempted to right the wrongs in the NYPD’s stop and frisk policy by passing a bill that “expand[s] New Yorkers’ ability to sue over racial profiling by officers.”66 This bill, Introduction Number 1080, adds “age, gender, housing status and sexual orientation” to “the definition of bias-based profiling.”67 This bill, therefore, “allow[s] individuals to sue the Police Department in state court . . . for policies that disproportionately affect people in any protected categories without serving a significant law enforcement goal.”68 Additionally, those “[i]ndividuals who are arrested and whose criminal charges are later dismissed, as well as those who are stopped but not arrested, [can seek monetary damages by suing] the NYPD [in federal court] under 42 U.S.C. § 1983 for violations of their federal civil rights.”69

But there is no certainty that litigation would have a significant impact in remedying these issues.70 Plaintiffs in stop

63 Id.

64 Once the supervisor reviews the UF-250 Form, it is “entered into a log in the precinct station house and assigned a serial number. Later, the data from the form are entered into the computerized database by an officer assigned to administrative duties or by a civilian precinct employee.” Id. at 548.

65 Floyd v. City of New York, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at *37 (S.D.N.Y. Aug. 12, 2013). In Judge Scheindlin’s recent opinion, she found “that the NYPD has no meaningful procedures for auditing stop paperwork to monitor the constitutionality of stops.” Id. at *38.


68 Goodman, supra note 66.

69 Kabakova, supra note 60, at 551; see generally Floyd, 2013 WL 4046209.

70 Though the appeal in this case is pending, Judge Scheindlin recently found that the NYPD’s stop and frisk policy was unconstitutional as it applied to a number of plaintiffs. See generally Floyd, 2013 WL 4046209. This ruling lends itself to the idea
and frisk lawsuits could face evidentiary challenges, such as gaining access to the limited paperwork detailing the stops and an officer’s justification for the stop or the inability to locate witnesses, should there be any.71 Moreover, monetary damages could be limited for those whose rights are violated by an improper stop and frisk, but suffered no significant injuries or losses.

C. The Exclusionary Rule

Violations of the Fourth Amendment are generally checked by the exclusionary rule, which “simply stated, prevents illegally obtained evidence from being used in court proceedings against a defendant.”72 Given the infrequency of meaningful judicial review of stop and frisk procedures, however, the exclusionary rule does not often apply.73 Because the majority of stop and frisks do not reveal contraband or criminal activity, there is simply no evidence to exclude, nor a trial from which to exclude it.

Further, even if a judge reviewed a stop and frisk and suppressed the evidence that was obtained during the encounter, the individual officer who conducted the stop may never know the outcome of the case or why the evidence was suppressed.74 As a result, an individual officer may never learn from his or her abuse of discretion.75 Consequently, not only does the exclusionary rule have an insignificant effect on an officer, but it also has an insignificant effect on “[p]olice departments [as they] have little incentive [to] discipline officers when evidence is suppressed because it is easy to write off a few lost prosecutions . . . .”76 This leaves individuals whose rights were violated by an unjustifiable stop and frisk without any real recourse, for any action they take has little impact on the stop and frisk policy or the officers themselves.77

that if the NYPD does not engage in efforts to update its policy soon, it might be updated for them. See Goldstein, supra note 18.

71 See supra Part II (introductory paragraph).
72 ETERNO, supra note 15, at 5.
73 Kabakova, supra note 60, at 549.
76 Id.
77 See McGowan, supra note 74, at 673.
D. The CCRB

Individuals may seek administrative review of police action by filing a complaint with either “the Civilian Complaint Review Board (CCRB), an independent agency . . . [or] the Internal Affairs Bureau (IAB) of the NYPD.”78 The CCRB and the IAB “have different jurisdiction[s]. The CCRB investigates complaints of ‘excessive or unnecessary use of force, abuse of authority, discourtesy, and offensive language,’ while the IAB handles complaints of corruption.”79 Though these review boards were based on sound intentions, they have proven to be relatively futile in remedying violations of the Fourth Amendment.80

The CCRB has not been effective in disciplining individual police officers, because the Board’s resources to review complaints and conduct research for bettering stop and frisk policy are scarce.81 First, “[t]he CCRB’s investigations are handled by more than 140 civilian investigators and are reviewed by panels of a 13-member board comprised of mayoral designees, city council designees, and police commissioner designees.”82 The board, empowered by the New York City charter, can “receive, investigate, hear, make findings and recommend action upon complaints by members of the public against members of the police department that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language.”83 Second, though the CCRB serves a legitimate need, its staff consists of solely civilians, who hold no disciplinary power.84 “[T]he ultimate disciplinary power remains with the police chief executive. Civilian review procedures [only] have the power to recommend disciplinary action.”85 As a result, the CCRB can only be effective if the chief executive chooses to implement the review board’s recommendations.86 Because of its limited resources, the CCRB has been forced to abandon its policy efforts because of their

78 Kabakova, supra note 60 at 555 (internal citations omitted).
79 Id. (internal citations omitted).
80 See Floyd v. City of New York, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at *44 (S.D.N.Y. Aug. 12, 2013) (“The DAO’s frequent rejection of the CCRB’s disciplinary recommendations has likely undermined public confidence in the CCRB and discouraged the filing of complaints—many of which may have been meritorious.”). For further discussion on the NYPD reprimand system, see Floyd, 2013 WL 4046209, at *42-44.
81 See Clarke, supra note 75, at 30-38.
82 Kabakova, supra note 60, at 556 (internal citations omitted).
84 See generally Clarke, supra note 75.
86 Id.
limited resources.87 As a result, “[t]he CCRB[] . . . gradually transformed . . . into an agency that investigates fewer complaints and is more deferential to the police.”88

Because the CCRB lacks any disciplinary power, it is rare for an officer to suffer any sort of strict punishment due to stop and frisk complaints.89 Consequently, these measures have little deterrent effect on officers.90 In fact, police officers who are punished as a result of a review of their stop and frisk complaint often receive instructions from a commanding officer about the flaws in the subject officer’s conduct, and what the proper conduct should have been in the given circumstance.91 Alternatively, if a commanding officer sees fit, the subject officer could be required to undergo further training at the Police Academy.92 While instructions may be useful in allowing the officer to learn, such a remedy is insufficient to remedy this department-wide issue.

In response to perceived stop and frisk abuse and because of the concern over the lack of oversight of the NYPD, the New York City Council proposed a bill that would “create an independent inspector general to monitor and review police policy, conduct investigations and recommend changes to the department.”93 But the same issue that plagues the CCRB would similarly affect the inspector general: the inability to implement any of the recommendations suggested to the NYPD.94

III. WHY THE NYPD SHOULD IMPLEMENT ADMINISTRATIVE SOLUTIONS TO REDUCE FOURTH AMENDMENT VIOLATIONS

In the absence of effective external checks on police stop and frisk practices, the NYPD must develop and implement its own internal policies to guide individual officers on how to handle stop and frisk situations. Recently, the NYPD has taken

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87 Id. at 34.
88 Id. at 37.
89 See McGowan, supra note 74, at 673.
90 Clarke, supra note 75, at 7 (citations omitted).
91 Id. (internal citations omitted).
92 Id.
steps to update its teaching policies. For instance, during training, officers act out hypothetical scenarios and then immediately get feedback from their police instructors about their use of police discretion in light of NYPD guidelines. Though it appears these updated teaching policies are contributing to a reduction in the number of stop and frisks in New York, the policies alone are not enough. “Police discretion can best be structured and controlled through the process of administrative rule-making by police agencies. Police administrators should, therefore, give the highest priority to the formulation of administrative rules governing the exercise of discretion . . . .” Officers need guidelines to which they can continually refer, such as an updated policy that will predictably and consistently guide them when they are out in the field protecting the citizenry.

When laws are written unclearly, officers are influenced by that ambiguity. Slight ambiguity in laws is used by officers to their advantage, meaning more officers will search and/or stop in mildly ambiguous legal situations. When the law is extremely ambiguous . . . it appears that officers will stretch the law to its very limits, taking advantage of every bit of ambiguity left to them.

Given the recent federal court decision regarding the NYPD’s stop and frisk procedures, the NYPD must reevaluate its current policies. Furthermore, the NYPD should disclose its policy to the public, because “(1) [a]ny public agency, because it is a public agency, should make its policies known [and] (2) [f]airness requires that those affected have a chance to know the enforcement policies.”

Additionally, the NYPD will be better served with a proactive policy rather than solely relying on a reactive review board like the CCRB. However, “the challenge is not to choose, but to balance and integrate the competing demands of

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96 Id.
98 DAVIS, supra note 9, at 100-01 (citation omitted).
99 For further discussion on the need for updated training, see Floyd v. City of New York, No. 08 Civ. 1034(SAS), 2013 WL 4046217, at *6-7 (S.D.N.Y. Aug. 12, 2013).
100 ETERNO, supra note 15, at 101.
101 See generally Floyd v. City of New York, No. 08 Civ. 1034(SAS), 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013); Floyd, 2013 WL 4046217; see also Goldman, supra note 19.
102 DAVIS, supra note 9, at 71.
different police functions.” 103 Therefore, though administrative tools do not suffice as an alternative to the judicially implemented exclusionary rule, administrative policies are sound supplemental procedures.104 As previously noted, the majority of the repercussions on individual officers consists solely of instructions.105 Given the expertise of the NYPD and its legal staff, it is far more useful to employ the tools the NYPD already has at its disposal to create a new proactive approach.

Police department “[m]anagement devotes its time to responding to economic and political elites, overseeing budgets, setting broad policy priorities, creating performance measures, and resolving other issues related to supervision.”106 The NYPD is no different. While the NYPD surely strives to decrease crime and to protect the general public, it could do more to limit abuse of discretion and better inform its officers about the consequences of such abuse.107 This is certainly no easy task, for “[s]treet-level bureaucrats, such as police officers, must cope with both management’s directives concerning a legal policy and the immediate pressures generated on the street.”108

An updated policy would address these problems, because the NYPD can “explicitly authorize discretion” in stop and frisk situations.109 “Such continued restatements are important, despite their redundancy, because citizens, prosecutors, courts, lawyers, and legislatures must clearly understand that the issue is not whether police officers use discretion. The real questions are how officers use discretion and how their use of it is shaped.”110

IV. ADMINISTRATIVE SOLUTIONS TO REDUCE VIOLATIONS OF INDIVIDUAL PRIVACY

In evaluating and promoting general updated policies, the National Institute of Justice, a research and development agency within the Department of Justice, set forth a number of principles that should be considered in “develop[ing] and implement[ing] policies”111:

104 ARONSON ET AL., supra note 28, at 433-34.
105 See supra Part II.D.
106 ARONSON ET AL., supra note 28, at 8.
107 See generally DAVIS, supra note 9, at 100-01, 116, 118-19.
109 KELLING, supra note 12, at 37.
110 Id.
111 Id. at 34.
Recognize the complexity of police work[,] [a]cknowledge that police will use discretion[,] [r]ecognize and confirm how police work is conducted[,] [a]dvance a set of values that may be applied to the substantive work issue at hand[,] [p]ut forward existing research, facts, or data about the substantive issue at hand[,] [u]ndergo development by practicing police officers and citizens[,] [u]ndergo public promulgation in a manner clear to officers, the general public, community stakeholders, and the courts[,] [i]nclude rules about what officers should not do[,] [e]mphasize police adherence to a process (application of knowledge, skills, and values), rather than any predictable outcome, because outcomes of police interventions are often wildly unpredictable regardless of officers' skills, intent, and values[,] [e]stablish accountability standards that identify component and/or excellent performance, violations of organizational rules, and incompetent or uncaring work, including performance within organizational rules[,] [r]eceive recognition as an ongoing continuing process.\(^{112}\)

All of these principles are important and further highlight the need for experienced officers, new officers, lawyers, politicians, and members of the community to work together to come up with a stop and frisk policy that is useful for officers and simultaneously protects individuals’ Fourth Amendment rights.\(^{113}\) “A police rulemaking process that involves supervisors and line officers as well as higher-level administrators and legal counsel is clearly more open than a process in which rule formulation is accomplished by administrators and legal counsel alone.”\(^{114}\) As long as stop and frisk is legal, continuous updating of administrative policies is the best solution because officers can more easily understand administrative rules as opposed to court decisions.\(^{115}\)

A. Update the NYPD Manual

As it stands today, individual officers are provided with a vague police manual. The Police Manual dictates the following procedure in conducting a stop and frisk:

When a uniformed member of the service reasonably suspects a person has committed, is committing or is about to commit a felony or a Penal Law misdemeanor: 1. Stop a person and request identification and explanation of conduct . . . . [However,] [i]f not in uniform, identify yourself as a police officer[;] 2. Frisk, if you reasonably suspect you or others are in danger of physical injury[;] 3. Search, if frisk reveals object which may be a weapon [(]NOTE: Only that portion of the suspect’s clothing where object was felt may be

\(^{112}\) Id.

