SPECIAL COUNSEL INVESTIGATIONS AND LEGAL ETHICS

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Rudolph Giuliani and the Ethics of Bullshit  
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I, Too, Sing America: Presidential Pardon Power and the Perception of Good Character  
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What is the Best Model for Investigating Presidential Wrongdoing, Today?

Bruce Ledewitz*

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The roundtable discussion, *Special Counsel Investigations and Legal Ethics*, of which this essay is a component, could hardly have raised a more urgent issue for American public life in our time. On May 17, 2017, only four months into the presidency of Donald Trump, and shortly after President Trump’s dismissal of F.B.I. Director James Comey created a crisis of confidence in the ability of

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the Justice Department to investigate, fully and fairly, alleged collusion between the Trump campaign and Russian officials prior to the 2016 election, the Justice Department appointed Robert Mueller III as Special Counsel to conduct the investigation.¹

This action did not alleviate the political crisis, which has continued in various manifestations to the time I am writing this essay in Spring 2019. Although in public statements at the time, President Trump evinced no criticism of Mueller’s appointment—he insisted that a thorough investigation would show that no collusion occurred and urged that the matter be speedily concluded²—the President grew increasingly critical of the Mueller investigation as time passed. On August 1, 2018, for example, President Trump, through a tweet on Twitter, urged Attorney General Jeff Sessions, who had recused himself from overseeing the Russia investigation, to “stop this Rigged Witch Hunt right now.”³

It is not my purpose in this paper to recount all the political vicissitudes of the Mueller investigation. Nor is it my purpose to conclude anything at all about possible wrongdoing by President Trump. Instead, my goal is to evaluate the different approaches that might be taken with regard to investigating alleged wrongdoing by a President. Which of the various models we can realistically imagine is best for that purpose? My effort can be viewed as an update of, and further engagement with, a similar investigation by Thomas W. Merrill in 1999, on the occasion of the then-looming expiration of the Independent Counsel Act.⁴ How has today’s toxic political environment impacted the question that he addressed?

Of course, wrongdoing by high Executive Branch officials other than the President occurs, but my focus is on investigation of a President, both because that is the current pressing issue, and because that is the perennial pressing issue. Investigations of a President will also involve other potential targets, but they are considered here only in the context of the quest for truth about possible presidential wrongdoing.

2. Id.
The question of which approach is best invites, in turn, two considerations before any analysis can be attempted. First, what are the realistically possible models of investigating a President?

We can determine potential models of investigation by looking at the actual events concerning presidential wrongdoing in American history. Although there have been numerous scandals that reflected upon, and perhaps implicated, Presidents—from scandals in the administration of President Ulysses S. Grant to the Teapot Dome Scandal in 1921 during the administration of Warren Harding—5—I will concentrate in this essay on more recent presidential scandals. My focus is upon the structural lessons to be learned from the three most recent and well-known investigations—Watergate, Whitewater and its later transformations, and the current Russia collusion investigation.6

Part I of the essay describes five models of investigation that were utilized in various forms during these episodes. Those five models are: (1) statutorily independent investigation—the Independent Counsel Model; (2) administratively independent investigation—the Special Counsel Model; (3) ad hoc investigation—the Ad Hoc Special Prosecutor Model; (4) ordinary criminal investigation—the U.S. Attorney Model; and (5) congressional investigation—the Legislative Branch Model. All of these models have been utilized to greater or lesser extents in the three most recent and well-known investigations.

In addition to these approaches, variations of a sixth model that has been proposed, but never implemented, in investigation of a President will be considered. We can call this model the Permanent Executive Branch Office Model because it involves the creation or utilization of permanent structures within the Executive Branch.7

The second consideration that is raised by the title of this essay is, what does “best” mean in a context of an investigation of presidential wrongdoing? I take that matter up in Part II, which concludes that the most important role for such investigation is to allow the people, through their representatives in Congress, to decide

---

6. I mostly leave out, because it did not focus originally on the actions of the President, Independent Counsel Larry Walsh’s seven-year investigation of the Iran-contra affair.
7. One model I leave out entirely is the Civil Damages Action Model, which was upheld in Clinton v. Jones, 520 U.S. 681 (1997). That model only applies to so-called private acts of wrongdoing by a President, which in practice means acts performed prior to a person becoming President. See id. Once in office, the President is shielded from damage actions by an absolute immunity for any official action. See Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).
whether wrongdoing by a President warrants impeachment and removal. The standard for the “best” model of investigation is, therefore, the one that most ably promotes this public consideration.

Looking at investigation from the perspective of the formation of a national consensus about removal differs considerably from the tone of most discussions of the Independent Counsel Act when it was allowed to lapse in 1999. At that time, discussion centered around partisan abuses that many felt had taken place under the Act, balanced against the need for real independence in determining the facts of potential presidential wrongdoing. The abuses led most observers to favor nonrenewal. Nevertheless, it was taken for granted that facts could be fairly and accurately determined, and that, if they were, Congress and the people would accept the facts and act on them.

That assumption may not have been warranted even in 1999. Today, however, in an era of alternative facts and the death of truth, actual public acceptance of facts found becomes the most important consideration. There is a tension in this highly partisan age between determining the relevant facts, on the one hand, and doing so in a way that can lead to formation of a national consensus about presidential removal, on the other. Simply put, today, an investigation that is viewed as controlled by a President’s political enemies, however competently executed, will not enable the people to make the necessary judgment about whether a President should be removed from office. No national consensus would be possible out of such a process. To be acceptable, a model of investigation must be one that could potentially convince many of a President’s own supporters that the President has engaged in serious wrongdoing.

With these considerations in mind, Part III proceeds to judge which of the six models is best and concludes that none of the models is actually the best choice—the one that best balances the need for accurate fact-finding with the need for political acceptance of the


9. See, e.g., id. at 64-68.


11. Thus, ABA President Philip S. Anderson testified before the House Judiciary Committee that the defects of the Act “include[d] its failure to assure accountability of the independent counsel; the possibility that an independent prosecutor may investigate and sometimes prosecute matters that are trivial or innocuous; the danger that open-ended investigations will waste taxpayer money; and the creation of conflicting responsibilities for independent counsels.” Rhonda McMillion, Good Idea Gone Bad, A.B.A. J., May 1999, at 81. These concerns are with a kind of partisan harassment, not a concern that facts accurately found would not be accepted.
facts found. Therefore, in Part IV, I set forth a hybrid model that I hope combines the needed political acceptance with some assurance of accuracy and independence.

In a highly toxic political environment, one in which politics no longer seems to work because Americans find it difficult to trust each other, it may be fanciful to imagine that any mechanism of investigating a President can transcend America’s political divisions. Nevertheless, those of us who are committed to constitutional democracy cannot afford to give in to despair. We must continue to work to make constitutional democracy possible again. Finding a workable model for investigation of presidential wrongdoing is one necessary aspect of any potential democratic renaissance.

I. THE MODELS OF INVESTIGATING PRESIDENTIAL WRONGDOING

In considering these models, I will paint with a broad brush. There are important potential differences in the details of each model that the reader can easily imagine, but which are beyond my purposes here. My goal is to broadly consider the following basic, differing approaches.

A. The Independent Counsel Model

This model is the most familiar and the easiest to describe. Its well-known exemplar is the Independent Counsel Act\(^\text{12}\) that was enacted in 1978, was amended at various points, and was allowed to lapse in 1999.\(^\text{13}\) This model potentially offers a high level of independence from Executive Branch oversight, combined with effective criminal investigative expertise. The Act was limited to investigation of serious federal crimes by a certain class of high government officials.\(^\text{14}\) It aimed at criminal prosecution, with a final report submitted to the judicial panel of appointment “setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought.”\(^\text{15}\) Conversely, the annual report to Congress was concerned only with oversight of the progress of any investigations and prosecutions that an Independent Counsel was engaged in, to ensure that the

\(^{14}\) 28 U.S.C. § 591(a)-(c).
\(^{15}\) Id. § 594(h)(1)(B).
expenditures for the Independent Counsel were justified.\textsuperscript{16} Clearly, despite this language, the Independent Counsel did evolve into an aid to Congress’ impeachment and removal deliberations.\textsuperscript{17}

The amendments to the Act over the years reflected differing concerns with wrongdoing in the Executive Branch. The Act was amended to prevent the investigation of relatively minor crimes, but to include the investigation of wrongdoing arising out of the investigation itself, such as perjury and obstruction of justice, and to permit requests that the original subject of investigation be changed or enlarged.\textsuperscript{18}

These changes were certainly important in historical context, but they did not alter the fundamental nature of the office. The Independent Counsel remained a temporary, inferior officer, appointed by a panel of federal judges at the request of the Attorney General, and was removable only for good cause.\textsuperscript{19} These attributes meant that the President would usually have a role in the decision whether to seek the appointment of an Independent Counsel, but would have no role at all in naming the person and only a restricted role in removal. This ensured a genuinely independent investigation.

The constitutional permissibility of such independent criminal investigation was upheld by the Supreme Court in \textit{Morrison v. Olson},\textsuperscript{20} against a powerful dissent by Justice Antonin Scalia.\textsuperscript{21} In Scalia’s view, a purely executive function, such as criminal investigation, had to be “fully within the supervision and control of the President.”\textsuperscript{22} While the \textit{Morrison} case did not involve allegations of wrongdoing by a President, Justice Scalia was plainly assuming the same conclusion would apply to an investigation of the President.\textsuperscript{23}

Notwithstanding Justice Scalia’s dissent, however, \textit{Morrison} specifically upheld the Act’s limits on presidential control.\textsuperscript{24} Therefore, the \textit{Independent Counsel Model} constitutes the furthest reach of

\begin{itemize}
\item \textsuperscript{16} Id. § 595(a)(2).
\item \textsuperscript{17} For a discussion of the Starr Report and the relationship between the Independent Counsel statute and impeachment proceedings, see Ken Gormley, \textit{Impeachment and the Independent Counsel: A Dysfunctional Union}, 51 STAN. L. REV. 309, 312-13 (1999).
\item \textsuperscript{19} 28 U.S.C. § 596(a)(1).
\item \textsuperscript{20} 487 U.S. 654, 660-61 (1988).
\item \textsuperscript{21} Id. at 697 (Scalia, J., dissenting).
\item \textsuperscript{22} Id. at 708.
\item \textsuperscript{23} See id. at 713. He referred not only to the President’s ability to protect “his staff” but also “to protect himself.” Id.
\item \textsuperscript{24} Id. at 685-94.
\end{itemize}
constitutionally acceptable independent investigation within the Executive Branch.  

B. The Special Counsel Model

Robert Mueller was appointed Special Counsel for the United States Department of Justice by Acting Attorney General Rod Rosenstein pursuant to statutory and regulatory authorization that describes the authority of the Special Counsel as that of existing U.S. Attorneys. Department regulations specify that “[t]he Attorney General, or . . . the Acting Attorney General, will appoint a Special Counsel” when the Attorney General, or Acting Attorney General, determines that:

(a) That investigation or prosecution of that person or matter by a United States Attorney’s Office or litigating Division of the Department of Justice would present a conflict of interest for the Department or other extraordinary circumstances; and

(b) That under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.

Although the regulations governing appointment of a Special Counsel are in some ways parallel to those of the Independent Counsel Act, there are notable differences that render the Special Counsel much less independent. In both, the decision of the Attorney General to begin the process of appointment of outside counsel, or not, is essentially unreviewable, but the standard under which one is called for was much more specific under the Act than it is

25. The decision to permit the Independent Counsel Act to expire may be thought to be after-the-fact affirmation of Justice Scalia’s constitutional concerns. See L. Darnell Weeden, A Post-Impeachment Indictment of the Independent Counsel Statute, 28 N. Ky. L. REV. 536, 552 (2001).

26. The appointment of a Special Counsel is to be distinguished from the staff of the United States Office of Special Counsel, which safeguards the civil service system from abuse. See Rebecca L. Dobias, Amending the Whistleblower Protection Act: Will Federal Employees Finally Speak Without Fear, 13 FED. CIR. B. J. 117, 119 (2003).


under the current regulations.\textsuperscript{29} Also, once the process of appointment is initiated, the President, through the Attorney General, presumably will have some influence in the choice of the Special Counsel. The President could at least expect that a political enemy would not be named. Conversely, the Executive Branch had no role in the selection of the individual who would serve as Independent Counsel under the Act.\textsuperscript{30}

Importantly, once appointed, the Independent Counsel had complete discretion to conduct the investigation.\textsuperscript{31} But the discretion of a Special Counsel, although hedged by safeguards, is subject to the oversight of the Attorney General.\textsuperscript{32}

Both the Independent Counsel and a Special Counsel may only be removed for good cause,\textsuperscript{33} but since the Attorney General may, in an extreme instance, direct that a particular prosecutorial step not be taken,\textsuperscript{34} failure of the Special Counsel to obey such a lawful order would presumably constitute good cause for removal. Therefore, a Special Counsel can theoretically be removed for a decision concerning the manner in which an investigation proceeds. Plus, the Independent Counsel could obtain judicial review of any for-cause removal,\textsuperscript{35} whereas, without such a specification, there is reason to doubt that any judicial review would occur in the instance of

\textsuperscript{29} 28 U.S.C. § 591(a) (1994) provides as follows: “The Attorney General shall conduct a preliminary investigation in accordance with section 592 whenever the Attorney General receives information sufficient to constitute grounds to investigate whether any person described in subsection (b) may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.” Section 592(c) provides that the Attorney General “shall apply” for the appointment of an independent counsel if “there are reasonable grounds to believe that further investigation is warranted.” Id. § 592(c)(1)(A) (1994). In contrast, 28 C.F.R. § 600.1(b) provides: “That under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.”

\textsuperscript{30} The judicial panel named the Independent Counsel. 28 U.S.C. § 593(b) (1994).

\textsuperscript{31} See id. at § 594(a) (1994) (listing oversight responsibilities of the Attorney General).

\textsuperscript{32} 28 C.F.R. § 600.7(b) (2019) provides: “The Special Counsel shall not be subject to the day-to-day supervision of any official of the Department. However, the Attorney General may request that the Special Counsel provide an explanation for any investigative or prosecutorial step, and may after review conclude that the action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued. In conducting that review, the Attorney General will give great weight to the views of the Special Counsel. If the Attorney General concludes that a proposed action by a Special Counsel should not be pursued, the Attorney General shall notify Congress as specified in § 600.9(a)(3).”

\textsuperscript{33} For the Special Counsel, see id. § 600.7(d): “The Attorney General may remove a Special Counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies.” For the Independent Counsel, see 28 U.S.C. § 596(a)(1) (1994).

\textsuperscript{34} 28 C.F.R. § 600.7(b).

\textsuperscript{35} 28 U.S.C. § 596(a)(3).
removal of a Special Counsel. Without congressional direction, good cause removal might well be considered a political question.\textsuperscript{36}

In terms of subject matter, the advantage of the flexibility of the standard of appointment of a Special Counsel is that the matter to be investigated need not even name the crimes alleged to be committed or the persons to be investigated. Thus, the letter appointing Robert Mueller gave as justification for the appointment, the need for a full and thorough investigation of the “Russian government’s efforts to interfere in the 2016 presidential election,” and specified the subjects to be investigated as “any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump.”\textsuperscript{37}

Like the Independent Counsel Model, the Special Counsel Model concerns itself primarily with criminal prosecution. The current regulations do not even refer to reports to Congress at the conclusion of the work of the Special Counsel.\textsuperscript{38} Thus, the letter appointing Robert Mueller authorized prosecution, but not a final report to Congress and the public.\textsuperscript{39}

\textbf{C. The Ad Hoc Special Prosecutor Model}

In the Watergate scandal, public pressure “forced the Attorney General to appoint two independent prosecutors ([Archibald] Cox and [Ron] Jaworski) without a statutory mandate.”\textsuperscript{40} While technically accurate, this formulation by Professor Merrill might suggest that the ad hoc Special Prosecutor served at the will of the Attorney General to conduct the investigation as the Attorney General directed. However, it was later held that the regulation that Attorney General Elliot Richardson adopted appointing the Special Prosecutor\textsuperscript{41} had the full force and effect of law until lawfully revoked.\textsuperscript{42} For this reason, the firing of Archibald Cox in the famous Saturday


\textsuperscript{38} 28 C.F.R. § 600.8(c) (2019) provides that the Special Counsel “shall provide the Attorney General with a confidential report,” and § 600.9(c) allows, but does not require, “public release” of reports by the Attorney General.

\textsuperscript{39} See \textit{Rod Rosenstein’s Letter}, supra note 37.

\textsuperscript{40} Merrill, supra note 4, at 1078.


Night Massacre by Acting Attorney General Robert Bork was held to have been unlawful. Therefore, the historical instance of the Watergate Special Prosecutor does not turn out to differ importantly from the Special Counsel Model above. In both instances, the outside counsel was a creature of administrative regulations once those regulations were formally adopted.

In contrast to that historical instance, the Ad Hoc Special Prosecutor Model I am imagining is closer to the one that Judge Gesell suggested would have been the case had no regulations been adopted and the Special Prosecutor had just been appointed: “Had no such limitations been issued, the Attorney General would have had the authority to fire Mr. Cox at any time and for any reason.” In other words, without any formal regulations, the firing of Cox would have been lawful. This context would render the Ad Hoc Special Prosecutor Model much less independent of presidential control than the previous two models.

In terms of the formalities of removal, the actual power was lodged in the Attorney General or Acting Attorney General, rather than in the President. That is why President Nixon had to dismiss officials in the Justice Department in order to effect Cox’s removal in the Saturday Night Massacre, which gave the public the chance to react to the firing. That gap between the President and removal of the special prosecutor, which is also the case in the prior two models, allows President Trump to delegitimate the Mueller investigation without having to take the political responsibility of actually acting. I will come back to this issue below.

As for subject matter and jurisdiction, these are left flexible in the Special Prosecutor Model. The appointment regulation for Archibald Cox gave authority to the Special Prosecutor to investigate and prosecute crimes arising out of the Watergate burglary and the 1972 presidential election and “allegations involving the

43. Id.
44. Id.
45. See Office of Watergate Special Prosecution Force, 38 Fed. Reg. 14688, providing that the special prosecutor does not name the Attorney General as the authority for removal, but since the Attorney General was the appointing authority, the authority was treated as lodged in the Attorney General.
President, members of the White House staff, or Presidential appointees.”

D. The Permanent Executive Branch Office Model

One model of Executive Branch investigation of presidential wrongdoing that has been suggested, but not tried, is the creation of permanent bodies with this responsibility within the Executive Branch. Professor Merrill calls this the “Civil Service Option” to emphasize the protections from removal that employees of such an office could enjoy. A permanent office dedicated to investigating wrongdoing by high government officials would presumably develop enormous expertise and independence in such proceedings. Of course, as will be discussed below, this model strains even the flexible separation-of-powers analysis in *Morrison*, because it thoroughly and intentionally insulates the office from presidential oversight and would likely be found unconstitutional.

A related suggestion that does not raise that kind of constitutional objection is one that Professor Merrill refers to as the “Inspector General Option.” This approach would utilize the Inspectors General in the Executive Branch, who already conduct investigations of inefficiency or illegality in government agencies, and who already have a kind of built-in tenure, such that they are not always removed with changes in the party that controls the government.

Both of these suggestions have the advantage of creating permanent institutions and thus possibly minimizing the political nature of investigations of presidential wrongdoing. These kinds of offices, however they might be structured, do not instantly bring the kind of counter-productive political pressure that any talk of creating a new body, or newly appointing an individual, inevitably sparks when presidential wrongdoing is being discussed as a potential matter for investigation.

E. The U.S. Attorney Model

Another permanent entity that could operate in the context of investigation of presidential wrongdoing, but one outside the Washington locus of the above models, is the Office of the U.S. Attorney. The current Special Counsel regulations provide alternatives should the Attorney General determine that a Special Counsel

48. Merrill, supra note 4, at 1063.
49. Id. at 1064-65.
should not be appointed.\textsuperscript{50} One of these alternatives is that the matter should be handled by “the appropriate component” of the Justice Department.\textsuperscript{51} I assume that the appropriate component would often be the local U.S. Attorney.

Essentially, this model of regular law enforcement within a general investigation of a President is currently being utilized by Mr. Mueller, who has referred numerous matters to the U.S. Attorney for the Southern District of New York for possible prosecution.\textsuperscript{52} Some of those matters seem to relate to Mueller’s investigation of Russia collusion, while others do not.\textsuperscript{53}

But the model would normally unfold somewhat differently. A matter implicating a President need not emerge from a context involving national security, defense, or any other obvious high government matter. For example, after the New York Times published a lengthy account of past tax and accounting practices of the Trump family, the New York State Department of Taxation and Finance announced that it would open what amounts to an ordinary tax fraud investigation.\textsuperscript{54}

For that matter, just as the Watergate scandal originally began as an investigation into a minor crime unrelated to the President—”a bungled burglary”\textsuperscript{55}—a U.S. Attorney’s Office might stumble onto presidential wrongdoing through an investigation that did not appear, at the outset, to involve high government officials at all. In such an instance, a U.S. Attorney might pursue such an investigation against progressively more highly placed government officials until discovering evidence that implicated a President in wrongdoing. At that point, presumably the matter would be brought to the attention of Justice Department officials in Washington for further action.

Proceedings of this nature, unlike the previous three models, would not necessarily attract much public attention, especially in

\begin{itemize}
\item \textsuperscript{50} 28 C.F.R. § 600.2 (2019) (Alternatives available to the Attorney General).
\item \textsuperscript{51} Id.
\item \textsuperscript{53} See id.
\end{itemize}
the beginning. That might render such an investigation highly effective. On the other hand, resources at such a local level would be limited, and the investigation itself would not be organized to maximize the chances of implicating the President. That outcome would probably be the last thing any U.S. Attorney would welcome.

F. The Legislative Branch Model

This final model is one that will inevitably function should serious presidential wrongdoing be uncovered. Obviously, there would be Legislative Branch investigation if the House of Representatives pursued impeachment of a President. But, even short of that, any serious allegations of wrongdoing in the government would inevitably bring some form of congressional investigation. In fact, it might be that a preliminary congressional investigation of more or less ordinary government malfeasance sets in motion further investigation that uncovers presidential wrongdoing.

There are too many possible forms of this model to do much more than just list this option. Presumably, the major part of an investigation of presidential wrongdoing would have already been finished by some body before impeachment would be considered. Once facts were found that might warrant impeachment of a President, further investigation would be expected to be conducted through a Special Congressional Committee, or Joint Committee.

But there is another, more exotic, possibility. Congress does have the option of creating and funding an investigatory office within the Legislative Branch for allegations of serious government wrongdoing. That approach would be capable of yielding both an independent, and presumably highly professional, investigation. Such an office would function similarly to the Permanent Executive Branch Office Model above, but, since the investigators would be located within the Legislative Branch, there would be no constitutional issues involving necessary presidential oversight.

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56. The House Judiciary Committee would play the primary role in the initiation of impeachment proceedings, see Jonathan K. Geldert, Presidential Advisors and Their Most Unpresidential Activities: Why Executive Privilege Cannot Shield White House Information in the U.S. Attorney Firings Controversy, 49 B.C. L. REV. 823, 855 n.265 (2008), but there are no specific requirements as to how the Committee must perform its investigation.

57. While Bowsher v. Synar, 478 U.S. 714, 723 (1986), held that executive functions could not be conferred upon a legislative branch officer, investigation on behalf of Congress would fall within legislative branch responsibilities. See generally Steven R. Ross et al., The Rise and Permanence of Quasi-Legislative Independent Commissions, 27 J.L. & POL. 415 (2012).
II. WHAT DOES “BEST” MEAN IN THE CONTEXT OF INVESTIGATING PRESIDENTIAL WRONGDOING?

First, any investigatory model must be constitutional. At the moment, Morrison’s highly flexible approach—referred to in the Constitutional Law textbook I use as “functionalism” as opposed to the dissent’s “formalism”—provides the relevant constitutional standard. According to Chief Justice Rehnquist’s majority opinion, a President must have sufficient oversight of any investigation and prosecution of government officials—a process that everyone agrees must, at least in terms of prosecution, be considered execution of the laws—that the President may be said to be able take care that the laws are being faithfully executed.

In the context of the Independent Counsel Act at issue in Morrison, the Court held that this broad standard was satisfied because the initiation of the process was held firmly by an official over whom the President exercised complete policy control. An Attorney General who sought the appointment of an Independent Counsel over the President’s objection could lawfully be fired for doing so. In addition, the standard of removal of the Independent Counsel only for good cause was a standard that had previously been held to satisfy the necessary level of presidential oversight in a variety of quasi-judicial and quasi-legislative contexts. This is the standard under which independent agencies routinely function. It is true that a President had no say in the actual selection of the Independent Counsel, but that was a function of the Appointments Clause itself, which specifically permits inferior officers to be appointed by Article III Judges.

The conclusion that an Independent Counsel is an inferior officer, as opposed to an officer who must be nominated by the President

59. Morrison v. Olson, 487 U.S. 654, 696 (1988) (“Notwithstanding the fact that the counsel is to some degree ‘independent’ and free from executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.”).
60. Not everyone would agree with that assertion, but it is at least one major approach to what it means for the Attorney General to serve at the will of the President. See Bruce A. Green & Rebecca Roiphe, Can the President Control the Department of Justice?, 70 Ala. L. Rev. 1, 33-34 (2018).
63. See U.S. Const. art. II, § 2, cl. 2.
and confirmed by the Senate, might be considered debatable. This holding was contested in Justice Scalia’s dissent, but, despite criticism, has not been overturned.

Under the Morrison standard, most of the models discussed above are plainly constitutional. The one exception might be the Permanent Executive Branch Office Model, because, at least in its civil service manifestation, appointment and removal would be strongly protected from presidential influence, probably beyond even the constitutional permissiveness of Morrison.

There is a real possibility that the flexible Morrison standard will be abandoned by the new, more conservative majority currently constituted on the Supreme Court. In such an eventuality, which cannot be reliably predicted one way or the other, the major changes would be that the removal of any investigator within the Executive Branch would have to be at the will of the officer who appointed her and, if that officer were not the President, that officer would in turn have to be removable at will by the President. I will not set this kind of change as a limiting factor in this essay, but the reader should keep in mind that an investigation genuinely independent of the President would be impossible under such a new standard, as indeed Justice Scalia argued it should be in his Morrison dissent.

The requirement of constitutionality also means that certain quite serviceable models of investigating presidential wrongdoing are simply not available within the American constitutional system. For example, in Columbia, the Supreme Court has authority to act if alleged presidential wrongdoing is criminal. That model

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64. Though Justice Scalia did dispute the conclusion that the independent counsel was an inferior officer. Morrison, 487 U.S. at 715-23 (Scalia, J., dissenting).
67. Justice Scalia’s opinion for the Court in Edmond v. United States, holding that civilian Judges of the Coast Guard Court of Criminal Appeals are inferior officers, surely presages a more formal approach to oversight issues, but expressly distinguished, rather than overruling or even criticizing, Morrison’s holding that the Independent Counsel was an inferior officer. Edmond v. United States, 520 U.S. 651, 661 (1997).
69. See 487 U.S. at 708 (Scalia, J., dissenting).
70. See Pablo Echeverri, Accountability of Public Officials and Separation of Powers in the United States, France, and Colombia (manuscript on file with the author); CONSTITUCIÓN POLÍTICA DE COLOMBIA, art. 174, 175.
would satisfy much of the concerns expressed below about the necessary nonpartisan nature of any presidential investigation in the American context, but this approach is simply not possible here.

Similarly, in terms of removal, a two-thirds vote in the Senate is, of course, an absolute requirement.\(^\text{71}\) No other body can perform a presidential removal and no other body can review either such a removal or the refusal by the Senate to remove the President.\(^\text{72}\) Again, we can think of other possibilities that might work very well, but this institutional arrangement sets the basic limits under which the topic of American presidential wrongdoing must be addressed.

It may seem counter-intuitive to the reader, but in my view the requirement of a Senate two-thirds vote is actually healthy in our rent, partisan democracy today. Without it, one political party would be tempted to remove a President without a national consensus. Because of the two-thirds requirement, that undemocratic possibility is not an option.

This reality of a required super-majority in the Senate sets in relief the other, and more important, requirement of what makes a model of presidential investigation “best.” Not only must it be constitutional, it must be one that will permit the formation of a national consensus that a President who has been found to have engaged in wrongdoing must be removed from office. The model must be one that even the President’s supporters, or at least many of them, can come to accept as rendering a fair judgment on the matter of presidential wrongdoing.

No one has ever denied that the most important goal of any investigation of presidential wrongdoing is that it allows impeachment and removal of a dangerous and/or criminal leader. Whether a President can be criminally prosecuted has been debated\(^\text{73}\) but, in practice, the American experience shows that criminal prosecution of a sitting President is not a real option. Thus, President Nixon was named only an unindicted co-conspirator and President Clinton was never charged with perjury.\(^\text{74}\) In these two most recent instances of alleged presidential wrongdoing brought to light, it was simply understood and accepted that impeachment and removal were the only possible remedies for the actions of the President.

\(^{71}\) U.S. CONST. art. I, § 3, cl. 6.


\(^{73}\) For perspectives, see Susan Low Bloch, Can We Indict a Sitting President?, 2 NEXUS 7 (1997).

\(^{74}\) For consideration of the difficulty of prosecuting a sitting President that these two instances demonstrate, see John Gilbeaut, Why Bill Clinton Won’t Face a Criminal Trial, A.B.A. J., April 1999, at 52.
Therefore, removal of a President by the Senate remains the last line of defense that our democracy has against potential tyranny. The crucial role of the Senate in this regard was confirmed by the Supreme Court in the Judge Walter Nixon removal case. Therefore, the Court confirmed the potential for “chaos” if a Senate removal of a President could be challenged in court. There must be finality in any judgment that the Senate makes.

The difficulty of obtaining a two-thirds vote for removal of a President, because of today’s hyper-partisanship, shifts the balance in evaluating models of investigation of presidential wrongdoing against the importance of exoneration of a President falsely accused. Creating the conditions under which removal is a real possibility becomes the overwhelming goal. One would therefore choose a model that would ensure that supporters of a President could accept its verdict against a President, even though the model would fail to convince opponents of a President that the President was innocent of charges that had been found unsubstantiated.

Almost twenty years ago, Professor Merrill agreed implicitly that any system of investigating a President must be one that permits the House and the Senate to act. However, at that earlier time, Professor Merrill emphasized accurate fact-finding as the most important attribute of any investigatory system. His evident assumption was that if only the facts could be ferreted out, Congress would act appropriately. That assumption inevitably places a high value on preventing presidential interference with any investigation.

This assumption proved warranted during the Watergate investigation. It became clear to President Nixon that if wrongdoing on his part were shown, enough Republicans in the Senate would vote

75. Nixon, 506 U.S. at 238.
76. Id. at 236 (quoting Nixon v. United States, 938 F.2d 239, 246 (D.C. Cir. 1991)).
77. See Merrill, supra note 4, at 1050 (“The first reason for having an independent investigator is to lay the groundwork for possible impeachment of the President.”).
78. Professor Merrill was quite explicit about this: “The ultimate standard or criterion should be how well each option would perform in practice. This in turn is largely a function of how often each option would ‘get it right,’ meaning how often it would avoid both false negatives—failing to detect and prosecute serious executive branch misconduct—and false positives—investigating or prosecuting officials who are innocent or whose conduct does not warrant criminal investigation or prosecution.” Id. at 1065-66.
against him to ensure his removal from office.\textsuperscript{79} Perhaps that assumption was even warranted in 1999, when Professor Merrill wrote his article.\textsuperscript{80} 

But, such an assumption is plainly not warranted today. President Trump was exaggerating when he claimed during the presidential campaign that "I could stand in the middle of Fifth Avenue and shoot somebody and I wouldn't lose any voters,"\textsuperscript{81} but only mildly so. We live in an era in which there is such skepticism about truth and truthfulness\textsuperscript{82} that it will be difficult to convince supporters of a President that any finding of wrongdoing is accurate and is not the product of a political vendetta.

My judgment about this problem of reaching a national consensus about presidential wrongdoing is not aimed particularly at supporters of President Trump. I expect the same level of partisan support for any democratic President elected in the foreseeable future. Indeed, even in the 1990s, President Clinton received a high level of support in facing a charge that some of his supporters now admit was more serious than they were willing to acknowledge at the time.\textsuperscript{83}

The foregoing considerations suggest to me that the best model of investigation of presidential wrongdoing will combine some aspects of the following five features. First, the standards calling for the initiation of an investigation should be as specific and mandatory as possible. Otherwise, it would be too easy for a President, or the President’s allies, to block the initiation of an investigation before the public realizes that there are serious potential issues of presidential wrongdoing. Unfortunately, the need for specificity


\textsuperscript{80} By the 1990’s, partisanship was increasing. President Bill Clinton’s first budget in 1993 received not a single Republican vote. See Bruce Ledewitz, \textit{What Has Gone Wrong and What Can We Do About It?}, 54 TULSA L. REV. 247, 248 (2019) (book review). Nevertheless, Presidential wrongdoing might still have elicited a bipartisan response in 1999.


will limit the flexibility referred to above in the naming of Robert Mueller.\textsuperscript{84} There must be a balance.

Second, the appointing authority should be aligned politically with the President. Any investigation of a President by a presumed political enemy would be a non-starter among the President’s supporters in the current partisan environment.

Third, once initiated, the investigation should be totally free of supervision by any official in the Executive Branch. Presidential wrongdoing cannot be detected and proved unless the investigation is completely unfettered.

But, fourth, in part because the investigation will have no effective oversight, the removal power should belong to the President alone and must be completely discretionary. This will not only satisfy any future constitutional standard of necessary presidential oversight, it will also preclude the bizarre situation in which a President criticizes an investigation as unfair, thus undermining the ultimate acceptance of its findings, but refuses to take effective steps to halt it.\textsuperscript{85}

Finally, the goal of any investigation should be a report to Congress and the people of the United States concerning the criminal liability, or other wrongdoing, of the President. Any criminal prosecution of others should be authorized, but only as a means to that end. Because no major criminal prosecution needs to be prepared, a reasonable time limit for the investigation can be set. The longer the investigation goes on, the more it will seem to supporters of the President that there is no serious wrongdoing, but that minor matters are being blown out of proportion.

Having set forth these five considerations, let me now apply them to the previously noted models. Given these considerations, no model works perfectly.

\textsuperscript{84} See supra notes 27-30 and accompanying text.