\(^{113}\) See generally AARONSON ET AL., supra note 28, at 207; see also McGowan, supra note 74, at 674.

\(^{114}\) AARONSON ET AL., supra note 28, at 425.

\(^{115}\) Id. at 407.
searched(); 4. Detain suspect while conducting investigation to determine whether there is probable cause to make an arrest.116

The NYPD can better regulate officer discretion by updating the stop and frisk section of the NYPD Manual, which guides officers throughout their duties.117 Moreover, it is imperative that the NYPD also instruct each officer on the limits of discretion within the confines of the Fourth Amendment.118

To effect change, NYPD leaders must declare a clear goal for stop and frisk.119 Merely identifying a vague goal, such as the desire to deter crime or reduce the number of guns on New York City streets, is insufficient.120 Identifying goals is essential for the successful application of any updated policy.121 As such, it is imperative to be specific, rather than merely set forth the standard “reduce crime” mantra.122 “There is a need for a deeper understanding of how goals are adjusted and refined in the implementation stage, and how conflicting organizational and self-interest goals place limits on achieving public policy goals.”123 If the NYPD can incorporate its new goals into both the teaching policy as well as the patrol guide, individual officers will be better informed and prepared as they conduct their assignments.124

While the exercise of street-level discretion appears upon superficial inspection to be an individualistic process, closer analysis suggests that discretion is not exercised in a random fashion. It is possible to identify factors that prompt shared responses to particular legal norms. These discretionary factors range from the cues police officers receive from the management level concerning the implementation of a particular norm, such as police orders and special training, to how a particular legal norm fits with officers’ conceptualization of their job.125

Currently, the Patrol Guide attempts to shed light on the vague court-determined standard of “reasonableness”126 by setting forth the following criteria that factor into reasonable suspicion:

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117 See id.
118 For further discussion on NYPD training, see Floyd v. City of New York, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at *40-42 (S.D.N.Y. Aug. 12, 2013).
119 See AARONSON ET AL., supra note 28, at 207.
121 AARONSON ET AL., supra note 28, at 207.
122 See Raymond, supra note 13.
123 AARONSON ET AL., supra note 28, at 207.
124 See generally id.
125 Id. at 41.
the demeanor of the suspect; the gait and manner of the suspect; any knowledge the officer may have of the suspect’s background and character; whether the suspect is carrying anything and what he is carrying; manner of dress of suspect including bulges in clothing; time of day or night; any overheard conversation of the suspect; the particular streets and areas involved; any information received from third parties; proximity to scene of crime.  

Though these factors are helpful, they are not enough to overcome the abuse of discretion that results from officers trying to achieve a quota, a requirement that officers stop a certain number of individuals. Further, while these factors shed some light on “reasonableness,” they do not paint a full picture of what constitutes a reasonable stop.

Because of the vagaries of the standards set forth in the Patrol Guide do not adequately guide officer behavior, the NYPD should update its police policies by clearly identifying its specific goals in the manual. Though it is not possible to predict all of the “reasonable” purposes that an officer may have to stop an individual, it would be useful to include examples of both proper and improper stop and frisk scenarios in the manual. This change will help to instruct the officers in specific circumstances and to further emphasize that abuse of discretion will not be tolerated.

B. Eliminate the Quota System

The NYPD should eliminate the quota system, which encourages officers and precincts to stop and frisk a minimum number of New Yorkers. Whether or not the quota system is part of a written policy, it is well understood throughout the ranks of the NYPD. This is problematic for many reasons.

[In a crime control environment, the pressure on police officers of every rank is to reduce the number of reported crimes. This pressure may ultimately manifest itself as overzealous enforcement behavior.

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128 See infra Part IV.B.
129 See AARONSON ET AL., supra note 28, at 207.
That is, some officers could be reacting to the unyielding stress to reduce crime by abusing their authority (e.g., conducting illegal searches, stops, arrests).132

This quota requirement may encourage officers to stop people that the officer does not reasonably suspect to have committed a crime.133 Additionally, the quota requirement suggests to officers that not only is it okay for them to violate a person’s Fourth Amendment rights,134 but that this kind of flagrant violation is condoned by the police department.135 “This abuse of authority is the antithesis of policing in a democracy.”136

While the Police Commissioner may not be personally encouraging individual officers to violate Fourth Amendment rights, a message from NYPD headquarters to individual officers to stop a certain number of people can certainly be misunderstood.137 “[S]treet-level bureaucrats and administrators use their discretionary powers differently because the former must face the day-to-day demands and needs of the citizenry.”138 Therefore, “legal policies are implemented” when officers interact with New York City residents, whether it be in responding to emergency situations or conducting stop and frisks.139 When the NYPD sets forth a policy to stop a certain number of New Yorkers, not based on reasonable suspicion, but rather on strict adherence to numbers,140 the ordinary demands on individual officers are left to the wayside.

C. Amend the UF-250 Form

Further, the NYPD should amend its UF-250 Form, as it promotes complacency and the potential to fabricate post hoc justification for stops where no justification existed. By amending the UF-250 Form, each officer would be required to

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132 ETERNO, supra note 15, at 17.
133 See Goldstein, supra note 18, at 17 (citations omitted).
134 In Ligon v. City of New York, Judge Scheindlin found that “[t]he evidence ... strengthen[ed] the conclusion that the NYPD’s inaccurate training has taught officers the following lesson: stop and question first, develop reasonable suspicion later.” Ligon v. City of New York, 925 F. Supp. 2d 478, 538 (S.D.N.Y. 2013).
135 See Goldstein & Ruderman, supra note 97 (“A police officer in the Bronx said that officers detected a mixed message from the top.”)
136 ETERNO, supra note 15, at 17.
137 See Goldstein & Ruderman, supra note 97 (Officers and supervisors alike are “unsure whether the political support remains for street stops, long a focal point of Police Commissioner Raymond W. Kelly’s crime-fighting strategy.”).
138 AARONSON ET AL., supra note 28, at 40.
139 Id.
140 See Coscarelli, supra note 131; see also NYPD Report Confirms Adrian Schoolcraft’s Quota and Underreporting Crime Claims, supra note 149; New Stop-and-Frisk Data: NYPD’s Controversial Policing Tactic Is on the Rise and Still Racist, supra note 131.
provide each and every relevant detail as to why the officer concluded that a stop and possibly a frisk was reasonable and necessary. Though it may take more time than the current practice, which requires police officers to merely check off boxes such as “citizen had suspicious bulge,” it is more important to take the time to actively provide supporting details. The officer’s immediate supervisor would then review the form with the officer to determine what exactly led the officer to reasonably suspect the individual was in some way threatening the officer or others’ safety. “There is something about the very process of having to write down on paper detailed guidelines for one’s conduct which summons rationality and elevates principle.”

As described above, discretion can be controlled by frequent conversations and interactions with a supervisor. “[P]olice patrol work usually ensures a high level of peer interaction and dependency. Partners are influenced by one another and the attitudes of rookie police officers are viewed as being significantly shaped by the beliefs of veteran officers.”

D. Increase the Responsibility of the Middle Management

An additional solution to address the disconnect between the means and purposes of the NYPD stop and frisk model is to give middle management more responsibility. “The police rank structure, like all rank structures, was created in order to enable large tasks to be broken down into smaller pieces, through several intermediate stages of

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141 Because an officer needs reason to believe that an individual is “armed and presently dangerous,” a frisk is not likely to occur in every “stop and frisk” encounter. See Terry v. Ohio, 392 U.S. 1, 30-31 (1968).

142 As NYPD policy stands, officers are supposed to fill out a UF-250 Form after every stop and frisk. See supra Part II.A.

143 As Judge Scheindlin notes in Floyd v. City of New York, the current policy requires officers to record the specific details of their stops in their memo books. Then, the officers’ supervisors review the officers’ notes for error. In practice, however, this is not always done. See Floyd v. City of New York, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at *37 (S.D.N.Y. Aug. 12, 2013). As such, the Judge ordered the NYPD to update its UF-250 Forms to “include a narrative section where the officer must record, in her own words, the basis for the stop [and frisk, if applicable]” and ideally “[t]he narrative will enable meaningful supervisory oversight of the officer’s decision to conduct the stop, as well as create a record for a later review of constitutionality.” Floyd v. City of New York, No. 08 Civ. 1034(SAS), 2013 WL 4046217, at *9-10 (S.D.N.Y. Aug. 12, 2013).

144 McGowan, supra note 74, at 680.

145 HANDBOOK OF REGULATION AND ADMINISTRATIVE LAW, supra note 45, at 409; see infra Part IV.D.

146 AARONSON ET AL., supra note 28, at 60; see also ETENZO, supra note 15, at 79.

aggregation.” By putting more responsibility on line officers’ supervisors, individual officers will be held more accountable for any abuse of discretion. Because “[s]o little police work is conducted under the eye of supervisors, . . . the only way to oversee most routine police work is for officers to talk about their work with their superiors.” It is particularly important to encourage this step because “[o]ne supposedly powerful influence on officers’ behavior is supervisory messages.”

Moreover, by requiring NYPD middle management to be more active in guiding and supervising individual officers, the updated stop and frisk policy will become streamlined throughout all of the ranks of the NYPD. “Because . . . police officers deal directly with citizens in relative autonomy of organizational managers, they . . . have considerable administrative flexibility or discretion to influence legal policy.” If all members on all levels of the NYPD, however, feel a sense of responsibility with respect to the use of their discretion not only to protect citizens and to decrease crime, but also to do so in accordance with the Constitution, individual officer discretion can be controlled and individual rights can be preserved.

By creating more regular and apparent supervision, policy decisions will be made and, consequently, standards will be set by the higher ranks of the NYPD, rather than by individual officers. Thus, putting the responsibility on those higher ranking officers will encourage the creation of clear and straightforward rules outlining the purpose of stop and frisk, detailed examples of successful and unsuccessful uses of police discretion, as well as the constitutional ramifications for violations of the Fourth Amendment. This will help every member of the NYPD, from line officer to Commissioner. Additionally, when law enforcement agencies are proactive about rulemaking, it leads to “more effective and responsive law enforcement, minimization of procedural errors, the centralization of accountability, improved community relations, and uniformity of policy.”

Despite this need for more controlled discretion and routine supervision, individual officers cannot and should not

148 See Sparrow, supra note 103, at 297.
149 See generally id. at 296-301.
150 KELING, supra note 12, at 44.
151 ETENNO, supra note 15, at 27.
152 See AARONSON ET AL., supra note 28, at 406.
153 Id. at 9.
154 McGowan, supra note 74, at 680.
155 “Rule making seeks to enhance predictability, fairness, and efficiency in daily operations.” AARONSON ET AL., supra note 28, at 406.
156 Id.
be supervised at all times.\textsuperscript{157} Consequently, there is an overwhelming need for “[g]ood policy statements . . . [that] provide the language that officers [can] use to describe their work for both development of ongoing police knowledge and supervisory purposes.”\textsuperscript{158} By creating a clearly defined procedure and incorporating strict supervisory oversight, the NYPD will decrease the occurrence of individual officers making decisions based on personal agendas and beliefs, and could reduce the number of unwarranted stops and frisks.\textsuperscript{159}

E. Revise the Reprimand System

Because even the best-intentioned policies are insufficient without some means of enforcing them, the NYPD needs to create a more effective reprimand system for those officers who abuse their discretion.\textsuperscript{160} As noted above, an officer may never become aware of the results of stop and frisk abuse under the current procedure because the exclusionary rule may not affect an officer’s case until many months after an incident.\textsuperscript{161} Additionally, the CCRB is not sufficient, given that the Police Commissioner has the sole power to accept or deny the CCRB’s recommendations and reprimand any behavior as he sees fit.\textsuperscript{162} This only furthers the concern that an individual officer will not learn from and will not be disciplined for his or her abuse of discretion, as it is highly unlikely that the Police Commissioner will hear about or feel the need to address every instance of discretionary abuse. Currently, if an officer is to be actually reprimanded for an abuse of discretion in a stop and frisk encounter, the officer will likely, at most, receive “instructions” as to why the decision was incorrect and perhaps some suggestions for future encounters.\textsuperscript{163} This kind of reprimand is inadequate, given the existence of the quota requirement. Merely being told that behavior is wrong would likely not motivate an officer to change his behavior.