\textsuperscript{85} This was occurring before the removal of Jeff Sessions as Attorney General. Tellingly, President Trump has cut back his criticisms of the Mueller investigation since then. On Tuesday, February 19, 2019, a Justice Department spokesperson reiterated that President Trump has not asked Acting Attorney General Matthew Whitaker to interfere with the Mueller investigation. Mark Mazzetti et al., \textit{Intimidation, Pressure and Humiliation: Inside Trump’s Two-Year War on the Investigations Encircling Him}, N.Y. TIMES (Feb. 19, 2019), https://www.nytimes.com/2019/02/19/us/politics/trump-investigations.html. Now that his allies can fire Mr. Mueller, President Trump cannot really just criticize from the sidelines. See \textit{infra} note 104.
III. EVALUATING THE MODELS OF INVESTIGATING PRESIDENTIAL WRONGDOING

A. The Independent Counsel Model

The original Independent Counsel Act delineated both standards and timing requirements for an Attorney General to decide whether to seek appointment of an Independent Counsel and a reporting requirement for whatever the Attorney General’s decision may be.\(^86\) It is true that there was to be no judicial review of a decision not to request the appointment, but the Act was as specific and as mandatory as may be possible. In addition, the conduct of the investigation, once the Independent Counsel was appointed, was to be carried out without further oversight by the Attorney General, except, as in the authorization of wiretaps, where such involvement was legally necessary.\(^87\) Thus, the Independent Counsel Model satisfies the first and third factors reasonably well.

However, this extreme specificity sacrificed flexibility. Thus, the Independent Counsel Act was a model of investigating crimes by certain Executive Branch officials. Something else is needed to investigate presidential wrongdoing that might lead to impeachment and removal.

In addition, the Independent Counsel Model is not well suited to today’s needs in terms of the second and fourth factors. The Independent Counsel was to be selected by a panel of federal judges. This led to an intensely partisan battle by the panel over the appointment of Kenneth Starr, who was considered a highly partisan figure, especially compared to Robert Fiske, a Republican previously named Special Counsel by Attorney General Reno.\(^88\) Today, even the hint that an Independent Counsel was appointed by a President’s political enemies would be sufficient to undermine confidence in any investigation that was conducted, whatever its results.

The preclusion of removal except for a determination of “good cause” by the Attorney General,\(^89\) while ensuring that an investigation is independent of presidential interference, also means that a President could, and likely would, complain publicly that an inves-

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tigation was being conducted unfairly or had simply reached inaccurate conclusions. A President could plausibly claim that the law did not permit him to remove the Independent Counsel. Such presidential actions would probably convince many of the President’s supporters that the President should not be removed from office, which would in turn easily prevent a two-thirds vote for removal in the Senate. Although the Independent Counsel Act might have the benefit of convincing many of the President’s critics that a President should not be removed, should the investigation prove negative as to presidential wrongdoing, it would not achieve the most necessary goal of investigating presidential misconduct. It would not lead to removal where presidential wrongdoing was found.

B. The Special Counsel Model

Surprisingly, the *Special Counsel Model* turns out in some ways to be the worst of all worlds. As currently set forth, the regulations give the Attorney General entirely too much discretion in appointing, or not appointing, a Special Counsel. While the language of the appointment is mandatory, the standards of conflict of interest or extraordinary circumstances, combined with the public good, are entirely arbitrary.\(^{90}\) Nor is any structured decision-making required.\(^{91}\)

In addition, the existing regulations do not entirely foreclose Attorney General interference with a Special Counsel’s investigation. In these ways, the *Special Counsel Model* as currently structured both creates too little independence for the investigation and does not ensure that any investigation will even commence.

Plus, the existing limit of removal to good cause found by the Attorney General creates the same issues as it does for the Independent Counsel above. The President lacks full personal authority to remove the Special Counsel.

The advantage of the *Special Counsel Model* is that the Attorney General names the individual who conducts the investigation.\(^{92}\) This would insulate, to some extent, any presidential complaint that an investigation was being conducted unfairly in order to benefit the President’s enemies. Another advantage is that the model

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\(^{90}\) See supra note 29 and accompanying text.

\(^{91}\) See id.

\(^{92}\) See id.
allows a more expansive conception of what and whom is to be investigated, as the terms of appointment of Robert Mueller, discussed above, show.

C. The Ad Hoc Special Prosecutor Model

This model also has the advantage that the actual appointment of the person who will conduct the investigation of the President remains in the hands of the President’s political allies. But it has the disadvantage that the absence of preexisting regulations or statutes means that the initiation of appointment is entirely at the Attorney General’s discretion. Also, there might be investigatory oversight by the Attorney General, depending on the terms of the appointment. In addition, as in the case of the appointment of Archibald Cox, removal might be limited to good cause. Thus, most of the factors set forth above are not satisfied in this model.

Basically, this model is by far the most flexible, and always remains an option in any future crisis of alleged presidential wrongdoing. This model could easily be used in order to aid Congress in an impeachment investigation, for example. Because of its discretionary elements, however, it should not be relied upon as the only model for investigation of presidential wrongdoing.

D. The Permanent Executive Branch Office Model

The advantage of the Civil Service or Inspector General approaches is that an office of this type could be structured to investigate all manner of wrongdoing anywhere in the government. It would not necessarily be restricted to criminal wrongdoing and need not be limited to investigating high government officials. If such an office did not conduct the actual prosecution, the Morrison standard would certainly permit removal only for good cause. Such an office would be well-suited to report to Congress and the people. On the other hand, as the Russia collusion investigation shows, the allegations of presidential wrongdoing might not be limited to the President’s actual conduct of government.

While this model could thus be structured to be both constitutional and effective, it would clearly fail in a political sense. A per-

93. See supra note 37 and accompanying text.
94. See supra notes 40-43 and accompanying text.
95. This was the effect of the ruling with regard to the firing. See id.
96. The initiation of that investigation, of course, concerned the election of 2016, rather than the conduct of the government once President Trump was elected. See supra note 37.
manent office of this kind is precisely the kind of “deep state” activity that is regularly denounced by supporters of President Trump.\textsuperscript{97} Even aside from the current political rhetoric, it is hard to envision the American people accepting that such an important role in removing a President would be played by unknown and unseen federal bureaucrats.

In terms of the five features listed above, the standards of such an office would presumably be specified, the investigation would be free of Executive Branch supervision, and reports could be furnished to Congress. However, the investigators would not be named by allies of the President and there would be no real possibility of removal by the President. Any conclusions by such an office would never convince the President’s supporters in the public or in the Senate.

\textbf{E. The U.S. Attorney Model}

This model is actually the most intriguing possibility, but it is hard to see how it could be institutionalized. A U.S. Attorney is nominated by the President, confirmed by the Senate and removable at will by the President.\textsuperscript{98} Therefore, any investigation by a U.S. Attorney of wrongdoing in the government has instant political credibility. If such an officer stumbled upon serious wrongdoing by a President through some ordinary criminal investigation, any resulting report would be taken very seriously by the President’s allies in Congress and, presumably, by the President’s supporters among the public as well.

In addition, there would not be any likelihood of interference with such an investigation, because in its early stages, no one, including the U.S. Attorney, would know that the investigation might turn up wrongdoing by the President. Of course, at some point, that possibility would become obvious and it would require enormous political courage by a U.S. Attorney to continue the investigation, notwithstanding the possible political fallout. In my experience, however, we do have U.S. Attorneys of high integrity.

But the model’s advantages also demonstrate its impracticality institutionally. Simply put, it would be a happenstance if presidential wrongdoing fell into the lap of a U.S. Attorney in this way. In a sense, the model is always available as long as there are honest


\textsuperscript{98} See Sara Sun Beale, Rethinking the Identity and Role of United States Attorneys, 6 Ohio St. J. Crim. L. 369, 370 (2009).
women and men in the Justice Department, but it cannot be regarded as a reliable answer to the issue of investigating presidential wrongdoing.

F. The Legislative Branch Model

If, as argued here, consideration of impeachment and removal, and not criminal prosecution, is the goal of any investigation of presidential wrongdoing, then the Legislative Branch Model is the obvious choice for the investigation. This, after all, is where impeachment and removal happen.99

The problem is both institutional and political. Institutionally, Congress is not particularly good at investigating wrongdoing. At least preliminarily, professional investigators in the Executive Branch are far superior. Congress can effectively present the results of such investigations to the public, but Congress is not a good detective. Of course, this disadvantage could be mitigated by the creation of a permanent investigatory office within the Legislative Branch, as suggested above.100 America has never proceeded in this formal way of inter-branch checking, but it could be done.

Politically, on the other hand, such an investigation could never be effective. If the President’s party controls Congress, the investigation will not be allowed to begin, permanent investigatory office or not. A high level of proof of presidential wrongdoing developed through one of the other models would be necessary before the President’s party would initiate impeachment proceedings, even preliminarily.

And, of course, if the other party controls Congress, there is zero possibility that the President’s supporters in the public, or in Congress, would ever support or vote to remove the President based on the congressional investigation. Congressional involvement must happen eventually, if impeachment and removal are to be possibilities, but cannot be the major, and certainly not the only, focus.

IV. A Hybrid Model of Investigating Presidential Wrongdoing

In retrospect, the appointment of Robert Mueller and subsequent developments in his investigation have gone fairly well in terms of

99. U.S. CONST., art. I, § 2 cl. 5 (impeachment power of the House); § 3, cl. 6 (power to try impeachments in the Senate).
100. See supra note 57 and accompanying text.
the goals and structure of an investigation of presidential wrongdoing. Mueller is a registered Republican, not conceivably considered an enemy of President Trump when he was appointed.\textsuperscript{101} He was given a broad subject to investigate and has been allowed broad discretion in conducting the investigation.\textsuperscript{102}

Nevertheless, the Mueller investigation has been undermined to such an extent that it seems unlikely that even a finding of obvious presidential wrongdoing would lead to a vote of removal in the Senate. The Mueller investigation has been undermined by several factors—some simply bad luck, others structural, and others in the way the investigation has gone forward.

The bad luck involved two matters. First, Mueller was not appointed by the Attorney General, a political ally of the President, but by an Acting Attorney General who had no independent credibility with the supporters of the President.\textsuperscript{103} Second, one of the investigators on Mueller’s staff, since removed, was exposed as a political opponent of the President.\textsuperscript{104} In the current environment, it does not take much to convincingly characterize an investigation of a President as political, as far as the President’s supporters are concerned.\textsuperscript{105}

The structural issue is that, because President Trump does not himself have removal authority over Mueller, he has been able to “call” for Mueller’s removal, without having to take the political heat for actually acting.\textsuperscript{106} This relentless drumbeat of criticism has already rendered the investigation incapable of performing its

\textsuperscript{101} For a flavor of reaction at the time of the appointment, see Joseph D. Lyons, Is Robert Mueller a Democrat or Republican? His Appointment Was Lauded by Both Parties, BUSTLE (May 18, 2017), https://www.bustle.com/p/is-robert-mueller-a-democrat-republican-his-appointment-was-lauded-by-both-parties-58693.

\textsuperscript{102} Indeed, it was just this lack of interference that President Trump increasingly criticized. See supra notes 1-3 and accompanying text.

\textsuperscript{103} See supra note 27 and accompanying text. Rod Rosenstein, who was appointed by President George W. Bush, but served for all eight years under President Barack Obama, reportedly thinks of himself as a career prosecutor, without a base in politics. See Darren Samuelsohn, Rod Rosenstein, Deputy Attorney General, The Ever-Civil Servant, POLITICO, https://www.politico.com/interactives/2018/politico50/rod-rosenstein/ (last visited Apr. 3, 2019).


\textsuperscript{105} To get a sense of the political fallout from this episode, see Tim Hains, DiGenova: Strzok Texts Prove a “Brazen Plot” Inside FBI to Exonerate Clinton, Frame Trump, REAL CLEAR POL. (Jan. 23, 2018), https://www.realclearpolitics.com/video/2018/01/23/digenova_a_brazen_plot_inside_fbi_to_exonerate_clinton_frame_trump.html.

\textsuperscript{106} See supra note 85 and accompanying text.
most important role of potentially creating a national consensus that President Trump should be removed if wrongdoing is shown.¹⁰⁷

But, partly, this weakness in the investigation is the result of how it has been conducted. Simply put, the investigation has gone on too long. A time limit for a report should have been set at the time of the appointment.

With these lessons in mind, and considering the evaluations of the models above, it is possible to imagine a hybrid model with a combination of the best attributes of each.

What is needed is a new statute requiring an Attorney General to appoint an Independent Counsel to investigate credible allegations of wrongdoing by the President, or associates of the President, that forbids any oversight of the resulting investigation, that gives to the President an unfettered removal power and that results, in addition to incidental criminal prosecutions of others, in a report to Congress and the people about the alleged presidential wrongdoing within a specified period—certainly no more than a year.

Under this hybrid model, the investigation could be relied upon to commence and not to be viewed as controlled by the enemies of the President, at least at the outset. Yet, as the investigation unfolded, any criticism by the President of the conduct of the Independent Counsel would be met with the response that the President need only remove the Independent Counsel and should do so if warranted.¹⁰⁸ Of course, such a removal would subject the President to grave suspicion and might prove politically unpalatable. This would eventually force a President to drop the subject.

One can at least imagine that, under this structure, a report to Congress of serious presidential wrongdoing might have a chance of receiving a nonpartisan reception. Of course, the downside of


¹⁰⁸. The effect of a direct presidential removal power is shown by the winding down of the story of removing Deputy Attorney General Rod Rosenstein, who had appointed, and could have removed, Mueller. Recently, President Trump considered removing Rosenstein, but ultimately decided not to do so and the story ceased to be news. The President could not go on criticizing Rosenstein simply because he could remove him if he had wanted to do so. The same would be true if the President himself could remove Mueller. In that event, tweets like the one at the beginning of this essay would eventually cease because the President himself would have the power to stop the investigation. On November 7, 2018, Trump transferred oversight of the Mueller investigation to acting US Attorney General Matthew Whitaker. Kathryn Krawczyk, Rod Rosenstein is No Longer in Charge of the Mueller Probe, WEEK (Nov. 7, 2018), https://theweek.com/speedreads/806484/rod-rosenstein-no-longer-charge-mueller-probe.
that advantage is that any report from such an Independent Coun-
sel exonerating the President would be sure to be discounted by the
President’s political opponents as the product of an overly biased
and friendly investigating structure. But, as stated above, ferreting
out wrongdoing by a President, and removing such a President, is
more important to the future of American democracy than is exon-
erating a President who has been wrongly accused.

IV. CONCLUSION

In a sense, this essay is a thought experiment imaging a scenario
in which Americans might come together, fairly and rationally, to
decide a crucial political issue in a spirit of consensus. It imagines
an American political landscape that works. It will face two objec-
tions. One is that the investigatory model it proposes would fail to
actually work to discover presidential wrongdoing because it is
heavily structured in the President’s favor. The reader will have to
judge whether that criticism is warranted. Admittedly, construct-
ing a model with a presidential bias was my intention from the be-
ginning.

The second objection will be that the underlying goal of creating
the possibility of a national consensus that a President has commit-
ted wrongdoing worthy of impeachment and removal is no longer
possible in this partisan, post-truth age. That conclusion I simply
cannot accept because it would mean the end of the American ex-
eriment in constitutional self-government. I have faith in Amer-
ica. Therefore, if my effort to construct a model of investigating
presidential wrongdoing is flawed, what is needed is a more imagi-
native and insightful effort in the same vein. Failure is not an op-
tion.
I. INTRODUCTION

In July 2016, Michael Cohen, then presidential candidate Donald Trump’s lawyer, secretly recorded Trump discussing how they would use the publisher for the *National Enquirer* to purchase former Playboy model Karen McDougal’s story about an alleged affair with Trump in order to stop it from becoming public before the 2016
presidential election. The National Enquirer’s publisher purchased McDougal’s story in August 2016. In a similar move to quash another alleged affair from going public in October 2016, Cohen set up a corporation to purchase adult film star Stormy Daniels’s story of her affair with Trump. Trump was elected President in November 2016. Cohen’s secret recording contradicted Trump’s claims that he knew nothing about payments to McDougal, and it raises issues concerning the lengths to which Trump has gone to keep his private life a secret.

The taped conversation between Cohen and Trump later became public when Cohen’s lawyer released a copy of the tape in July 2018, which was after the Federal Bureau of Investigation (FBI) raided and seized audio tapes from Cohen’s office, home, and hotel room. It was also reported that Cohen was cooperating with Special Counsel Robert Mueller’s investigation into Russia’s interference in the 2016 presidential election and possible coordination between the Russian government and individuals associated with Trump’s presidential campaign. Reacting to the release of the tape, Trump tweeted: “Even more inconceivable that a lawyer

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3. Id.
would tape a client—totally unheard of & perhaps illegal.”

Trump also tweeted: “What kind of a lawyer would tape a client? So sad! Is this a first, never heard of it before? . . . I hear there are other clients and many reporters that are taped—can this be so? Too bad!”

Contrary to Trump’s Twitter rant, this incident is not the first time a lawyer has secretly taped a conversation with a client or others. Secret taping, though, raises a number of questions, including the following: Is secret taping legal? Is secret taping by a lawyer ethical? Lastly, if legal and ethical, what are the pros and cons of a lawyer secretly taping conversations? This essay sets out to answer those questions—but first, a little more about secret taping, secret tapes involving Presidents under Special Counsel investigations, and Trump’s experiences with secret taping.

II. SECRET TAPEING AND PRESIDENTS

A. Secret Tapes Involving Prior Presidents and Special Counsel Investigations

One person secretly taping a conversation with another is nothing new, and even secret tapings involving Presidents and Special Counsel investigations have happened previously. Indeed, evidence that Special Counsels obtained through secret tapes was partially responsible for one former U.S. President to resign and another to be impeached. The following sections of this essay examine the roles those secret tapes played.

1. Richard Nixon

President Richard Nixon, who was also a lawyer, reportedly taped his conversations with everyone in the Oval Office. In June 1972, police arrested five burglars who broke into and attempted to bug the Democratic National Committee headquarters in the Watergate complex in Washington, D.C., prior to the 1972 presidential election. In the months after the break-in, the Washington Post


10. Cuomo et al., supra note 1.


reported links between Nixon’s re-election campaign and the burglars, including a $25,000 re-election campaign check deposited into the bank account of one of the Watergate burglars. Nixon was re-elected, even as connections between the White House and the break-in emerged. In May 1973, Attorney General Elliot Richardson appointed Archibald Cox as special prosecutor to lead an independent investigation into the break-in and Nixon’s re-election campaign. When Nixon’s former aides testified to a grand jury about the break-in, they told the grand jury that Nixon had taped discussions about efforts to cover up the connection between the re-election campaign and break-in. Cox tried to subpoena the “smoking gun” tapes in which Nixon admitted his role in the cover-up, and Nixon directed Cox to be fired. The United States Supreme Court forced Nixon to release the tapes, and the tapes provided evidence of Nixon’s involvement in the Watergate crimes and cover-up. Nixon resigned under the threat of impeachment with the tapes as key evidence in August 1974.

2. Bill Clinton

In 1997, Linda Tripp began to secretly record her phone conversations with Monica Lewinsky, a White House intern who had an affair with President Bill Clinton. In 1998, Tripp gave the tapes to Independent Counsel Kenneth Starr, who was investigating

13. Id.
15. Bush, supra note 12. “Special counsel” is the term in current law to refer to an individuals previously known as a "special prosecutor" or “independent counsel” under previous legislation. CYNTHIA BROWN & JARED P. COLE, CONG. RESEARCH SERV., R44857, SPECIAL COUNSEL, INDEPENDENT COUNSEL, AND SPECIAL PROSECUTORS: LEGAL AUTHORITY AND LIMITATIONS ON INDEPENDENT EXECUTIVE INVESTIGATIONS 1 (2018).
18. United States v. Nixon, 418 U.S. 683, 702 (1974) (“We also conclude that the Special Prosecutor has made a sufficient showing to justify a subpoena for production [of the tapes] before trial.”).
20. Id.
Clinton’s involvement in the Whitewater real estate venture in Arkansas.²² Starr called Clinton to testify to the grand jury, and Clinton denied his relationship with Lewinsky.²³ Then, after learning about the tapes that conflicted with his grand jury testimony, Clinton admitted to the affair.²⁴ The tapes gave Starr the evidence he needed and prompted the cooperation of Lewinsky,²⁵ which Starr believed necessary to prove that Clinton committed perjury by lying under oath to the grand jury.²⁶ The House of Representatives impeached Clinton in December 1998, and the Senate acquitted him in February 1999.²⁷

As the Nixon and Tripp tapes demonstrate, the secret recordings in the hands of Special Counsel proved to be evidence powerful enough to bring down one President and impeach another. What role, if any, Cohen’s secret tapes will play in Special Counsel Mueller’s investigation into Russian interference in the 2016 presidential election is not clear.²⁸ Secret recordings in addition to Cohen’s have been a prominent feature of Trump’s candidacy, presidency, and history, however.

B. President Trump and Secret Taping

Cohen’s tape in which Trump discussed hush money for McDougal is not the only tape; it is just one of more than 100 audiotapes that Cohen made and the FBI seized.²⁹ According to reports in the press, Cohen made some of the secret recordings with an iPhone, and some additional secret tapes could relate to Trump.³⁰

Cohen is not the only one who has taped Trump. Most famously, there was the Access Hollywood tape made while Trump believed the microphone should have been turned off.³¹ In this videotape,
Trump bragged about kissing women and grabbing their genitals, stating, “when you’re a star, they [women] let you do it. You can do anything.”\textsuperscript{32} Then, there are the tapes that Omarosa Manigault Newman made while serving as an assistant to Trump as Director of Communications for the White House office of Public Liaison.\textsuperscript{33} When asked why she made secret recordings, Manigault Newman replied that without the tapes “no one in America would believe me.”\textsuperscript{34}

It seems that Trump has long assumed others are taping him, and he may have secretly taped others as well. In 2015, he told a radio host, “I assume when I pick up my telephone, people are listening to my conversations anyway, if you want to know the truth.”\textsuperscript{35} “It’s pretty sad commentary, but I err on the side of security.”\textsuperscript{36} In 2000, long before he was in politics, Trump admitted he had taped a reporter for \textit{Fortune} who was questioning Trump’s stated net worth, and Trump threatened to sue the publication for stating that Trump’s net worth was less than Trump claimed.\textsuperscript{37} Trump later denied that he had taped the phone call.\textsuperscript{38}

In addition to these instances of secret taping, including those that have occurred in Special Counsel investigations, lawyers engaged in law enforcement activities often direct or are involved in secret taping, including securing wiretaps from undercover law enforcement agents or cooperating witnesses wearing hidden microphones or recording devices.\textsuperscript{39} But what about lawyers not engaged

deadline.com/2016/10/donald-trump-blames-nbcu-microphone-access-hollywood-groping-women-tape-1201843905/.
\textsuperscript{32} The following is a portion of the transcript of the \textit{Access Hollywood} tape in which Trump is filmed talking with television personality Billy Bush:

\begin{quote}
Trump: I better use some Tic Tacs just in case I start kissing her. You know, I’m automatically attracted to beautiful—I just start kissing them. It’s like a magnet. Just kiss. I don’t even wait. And when you’re a star, they let you do it. You can do anything.

Bush: Whatever you want.
\end{quote}


\textsuperscript{34} Id.


\textsuperscript{36} Id.

\textsuperscript{37} Id.

\textsuperscript{38} Id.

in law enforcement activities? The next two parts of this essay analyze the law on secret taping and, if legal, under what circumstances it may be ethical for a lawyer to secretly tape conversations.

III. THE LAW ON SECRET TAPING

Federal law and the law in more than two-thirds of states permit the taping of conversations as long as one party to the conversation consents. These jurisdictions are known as “one-party consent” jurisdictions. Therefore, both non-lawyers and lawyers in most states may secretly record a conversation with anyone, even when one or more persons being recorded are unaware of the taping. Conversely, it is illegal for someone to arrange to record conversations when the lawyer is not a party to the conversation and the lawyer does not have the consent of at least one of the parties to the conversation. The statutes regulating secret recording are usually referred to as anti-wiretap or eavesdropping laws.

Other jurisdictions require everyone—all parties—to consent to being recorded, and Pennsylvania is among these jurisdictions. Another such jurisdiction is Maryland, where Linda Tripp secretly

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40. Federal law generally proscribes the interception of wire, electronic, and oral communications, but permits the recording of a phone call or conversation provided one is a party to the conversation. 18 U.S.C. § 2511(2)(d) (2018). The federal law states:

It shall not be unlawful under this chapter . . . for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State. Id.


41. MATTHIESEN, WICKERT & LEHRER, S.C., supra note 40.

42. See, e.g., Celia Guzaldo Gamrath, A Lawyer’s Guide to Eavesdropping in Illinois, 87 ILL. B. J. 362 (1999) (discussing the history of eavesdropping and anti-wiretapping laws in Illinois). Electronic eavesdropping refers to overhearing, recording, or transmitting any part of a private communication without the consent of at least one party to the communication. MATTHIESEN, WICKERT & LEHRER S.C., supra note 40, at 2. Wiretapping is using “covert means to intercept, monitor, and record telephone conversations of individuals.” Id.

43. MATTHIESEN, WICKERT & LEHRER, S.C., supra note 40, at 2.


45. The Maryland law prohibits “willfully” intercepting, recording, and disclosing wire, oral, or electronic communications, but also provides:

It is lawful under this subtitle for a person to intercept a wire, oral, or electronic communication where the person is a party to the communication and where all of the parties to the communication have given prior consent to the interception...
recorded conversations with Monica Lewinsky. After her secret taping became public, police sought charges against Tripp for a conversation she taped in Maryland after she was warned that secret taping was illegal and before she received a federal grant of immunity from the special prosecutor. Prior to Tripp’s taping, a Maryland court of special appeals had held that the person doing the taping must know that it is illegal, which made the date of this one phone call so important. The Maryland prosecutor later dropped the charges when the judge presiding over the case ruled that Lewinsky’s testimony against Tripp would not be admissible because it was tainted by the Special Counsel’s investigation, which the judge ruled had influenced Lewinsky’s recollection of when the conversation took place.

When a taped conversation is illegal, federal law prohibits the admission of such evidence. Illegally intercepted oral or wire conversation may not be admitted into evidence “before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof.” In addition to this federal law, some states also exclude evidence obtained in violation of statutes regulating recording conversations.

unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State.


47. Id.

48. Hawes v. Carberry, 653 A.2d 479, 484 (Md. Ct. Spec. App. 1995). In 2001, the highest state court in Maryland, the Maryland Court of Appeals, issued a decision overruling Hawes, and held that it was not necessary to prove that a person knew that it was illegal to intercept or record a communication without the consent of all parties to the communication. Deibler v. State, 776 A.2d 657, 665 (Md. 2001).


50. 18 U.S.C. § 2515 (2018). In its entirety, the federal statute provides: Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Id.

51. For example, a Florida statute follows the federal approach in excluding evidence obtained in violation of the law, and it states: Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any
It is legal in most states, therefore, for a lawyer to secretly record a conversation with a potential witness or client. When a conversation is lawfully recorded, the lawyer may use the recording to impeach a witness with a prior inconsistent statement, or have the recording admitted into evidence if there is an applicable hearsay exception. If the recording is of a client, as the following section on the ethics of secret taping by lawyers explains, there are circumstances in which a lawyer may use the recording to establish a claim or defense, or to respond to allegations, in a matter involving the client or arising from conduct in which the client was involved.

IV. THE ETHICS OF SECRET TAPING BY LAWYERS

Ethics codes, such as the American Bar Association (ABA) Model Rules of Professional Conduct, do not specifically address secret taping by lawyers. The secret recording of conversations potentially implicates some general ethics rules, however.

Model Rule 8.4 states: “It is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” The older ABA Model Code of Professional Responsibility, which the Model Rules replaced, had a virtually identical prohibition in DR 1-102. If secret taping by a lawyer is inherently deceitful or dishonest, then such conduct would violate Model Rule 8.4(c).

The Model Code also contained a broad provision, Canon 9, that a lawyer “should avoid even the appearance of professional impropriety.” An Ethical Consideration to Canon 9 advised, among

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52. See infra note 107 and accompanying text.
53. Hearsay exceptions under the Federal Rules of Evidence that may be admitted into evidence include: a present sense impression, which is a “statement describing or explaining an event or condition made while or immediately after the declarant perceived it.” FED. R. EVID. 803(1); an excited utterance, which is a “statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused,” id. at R. 803(2); and “[a] statement of the declarant’s then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health),” id. at R. 803(3).
54. See infra notes 94-95 and accompanying text.
55. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2018) [hereinafter MODEL RULES].
56. Id. at r. 8.4.
57. DR 1-102, which defined professional misconduct, stated in pertinent part: “(A) A lawyer shall not . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(4) (AM. BAR ASS'N 1980).
other things, that “a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession.”

Ethics authorities have taken various and sometime evolving positions on the ethics of secret taping. An early ABA ethics opinion, based on provisions in the Model Code, held that the secret taping of conversations by a lawyer was inherently deceitful and therefore prohibited, but, nearly three decades later, another ABA ethics opinion, based on the Model Rules, determined that was not always the case. State ethics authorities that have addressed secret taping are divided on whether it is a violation of the ethics rules, and some too have changed their position over time.

A. ABA’s Early Position on Secret Taping

In 1974, the ABA Standing Committee on Ethics and Professional Responsibility issued an advisory ethics opinion addressing secret recordings. The Committee acknowledged that it was not a federal crime to make secret recordings when one is a party to the conversation, but the Standing Committee nonetheless determined DR 1-102’s prohibition against conduct involving “dishonesty, fraud, deceit, or misrepresentation” “clearly encompasses the making of recordings without the consent of all parties,” and Canon 9’s prescription that a lawyer “should avoid even the appearance of professional impropriety” would not condone secret taping. The Committee identified a possible exception to this prohibition by finding that under “extraordinary circumstances” a prosecutor “might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements.”

A year later, the Committee reconsidered and affirmed its position that secret taping was unethical, with a limited exception for prosecutors, and added that a lawyer in private practice could not ethically direct an investigator to tape-record a conversation without the knowledge of the other party. Under the Model Rules,
Model Rule 5.3 makes it clear that the lawyer is ethically responsible for the conduct of nonlawyer assistants, and Model Rule 8.4 states that it is professional misconduct to violate the Rules of Professional Conduct "through the acts of another."

B. State Ethics Authorities' Early Positions on Secret Taping

In the years after the ABA issued these two ethics opinions, the opinions influenced ethics authorities in a number of jurisdictions to adopt the ABA’s position. But, some jurisdictions expanded the list of exceptions, and still other jurisdictions concluded that, when done legally, a lawyer is ethically permitted to secretly record conversations.

The rationale that most states used, in following the ABA’s approach, centered on some version of the proscription against the appearance of impropriety. In 1978, for example, the Texas Committee on Professional Ethics issued an opinion stating that “attorneys are held to a higher standard” than simply what the law permits, and “secret recording of conversations offends the sense of honor and fair play of most people.” From 1978 through 1995, ethics authorities in Alabama, Alaska, Colorado, Hawaii, Iowa, Missouri, and Virginia issued similar advisory ethics opinions.

Ethics authorities in several other jurisdictions adopted the basic ABA approach to secret recording, but expanded the list of exceptions. A 2012 Congressional Research Service report to Congress identified ethics opinions from these jurisdictions—including Arizona, Idaho, Kansas, Kentucky, Minnesota, Ohio, South Carolina, and Tennessee—containing one or more of the following exceptions:

- permitting recording by law enforcement personnel generally not just when judicially supervised; or recording by criminal

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67. **Model Rules** r. 5.3(c). Model Rule 5.3(c) states that a lawyer with supervisory authority over a nonlawyer assistant is responsible for the conduct of a nonlawyer if the lawyer orders or ratifies the conduct, or fails to avoid, mitigate, or take reasonable remedial action. *Id.*

68. *Id.* at r. 8.4(a). “It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” *Id.*

69. See, e.g., Carol M. Bast, *Surreptitious Recording by Attorneys: Is It Ethical?*, 39 St. Mary’s L.J. 661, 665 (2008) (“ABA opinions carry a great deal of weight and a number of states were influenced by Formal Opinion 337.”).

70. See *infra* Section IV.B. and accompanying text.


defense counsel; or recording statements that themselves constitute crimes such as bribery offers or threats; or recording confidential conversations with clients; or recordings made solely for the purpose of creating a memorandum for the files; or recording by a government attorney in connection with a civil matter; or recording under other extraordinary circumstances.\(^{73}\)

The Report found that in still other jurisdictions—including the District of Columbia, Mississippi, New Mexico, North Carolina, Oklahoma, Oregon, Utah, and Wisconsin—ethics authorities rejected the ABA approach and held that whether secret recording violated any ethical rules had to be decided on a case-by-case basis.\(^{74}\)

Given the wide-ranging approaches that different jurisdictions took to the issue of secret recording, it is not surprising that the ABA revisited the issue in 2001.\(^{75}\) The next two sections to this part of the essay analyze the ABA’s current approach to secret taping and how state ethics authorities have responded.

C. ABA’s Current Position on Secret Taping

The ABA Standing Committee on Ethics and Professional Responsibility reexamined its position on secret taping and withdrew Opinion 337 in 2001.\(^{76}\) The Committee announced the ABA’s current position in ABA Formal Opinion 01-422 that “[a] lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules,” provided the lawyer is not violating the law in making the secret recording.\(^{77}\)

In reaching this new position on the ethics of secret recording, the Committee observed that its earlier opinion relied on the principle that a lawyer “should avoid even the appearance of impropriety,” which does not appear in the Model Rules.\(^{78}\) The Committee then identified two instances in which secret recording could violate an ethics rule.

First, if a lawyer secretly records a conversation in a state that requires the consent of all parties, or secretly records a conversation without being a party to the conversation, the Committee found

\(^{73}\) Id. at 2; see also id. at nn.5-11 (citing to the ethics opinions).
\(^{74}\) Id.; see also id. at n.12 (citing to the ethics opinions).
\(^{75}\) ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 01-422 (2001).
\(^{76}\) Id.
\(^{77}\) Id.
\(^{78}\) Id.
that such a lawyer “likely has violated Model Rule 8.4(b) or 8.4(c) or both.” The Committee reached this conclusion because it is professional misconduct under Model Rule 8.4(b) to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,” and misconduct under Model Rule 8.4(c) to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” The Committee also reasoned that an illegal secret recording would also violate Model Rule 4.4, which prohibits using “methods of obtaining evidence that violate the legal rights of [a third] person.”

Second, while the Committee found secretly recording a conversation does not itself equate to a lawyer falsely stating that the conversation is not being recorded, a lawyer falsely denying that a conversation is being recorded “would likely violate Model Rule 4.1, which prohibits a lawyer from making a false statement of material fact to a third person.” The Committee cited to two disciplinary cases in which the Mississippi Supreme Court drew this distinction—in one case holding that nonconsensual recording of a conversation by a lawyer is usually ethical, in the other holding that a lawyer who falsely denied to another that he was recording a telephone conversation violated Mississippi Rule 4.1, which tracks the Model Rule.

Finally, the Committee split on whether secret recording of a confidential conversation with a client would violate any of the Model Rules. The Committee noted that a recording could capture a client saying something profane or slanderous, and if the recording was inadvertently disclosed or disclosed by operation of law, it could prove damaging or embarrassing to the client. The disclosure in the secret tape Cohen made where Trump arranged with Cohen to suppress the story of Trump’s alleged affair with McDougal before the 2016 election highlights how a client may be embarrassed or damaged by the disclosure of a secret tape.

While it was divided on the issue of secret taping of a client, the Committee unanimously agreed “that it is almost always advisable

79. Id.
80. MODEL RULES r. 8.4(b).
81. Id. at r. 8.4(c).
82. ABA Formal Op. 01-422.
83. Id.
84. Id. (citing Attorney M. v. Miss. Bar, 621 So. 2d 220, 223-24 (Miss. 1992)).
85. Id. (citing Miss. Bar v. Attorney ST, 621 So. 2d 229, 232-33 (Miss. 1993)).
86. Id.
87. Id.
88. See supra notes 1-10 and accompanying text.
for a lawyer to inform a client that a conversation is being or may be recorded, before recording such a conversation." The Committee also opined that the trust and confidence of the client would likely be undermined if a client discovered that her lawyer had secretly recorded her, which Trump’s tweets appear to demonstrate.

Counterbalanced against how secret taping of a client could undermine the client’s trust and confidence in her lawyer, the Committee identified two exceptional circumstances where a client may forfeit a lawyer’s loyalty and confidentiality, and which would permit a lawyer to disclose confidential client communications, including recordings secretly taped. Those exceptional circumstances are a client’s “plans or threats by a client to commit a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm,” which is an exception to Model Rule 1.6 on confidentiality. The second exceptional circumstance is when a lawyer may use “confidential information necessary to establish a defense by the lawyer to charges based upon conduct in which the client is involved,” which is another exception to confidentiality in Model Rule 1.6.

D. Current State Ethics Authorities’ Positions on Secret Taping

Ethics authorities in two states, Colorado and South Carolina, have considered the new ABA ethics opinion and rejected the ABA’s current position that secret recording does not necessarily violate an ethics rule, provided that no law is broken. After considering the ABA’s current position, the Colorado Bar Ethics Committee stated: “Because surreptitious recording of conversations or statements by an attorney may involve an element of trickery or deceit,

89. ABA Formal Op. 01-422.
90. Id.
91. See supra notes 9-10 and accompanying text.
92. ABA Formal Op. 01-422.
93. Model Rule 1.6(b)(1) provides: “A lawyer may reveal information relating to the representation of a client to the extent that the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm.” MODEL RULES r. 1.6(b)(1).
94. ABA Formal Op. 01-422.
95. Model Rule 1.6(b)(5) provides:
   A lawyer may reveal information relating to the representation of a client to the extent that the lawyer reasonably believes necessary: . . . (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client. MODEL RULES r. 1.6(b)(5).
96. DOYLE, supra note 72, at 4 (citing the ethics opinions).
it is generally improper for an attorney to engage in surreptitious recording even if the recording is legal under state law."97 The Colorado Committee, however, adopted the ABA’s position in the criminal law setting, stating that “an attorney may surreptitiously record, and may direct a third party to surreptitiously record conversations or statements for the purpose of gathering admissible evidence in a criminal matter.”98 The South Carolina Bar Ethics Advisory Committee also decided that “[w]hile representing a client, a lawyer may not surreptitiously record any conversation, subject to certain law-enforcement related exemptions.”99 Noting that the ABA had changed its position, the South Carolina Committee affirmed that it had not changed its position.100 Several other states—including Arizona, Idaho, Indiana, Iowa, Kansas, and Kentucky—have not revisited the issue, and those states’ opinions that lawyers secretly recording conversations are usually unethical still stand.101

Most jurisdictions considering the ABA’s position that secret recording is usually ethical agree with the ABA, however.102 Like ABA Formal Opinion 01-422, the ethics opinions in these jurisdictions find that under some circumstances secret taping may still be unethical, such as when the taping is done in violation of the law or when a lawyer falsely denies the taping.103

On the issue of secret taping of client communications, jurisdictions are split. For example, ethics authorities in Ohio changed their position, much like the ABA, and found that secret taping that is legal is also usually ethical.104 The Ohio ethics opinion also agreed with the ABA that it was advisable for a lawyer to inform a client before recording a conversation, and it also extended this admonition to recording prospective clients.105 In contrast, the Wisconsin State Bar Professional Ethics Committee, which has not considered secret recording since the ABA issued Formal Opinion 01-422, stated, in 1994, that while secret recording of others is not per se unethical, “fiduciary duties owed by a lawyer to a client and the duty of communication under SCR 20:1.4 [the equivalent to Model

98. Id.
100. Id.
101. Doyle, supra note 72, at 4.
102. Id.
103. Id. at 4-5.
105. Id. at 7.
Rule 1.4] dictate that statements made by clients over the telephone not be recorded without advising the client and receiving consent to the recording after consultation.”

Because secret taping is legal in most jurisdictions as long as the lawyer is a party to the communication, and also ethical, does the potential benefit of secret recording outweigh the risks? The following part of this essay sets out the pros and cons of secret taping.

V. THE PROS AND CONS OF SECRET TAPING

The advantages and disadvantages of legally and ethically allowing lawyers to secretly record conversations may be assessed from several different points of view—the points of view of the justice system, the legal profession, the lawyer who does the recording, and the lawyer’s client.

From a systemic perspective, recording what a potential witness has to say helps to prevent the loss of evidence due to faulty recollection over time. Recording a witness also averts a witness’s conscious or unconscious distortion of testimony by information a witness learns at a later point. If the witness learns that he or she was secretly taped before testifying in a proceeding, the existence of the tape may discourage the witness from giving testimony that is unreliable or perjured. If a witness who was secretly taped testifies inconsistently with the recording, then the lawyer may use the recording to impeach the witness and expose the unreliable or perjured testimony.

From the organized bar’s point of view, secret taping has both positive and negative aspects. If secret taping results in more information to resolve factual issues and increases the reliability of witness testimony, then secret taping fulfills a positive function by improving the justice system. On the other hand, if the public views secret taping by lawyers as deceptive, then secret taping by a lawyer reflects negatively on the profession. Especially when a lawyer secretly tapes the lawyer’s own client, both the client and the public are likely to view the lawyer as disloyal. Certainly, Trump’s tweets indicate that he felt Cohen had acted improperly by taping their

106. Wis. State Bar Prof’l Ethics Comm’n, Formal Op. E-94-5, at 480 (1994). Citing to Wisconsin’s equivalent to Model Rule 8.4 and the Attorney’s Oath, the Wisconsin Ethics Committee also stated that the secret recording of judges and their staff is prohibited by the duty “to maintain the respect due to courts of justice and judicial officers.” Id.

107. For example, a Federal Rule of Evidence states that a party may use a witness’s prior statement during the examination of the witness. FED. R. EVID. 613. States also permit the impeachment of a witness with a witness’s prior inconsistent statement. See, e.g., PA. R. EVID. 613(a) (“A witness may be examined concerning a prior inconsistent statement made by the witness to impeach the witness’s credibility.”).
conversation. And, one commentator claims that “most Americans will likely side with the [sic] President Trump,” that secret taping “smacks of trickery.”

From the attorney’s perspective, there is a benefit in documenting exactly what was said by someone unaware that a conversation was being taped. For example, a defense lawyer talking with a witness could use a secret tape recording to help prove that the lawyer did not intimidate, coerce, or bribe the witness. Just as taping police interrogations protects police from false charges of misconduct, secretly taping witnesses can protect the lawyer from later false misconduct allegations by a witness, opposing party, or, in criminal cases, by the prosecution. Of course, the benefit of documenting exactly what was said by someone could be achieved if the lawyer openly tapes interviews or has a third party present, such as an investigator. The lawyer may believe that openly taping a witness or having a third person present may prompt a witness to be less candid or even refuse to talk to the lawyer, however.

From the client’s perspective, the client’s lawyer secretly taping others may give the client access to information that the client might not otherwise have, and, as discussed previously, secret recordings may allow a lawyer to impeach false or unreliable testimony against the client. A potential downside of secret taping for the client is that such recordings may be discoverable under rules of civil procedure and may constitute discoverable material under rules of criminal procedure. For example, Federal Rule of Civil Procedure 26 requires the initial disclosure of “all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.” Thus, if the recording is solely used for impeachment, it would not have to be initially disclosed. It would be subject to later disclosure if a subsequent discovery request asked for recordings of all witness statements, however.

108. See supra notes 9-10 and accompanying text.
110. Id.
111. For example, a person engaged in unlawful activity would be less likely to speak openly with a lawyer if the person knew the conversation was being taped. See Lefcourt, supra note 39, at 399.
113. The discovery rule provides that, with some limitations, a party “may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Id. at R. 26(b)(1).
of Criminal Procedure 26.2, and similar reciprocal state discovery rules, prior recorded statements by a defense witness must be turned over to the prosecution for use in impeachment.\footnote{114} If the recording provides a means for impeaching a witness who testifies favorably for the client, then the recording could wind up hurting the client’s position.

But, what about the client’s perspective on being secretly taped by her own lawyer? From the client’s perspective, it is difficult to imagine how a lawyer secretly taping conversations with the client would not undermine trust and confidence in the lawyer, just as the ABA’s current ethics opinion predicts.\footnote{115}

VI. CONCLUSION

In addition to undermining trust and confidence in one’s lawyer, a client discovering that she was secretly taped by her own lawyer would most likely lead to a breakdown in the attorney-client relationship. Whether this is what occurred between Cohen and Trump is unclear, but there are some things we do know that point in that direction.

It is very likely that Cohen was still Trump’s lawyer at the time that the FBI searched Cohen’s office, hotel room, and home on April 9, 2018.\footnote{116} We know this because Trump stated on April 5, 2018, a few days before the FBI searches, that Cohen was representing Trump.\footnote{117} On April 16, 2018, the judge presiding over Cohen’s case ruled that Cohen could review the materials the FBI seized, and he could share materials with lawyers representing Trump.\footnote{118} When Cohen shared the tapes with Trump’s lawyers is unclear, but a member of Trump’s legal team, Rudy Giuliani, stated that Cohen was no longer representing Trump on May 11, 2018.\footnote{119} Giuliani

\footnote{114. “After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant’s attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness’s testimony.” \textsc{Fed. R. Crim. P.} 26.2(a). A statement included “any recording or any transcription of a recording.” \textit{Id.} at R. 26.2(f)(2).}
\footnote{115. ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 01-422 (2001).}
\footnote{116. Apuzzo, supra note 7.}
\footnote{117. Darren Samuelsohn, Guiliani: Cohen Is Not Trump’s Lawyer Anymore ‘As Far as We Know’, \textsc{Politico} (May 11, 2018, 2:01 PM), \url{https://www.politico.com/story/2018/05/11/michael-cohen-not-trump-attorney-583902}. On April 5, 2018, when reporters asked Trump about the payment Cohen had made to McDougal to silence her, Trump said: “You have to ask Michael Cohen . . . Michael’s my attorney and you’ll have to ask Michael.” \textit{Id.}}
\footnote{119. Samuelsohn, supra note 117.}
also stated that Trump’s legal team “never really determined’ a precise day” when Cohen stopped representing Trump.\textsuperscript{120} So, sometime after April 5 and before May 11, Trump terminated his attorney-client relationship with Cohen.

In July 2018, Trump’s lawyers waived any claims of attorney-client privilege on Trump’s behalf in connection with the conversation Cohen secretly recorded concerning the payment to McDougal,\textsuperscript{121} as well as to at least eleven other audio files.\textsuperscript{122} It is unclear from this timeline if Trump terminated Cohen after learning that Cohen had secretly taped him, because we do not know for certain when Trump learned of the secret tapes. What is clear, at least from Trump’s tweets, is that Trump was unhappy and upset with Cohen secretly taping him. It is reasonable to assume that if Cohen was still Trump’s lawyer when Trump learned of the secret tapes, Trump would have fired him because Cohen had secretly taped him.

Whether secret taping will play an even greater role in the Special Counsel Mueller’s investigation is still unknown. Unlike Nixon’s secret tapes, the secret tape of Trump that has been disclosed thus far is “no smoking gun” that would lead Trump to resign. Also, unlike Tripp’s secret tapes of Lewinsky, the secret tapes involving Trump and his associates do not seem to be sufficient to lead to an impeachment. Even if secret tapes do not directly affect the Trump presidency, it is remarkable that secret taping has played such a prominent role in Special Counsel investigations involving three Presidents. If the past is any indication, then secret taping is likely to continue to play a prominent role in Special Counsel investigations.

\textsuperscript{120} Id.


Prosecutors in the Court of Public Opinion

Bruce A. Green*

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I. INTRODUCTION

Some prosecutors have been criticized for discussing their cases in the public media,1 but not Special Counsel Robert Mueller. Following his appointment to probe the connection between Russia and the Trump presidential campaign,2 he gave no interviews. His office’s web page on the Department of Justice website, linking to public filings, was unilluminating.3 He did not hold press conferences following indictments after defendants were convicted or sentenced, or after submitting his final report to the Attorney General.4 Nor does it appear that Mueller’s office “leak[ed]” information by speaking to reporters off the record.5

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1. See infra notes 27-36 and accompanying text.
3. See Special Counsel’s Office, U.S. DEPT JUST., https://www.justice.gov/sco (last visited Feb. 26, 2018). The webpage lists cases where charges were brought and provides links to court filings in those cases, a link to the Order appointing Mueller, and a link to Statements of Expenditures. Id.
4. If not routine, prosecutors’ press conferences following indictments and convictions in high-profile cases are certainly common. See Bennett Gershman, The Prosecutor’s Duty of Silence, 79 ALB. L. REV. 1183, 1193 (2016) (“The press conference has become . . . a fixture in the criminal justice system . . . .”).
5. See, e.g., Dan Janison, At the Trump-term Midpoint, Another Volatile Year Awaits, NEWSDAY (Dec. 30, 2018, 6:00 AM), https://www.newsday.com/long-island/columnists/dan-
Mueller was described in the *Washington Post* as “a man who seldom speaks and is rarely seen . . . omnipresent and absent, inescapable but elusive.”6 His reputation for keeping a low profile as Special Counsel spread internationally. Before his team tried Paul Manafort in mid-2018, an English-language newspaper in Armenia described Mueller as “Sphynx-like” and observed: “The only public voice he has had so far is through its court filings. In fact, he has been so scarce in the public’s view that most media outlets are running the same series of photographs taken as he walked the halls of the US Capitol back in June 2017.”7

One might wonder whether Mueller was reticent to a fault. Former Independent Counsel Ken Starr, who investigated President Clinton, seemed to think so. Commenting on Mueller’s investigation, Starr expressed the view that federal prosecutors’ obligation of accountability to the public ordinarily calls on them to speak more freely about their work.8

Using Special Counsel Mueller’s investigation as a case study—indeed, as a study in contrast—this essay considers prosecutors’ relationship with the media. It identifies some law enforcement-related reasons why, in limited circumstances, prosecutors’ offices might discuss their investigations and prosecutions outside of judicial proceedings. But this essay challenges the idea that prosecutors’ duty of accountability requires them generally to discuss ongoing cases in the public media.9

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8. Roberts, *supra* note 6 (quoting Starr: “A federal prosecutor wields important powers and thus should always be held accountable by the American people. That accountability carries with it, in my view, a role for providing public information . . . without transgressing important limitations—especially the protection of grand jury secrecy.”); see also Bernard Shaw et al., *Impeachment Hearings: Clinton Attorney Kendall Questions Ken Starr; David Schippers Paints Starr in a Favorable Light* (CNN Live Event/Special broadcast Nov. 19, 1998, 8:30 PM) (quoting Starr: “I think it is the duty of the prosecutor to combat the dissemination of misinformation as long as the prosecutor can do that without violating his or her obligations under rule 6(e). And that’s the position . . . of the Justice Department.”).
9. The focus of this essay is prosecutors’ recourse to the public media in their official capacity. It does not address whether, in their personal capacity, individual prosecutors have legitimate reasons to discuss their or their offices’ work. With respect to prosecutors speaking extrajudicially on their own behalf, see Emily Anne Vance, Note, *Should Prosecutors Blog, Post, or Tweet?: The Need for New Restraints in Light of Social Media*, 84 FORDHAM L. REV. 367 (2015).
II. THE RUSSIA INVESTIGATION AS A STUDY IN CONTRAST

Mueller’s approach was a throwback to the days when it was considered unprofessional to try one’s case in the press. Although contemporary rules of professional conduct restrict what trial lawyers may say about their cases outside formal judicial filings and proceedings, the rules now leave considerable room for advocates to try to exploit the public media to their clients’ advantage. One provision, Model Rule of Professional Conduct 3.6, forbids advocates from making public statements that “will have a substantial likelihood of materially prejudicing” a trial, but recognizes that many public statements will not taint a jury. Another provision, Rule 3.8(f), admonishes prosecutors in particular not to make “extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.” But the rule does not address prosecutors’ public comments that do not add to the defendant’s embarrassment—including comments that vilify uncharged third parties. The rule also includes an exception allowing prosecutors to vilify a defendant if the prosecutors are discussing the nature and extent of their own actions and their comments serve “a

10. See Canons of Prof’l Ethics Canon 20 (Am. Bar Ass’n 1908) (stating: “Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned.”); see also Gleason L. Archer, Ethical Obligations of the Lawyer 200 (1910) (“If a lawyer, either through a desire for personal notoriety, or with an intent to injure the adverse party, gives out facts or allegations of facts that should properly be reserved until the trial day, he is guilty of improper conduct.”); see generally Lonnie T. Brown, Jr., “May it Please the Camera, . . . I Mean the Court”—An Intrajudicial Solution to an Extrajudicial Problem, 39 Ga. L. Rev. 83, 95 (2004) (describing ABA’s position in the early 20th century “that lawyer commentary regarding cases should be limited to the confines of the courtroom only”).


12. Model Rules of Prof’l Conduct r. 3.6(a).

13. See id. at r. 3.6(b); see also id. at r. 3.6 cmt. 4.

14. Id. at r. 3.8(f).
legitimate law enforcement purpose.”

Courts sanction prosecutors infrequently for violating these rules.

Advocates do not generally discuss their cases publicly, because the public usually would not be interested and, in any event, the pitfalls often outweigh the benefits to the client. But in high-profile cases, lawyers sometimes exploit the leeway afforded by the Model Rules of Professional Conduct to speak in the press and social media. If a lawyer lacks the skill to do so effectively, the lawyer can hire a public relations specialists to provide assistance.

Mueller’s example offers an interesting case study in which to consider why prosecutors resort to the public media and, in particular, to consider Starr’s view that commenting on ongoing cases is necessary as a matter of prosecutorial accountability. As a case study, Mueller’s investigation serves as a study in contrast in at least the following five respects.

First, and most obvious, is the stark contrast with the exuberant use of public media by both the subjects and the targets of Mueller’s investigation, as well as their lawyers. President Trump, in particular, used both social media and traditional media to attack Mueller and discredit his investigation. Trump maintained a steady barrage of tweets, asserting, for example, that the investigation is “[t]he single greatest Witch Hunt in American History,” and that “Mueller is a conflicted prosecutor gone rogue.” One of Trump’s lawyers, Rudolph Giuliani, went on the air to disassociate Trump from the crimes for which Trump’s former aides were convicted, and to join in his client’s attacks on the legitimacy of

15. Id.
17. See Brown, supra note 10, at 86 (“There can be no question that high-profile cases are almost routinely tried in the media . . . .”).
Mueller’s work. His acknowledged objective was to sway the public against the possibility of impeachment.

Second, Mueller’s approach stood in a marked contrast to how some other federal prosecutors have publicly discussed their high-profile cases at early stages when the defendant was still entitled to a trial at which he will be presumed innocent. For example, during the investigation of President Clinton, Starr and his office spoke with reporters on the record and, some alleged at the time, off the record, by way of “leaking” information about the investigation’s progress. In cases of public interest, it is not unusual for prosecutors to issue press releases and conduct press conferences announcing an indictment, in order to explain the public filing in a way that is more accessible to the public and to provide quotable sound bites or a visual for the televised news. At later stages, prosecutors sometimes comment on significant events that occurred in the course of the proceedings.

As a United States Attorney in the 1980s, Rudolph Giuliani was criticized for his and his office’s accessibility to the press. For example, Giuliani accused Mueller’s office of unethical conduct. See, e.g., Sheetal Sukhija, Rudy’s Rudimentary Rant: Masking Fears with Mueller-Bashing, BIG NEWS NETWORK (Dec. 5, 2018), https://www.bignewsnetwork.com/news/258494813/rudys-rudimentary-rant-masking-fears-with-mueller-bashing (quoting Giuliani: “This isn’t a search for the truth. It’s a witch hunt. This is what is wrong with these special prosecutors and independent counsels. They think they are God. They seemed to want to prosecute people at any cost, including the cost of ethical behaviour [sic] and the rights of people”). For a view that Giuliani himself acted unethically in his public commentary, see Ellen C. Brotman, Advice for the President’s New Lawyer: There’s a Rule for That, LEGAL INTELLIGENCER, June 15, 2018 (asserting that Giuliani’s claim that Mueller is trying to “frame” the President is legally and factually baseless, and observing: “Giuliani’s statements accusing a high-ranking Department of Justice official implicate at least two Rules of Professional Conduct: Rule 4.1(a), which prohibits making a false statement of material fact to a third person and Rule 8.4 (d) [sic], which prohibits conduct that is prejudicial to the administration of justice.”). Charles M. Blow, Trump Reeks of Fear, N.Y. TIMES, July 9, 2018, at A21 (quoting Giuliani’s statement to CNN interviewer Dana Bash: “Of course, we have to do it in defending the president [sic]. We are defending—to a large extent, remember, Dana, we are defending here, it is for public opinion, because eventually the decision here is going to be impeach, not impeach. Members of Congress, Democrat and Republican, are going to be informed a lot by their constituents. So, our jury is the American—as it should be—is the American people.”). See, e.g., Judy Woodruff & John King, White House Accuses Starr of Abuse of Power (CNN Worldwide broadcast Feb. 24, 1998, 6:23 PM) (quoting public statement issued by Starr’s office regarding its investigation).

See Gershman, supra note 4, at 1193-96.

See id. at 1194.

See, e.g., Nancy Blodgett, Press-sensitive: Prosecutors’ Use of Media Hit, 71 A.B.A. J. 17, 17 (1985) (quoting judicial administrator: “Giuliani is a classic illustration of a prosecutor who has disregarded the rules . . . . He’s developed it into a new art form, revealing all sorts of things he should not and treating indictments like convictions.”); Alexander Stille, A Dynamic Prosecutor Captures the Headlines, NAT’L L.J., June 17, 1985, at 2. (“Recently, prominent members of the New York bar have begun to criticize Mr. Giuliani sharply for conducting trial by press conference. The local bar association responded to the criticisms by opening an investigation into the abuse of pretrial publicity.”). Giuliani’s controversial use of the
used his position as U.S. Attorney as a springboard to become a candidate for the New York City mayoralty. His exploitation of the media became a model for later prosecutors with higher ambitions. The criticisms underscored the difficulty of determining a prosecutor’s motivation for speaking in the public media—and, in particular, whether the motivation is to serve a law enforcement interest or primarily to advance the prosecutor’s own reputation and career.

Although the Model Rules of Professional Conduct leave prosecutors room to speak extra-judicially, some prosecutors have skirted, if not crossed, the lines drawn by the rules. One noted example was Attorney General John Ashcroft’s public assertion in September 2001 that three men who had been arrested in Detroit on terrorist-related charges were suspected of having advanced knowledge of the September 11, 2001 terrorist attacks.\(^\text{28}\) Ashcroft’s statement contravened a judicial gag order and had no factual basis.\(^\text{29}\) Although Ashcroft later withdrew his statement, he was undeterred; his later, similar transgressions led to a contempt motion and a judicial admonition.\(^\text{30}\) And, notably, the arrested men’s convictions were eventually set aside.\(^\text{31}\) Another prominent example of over-reaching was U.S. Attorney Patrick Fitzgerald’s 2008 press confer-

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\(^{29}\) Id. at 745; Peter Margulies, Above Contempt?: Regulating Government Overreaching in Terrorism Cases, 34 Sw. U. L. Rev. 449, 481-83 (2005).

\(^{30}\) Koubriti, 305 F. Supp. 2d at 757-66.

ence announcing the indictment of Illinois Governor Rod Blagojevich, at which Fitzgerald remarked that “Lincoln [would] roll over in his grave.”

More recently, U.S. Attorney Preet Bharara drew criticism for his statements in a press conference, a press release, a news interview, tweets, and a law school speech relating to a corruption case against the Speaker of the New York State Assembly. In the district court’s characterization, Bharara “bundle[d] together unproven allegations . . . with broader commentary on corruption and a lack of transparency in certain aspects of New York State politics.” Professor Bennett Gershman charged that Bharara’s vilification of the defendant’s character and proclamation of his guilt—such as Bharara’s assertion that the defendant “corruptly profit[ed] from [the] tremendous personal fortune he amassed through the abuse of his political power”—prejudiced the fairness of the upcoming trial. While not going so far, the district judge in Silver found the prosecutor’s statements to be “of concern” and “problematic,” rejected the prosecutor’s defense of some as “pure sophistry,” and “cautioned that this case is to be tried in the courtroom and not in the press.”

Third, the Mueller case study offers a contrast between Mueller’s extra-judicial silence and his intra-judicial words and deeds. Both his team’s work product and the manner in which they produce it spoke volumes, and their significance was amplified by the public media. Mueller’s office had little need to offer explanations of filings and actions that might be opaque, or to provide sound bites in order to attract public interest, because the investigation attracted ample public discussion and analysis in response to every public aspect of its work—often in response to the prosecutors’ momentary quiescence. Legally trained commentators appearing in various public media eagerly explicated and analyzed Mueller’s every move. Although Mueller’s office’s judicial filings and appearances did not afford an opportunity to respond expressly and immediately to every public criticism or misconception, his office’s work offered many implicit responses. For example, Mueller’s office answered

34. Id. at 378-79.
36. Silver, 103 F. Supp. 3d at 379, 379 n.8, 382.
broad accusations that it was engaged in a “witch hunt” by amassing indictments and convictions, including convictions of powerful men who had been Trump aides: Trump’s former national security advisor, Michael Flynn; Trump’s personal lawyer, Michael Cohen; Trump’s campaign consultant, Paul Manafort; and Trump’s foreign policy advisor, George Papadopoulos.37 The guilty pleas and, in Manafort’s case, jury verdict, showed that Mueller’s investigation was uprooting crimes, not fabricating them.

Mueller’s office has also responded implicitly to assertions that it was partisan or, in Trump’s word, “conflicted.”38 Although Mueller is himself a Republican, his team was said to be comprised principally of Democrats working to advance their partisan political preferences.39 By staying out of the spotlight, Mueller and his team avoided the impression that they were over-zealous, expressing their own personal preferences, or acting to promote their own perceived interests; they implicitly conveyed that, to the contrary, they were professionals, conducting their work in accordance with professional norms—that, like conventional prosecutors, they were simply “following the evidence” and the law.

Mueller’s judicial filings also provided an opportunity to respond to some of his critics’ more specific claims. Most significantly, Trump and his supporters asserted repeatedly as the investigation progressed that his associates’ crimes had nothing to do with him.40 That claim was implicitly answered by Mueller’s filings in Michael Cohen’s case.41 The charging instrument (a criminal “information” rather than an indictment), to which Cohen pleaded guilty, alleged that Cohen lied to Congress about the proposed development of Trump properties in Moscow, including about the timing and extent of Trump’s involvement in the project.42 He did so, the document said, in order to “minimize [the] links between the Moscow Project and [Trump]”—to whom the document referred as “Individual 1”—

37. See Special Counsel’s Office, supra note 3.
40. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 30, 2017, 7:25 AM), https://twitter.com/realDonaldTrump/status/925005659569041409 (Trump tweeted that Paul Manafort was indicted for acts predating his campaign).
42. Id.
and to “give the false impression that the Moscow Project ended before ‘the Iowa caucus.”43 By lying, it was alleged, Cohen “hope[d] [to] limit[] the ongoing Russia investigations.”44

Fourth, there is a contrast between the amount of information that Mueller’s office publicly revealed in court, little by little and case by case, and the far greater amount it evidently amassed over the course of its investigation, out of the public eye and under the cloak of grand jury secrecy.45 To the extent that Mueller’s office obtained grand jury testimony and documentary evidence pursuant to grand jury subpoena, criminal procedure rules generally required the office to protect witnesses’ privacy by keeping the evidence secret until it is to be used in judicial proceedings.46 Even to the extent that the law does not tie prosecutors’ hands, the public interest in the effectiveness of ongoing criminal investigations, as well as fairness to witnesses and others, ordinarily impels prosecutors to preserve secrecy.47

Staying out of the public media is consistent with Department of Justice regulation and policy, even if not compelled by it. Under the Department’s regulations, when Mueller completed his work as Special Counsel, he was required to submit to the Attorney General a confidential report explaining his decisions to prosecute or not prosecute cases.48 In the interim, he was required to provide the Attorney General annual budget requests49 and notify the Attorney

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43. Id.
44. Id. Later, implicitly responding to the suggestion that investigators had tricked or pressured Michael Flynn into lying to them, Mueller’s sentencing memo made clear that Flynn had no excuse for lying to the investigators, as Flynn was then forced to concede in court. See Eric Tucker & Chad Day, Judge Scolds Former Trump Aide; Flynn’s Sentencing for Lying to the FBI Delayed Until March, CHI. TRIB., Dec. 19, 2018, at C11.
45. See Jennifer Rubin, Distinguished Person of 2018: His Results Speak for Themselves, WASH. POST (Dec. 30, 2018), https://www.washingtonpost.com/opinions/2018/12/30/distinguished-person-his-results-speak-themselves/?utm_term=.93d1b0377949 (observing: “[Mue-ller] has operated without fanfare or leaks. His court filings have repeatedly surprised onlookers, reminding us we know a fraction of what Mueller and his prosecutors have uncovered.”).
46. FED. R. CRIM. P. 6(e)(2).
47. Prosecutors customarily cite these public interests in opposing the expansion of criminal defendants’ rights to broader discovery in criminal cases. See Bruce A. Green, Federal Criminal Discovery Reform: A Legislative Approach, 64 MERCER L. REV. 639, 649 (2013) (noting that in arguing against expanding discovery, “[t]he government typically relies [on] . . . primarily, the need to protect public safety and prevent obstruction of justice”). It might seem hard for prosecutors to defend disclosures of non-public information in the public media while maintaining the need to keep non-public information out of the hands of indicted defendants who may need to information to defend themselves at trial or to make informed decisions regarding whether to plead guilty.
48. 28 C.F.R. § 600.8(c) (2019).
49. Id. § 600.8(a)(2).
General of significant events. But no regulation or policy requires reporting directly to the public through press releases, interviews, or other means. There is a regulation concerning a Special Counsel’s “conduct and accountability,” but it does not presuppose that “accountability” requires public transparency. Rather, the regulation focuses on the Special Counsel’s accountability to the Attorney General: it requires the Special Counsel to comply with the Department’s “rules, regulations, procedures, practices and policies,” obligates the Special Counsel to answer the Attorney General’s questions about investigative and prosecutorial decisions, and subjects the Special Counsel to discipline or removal by the Attorney General.

There is nothing to suggest that Mueller’s investigation and prosecutions, or that the public interest in general, were disadvantaged by his unwillingness to discuss his cases in the public media. His supporters seemed to admire his restraint, and even his critics did not complain about it. Although prosecutors sometimes assume that a strong public presence will encourage witnesses to come forward, or that a fearsome public presence will encourage reluctant witnesses to cooperate, Mueller’s office appeared to have more effective tools to identify potential witnesses and secure their cooperation. These included FBI investigators, grand jury subpoenas, and access to search warrants and immunity and compulsion orders. To the extent that there is a public interest in keeping criminal investigations and prosecutions in the public consciousness in order to deter future wrongdoing, that interest also seemed to be served without press conferences and interviews by Mueller and his staff. No one could suggest that, by keeping its own counsel, Mueller’s office kept its work out of the media. Public discussion of the ongoing Russia investigation was virtually continuous. If anything, his office’s secrecy fueled public discussion, allowing commentators to speculate exhaustively and without any contradiction from Mueller about what his office may have learned, may be doing, and may be likely to do next.

50. Id. § 600.8(b). Regarding this obligation, see United States Attorneys’ Manual § 1-7.700 (U.S. DEP’T OF JUSTICE 1988).
51. 28 C.F.R. § 600.7.
52. Id.
53. See David Zurawik, Trump vs. Mueller: Our National Cliffhanger, BALTIMORE SUN, Dec. 23, 2018, at E1 (“Mueller, without saying a word on cable TV or firing off a single tweet, now has a starring role equal to Trump’s. It’s tempting to think Trump is fighting a media war while Mueller is quietly doing his job, but the special counsel has proved to possess an uncanny sense of timing in the way he speaks through indictments and court filings.”).
Fifth, there is a marked contrast between Mueller’s ordinary daily reticence and his office’s rare public disclosure. In January 2019, an online news outlet, Buzzfeed, reported that, according to unidentified government officials, Mueller’s office had obtained witness statements and documentary evidence corroborating Michael Cohen’s assertion that President Trump had told him to lie to Congress. The report elicited a strong public reaction, including from some members of Congress, because, if true, the Special Counsel now possessed compelling evidence of obstruction of justice by the President himself. The following day, however, disavowing Buzzfeed’s account, Mueller’s spokesman issued a statement: “Buzzfeed’s description of specific statements to the special counsel’s office, and characterization of documents and testimony obtained by this office, regarding Michael Cohen’s congressional testimony are not accurate.” Media accounts noted the exceptional nature of the Special Counsel’s Office’s departure from its practice of not commenting publicly on its investigative progress.