The NYPD will be well-served if it were to implement a detailed incentive and sanction program, for “rule making must be supported by reinforcement devices—a system of incentives

\textsuperscript{157} \textit{See generally} DAVIS, \textit{supra} note 9.
\textsuperscript{158} KELLING, \textit{supra} note 12, at 44.
\textsuperscript{159} AARONSON ET AL., \textit{supra} note 28, at 406 (citations omitted).
\textsuperscript{160} \textit{See supra} Part II.D. For further discussion on the NYPD reprimand system, see Floyd v. City of New York, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at *42-44 (S.D.N.Y. Aug. 12, 2013).
\textsuperscript{161} \textit{See supra} Part II.C.
\textsuperscript{162} \textit{See} Clarke, \textit{supra} note 75, at 46 (citations omitted).
\textsuperscript{163} \textit{See supra} Part II.D.
and sanctions—if public policy goals are to be served by administrative rules for the police.”164 In designing a similar model of incentives and sanctions, the Police Executive Research Forum set forth the following hierarchy of penalties: “(1) counseling; (2) verbal reprimand; (3) letter of reprimand; (4) loss of vacation time; (5) imposition of extra duty; (6) monetary fine; (7) transfer; (8) suspension without pay; (9) loss of promotion opportunity; (10) demotion; (11) discharge from employment; and (12) criminal prosecution.”165 Creating incentives and sanctions may be the most challenging task for the NYPD to tackle, because the police have few limitations on their discretion.166 But with an updated policy that details the goals and examples of proper discretion in a stop and frisk setting, the NYPD should be able to create a more distinct bright-line rule and, as a result, clear incentives and sanctions.

If the NYPD adopts a stricter model regarding police discretion, it would be unfair to immediately implement penalties six through twelve, noted above. The NYPD could, however, implement the lower-numbered penalties, such as assigning an officer to desk duty for an extended period of time if counseling, verbal reprimand, or letters of reprimand do not work and the officer were a repeat offender of the policies. Though sanctions are not the ideal solution to this problem, it is important that “[s]anctions are imposed frequently enough to establish credibility of the threat, but . . . withheld as long as violators work hard at coming into compliance.”167

A hierarchy of incentives could work in a similar fashion. When giving incentives, however, it is important to set the bar high, for the NYPD would be sending the wrong message if it were to reward an officer for merely doing his or her job properly. Thus, the NYPD could reward officers with praise and recognition from a supervisor for not only continuously displaying appropriate use of police discretion in stop and frisk procedures, but also for setting an example within the police command. “When the behavior elicits both recognition by the officer’s supervisors and the approval of his or her peer group, the motivational force is likely to be very strong, and the behavior will be doubly reinforced.”168

164 AARONSON ET AL., supra note 28, at 436.
165 Id. at 466.
166 See McGowan, supra note 74, at 673 (“In the matter of sanctions, it is important to note that the mode of enforcement of external rules has been almost entirely indirect in its incidence. The erring policeman rarely has had visited upon himself any penalty for his infraction.”).
167 HANDBOOK OF REGULATION AND ADMINISTRATIVE LAW, supra note 45, at 387.
168 AARONSON ET AL., supra note 28, at 465.
In order for an incentive and sanction-based policy to serve its purpose, however, “several factors must usually be present[. . . (1) [t]he person usually must be aware of the purpose of the program; (2) the person must know how the program will apply to him or her; and, (3) the person must desire to accomplish the goals established by the program.”

This can be achieved by creating a clear policy, not based on quotas, that is enforced throughout all ranks of the NYPD. If such a policy is adopted, there will be

less reluctance by command authorities to punish infractions of rules formulated by those authorities themselves as compared with standards imposed [by the court]. More effective departmental discipline, along with the transfer of policy-making responsibilities to the upper levels of police leadership, should also contribute to the realization of a greater degree of uniformity in law enforcement practices . . . .

CONCLUSION

Given the significant number of New Yorkers affected by the NYPD stop and frisk program, as well as the recent decision in federal court related to NYPD stop and frisk practices, the NYPD must update its policies. Though NYPD policy does not have the “force of law,” Kenneth Culp Davis, an expert in the field of administrative law, “has concluded that the police do have rule-making powers and that the rules on enforcement policy are legal and constitutional . . . .” In fact, Davis opines: “[W]hile not controlling upon the courts, the courts would probably treat the rules at least as ‘interpretive regulations’ that ‘constitute a body of experience resulting from informed judgment to which courts and litigants may properly resort for guidance.’” The effects of an updated NYPD stop and frisk policy could be astounding, given the impact that an updated policy could have not only on the NYPD, but also on the legal system. By accepting the NYPD standards, the court as well as individual line officers could have a better understanding of how

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169 Aaronson et al., supra note 28, at 459; see also Eterno, supra note 15, at 70.
170 McGowan, supra note 74, at 681.
171 See supra Introduction.
173 See Goldstein, supra note 18.
174 Aaronson et al., supra note 28, at 422-23.
175 Id. at 423.
176 Id.
to apply the “reasonable police officer” standard that has remained unclear since its creation in Terry\textsuperscript{177} and De Bour.\textsuperscript{178}

The NYPD can utilize different administrative rule-making tactics to limit individual officer discretion and thereby refocus and update its current stop and frisk policy.\textsuperscript{179} Discretion is essential for the NYPD’s daily functioning, but that discretion should be controlled.\textsuperscript{180} “Bureaucratic discretion is an inescapable characteristic of the administrative process. It cannot be eliminated, but it can be balanced more effectively with our other expectations of the exercise of administrative power.”\textsuperscript{181} By utilizing this discretion as a whole and revamping its current stop and frisk procedure, instead of deferring to individual officers, the NYPD “can reduce injustice by cutting out unnecessary discretion, which is one of the prime sources of injustice . . . . Officers should not have power to determine in each case in accordance with their momentary whims what overall policy they prefer.”\textsuperscript{182}

Updating the NYPD stop and frisk policy with administrative rules will help constructively limit the ability of individual officers to make policy decisions.\textsuperscript{183} Doing so will give New Yorkers confidence that their Fourth Amendment rights are respected and that the City is making strides to ensure that those rights are protected. The NYPD should implement administrative rules, such as updating the stop and frisk section of the NYPD manual, eliminating the quota system, increasing the responsibility of middle management, amending the UF-250 Form, and revising the reprimand system.\textsuperscript{184} Updating the stop and frisk policy will create a more straightforward system that will not only be useful to each officer, but could also be useful to the courts.\textsuperscript{185}

\textit{Kaitlyn Fallon*}

\textsuperscript{177} Terry v. Ohio, 392 U.S. 1, 27 (1968).
\textsuperscript{178} People v. De Bour, 40 N.E.2d 562, 571-72 (N.Y. 1976).
\textsuperscript{179} See generally DAVIS, supra note 9.
\textsuperscript{180} See id. at 140-41.
\textsuperscript{181} BRYNER, supra note 27, at 209.
\textsuperscript{182} DAVIS, supra note 9, at 119.
\textsuperscript{183} AARONSON ET AL., supra note 28, at 406.
\textsuperscript{184} See supra Part IV.
\textsuperscript{185} “Agencies through rule-making can often move from more vague or absent statutory standards, and then, as experience and understanding develop, to guiding principles and finally, when the subject matter permits, to precise and detailed rules.” BRYNER, supra note 27, at 9 (citations omitted); AARONSON ET AL., supra note 28, at 423.

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**Apprendi after Miller and Graham**

HOW THE SUPREME COURT’S RECENT JURISPRUDENCE ON JUVENILES PROHIBITS THE USE OF JUVENILE ADJUDICATIONS AS MANDATORY “SENTENCING ENHANCEMENTS”

**INTRODUCTION**

On December 12, 2011, in the United States District Court for the Western District of Oklahoma, Cory Devon Washington was sentenced after pleading guilty to two counts of firearm possession—felon in possession of a firearm and possession of an unregistered firearm. Under ordinary circumstances, Washington would have faced a maximum of 10 years incarceration for such offenses. Washington, however, was sentenced to a minimum of 15 years after the sentencing judge applied the requirements of the Armed Career Criminal Act (ACCA).

The ACCA is a federal law that sets mandatory minimum sentences of incarceration for crimes involving a firearm when the defendant has three prior convictions for a “violent felony” or “serious drug offense.” Washington had three prior involvements with the justice system, including two convictions as an adult—one for assault and battery and another for burglary—and a juvenile adjudication for pointing a weapon that was dismissed after Washington completed a five-month probationary sentence. Not only had the juvenile offense been dismissed, it had occurred when Washington was 16 years old, nearly 20 years prior. But the sentencing judge

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1 Brief of Defendant/Appellant at 5, United States v. Washington, 706 F.3d 1215 (10th Cir. 2012) (No. 11-6339), 2012 WL 1074455 at *5.
2 Id. at 11.
4 United States v. Washington, 706 F.3d 1217 (10th Cir. 2012).
5 Id. An additional argument made by the defendant in the Washington case was that the defendant’s juvenile adjudication should not be considered a conviction under the ACCA not only because it was a juvenile offense but also because it was actually dismissed after a period of probation. See id. at 1218-19. The court did not find this argument convincing because Oklahoma state law does not automatically seal
determined that Washington’s juvenile offense of pointing a gun counted as a conviction for a violent felony under the ACCA, meaning that Washington had three prior convictions for violent felonies. Under the mandatory requirements of the ACCA, the court sentenced Washington to a minimum term of imprisonment of 15 years.

Washington’s case is only one of the stories in the ongoing question of how to treat prior juvenile adjudications when sentencing adult defendants who have violated federal or state laws. In *McKeiver v. Pennsylvania*, the Supreme Court held that due process does not require the right to a jury trial in juvenile delinquency adjudications. In 2000, the Court held in *Apprendi v. New Jersey* that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Failure to submit and prove such facts to a jury constitutes a violation of the defendant’s right to due process. The exclusion of convictions from this requirement has been commonly referred to as a “conviction exception” or the “Apprendi exception.” The intercept between *Apprendi* and *McKeiver* has resulted in disagreement over whether juvenile adjudications obtained without a jury trial guarantee can be counted as convictions, subject to the *Apprendi* exception, for the sentencing of adult defendants without running afoul of due process and violating the defendant’s rights under the Sixth and Fourteenth Amendments.
A significant number of circuit courts have held that a juvenile adjudication counts as a conviction. Many in the scholarly community, however, have argued that juvenile adjudications should not count as previous convictions because of the absence of a jury trial guarantee. Thus, any sentencing scheme where the judge imposes a mandatory or enhanced sentence based on the adult defendant’s prior juvenile record, without submitting and proving this fact to the jury, is a violation of due process. This note will argue that a juvenile adjudication should not count as a conviction under the Apprendi exception: that based on the factual underpinnings of recent Supreme Court jurisprudence on the nature of juveniles in Miller v. Alabama and Graham v. Florida, the Court should conclude that the purpose of the juvenile court system prohibits courts from counting a juvenile delinquency adjudication as a “conviction” when sentencing adult defendants. Therefore, any sentencing scheme under which the judge imposes a mandatory or enhanced sentence based on the adult defendant’s prior juvenile record is a violation of due process.