Perhaps just as notable is how unforthcoming the disclosure was. The Office did not say in what ways, or to what extent, Buzzfeed’s report was inaccurate—for example, whether Buzzfeed mischaracterized Cohen’s account; whether Cohen did say that Trump directed him to lie to Congress but his account was contradicted by other evidence and, as the White House claimed, “categorically false;” or whether Cohen implicated Trump but the corroborative testimony and evidence obtained by investigators was simply less compelling than Buzzfeed’s report conveyed. Nor did the Office’s statement explain why, on this particular occasion, it elected to make a public statement, however terse, about the progress of its investigation in response to a media report—for example, whether its objective was to mitigate the political or reputational harm to the President caused by unwarranted speculation, or whether it was motivated to redress an improper “leak” by a public official. Nor did the Office indicate when, in the future, some significance

56. Id. (quoting spokesman Peter Carr).
57. See, e.g., id. (referring to the Office’s “rare public statement”).
58. See id. (quoting White House press secretary Sarah Huckabee Sanders).
59. See id.
can and cannot fairly be read into its nonresponse to public claims about its investigation.\textsuperscript{60}

### III. Why Should Prosecutors Ever Discuss Their Cases in the Public Media?

Given Mueller’s example, one might naturally wonder what legitimate reasons prosecutors ever have to hold press conferences, give interviews and speeches, blog or tweet about the work, or otherwise discuss their cases in the public media? The professional literature assumes that there are sometimes legitimate reasons for lawyers, including prosecutors, to speak extra-judicially. For prosecutors in particular, the justifications are not well-elaborated.

The Model Rules of Professional Conduct themselves do not say much about when lawyers generally, and prosecutors particularly, should discuss their cases in the media. The rules are designed to be enforced by attorney disciplinary authorities, so the rules focus on circumstances in which lawyers may not speak extra-judicially.\textsuperscript{61} To a significant extent, the rules’ line-drawing is influenced by the First Amendment right to free speech, which requires a state to have a substantial justification before restricting public discussion of legal proceedings and to define the area of forbidden speech with sufficient particularity to avoid chilling speech that is constitutionally protected.\textsuperscript{62} The Model Rules of Professional Conduct allow lawyers considerable room to comment publicly on their cases, because doing so does not necessarily threaten the fairness of criminal proceedings or otherwise risk serious harm, and because it is hard to draft with precision in order to capture the situations where lawyers’ public comments are prejudicial while avoiding the possibility of chilling protected speech. The rule drafters did not mean to encourage lawyers to speak whenever the rules allow them to do so.\textsuperscript{63}

To the extent that the professional literature identifies legitimate reasons for private lawyers to speak in the public media, those ra-

\textsuperscript{60} See id.

\textsuperscript{61} See Model Rules of Prof’l Conduct r. 3.6, 3.8(f) (Am. Bar Ass’n 2018); see also generally Brown, supra note 10, at 108-12 (discussing “permissible areas of comment” under Rule 3.6).


\textsuperscript{63} See, e.g., Gentile, 501 U.S. at 1058 (“A profession which takes just pride in these traditions may consider them disserved if lawyers use their skills and insight to make untested allegations in the press instead of in the courtroom. But constraints of professional responsibility and societal disapproval will act as sufficient safeguards in most cases.”).
tionales do not necessarily apply equally to prosecutors. In particular, criminal defense lawyers might legitimately speak in the media to counterbalance the negative portrayal and public discussion of a defendant resulting from an indictment. The objective is to offset the jury venire’s unfair preconceptions and to redress the diminution of the client’s reputation in the community. This was the defense lawyer’s reason for discussing his client’s case in *Gentile v. State Bar of Nevada*, where the Court struck down Nevada’s rule restricting lawyers from discussing their pending cases. In his plurality opinion, Justice Kennedy acknowledged that “in some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts.” This rationale is inapplicable to prosecutors, who do not have a client whose reputation is at stake and do not have to contend with any publicity that may undermine the presumption of innocence. For prosecutors, discussing a pending case is more likely to enhance unfair prejudice than to counter it.

The rule drafters nevertheless assumed that it is sometimes useful for prosecutors to discuss their work. As noted, Model Rule of Professional Conduct Rule 3.8(f) expressly allows the possibility that a prosecutor, even if heightening public condemnation of the accused, will nevertheless be serving “a legitimate law enforcement purpose.” But the rule leaves it to prosecutors to decide what a “law enforcement purpose” is and when one is “legitimate.”

A Comment to Model Rule of Professional Conduct Rule 3.6, the rule restricting prejudicial extra-judicial speech, specifically identifies only a rare occasion when it may be necessary for prosecutors to discuss a case in the media. That is when there is a need to let the public know that their safety is at risk—for example, that there is a killer on the loose—and what law enforcement authorities are doing about the problem.

The recently updated ABA Criminal Justice Standards on Fair Trial and Public Discourse offer an equally narrow view. These

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64. *Id.*
65. *Id.*
66. *See, e.g.*, Matheson, *supra* note 11, at 889 (condemning prosecutors’ speech to gain a tactical advantage).
67. *Model Rules of Prof'l Conduct* r. 3.8(f) (AM. BAR ASS’N 2018).
68. *See* Brown, *supra* note 10, at 114-15 (discussing the vagueness of the phrase “legitimate law enforcement purpose” in Model Rule of Professional Conduct 3.8(f)).
69. *Model Rules of Prof'l Conduct* r. 3.6 cmt. 1.
70. *Id.* ("The public has a right to know about threats to its safety and measures aimed at assuring its security.").
standards identify only two kinds of statements by prosecutors “that serve a legitimate law enforcement purpose,” namely, “state-
ments reasonably necessary to warn the public of any ongoing dan-
gers that may exist or to quell public fears” and “statements rea-
sonably necessary to obtain public assistance in solving a crime, ob-
taining evidence, or apprehending a suspect or fugitive.” The list
of two is not meant to be exclusive. But it is hard to see how these
two considerations or others like them might have impelled
Mueller, or other prosecutors in white-collar criminal cases, to hold
a press conference or post on social media.

Like the ABA’s rules and standards, the Department of Justice
regulations and internal policies governing federal prosecutors’
communications with the press focus on impermissible commu-
nications. The Department has articulated only a vague view of when
it is advisable for prosecutors to discuss their ongoing cases in the
public media. The internal policy says that “[t]here are circum-
stances when media contact may be appropriate after indictment or
other formal charge, but before conviction,” and allows prosecu-
tors to assist the news media “[i]n order to promote the aims of law
enforcement, including the deterrence of criminal conduct and the
enhancement of public confidence.” But the policy is not specific
about the “appropriate” circumstances or about when extrajudicial
speech furthers law enforcement aims.

The Department of Justice policy strictly limits the range of per-
missible extrajudicial speech. It allows press conferences “only for
significant newsworthy actions, or if an important law enforcement
purpose would be served,” and even then, “communications with
the media should be limited to the information contained in publicly
available material, such as an indictment or other public plead-
ings.” Most significantly, the effect of this policy is to bar federal
prosecutors from explaining their decisions not to take investigative
or prosecutorial action and, in particular, their decision not to bring
criminal charges. FBI Director Jim Comey, acting under the au-
thority delegated by Attorney General Loretta Lynch, was criticized

72. Id. at Standard 8-2.2(b)(ii).
73. Rather, the two categories are meant merely to be examples. See id. (endorsing
“statements that serve a legitimate law enforcement purpose, such as” the two kinds listed).
74. See, e.g., 28 C.F.R. § 50.2(a)(2) (2019) (“[T]he release of information for the purpose
of influencing a trial is, of course, always improper.”).
75. UNITED STATES ATTORNEYS’ MANUAL § 1-7.700(B) (U.S. DEPT OF JUSTICE 1988).
76. Id. § 1-7.710(B).
77. See generally id. §§ 1-7.000-7.900.
78. See generally id.
79. Id. § 1-7.700(A).
80. Id. § 1-7.700(B).
for contravening this policy when, in the lead-up to the 2016 presidential election, he discussed the decision not to prosecute Hillary Clinton in connection with her use of a private e-mail server.  

Tellingly, neither the organized bar’s model rules and standards nor federal prosecutors’ internal regulations and rules discuss “accountability” to the public; neither endorses the view that, as a matter of accountability, prosecutors should or must speak publicly, outside the judicial setting, about their ongoing work. The comments to the Model Rules of Professional Conduct acknowledge the public’s interest in learning about judicial proceedings in order to engage in public debate and deliberation regarding the law and legal processes, but they do not encourage or endorse prosecutors’ extra-judicial speech to promote these interests. Similarly, the Department of Justice acknowledges that its internal policy on confidentiality and media contacts gives weight to “the right of the public to have access to information about the Department of Justice.” But nothing suggests that federal prosecutors should, or must, resort to the public media out of respect for this right. At most, the public’s “right to know” restricts prosecutors from placing impediments in the public media’s path. And, as noted, when it comes to a Special Counsel in particular, the Department of Justice regulations focus on “accountability” to the Attorney General, not the public directly. On the contrary, the regulation requires the Special Counsel to deliver a final report in confidence to the Attorney General, who may elect to keep the report confidential. The arguable implication is that the Special Counsel may not be accountable to the public directly.

81. See, e.g., Memorandum from Rod J. Rosenstein, Deputy Attorney General, to the Attorney General re: “Restoring Public Confidence in the FBI” (May 9, 2017) (https://www.justice.gov/oip/foia-library/moss/download) (“Compounding the error, the Director ignored another longstanding principle: we do not hold press conferences to release derogatory information about the subject of a declined criminal investigation. Derogatory information sometimes is disclosed in the course of criminal investigations and prosecutions, but we never release it gratuitously.”).

82. See 28 C.F.R. § 50.2 (2019); UNITED STATES ATTORNEYS’ MANUAL §§ 1-7.000-7.900.

83. See MODEL RULES OF PROF'L CONDUCT r. 3.6 cmt. 1 (AM. BAR ASS'N 2018) (“[T]here are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves,” and the public “has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.”).

84. UNITED STATES ATTORNEYS’ MANUAL § 1-7.001.

85. See id. § 1-7.710(A) (“DOJ personnel shall not prevent lawful efforts by the news media to record or report about a matter, unless by reason of a court order.”).

86. See supra notes 48-52 and accompanying text.

87. 28 C.F.R. § 600.8(c) (2019).
IV. DOES PROSECUTORS’ ACCOUNTABILITY REQUIRE THEM TO DISCUSS THEIR CASES IN THE PUBLIC MEDIA?

Do prosecutors have a duty of public accountability that calls on them to discuss their work in the public media, not just in court? Ken Starr is not the only one to suggest as much.\textsuperscript{88} But prosecutors themselves do not appear to think so: they do not routinely discuss their cases in the media, and there is no public demand for them to do so. Prosecutors might plausibly justify their extra-judicial discussions of cases by citing law enforcement interests such as deterrence, the discovery of evidence, and public safety. Prosecutors might also cite the need to promote public understanding. But they rarely assert that they have a general duty to hold themselves accountable to the public by updating the public about their work.

It is important to note that “accountability” has no fixed meaning in this context. Much of the discussion of prosecutors’ “accountability” focuses on whether prosecutors are complying with their legal and disciplinary obligations, whether they are otherwise abusing their power, and whether there are adequate disciplinary processes and other procedural mechanisms for holding prosecutors accountable for illegal or abusive conduct.\textsuperscript{89} But the claim that prosecutors must tell the public what they are doing and why rests on a broader understanding of accountability—an idea of political accountability. The assumption is that prosecutors—especially elected prosecutors—must be politically accountable to the public, and that political accountability presupposes public transparency.\textsuperscript{90}

If one assumes that a prosecutor’s job is to exercise authority in accordance with public preferences, then political accountability might presuppose much greater public transparency than is currently the norm.\textsuperscript{91} Prosecutors might be expected to explain their

\textsuperscript{88} See, e.g., Brown, supra note 10, at 125 (“Prosecutors have an obligation as public officials to keep the citizenry reasonably informed regarding criminal matters.”).

\textsuperscript{89} See, e.g., Bruce Green & Ellen Yaroshefsky, Prosecutorial Accountability 2.0, 92 NOTRE DAME L. REV. 51, 51 (2016) (“Given prosecutors’ extraordinary power, it is important that they be effectively regulated and held accountable for misconduct.”) (footnote omitted); Bidish Sarma, Using Deterrence Theory to Promote Prosecutorial Accountability, 21 LEWIS & CLARK L. REV. 573, 579-82 (2017).

\textsuperscript{90} See Angela J. Davis, The American Prosecutor: Independence, Power, and the Threat of Tyranny, 86 IOWA L. REV. 393, 397 (2001) (“In most cases, the mechanisms that purport to give the general public the ability to hold prosecutors accountable are ineffective and meaningless. Most citizens know very little about the practices and policies of their local prosecutor.”).

\textsuperscript{91} See, e.g., Daniel Epps, Adversarial Asymmetry in the Criminal Process, 91 N.Y.U. L. REV. 762, 822 (2016) (“If our system of broad prosecutorial discretion is in theory supposed to produce results that accord with the public’s preferences, in practice it has two significant and related accountability deficits. First, prosecutors’ broad discretion gives them a tremendous amount of power, and some of the ways they exercise that power are troubling. Second,
public actions—for example, why they initiated an investigation, used a particular investigative technique, initiated charges, or accepted a plea bargain. They might also be expected to identify and explain roads not taken—for example, why they declined to investigate, eschewed particular investigative measures, or closed an investigation without bringing charges. Prosecutors rarely explain their decisions, and they rarely even disclose the fact that they have decided not to act in particular ways. But without knowing what prosecutors decided to do, or not to do, and why, the public could not hold prosecutors politically accountable for implementing popular preferences.

If prosecutors’ job is not to carry out the public will in individual cases, but to act competently in accordance with the law and professional norms, then it is less obvious that prosecutors must discuss their work extra-judicially, rather than speaking only through their judicial filings and statements. To be politically accountable as a public official does not invariably require reporting to the public. National security officials and military leaders are accountable, but they are accountable to select high-ranking executive and legislative branch officials with high-level security clearance. The effectiveness of national security and military officials presupposes a high level of secrecy; public transparency would impede, if not destroy, their effectiveness. Likewise, judges—some of whom are elected—are expected to be accountable in general terms, but this does not mean following the public’s preferences in individual cases nor does it require explaining their work extra-judicially in the public media.

Like national security officials, military officials, and judges, prosecutors engage in work that demands a high level of both con-
fidentiality and independence from political and popular preferences. Robust public reporting of their internal decision-making and nonjudicial actions would undermine prosecutors’ effectiveness and potentially subject them to popular pressure that would influence them to act unprofessionally. Public disclosure at times would also be contrary to the interests in respecting witnesses’ privacy, in avoiding embarrassment of individuals who are entitled to a legal presumption of innocence, and in promoting fair criminal processes. Mueller’s heavily redacted public filing in connection with Paul Manafort’s sentencing vividly depicted the competing public interests in confidentiality and transparency: the public version of the sealed submission deleted the names of witnesses, the names of other third parties, and significant amounts of information on the subject of Manafort’s alleged false statements to the prosecutors. And, as Brett Kavanaugh observed twenty years ago, even the idea that a special appointed prosecutor’s final report might be made public at the conclusion of a government corruption investigation is contrary to conventional federal prosecutorial practice and at odds with strong interests that favor confidentiality.

The idea of prosecutorial accountability is undeveloped both theoretically and legally in the United States. There is no clear understanding of (1) what it means for U.S. prosecutors to be accountable, (2) whether accountability presupposes accountability to the public, (3) if so, whether public accountability necessitates transparency, and (4) if so, to what extent. While prosecutors may elect to discuss their work publicly (within limits), and the public may demand

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94. See, e.g., Bruce A. Green & Rebecca Roiphe, Can the President Control the Department of Justice?, 70 ALA. L. REV. 1, 73-74 (2018) (“Preserving prosecutorial independence is one way to ensure the disinterested and even-handed application of criminal law.”); Bruce A. Green & Alafair S. Burke, The Community Prosecutor: Questions of Professional Discretion, 47 WAKE FOREST L. REV. 285, 315-16 (2012) (“[I]n the context of much of prosecutors’ traditional work—namely, the prosecution of individual cases—there are practical and ethical limits on the ability to make decision making transparent and respond to community input. Discretionary decision making is pervasive; prosecutors would not have time to become transparent and accountable in every individual case even if it were desirable and proper to do so. Prosecutors are limited by the interests in investigative secrecy and in fairness to the accused in their ability to discuss publicly the facts relevant to charging decisions and other discretionary decisions or the reasons for their decisions.”).


96. Brett M. Kavanaugh, The President and the Independent Counsel, 86 GEO. L.J. 2133, 2156 (1998) (“As a general proposition, a public report is a mistake. It violates the basic norm of secrecy in criminal investigations, it adds time and expense to the investigation, and it often is perceived as a political act. It also misconceives the goals of the criminal process.”).

97. Prosecutors have some accountability to the courts, both because they are lawyers licensed by the courts and subject to discipline and because they appear as advocates before the courts subject to judicial oversight and sanction. As a legal matter, however, courts have
greater transparency, there is no professional or popular understanding, much less a legal understanding, that prosecutors must disclose any otherwise nonpublic aspects of their work. Certainly, nothing in the nature of prosecuting demands that prosecutors should explain their work directly to the public. The public undoubtedly has an interest in knowing what public prosecutors are doing, both in particular cases and in general, but the public has no legal “right to know” that implies a reciprocal legal obligation of disclosure by prosecutors. The constitutional commitment to open criminal proceedings does not imply a commitment to open prosecutors’ files. Although prosecutors’ visible work in public proceedings is only the tip of the iceberg, the successful implementation of criminal law does not require disclosing those aspects of prosecutors’ work that do not surface in public proceedings. Prosecutors outside the United States conduct their work successfully without generally accounting to the public, and so can United States prosecutors.

Moreover, to the extent that prosecutors currently resort to the public media, they cannot fairly claim thereby to be holding themselves accountable. Prosecutors are too selective in their public communications, which are unlikely to offset pervasive misinformation from other sources. And it is doubtful whether prosecutors’ public commentary could ever enable the public to make a well-

minimal oversight of prosecutors’ decisions regarding whether to investigate or prosecute particular cases and no oversight of prosecutors’ general charging policies and practices. See generally Bruce A. Green, Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis, 14 OHIO ST. J. CRIM. L. 143 (2016). Courts have substantially more authority to establish standards governing prosecutors’ conduct in their advocacy role and to enforce the standards both through trial judges’ oversight of individual cases and through the disciplinary process. As a practical matter, judicial oversight of prosecutors’ advocacy is principally the work of trial judges. It is “conventional wisdom . . . that disciplinary authorities do not effectively regulate prosecutors,” id. at 144, although there have been recent signs of change. See generally Green & Yaroshesky, supra note 89.

98. See Erik Luna & Marianne Wade, Prosecutors as Judges, 67 WASH. & LEE L. REV. 1413, 1475 (2010) (“Unlike their American counterparts, . . . European prosecutors have no immediate structural accountability to the general public. . . . Any political accountability is . . . indirect.”).


100. Cf. Davis, supra note 90 (“In most cases, the mechanisms that purport to give the general public the ability to hold prosecutors accountable are ineffective and meaningless. Most citizens know very little about the practices and policies of their local prosecutor.”).

informed assessment of prosecutors’ work. Professional rules and norms limit what prosecutors can say outside court about ongoing cases. But even if that were not true, prosecutors’ self-interest would limit them, as would their role as advocates. Prosecutors do not now, and never will, provide an unselective, objective account of their current work. They and their offices’ self-interests in winning public approval motivate them to discuss their successes and to advocate for the legitimacy of their decisions, not to discuss failures and self-doubts. Their interest as advocates in defending their conduct from legal challenges likewise militates against candor. Because prosecutors control the information held within their offices, so that the public cannot extract information beyond whatever prosecutors disclose on their own initiative, the public has no means to obtain a more complete and balanced account. When prosecutors present their case in the court of public opinion, no one with inside knowledge can present the other side. Prosecutors’ public speech is less likely to serve accountability than to distort public understanding by providing an incomplete, misleading and altogether too rosy perspective on their work.

Finally, insofar as one believes that, to be politically accountable, prosecutors must make their decision-making more transparent, it does not necessarily follow that prosecutors must discuss their work in the public media, or that, in discussing their work in the media, they must discuss ongoing cases. Prosecutors can explain how

comes from crime dramas or novels, reality television shows, or sensational, unrepresentative news stories. As a result, the public suffers from chronic misperceptions about how the criminal justice system actually works.

102. See supra notes 11-16 and accompanying text (discussing Model Rules of Professional Conduct 3.6 and 3.8(f)).


104. For example, as alternative means of promoting public accountability, Stephanos Bibas has discussed the possibilities of “[g]iving victims a greater role as stakeholders,” Bibas, supra note 101, at 993, and treating criminal defendants as stakeholders with a voice in the system, id. at 994-96. Others have discussed the utility of engaging the community in prosecutors’ decisions—not about whether to investigate or prosecute particular cases, but about general problems and approaches, see, e.g., Green & Burke, supra note 94, at 291-92 (“Community prosecutors typically work with members of the community to identify recurring, ongoing criminal justice problems (drug dealing, graffiti, vagrancy) and then work in tandem with community representatives and agencies to address these problems through a project, policy, or strategy, often involving nontraditional methods.”), while at the same time cautioning about potential pitfalls to community engagement, see id. at 303-04 (“But to rely on community participation as a means of improving prosecutorial discretion is to assume that the community is sufficiently democratic, informed, and powerful to ensure that community prosecution policies serve the community interest, but not so powerful as to override other prosecutorial priorities. Without participation by representative, well-informed, and empowered stakeholders, there is a risk that law enforcement may co-opt the politically popular rhetoric of ‘community,’ simply to advance its own agenda. At the same time, trusting the community
they generally make decisions—for example, what decision-making principles they adopt, what deliberative processes they establish, and how they ensure that their principles and processes are actually employed.\textsuperscript{105} Increased public discussions of prosecutors’ work, even at a level of generality, would encourage better decision-making, if only by making prosecutors’ offices more self-conscious.\textsuperscript{106} In jurisdictions where prosecutors are elected, greater transparency would also enhance the public’s ability to make informed decisions in the electoral process.\textsuperscript{107} Although such discussions might not allow the public to judge whether prosecutors are honestly applying the standards that they claim to apply, prosecutors will likely never disclose their internal processes in individual cases completely and candidly enough to allow the public to sit as judges over prosecutors’ decision making. Prosecutors, like judges, can be transparent only to a degree. They can never be as forthcoming with the public as private lawyers are expected to be in communicating with individual and entity clients.

V. CONCLUSION

Prosecutors, as public officials, are expected to be accountable to the public. One might take the view that prosecutors’ accountability presupposes transparency, which, in turn, includes an obligation to disclose and explain their investigative and prosecutorial decisions to the public as they are being implemented. By that standard, Special Counsel Robert Mueller would appear to have been among the least accountable prosecutors, given his unwillingness to comment about his work in the public media.

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\textsuperscript{105} Green & Burke, supra note 94, at 315 ("[T]raditional prosecution—even applying reactive, retributive models of punishment—might benefit from engagement with voices outside the prosecutor’s office. As scholars have previously noted, prosecutorial transparency increases public confidence in prosecutors and courts and enhances the legitimacy of the criminal justice system."); Wright & Miller, supra note 91, at 1600 ("An accountable prosecutor’s office can keep citizens informed about its progress in reaching goals such as rough equality across cases and transparency in decision-making. Ultimately, an accountable prosecutor does more than prevent misconduct: Accountability creates faith and trust in the workings of prosecutors, courts, and government more generally.").

\textsuperscript{106} Cf. Bibas, supra note 101; Bruce A. Green & Rebecca Roiphe, Rethinking Prosecutors’ Conflicts of Interest, 58 B.C. L. Rev. 463, 537 (2017) (arguing that prosecutors should be taught to deliberate more self-consciously in negotiating the tension between the roles as advocate and minister of justice).

\textsuperscript{107} Sec, e.g., Green & Burke, supra note 94, at 315 ("Public elections of prosecutors would be more reliable if the public were better informed about prosecutorial policies and discretionary decision making.").
}
In truth, Mueller was among the most accountable prosecutors, however. To the extent Mueller worked outside public scrutiny, he collaborated with a team of experienced government lawyers and investigators who presumably justified their decisions to each other. To the extent his work resulted in public filings and appearances and other publicly visible actions in the context of judicial proceedings, his work was heavily scrutinized and analyzed in the public media. Mueller made periodic reports to the Attorney General, who had the authority to remove him for cause. And when his work ended, Mueller was required to explain his decisions in a report to the Attorney General, who could make the report public.

As Mueller’s example shows, prosecutors can be accountable without speaking to reporters or posting on social media about their ongoing work. At the same time, to the extent that other prosecutors, taking a different approach, discuss their own ongoing work, they are rarely doing so to promote accountability; their public comments rarely advance the public’s ability to influence prosecutors’ work based on enhanced public understanding. Further, given disciplinary restrictions on prosecutors’ extra-judicial speech, counter-vailing law enforcement interests in preserving secrecy, and prosecutors’ own self-interest, prosecutors’ public discussions of pending cases could never significantly advance accountability.

Of course, Mueller’s example is anomalous. Prosecutors’ work rarely, if ever, evokes comparable public interest. And prosecutors do not ordinarily have to report up, much less so extensively. That means that prosecutors must find other, perhaps more creative, ways to advance public understanding of their work, and that the public must be more assertive in holding prosecutors accountable by other means.
Rudolph Giuliani and the Ethics of Bullshit

Bennett L. Gershman*

“Truth isn’t truth.”

I. INTRODUCTION

Lawyers are communicators. They communicate with clients, courts, adversaries, juries, witnesses, and the public. Lawyers have a special responsibility for the quality of justice. Their communications, therefore, are hedged by various ethical rules to ensure that their statements are knowledgeable, truthful, respectful, and not prejudicial to the administration of justice. But lawyers are not always knowledgeable of the facts. In fact, they sometimes behave disrespectfully, and stray from the truth. False statements by lawyers may be made unwittingly, sometimes intentionally, and sometimes with an indifference, even a contempt for the truth. Discourse of the latter kind may be characterized as bullshit.¹

Bullshit is more prevalent in our culture than ever. Expanded forms of electronic communication and the ability of everybody to be an expert on almost everything probably accounts for so much more bullshit. The proliferation of bullshit in our culture generally is also reflected in an increase in bullshit by lawyers. Indeed, the investigation of President Donald Trump by Special Counsel Robert Mueller produced a dizzying array of unusual public statements by his personal lawyer Rudolph Giuliani that may be regarded as bullshit.² Giuliani’s statements invite consideration of the following questions: Do the rules of professional ethics cover attorney bullshit? If so, how much bullshit may a lawyer utter before crossing an ethical line? Assuming the ethics rules apply, are professional disciplinary bodies capable of exposing lawyer bullshit?

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1. HARRY G. FRANKFURT, ON BULLSHIT 33-34 (2005) (the “essence of bullshit” is “[a] lack of connection to a concern with truth . . . [and] [an] indifference to how things really are.”).
2. See Addendum for a compilation of many of Giuliani’s notable statements.
II. WHAT IS BULLSHIT?

First, I will explore the meaning of bullshit. The Merriam Webster Dictionary defines bullshit as “to talk nonsense to especially with the intention of deceiving or misleading.” The Cambridge Dictionary defines bullshit as “complete nonsense or something that is not true,” including “cheating” and “trickery,” and “to try to persuade someone . . . by saying things that are not true.” These definitions suggest that bullshit is not the telling of a lie, but something less than lying. Bullshit in one sense involves a biased interpretation of facts in order to persuade someone to support the speaker’s position. Bullshit involves fakery and bluffing—claims of excuse, mistake, and accident—in order to deceive and mislead.

The bullshitter has no regard for the truth or for facts. The bullshitter is indifferent to whether a statement is accurate or not. The bullshitter’s purpose is to persuade someone in a manner that appears to be more morally acceptable than telling a lie. Thus, I am not surprised at hearing one student tell another student: “Don’t lie to the professor, just try to bullshit him.” The student is neither indifferent to the truth nor indifferent to lying. She is simply trying to avoid being caught telling a lie by crafting an excuse that is neither a lie nor the truth. The student is being insincere; the student is a phony. But she has not told a lie.

Lawyers engage in bullshit. They say things that are nonsensical, misleading, and with indifference to the truth. Lawyers for the big tobacco companies were likely engaged in bullshit when they repeatedly argued that smoking does not cause cancer, belittled the surgeon general’s report, and extolled the testimony of experts that there is no link between smoking and cancer. Prosecutors also engage in bullshit when they remove minority jurors for nonsensical reasons. Lawyers who make ridiculous arguments extolling the virtues of their nefarious clients also may be engaging in bullshit.

5. FRANKFURT, supra note 1, at 9.
7. BENNETT L. GERSHMAN, CRIMINAL TRIAL ERROR AND MISCONDUCT § 4-4(c)(2)(ii)-(iii) 348-50 (Lexis Law Publishing 3d ed. 2015) (noting that prosecutors may challenge jurors for failing to make eye contact, appearing “uncooperative,” “sinister,” “uptight, disinterested,” “inattentive,” “a gut feeling,” “didn’t seem sincere,” “the way they answer questions,” and “a hunch.”).
8. For example, in a recent high profile criminal trial, the defendant was charged with orchestrating a Ponzi scheme by duping investors into putting money into failing hedge
III. ETHICS RULES RELATING TO BULLSHIT

Initially, let me try to position Giuliani’s public statements within an ethical framework relating to bullshit. As a general matter, a lawyer’s ethical responsibilities are quite different and more profound than that of an ordinary citizen.9 A lawyer must exemplify high standards of honesty,10 diligence,11 competence,12 and trustworthiness.13 A lawyer has a “special responsibility for the quality of justice”14 and a “duty to uphold legal process.”15 As a public citizen “a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”16

The American Bar Association Model Rules of Professional Conduct address public statements by lawyers in several places. For example, Model Rule 3.3 addresses conduct by lawyers during adjudicative proceedings that undermine the integrity of the proceedings.17 Thus, a lawyer is forbidden to make knowingly false statements to a tribunal,18 and to offer evidence that the lawyer knows is false.19 Moreover, a lawyer is required to alert the tribunal if he

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9. See e.g., MODEL RULES OF PROF’L CONDUCT Preamble: A Lawyer’s Responsibilities (AM. BAR ASSN 2018).
10. See generally id. at r. 8.4(b).
11. Id. at r. 1.3.
12. Id. at r. 1.1.
13. Id. at r. 8.4(b).
14. Id. at Preamble: A Lawyer’s Responsibilities.
15. Id.
16. Id.
17. Id. at r. 3.3.
18. See id. at r. 3.3(a)(1) (“A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal.”).
19. Id. at r. 3.3(a)(3) (“A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false.”).
or she knows that a person intends to engage in fraudulent conduct.\textsuperscript{20} None of Giuliani’s statements were made during formal legal proceedings and therefore this rule would not apply to him.

Model Rule 3.6 prohibits a lawyer from making public statements which the lawyer knows or should know will materially prejudice a legal proceeding.\textsuperscript{21} There are presently several ongoing legal proceedings involving the Special Counsel’s investigation. Lawyers involved in the investigation and representing clients connected to the investigation, as is Giuliani, have to be extremely careful about making public statements that could seriously prejudice any potential adjudicative proceeding.

Model Rule 4.1 deals with truthfulness by lawyers generally.\textsuperscript{22} It forbids a lawyer from knowingly making a material false statement to any third person.\textsuperscript{23} The commentary notes that misrepresentations, partially false statements, and omissions may constitute false statements.\textsuperscript{24} But the statement must refer to a material fact.\textsuperscript{25} This rule might apply to some of Giuliani’s statements that may be viewed as assertions of fact.\textsuperscript{26} However, whether a statement does make a factual assertion will depend on the circumstances.\textsuperscript{27}

Model Rule 8.4 addresses misconduct by lawyers.\textsuperscript{28} According to subsection (c) of this rule, it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”\textsuperscript{29} According to subsection (d) of this rule, it is professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.”\textsuperscript{30} These provisions are applicable to a lawyer’s conduct that specifically relates to the lawyer’s

\textsuperscript{20} Id. at r. 3.3(b) (“A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”).
\textsuperscript{21} Id. at r. 3.6(a) (“A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”).
\textsuperscript{22} Id. at r. 4.1.
\textsuperscript{23} Id. at r. 4.1(a) (“In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.”).
\textsuperscript{24} Id. at r. 4.1 cmt. 1.
\textsuperscript{25} Id. at r. 4.1(a).
\textsuperscript{26} Id. at r. 4.1 cmt. 2 (“This Rule refers to statements of fact.”).
\textsuperscript{27} Id. (“Whether a particular statement should be regarded as one of fact can depend on the circumstances.”).
\textsuperscript{28} Id. at r. 8.4.
\textsuperscript{29} Id. at r. 8.4(c) (“It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”).
\textsuperscript{30} Id. at r. 8.4(d) (“It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.”).
practice of law. One type of conduct for which a lawyer would be professionally answerable is dishonesty.\footnote{Id. at r. 8.4 cmt. 2 (“dishonesty” is one of the “offenses that indicate lack of those characteristics relevant to law practice”).}

IV. DISCUSSION


In examining Giuliani’s statements, I will assume that one of the elements of bullshit is a requirement that the speaker know that he or she is saying something that may be perceived as false, deceptive, confusing, misleading, or nonsensical. In considering Giuliani’s statements, I recognize that if he really is a fool, this assumption may be incorrect and may complicate my analysis. Many of Giuliani’s statements, at least to a rational observer, are logically and rhetorically incomprehensible. There are simply too many instances in which Giuliani appears to contradict one statement with
another,38 claim that he never made a statement which he clearly made,39 or made statements that are clearly untrue.40 It is therefore uncertain whether Giuliani really knows or remembers anything he once said, comprehends what he is presently saying, or even cares about whether anything he says is true.41

Salient features of bullshit include misstating, deceiving, misrepresenting, and misleading. What distinguishes bullshit from knowingly making false factual statements is the speaker’s indifference to the truth and disregard whether his statement is factually correct. To constitute bullshit the speaker has no interest in the truth or the ascertainment of the truth. So, for example, Giuliani may not have been deliberately lying when he stated that no one signed a letter of intent to build the Trump Tower in Moscow;42 that he never said there was no collusion between the Trump campaign and

Russia;\footnote{43} that Roger Stone never alerted Trump to WikiLeaks concerning Hillary Clinton;\footnote{44} that paying Stormy Daniels was not a crime;\footnote{45} and that the big October “surprise” that would turn the election to Trump’s favor, had nothing to do with FBI director James Comey’s announcement of a new email investigation of Hillary Clinton.\footnote{46} Although these statements are false, it does not appear that making factually inaccurate statements was Giuliani’s purpose or that he even cared whether his statements were factually accurate or not. Giuliani’s principal purpose in making these statements was likely not to hide the truth but to obfuscate the truth, to attack the conduct of Mueller’s investigation, and to protect his client’s reputation. These statements reflect not a conscious design to lie but an indifference and even contempt for the truth, in a word, to engage in bullshit.

In any event, there is an overlap between telling a lie and bullshit. Bullshit often includes telling lies, but bullshit appears more benign than lying. Moreover, from a legal standpoint, a lie is more objectionable than bullshit; it may be a crime. However, from an ethical standpoint, bullshit by a lawyer may be more morally objectionable than lying. A lie is a discrete event. A lie typically relates to a particular occurrence. When Giuliani stated that he never claimed that anybody in the Trump campaign had any dealings with Russia, he lied.\footnote{47} He had in fact made that claim often. But bullshit is much more “panoramic,” more comprehensive.\footnote{48} Giuliani’s many statements attempting to distance and gloss over con-


\footnote{48} See FRANKFURT, supra note 1, at 51-52 (to invent a lie a speaker “must think he knows what is true” whereas a person who undertakes bullshit “has much more freedom [since] [h]is focus is panoramic rather than particular.”).
tacts between Trump and his campaign officials and Russian operatives are contradictory, confusing, and deceptive. Giuliani may have been bluffing, a key feature of bullshit.

In the same connection, a quintessential feature of bullshit, noted above, is to make false or deceptive statements in order to sow confusion, obscure the truth, or bluff through a difficult situation. It is here as well that Giuliani is adept at engaging in bullshit. Immediately after the BuzzFeed report that Trump directed his lawyer, Michael Cohen, to lie to Congress about Trump’s plans to build a skyscraper in Moscow and the quick correction by Special Counsel Mueller as to the accuracy of that report, Giuliani made several contradictory remarks that appeared to be made to distract from the story, inject confusion as to the details of the plan, and possibly set the stage for a defense. 49 Giuliani’s pre-textual defense of the Muslim travel ban by claiming that it was not based on religion but on national security was a deliberate misrepresentation, an obvious attempt to provide an innocent spin to an amoral and unconstitutional act. 50 Additionally, Giuliani’s contradictory statements about the timing of Trump’s skyscraper deal with Russia demonstrated not only Giuliani’s apparent ignorance of the facts, but his apparent indifference to the facts, which is a hallmark of bullshit.

A lawyer who displays an indifference to the truth, as Giuliani has shown, may be a more insidious threat to the rule of law and the public’s confidence in the justice system than a lawyer who tells a lie. Giuliani’s stunning pronouncement that “truth isn’t truth” does far more to destroy the bedrock principle in any legal system, namely, that truth matters, than a lawyer telling a lie. 52 Whatever the context, Giuliani’s statement is nonsensical, anarchic, and very dangerous. Additionally, Giuliani’s effort to explain his statement by trying to provide an excuse for Trump to refuse to be interviewed by the Special Counsel’s office is perverse, and clearly bullshit.


Too, a lie can be corrected; bullshit is not susceptible of correction. Bullshit embraces not facts but opinions, perceptions, and biases. It fits neatly into the current mainstream view of alternative facts and the inherent ambiguity of truth. Since bullshit does not require knowledge of facts and knowingly making an assertion that contradicts the facts, bullshit is much easier to create than a lie and much easier to get away with. It allows a speaker to say anything about any subject regardless of whether the speaker knows anything about the subject. The statement is disconnected from the facts and from reality. Understood in this sense, a statement by a lawyer that demonstrates a failure to make a conscientious effort to ascertain the truth has a much greater capacity to contaminate the legal system and the public perception of lawyers.

Bullshit is propaganda. It involves disseminating ideas and images to the public to influence public opinion by the selection of certain information, deceptive portrayals of that information, and misrepresentation of reality. Bullshit ignores facts, reality, and truth. It assumes that facts are fungible and truth is whatever the speaker says is the truth. Since the speaker has no interest or belief in the truth, and that facts and truth have no inherent value, then whatever the speaker says cannot be regarded as lying. Thus, “Big Brother,” in George Orwell’s 1984, was not lying about any particular facts; he was engaged in pervasive deceit and misinformation, or in a word, bullshit.

V. AFTERTHOUGHTS

Bullshit is ubiquitous in the current culture of chaos, tribalism, and noise. Bullshit is counter-factual; it is the spinning of facts to persuade. The most persuasive bullshit is carefully crafted by a skilled communicator. That is why we call a person who excels at bullshit a bullshit “artist.” The question this essay addresses is whether an attorney—not a politician, pundit, or used car salesman—who is a skilled communicator subject to various ethics rules that protect the public from false, deceptive, and misleading bullshit violates those rules when he engages in bullshit.

Is Rudolph Giuliani a bullshit artist? Or is he a fool? He has zealously crafted a false and confusing narrative to protect his client, the President of the United States. Many of his statements are

55. See generally MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS’N 2018).
simply untrue. However, even if they are untrue, his statements reflect an ignorance of facts, a skewed appreciation of facts, and an indifference to whether his statements are true.

Do Giuliani’s statements constitute bullshit? As I have construed bullshit in this article, they do. Do his statements violate the ethics rules? Do they impair the administration of justice to the extent they undermine public confidence in the legal system and respect for the conduct of lawyers? My purpose in this essay is not to answer these questions, but to raise them for further discussion.

ADDENDUM: PUBLIC STATEMENTS BY GIULIANI

James Comey’s “Big Surprise”:

Three days before FBI director James Comey’s announcement two weeks before the 2016 election that the FBI discovered a new unexamined laptop in the investigation of Hillary Clinton’s emails, Giuliani appeared on Fox morning news and stated: “We got a couple of surprises left . . . I think it’ll be enormously effective.”56 Two days later Giuliani again appeared on Fox News and said he was talking about “pretty big surprises.”57 He also stated that “We’ve got a couple of things up our sleeve that should turn this thing around.”58 As it turned out, the emails on the laptop were meaningless.59 Giuliani stated that the surprise he was talking about had nothing to do with the emails, but with a speech Trump was going to give attacking Clinton.60 However, on the day of Comey’s announcement Giuliani was so pleased he blurted out a description of his sources for inside information on the email case.61 He claimed that the F.B.I.’s original conclusion was “completely unjustified, and almost a slap in the face of the F.B.I.’s integrity.”62 Giuliani said he knew that “from former agents” and “a few active agents who obviously don’t want to identify themselves.”63 Giuliani’s new version was that his prediction was just speculation.64 “We knew just by instinct . . . that the New York office was enraged.”65

56. Dwyer, supra note 46.
57. Id.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
63. Id.
64. Id.
65. Id.
**Muslim Ban:**

According to Giuliani, President Trump wanted a “Muslim ban” and asked Giuliani to convene a commission to figure out “the right way to do it legally.”

So, “instead of religion, [we focused on] danger—the areas of the world that create danger for us.”

“Which is a factual basis, not a religious basis. Perfectly legal, perfectly sensible. And that’s what the ban is based on. It’s not based on religion. It’s based on places where there are substantial evidence that people are sending terrorists into our country.”

**Roger Stone and WikiLeaks:**

Giuliani’s exchange with journalist, George Stephenopoulos:

STEPHENOPOLOUS: Did Roger Stone ever give the president a heads-up on WikiLeaks’ leaks concerning Hillary Clinton, the DNC?

GIULIANI: No, he didn’t.

STEPHENOPOLOUS: Not at all?

GIULIANI: No. I don’t believe so. But again, if Roger Stone gave anybody a heads-up about WikiLeaks’ leaks, that’s not a crime.

**Collusion With Russia:**

On the issue of whether there was any collusion between Trump or officials in his campaign and Russia, Giuliani stated that “I have no knowledge of any collusion by any of the thousands of people who worked on the campaign.”

Later, Giuliani stated: “I never said there was no collusion between the campaign, or people in the campaign.”

Giuliani previously stated that “no one in ‘the upper levels of the Trump campaign’ colluded with Russia, adding that he had

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66. Wang, supra note 50.
67. Id.
68. Id.
69. Benen, supra note 44.
70. Philip Rucker, Giuliani Seeks to Clarify Comments on Trump Campaign and Russia, Saying He Has ‘No Knowledge of Any Collusion’, WASH. POST (Jan. 17, 2019), https://www.washingtonpost.com/.../0321b244-1a76-11e9-9ebf-c5fed1b7a081_story.html.
‘no reason to believe anybody else did’ either.” 72 According to Giuliani, “the only knowledge I have in this regard is the collusion of the Clinton campaign with Russia, which has so far been ignored.” 73

Giuliani stated that “collusion is not a crime” 74 because the term “collusion” appears nowhere in the federal criminal code. 75

According to Giuliani, “There is not a single bit of evidence the president of the United States committed the only crime you can commit here, conspired with the Russians to hack the DNC.” 76

According to Giuliani, “[c]ollusion is not a crime.” 77 “Hacking is the crime. The president didn’t hack. He didn’t pay for the hacking.” 78 In any event, there was no collusion between the Trump campaign and Russia. But even if meaningful information “comes from a Russian, or a German, or an American, it doesn’t matter. And they never used it, is the main thing. They never used it. They rejected it. If there was collusion with the Russians, they would have used it.” 79

Giuliani, asked about revelations that Paul Manafort, Trump’s campaign chairman, shared Trump campaign polling data with a Russian linked to the nation’s intelligence services, Giuliani replied that it’s not collusion, because “polling data is given to everybody.” 80 In any event, Giuliani said, internal polling data “is cooked,” and “the most inaccurate stuff.” 81

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75. Blake, supra note 43.
77. Zhao, supra note 74.
78. Blake, supra note 43.
79. Id.
Trump Tower Moscow Deal:

Giuliani stated that Trump was involved in discussions to build a skyscraper in Moscow throughout the entire presidential campaign. According to Giuliani, he quoted Trump that the Moscow Tower discussions were “going on from the day I announced to the day I won.”

Giuliani later corrected his statement to allow for the possibility that the President and his lawyer Michael Cohen could have discussed the project through the election. They were “fleeting conversations,” according to Giuliani, but that there were no notes or logs about the dates. “We’re at Cohen’s mercy for the dates,” Giuliani stated. However, one day after making these statements Giuliani backtracked, stating that his comments about the dates of conversations about the Trump Tower were “hypothetical,” and “not based on conversations I had with the President.”

When asked about whether President Trump signed a letter of intent during the 2016 presidential campaign that laid the groundwork to develop a Trump Tower, Giuliani claimed that the letter had not been signed. Then, after being shown the letter and that Trump had indeed signed the letter, Giuliani stated: “I don’t think I said nobody signed it.” He added “of course” Trump signed it. “How could you send it but nobody signed it?” He claimed the latter was meaningless because the project didn’t go anywhere. “It means nothing but an expression of interest . . . .”

Trump Tower Meeting:

Giuliani stated that top Trump officials met at Trump Tower two days before the well-publicized June 9th Trump Tower meeting involving Donald Trump, Jr., Jared Kushner, Paul Manafort, Rick Gates and a Russian lawyer, to plan for the June 9th meeting, then, four hours later, denied that the meeting ever took place, stating that he was merely repeating a claim that multiple reporters had

82. Mazzetti et al., supra note 51.
83. Id.
84. Id.
87. Id.
88. Id.
89. Id.
been asking him about.\textsuperscript{90} When he was questioned about his assertion that President Trump did not know about the June 9th meeting, Giuliani stated that “Nobody can be sure of anything.”\textsuperscript{91}

\textit{Michael Cohen Testimony:}

After news reports stated that Trump had told his personal lawyer Michael Cohen to lie to Congress about negotiations over the Trump Tower, Giuliani derided the report as false.\textsuperscript{92} “There are no tapes, there are no texts, there is no corroboration that the president told him to lie.”\textsuperscript{93} Giuliani stated that “I have been through all the tapes, I have been through all the texts, I have been through all the e-mails, and I knew none existed.”\textsuperscript{94} When asked what tapes he had reviewed, Giuliani conceded that the original report mentioned texts and emails, but not tapes.\textsuperscript{95} “I shouldn’t have said tapes.”\textsuperscript{96}

\textit{Hush Money Payments:}

After Trump denied having affairs with Stormy Daniels and Karen McDougall, then denied knowledge of hush money payoffs to them, then denied any knowledge of the payoffs, Giuliani claimed that the payoffs were simple, private transactions and that the hush payments weren’t crimes.\textsuperscript{97} Although made a few weeks before the election, Giuliani claimed that the sole purpose of the payments was to avoid embarrassment and had nothing to do with the election.\textsuperscript{98} In the face of claims by Cohen, the prosecutors, a judge, and the media company AMI that the payments were intended to help Trump’s campaign, Giuliani stated that “I can produce an enormous number of witnesses that say the president was very concerned about how this was going to affect his children, his marriage.”\textsuperscript{99} Moreover, Giuliani stated, “the amount of money is consistent with harassment, not truth.”\textsuperscript{100} He added: “When it’s true and you have the kind of money the president had, it’s a $1 million

\begin{thebibliography}{10}
\bibitem{91} Id.
\bibitem{92} Haltiwanger, supra note 49.
\bibitem{93} Chotiner, supra note 86.
\bibitem{94} Haltiwanger, supra note 49.
\bibitem{95} Id.
\bibitem{96} Id.
\bibitem{97} Hains, supra note 45.
\bibitem{98} Id.
\bibitem{99} Id.
\bibitem{100} Id.
\end{thebibliography}
settlement. When it’s not true, when it’s a harassment settlement and it’s not true, you give them $130,000, $150,000. They went away for so little money that it indicates their case was very, very weak.”

Interview With Mueller:

In discussing the circumstances under which Trump would submit to an interview with Special Counsel Mueller, Giuliani claimed that Mueller is trying to trap Trump into committed perjury. According to Giuliani, “When you tell me . . . that [Trump] should testify because he’s going to tell the truth, and he shouldn’t worry, well that’s so silly because it’s somebody’s version of the truth, not the truth.” When the interviewer stated that “truth is truth,” Giuliani responded, “No, it isn’t truth . . . . Truth isn’t truth.”

9/11:

According to Giuliani, “Under those eight years, before Obama came along, we didn’t have any successful radical Islamic terrorist attack in the United States.” Giuliani added, “They all started when Clinton and Obama got into office.”

Charging Trump:

According to Giuliani, Trump could shoot former FBI director James Comey in the oval office and not be indicted while still serving as President. Jay Sekulow and John Dowd added that the President has the constitutional authority to pardon even himself for federal crimes.

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101. Id.
103. Id.
104. Id.
106. S.V. Date, Giuliani: Trump Could Have Shot Comey and Still Couldn’t Be Indicted for It, HUFFPOST (June 4, 2018), https://www.huffingtonpost.com/entry/trump-shoot-comey_us_5b145897e4b02143b7cd633e.
107. Id.
Although federal prosecutors implicated President Trump in campaign-related felonies, Giuliani claims it’s not a big deal.\textsuperscript{108} “Nobody got killed, nobody got robbed . . . This was not a big crime . . . . I think in two weeks they’ll start with parking tickets that haven’t been paid.”\textsuperscript{109}

\textit{Joe Biden}:

After calling Joe Biden “a moron,” and “a mentally deficient idiot,” Giuliani clarified his remarks that “I didn’t mean that. I meant he’s dumb.”\textsuperscript{110} “Every decision he’s made about foreign policy has turned out to be wrong, you know.”\textsuperscript{111} Giuliani continued: “He didn’t want to go into Iraq when they took over Kuwait, that was wrong. He did want to go into Iraq later and then he changed his mind then he wanted to divide Iraq into three parts. His, it’s all coming about because he’s a fun guy, but they only love him because he’s a Democrat. If he were a Republican they would be going after him constantly.”\textsuperscript{112}

\begin{footnotes}
\item[109.] \textit{Id}.
\item[111.] \textit{Id}.
\item[112.] \textit{Id}.
\end{footnotes}
I, Too, Sing America: Presidential Pardon Power and the Perception of Good Character

Jalila Jefferson-Bullock∗

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Presidential pardon power is among the most expansive, unen-
cumbered, and suspicion-evoking of executive powers.1 Generally
speaking, Americans hold negative views of presidential pardons.2
In recent poll responses, Americans report concern that Presidents
may conceal their own misdeeds when pardoning others, especially
when those pardoned are high-profile individuals.3 Such disquie-

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1. Frank Newport and Joseph Carroll, Americans Generally Negative on Recent Presi-
dential Pardons, GALLUP (Mar. 9, 2007), https://news.gallup.com/poll/26830/americans-gen-
erally-negative-recent-presidential-pardons.aspx.
2. See generally id. Recent statistics show that the American public opposed President
Ford’s pardon of President Nixon, George H.W. Bush’s pardon of Caspar Weinberger, and
President Clinton’s pardon of Marc Rich. Thirty-eight percent of Americans felt that Ford
should pardon Nixon, while fifty-percent of Americans believed that Clinton should pardon
Rich at the time that the pardons were issued. Id.
3. Id. When asked why they supposed Bush had pardoned Weinberger and other Iran-
Contra operatives, forty-nine percent of respondents expressed that Bush was trying to pro-
tect himself or hide information from the American people. Bush’s use of executive pardon
power in this manner may indicate the first time that a United States President used the
tude persists even today. As Special Counsel Robert Mueller secures indictments of members of President Trump’s inner circle and news continues to cycle of Trump’s alleged criminal involvement, Americans are fretful that Trump may abuse presidential power by pardoning those implicated in the investigation, including family and inner-circle members.\(^4\) This apprehension is not without merit. Unlike other Presidents who have typically waited to exercise expansive pardon power until the waning days of their administration, Trump has already issued high-level, controversial pardons with no hint of restraint and without typical Department of Justice oversight.\(^5\) Shockingly, he has even publicly alluded to pardoning his associates who have been indicted as a result of the Mueller investigation.\(^6\) Such a move is dangerous and would erode public confidence in the Trump administration, an administration that is unique in its struggle to secure and maintain public trust in the integrity of the American system of government.

President Donald Trump’s tenure in the White House has left throngs of Americans feeling increasingly isolated from America’s dreams. The blatant racism, misogyny, xenophobia, and overall contempt for any semblance of Americanism that is remotely misaligned with overarching notions of white male heterogeneity labels those who are neither white nor male as “misfits” who can never enjoy the full and free benefits of America’s bounteous promises.\(^7\) Many Americans feel abandoned by an Executive who refuses to recognize, that, we, too “sing America.”\(^8\) A multitude of Trump’s pardon power to conceal his own potentially criminal conduct. *Id.*; William Schneider, *Bush’s Pardons Break All the Rules*, L.A. TIMES (Jan. 3, 1993), http://articles.latimes.com/1993-01-03/opinion/op-864_1_bush-s-pardons.


policies, programs, and proposals, including the border wall national emergency declaration, travel ban executive order, tax breaks for the wealthiest citizens, anti-transgender military stance, and revival of unconstitutional stop and frisk tactics, typify his administration’s inherent culture of exclusion, disdain for legal history and tradition, and utter defiance of constitutional precedent. Even many of the faithful who originally supported Trump’s presidency, critically question his commitment to fair governance and the rule of law. The foreseeable consequence of his scorn of our system of government is the utter disillusionment of the governed. Disillusionment, however, proves detrimental to democracy.

The American system of democracy is unique in that it demands belief among those it would govern, in its utility, power, and benefits. “[P]ublic satisfaction . . . is the key goal of democratic governance,” as the United States ultimately “derives its powers from the consent of the governed.” Scholars agree the American political system can only perform effectively with the “support of the governed, and that such support will only occur if a system is perceived


13. Id.

as fair and just.’’. The very balance of our esteemed democracy, then, is weakened when the governed cease to believe that government works. In this way, perception is reality. While scores of initiatives fuel the aforementioned disenchantment, presidential pardon power triggers incredible skepticism at this specific moment in history.

Relying on the premise that effective democracy requires a certain measure of public satisfaction, this Article argues that presidential pardon power must be reformed and limited immediately, in order to begin restoring public confidence in our Chief Executive and in our overall system of government. In so offering, this Article borrows from the retributive criminal justice tenet that perceptions of fairness are integral to an effective administration of criminal justice, and incorporates that principle in advocating for a novel model of presidential pardon power. Following this Introduction, Part I of this work provides a brief history of the original concept of presidential pardon power, including its underlying assumption that the President will always be a person of the highest character. Part II explores the concept of perception as reality in the context of the criminal justice system, and advises that retributive punishment theory may be informative in constructing a novel model of presidential power. Finally, Part III provides guidance in crafting a reformed model of presidential pardon power that, in the absence of the strong character envisioned by the Framers, will assist in reestablishing public trust in presidential pardon power, the Chief Executive, and our American democracy.

I. THE SCOPE OF PRESIDENTIAL POWER AND THE CONTENT OF CHARACTER

The scope of presidential pardon power remains the subject of robust debate. Scholars note that:

[T]he very factors that make the pardoning authority unique--its ancient history, its oddly dual nature as a gift or a political tool, its existence outside the normal system of checks and balances of democratic government, and the way it resonates to

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16. See Amanda Shanor, No, President Trump, You Are Not Above the Law, ACLU (June 18, 2018, 12:30 PM), https://www.aclu.org/blog/executive-branch/no-president-trump-you-are-not-above-law (noting that while the Constitution provides Presidents with a broad pardoning power, President Trump’s recent claims of an even more far-reaching executive power to pardon could potentially “undermine the democratic safeguards enshrined” in the Constitution).
the distant thunderclap of absolute power--are the same factors that make its existence and exercise controversial.\textsuperscript{17}

Throughout the years, the Supreme Court has grown to support an expanding and broad interpretation of presidential pardon authority, evolving from initially viewing it as a gift to considering it as an almost exclusively unchecked grant of public welfare.\textsuperscript{18} Though supported by the Court, modern-day application of this seemingly unfettered power circumvents and frustrates the administration of criminal justice, a system that is secured by constitutional protections and safeguards. The lack of legislatively-appointed guiding principles and the absence of judicial review are among the traditional checks that are missing from the presidential pardon power rubric, further boosting its controversial nature. Scholars opine that:

[T]heir [presidential pardons] use typically involves marked departures from the procedural regularities that swathe the criminal justice process. . . . [T]hey represent a mechanism by which the executive can override not only the authority of the judiciary to impose a criminal conviction and sentence, but in a larger sense, prevent the general aims of punishment . . . . [E]xecutive pardons effectively circumvent the criminal adjudications occurring in the judiciary. Such adjudications ideally and symbolically represent extraordinarily formal due process . . . .\textsuperscript{19}

There remains a fear that the President will abuse this extraordinarily sweeping power, resulting in sustaining dialogues concerning whether the power should be more limited, and if so, in what specific ways. In contemplating a novel presidential pardon power model, reformers consult the Framers and constitutional history.

Seeking guidance from the Framers of the Constitution does little to settle the presidential pardon power controversy, but may be instructive in generating reform proposals. At a time when the threat of revolution was a tangible prospect, the Framers initially justified the grant of presidential pardon power as a means of suppressing potential rebellions.\textsuperscript{20} The hope was that offering the olive branch

\begin{itemize}
  \item \textsuperscript{17} Clifford Dorne & Kenneth Gewerth, \textit{Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures}, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413, 418 (1999).
  \item \textsuperscript{18} Biddle v. Perovich, 274 U.S. 480, 486 (1915); Ex parte Garland, 71 U.S. 333, 351 (1866); 59 AM. JUR. 2D Pardon and Parole § 13 (2019).
  \item \textsuperscript{19} Dorne & Gewerth, supra note 17, at 414.
  \item \textsuperscript{20} \textit{THE FEDERALIST} NO. 74 (Alexander Hamilton).
\end{itemize}
of a “well-timed offer of pardon” to would-be insurgents might “restore the tranquility of the commonwealth.” The power was to be broad and its usage left to the discretion of the Executive. The historical data suggests that the Constitutional Convention delegates intended for presidential pardon powers to mirror the expansive royal entitlement exercised by the English Crown. It therefore lacks the checks, balances, and limited democracy characteristics of other constitutionally enumerated governmental powers. This original model, however, was not without critics. Detractors earnestly complained of the potential for future abuse.

In response, some Framers found solace in the image they had carefully crafted of the President and his powers. The original, aspirational view was that the President would act as a “political eunuch, with the duty of only assuring that laws passed by Congress, which is where the political action would occur, be faithfully executed.” While the grant of pardon power was to be extensive, the President himself was to occupy a much more limited role. Further, the Framers earnestly believed that the President would be of such exceptional character that he would never violate the law, nor would he ever consider abusing this broad grant of power. In the words of Framer Alexander Hamilton,

Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. . . . [I]t may be inferred that a single man would be . . . least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow-creature depended on his sole fiat, would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind.

History, however, recounts a distinctly contrasted narrative. Far from a “political eunuch,” the President “has been transformed into the most powerful official in American politics and has been described as the nation’s Chief of State, Chief Executive, Commander-in-Chief, Chief Diplomat, Chief Legislator, Chief of Political Party,

21. Id.
23. Id.
24. Johnson, supra note 5, at 303.
25. Id. at 290.
26. THE FEDERALIST, supra note 20 (emphasis added).
as well as several other important titles.”

The record is also clear that American Presidents have, in fact, exercised the pardon power beyond its originally envisioned reach, even perhaps crossing the boundary into seemingly potential abuse. Included in some controversial pardons are President Ford’s pardon of Richard Nixon in the nascent years of his tenure, President Bush’s pardon of six key figures involved in the Iran Contra affair (and the possible concealment of his own misdeeds in the process), and President Trump’s recent pardon of Arizona Sheriff Joe Arpaio. Additionally, President Trump actively speaks of and expresses interest in granting pardons to his relatives and close associates. American Presidents do not always abide by the code of conduct contemplated by the Framers that justified such an expansive grant of presidential pardon power. They are not always of the highest character. Nevertheless, presidential pardon power remains nearly unchecked. The time has come to reconsider the scope of presidential pardon power. Democracy requires it.

II. PERCEPTION IS REALITY

American democracy demands active participation by the governed. The exceptional nature of the American system of democracy insists that the governed maintain confidence in the system’s utility, power, benefits, and fairness because “public satisfaction . . . is the key goal of democratic governance,” and because the United States ultimately “derives its powers from the consent of the governed.” Actual fairness, however, is not required to earn the public’s confidence. Rather, the governed must have the impression that the system that governs them is operating equitably. Perceptions of credibility lead to increased compliance with the law, while

27. Johnson, supra note 5, at 303.
31. Hibbing & Theiss-Morse, supra note 12.
lack of public trust may have serious consequences.\textsuperscript{34} Scholars assert that the perception of justice is as important as its attainment.\textsuperscript{35} In this way, perception is reality.

As in the case of our esteemed democracy, the criminal justice system is also rendered impotent when people become less convinced of its efficacy.\textsuperscript{36} As with all governmental systems, the criminal justice system must be mindful of public perceptions of fairness and justice.\textsuperscript{37} Studies demonstrate that perceptions of criminal law’s legitimacy give rise to “higher levels of cooperation and lower rates of recidivism.”\textsuperscript{38} Further, “people are less likely to comply with laws they perceive to be unjust” or “with the law generally when they perceive the criminal justice system as tolerating such injustice.”\textsuperscript{39} In this way, lessons gleaned from the criminal justice system are instructive to presidential pardon power reform efforts.

According to scholars, “a criminal justice system derives practical value by generating societal perceptions of fair enforcement and adjudication.”\textsuperscript{40} Professors Josh Bowers and Paul H. Robinson reduce this notion of “societal perceptions of fair enforcement and adjudication” into two distinct types: 1) legitimacy and 2) moral credibility.\textsuperscript{41} Under this model, the legitimacy class of societal perceptions focuses on criminal justice processes, and requires that they are fairly, accurately, and uniformly executed.\textsuperscript{42} The moral credibility category concerns the concept of justice, demanding that the criminal justice system produce equitable outcomes, thereby maintaining its “reputation for moral credibility with its community.”\textsuperscript{43} Though their internal operations vary significantly, the concepts of legitimacy and moral credibility possess the same ultimate goal. The aim of both is that people come to believe that the criminal justice system works, and, for that reason, choose to behave lawfully.\textsuperscript{44} The criminal justice system simply cannot function effectively if the general population refuses to believe in it and conform to its laws.

\begin{thebibliography}{99}
\bibitem{35} Flowers, \textit{supra} note 15, at 699.
\bibitem{36} Bowers & Robinson, \textit{supra} note 34, at 212.
\bibitem{38} Bowers & Robinson, \textit{supra} note 34, at 253.
\bibitem{39} \textit{Id.} at 282.
\bibitem{40} \textit{Id.} at 211.
\bibitem{41} \textit{Id.} at 211-12.
\bibitem{42} \textit{Id.} at 215.
\bibitem{43} \textit{Id.} at 218.
\bibitem{44} \textit{See generally id.} at 211-18.
\end{thebibliography}
The legitimacy theory suggests that people adapt their behavior to a system of criminal laws, policies, and programs because they believe that the process is fair.\textsuperscript{45} According to Bowers and Robinson, “procedure is legitimacy’s starting point.”\textsuperscript{46} In their words, “[p]eople come to obey the law and cooperate with legal authorities because they perceive their institutions to operate fairly,” such that “perceptions of procedural fairness facilitate a kind of normative, as opposed to purely instrumental, crime control.”\textsuperscript{47} The perception of fair process induces a commitment to fully participate in the system by adjusting one’s conduct to comport with the system’s requirements. In the words of Bowers and Robinson:

[C]itizens of a procedurally just state comport their behavior to the substantive dictates of the law not because the state exercises coercive power . . . but because they feel a normative commitment to the state. . . . an individual . . . complies with the law not because he rationally calculates that it is in his best interest to do so but because he sees himself as a moral actor who divines that it is right to defer to legitimate authority.\textsuperscript{48}

Fair process, then, leads to increased compliance with and belief in the law. The perception of justice does as well.

The moral credibility aspect of fair enforcement and adjudication contends that “doing justice may be the most effective means of fighting crime.”\textsuperscript{49} While legitimacy contemplates the process aspect of criminal justice, moral credibility ponders the punishment facet of criminal justice.\textsuperscript{50} Per moral credibility, the criminal justice system is rendered legitimate if it appeals to a community’s shared intuitions of justice, but succumbs to invalidity if it does not.\textsuperscript{51} Of the many virtues of law, morality appears, arguably, to be among the strongest, with people tempering their behaviors to fit the law because “they believe the laws to be just.”\textsuperscript{52} In this way, moral credibility is steeped in retributivist theory. In the words of Bowers and Robinson:

\textsuperscript{45} Id. at 214.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 216.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Gregory M. Gilchrist, Plea Bargains, Convictions and Legitimacy, 48 AM. CRIM. L. REV. 143, 162 (2011).
Some of the system’s power to gain compliance derives from its potential to stigmatize . . . Yet a criminal law can stigmatize only if it has earned moral credibility with the community it governs. That is, for conviction to trigger community stigmatization, the law must have earned a reputation with the community for accurately reflecting the community’s views on what deserves moral condemnation. A criminal law with liability and punishment rules that conflict with a community’s shared intuitions of justice will undermine its moral credibility.\(^{53}\)

However, like legitimacy, moral credibility only requires the perception of justice to function appropriately. In other words, “legitimacy . . . does not actually demand that procedures be fair, only that they appear to be,” and “moral credibility . . . does not actually require that substantive rules produce just results . . . only that they reflect people’s shared moral intuitions.”\(^{54}\)

Together, legitimacy and moral credibility explain if, why, and when our criminal justice system works. Both, too, rely, rather soundly, upon public perception; perhaps even more decidedly than actual truth. The pair attempts to legitimize the criminal justice system by rendering it fair, just, and therefore effective in the minds of the people.\(^{55}\) Perception is the tie that binds them. This may be recognized most readily when considering how the principles of legitimacy and moral credibility achieve their imagined ends even when the system is, in truth, neither procedurally fair nor appropriately aligned with empirical desert. Genuine procedural fairness and empirical desert command a type of uniformity that must be aspired to, but is nearly impossible to realize fully. In the case of legitimacy:

legitimacy advocates must reconcile themselves to the fact that a system premised even partially on legitimacy may come to adopt procedural rules and standards that may vary from place to place, community to community, and time to time--a scenario that some may find especially problematic when it comes to purportedly nationally applicable standards and rules.\(^{56}\)

Studies suggest that even defendants who are unsuccessful in court will refrain from “denigrat[ing] the judge or the system so long

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\(^{53}\) Bowers & Robinson, supra note 34, at 217.
\(^{54}\) Id. at 246.
\(^{55}\) See id.
\(^{56}\) Id. at 234.
as they believe their outcomes were reached by fair procedures.”\(^{57}\) In the case of moral credibility, “studies make clear that current criminal law regularly deviates from the community’s justice judgments,” thereby “risk[ing] [and] undermining its moral credibility with the community.”\(^{58}\) The public confidence that is “essential to the law's democratic legitimacy, moral force, and popular obedience”\(^{59}\) may be harnessed through perception.

Both the capability “of courts to influence the structure of law and the ability of the police and other government officials to enforce the law depend upon public satisfaction with, confidence in, and trust of legal authorities.”\(^{60}\) In reimagining presidential pardon power and reestablishing confidence therein, the criminal justice system model provides impactful, effective instruction concerning the perception of fairness, the positive benefits of its presence, and the detrimental effects of its privation. Further, remodeling presidential pardon power is at least one simple step in rebranding the criminal justice system. Many scholars have suggested limiting presidential pardon power, with limits on its exercise to convictions only and detailing specific charges, emerging as primary recommendations.\(^{61}\) While those are helpful proposals, a more radical approach is warranted.

### III. A NEW MODEL OF PRESIDENTIAL PARDON POWER

Presidential pardon power must be limited in order to launch the process of restoring public confidence in American government, particularly in the executive branch. To commence this undertaking, presidential pardon power must no longer be viewed as boundless. Professors Clifford Dorne and Kenneth Gewerth acknowledge that pardons should be “both justifiable according to some theoretical scheme or framework and justified under the circumstances of the individual case.”\(^{62}\) Pardons, then, must be “justified by reasons having to do with what is just[,]” and must be supported by a “symmetry between the justifications of punishment and a theory that would justify pardon.”\(^{63}\) Relying upon Moore’s theory, Dorne and Gewerth advocate for a pardon model that entails pardoning only

\(^{57}\) Flowers, supra note 15, at 701 (quoting Tom R. Tyler, The Role of Perceived Injustice in Defendants’ Evaluations of Their Courtroom Experience, 18 L. & Soc’y REV. 51, 70 (1984)).

\(^{58}\) Bowers & Robinson, supra note 34, at 241.

\(^{59}\) Bibas, supra note 37, at 1387.

\(^{60}\) Flowers, supra note 15, at 700 (quoting Tyler, supra note 57, at 51).

\(^{61}\) Johnson, supra note 5, at 322-23.

\(^{62}\) Dorne & Gewerth, supra note 17, at 420 (emphasis added).