Part I will introduce Supreme Court jurisprudence on the evolution of the juvenile court system and the extension of some procedural protections to juvenile delinquency proceedings. Part II will explain Apprendi v. New Jersey and the Court’s recognition of a “conviction exception.” Part III will discuss how federal courts have treated juvenile adjudications in light of the Apprendi exception. Part IV will discuss recent Supreme Court cases dealing with juveniles as a class distinguishable from adults, specifically the most recent cases of Miller v. Alabama and Graham v. Florida. Finally, in Part V, this note will address how Miller v. Alabama and Graham v. Florida reflect a change in the Court’s perception of juveniles. It advances the

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12 See e.g., Welch, 604 F.3d at 428-29; Wright, 594 F.3d at 264; Matthews, 498 F.3d at 35; Crowell, 493 F.3d at 750; Burge 407 F.3d at 1191; Jones, 332 F.3d 688, 696; Smalley, 294 F.3d 1030, 1033.

argument that, regardless of whether a juvenile adjudication was obtained by a jury, the Court’s view of juveniles as a class fundamentally distinct from adults prohibits equating juvenile adjudications with adult convictions under *Apprendi*.

I. **SUPREME COURT JURISPRUDENCE ON THE JUVENILE SYSTEM**

In the 1800s, Progressive Reformers pushed to create institutions and enact laws that would shape and mold the development of children.  

The legal doctrine of *parens patriae*—the right and responsibility of the state to substitute its own control over children for that of the natural parents when the latter appeared unable or unwilling to meet their responsibilities or when the child posed a problem for the community—provided the formal justification to intervene.  

The root of the juvenile justice system as a method of combating delinquency stems from “positivist ideology” and the notion of a “rehabilitative ideal,” requiring an individualized approach to each child and deference to professional opinions.  

Progressive reformers imagined a court system where “professionals made discretionary, individualized treatment decisions to achieve benevolent goals and social uplift and substituted a scientific and preventive approach for the traditional punitive goals of the criminal law.” Adopting this flexible approach, and in an effort to avoid the stigmatization associated with the adult criminal system, reformers classified the juvenile court as a civil system where “petitions” were filed (as opposed to charges brought), “[c]ourts found youths to be ‘delinquent’ rather than guilty of an offense, and youths received ‘dispositions’ rather than sentences.”  

In the 1960s, the Supreme Court, however, concerned about the degree of power and discretion wielded by the State, stepped in to extend Constitutional protections to youths in the juvenile system. In 1967, the Supreme Court decided *In re Gault*, holding that while the juvenile system was different from the adult criminal system, the possibility of serious consequences such as confinement and loss of liberty required  

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15  *Id.* at 52.
16  *Id.* at 60.
17  *Id.* at 62.
18  *Id.* at 68.
the imposition of procedural protections including the right to notice of charges, the right to counsel, the right to cross-examine and confront witnesses, and the privilege against self-incrimination. The facts of Gault vividly illustrated the potential for abuse given the wide discretion exercised in the juvenile court system. The defendant, Gerald Gault, was committed to custody for six years for making an obscene phone call, whereas an adult who committed the same offense would have faced a maximum punishment of a 50 dollar fine.

While the purported purpose of the juvenile court system is to rehabilitate juveniles, the Court recognized that “[t]he rhetoric of the juvenile court movement ha[d] developed without any necessarily close correspondence to the realities of court and institutional routines.” The facts of Gault exhibited such a glaring departure from the benevolent and rehabilitative ideal of the juvenile court that it spurred major constitutional change. Three years later, the Court held, in In re Winship, that juveniles are constitutionally entitled to the same criminal trial standard of “proof beyond a reasonable doubt.”

The Court extended many of the constitutional protections available to adult criminal defendants to juvenile defendants in recognition of the unavoidably adversarial nature of the juvenile system. Thus, in both Gault and Winship, the Court “emphasized the dual functions of constitutional criminal procedures to ensure accurate fact-finding and to protect against governmental oppression.”

Especially telling was the Supreme Court’s decision that the Fifth Amendment privilege against self-incrimination applied to juvenile court proceedings, demonstrating that despite the state’s benevolent motives, a juvenile still required certain fundamental protections against the power of the state.

The Court, however, seemed to take a step back from this philosophy not long after deciding Winship. At the end of

19 In re Gault, 387 U.S. 1, 4-58 (1967).
20 Id. at 29.
21 Id. at 30 (quoting STANTON WHEELER & LEONARD S. COTTRELL, JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL 35 (1996)).
22 FELD, supra note 14, at 99-100.
23 In re Winship, 397 U.S. 358, 367-68 (1970). Several years before Gault was decided, Chief Justice Warren had foreshadowed the possibility of the decision when, speaking before the National Council of Juvenile Court Judges, he acknowledged that the juvenile system was different from adult criminal court but expressed concern for the possibility of “unbridled caprice.” FELD, supra note 14, at 99 (1999).
24 Id. at 99.
25 Id. at 101.
26 Id. at 101.
the same year Winship was decided, the Court heard arguments in McKeiver v. Pennsylvania on whether a jury trial is constitutionally required in a juvenile delinquency proceeding. The Court’s recognition in Gault and Winship that juvenile proceedings were in fact adversarial and could result in significant consequences despite their purpose of rehabilitation seemed to suggest that the Court would continue the trend of applying adult procedural protections to juvenile proceedings. Notably, between Gault and McKeiver, the Court had decided Duncan v. Louisiana, holding that the right to a jury in criminal prosecutions, guaranteed by the Sixth Amendment, applied to the states through the Due Process Clause of the Fourteenth Amendment.

In McKeiver, the Court reiterated its holding in Duncan “that trial by jury in criminal cases is fundamental to the American scheme of justice” but stated that Duncan does not automatically provide the answer to the present jury trial issue, if for no other reason than that the juvenile court proceeding has not yet been held to be a “criminal prosecution,” within the meaning and reach of the Sixth Amendment, and also has not yet been regarded as devoid of criminal aspects merely because it usually has been given the civil label.

The Court acknowledged the failure of the juvenile system to achieve its idealistic goals, citing extensively from a Presidential Commission report detailing these failures. However, the Court held that, nevertheless, “trial by jury in the juvenile court’s adjudicative stage is not a constitutional requirement.”

The Court discussed Duncan at the beginning of its opinion, but it decided the issue based on the Fourteenth Amendment due process standard of “fundamental fairness,” without delving into the intricacies of a Sixth Amendment analysis. The Court’s avoidance of an explicit Sixth Amendment analysis suggests it was uncomfortable with classifying juvenile

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28 See Feld, supra note 14, at 101.
29 Duncan v. Louisiana, 391 U.S. 145, 156 (1968); see also Feld, supra note 14, at 104.
30 McKeiver, 403 U.S. 528 at 540-41 (internal citations omitted) (emphasis added).
31 Id. at 543-45.
32 Id. at 545.
33 Id. at 540-43; see also Feld, supra note 14, at 104 (“The Supreme Court decided McKeiver solely on the basis of the Fourteenth Amendment’s Due Process Clause and ‘fundamental fairness’ without reference to the Sixth Amendment or its Duncan rationale.”).
delinquency adjudications either as entirely civil or entirely criminal matters.

II. **APPRENDI V. NEW JERSEY AND THE “CONVICTION EXCEPTION”**

Decades after the Supreme Court’s line of cases addressing constitutional protections in the juvenile system, the Court found itself facing constitutional claims in an entirely different area—the sentencing of adult defendants. In 2000, the Supreme Court decided *Apprendi v. New Jersey*.\(^{34}\) In *Apprendi*, under a plea agreement, the defendant pled guilty to two counts of possession of a firearm and one count of unlawful possession of a bomb.\(^{35}\) The state of New Jersey reserved the right to seek a higher sentence on one of the counts by applying the state’s “hate crime” statute, claiming that the crime was committed with a biased purpose based on a statement by Apprendi suggesting a racial motive.\(^{36}\) After the trial judge accepted the defendant’s guilty plea, the judge held an evidentiary hearing, without a jury present, to determine whether Apprendi’s acts were due to a biased purpose.\(^{37}\) The judge held that Apprendi’s actions met the statutory requirements “by a preponderance of the evidence” and that the sentencing enhancement under the hate crime statute applied.\(^{38}\) The Supreme Court reversed, holding that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”\(^{39}\)

The *Apprendi* Court did not expressly overturn *McMillan v. Pennsylvania*,\(^{40}\) a 1986 decision holding that a

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\(^{34}\) *Apprendi* v. New Jersey, 530 U.S. 466 (2000).

\(^{35}\) Id. at 469-70.

\(^{36}\) Id. at 470; *See* N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999–2000) (“The defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.”).

\(^{37}\) *Apprendi*, 530 U.S. 466 at 470.

\(^{38}\) Id. at 471.

\(^{39}\) Id. at 490. The Court acknowledged that the *Apprendi* holding confirms a principle first expressed in a footnote to the Court’s opinion in *Jones v. United States*, concerning a federal statute. *See* id. at 476; *Jones v. United States*, 526 U.S. 227, 243, n.6 (1999) (“[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”). In *Apprendi*, the Court explained that “[t]he Fourteenth Amendment commands the same answer in this case involving a state statute.” *Apprendi*, 530 U.S. 466 at 476.

\(^{40}\) *See generally Apprendi*, 530 U.S. 466.
“sentencing factor” could affect the judge’s sentencing decision even if it was not found by a jury.\textsuperscript{41} The Court in Apprendi made a point of stressing that in McMillan, it “did not, however, . . . budge from the position that (1) constitutional limits exist to States’ authority to define away facts necessary to constitute a criminal offense . . . [and (2)] a state scheme that keeps from the jury facts that ‘expos[e] [defendants] to greater or additional punishment,’ may raise serious constitutional concern.”\textsuperscript{42}

The Apprendi Court’s discussion of a “sentencing factor” was necessary for it to clarify how its decision fit in with Almendarez-Torres v. United States, decided two years before Apprendi.\textsuperscript{43} In Almendarez-Torres, the Court held that the use of a previous conviction to sentence the defendant to a longer term constituted a “sentencing factor” and not an element of the crime that needed to be listed in an indictment.\textsuperscript{44} Therefore, it did not violate due process or other constitutional provisions.\textsuperscript{45} The Almendarez-Torres holding applied only to criminal indictments and was not concerned with sentencing procedures. At issue in Almendarez-Torres was a federal statute enhancing the maximum prison term for a deported alien returning to the United States without permission, if he had previously been deported upon conviction of an aggravated felony.\textsuperscript{46}

The Apprendi Court explained that,

\begin{quote}
[b]ecause Almendarez-Torres had admitted the three earlier convictions for aggravated felonies—all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own—no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court.\textsuperscript{47}
\end{quote}

The Almendarez-Torres decision focused on the general characterization of recidivism as a “sentencing factor” that did not need to be charged in the indictment.\textsuperscript{48} As Almendarez-Torres admitted to prior convictions for aggravated felonies, the Court never reached the question of what constituted a

\begin{footnotes}
\footnotetext[41]{Apprendi, 530 U.S. 466 at 485-86. See McMillan v. Pennsylvania, 477 U.S. 79 (1986).}
\footnotetext[42]{Apprendi v. New Jersey, 530 U.S. 466, 486 (2000) (citations omitted).}
\footnotetext[43]{Almendarez-Torres v. United States, 523 U.S. 224, 226 (1998).}
\footnotetext[44]{Id. at 226-27.}
\footnotetext[45]{Id. at 226.}
\footnotetext[46]{Id. at 224. See 8 U.S.C. § 1326(a) & (b)(2) (2012).}
\footnotetext[47]{Apprendi, 530 U.S. 466 at 488.}
\footnotetext[48]{See Almendarez-Torres, 523 U.S. 224, 230 (1998).}
\end{footnotes}
“conviction” under the statute in issue. Consequently, the Apprendi Court did not overrule Almendarez-Torres because the facts of the case still fit within the Apprendi holding allowing for a “conviction exception” to the general rule that facts enhancing the sentence should go before a jury. The Court, however, went so far as to suggest that

it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested. Apprendi does not contest the decision’s validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.

Recently, in Alleyne v. United States, the Court held that Apprendi applies not only to facts that increase the statutory maximum, but also facts that increase the mandatory minimum. Therefore, “any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury.” While Chief Judge Roberts’s dissenting opinion disagreed with the application of Apprendi in the context of mandatory minimums, he described the Apprendi rule as “draw[ing] its legitimacy from two primary principles: (1) common law understandings of the ‘elements’ of a crime, and (2) the need to preserve the jury as a ‘strong barrier’ between defendants and the State.”

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49 See id. at 248.
50 Apprendi, 530 U.S. 466 at 487-90.
51 Id. at 489-90 (footnote omitted).
52 Alleyne v. United States, 133 S. Ct. 2151 (2013).
53 Id. at 2153.
54 Id. at 2170 (Roberts, C.J., dissenting). Three days after Alleyne, the Court issued another opinion concerning the Apprendi exception in Descamps v. United States. See Descamps v. United States, 133 S. Ct. 2276 (2013). In Descamps, the Court limited the amount of information a sentencing court can consider when determining whether the defendant’s prior conviction falls under the ACCA as a “violent felony.” Id. at 2281-82; see also Daniel Richman, Opinion Analysis: When Is a Burglary Not a Burglary?, SCOTUSBLOG (June 20, 2013, 11:18 PM), http://www.scotusblog.com/2013/06/opinion-analysis-when-is-a-burglary-not-a-burglary/ (“Justice Thomas concurred in the judgment just to make clear that he still wants Almendarez-Torres dead.”).
III. THE JUVENILE ADJUDICATION AS “PRIOR CONVICTION” DILEMMA

A. The “Armed Career Criminal Act”

Apprendi dealt with a state law, but the application of the “conviction exception” has frequently arisen under the ACCA, a federal act. The ACCA mandates a 15-year minimum period of incarceration for defendants convicted of possessing a firearm, in violation of 18 U.S.C. § 924, if the defendant previously was convicted of three or more “violent felonies” or “serious” drug offenses.

The ACCA has forced many federal courts of appeals to take up the issue of whether a defendant’s juvenile adjudication should count as a prior conviction. The act defines “conviction” as “includ[ing] a finding that a person has committed an act of juvenile delinquency involving a violent felony.” While the ACCA includes a juvenile adjudication in its definition of conviction, the adjudication still must be a “conviction” under the Apprendi exception, or else its use as a mandatory sentencing enhancement without submission to a jury constitutes a violation of due process.

As the language of the ACCA specifically indicates that Congress intended for a juvenile delinquency adjudication to count as a predicate conviction, federal circuit courts have frequently been tasked with determining whether a juvenile adjudication counts as an exception under Apprendi in the context of the ACCA. The courts have also been faced with the same constitutional question in light of similar state laws.

55 18 U.S.C. § 924 (2011); See Daniel Richman, Opinion Analysis: When Is a Burglary a "Burglary?", SCOTUSBLOG (Jan. 4, 2013, 10:29 PM), http://www.scotusblog.com/2013/01/argument-preview-when-is-a-burglary-a-burglary/ (“Because its application brings some of the federal system’s harshest mandatory penalties, and requires federal courts to categorize a diverse range of prior state convictions . . . the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), has provided the Court with considerable business (and a fair amount of exasperation).”). See, e.g., supra notes 1-7 (describing the application of the ACCA in the Washington case).
57 Id. § 924(e)(2)(B) (2012).
58 Id.
60 See, e.g., Boyd v. Newland, 467 F.3d 1139, 1142 (9th Cir. 2006), cert. denied, 550 U.S. 933 (2007). These laws are commonly referred to as “Three Strikes Laws.”
B. The Federal Courts of Appeals on Juvenile Adjudications and Apprendi

A vast majority of federal circuit courts have decided that a juvenile adjudication counts as a “conviction,” making it an “exception” under Apprendi. While some courts of appeals have carefully laid out the legal analysis under Apprendi, others have deferred to previous decisions in the state courts or other circuit courts, relying on the fact that there is no “clearly established federal law” in this area.

One potentially confounding issue is that while the ACCA is a federal statute and the Apprendi exception is a constitutional due process concern, a previous juvenile adjudication will almost always be determined under the state’s specific legal procedures for juveniles. Even juveniles who violate federal law are typically prosecuted by state authorities in the state’s juvenile system unless the state “does not have jurisdiction or refuses to assume jurisdiction over [the] juvenile.” Therefore, the state’s procedures and characterization of juvenile adjudications is relevant to the overall constitutional analysis.

While a majority of the courts of appeals now hold that a juvenile adjudication should count as a previous conviction, or a “strike” for ACCA purposes, the first case to address this issue determined otherwise. In United States v. Tighe, decided in 2001, the year following Apprendi, the Court of Appeals for the Ninth Circuit held that a juvenile adjudication does not count as a “conviction” and therefore may not be used as a sentencing enhancement under the ACCA. In Tighe, the district court sentenced the defendant to a minimum term of 15 years in prison after the sentencing judge included a 1988 juvenile adjudication of reckless endangerment, robbery, and unauthorized use of a motor vehicle as a prior conviction for a

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62 See, e.g., Smalley, 294 F.3d at 1031-33; United States v. Tighe, 266 F.3d 1187, 1192-93 (9th Cir. 2001).

63 See Boyd, 467 F.3d 1139 at 1142; Welch, 604 F.3d 408. See infra note 102 for the standard of review used when the federal court hears a habeas corpus petition after the defendant was sentenced in state court.


65 Id.

66 See Tighe, 266 F.3d 1187 at 1194-95.
violent felony. The Ninth Circuit explained that Congress’s characterization of a juvenile adjudication as a “prior conviction” under the ACCA “ignores the significant constitutional differences between adult convictions and juvenile adjudications.” The court stressed that “[n]either Apprendi, nor Almendarez-Torres—the case upon which Apprendi relied to create the ‘prior conviction’ exception to its general rule—specifically addressed the unique issues that distinguish juvenile adjudications from adult convictions, such as the lack of a right to a jury trial in most juvenile adjudications.”

The Ninth Circuit looked carefully at United States v. Jones, a Supreme Court case decided just before Apprendi and upon which the Apprendi court relied. Although Jones did not deal with a case involving a prior conviction, the Supreme Court took the opportunity to discuss why convictions were different from other elements that may increase a defendant’s sentence: “One basis for that constitutional distinctiveness [of prior convictions] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt[,] and jury trial guarantees.” The Tighe court continued the Supreme Court’s analysis to reason that

Jones’ recognition of prior convictions as a constitutionally permissible sentencing factor was rooted in the concept that prior convictions have been, by their very nature, subject to the fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions: fair notice, reasonable doubt[,] and the right to a jury trial.

Thus, the Tighe court pointed out that the basis for an exception for convictions is inapplicable in juvenile adjudications obtained without a right to a jury trial. The Tighe court then

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67 Id. at 1190.
68 Id. at 1192-93.
69 Id. at 1193.
70 Id.; see also Jones v. United States, 526 U.S. 227, 243-52 (1999) (holding that a federal statute requiring a greater term of imprisonment when the offense resulted in “serious bodily injury or death” constitutes separate elements of the offense which must be presented to the jury).
72 Tighe, 266 F.3d at 1193 (quoting Jones, 526 U.S. at 249).
73 Id. at 1193.
74 Id. The Tighe court did not address the argument that some states may provide juvenile delinquency defendants with the right to a jury trial as Tighe himself did not have a right to a jury trial under Oregon state law. It does not matter to this analysis whether any state provides the right to a jury trial for juvenile adjudications. It is undisputed that
completed the analysis by looking at whether the conviction exception should be extended to include nonjury adjudications and decided not to take such a step. The court reasoned that such an extension of the Apprendi holding would be unwarranted given “[t]he Apprendi Court’s serious reservations about the reasoning of Almendarez-Torres [which] counsel against any extension of that opinion’s holding.”

In the year following Tighe, the Eighth Circuit Court of Appeals addressed the exact same issue in United States v. Smalley, which also focused on the use of a juvenile adjudication as a “conviction” under the ACCA. In Smalley, the defendant had multiple prior juvenile adjudications which the trial court counted as “convictions” to increase his sentence. The Smalley court noted that the language of the ACCA indicated that Congress intended for juvenile adjudications to count as convictions, “[b]ut the issue of whether juvenile adjudications can be characterized as prior convictions for Apprendi purposes is a constitutional question implicating Mr. Smalley’s right not to be deprived of liberty without due process of law.” The court then went on to describe the holding of Tighe, noting it was the only federal court case on point.

The Smalley court disagreed with the Tighe holding, reasoning that the Court’s opinion in Apprendi did not take a position on what constitutes sufficient procedural safeguards in every situation:

> We think that while the Court established what constitutes sufficient procedural safeguards (a right to jury trial and proof beyond a reasonable doubt), and what does not (judge-made findings under a lesser standard of proof), the Court did not take a position on possibilities that lie between these two poles.

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75 Id. at 1194 n.4. Therefore, the court did not consider whether a juvenile adjudication based on a jury verdict would count as a “conviction” under Apprendi. Id.

76 Id. at 1194.

77 United States v. Smalley, 294 F.3d 1030, 1031 (8th Cir. 2002).

78 Id. at 1031.

79 Id. at 1031-32 (internal quotations omitted).

80 Id. at 1032.

81 Id.
The Smalley court “conclude[d] that the question of whether juvenile adjudications should be exempt from Apprendi’s general rule should not turn on the narrow parsing of words, but on an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption.”82 The court then determined that they are,83 went on to list the many other procedural safeguards available to juvenile defendants,84 and concluded by stating that a jury in a juvenile proceeding is not constitutionally required under McKeiver v. Pennsylvania.85

The Third Circuit soon faced the same issue in United States v. Jones, where the court held that a nonjury juvenile adjudication counts as a conviction under the Apprendi exception.86 The court adopted the reasoning of the Smalley court, stating “we find nothing in Apprendi or Jones, two cases relied upon by the Tighe court and [the defendant] on this appeal, that requires us to hold that prior nonjury juvenile adjudications that afforded all required due process safeguards cannot be used to enhance a sentence under the ACCA.”87

While the defendant, Jones, lost in front of the Third Circuit, he succeeded on a subsequent appeal on the only basis available to him—the fact that he was unrepresented by

82 Id. at 1032-33.
83 Id.
84 “For starters, juvenile defendants have the right to notice, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination. A judge in a juvenile proceeding, moreover, must find guilt beyond a reasonable doubt before he or she can convict.” Id. at 1033 (internal citations omitted). Interestingly, now that the court has reasoned juvenile adjudications to be counted as prior convictions, the court uses the term “convict” rather than the proper procedural term, “adjudicate.”
86 United States v. Jones, 332 F.3d 688, 696 (3d Cir. 2003). A year earlier, the Third Circuit had avoided having to make a definitive ruling on the precise issue by holding that, in the case before it, the juvenile adjudication did not constitute a “violent felony” under the language of the ACCA. United States v. Richardson, 313 F.3d 121, 127 (3d Cir. 2002). The Richardson court noted that, “as Richardson’s case well illustrates, [the ACCA] provides for dramatically increased penalties.” Id. at 123. The trial court applied the ACCA enhancement to Richardson’s case by counting a “juvenile adjudication for robbery and other offenses, along with two adult convictions for possessing crack cocaine with intent to distribute.” Id. The court noted that if the enhancement did not apply, Richardson’s sentence would have been limited to a ten year statutory maximum, and he likely would have been sentenced within the guideline range of eight and a third to ten years. Id. (emphasis added). If the ACCA enhancement applied, Richardson faced a minimum sentence of fifteen years, with sentencing guidelines of roughly nineteen and a half to twenty four years. Id. (emphasis added). The trial court, counting the juvenile adjudication as a conviction, sentenced Richardson to 235 months, or roughly nineteen and a half years in prison—nearly twice the maximum allowable period of incarceration if no such enhancement applied. Id.
87 Id.
counsel at his juvenile adjudication.88 If juvenile adjudications count as convictions, then federal defendants are bound by *Custis v. United States*, a 1994 Supreme Court case holding that “a defendant in a federal sentencing proceeding . . . has no [] right (with the sole exception of convictions obtained in violation of the right to counsel) to collaterally attack prior convictions.”89 Therefore, if juvenile adjudications count as convictions under federal laws such as the ACCA, then the only basis on which a defendant may attack the validity of his prior adjudication was if he or she was unrepresented by counsel at the proceeding.90 Any other suggested procedural deficits are insufficient.