\(^{63}\) Id. at 421.
those who do not deserve to be punished. They argue that this model is necessary because of the “unreviewable and absolute nature of the pardon power.” Following this model, a board, guided by specific, stated, measurable standards, could be empaneled and empowered to approve “justice-enhancing” pardon decisions.

Dorne and Gewerth offer that criteria for determining whether an offender is eligible for pardon would include wrongful convictions, diagnosis of an extremely debilitating medical condition, issuance of a grossly disproportionate sentence, amnesty considerations, age, heroic acts of service, and whether a pardon is “strongly and unequivocally supported by [the] victim, [their] family, and/or [the affected] community.” This proposed model relies, almost exclusively, on the retributive theory of punishment, which purports to extend an amount and quality of punishment that is proportional to an offender’s moral blameworthiness. Retribution’s core justification is proportionality, and retribution’s assurance is that punishment will always be proportional, and therefore, fair. Relying upon Dorne and Gewerth’s proposal, the guiding principle for both punishment and pardon would be retribution. It must be clearly noted, however, that any reformed model of presidential pardon power must limit pardon offerings solely to those who have been convicted of a crime.

A. The Problem with Desert and Punishment

This author has regularly criticized the use of retribution as a fundamental punishment principle because of the inability to precisely measure moral blameworthiness in determining periods of incapacitation. Nevertheless, desert theory proves useful in con-
templating the potential for release. Retributive punishment theory falls into two separate categories: desert pragmatism and desert moralism.\textsuperscript{72} Desert pragmatism or empirical desert adopts the “community’s shared principles of justice” in assigning liability and, ultimately, punishment, while desert moralism or deontological desert relies upon “abstract principles of moral right and goodness.”\textsuperscript{73} Together, they work to ensure overall justice so that “each offender receives the punishment deserved, no more, no less.”\textsuperscript{74} Scholars agree that empirical desert punishment principles may help inform presidential pardon power reform.\textsuperscript{75} In this regard, a more thorough review of desert’s underlying principles is informative.

Proportionality is the foundation of retributive punishment theory.\textsuperscript{76} For criminal sentences, proportionality requires a thorough appraisal of the degree of an offender’s moral blameworthiness, followed by an evaluation of whether any proposed sentence is aligned therewith.\textsuperscript{77} It has proven difficult, however, to measure proportionality accurately. Just as “it is difficult to know or control which particular details of an offender or offense inform a decision-maker’s assessment of desert,”\textsuperscript{78} it is also nearly impossible to measure how much punishment is enough.\textsuperscript{79} For desert to function fairly, however, proportionality must be measurable—retribution requires punishment no more and no less than what is deserved, “solely because the offender deserves it.”\textsuperscript{80} The basic premise underlying desert is that what is “deserved” is identifiable and quantifiable. In its current form, retribution cannot be gauged and translated into precise prison terms.\textsuperscript{81} It can, however, be helpful

\textsuperscript{72} PAUL H. ROBINSON \& MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN’T GIVE PEOPLE WHAT THEY DESERVE 19 (Oxford University, Inc., 2006).

\textsuperscript{73} Id.

\textsuperscript{74} Id.

\textsuperscript{75} See Dorne \& Gewerth, supra note 17, at 421.


\textsuperscript{78} Alice Ristroph, \textit{Desert, Democracy, and Sentencing Reform}, 96 J. CRIM. L. \& CRIMINOLOGY 1293, 1296 (2006) (“Racial bias, fear, [and] disgust . . . can shape desert assessments, but . . . do so under cover of a seemingly legitimate moral judgment.”).

\textsuperscript{79} See generally ROBINSON \& CAHILL, supra note 72, at 36-37; Jefferson-Bullock, \textit{How Much Punishment}, supra note 71, at 398.


\textsuperscript{81} Jefferson-Bullock, \textit{How Much Punishment}, supra note 71.
in determining parameters for early release, discharge of a sentence, or pardoning of an offense, generally.

B. Problem Solved—Retribution as a Guiding Principle in Granting Presidential Pardons

Though our criminal justice system relies heavily on retributive theory in distributing punishment, lawmakers have struggled to pinpoint precisely how much punishment retribution requires. This is incredibly problematic because retribution expects meticulous particularity. The Comprehensive Crime Control Act of 1984, which birthed our current sentencing regime, severely limited judges’ previously unfettered discretion in sentencing. Rendering mandatory minimum sentences advisory in later years did little to empower sentencing judges to reduce the excessive lengths of incarceration imposed by the Comprehensive Crime Control Act’s Sentencing Commission. Even modern-day legislative efforts have accomplished mere miniscule improvements in aligning punishment with blameworthiness. However, a fragment of discretion remains in judges’ hands, and is expressed in 18 U.S.C. § 3582(c), which states, in part:

The Court may not modify a term of imprisonment once it has been imposed except that--(1) in any case--(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment . . . after considering the factors set forth in §3553(a) to the extent that they are applicable, if it finds that--(i) extraordinary and compelling reasons warrant such a reduction; or (ii) the defendant is at least 70 years of age [and] has served at least 30 years in prison . . . ; and (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

This power to correct an arguably unjust punishment retroactively is retribution’s saving grace and should be how retributive

82. Id.
86. 18 U.S.C. § 3582(c) (2019).
theory is practically utilized. Presidential pardon power reform is a natural point of departure for such an experiment.

There is historical support for this proposal. Alexander Hamilton’s view of presidential pardon power is grounded in the type of reassessment of justice post-conviction that only retribution can provide. In his words, “[t]he criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”87 Additionally, the majority of Framers believed that, in the interest of justice, mercy should be meted out by one individual of good character: the President.88

While a presidential pardon power model based upon retributive justice is a good start, presidential discretion in this area still must be limited. Following the practice of several states, a federal pardon board should be implemented.89 Board membership must not be limited to appointees chosen by the President and the reigning political party, but must include a term-limited, bi-partisan mix of individuals who are chosen, perhaps, at the state level. This group should provide input to the President, based on statutory guidelines steeped in retributive principles. While the President would retain final decision-making power, the board’s recommendation would be part of the public record. Such a practice would work to restore public confidence in the presidential pardon system by involving and informing the public in the deliberative process.

IV. CONCLUSION

Public assurance is not only a paramount virtue of American democracy, it is an integral component. For our government to function effectively, the governed must perceive that the system is fair and worthy. More specifically, public perception is an essential component of presidential power as well.90 The President of the United States is charged with “tak[ing] Care that the Laws be faithfully executed” and upon assuming office, vows that (s)he “will faithfully execute the Office of President of the United States, and will to the best of [his or her] Ability, preserve, protect[,] and defend

87. THE FEDERALIST, supra note 20.
88. Id.
89. States that have a pardon board include Alabama, see ALA. CODE § 15-22-20 (2003); Connecticut, see CONN. GEN. STAT. § 54-124a (2015); Georgia, see GA. CODE ANN. § 42-9-2 (1999); Idaho, see IDAHO CODE § 20-210 (2017); South Carolina, see S.C. CODE ANN. § 24-21-10 (2012); and Utah, see UTAH CODE ANN. § 77-27-2 (2011).
90. See Barkow & George, supra note 34, at 983-84; see also Bowers & Robinson, supra note 34.
the Constitution of the United States.”91 Despite broad presidential authority in a number of areas, the president’s authority is not limitless and must not be viewed as such. Today, the American electorate is actively questioning President Trump’s authority, intentions, and temperament in a manner that has been unprecedented in modern American history.92 There are many reasons for this growing distrust, but one that is on the minds of many Americans at this moment in time is potential presidential pardon power abuse.

The most obvious remedy to the quandary of seemingly abusive presidential pardons provides no cognizable relief. Theorists opine that the public may exercise its prerogative through voting, and may simply vote an unruly president out of office.93 While this is true, a more expedient, dependable, and manageable remedy is needed. Crafting of a presidential pardon power guided by retributive theory will assist in restoring public trust in the American presidency by helping to destroy the perception of abuse. Such a schema is closely aligned with the original concept of presidential pardon power. More importantly, it will facilitate the restoration of public confidence in presidential pardon power and in our overall system of government, so that, even in the absence of a Chief Executive of the highest character, we all may, with pride, “sing America.”94

91. U.S. CONST. art. II §§ 1, 3.
93. See Barkow & George, supra note 34, at 986.
94. Hughes, supra note 8.

Ashley J. Puchalski*

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I. INTRODUCTION

On the night of October 1, 2017, the sound of a machine gun could be heard echoing throughout the Las Vegas Strip.\(^1\) What should have been a fun, carefree night for country music fans attending the Route 91 Harvest Music Festival in Las Vegas, Nevada, quickly turned into a nightmare when gunman Steven Paddock smuggled firearms into his thirty-second-floor Mandalay Bay Resort & Casino hotel room, and shot into the crowd below,\(^2\) killing fifty-eight people and injuring more than five hundred others.\(^3\)

After the Las Vegas Massacre, a Second Amendment debate was, naturally, ignited once again on Capitol Hill,\(^4\) however, one aspect of the shooting’s aftermath that has largely been left out of the discussion is the impact the massacre had on hotel security. Since the Las Vegas Massacre, hotels in both Las Vegas and throughout the country have begun implementing security measures to ensure the safety of hotel guests.\(^5\) Given the nature of the situation, many hotels’ actions seem reasonable, however, these changes could potentially be devastating to individual Fourth Amendment privacy rights, as the Fourth Amendment of the United States’ Constitution gives heightened protections to individuals residing in their homes or in home-like places,\(^6\) such as a hotel room.\(^7\)

The sanctity of the home has long been recognized by legislatures and courts through the implementation of Fourth Amendment principles, ensuring that search warrants are obtained before searches

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and seizures are conducted within an individual’s home or home-like place.\textsuperscript{8} However, the horrific nature of the recent Las Vegas shooting leaves open an important question: what is next for hotel security in the United States? While there has been no congressional attempt at this point to regulate this area, if events that endanger public safety such as the Las Vegas shooting continue to occur, it is likely only a matter of time until Congress will be forced to take action. If Congress passes legislation requiring heightened security in hotels, and Congress struggles to strike an acceptable balance between individual liberties and public safety, the legislation may have the potential to relax warrant requirements, weaken individual privacy rights, and jeopardize the greater Fourth Amendment protections afforded to privacy within the home or home-like places, such as hotel rooms.

In this article, I first discuss the history of protecting privacy within the home and the Supreme Court’s extension of that protection to hotel rooms. Next, I discuss the impact of the Las Vegas Massacre on hotel security in the United States, followed by a discussion of how the international hotel industry has historically responded to terrorist attacks by increasing hotel security. I then discuss the United States’ response to perhaps the most well-known incident to endanger public safety in the United States: September 11, 2001. Accordingly, I demonstrate how, in the wake of that tragedy, Congress struggled to balance national security and individual liberties when it hastily passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001,\textsuperscript{9} more commonly known as the USA PATRIOT Act (hereinafter “PATRIOT Act”).\textsuperscript{10}

In the analysis section of this article, I propose ideal legislative provisions for Congress to include in future legislation. While I do not propose complete legislation, I propose provisions that I believe have the potential to improve hotel security in the United States, while preserving the Fourth Amendment rights of hotel guests. The legislative provisions draw inspiration from the international hotel

\textsuperscript{8} Kyllo, 533 U.S. at 31; Silverman, 365 U.S. at 512.


industry, from the mistakes of Congress post-September 11, 2001, and from domestic airport security procedures.

I first suggest that Congress mandate that American hotels have security stations at each hotel entrance where security guards are professionally trained to use X-ray machines and metal detectors to screen individuals and their luggage. Next, I suggest that the legislation provide a comprehensive list of unauthorized items for hotels and hotel rooms. While I do not propose a complete list of unauthorized items, I recommend giving hotel guests leeway regarding everyday items, while certain firearms and explosives should be absolutely prohibited. I then propose that Congress mandate hotel staff members to ensure that they are properly screening guests before they enter the hotel, and are trained to recognize suspicious activity. I then propose that Congress include a provision in the legislation that explicitly states that no hotel room can be searched without probable cause, ensuring that hotel personnel do not authorize warrantless searches of hotel rooms. My final suggestion is that Congress create a governing body (a department, committee, etc.) to oversee the newly implemented processes and to ensure compliance.

Finally, I explain that, in the event that Congress passes legislation that infringes on individual Fourth Amendment privacy rights, the last line of defense for individuals will be state constitutions that offer greater Fourth Amendment protections to their citizens. Citizens of Pennsylvania, for example, may be afforded greater Fourth Amendment protections, while citizens of Florida will not because the Florida Supreme Court has refused to broaden privacy protections beyond those afforded by the Fourth Amendment of the United States Constitution. Thus, this has the potential to be problematic because it will leave some Americans turning to their respective state courts for relief, while other Americans will not be afforded the same opportunity.

11. PA. CONST. art. 1, § 8.
12. Bernie v. State, 524 So. 2d 988, 990-91 (Fla. 1988) (After the 1982 amendment to the Florida Constitution, Florida courts were bound to follow the interpretations of the United States Supreme Court with relation to the Fourth Amendment but could not provide greater protections than those interpretations.).
II. FOURTH AMENDMENT PROTECTIONS OF THE HOME & HOME-LIKE PLACES

A. A Man is the “King” of His Own Castle

What exactly constitutes a “home?” Is a home where a man lays his head at night? Must a home be a permanent place? Or can a home be temporary in nature? The Supreme Court of the United States has been called upon to answer many of the aforementioned questions over the past few decades, however, the right to privacy in the home or in home-like places has deep roots in both English and American jurisprudence.

The idea that “a man’s house is his castle”13 is a powerful concept that is deeply embedded in English tradition. For example, the Earl of Chatham, William Pitt, addressed the English House of Commons to discuss the danger of admitting officers into private citizens’ houses.14 Pitt eloquently demonstrated the importance of residential privacy in England:

“The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!”15

Additionally, when the time came to form the United States of America, the founding fathers kept in mind the idea that an individual should be able to deny entry into his home to whomever he wishes.16 In fact, to ensure that residential privacy would remain a fundamental right for all American citizens, the founders codified it as the Fourth Amendment of the United States Constitution:

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

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15. Id. (quoting William Pitt, Earl of Chatham on the occasion of a debate in Parliament).
particularly describing the place to be searched, and the persons or things to be seized.\footnote{17}

While the Fourth Amendment protects the home from unreasonable searches and seizures, the Amendment’s core principle allows a man the opportunity to retreat into his home and be free from unreasonable governmental intrusion.\footnote{18}

In \textit{Silverman v. United States}, the District of Columbia Police Department used an amplifying device to both record and listen to the petitioners’ conversations in their home after the police suspected that they were involved in illegal gambling activities.\footnote{19} Accordingly, the testimony regarding those conversations was admitted at trial and played a substantial part in the petitioners’ convictions.\footnote{20} However, the Supreme Court refused to allow the admission of evidence gathered from the recorded conversations because “the officers overheard the petitioners’ conversations only by usurping part of the petitioners’ house or office . . . a usurpation that was effected without their knowledge and without their consent.”\footnote{21} The Court made this decision based upon precedent, as it had never before allowed an officer who lacked a warrant or consent to enter a man’s home to secretly observe and relate what was seen or heard at the individual’s subsequent criminal trial.\footnote{22} Additionally, the Court emphasized the fact that the intrusion was directly related to the defendant’s home, stating “[t]he Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”\footnote{23}

Additionally, in \textit{Payton v. New York},\footnote{24} and its companion case, \textit{People v. Riddick},\footnote{25} the Supreme Court was called upon to examine the constitutionality of two New York statutes that allowed police to enter residences without search warrants to make felony arrests.\footnote{26} In \textit{Payton}, police officers went to Payton’s residence without a search warrant.\footnote{27} When there was no answer at the door, police

\begin{itemize}
  \item \footnote{17. U.S. Const. amend. IV.}
  \item \footnote{18. Silverman v. United States, 365 U.S. 505, 511 (1961).}
  \item \footnote{19. \textit{Id.} at 506.}
  \item \footnote{20. \textit{Id.} at 507.}
  \item \footnote{21. \textit{Id.} at 511.}
  \item \footnote{22. \textit{Id.} at 512.}
  \item \footnote{23. \textit{Id.} at 511.}
  \item \footnote{25. The New York Court of Appeals consolidated \textit{Riddick} and \textit{Payton} and issued only one opinion. \textit{Id.} at 579. For purposes of this article, the principles set forth by the Supreme Court in its consolidated opinion will be referred to as \textit{Payton}.}
  \item \footnote{26. \textit{Payton}, 445 U.S. at 574.}
  \item \footnote{27. \textit{Id.} at 576.}
\end{itemize}
officers broke down the door, entered the apartment, and seized evidence in plain view that was later admitted as evidence in Payton’s criminal trial.  In *Riddick*, the police arrived at Riddick’s house without a warrant and when Riddick’s young son answered the door, the police entered the house and seized illegal narcotics after seeking Riddick inside. Riddick was later arrested and indicted on narcotics charges. Accordingly, the Supreme Court consolidated both of the aforementioned cases and issued one opinion.

In its analysis, the Court cited its previous decision in *United States v. United States District Court for the Eastern District of Michigan*, noting that the “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” The Court also reasoned that entry into a home to search for and to seize property justify the same level of constitutional protection. Further, the Court found the Second Circuit’s reasoning regarding warrantless intrusions in the home to be persuasive:

To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present.

The Court echoed this principle by reasoning that the Fourth Amendment “draw[s] a firm line at the entrance to the house,” and “absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.” Accordingly, the Supreme Court held that the warrantless entries in both *Payton* and *Riddick* violated the Fourth Amendment.

**B. Is a Man the “King” of His Own Hotel Room?**

Historically, residential privacy has been considered sacrosanct. However, whether Fourth Amendment protections extended to
“temporary” or “non-permanent” homes was the next logical question for the Supreme Court. As previously mentioned, the Fourth Amendment requires police officers or other governmental actors to obtain a warrant before searching or seizing “persons, houses, papers, and effects.”37 While a hotel room and a permanent residence are facially different, the Supreme Court extended Fourth Amendment protections to individuals staying in hotel rooms as well.38

In *Katz v. United States*, the Supreme Court held that the Fourth Amendment protects people, not places, and explained that Fourth Amendment protection depends on whether the individual seeking the constitutional protection has a legitimate expectation of privacy in the invaded place.39 Accordingly, the Supreme Court has also held that a hotel room is like a home until the guest’s lease of the room expires or the guest checks out,40 and the resident of a hotel room has the same expectation of privacy as an individual within a house.41 Further, just as an individual’s home is protected from warrantless intrusions, any lesser standard when applied to a hotel room is presumptively unreasonable.42

In *United States v. Jeffers*, the Supreme Court of the United States held that the warrantless search of a hotel room was unconstitutional even though the police were granted entry by the hotel’s assistant manager.43 Jeffers was convicted of violating narcotics laws after police conducted a warrantless search of the hotel room where he was staying.44 After police suspected that Jeffers had “some stuff stashed” in his hotel room at the Dunbar Hotel, they went to his hotel room, knocked at the door, and when there was no answer, asked the hotel’s assistant manager for a key to the room.45 The assistant manager unlocked the door and the police entered Jeffers’s hotel room, conducted a warrantless search, and subsequently discovered illegal narcotics.46 Jeffers was later arrested and charged.47 The Supreme Court noted that if it were to hold that

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40. United States v. Young, 573 F.3d 711, 721 (9th Cir. 2009) (citing Jeffers, 342 U.S. at 51-52).
41. See Stoner, 376 U.S. at 490.
44. *Id.* at 49-50.
45. *Id.*
46. *Id.* at 50.
47. *Id.*
the search and seizure in this instance were lawful, it would essentially overturn a principle designed to protect a fundamental privacy right. 48 Accordingly, the Court held that the evidence discovered during the warrantless search and seizure of Jeffers’s hotel room should be suppressed. 49

Thirteen years later, in Stoner v. California, the Supreme Court once again suppressed evidence resulting from a warrantless search of a hotel room when the hotel’s night clerk granted police officers entry to Stoner’s hotel room without his consent. 50 The Pomona, California Police Department received information that Stoner may have been involved in a robbery that occurred earlier that day. 51 Police officers then went to the Mayfair Hotel where Stoner was staying and without Stoner’s permission or consent, the hotel night clerk unlocked his hotel room door and allowed the police to enter his room. 52 The police subsequently conducted a warrantless search of the hotel room, and discovered evidence that linked Stoner to the robbery. 53 Additionally, the evidence seized from the room was used against Stoner at his criminal trial. 54 The Supreme Court noted that in this case it was Stoner’s [Fourth Amendment] right at stake, “not the night clerk or the hotel’s.” 55 Further, the court explained that because a guest in a hotel room is entitled to protection against unreasonable searches and seizures, if the Court were to allow hotel employees to have “unfettered discretion” in entering and granting others permission to enter an individual’s hotel room, it would infringe upon hotel guests’ Fourth Amendment rights. 56 Thus, the Court held that the warrantless search conducted by police was unconstitutional and ordered that Stoner’s conviction be set aside. 57

Based upon the aforementioned Supreme Court decisions, Fourth Amendment protections have been extended to individuals staying in hotel rooms. 58 Therefore, because hotel guests are afforded nearly the same Fourth Amendment protections that they would receive in their home, if Congress chooses to pass legislation that regulates hotel security in the United States, they must strike an

48. Id. at 52.
49. Id. at 54.
51. Id. at 484-85.
52. Id. at 485.
53. Id. at 485-86.
54. Id. at 486.
55. Id. at 489.
56. Id. at 490.
57. Id. at 484.
acceptable balance between public safety and protecting hotel guests’ Fourth Amendment rights in their hotel rooms.

III. UPPING THE ANTE: INCREASED HOTEL SECURITY IN THE WAKE OF THE LAS VEGAS MASSACRE

Unfortunately, the Las Vegas Massacre was not the first mass shooting to occur in the United States, but it is the deadliest.\textsuperscript{59} Paddock had been a hotel guest at Mandalay Bay since September 28, 2017.\textsuperscript{60} After police entered Paddock’s hotel room, they found an “arsenal” of sixteen weapons stashed in the room.\textsuperscript{61} Police believed that Paddock was able to get the vast amount of weapons into the hotel without suspicion by putting the firearms in ten suitcases, which he transported up to his thirty-second floor hotel room in order to carry out the attack.\textsuperscript{62}

Accordingly, in the wake of the massacre, Mandalay Bay and other Las Vegas hotels have increased security.\textsuperscript{63} Some Las Vegas hotels have started requiring guests to walk through metal detectors and put their luggage through x-ray machines.\textsuperscript{64} These security measures appear to be warranted given the circumstances, however, hotels must be sure to avoid infringing upon hotel guests’ individual privacy rights.\textsuperscript{65} While a search of Paddock’s luggage prior to check-in may have allowed Mandalay Bay personnel to discover the deadly weapons, such searches may be seen as intrusive and invasive. Additionally, experts believe that using x-ray machines and metal detectors as security measures would be virtually impossible long-term and would be burdensome to both hotel guests and personnel.\textsuperscript{66}

\begin{itemize}
\item \textsuperscript{63} Taylor, supra note 5.
\item \textsuperscript{64} Id.
\end{itemize}
Even as time passes and the Las Vegas Massacre becomes more distant, discussions surrounding the future of hotel security in the United States are inevitable. While there is currently no legislation in the United States aimed at regulating hotel security, if mass shootings, terrorist attacks, and other events that endanger public safety continue to occur, we may see a push for legislation and regulation that has the potential to infringe upon hotel guests’ Fourth Amendment privacy rights.

IV. RAISING THEIR HAND: HOW THE INTERNATIONAL HOTEL INDUSTRY HAS RESPONDED TO TERROR ATTACKS ON HOTELS ABROAD

Unlike other industries, the hotel and hospitality industry is largely inconsistent when it comes to hotel security.\textsuperscript{67} For example, while some international hotels have historically implemented invasive hotel security measures,\textsuperscript{68} the United States has opted for less invasive, less restrictive measures.\textsuperscript{69} American hotels rarely resort to using metal detectors and x-ray machines to ensure guests’ safety, while both methods are commonly used internationally.\textsuperscript{70} Additionally, it is becoming increasingly common for hotels in other countries to have armed guards on hotel premises, use vehicle barricades, and resort to other extreme security measures to reduce the risk of an attack.\textsuperscript{71} In contrast, such practices are unheard of in the United States.\textsuperscript{72}

Often, hotels are seen as “soft target[s]” and tend to be vulnerable to safety and security threats such as terrorism, natural disasters, and other crimes.\textsuperscript{73} Accordingly, because hotels have become the target of more bombings and terrorist attacks abroad, invasive security screenings when hotel guests check in have become a way of life in countries such as Indonesia, Israel, and Egypt.\textsuperscript{74} In 2003, terrorists set off a car bomb in a Marriott in Jakarta, Indonesia,

\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} See generally Chan & Koenig, supra note 69.
\textsuperscript{73} Karum Mansour Ghazi, Safety and Security Measures in Egyptian Hotels, 4 J. HOTEL & BUS. MGMT. 1, 2 (2015).
\textsuperscript{74} Hsu, supra note 68.
which resulted in twelve fatalities. Then, in 2009, terrorists again set off explosives in major Jakarta hotels, leaving eight people dead. Since both of the aforementioned incidents, Indonesia have strengthened hotel security in order to ensure guests’ safety.

Additionally, after a 2008 terrorist attack in India that resulted in more than one-hundred fatalities, the hotel industry in that region responded accordingly. Major hotel chains began using x-ray systems and explosive trace detectors in hotels across India, and the Lemon Tree Premier Hotel in New Delhi even trained employees to use facial-recognition software to identify anyone who entered onto the hotel’s premises. Furthermore, the King David Hotel in Jerusalem has taken hotel security measures to even greater extremes. Due to the ongoing Israeli-Palestinian conflict, the King David Hotel, which is a frequent destination for world leaders, “reportedly uses infrared cameras carried by balloons and robots in sewers to search for bombs.” The hotel also has an air conditioning system that prevents the spread of poisonous gas, and has installed windows that can withstand gunfire.

As terrorist attacks on hotels abroad have become more common, the international hotel industry has been both responsive and innovative when implementing hotel security measures after terrorist attacks. Bjorn Hanson, professor of hospitality and tourism at New York University, commented after the Las Vegas Massacre that despite the horrific nature of the Las Vegas Massacre, he did not think that metal detectors or x-ray machines would become common hotel security measures in United States hotels. Rather, he believed more hotels would simply begin using security cameras and would become more sensitive to guests who checked in with large packages. While it may be premature to suggest that the United States adopt the extreme security measures used by international hotels, there may come a time when Congress will be

75. Chan & Koenig, supra note 69.
76. Id.
77. Id. (Indonesian hotels have strengthened hotel security by inspecting vehicles, scanning luggage with x-ray machines, and installing more security cameras.)
78. Hsu, supra note 68.
79. Id.
80. Chan & Koenig, supra note 69.
81. Id.
82. Id.
83. In the six-year period from 2003-2009, there were at least three high-profile terrorist attacks on hotels abroad. See Chan & Koenig, supra note 69; Hsu, supra note 68.
84. Chan & Koenig, supra note 69.
85. Id.
forced to look to the international hotel industry for guidance when drafting legislation to regulate hotel security in America’s hospitality industry.

V. FOLDING THEIR HAND: HOW THE UNITED STATES HAS RESPONDED TO DOMESTIC TERROR ATTACKS–THE PATRIOT ACT’S DEVASTATING EFFECTS ON FOURTH AMENDMENT PRIVACY RIGHTS

Historically, there has been a balancing act in our society between individual privacy rights and public safety. After incidents that jeopardize public safety, the Fourth Amendment is more likely to yield to legislation that puts individual Fourth Amendment privacy rights at-risk. Perhaps the best example of the aforementioned principle is the September 11, 2001 terrorist attacks and the subsequent enactment of the PATRIOT Act.

On September 11, 2001, four United States commercial planes were hijacked by nineteen members of the al Qaeda terrorist group led by the now-deceased al Qaeda leader, Osama bin Ladin. Two of the hijacked planes crashed into the north and south towers of the World Trade Center in New York City, another plane crashed into the Pentagon in Washington D.C., and a fourth plane crashed in a field near Shanksville, Pennsylvania. While the devastating events of September 11, 2001, resulted in 2,977 fatalities, the tragedy left America in shock and demanding answers, as it became apparent that America was not unsusceptible to foreign terrorist attacks.

The events of September 11, 2001 left Americans and politicians alike asking questions about the effectiveness of the country’s counterterrorism efforts. Accordingly, Congress acted swiftly and introduced the PATRIOT Act. On October 26, 2001, President George

86. See United States. v. United States Dist. Court for the E. Dist. of Mich., 407 U.S. 297, 314-15 (1972) (noting that “the Fourth Amendment is not absolute in its terms, our task is to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression”).
89. Id.
90. Id.
91. PATRIOT Act of 2001, 115 Stat. 272; see also Peter Baker, In Debate Over Patriot Act, Lawmakers Weigh Risks vs. Liberty, N.Y. TIMES (June 1, 2015), https://www.nytimes.com/2015/06/02/us/politics/in-debate-over-patriot-act-lawmakers-weigh-risks-vs-liberty.html (noting that only one senator voted against the PATRIOT Act, as they felt that the Act was a violation of civil liberties).
W. Bush signed the Act into law. On its face, the PATRIOT Act simply appeared to provide law enforcement with the necessary tools to prevent future terrorist attacks from occurring on American soil. However, the PATRIOT Act ended up being the first of many changes to surveillance laws that allowed the U.S. government to intrude upon the civil liberties of ordinary Americans by expanding the government's authority to monitor phone calls, e-mails, bank records, credit reports, and individual internet activity. The PATRIOT Act also allowed law enforcement to "better observe the conduct of individuals through sophisticated surveillance devices, including monitoring, tracking, searching a suspect's computer movements, and eavesdropping on communications with other computer users." Therefore, while the PATRIOT Act was enacted in order to prevent future terrorist attacks, it also had the effect of eroding civil liberties afforded to American citizens by the United States Constitution.

In contrast to the haste in which the PATRIOT Act was passed, Congress extensively deliberated over the PATRIOT Act's predecessor, the Foreign Intelligence Surveillance Act (hereinafter "FISA"). In 1978, Congress enacted FISA to "provide legislative authorization and regulation for all electronic surveillance conducted within the United States for foreign intelligence purposes." While Congress rushed to pass the PATRIOT Act post-September 11, 2001, Congress extensively deliberated before passing FISA. When deciding how much authority should be given to national security surveillance, Congress strived to achieve an adequate balance between national security and civil liberties. Accordingly, FISA's legislative provisions were much more protective of individual privacy rights than those in the PATRIOT Act, as the PATRIOT

92. Glass, supra note 9.
95. Gross, supra note 93, at 1-2.
98. Surveillance Under the Patriot Act, supra note 94.
100. Id.
Act expanded FISA by authorizing more intrusive procedures to ensure national security. For example, the PATRIOT Act expanded FISA by authorizing roving wiretaps, orders to obtain “any tangible things” without requiring individual suspicion, and warrantless wiretaps when the primary purpose is for criminal investigation.

Perhaps instead of hastily passing the PATRIOT Act a mere forty-five days after the September 11, 2001 terrorist attacks, Congress could have taken more time to consider how to achieve balance between adequate protection and civil liberties, as they did when passing FISA nearly three decades earlier.

Keeping the Fourth Amendment in mind, Congress had an obligation to balance individual citizens’ Fourth Amendment rights with national security. Unfortunately, when faced with this task, Congress struggled to strike an acceptable balance and innocent Americans have been forced to pay the price. Overall, the American public has never supported the government monitoring personal phone calls or emails. In fact, a survey conducted on the tenth anniversary of the September 11, 2001 terrorist attacks indicated that only 29% of Americans who were surveyed favored “the U.S. government monitoring personal telephone calls and emails” in order to curb terrorism, and that particular question drew less support than the other anti-terror tactics asked about in the same survey. Additionally, when it came to civil liberties, fewer Americans thought it was necessary to sacrifice civil liberties in order to combat terrorism than they did immediately after the September 11, 2001 terrorist attacks. In a study conducted immediately after September 11, 2001, but before the enactment of the PATRIOT Act, 55% of individuals surveyed thought it was necessary for Americans to give up civil liberties in order to ensure national security, while 35% of those surveyed believed it was not.

102. Id. (The following provisions of FISA were expanded upon by the Patriot Act: 50 U.S.C. §1805(c)(2)(B); 50 U.S.C. §§1861-1862; 50 U.S.C. §1804(a)(7)(B)).
103. Surveillance Under the Patriot Act, supra note 94.
104. Cusick, supra note 99, at 56.
106. Id. (other anti-terror tactics that were surveyed include: requiring all citizens to carry a national identification card at all times, requiring extra airport checks for individuals who appear to be of Middle-Eastern descent, and government monitoring of credit card purchases.).
107. Id.
108. Id.
in a poll conducted shortly before the tenth anniversary of September 11, 2001, 40% of individuals surveyed believed that “in order to curb terrorism in this country it will be necessary for the average person to give up some civil liberties,” while the majority of individuals surveyed, 54%, said it would not.\(^\text{109}\) Moreover, the statistics overwhelmingly indicate that, while Americans are concerned about national security, they disfavor government action that is considered intrusive and fails to preserve civil liberties.\(^\text{110}\)

Rather than learning from past legislative mistakes, conflict between the government’s right to protect national security and citizens’ right to privacy continues to frustrate the legal system.\(^\text{111}\) Similar to what occurred in the aftermath of September 11, 2001, if American hotels continue to be soft targets for terrorist attacks, Congress will likely be pressured to pass legislation that strengthens hotel security in order to preserve national security. When, and if, Congress finds itself in this predicament, Congress’s solution should keep the founding fathers’ vision in mind and strike an acceptable balance between Fourth Amendment rights and public safety.

VI. ANALYSIS–PLACING MY BET: IDEAL LEGISLATION PROPOSED

There is no denying that the Las Vegas Massacre was the most devastating shooting in modern-day U.S. history.\(^\text{112}\) While the tragedy left America mourning the fifty-eight lives lost that October night, it also raised some red flags when it comes to gun control and hotel security.\(^\text{113}\) Although members of Congress chose to ignore the inadequacy of hotel security measures in the wake of the massacre,\(^\text{114}\) if hotels continue to be soft targets for terrorist attacks, there may come a time when lawmakers will be forced to pass legislation that regulates hotel security in the United States.