Following the Third Circuit, other federal appellate courts began to almost uniformly adopt reasoning similar to *Smalley* and hold that juvenile adjudications count as convictions and therefore fall under the *Apprendi* exception.91 The Eleventh Circuit Court of Appeals “base[d] [its] holding on the reasoning of . . . *Smalley* and *Jones*.”92 The Sixth,93 First,94 Fourth,95 and Seventh96 Circuits followed suit over the next five years, echoing the reasoning that juvenile adjudications are

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88 See United States v. Jones, No. 2:01-CR-0136, 2006 WL 2939744 at *1-3 (W.D. Penn., Oct. 13, 2006). The court’s opinion is noteworthy as it anecdotally sheds light on the possibility of procedural deficits in juvenile adjudications. The certified record of the defendant’s adjudication was silent regarding whether he was represented by counsel. Id. at *1. At the evidentiary hearing, the defendant Jones testified that he was not represented by counsel during his juvenile adjudication and the juvenile court judge never inquired whether he wanted counsel. Id. at *2. Jones also testified that he never took the stand, he did not cross-examine any witnesses, and his co-defendant’s counsel did not cross-examine any witnesses. Id. Finally, he testified that the hearing lasted 10 minutes. Id. “Jones testified that he did not appeal the Juvenile Adjudication because he lacked the resources or knowledge to do so.” Id. The juvenile court judge could not recall the specifics of Jones’ case, although he “conceded that he may not have asked the parent of an unrepresented co-defendant whether the defendant waived his right to counsel if [he] mistakenly thought the attorney present at the hearing was representing both co-defendants.” Id. at *3.


90 Id.


92 *Burge*, 407 F.3d at 1190.

93 *Crowell*, 493 F.3d at 750-51.

94 *Matthews*, 498 F.3d at 35-36.

95 *Wright*, 594 F.3d at 264.

96 *Welch*, 604 F.3d at 429.
just as reliable and are afforded with all the protections constitutionally required.

Additionally, the Ninth Circuit, which originally decided *Tighe*, narrowed the holding even more when the court addressed the use of juvenile adjudications to enhance sentences under state law in *Boyd v. Newland*.97 In *Boyd*, the state court considered the defendant’s prior nonjury juvenile adjudication in deciding to increase his sentence.98 The Ninth Circuit reiterated its holding from *Tighe*, stating:

We have held that the *Apprendi* “prior conviction” exception encompasses only those proceedings that provide a defendant with the procedural safeguards of a jury trial and of proof beyond a reasonable doubt. Consequently, we do not recognize nonjury juvenile adjudications as “convictions” falling within the *Apprendi* exception, and ordinarily we do not allow sentencing enhancements based on such adjudications.99

The court, however, continued to recognize the dilemma that, in the years following *Tighe*, California state courts disagreed with the holding and have declined to follow it.100 The court also acknowledged that subsequent federal appellate court decisions in other circuits disagreed with their interpretation.101 Faced with conflicting interpretations the court stated:

Although we are not suggesting that *Tighe* was incorrectly decided, as some of these varying interpretations of *Apprendi* suggest, the opinion does not represent clearly established federal law ‘as determined by the Supreme Court of the United States.’ In general, Ninth Circuit precedent remains persuasive authority in determining what is clearly established federal law. But in the face of authority that is directly contrary to *Tighe*, and in the absence of explicit direction from the Supreme Court, we cannot hold that the California courts’ use of Petitioner’s juvenile adjudication as a sentencing enhancement was contrary to, or involved an unreasonable application of, Supreme Court precedent.102

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97 See generally *Boyd*, 467 F.3d 1139.
98 Id. at 1151.
99 Id. at 1151-52 (citations omitted).
100 See id. at 1152.
101 Id.
102 Id. (citations omitted). As the Ninth Circuit Court of Appeals was deciding a *habeas corpus* petition arising from a state court judgment, such a deferential standard of review was required under federal law:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
Taking Tighe and Boyd together now leads to an incongruous result: in the state of California, a defendant’s juvenile adjudication counts as a conviction under Apprendi when the defendant is prosecuted under state law while that exact same adjudication may not qualify as a conviction under federal law. In other words, the use of the adjudication to enhance a sentence under state law is constitutionally valid, while that same use under federal law is a violation of the defendant’s constitutional right to due process.

When the Seventh Circuit Court of Appeals in Welch v. United States followed the reasoning of the other circuits and held that a juvenile adjudication counts as a conviction under the Apprendi exception, Judge Posner wrote a strong dissenting opinion. His dissent focuses on two distinct reasons why a juvenile adjudication should not count as a conviction: the different procedures and different objectives in the juvenile court system.

In terms of different procedures, Judge Posner begins by recognizing that a juvenile adjudication “is best described as ‘quasi-criminal.’” His opinion further acknowledges that McKeiver v. Pennsylvania holds that a jury is not required in a juvenile court proceeding to imprison (i.e. “remand”) a juvenile,

[but whether a juvenile can be imprisoned on the basis of findings made by a juvenile-court judge rather than by a jury is different from whether a “conviction” so procured (if it should even be called a “conviction”) is the kind of “prior conviction” to which the Court referred in Apprendi, namely a conviction that can be used to jack up a person’s sentence beyond what would otherwise be the statutory maximum.]

Posner points out that the Apprendi Court implied the predicate conviction would be determined by a jury;

[otherwise[,] why does the Supreme Court require that any fact, as distinct from a conviction, used to enhance a sentence be a fact found by a jury (unless of course the defendant waived a jury)? Why didn’t

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(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.[] 28 U.S.C. § 2254 (2011).

103 See Welch v. United States, 604 F.3d 408, 429-32 (7th Cir. 2010) (Posner, J., dissenting).
104 Id.
105 Id. at 430.
106 Id. at 430-31.
the Court just say that the fact must be found by a reliable means?107

Posner notes that the Court in Jones v. United States specifically pointed out that “a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.”108 These three procedural requirements are not explicitly stated in Apprendi and many courts considered the absence of such a statement in determining that juvenile adjudications should count as prior convictions,109 essentially reading the Apprendi holding in a vacuum. Posner argues:

The Court in Apprendi did not take [these three procedural requirements] back when it said that

if a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.

The defendant in this case was not “deprived of protections” that had attached to his juvenile-court proceeding.110

Although Posner does not explicitly say so, he seems to suggest that the language in Apprendi naturally follows from Jones. How else do we know what “protections” the Court is referring to? Furthermore, while the Apprendi Court did not overrule Almendarez-Torres, the Court left it on extremely narrow footing,111 which is telling considering that Almendarez-Torres involved predicate convictions that actually were subject to the same procedural protections, including the right to a jury trial.112

The next section of Posner’s dissent is particularly interesting as it puts forth novel arguments and employs language similar to recent Supreme Court jurisprudence on the punishment of juveniles. Posner discusses the objectives of the juvenile court system as constituting a concern separate and

107 Id. at 431.
108 Id. (quoting Jones v. United States, 526 U.S. 227, 249 (1999)).
109 Welch v. United States, 604 F.3d 408, 431 (7th Cir. 20120) (Posner, J., dissenting).
110 Id. (citations omitted).
112 Id. at 488.
distinct from the *procedures* of the juvenile system.\(^{113}\) This part of Posner’s opinion responds to the argument previously articulated by other courts of appeals that a nonjury juvenile adjudication which provides the defendant all the procedural due process afforded under *McKeiver*, cannot “become” a due process violation later down the road just because it is used to enhance an adult sentence.\(^{114}\) The basic argument is simply: once constitutional, always constitutional. Posner challenges this assumption, arguing that

> the constitutional protections to which juveniles have been held to be entitled have been designed with a different set of objectives in mind than just recidivist enhancement. So the mere fact that a juvenile had all the process he was entitled to doesn’t make his juvenile conviction equivalent, for purposes of recidivist enhancement, to adult convictions.\(^{115}\)

Posner then continues to challenge the *McKeiver* court’s assumption that juvenile adjudications determined by judges are just as reliable as criminal convictions by juries.\(^{116}\) Posner points to subsequent research suggesting that this is not the case.\(^{117}\) He expresses a major concern which is “[o]f particular relevance to *Apprendi* [that] the literature finds that judges are more likely to convict in juvenile cases than juries are in criminal cases.”\(^{118}\) Posner suggests several reasons to explain this phenomenon:

Juvenile-court judges are exposed to inadmissible evidence; they hear the same stories from defendants over and over again, leading them to treat defendants’ testimony with skepticism; they become chummy with the police and apply a lower standard of scrutiny to the testimony of officers whom they have come to trust; and they make their decisions alone rather than as a group and so their

\(^{113}\) *Welch*, 604 F.3d 431-34 (Posner, J., dissenting).

\(^{114}\) See, e.g., United States v. Smalley, 294 F.3d 1030 (8th Cir. 2002).

\(^{115}\) *Welch*, 604 F.3d at 431-32 (Posner, J., dissenting). Judge Posner makes the comparison to a guilty conviction for a military crime, obtained in front of a military commission without the right to a jury trial, being later used to enhance a “conviction of a conventional crime” and concludes that “would stretch *Apprendi* awfully far.” *Id.* at 432.

\(^{116}\) *Id.* at 432.

\(^{117}\) *Id.* See, e.g., Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 260 (2007) (arguing that juveniles make “less competent trial defendants” and “also tend to be more compliant and suggestible during police interrogations, two traits which are risk factors for false confessions”); see generally Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 556 (1998) (arguing “juries are generally more likely than judges to be fair and just triers of fact on the issue of guilt or innocence in a criminal or delinquency case”).

\(^{118}\) *Welch*, 604 F.3d 408 at 432.
decisions lack the benefits of group deliberation. It would be hasty to conclude that juvenile-court judges are more prone to convict the innocent than juries are. But if it is true that juvenile defendants fare worse before judges than they would before juries—if there is reason to think that trial by jury would alter the outcomes in a nontrivial proportion of juvenile cases—one cannot fob off the Apprendi argument with the observation that a jury makes no difference.\textsuperscript{119}

In addition to a greater likelihood that judges will find the defendant delinquent, Posner argues that juvenile delinquency defendants are also less likely to appeal or seek postconviction relief.\textsuperscript{120} Finally, Posner expresses special concern that the majority of the court may be deciding the issue based upon a “circuit scorecard, without independent consideration of the issues”\textsuperscript{121} and finds it “telling” that the government is unable “to give a reasoned basis” for its position that a juvenile adjudication should count as a conviction.\textsuperscript{122} He concludes with a call to the Supreme Court, as “only the [Court] can decide authoritatively what its decisions mean.”\textsuperscript{123}

C. Juveniles as a Class Distinguishable from Adults

Although McKeiver v. Pennsylvania stands as the last case ruling on what procedures are constitutionally required in juvenile delinquency proceedings, the Court has decided cases within the last seven years expressly concerning the treatment and punishment of juveniles under the Eighth Amendment prohibition on cruel and unusual punishment.\textsuperscript{124} While the

\textsuperscript{119} Id. (emphasis added). While Judge Posner comments that it would be “hasty to conclude juvenile-court judges are more prone to convict the innocent than juries are,” some scholarship has argued that juveniles are at special risk of being wrongfully convicted. See Drizin & Luloff, supra note 117. Drizin and Luloff argue that juveniles are at special risk for wrongful convictions primarily because they “make less competent trial defendants” and exhibit “risk factors for false confessions.” Id. at 260. While those factors exist regardless of whether the fact finder at trial is a judge or jury, they further argue that “[t]he risk of wrongful convictions in juvenile court proceedings may also be increased by a lack of many of the due process protections afforded adult criminal defendants,” as well as “the fact that few juvenile cases are appealed and even fewer post-conviction and habeas cases are filed involving juveniles.” Id. at 260: Martin Guggenheim and Randy Hertz take an approach which strongly supports Posner’s assertion and argues that while juries are not necessarily more likely to reach the “correct” outcome, they provide a higher quality of factfinding than bench trials. See Guggenheim & Hertz, supra note 117, at 553, 562-82.

\textsuperscript{120} Welch, 604 F.3d 408 at 432.

\textsuperscript{121} Id. at 431.

\textsuperscript{122} Id. at 432.

\textsuperscript{123} Id.

Gault line of cases determined the procedures afforded to juveniles in the juvenile court system specifically, this line of cases dealt with the treatment of juveniles in the adult criminal system as all of the defendants were prosecuted and sentenced as adults.125

In Roper v. Simmons, the Court held that the execution of juveniles who were under 18 years old at the time of their crimes constituted cruel and unusual punishment barred by the Eighth Amendment.126 The Court focused on juveniles as a group distinguishable from adults, outlining “[t]hree general differences between juveniles under 18 and adults [which] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.”127 The Court found that juveniles, in comparison to adults, have a lack of maturity, a vulnerability to peer pressure, and a still-evolving character.128 The Court argued that these differences mean that juveniles’ “irresponsible conduct is not as morally reprehensible as that of an adult.”129 “From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.”130 The Court thus concluded that, in light of such diminished capacity, the justifications of the death penalty of retribution and deterrence do not apply to juveniles with the same force as adults.131

Five years later, in Graham v. Florida, the Supreme Court addressed the imposition of life without parole on juveniles who did not commit homicide and held such punishment to be unconstitutional under the Eighth Amendment.132 The Graham Court summarized Roper as “establish[ing] that because juveniles have lessened culpability they are less deserving of the most severe punishments.”133 In determining whether the punishment was proportional to the crime under the Eighth

125 See generally Miller, 132 S. Ct. 2445; Graham, 130 S. Ct. 2011; Roper, 543 U.S. 551.
126 Roper, 543 U.S. at 568 (2005).
127 Id. at 569.
128 Id. at 569-70.
129 Id. at 570 (internal citation omitted).
130 Id.
131 Id. at 571. The Court’s holding is especially noteworthy given that the beginning of its opinion was devoted to outlining the callous nature of the murder committed by the seventeen-year-old defendant. Id. at 555-58. One of the State’s aggravating factors in seeking the death penalty was that the murder “involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman.” Id. at 557.
133 Id. at 2026.
Amendment, the Court concluded that, “compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.” As in its Roper analysis, the Court addressed the State’s justifications of retribution and deterrence and concluded them to be insufficient. The Court’s conclusion that retribution was an inadequate justification was directly related to its assessment of the relative culpability of juveniles, stating,

Retribution is a legitimate reason to punish, but it cannot support the sentence at issue here. Society is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense. But [t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender. And as Roper observed, “whether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult.”

The analysis of the diminished culpability of juveniles is central to the Graham opinion as the Court does not hold life without parole for non-homicide adult offenders to be unconstitutional.

The most recent Supreme Court case on juvenile offenders as a group distinct from adults is Miller v. Alabama, decided in 2012. In Miller, the Court held that, even in the case of homicide offenses, “mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’” Unlike Roper and Graham, Miller did not hold that a type of punishment was unlawful based on the category of the offender; instead, the Court held that a type of punishment, while lawful, was unconstitutional if mandatorily applied to juveniles. Only the procedure was at issue. The reasoning for the constitutional violation is that the state’s mandatory sentencing “scheme prevents those meting out punishment from considering a ‘juvenile’s lessened culpability’ and greater ‘capacity for change.’” Such a scheme essentially ignores the precepts of

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134 Id. at 2027 (emphasis added).
135 Id. at 2028.
136 Id. (citations omitted) (quoting Roper v. Simmons, 543 U.S. 551, 571 (2005)).
138 Id.
139 Id. (citations omitted).
Roper and Graham “that children are constitutionally different from adults for purposes of sentencing.” The Court reiterated that the recognition of juveniles as having diminished culpability compared to adults rests on common sense as well as the support of biology and social science.

While the defendants in Miller faced prosecution and sentencing in the adult criminal system, the Court’s reasoning echoes the original justification for the juvenile court system, stating that “[l]ife without parole forswears altogether the rehabilitative ideal. It reflects an irrevocable judgment about [an offender’s] value and place in society, at odds with a child’s capacity for change.” In addition to reiterating the recognition from Roper and Graham that juveniles are less culpable than adults who have committed the same crime, Miller adds a decidedly different analysis. Miller ruled the procedure of mandatorily imposing the punishment, as opposed to the punishment itself, constitutionally impermissible. Such procedure ran afoul of the Eighth Amendment because it did not take into account the lessened culpability of juveniles and instead completely equated juveniles with adults.

D. Apprendi after Miller and Graham

Since deciding Apprendi in 2000, the Supreme Court has not ruled on whether juvenile delinquency adjudications count as convictions and therefore need not be submitted to a jury during sentencing. As the federal courts of appeals have struggled with that question, the Supreme Court’s understanding and conception of juveniles has evolved as evidenced by its decisions in Roper, Graham, and Miller. The language of these cases all stress the lessened culpability of juveniles and the “rehabilitative ideal,” justifications upon which the juvenile

140 Id. at 2464.
141 Id. at 2464-65.
142 Id. (alteration in original) (citations omitted).
143 Id. at 2466.
144 But see infra notes 151-58 for a discussion on recent petitions for certiorari and recent indications which could suggest the Court may be amenable to addressing the issue soon.
145 See Roper, 543 U.S. at 571 (“Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults.”); Graham, 130 S. Ct. at 2030 (“[T]he State’s judgment is not appropriate in light of a juvenile nonhomicide offender’s capacity for change and limited moral culpability.”); Miller, 132 S. Ct. 2455, 2468 (“So Graham and Roper and our individualized sentencing cases alike teach that in imposing a State’s harshest penalties, a sentencer misses too much if he treats every child as an adult.”).
court system was originally founded. These cases have made it vitally important for the Supreme Court to take up the issue and explicitly rule on whether juvenile delinquency adjudications are convictions under the language of Apprendi.

As previously discussed, the language of Apprendi itself demonstrated the Court’s already apparent uneasiness with its holding in Almendarez-Torres, allowing a “conviction exception.” In 2011, the Court considered granting certiorari petitions in cases that challenged the Almendarez-Torres decision altogether—choosing to relist the cases and call for briefs. This is an even broader issue given that if the Court were to overrule Almendarez-Torres, it would get rid of the problem with the use of juvenile delinquencies altogether as there would no longer be a “conviction exception.” The Court ultimately denied certiorari in those petitions.

In May 2012, before the Court decided Miller, it considered granting certiorari in Staunton v. California, a case in which the court used a juvenile delinquency adjudication under Apprendi to increase the defendant’s sentence. The Court did not immediately deny certiorari, but instead relisted the case for another conference to consider the petition. In fact, the Court actually requested the record in the Staunton case. Despite eventually denying certiorari, the Court’s actions suggest a willingness to eventually take up the issue if presented with amenable facts. Granting certiorari in a case

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146 See FELD, supra note 14, at 60.
152 Id.
153 Id.
155 Though the Court eventually denied the petition for certiorari, Staunton’s case and the trial court’s decision offered a less than perfect set of facts. Id. Staunton’s prior juvenile adjudication that counted as a “strike” under California state law was a juvenile offense for robbery committed fourteen years prior to the offense in question. See People v. Huggins, No. H036254, 2011 WL 4852287 at *3 (Cal. Dist. Ct. App. Oct. 13, 2011) (Mr. Staunton was a co-defendant in People v. Huggins.) In addition to the juvenile offense, however, Staunton had eight prior felony convictions, several prior misdemeanor convictions, was on parole when he was convicted of the offense in question, and had violated parole at least once before. Id. at *2. The trial court denied
involving the use of a juvenile delinquency adjudication under Apprendi would allow the Court to revisit the original justification of the Almendarez-Torres “conviction exception” without forcing its hand on whether or not that decision should be entirely overruled.

If the Supreme Court does not choose to directly address the use of juvenile adjudications within the “conviction exception” in light of its decisions in Graham and Miller, it seems unlikely the lower courts will do so. While some circuit courts have ruled on the use of juvenile delinquency adjudications since Roper was decided in 2005, none have explicitly considered any of the language or reasoning in the Roper line of cases. That is likely because: (1) the Roper cases were all decided based on the Eighth Amendment prohibition on cruel and unusual punishment rather than on due process grounds, and (2) all of the Roper cases involved juveniles tried as adults in the adult criminal system, and thus did not implicate juvenile adjudications. No federal court of appeals has ruled on the use of juvenile delinquency adjudications under Apprendi since Miller was decided in 2012. This is noteworthy because Miller deemed a process that equated juveniles and adults in terms of sentencing constitutionally offensive. What does this mean then for Staunton’s request to exclude the use of the juvenile adjudication as a prior strike based on “the facts and circumstances of not only this [juvenile] offense but Mr. Staunton’s background.” Id. at *3. The trial court also considered that Staunton had been convicted of two felony offenses in the time since the juvenile offense. Id. On appeal, the Sixth District declined to address the issue any further. Id. at *4.


158 While the Washington case discussed supra notes 1-2 & 4-7 was decided at the end of 2012 and thus was after Miller, the court decision makes no mention of Apprendi and it is not argued in the defendant-appellant’s brief. See United States v. Washington, 706 F.3d 1215 (10th Cir. 2012); Brief of Defendant/Appellant at 5, United States v. Washington, 706 F.3d 1215 (10th Cir. 2012) (No. 11-6339), 2012 WL 1074455 at *11. The Tenth Circuit Court of Appeals has not yet decided on whether the use of juvenile adjudications is a violation of Apprendi. In dealing with state cases on habeas corpus claims, the Tenth Circuit has held a state court’s determination that such use is not a violation of Apprendi is “neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent.” See Harris v. Roberts, No. 12-3045, 2012 WL2354433 at *2 (10th Cir. 2012).

treating juvenile delinquency adjudications to be equivalent to adult criminal convictions for the purposes of sentencing?

E. Juvenile Adjudications Should Not Count Under the Apprendi “Conviction Exception”

There are two separate bases on which the use of juvenile delinquency adjudications should not be counted as equivalent to prior convictions under Apprendi: (1) the fact that juvenile delinquency adjudications are not supported by a jury trial guarantee, which is assumed as a prerequisite under the language of Apprendi,160 and (2) recent Supreme Court jurisprudence recognizing and reiterating that juveniles are less culpable than adults and more capable of rehabilitation. The second basis, in particular, would mark a return to the conception upon which the juvenile court was founded and the paramount justification for a separate court system for juveniles.

1. The Use of Juvenile Adjudications as “Prior Convictions” Is a Violation of Due Process Because They Are Not Supported by a Jury Trial Guarantee

Because McKeiver has never been overturned, there is no constitutional right to a jury trial in a juvenile delinquency proceeding.161 While a juvenile adjudication obtained without a jury trial is therefore constitutionally valid, many scholars argue that the language and reasoning of the Apprendi opinion require that the defendant had a right to a jury trial even though the Court did not explicitly define a “conviction.”162 The question then becomes—why does the language of Apprendi suggest that a “conviction” must have been obtained with a right to a jury trial? What procedural safeguards underlie a right to a jury that would require it?

Some authors have argued that the jury plays an important role in protecting against governmental oppression.163 But the decision in McKeiver not to extend the right to a jury trial to juvenile court proceedings demonstrated that the Court

160 See infra note 165.
162 See e.g., Feld, supra note 13; Abbott, supra note 13; Schneider supra note 13; Thill, supra note 13.
was only concerned with accurate fact-finding in order for the adjudication to be constitutionally sound.\textsuperscript{164} Many of the circuit courts arrived at their decisions regarding the use of juvenile adjudications by interpreting the holding of Apprendi to focus on the reliability of the previous proceeding.\textsuperscript{165} Therefore, the courts reason, if McKeiver holds that a right to a jury trial is not required for juveniles because judges are just as reliable, and Apprendi holds that convictions are exempted from going in front of a jury because convictions are reliable, then juvenile adjudications may be equated with convictions for the purpose of sentencing without violating the defendant’s right to due process.\textsuperscript{166}

But many critics, including Judge Posner,\textsuperscript{167} have challenged the factual basis of the McKeiver court’s assumption that judges are just as reliable as juries,\textsuperscript{168} leading others to argue that the unreliability of juvenile adjudications prohibit equating them with adult convictions.\textsuperscript{169} Others go as far as to argue that McKeiver should be overruled, which would result in a constitutional right to a jury trial during the juvenile delinquency proceeding.\textsuperscript{170}

Further, even if McKeiver were overruled and juveniles were granted the right to jury trials, there are still significant concerns that juvenile adjudications are less reliable than adult convictions based on the nature of juveniles themselves. Professor Steven Drizin and Greg Luloff suggest that a

\textsuperscript{164} Feld, supra note 14, at 104.

\textsuperscript{165} See, e.g., United States v. Smalley, 294 F.3d 1030, 1033 (8th Cir. 2002) (juvenile adjudications are “so reliable that due process of law is not offended by such an exemption”); see also Welch v. United States, 604 F.3d 408 (7th Cir. 2010).

\textsuperscript{166} See, e.g., Smalley, 294 F.3d at 1033; see also Welch v. United States, 604 F.3d 408 (7th Cir. 2010).