Ideal legislative provisions would take into account both the need to protect hotel guests and the need to preserve individual liberties, particularly hotel guests’ Fourth Amendment rights while staying in hotel rooms. Because Congress missed the mark when drafting

109. \textit{Id.}
110. \textit{See generally id.}
112. Taylor, supra note 5.
113. \textit{Id.}
114. \textit{See generally Greenwood, supra note 4; Savransky, supra note 4. Both of these sources demonstrate that in the wake of the massacre, Capitol Hill was primarily concerned about gun control issues and was virtually silent on the topic of hotel security.}
the PATRIOT Act post-September 11, 2001, I propose legislative provisions for Congress to include in future legislation. Accordingly, the suggested provisions take inspiration from the international hotel industry, from Congress’ mistakes post-September 11, 2001, and from domestic airport security procedures.

While convenience is certainly important to American travelers, public safety, and national security, individual liberties should be the main factors that Congress considers when drafting legislation that regulates hotel security. Accordingly, these factors will also drive my analysis. The first provision that Congress should include in future legislation is the implementation of security stations at each hotel entrance. Ideally, these security stations will employ professionally trained security guards and use x-ray machines and metal detectors to screen individuals and their luggage. Congress should take inspiration for the security stations from the international hotel industry, as it is common practice for international hotels to have similar checkpoints where guests and their bags are screened before entering the hotel. While acknowledging the fact that this process may be seen as intrusive, burdensome, and may make traveling less convenient for Americans, more importantly, the security procedures would increase public safety and likely lower the risk of warrantless entry into guests’ hotel rooms because guests will be screened immediately after they enter the hotel.

Experts, however, believe that using x-ray machines and metal detectors as security measures would be virtually impossible long-term and would be burdensome to both hotel guests and personnel. Jim Stover, a senior vice president of the real estate and hospitality practice at Arthur J. Gallagher & Company, noted after the Las Vegas Massacre that explosive scanners and x-ray machines would likely not be adopted by American hotels due to privacy concerns. However, while experts believe that having x-ray machines and metal detectors in hotels would be too burdensome for hotel guests, it is important to acknowledge that the United States implemented similar security measures in airports after

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116. See generally Chan & Koenig, supra note 69.
117. Sheehan, supra note 66.
September 11, 2001, and American travelers have acclimated accordingly.  

After September 11, 2001, Congress swiftly federalized domestic airport security by enacting the Aviation and Transportation Security Act (hereinafter “ATSA”). ATSA initiated a “fundamental change in the way [the U.S. government] approaches the task of ensuring the safety and security of the civil air transportation system,” and transferred control of airport security to the Transportation Security Administration (hereinafter “the TSA”). Before September 11, 2001, airport security measures were much more relaxed; however, over the past seventeen years, more innovative and intrusive technology has been used to screen airline passengers. Perhaps the most advanced and the most controversial is the full-body scanning machine that the TSA uses to detect weapons and explosives on individuals. While these full body scanning machines initially incited criticism from travelers who were concerned about their privacy, the machines are still being used in airports today. Further, the TSA has increasingly restricted passengers from bringing particular weapons and even everyday items aboard an airplane. Prior to 2001, blades up to four inches long were allowed aboard a plane, in addition to baseball bats, box cutters, darts, and scissors. Consequently, many of these items were banned from flights in the aftermath of September 11, 2001. Despite the aforementioned restrictions, however, Americans still choose air travel as a primary method of transportation.

121. Mock, supra note 119.
122. Id.
124. Id.
125. Id.
127. Lydia O’Connor, This Is What it Was Like to Go to the Airport Before 9/11, HUFFINGTON POST (Sept. 11, 2016, 2:36 PM), https://www.huffingtonpost.com/entry/airports-before-911_us_57c85e17e4b078581f11a133.
128. Id.
129. See generally Air Traffic by the Numbers, FED. AVIATION ADMIN., https://www.faa.gov/air_traffic/by_the_numbers/ (last updated Nov. 26, 2018, 11:02 AM).
The next legislative provision I suggest is that Congress draft a comprehensive list of unauthorized items for hotel guests. This list should be included in the actual piece of legislation, each hotel should be mandated to publish the list on their website, and hotel guests ideally should be required to sign a waiver before booking their room(s), which would prompt the guest to agree to the initial security screening and not to bring unauthorized items onto hotel premises. While I do not propose a complete list of unauthorized items in this article, I will provide suggestions and guidelines for Congress.

First, Congress should use the TSA’s list of unauthorized items and modify it accordingly. When drafting legislation, Congress should also keep in mind that individuals who are traveling may choose to drive rather than fly because they prefer to travel with items that may be prohibited on airplanes. Accordingly, the list of unauthorized items on hotel premises should be less restrictive than TSA’s unauthorized items. Ideally, hotel guests would be permitted to bring everyday items with them to hotels that may be prohibited on airplanes (i.e. full-sized toiletries, small scissors, aerosol cans, Swiss army knives, pepper spray and other self-defense sprays, etc.). Additionally, because hotels are considered temporary homes for guest staying for long durations, creating a flexible list of authorized items for hotel guests is appropriate.

However, while hotel guests should have more flexibility bringing everyday items into the hotel, guests should be required to follow appropriate check-in procedures for firearms and explosives that Congress may choose to permit on hotel premises. Ideally, the legislation would require that these objects be kept in an authorized area under hotel personnel supervision until the guest either checks out the item (and immediately exits the premises), or the guest completes his or her stay. Further, based on the TSA’s authorized and unauthorized items list, items guests should be allowed to bring into hotels (as long as the guest complies with proper check-in procedures and the items are subsequently placed into an authorized area on hotel premises) are: axes/hatchets, BB guns, billy clubs, bows and arrows, box cutters, brass knuckles, firearms, flare guns, ice picks, martial arts weapons, meat cleavers, nail guns, parts of guns and firearms, pellet guns, rifles, screwdrivers/tools, stun gun/shocking devices, and swords. Additionally, guests should be

131. Id.
132. Id.
absolutely prohibited from bringing the following items: blasting caps, dynamite, firecrackers, fireworks, gas torches, gasoline, gun powder, hand grenades, realistic replicas of explosives, realistic replicas of firearms, and sparklers.133 When it comes time for Congress to draft comprehensive lists of unauthorized objects, because hotels are considered temporary homes for some guests who may stay for long durations, it will be important for Congress to be more flexible when determining what items guests are permitted and prohibited on hotel premises.

Further, in order to ensure that none of the aforementioned items brought by hotel guests will be used to carry out an attack, it is absolutely imperative that hotels employ properly trained hotel personnel and security guards. My next suggested provision urges Congress to mandate that hotel personnel complete safety training(s) and get specific certifications to ensure that hotel staff members are properly checking in and storing the authorized items. Hotel staff members should also be trained to recognize suspicious activity. In fact, Mac Segal, head of hotel security consulting for the global security firm AS Solution, maintained that the best way to prevent future terror attacks is by having a well-trained hotel staff, and noted that “every hotel employee, from housekeeping to blackjack dealers” should be trained to recognize “suspicious indicators” of an attack.134 Additionally, transport security officers in airports go through extensive training and testing.135 In fact, transport security officers must complete a minimum of forty hours of classroom training and sixty hours of on-the-job training to become a certified transport security officer.136 These security officers also must pass a “standard operating procedures knowledge test, an image certification test, and a practical skills demonstration” annually to become recertified.137 While I do not propose training requirements for each hotel employee and security guard, Congress should consult with experts from the international and domestic hospitality industry and look to the TSA’s requirements for transportation security officers when determining what certification standards are appropriate for hotel staff members.

Next, I propose that Congress include a special provision in the legislation that explicitly states that no hotel room can be searched

133. Id.
135. See Mock, supra note 119, at 216-17.
136. Id.
137. Id. at 217.
without probable cause. While limiting the dangerous items that can be brought on the hotel premises and mandating that hotels have security stations at each entrance, the probability of dangerous contraband making it into a guest’s hotel room will likely be significantly reduced, however, because hotel rooms have granted the same Fourth Amendment protections as a home, the provision would ensure that hotels will not take advantage of newly implemented security measures and allow police to conduct warrantless searches of hotel rooms.

Further, if Congress passes legislation that regulates hotel security, in order for it to be effective, it is imperative that all American hotels comply with the potential legislation. This will most likely require Congress to create a governing body, like a department or committee, to oversee the newly implemented processes and ensure compliance. It is best for Congress to create universal hotel security standards/procedures and subsequently mandate that hotels comply with those standards rather than leaving it to the courts to decide when hotels have failed to comply or leaving it for guests to decide which hotels they would like to stay at based on the intrusivity of their security measures. Congress has the time and resources to create a comprehensive piece of legislation that considers all competing issues, while courts and individual hotels do not have the same resources at their disposal. Further, it is necessary for Congress to create and implement the legislation in order to prevent economic advantage or disadvantage to particular hotels. For example, if the decision is left up to individual hotels to decide whether they want to increase security measures, a hotel that implements security procedures may be economically disadvantaged compared to a hotel that does not, as travelers may opt to stay at the hotel where they would not have to be subjected to security screenings. On the other hand, a hotel that implements security procedures may have an economic advantage compared to a hotel that does not, as travelers may opt to stay at the hotel where they feel safer and more protected. Therefore, in order to create effective legislation that evens the playing field for hotels, Congress should be the lawmaking body to create the legislation, while a committee or department, also created by Congress, would carry out Congress’ objectives and ensure that all American hotels comply with the new legislation.

VII. RED OR BLACK?: PLAYING ROULETTE BY RELYING ON INDIVIDUAL STATE CONSTITUTIONS FOR HEIGHTENED FOURTH AMENDMENT PROTECTIONS

The Fourth Amendment of the United States Constitution is a constitutional floor, rather than a ceiling, and states are free to provide their citizens with protections broader than those guaranteed by the Fourth Amendment.139 If Congress passes legislation that increases hotel security measures while simultaneously infringing upon Fourth Amendment privacy rights, individuals may rely on their state constitutions as a last line of defense. This is not an ideal solution, however, as citizens of some states may be afforded greater Fourth Amendment protections than others. For example, while Pennsylvania citizens would be able to take advantage of the greater Fourth Amendment protections afforded by their respective state constitution,140 Florida citizens would be unable to do so, as Florida’s constitution offers no additional privacy protections beyond those included in the Fourth Amendment.141

The Pennsylvania Constitution, more specifically the Fourth Amendment, has often been found to be more protective of individual rights and liberties than the U.S. Constitution.142 Shockingly, when the U.S. Constitution was adopted, there was no provision that protected citizens from searches and seizures.143 In fact, when the Bill of Rights in the United States Constitution was being drafted, it was modeled in part from the Declarations of Rights in the Pennsylvania Constitution, particularly in regard to the warrantless searches and seizures provision.144

Further, Pennsylvania’s constitution, enacted in 1776, is one of the oldest state constitutions and has remained essentially unchanged, especially with regards to its criminal procedure provisions, since then.145 For example, in Commonwealth v. Sell, the

139. Marjorie A. Shields, Annotation, Fourth Amendment Protections, and Equivalent State Constitutional Protections, as Applied to the Use of GPS Technology, Transponder, or the Like, to Monitor Location and Movement of Motor Vehicle, Aircraft, or Watercraft, 5 A.L.R. 6th 385 (2005) (noting that “[s]tate constitutional provisions also provide commensurate protections, and some states provide protections which have been held to be broader than those imposed by the Fourth Amendment”).
Pennsylvania Supreme Court discussed how the Pennsylvania Constitution has historically protected individual privacy rights: “[S]urvival of the language now employed in Article I, Section 8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as a part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth.” Accordingly, the original version of Pennsylvania’s search and seizure provision read:

The people have a right to hold themselves, their houses, papers and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right and ought not be granted.

Today, Pennsylvania’s search and seizure provision is codified in Article I, Section 8 of the Pennsylvania Constitution, and reads:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Additionally, while Article I, Section 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution are nearly identical, the Pennsylvania Supreme Court has previously decided that Article I, Section 8 provides “different, greater, or more heightened protection than that of the Fourth Amendment.” Thus, a citizen of Pennsylvania may be able to seek relief in state court if Congress passes intrusive legislation

146. Edmonds, 586 A.2d at 897 (quoting Commonwealth v. Sell, 470 A.2d 457, 467 (Pa. 1983)).
147. Id. at 896-97 (This constitutional provision was reworded when the Pennsylvania Constitution was extensively revised in 1790, and reappeared as PA. CONST. art. 1, § 8.).
148. PA. CONST. art. 1, § 8.
149. McCarthy, supra note 145, at 88; see also Commonwealth v. Hughes, 836 A.2d 893, 902 (Pa. 2003) (noting that “[w]hen examining the text of Article I, Section 8, this Court has repeatedly stated that this constitutional provision embodies a strong notion of privacy, and has held that the section often provides greater protection than the Fourth Amendment to the United States Constitution”).
that regulates hotel security and infringes on Fourth Amendment privacy rights at the same time.

Conversely, the Florida Constitution offers citizens less Fourth Amendment protections than the Pennsylvania Constitution.\textsuperscript{150} The 1982 amendment to Article I, Section 12 of the Florida Constitution mandated that Florida courts follow the United States Supreme Court’s interpretation of the Fourth Amendment.\textsuperscript{151} Accordingly, Article I, Section 12 of the Florida Constitution reads:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.\textsuperscript{152}

Prior to passage of the 1982 amendment, Florida courts “were free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the [F]ederal [C]onstitution.”\textsuperscript{153} After the 1982 amendment, however, Florida courts were bound to follow the interpretations of the United States Supreme Court with relation to the Fourth Amendment but could not provide greater protections than those interpretations.\textsuperscript{154}

Thus, if Congress passes legislation that regulates hotel security while simultaneously intruding upon individual Fourth Amendment liberties, citizens hoping to protect their Fourth Amendment rights would first have to determine where their state constitution falls on the spectrum of constitutional protections. Accordingly, a Florida citizen seeking Fourth Amendment protection from the

\textsuperscript{150} Compare FLA. CONST. art. 1, § 12 (amended 1982), with PA. CONST. art. 1, § 8.
\textsuperscript{151} FLA. CONST. art. 1, § 12 (amended 1982).
\textsuperscript{152} Id.
\textsuperscript{153} State v. Lavazzoli, 434 So. 2d 321, 323 (Fla. 1983).
\textsuperscript{154} Bernie v. State, 524 So. 2d 988, 990-91 (Fla. 1988).
Florida Constitution may face greater challenges than a similarly situated Pennsylvania citizen who can rely on the Pennsylvania Constitution for relief. To avoid this confusion, Congress should strive to pass legislation that balances both the need to ensure public safety and the constitutional obligation to preserve Fourth Amendment privacy rights of Americans.

VIII. CONCLUSION—ALL CARDS ON THE TABLE

In the aftermath of the Las Vegas Massacre, instead of shifting legislative focus toward the inadequacy of hotel security in United States hotels, a Second Amendment debate ignited on Capitol Hill once again.\textsuperscript{155} While Congress may have turned a blind eye this time, if hotels continue to be popular targets for gun violence and terrorist attacks, hard discussions regarding increased hotel security measures are likely inevitable on Capitol Hill. If and when the time comes to draft legislation with respect to hotel security, Congress will be faced with the task of balancing public safety and the Fourth Amendment rights of citizens. However, this task is not to be taken lightly, as the right to privacy in one’s home is both fundamental and sacrosanct,\textsuperscript{156} and the Supreme Court of the United States has extended those same Fourth Amendment protections to hotel rooms.\textsuperscript{157}

When drafting legislation that increases hotel security in American hotels, ideal legislative provisions would take into account both the need to protect hotel guests and the need to preserve individual liberties, particularly hotel guests’ Fourth Amendment rights while staying in hotel rooms. As Professor Erwin Chemerinsky, a constitutional law scholar and the Dean of Berkeley School of Law stated,\textsuperscript{158} “[s]ome loss of freedom may be necessary to ensure security; but not every sacrifice of liberty is warranted . . . The central question must be what rights need to be sacrificed, under what circumstances, and for what gain.”\textsuperscript{159} While I cannot predict the future, one can only hope that if Congress passes legislation regulating hotel security, they will preserve the integrity of the Fourth Amendment of the United States Constitution, honor the wishes of

\begin{footnotes}
\item[155. ] Savransky, supra note 4.
\item[156. ] See U.S. CONST. amend. IV.
\item[159. ] Cusick, supra note 99, at 56.
\end{footnotes}
the founding fathers, and ensure hotel guests’ privacy in their hotel rooms.\textsuperscript{160}

160. Since the Las Vegas Massacre, more than 2,500 lawsuits have been filed against MGM Resorts International, the parent company that owns Mandalay Bay Hotel and Casino in Las Vegas, Nevada, claiming that MGM is responsible for “deaths, injuries, and emotional distress resulting” from the Massacre. Joshua Barajas, \textit{MGM’s Lawsuit Against Shooting Victims, Explained}, PBS (July 18, 2018, 9:20 PM), https://www.pbs.org/newshour/nation/mgms-lawsuit-against-las-vegas-shooting-victims-explained. On July 13, 2018, MGM Resorts filed a lawsuit against victims of the Las Vegas Massacre, claiming that they have “no liability of any kind” to the shooting victims because security services for the Route 91 Harvest Music Festival were provided by Contemporary Services Corporation, a security company that is certified by the Department of Homeland Security. \textit{Id.} Accordingly, MGM argued that because it employed Contemporary Services Corporation for the music festival, MGM is granted protection under the 2002 Support Anti-Terrorism by Fostering Effective Technologies (SAFETY) Act, which limits a company’s liability in claims that follow a terror attack, so long as that company used services certified by Homeland Security. \textit{Id.} MGM’s spokesperson argued that the Department of Justice’s Crime Victims’ Fund, which has more than $12 billion dollars in funding, should award money to the victims of the Las Vegas Massacre, as it did for victims of the Boston Marathon bombing in 2013. Elliott Mest, \textit{Why MGM Resorts Wants Its Day in Federal Court}, \textit{HOTEL MGMT}. (Sept. 5, 2018, 5:53 PM), https://www.hotelmanagement.net/legal/why-mgm-resorts-wants-its-day-federal-court. However, the Las Vegas Massacre has yet to be ruled as an act of terrorism. \textit{Id.} In fact, Jim Connors, attorney at law firm Marshall Dennehey Warner Coleman & Goggin, said that “the act is notoriously vague in determining what is in fact a terrorist act,” but he noted that federal court is the best place to settle cases like these for both the plaintiffs and defendants because of discrepancies surrounding what is awarded to the victims of such events based on various state laws. \textit{Id.}
Police Body Camera Footage: It’s Just Evidence

Bridget M. Synan*

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I. INTRODUCTION

Police officers follow a man into a backyard and order him to show his hands. One officer shouts, “gun, gun, gun, gun!” and the officers fire twenty times, killing the man.1 When officers search for a gun, only a cellphone is found.2 A police officer sprints up a staircase where two frantic women hand him an infant, explaining that she is not breathing.3 The police officer quickly begins performing compressions until crying is heard.4 Later at a press conference, the child’s family thanks the officer and tells the crowd, “See, sometimes angels don’t come from heaven.”5 A police officer pulls up to

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2. Id.
4. Id.
5. Id.
a home in the midst of gunfire. He finds a woman lying in the driveway. As the woman’s husband continues to fire, the officer drags the woman to safety then returns to lead her two children out of the home. Cell phone video shows a young man running from police fall to the ground as shots ring out. Cell phone video shows a young man playing basketball with a police officer on his break.

Footage of police-citizen encounters, captured by officers and citizens alike, increasingly allows the public to view the range of situations police officers respond to while performing their duties, thus revealing the good, the bad, and the ugly of police work. Body-worn camera footage often elicits strong emotions in the viewer, and in many cases public outcry. Yet, a sharp disconnect exists between public perception of use of force incidents and the Constitutional limits of police authority. This disconnect often leads to situations where the public expects an indictment based on a publicly released video, yet a grand jury fails to return one. In turn, this leads to further pain, confusion, and public outcry.

In this article, I will argue that rather than the panacea hoped for, police body cameras are merely an evidence collecting tool. With regards to claims against police officers, body-worn camera footage can be greatly beneficial in determining whether the officer exercised excessive use of force. However, such an evaluation can only properly be made when a jury is presented with all of the relevant evidence and instructed on the applicable law. As police departments increasingly outfit their officers with body-worn cameras, the public must come to recognize the limitations of the devices as well as the scope of police power. In order to facilitate this

6. Cop Rescues Women, Kids From Shooting [Body Cam Footage], ABC (July 27, 2016), https://www.youtube.com/watch?v=1yxsyfwk1Hg.
7. Id.
8. Id.
14. See id.
process, state governments and police departments must shape policy so as to guide police discretion when using the cameras and to ensure that the privacy of those featured in the video is preserved.

Accordingly, Section II discusses policing and camera technology beginning with a focus on police officers’ exercise of discretion. Next, Section III describes the initial call to outfit police officers with body-worn cameras following the 2014 unrest in Ferguson, Missouri and the perceived benefits of body-worn cameras in promoting accountability. A comparison will then be drawn between the implementation of body-worn cameras to that of dashboard, or in-car, cameras. I next call into question the overall reliability of video evidence. After that, I discuss the tension between protecting the privacy of individuals featured in body-worn camera footage and the desire of the public for increased police oversight. I will specifically explain the significance of this distinction in the context of domestic violence situations. Finally, Section IV highlights Pennsylvania’s approach to a body-worn camera program and recommends that Pennsylvania’s legislation serves as a model for other states. This is so because it emphasizes evidence collection and the preservation of the rights of parties seen in body-worn camera footage over public transparency, while still allowing officials to release body-worn camera footage when it is deemed appropriate to do so.

II. POLICING AND CAMERA TECHNOLOGY

A. The Exercise of Discretion

The criminal justice system in the United States provides for the exercise of discretion by police and prosecutors.\textsuperscript{15} Police officers hold the power to decide “when and how to enforce the law.”\textsuperscript{16} The classic example of discretion involves speeding drivers.\textsuperscript{17} If the speed limit is seventy miles per hour, and the officer clocks a vehicle driving by at seventy-one, or even seventy-five, the officer is unlikely to pull over the motorist even though the motorist clearly broke the law. In contrast, it is much more likely that a police officer will pull over a motorist traveling at eighty-five miles per hour.


higher. The decision to allow the driver speeding at seventy-five miles per hour to continue traveling, but to pull over and ticket the driver speeding at eighty-five miles per hour falls within a police officer’s discretion. Motorists expect the law to be enforced this way. It is not feasible or desirable for the law to be enforced absolutely, thus police officers must be granted discretion:

Given the limitations of law enforcement resources, the need to prioritize policing goals, and the impossibility of legislating every move that a police officer might make, society has little choice but to entrust the police with a certain amount of discretionary authority. Police discretion involves the power to choose between two or more courses of conduct in a particular set of circumstances. Because legislators cannot anticipate the range of situations that police may face, they often draft criminal laws of broad scope, leaving room for police to exercise discretion regarding the enforcement of these laws.  

As legal scholar Roger A. Fairfax, Jr. explains, “Discretion pervades the American criminal justice system . . . it is essential to the efficient operation of the criminal justice system. Full enforcement of the law would not only be impractical, but also unwise.” On the other hand, complete discretion would lead to arbitrary or improper enforcement of the law. When a police officer does make an arrest, it next comes within the discretion of the prosecutor to decide whether to charge the offender. Thus, it is necessary to allow police and prosecutors to exercise a certain level of discretion in order to provide fairness by choosing not to enforce the law in certain situations. The need for discretion in enforcing the law remains when a police officer dons a body-worn camera. Many advocates of body-worn cameras view the devices as a way to limit police officers’ discretion; however, to preserve the rights of citizens, the devices will necessarily require police officers to make another discretion-

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18. Reenah L. Kim, Note, Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils, 36 HARV. C.R.-C.L. L. REV. 461, 463-64 (2001); see also Gregory Howard Williams, Police Discretion: The Institutional Dilemma – Who is in Charge?, 68 IOWA L. REV. 431, 432 (1983) (“As a practical matter . . . the police could not arrest all violators even if they so desired. Lack of sufficient resources precludes such action. Consequently, the police exercise discretion, and the public expects them to do so.”).


20. Id. at 1250-51.

21. Id. at 1244 (“Prosecutors are expected to make decisions regarding which cases will be prosecuted out of the many which could be prosecuted.”).

22. Id. at 1243-44.
ary decision—when to turn the cameras on and off. Therefore, discretion remains an integral and necessary part of policing in the criminal justice system that body-worn cameras will not and cannot eliminate. \(^{23}\) Rather, when implementing body-worn cameras, police departments should focus on defining parameters for the exercise of discretion as it applies to using the devices.

**B. The Call for Body-Worn Cameras**

Following the unrest in Ferguson, Missouri in 2014, the notion of equipping officers with body-worn cameras emerged as a policy suggestion. \(^{24}\) On August 9, 2014, white police officer Darren Wilson fatally shot Michael Brown, an unarmed African-American teenager. \(^{25}\) The shooting led to weeks of protests and rioting, which police responded to forcefully. \(^{26}\) Without a clear picture of what transpired between Wilson and Brown, commenters began to suggest that “if Ferguson officers had such [body-worn] cameras... we would know whether the Brown shooting was justified, and we would know whether Ferguson police overreacted to peaceful, constitutionally protected demonstrations or whether members of the public were engaged in violent rioting warranting forceful police response.” \(^{27}\) In other words, commenters felt video documentation of the incident would not only reveal whether the shooting itself was justified, but whether public and police response in the aftermath of the shooting was justified as well. Ultimately, supporters began to promote body cameras as a comprehensive solution, which could prevent “another Ferguson.” \(^{28}\)

The call to equip police officers with body-worn cameras received support from a variety of stakeholders, including police chiefs, the American Civil Liberties Union, \(^{29}\) and President Barack Obama. \(^{30}\) Some polls found nearly ninety percent of Americans, including both Democrats and Republicans, supported the movement to equip

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23. See generally Thomas, supra note 17, at 1043 (“Discretion in enforcement and prosecution of crime is inevitable; it can be restrained at the margin but it cannot be eliminated.”).


26. Wasserman, supra note 24, at 831.

27. Id. at 832.

28. Id. at 833.


police officers with body-worn cameras.\textsuperscript{31} In May 2015, the Justice Department announced a twenty million dollar grant for a body-worn camera pilot program.\textsuperscript{32} As of February 2018, five states require at least some officers to wear body cameras.\textsuperscript{33} Body-worn cameras offer a plethora of potential benefits to both police officers and citizens by creating a reviewable record, providing a civilizing effect, and aiding in the collection of evidence.\textsuperscript{34}

Many proponents of body-worn cameras, including those within law enforcement, consider accountability as the primary benefit of body-worn cameras.\textsuperscript{35} If an incident occurs while a police officer is wearing a body camera, and the camera is turned on, then a reviewable record exists that can be used to evaluate the officer’s actions. Given the proliferation of cell phone cameras, bystanders will often record encounters between police officers and citizens.\textsuperscript{36} By wearing a camera, the officer can show his or her view of the incident.\textsuperscript{37} As Deputy Assistant Attorney General for the Civil Rights Division of the U.S. Department of Justice, Roy L. Austin, Jr. explains, “Some police departments are doing themselves a disservice by not using body-worn cameras. Everyone around you is going to have a camera, and so everyone else is going to be able to tell the story better than you if you don’t have these cameras.”\textsuperscript{38} Thus, body-worn

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\textsuperscript{34} South Carolina’s law requires, contingent on state funding, that every police department implement a body camera program. In Nevada and California, their laws require certain members of their state highway patrol to wear body cameras. Connecticut’s law requires their division of state police and special police forces, as well as, municipal police officers receiving grant funds to wear body cameras while interacting with the public.” \textit{Id.}


\textsuperscript{36} See, e.g., Chris Dunn & Donna Lieberman, \textit{Body Cameras are Key for Police Accountability. We Can’t Let Them Erode Privacy Rights.}, WASH. POST (June 1, 2017), https://www.washingtonpost.com/posteverything/wp/2017/06/01/bodycams-are-key-for-police-accountability-we-cant-let-them-erode-privacy-rights/?utm_term=.470702e008bf (“Video’s power to improve policing lies in the fact it makes us all eyewitnesses to police-civilian interactions”); Maya Wiley, \textit{Body Cameras Help Everyone — Including the Police}, \textit{TIME} (May 9, 2017), http://time.com/4771417/jordan-edwards-body-cameras-police.

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} \textit{Id.} at 9.
cameras provide officers with a way to document their view of an encounter, which is the pertinent view if a complaint later arises.\textsuperscript{39} On the front end, footage can be an especially useful tool for providing scenario-based training to new officers.\textsuperscript{40} Later, departments can use footage to evaluate performance as new officers enter the field.\textsuperscript{41} Reviewing body-worn camera footage enables police departments to identify both structural and individual issues regarding officer conduct.\textsuperscript{42} Departments can then provide officers with training to correct questionable behavior before it escalates, or terminate officers if necessary.\textsuperscript{43} When addressing department-wide claims, such as racial-profiling, body camera footage can provide a record of whether profiling occurred and the frequency of such incidents, and can show whether any patterns of behavior exist.\textsuperscript{44}

Use of body-worn cameras demonstrably reduces use of force complaints, and in many cases the footage exonerates the officer.\textsuperscript{45} A 2012 study of the Rialto, California Police Department found a 60\% reduction in use of force incidents after officers began wearing cameras.\textsuperscript{46} The study randomly assigned body-worn cameras to police officers, and found “shifts without cameras experienced twice as many use of force incidents as shifts with cameras.”\textsuperscript{47} Likewise, a 2012 study conducted in Mesa, Arizona found officers that did not wear body-cameras received “almost three times as many complaints as the officers who wore the cameras.”\textsuperscript{48} The Chief of Police of Rialto, William Farrar, surmised that the reduction in complaints likely occurred because both officers and citizens behaved better knowing their actions were being filmed.\textsuperscript{49} In other words, the body cameras provided a civilizing effect. Decades of research demonstrating the presence of cameras, other people, or “even just a picture of eyes,” support Chief Farrar’s observation.\textsuperscript{50}

Mere awareness of being watched tends “to nudge us toward civility: [w]e become more likely to give to charity, for example, and

\begin{thebibliography}{99}
\bibitem{Miller} MILLER ET AL., supra note 34, at 7.
\bibitem{Id} Id.
\bibitem{Id at 7-8} Id. at 7-8.
\bibitem{Id at 8} Id. at 8.
\bibitem{Id at 6-7} Id. at 6-7.
\bibitem{Id at 5} Id. at 5.
\bibitem{Id at 6} Id. at 6.
\bibitem{Id at 5} Id. at 5.
\end{thebibliography}
less likely to speed, steal or take more than our fair share of candy.\textsuperscript{51} However, a more recent study conducted in Washington, D.C. showed no difference in the number of use of force incidents between officers with and without body cameras.\textsuperscript{52} Explanations for the surprising findings of the study, which contradicts the popularly held notion that cameras do provide a civilizing effect, include: (1) the possibility police officers became accustomed to the cameras and hence desensitized to them; (2) “officers without cameras were acting like officers with cameras, simply because they knew other officers had the devices”; (3) in high-stress encounters officers did not remember to activate their cameras; or (4) the cameras were less effective in Washington, D.C. than in other cities because the department already addressed excessive use of force problems in the late 1990s.\textsuperscript{53}

When determining whether an officer used excessive force,\textsuperscript{54} courts use the Fourth Amendment reasonableness standard.\textsuperscript{55} The inquiry is an objective one that accounts for “the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.”\textsuperscript{56} In Graham v. Connor, the United States Supreme Court further notes, “[n]ot every push or shove”\textsuperscript{57} constitutes a Fourth Amendment violation; rather, “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”\textsuperscript{58} Consequently, use of force cases are inherently fact dependent.\textsuperscript{59}

\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} “Excessive force” is defined as “[m]uch more force than is required to achieve a lawful goal.” Stephen Michael Sheppard, Excessive Force, WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk ed. 2012). The Pittsburgh Bureau of Police defines excessive force as “the use of force which exceeds the level that a reasonable officer might reasonably believe, at the time of the incident, is necessary under the circumstances of a particular incident.” PITTSBURGH BUREAU OF POLICE, USE OF FORCE 2 (May 19, 2015), http://apps.pittsburghpa.gov/redtail/images/1147_12-06_Use_of_Force.pdf.
\textsuperscript{56} Graham, 490 U.S. at 396.
\textsuperscript{57} Id. (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).
\textsuperscript{58} Id. at 396-97.
\textsuperscript{59} Scott, 550 U.S. at 383 (stating “we must still slosh our way through the factbound morass of reasonableness”).
Proponents of body-worn cameras believe video will resolve factual disputes between a police officer and a suspect’s version of events by providing an objective account of the incident. The reasonableness standard under the Fourth Amendment, however, diverges from what most people consider acceptable behavior. Studies show a wide disparity in what the public considers legitimate police conduct and what police conduct is constitutionally permissible. For example, pursuant to department policy in Pittsburgh, a police officer may use a level of force that exceeds that used by the suspect. Most police departments have established a use of force continuum describing a series of escalating actions an officer may take. Hence, video that clearly seems to show excessive force when viewed by the public will oftentimes fail to lead to an indictment when presented to a grand jury that has taken into account the circumstances leading up to the incident. Moreover, video is subject to the bias of the factfinder.

C. Lessons Learned from Dashboard Camera

The policy arguments over body-worn cameras are not unfamiliar. Two decades ago, police departments and activists similarly debated the costs and benefits of another type of video surveillance: in-car dashboard cameras. Initially, dashboard cameras were intended to aid in the prosecution of drunk drivers. In fact, insurance companies funded the first wave of dashboard cameras in the 1980s. These companies sought to reduce the medical bills accompanying drunk driving incidents by increasing enforcement and penalties imposed against drunk drivers. The then recently

61. Id. at 793; see also Meares et al., supra note 12, at 300.
62. Id. at 792-93.
63. Id. at 796.
64. Id. at 796.
65. Id.
66. Id.
67. Id.
68. Id.
69. Id.
70. Id.
formed organization, Mothers Against Drunk Driving, also provided funds.\textsuperscript{71} Later, in the 1990s, the Drug Enforcement Administration provided additional support for the purchase of cameras in order to document whether a suspect gave consent to a vehicle search, which is important evidence in the prosecution of drug traffickers.\textsuperscript{72} Later on, activists began to view dashboard cameras as a way to document and prevent racial profiling.\textsuperscript{73} In the late 1990s and early 2000s, advocates argued dashboard cameras could prevent racial profiling by making officers aware their actions were being recorded.\textsuperscript{74}

After initial skepticism, law enforcement agencies also came to support use of dashboard cameras.\textsuperscript{75} With increased support came more funding, and between 2000 and 2004, the Department of Justice gave twenty-one million dollars in grants to state and local agencies for the purchase of dashboard cameras.\textsuperscript{76} Ultimately, the grants outfitted police cruisers in forty-nine states and Washington, D.C. with dashboard cameras.\textsuperscript{77} A study published by the International Association of Chiefs of Police ("IACP") in 2004, funded by the Department of Justice’s Office of Community Oriented Policing Services ("COPS"), evaluated the use and impact of dashboard camera for forty-seven state agencies that received in-car camera grants.\textsuperscript{78} The study surveyed the agencies as well as prosecutors and the public.\textsuperscript{79} The study identified many of the same benefits and concerns for implementing dashboard camera that analyses of body-worn cameras discuss today. The survey found that in-car camera reduced complaints regarding officer professionalism and courtesy, and typically exonerated officers of any accusations of wrongdoing.\textsuperscript{80} Only 5\% of the over 3,000 officers surveyed reported that complaints against them were sustained by video evidence.\textsuperscript{81} Dashboard camera improved both officer and citizen behavior.\textsuperscript{82} Officers who reported acting less aggressively when cameras were

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id. at 7.
\item Id. at 15.
\item Id.
\item Id. at 23.
\end{enumerate}
\end{footnotesize}
rolling likewise reported that citizens behaved more courteously. This finding confirmed prior research indicating “the demeanor of the police and public are interdependent.” Furthermore, the study found, “in-car camera enjoys overwhelming public support and can enhance an agency’s image while ensuring integrity and accountability.”