\textsuperscript{167} Welch, 604 F.3d at 432-34.

\textsuperscript{168} See Guggenheim & Hertz, supra note 117.

\textsuperscript{169} See, e.g., Feld, supra note 13, at 1120 (arguing that until McKeiver is overruled it is “unfair[ ] [to use] procedurally deficient, factually unreliable convictions to enhance subsequent sentences. States which deny delinquents jury trials in the contemporary punitive juvenile justice system compound that inequity when they use those nominally rehabilitative sentences to extend terms of adult imprisonment.”); Abbott, supra note 13, at 91-92; Schneider, supra note 13, at 863 (arguing that juvenile adjudications without jury trials constitute “a deal between the state and the juvenile. . . . [where] the juvenile ideally receives treatment and in return surrenders certain procedural protections . . . . The state fails to hold up its end of the deal when it treats the juvenile adjudication as an adult conviction.”); Thill, supra note 13, at 90-98 (arguing that the exception only applies narrowly to convictions obtained with a right to jury trial guarantee). But see Kennedy, supra note 13 (arguing that juvenile adjudications should fall under the conviction exception as they are reliable).

\textsuperscript{170} See, e.g., Feld, supra note 13, at 1124; Barry C. Feld, Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997) (arguing that the juvenile court should be abolished and youthfulness should be recognized as a mitigating factor in criminal proceedings).
multitude of factors may contribute to decreased reliability with juvenile adjudications as studies suggest juveniles are “at special risk of being wrongfully convicted . . . especially when it comes to false confessions” and developmental differences “make juveniles less competent trial defendants . . . [and] more compliant and suggestive during police interrogations.”171 The Supreme Court recognized in *Graham v. Florida* that some of “the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. . . . They are less likely than adults to work effectively with their lawyers to aid in their defense.”172 Other scholars have been disturbed by the high incidence of waiver of counsel in the juvenile courts173 and even if the child is represented, some authors have argued that there is a strong concern for ineffective assistance of counsel in juvenile cases.174 Notably, a claim of ineffective assistance of counsel would be brought on appeal and, as Judge Posner pointed out in his dissent in *Welch*, there is a much lower rate of appeal in juvenile court cases.175 Recently, Megan Anitto, Director of the Center for Law and Public Service at West Virginia University College of Law, examined data measuring the rates of juvenile appeals in 15 states and appellate decisions over a period of 10 years.176 She described juvenile courts as “an area of the law where the appellate role and transparency to the public is overwhelmingly absent.”177 These findings and studies on reliability in the juvenile court system suggest that, even if *Apprendi* is read to only require a reliable previous adjudication, simply requiring jury trials will not necessarily make juvenile adjudications as reliable as adult convictions.178

175 See *Welch v. United States*, 604 F.3d 408, 432 (7th Cir. 2010) (Posner, J., dissenting).
177 Id.
178 While the aforementioned findings on reliability rely heavily on social science and research as opposed to court opinions, the Supreme Court’s decisions in *Roper, Graham*, and *Miller* all evinced a willingness to look to such research and findings when considering the relative culpability and rehabilitative capacity of juveniles. See *Miller v. Alabama*, 132 S. Ct. 2455, 2464-68 (2012); *Graham v. Florida*, 130 S. Ct. 2011, 2026-30 (2010); *Roper v. Simmons*, 543 U.S. 551, 568-73 (2005). Therefore, if the Court decided primarily to focus on the reliability of juvenile
2. Equating Prior Juvenile Adjudications with
Convictions is a Violation of Due Process Because the
Supreme Court Characterizes Juveniles as a Class
Categorically Less Culpable than Adults

Many scholars and authors have argued against
juvenile adjudications falling under the “conviction exception”
on the basis that such adjudications have not been subjected to
a jury trial guarantee and, subsequently, are either not as
reliable as convictions obtained by juries or do not provide
adequate protection from governmental oppression. This note
advances a second argument: based on the Supreme Court’s
recognition of juveniles in Roper, Graham, and Miller as a class
categorically less culpable than adults, juvenile adjudications
are fundamentally different than adult convictions and therefore
their use as mandatory sentence enhancements constitutes a
violation of due process.

Over time, both the courts and the academic community
have voiced doubts over whether the juvenile court system truly
embraces the “rehabilitative ideal” upon which it was founded.
Even in McKeiver, despite holding that a right to a jury was not
constitutionally required, the Court was still concerned with the
failures of the juvenile court to live up to its intended purpose.
The Supreme Court’s most recent cases on juveniles, however,
decided in the context of the Eighth Amendment, seem to signal
a return to focus on lessened culpability and capacity for
rehabilitation when determining appropriate punishment.
As Professor Kristin Henning has written,

The Supreme Court’s recent review of adolescent development
research in Graham v. Florida and Roper v. Simmons suggests that

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179 See supra notes 170-81.
180 While this argument is based on the reasoning of Roper, Graham, and
Miller, I am not arguing that the use of juvenile adjudications to increase mandatory
sentences constitutes an Eighth Amendment violation. (For such an argument, see
Beth Caldwell, supra note 157). Rather, the Court’s conception and understanding of
juveniles, as developed in its Eighth Amendment jurisprudence, sheds light on how the
Court may view adjudications resulting from a system specifically created to
accommodate juveniles as distinct from adults in the area of due process. For a detailed
discussion of such “constitutional borrowing,” see Nelson Tebbe & Robert L. Tsai,
181 See, e.g., Welch v. United States, 604 F.3d 408, 430 (7th Cir. 2010) (Posner,
J., dissenting); Barry C. Feld, supra note 173.
183 See generally Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida,
policymakers may be heading in the wrong direction with juvenile court policy. . . . [T]he Supreme Court has been seemingly less reactionary and more attentive to science in its analysis of criminal justice issues involving children.184

Additionally, the research upon which the Court has based such decisions “re-affirms the beliefs of the founders of the juvenile court.”185

Juvenile adjudications are obtained in a system that is grounded in the purpose and design of accommodating juveniles as a class distinct from adults.186 This is different from the purpose of the adult criminal system. Roper, Graham, and Miller all demonstrate the Supreme Court’s decision that juveniles are categorically less culpable than adults.187 Essentially, the purpose of the juvenile system is to account for the differences described in the Roper line of cases—less culpability, less stigmatization, and greater opportunity for rehabilitation.188 Therefore, the use of juvenile adjudications under the Apprendi exception constitutes a due process violation by equating a juvenile adjudication with an adult conviction without any consideration of the relative culpability between the two.189 Under the view currently adopted by a majority of the courts, a defendant with three prior juvenile adjudications is automatically considered to be as deserving of punishment as a defendant with three prior adult convictions. This result runs afoul of the Roper line of cases. At the time when the offense was committed, the juvenile defendant was less culpable than an adult. The passage of time does not now make him equally culpable.

The Court’s focus on the inappropriateness of equating the misconduct of juveniles with that of adults tracks from

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185 Id.
186 FELD, supra note 14 at 60.
188 FELD, supra note 14 at 60.
189 Although Judge Posner does not focus on relative culpability, he briefly touches upon a similar argument in his dissenting opinion in Welch, arguing that just because the juvenile adjudication is constitutionally sound for the purpose of the juvenile court system does not render it constitutionally sound for all purposes:

The constitutional protections to which juveniles have been held to be entitled have been designed with a different set of objectives in mind than just recidivist enhancement. So the mere fact that a juvenile had all the process he was entitled to doesn’t make his juvenile conviction equivalent, for the purposes of recidivist enhancements, to adult convictions.

Roper and is developed through Graham and Miller. Roper focused on the fact that “[f]rom a moral standpoint it would be misguided to equate the failings of a minor child with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” While the Roper Court discussed the possibility of reform, a possibility that arguably applies with less persuasion in the case of an adult defendant with multiple offenses, the Court pointed out that the two social purposes served by the death penalty in that case were deterrence and retribution. The Court went on to state that “the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”

Following Roper, Graham also focused on the diminished culpability of juveniles. The Court directly discussed retribution as a possible justification for the imposition of a sentence of life without parole on a non-homicide juvenile offender. The Court stated that while “[r]etribution is a legitimate reason to punish,...’[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.” Notably, the Court wrote:

A sentence of life imprisonment without parole...cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative idea. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person’s value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender’s capacity for change and limited moral culpability.

The Graham Court’s discussion of the “rehabilitative ideal” is noteworthy because the Roper line of cases, including Graham itself, deals with juvenile offenders in the adult system. By discussing the importance of the rehabilitative ideal in this context, the Court attaches the rehabilitative ideal not to the system in which the sentence is imposed, but rather to the age of the person at the time the offense is committed.

191 Id. at 571.
192 Id. at 570.
194 Id. at 2028.
195 Id. (citation omitted).
196 Id. at 2029-30.
Roper and Graham both focused on a type of sentence being unconstitutional when applied to juveniles. Roper prohibited the death penalty for all juveniles,\(^{197}\) while Graham prohibited life without parole for juveniles who did not commit a homicide offense.\(^{198}\) Miller focused on a type of sentence being unconstitutional when it was mandatorily applied.\(^{199}\) Even though the constitutional provision in question in Miller is still the Eighth Amendment, the constitutional deficiency arises out of the lack of process afforded the juvenile when life without parole is mandatorily applied.\(^{200}\) In rendering its decision, the Miller Court began with the premise that “Roper and Graham establish that children are constitutionally different from adults for purposes of sentencing.”\(^{201}\) The Miller Court focused on the fact that the mandatory process

remove[s] youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—[which] prohibit[s] a sentencing authority from assessing whether the law’s harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes Graham’s (and also Roper’s) foundational principle: that imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.\(^{202}\)

In holding that a mandatory sentence was unconstitutional when applied to juveniles, the Court recognized that previous cases held that “a sentence which is not otherwise cruel and unusual does not becom[e] so simply because it is mandatory.”\(^{203}\) However, “a sentencing rule permissible for adults may not be so for children.”\(^{204}\)

Likewise, the Apprendi “conviction exception,” as it currently stands, may be viewed as a sentencing rule that is permissible for adults with prior adult convictions. It does not necessarily follow that the same sentencing rule must be constitutionally sound for adults with prior juvenile adjudications. The Roper line of cases stressed the lessened culpability of juveniles while Graham held that the sentencing process itself must take into account the lessened culpability of youth when such a severe sentence was imposed.\(^{205}\) These cases recognize

\(^{197}\) Roper, 543 U.S. at 568 (2005).
\(^{200}\) Id.
\(^{201}\) Id. at 2464.
\(^{202}\) Id. at 2466.
\(^{203}\) Id. at 2470 (alteration in original) (internal quotation marks omitted).
\(^{204}\) Id.
\(^{205}\) See supra notes 191-200.
that the conviction of a juvenile, even within the adult system, is constitutionally different than the conviction of an adult for the same offense. *Graham* specifically held that even though a punishment may be constitutionally permissible, a sentencing process that does not take into account the lessened culpability of the juvenile can create a constitutional violation.\(^{206}\) Such reasoning implicates the use of juvenile adjudications for sentencing enhancements. While the sentence itself may be constitutionally permissible, a process that does not take into account the lessened culpability of a juvenile is constitutionally deficient.

**CONCLUSION**

There has long been an argument against using juvenile adjudications as sentencing enhancements because they were obtained without a right to a jury trial guarantee.\(^{207}\) Scholars argue that the language of *Apprendi* presupposes a jury trial guarantee in the prior proceeding and, additionally, juvenile adjudications may not be as reliable as previously assumed.

But there is a second basis on which juvenile adjudications should not count as convictions for the purpose of sentencing enhancement—one that stands regardless of whether *McKeiver* is overturned. Recent Supreme Court jurisprudence in *Miller* and *Graham* focuses on the nature of juveniles as fundamentally distinct from adults. A juvenile adjudication cannot simply be equated with an adult criminal conviction. A juvenile adjudication is obtained within a system that exists precisely to recognize a categorical distinction between children and adults. Even if such a system were supported by a jury trial guarantee, counting juvenile adjudications as convictions falling within the “conviction exception” of *Apprendi* violates the constitutionally guaranteed due process rights of the defendants. The Supreme Court has already provided the framework for this decision. All that remains now is for the Court to be presented with the correct set of facts.

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\(^{207}\) See supra notes 161-78.

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