Notably, the majority of officers surveyed regarded the dashboard cameras primarily as a tool for gathering evidence. In a 1990 article, New York Times reporter Andrew Malcom interviewed the heads of several law enforcement agencies regarding dashboard camera. Franklin County Sheriff’s Department Chief Deputy Michael E. Creamer admitted, “I was skeptical of the cameras at first . . . . Now I’d like a camera in all 45 cars.” Creamer went on to explain how the substantial evidentiary value of the video led to his support for dashboard cameras, pontificating: “We’ll show the judge, the jury and the courtroom how they really looked driving on the wrong side, falling down by their car, unable to walk a straight line or recite the alphabet. It’s very hard to rebut that kind of testimony.” While dashboard cameras led to a notable increase in prosecutions for driving under the influence in Richmond, Virginia, Captain Thomas Shook of Richmond’s Traffic Safety Division was careful to note, “[t]he cameras are no panacea . . . some of the older guys grumble about the extra gear and new technology. But our guilty pleas are going up each month—and so are . . . our requests for alcohol treatment.” The sentiments of Creamer and Shook largely echo the initial skepticism with which law enforcement officers viewed body-worn cameras, along with later acceptance that the devices do provide notable benefits, especially in terms of evidence collection and prosecution.

On their part, prosecutors “rated the overall use of [dashboard] video evidence as successful or highly successful.” Prosecutors found dashboard video especially useful in cases involving “driving under the influence, traffic violations, vehicular pursuits, assaults

83. Id.
84. Id.
85. Id. at 29.
86. Id. at 16.
88. Id.
89. Id.
90. Id.
91. OFFICE OF CMTY. ORIENTED POLICING SERVS., supra note 78, at 22.
on officers, narcotics enforcement, domestic violence, and civil litigation against law enforcement agencies.” The prosecutors surveyed did report concerns regarding the limited field of vision of the cameras and poor audio/video quality. The study also noted storage of the video evidence would be one of the biggest obstacles for an agency implementing dashboard cameras to overcome. These concerns largely echo those mentioned in the debate over body-worn cameras heard today.

Ultimately, the IACP study advised, “the recordings should be treated as any other evidentiary items” because dashboard camera footage can serve as critical evidence in criminal, civil, or administrative matters. Today’s dashboard cameras may offer even further evidentiary value because modern technological additions can provide information beyond the recording alone. For example, some dashboard cameras are equipped to mark an area using GPS. If a suspect is seen throwing an item out of their car during pursuit, the officers can later return to the area to search for weapons or drugs. Some dashboard cameras can also record when a vehicle brakes, which would be important evidence if the vehicle were in crash.

Perhaps one of the most well-known pieces of dashboard camera evidence is the video the United States Supreme Court relied on in Scott v. Harris. In March 2001, police clocked Victor Harris traveling at seventy-three miles per hour in a fifty-five mile per hour speed zone. Harris did not pull over when a Georgia County deputy activated his lights; rather, he engaged in a chase down mostly two-lane roads at speeds exceeding eighty-five miles per hour. Deputy Timothy Scott joined the pursuit, becoming the lead car after Harris pulled into a shopping center. Police nearly boxed Harris in at the shopping center, but he managed to exit the lot and speed away once more. After receiving permission from his supervisor to “take him out,” Scott “applied his push bumper to the

92. Id.
93. Id. at 21-22.
94. Id. at 36.
95. Id.
96. Meyer, supra note 67.
97. Id.
98. Id.
99. Id.
101. Id. at 374.
102. Id. at 374-75.
103. Id. at 375.
104. Id.
rear” of the vehicle, which caused Harris to lose control. Harris’ vehicle “left the roadway, ran down an embankment, overturned, and crashed.”

The severe injuries Harris sustained in the crash left him a quadriplegic. Harris filed suit under 42 U.S.C. § 1983 arguing his Fourth Amendment rights against unreasonable seizure were violated by Scott’s use of deadly force. The United States Court of Appeals for the Eleventh Circuit found Harris “remained in control of his vehicle,” slowing for turns and using his indicators, and did not pose a threat to pedestrians. Consequently, the Eleventh Circuit ruled that “a jury could conclude that Scott unreasonably used deadly force to seize Harris by ramming him off the road.” The case ultimately made it to the United States Supreme Court, which decided the video evidence clearly contradicted Harris’ version of the story, and that the facts should be viewed “in the light depicted by the videotape.” Upon watching the video, the Supreme Court declared:

Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury . . . . Respondent’s version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction.

The majority considered the video irrefutable. The Court even posted the video on its website asserting, “[w]e are happy to allow

105. Id.
106. Id.
107. Id.
108. Section 1983 claims provide “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity.” 42 U.S.C. § 1983.
109. Scott, 550 U.S. at 375-76.
110. Harris v. Coweta Cty., 433 F.3d 807, 815-16 (11th Cir. 2005); see also Scott, 550 U.S. at 378-79 (writing for the majority Justice Scalia notes, “reading the lower court’s opinion, one gets the impression that respondent, rather than fleeing from police, was attempting to pass his driving test”).
111. Harris, 433 F.3d at 821.
112. Scott, 550 U.S. at 380-81.
113. Id.
the videotape to speak for itself.” Justice Stevens, however, saw the tape as confirming the lower court’s view of the facts.

Justice Stevens believed the other cars seen pulling to the side of the road did so not because Harris forced them off the road, but because of the sirens and lights of the police cars. According to Justice Stevens, a reasonable jury could find the motorists were at no greater risk than if a speeding ambulance drove past. No pedestrians or residences were visible during the chase, Justice Stevens noted, and at one point Harris even slowed down to wait for cars moving in the other direction to pass. Concluding, Stevens emphasized, “[i]f two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court’s characterization of events.” Although he was the lone dissenter, “[i]n reporting that he, at least, saw something different, Justice Stevens was plainly advancing the claim that the tape doesn’t speak for itself—that different people, with different experiences, can see different things in it.”

A group of law professors decided to take on the so-called “Scott Challenge” of letting the video “speak for itself” by showing the video to approximately 1,350 individuals. Although the bulk of subjects agreed with the majority’s view of the videotape, “marked differences in perceptions” were identifiable across certain subgroups. Approximately 75% of participants in the study agreed with the majority, while 25% did not agree that use of deadly force was justified. African Americans were significantly more pro-plaintiff, as were lower-income subjects. “[B]eing African American (as opposed to white)” had the largest effect on response measures.

The test showed life experience influences perception of a supposedly completely objective video and can lead reasonable people to disparate conclusions. The study found “[d]ifferences in means

114. Id. at 378 n.5.
115. Id. at 380 (Stevens, J., dissenting).
116. Id. at 380-91.
117. Id.
118. Id. at 392-93.
119. Id. at 396.
121. Id. at 848, 854.
122. Id. at 864.
123. Id. at 866.
124. Id. at 867.
125. Id.
126. See generally id.
show that characteristics like race, gender, income, party affiliation, ideology, region of residence, and cultural orientation all tend to matter” when viewing the video. The study identified two distinct cultural styles:

Individuals (particularly white males) who hold hierarchical and individualist cultural worldviews, who are politically conservative, who are affluent, and who reside in the West were likely to form significantly more pro-defendant risk perceptions. Individuals who hold egalitarian and communitarian views, whose politics are liberal, who are well educated but likely less affluent, and whose ranks include disproportionately more African Americans and women, in contrast, were significantly more likely to form pro-plaintiff views and to reject the conclusion that the police acted reasonably in using deadly force to terminate the chase.

Consequently, the Court’s decision in Scott v. Harris can only be justified if the group of people who see the video differently from the majority are unreasonable. The divergent reactions to a seemingly straightforward piece of evidence demonstrate that video is not necessarily a silent and impartial witness. Rather, the meaning one derives from watching video evidence is greatly impacted by one’s own views and experiences.

III. THE TENSION BETWEEN PRIVACY AND TRANSPARENCY

A. Privacy Concerns

Privacy is a major concern when implementing a body-worn camera program. When wearing a body camera, a police officer may encounter suspects, victims, and bystanders in a variety of stressful and extreme circumstances. The need to protect the privacy of individual citizens clearly stands in tension with the desire for increased transparency. Footage will often depict citizens who may not want their images widely shared; especially if police captured

127. Id. at 870.
128. Id. at 879.
129. Id. at 880-81.
131. JAY STANLEY, ACLU, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL 2 (2015).
the video during a sensitive situation. Video may also serve no legitimate public purpose other than embarrassment. For example, dashboard camera footage of intoxicated individuals often goes viral, and becomes immortalized online. Of particular concern is when an officer responds to a domestic violence call at a private residence. Legal scholar Mary D. Fan posits the following scenario:

You call the police to report stalking by an ex-partner. Officers come to your home to take your statement. You reveal personal details about your relationship, your employment, your nightly fear, how you sought a protection order. All of this information—plus your address and intimate details inside your home—are recorded on police body camera by the responding officers. This video of you ends up posted on YouTube, obtained pursuant to a sweeping public disclosure request for all police body camera video by someone you have never met.

The need to protect privacy in a domestic violence situation is abundantly clear. In many cities, domestic violence calls account for the largest number of emergency calls and pose great danger to responding officers with “22% of law enforcement officer ‘line of duty’ deaths” between 2010 and 2014 occurring “while responding to a call for service involving a domestic dispute.” Additionally, prosecutors often find it particularly difficult to try domestic violence cases. Victims habitually fail to cooperate for a variety of

133. STANLEY, supra note 131, at 5.
134. Id.
135. Id.
136. Bryce Clayton Newell, Collateral Visibility: A Socio-Legal Study of Police Body-Camera Adoption, Privacy, and Public Disclosure in Washington State, 92 Ind. L.J. 1329, 1337 (2017) (“[A]s police officers are outfitted with mobile surveillance devices, such as body-worn cameras, which are not constrained by property or spatial limitations (that is, they can be worn into private residences or anywhere else the officer chooses to be), the tensions between privacy, state surveillance, and public access become increasingly escalated.”).
reasons, such as: fear of retaliation, financial dependence on the
abuser, or because the victim yields “to their abusers’ need for
power and control.”141 As such, it is imperative for police officers to
collect as much evidence as possible when initially responding to a
domestic violence call. Thus, if the victim no longer wishes to coop-
erate in the prosecution, proof remains that can corroborate the in-
itial allegations and sustain the conviction.142 Hence, in addressing
domestic violence, use of body-worn cameras can be greatly benefi-
cial to officers, prosecutors, and victims.

Body-worn camera footage “can provide prosecutors with power-
ful evidence of the actions and statements of offenders and victims
and the scene of the incident, in ways that written descriptions or
still photographs cannot equate.”143 In fact, in a study conducted in
Phoenix, Arizona, researchers found domestic violence cases involv-
ing a camera-wearing officer “were more likely to be initiated by the
prosecutor’s office (40.9% vs. 34.3%), have charges filed (37.7% vs.
26%), have cases furthered (12.7% vs. 6.2%), result in a guilty plea
(4.4% vs. 1.2%), and result in a guilty verdict at trial (4.4% vs.
0.9%).”144

The benefits of body-worn camera footage in the context of do-
monic violence are clear; yet, individuals hold a constitutionally
recognized right to greater privacy in the home than in public.145
This is one area where implementation of a body-worn camera pro-
gram differs from the implementation of dashboard camera. Whereas
dashboard camera generally captures content occurring on public roads and highways, body cameras can invade the private
sphere. Thus, state legislatures and police departments must care-
fully craft body camera policies that strike a balance between the
need to protect the privacy of individuals, and victims especially,
while reaping the benefits of evidence collected by body-worn cam-
era. The need to preserve privacy, though, also stands in tension

141. Farrah Champagne, Prosecuting Domestic Violence Cases, AM. B. ASS’N (Sept. 17,
2015), https://www.americanbar.org/groups/litigation/committees/criminal/articles/2015/fall
2015-0915-prosecuting-domestic-violence-cases/.
142. Paula Reed Ward, Why Do some Victims of Domestic Violence Refuse to Testify?, PITT.
POST-GAZETTE (June 23, 2013, 12:00 AM), https://www.post-gazette.com/local/region/
45.
143. SANDRA TIBBETTS MURPHY, BATTERED WOMEN’S JUSTICE PROJECT, POLICE BODY
CAMERAS IN DOMESTIC AND SEXUAL ASSAULT INVESTIGATIONS: CONSIDERATIONS AND
144. BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT JUSTICE, BODY-WORN CAMERA
145. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965); Mapp v. Ohio, 367
with public desire for increased transparency and the idea that body cameras would facilitate greater citizen oversight of the police.

One way to address privacy concerns is to require a police officer to give notification that he or she is recording via body camera upon entering a private residence. It may not always be feasible, however, to safely give notification based upon the circumstances when police officers arrive. The ACLU therefore recommends police officers give notice except in an emergency situation.\textsuperscript{146} Most police departments allow officers the discretion not to record if “doing so would be unsafe, impossible, or impractical.”\textsuperscript{147} Departments currently using body-worn cameras employ a variety of notification policies. Some departments require police officers to give notification when recording; some only encourage it, while others do not specify whether or not notification is required.\textsuperscript{148} For example, in Los Angeles, notice is “encouraged but not required if officers are legally in the area.”\textsuperscript{149} In Minneapolis, notice is “[e]ncouraged in general. If asked, an officer must inform those inquiring that [the] body cam[era] is recording, unless it would be unsafe to do so.”\textsuperscript{150} Whereas in Tampa, officers must only give notification when recording victims.\textsuperscript{151} Meanwhile, in San Antonio officers “are not required to advise citizens they are being recorded or show any citizen a video which they recorded” and officers need not activate or deactivate a body-worn camera based “solely upon the request of a citizen.”\textsuperscript{152} Due to the increased privacy concerns when interviewing victims, some departments prefer to give officers discretion in determining whether or not to record these interviews.\textsuperscript{153} The ACLU advises body-worn camera policies should not require continuous recording for the duration of the police officer’s shift, or even during every public encounter.\textsuperscript{154} Originally, the ACLU advocated for an all-public-encounters policy; however, it changed its position upon consideration of the importance of protecting the privacy rights of victims and witnesses, especially in states where open-records laws

\textsuperscript{146} STANLEY, supra note 131, at 6.
\textsuperscript{147} MILLER ET AL., supra note 34, at 13.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} SAN ANTONIO POLICE DEPT. GENERAL MANUAL, PROCEDURE 410 – BODY WORN CAMERAS 2 (2017).
\textsuperscript{153} See MILLER ET AL., supra note 34, at 18.
\textsuperscript{154} STANLEY, supra note 131, at 4.
do not protect access to routine footage. Consequently, the ACLU suggests the decision to record should be within an officer's control; although, the officer's ability to choose which encounters to record should be limited.

Recording can also impinge upon the privacy of the officer. The ACLU has acknowledged, "continuous recording might feel as stressful and oppressive in those situations as it would for any employee subject to constant recording by their supervisor." This could create distrust between officers and their supervisors.

Many police officers feel concern over adding more scrutiny to an already stressful job. First-level officers in particular feel pressure to "get everything right." The danger also exists that footage could be misused by supervisors to discipline officers for minor violations, particularly in the case of whistleblowers or union activists. Moreover, not every action an officer takes during a shift will involve a police-citizen encounter. For example, during a shift, an officer may answer a phone call from a spouse, pick up lunch, or chat with other officers about football, precinct politics, or any number of topics not related to work.

Other initiatives aimed at increasing public trust of police, such as community policing, could suffer if departments required police officers to record all public encounters. The philosophy of community policing encourages police departments to develop collaborative partnerships with "the individuals and organizations they serve to develop solutions to problems and increase trust in police." In other words, it encourages interaction and communication between officers and members of the community. One facet of achieving this goal involves placing officers on long-term assignments to specific neighborhoods in order to "enhance customer service and facilitate more contact between police and citizens, thus establishing a strong relationship and mutual accountability."

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155. Id.
156. Id. at 4.
157. Id. at 3.
158. MILLER ET AL., supra note 34, at 24.
159. Id. at 24-25.
160. Id. at 25.
161. STANLEY, supra note 131, at 3.
162. Community policing is "a philosophy that promotes organizational strategies that support the systematic use of partnerships and problem-solving techniques to proactively address the immediate conditions that give rise to public safety issues such as crime, social disorder, and fear of crime." OFFICE CMTY. ORIENTED POLICING SERVS., U.S. DEP'T JUSTICE, COMMUNITY POLICING DEFINED 1 (2012).
163. MILLER ET AL., supra note 34, at 12.
164. OFFICE CMTY. ORIENTED POLICING SERVS., supra note 162.
165. Id. at 7.
Neighborhood placements seek to promote familiarity and comfort between police officers and citizens. Such efforts could suffer if these “routine and casual situations—such as officers on foot or bike patrol who wish to chat with neighborhood residents”—were required to be recorded, because “turning on a video camera could make the encounter seem suspicious and off-putting.” The Chief of Police of Greensboro, North Carolina, Ken Miller, explained:

There are a lot of issues with recording every citizen contact without regard to how cooperative or adversarial it is . . . if people think that they are going to be recorded every time they talk to an officer, regardless of the context, it is going to damage openness and create barriers to important relationships.

Body camera footage can capture the wide array of situations a police officer encounters, from chatting with a member of the community while walking the beat to responding to a tense emergency situation in an individual’s home. As discussed above, knowledge that one is being recorded changes human behavior. While this phenomenon creates a civilizing effect that benefits both police officers and citizens in most situations, there are certain encounters where the presence of a camera may cause discomfort and hinder the efforts of police officers to communicate with victims or build trust in the community. As such, the proper use of body-worn cameras necessitates policies which allow police officers to use discretion in determining when and when not to record.

B. Body-Worn Camera Legislation in Pennsylvania

In Pennsylvania, legislators made major changes to state law in order to successfully implement body-worn camera programs in police departments across the state. State Senator Stewart J. Greenleaf originally introduced the legislation, known as Act 22, remarking that “[t]he use of body-worn cameras not only ensures the integrity of convictions by capturing the defendant’s conduct at
the scene, but the cameras also have ancillary benefits” such as increasing guilty pleas while decreasing suppression hearings, administrative complaints, and civil lawsuits against police officers.171

In order to receive grant funding for a body-worn camera program, police departments in Pennsylvania “must issue a written, publicly accessible policy.”172 The policy must meet or exceed the recommendations adopted by the Pennsylvania Commission on Crime and Delinquency (“PCCD”), which include: (1) establishing a protocol “related to the implementation, use, maintenance or storage of body worn cameras”; (2) making that protocol “publicly accessible”; and (3) “[e]nsuring that the protocol . . . substantially compl[ies] with applicable recommendations by the Commission.”173 For example, the Pennsylvania State Police’s body-worn camera policy outlines the goals of its program, the responsibilities of officers wearing the cameras, rules on when to record, and procedures for reviewing and releasing video.174 The PCCD further encourages police agencies to develop such policies “in accordance with best practices [and] with input from . . . community stakeholders, such as local victim service providers, community police review boards, and other interested parties.”175

Initially, the use of body-worn cameras conflicted with Pennsylvania’s wiretap laws, which prohibited recording in private residences without the owner’s consent.176 Consequently, a police officer faced potential felony charges if he or she entered a private home while wearing a body camera.177 As mentioned previously, body-worn cameras are especially useful when responding to domestic violence calls due to both the danger posed to police officers and the need to collect evidence.178 Pennsylvania Senator Greenleaf, recognizing this issue, proposed legislation that would permit officers to record in private residences “because so much of their

173. Id.
175. P.A. COMM’N ON CRIME & DELINQUENCY, supra note 172.
176. Finnerty, supra note 170; see also 18 Pa. Cons. Stat. § 5702 (2018) (“[a]ny oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation.”).
177. Id.
178. MURPHY, supra note 143, at 8.
work involves responding to incidents taking place inside a residence. Measures can be taken to protect the privacy of the occupants of the residence, and the recordings will enhance any prosecution of wrongdoers inside the residence.”  

In order to enable the use of body cameras in departments across the state, Pennsylvania legislators eliminated the double consent barrier by excluding communications made to police officers wearing body cameras from Pennsylvania’s Right-to-Know Law, while simultaneously limiting the ability of the public to gain access to such footage. Generally, under Pennsylvania’s Right-to-Know Law, public records are available unless an enumerated exemption applies. Act 22 amended the definition of an “oral communication” so as to exclude communications “made in the presence of a law enforcement officer on official duty who is . . . using an [approved] electronic . . . device . . . to intercept the communication in the course of law enforcement duties” from state wiretap law. Additionally, Act 22, “pre-empts the Right-to-Know Law, and establishes procedures for requests for law enforcement audio recordings or video recordings from body cameras.” As a result, most people will not be able to access body camera footage through the state’s Right-to-Know law in order to protect the privacy of individuals appearing in body-worn camera footage. As Pennsylvania State Police Spokesman Ryan Tarkowski clarifies, “[t]his protects the privacy of anyone who might have day-to-day interaction with the police including people reporting crimes, victims, witnesses and bystanders,” though, “[v]ideo will still be available to parties with direct involvement—like a pending court case—and be made public in certain circumstances.” Accordingly, the footage will be easily

179. Memorandum from Stewart J. Greenleaf to Senate, supra note 171.
181. Id.; see also 65 P.S. § 67.305(a) stating:
A record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record. The presumption shall not apply if: (1) the record is exempt under section 708; (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree.
182. 18 PA. CONS. STAT. § 5702.
184. Finnerty, supra note 170.
185. Id.
accessible to those recorded, or reasonably related to someone recorded,\textsuperscript{186} but not to the public at large.\textsuperscript{187} While this measure may limit transparency, it ensures individual privacy. As Pennsylvania State Senator Sharif Street, who represents areas of Philadelphia County, explains:

In our effort to shine a light on truth and justice, we must be sensitive to citizens’ privacy. We live in an era of instant gratification . . . thanks to social media . . . While it’s awakened society to important issues, it should not come at the expense of allowing anyone to put individuals on public display without their consent.\textsuperscript{188}

While many consider limited access as an important step in protecting privacy, others believe it undermines the potential for body-worn cameras to facilitate greater public oversight of the police.\textsuperscript{189} The Pennsylvania ACLU argued that creating a different process for obtaining body camera video “turns the [Right-to-Know] presumption\textsuperscript{190} on its head.”\textsuperscript{191} The ACLU objected to Pennsylvania’s legislation, “because it undermines public trust by creating a new, confusing process for getting access to body cam[era] footage.”\textsuperscript{192} In addressing the tension between promoting transparency and protecting an individual’s constitutional right to privacy, Pennsylvania legislators decided to strike the balance largely in favor of privacy. As use of body-worn camera becomes more common, each state must likewise determine the limitations it will place on the release of footage.

Currently, twenty-three states and the District of Columbia have enacted legislation specifying separate procedures for requesting body-camera footage under open records law and detailing which footage can and cannot be released to the public.\textsuperscript{193} Connecticut, Nevada, North Dakota, Oklahoma, and Texas, include body camera

\textsuperscript{186} The mother of a child that has been recorded, for example.
\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} Id.
\textsuperscript{190} See 65 P.S. § 67.305 (creating the presumption that a record in the possession of a Commonwealth or local agency is a public record).
\textsuperscript{191} Finnerty, supra note 170 (quoting Liz Randol, legislative director for the ACLU in Pennsylvania).
\textsuperscript{192} Id.
footage as a public record; however, these policies provide exceptions that allow police to deny access to the video—or otherwise redact or obscure the footage—in certain situations.\textsuperscript{194} For example, Connecticut law prohibits the disclosure of a “communication between police officers and undercover officers or informants, any medical or psychological treatment and victims of domestic or sexual abuse, homicide, suicide or accidental death.”\textsuperscript{195} Under Texas law, only footage used or potentially used as evidence in a criminal proceeding is subject to the open records law; however, footage taken in a private space or of an incident that constitutes a misdemeanor not resulting in arrest may not be released.\textsuperscript{196} Conversely, Florida, Georgia, Illinois, Oregon, and South Carolina exclude body-worn camera footage from open records laws; yet these states provide exceptions that allow the public to access video in certain situations.\textsuperscript{197} Georgia law allows access to “those who believe the video would be relevant to a pending criminal case or civil action.”\textsuperscript{198} In Florida and South Carolina, persons who are the subject of a body camera recording may request the video.\textsuperscript{199} In Oregon body camera footage may be released if it serves the public interest.\textsuperscript{200}

The approach taken by Pennsylvania and other states that have established separate procedures for obtaining body camera footage outside open records law is preferable to the patchwork of inclusions and exclusions other states have carved out to address privacy concerns. By either excluding certain footage from open records law while providing for exceptions to enable access or by including body camera footage under open records laws while providing exceptions that deny access, these states create potential for confusion as to what footage citizens may access. While crafting a different process for obtaining body camera footage may seem counterintuitive to the Right-to-Know presumption,\textsuperscript{201} body camera footage presents a markedly greater potential to intrude upon the privacy of individuals than records conventionally thought of as accessible under open records law requests.

\textsuperscript{194} Id.
\textsuperscript{195} Id.; see also CONN. GEN. STAT. ANN. § 1-210(b)(3) (2018).
\textsuperscript{196} Body Worn Camera Laws Database: Body-Worn Camera Data and Open Record Laws, supra note 193; TEX. OCC. CODE ANN. § 1701.661(f) (2017).
\textsuperscript{197} Body Worn Camera Laws Database: Body-Worn Camera Data and Open Record Laws, supra note 193.
\textsuperscript{198} Id.
\textsuperscript{199} Id.
\textsuperscript{200} Id.
\textsuperscript{201} See Finnerty, supra note 170.
\textsuperscript{202} Under 65 P.S. § 67.102, a record is defined as:
While under Pennsylvania law a record includes a film or sound recording that documents the activity of an agency, and body-worn camera footage made by a police agency fits squarely within this description, the extent to which police would begin recording their activity could not have been envisioned when the latest version of the Right-to-Know Law went into full effect in 2009. For example, in a guide to the open records law, the ACLU of Pennsylvania lists agency meeting minutes, the salaries of public officials, communications between lobbyists and legislators, internal email, and 911 time response logs as examples of the type of records available to the public under the state’s Right-to-Know law. Hence, those participating in the creation of such records would have been at least marginally aware of the public nature of the documents at the time of their creation. For example, when running for office, a legislator knows he or she will be subject to public scrutiny; or, when placing a call to 911 citizens use a public service. As such there is a decreased expectation of privacy. In contrast, citizens may not know whether a police officer’s body-worn camera is turned on and recording their actions. Furthermore, footage taken on body cameras is far likelier to capture people in compromising, emotional, or intimate settings as compared to the mere release of email or a 911 time log. Thus, while body camera footage may technically fit within open records law because it is created by a government agency, there is elevated potential that such footage will infringe upon the privacy rights of individuals who do not expect that records of their activity will be available and subject to public scrutiny. Consequently, access to body camera footage should not be openly obtainable through open records law and creating a separate procedure to protect the rights and privacy of those involved is fitting and proper.

Citizens seeking to obtain footage in the possession of a Pennsylvania police agency must submit a detailed request to that

Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.

203. 65 P.S. § 67.3104.
205. See, e.g., Fan, supra note 137.
206. The request must include “[t]he date, time and location of the event recorded,” “[a] statement describing the requester’s relationship to the event recorded,” and “[i]f the recorded incident took place inside a residence, the request must also identify every person pre-
agency’s open records officer or “if the agency has a memorandum of understanding with either a District Attorney’s Office or the Attorney General’s Office, an attorney from one of those offices may review the request and decide if the recording will be released.” For example, release of video recorded by the Pennsylvania State Police is “coordinated with the applicable district attorney’s office.” In order to comply with ethical rules governing prosecutors, “[t]he public release of body-worn camera recordings in active criminal prosecutions is limited . . . in order to avoid potentially tainting the jury pool or violating other rights of a criminal defendant . . . [and] to avoid possible problems in ensuring a fair trial.” Consequently, if the requested recording contains “[p]otential evidence in a criminal matter; or” “[i]nformation pertaining to an investigation or a matter in which a criminal charge has been filed; or” “[c]onfidential information or victim information; and” “[t]he reasonable redaction of the recording would not safeguard potential evidence,” the request may properly be denied. If denied, the requester may then appeal to “the Court of Common pleas with jurisdiction over the matter.” A police agency or prosecuting attorney, however, may release such footage “with or without a written request.” This allows police departments and district attorneys to act “proactively when there’s a case of public interest” as Pennsylvania’s Office of Open Records Executive Director Erik Arneson explains. Arneson further notes that significant portions of the Act 22 legislation track Right to Know Law hence minimizing confusion and providing for transparency. Ultimately, Arneson believes that if used properly body cameras “can be a benefit to both police and the public.”

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210. Requesting Police Recordings, supra note 207.
211. Id.
212. Id.
214. Id.
215. Id.
III. BODY-WORN CAMERA POLICY RECOMMENDATIONS

Body-worn cameras will not provide a sea change in police-citizen relations. The devices can certainly improve the criminal justice system; however, this must be done within its existing framework. When implementing a body-worn camera program, departments should focus on using the cameras as a means of collecting evidence. While body-worn camera footage can be greatly beneficial in determining what occurred during an encounter, video evidence of any type is not without its flaws and hence should be primarily utilized in a courtroom where the factfinder is properly instructed on the applicable law and may receive additional evidence regarding the surrounding circumstances at play when the video was made. Additionally, public access to all body camera footage greatly threatens the privacy interests of parties—police officers, victims, suspects, and bystanders—recorded in the video. Hence, when implementing a body-worn camera program the interests of the parties involved should be placed before any public interest in viewing the footage. The approach used in Pennsylvania provides a model for body-worn camera policy because it emphasizes the collection of evidence and the protection of parties featured in body-worn camera footage while still enabling police and prosecutors to release video when it is determined to be appropriate to do so.

The standard by which excessive use of force claims are evaluated diverges from what most people consider acceptable police behavior.\textsuperscript{216} The creation of a record of police action is undeniably valuable in addressing excessive use of force claims; however, the reasonableness standard is a permissible one, which allows for police to exercise discretion.\textsuperscript{217} It takes into consideration the split-second decisions police officers must make. Importantly, the determination is made from the viewpoint of a reasonable officer on the scene, not from the viewpoint of the suspect or that of a reasonably prudent person.\textsuperscript{218} When body-worn camera video is released to the public, it will likely be interpreted under an improper standard thus generating disapproval of the police where perhaps the action was, in fact, legally permissible. Certainly, body-worn cameras will record both justified and unjustified uses of force; however, without the proper instruction and the presentation of other relevant evidence the public cannot accurately determine whether police acted outside the scope of their authority.

\textsuperscript{216} Meares et al., supra note 12, at 300.
\textsuperscript{218} Id.
As human beings, we inherently understand the need to make discretionary and split-second judgment calls, such as when driving a vehicle. Even in the very operation of body-worn cameras, it has been recognized that police officers must retain discretion to determine when to turn the devices on and off in order to protect the privacy rights of victims in sensitive situations. In other words, a police officer will always be required to exercise discretion in performing his or her job whether or not the officer’s actions are recorded. Consequently, the desire for increased accountability and transparency cannot come at the expense of discretion. Rather, the focus should be on defining the acceptable level of deviance from stated parameters and training officers to adhere to promulgated body camera policies. For example, a police department might list encounters during which it expects officers to record, such as traffic stops, arrests, searches, and foot pursuits. However, given the rapidly evolving circumstances of police-citizen encounters, these rules likely will not be followed absolutely. For instance, an officer may neglect to turn on the camera if he or she suddenly and unexpectedly becomes involved in a foot pursuit. Where such an incident occurs, rather than objectively punishing officers for failure to record, supervisors should ask the officer to give a justifiable reason for failing to record thereby channeling discretion rather than eliminating it.

Notably, the Minneapolis Police Department took steps to provide increased public accountability by providing both raw footage and a “stabilized” video of the officer involved shooting of Thurman Blevins. No charges were filed against the officers because, as determined by the Hennepin County Attorney, Blevins presented a danger to the officers and the community. The “stabilized” video includes footage from the body cameras of each of the officers involved, as well as a red circle indicating the gun on Blevins’ person. While the addition of the circle may shape “the perspective of the person . . . watching,” the view of an officer on scene is the relevant perspective when making a legal determination as to the

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223. Id.
reasonableness of the use of force. Moving forward, more departments may consider the approach taken by Minneapolis because it not only provides transparency by showing what happened but further serves to educate the public by attempting to illustrate why the incident occurred and why the charges were dropped.

Over time, as more footage becomes available for review, the footage should be used to provide training and to identify how far discretion can go before it exceeds the scope of the officer’s authority. Where actions deviate, those actions must be considered in a court of law. Holding police officers accountable to the communities they serve ultimately lies in presenting evidence to a jury of their peers rather than the court of public opinion. Body-worn camera footage will provide especially valuable evidence of police-citizen encounters; however, footage is only one potential piece of evidence that can be presented at trial. Often, the footage will not include critical events leading up to the incident. Also, the footage only shows one perspective or angle of the encounter and video evidence remains subject to the individual biases of jury members. During an excessive use of force case, additional witnesses may help fill in the gaps the general public does not see in footage shared in the media. Moreover, the jury will receive instruction on the applicable law the general public will lack. Thus, while body camera footage will undoubtedly aid a jury in reaching its decision, it is but one piece of evidence amongst all the other testimony, physical evidence, and overall impression that our criminal justice system asks a jury to evaluate in making its decision.

The implementation of dashboard camera video illustrates that the use of body-worn cameras will likewise serve primarily evidentiary purposes. While activists in the 1990s and early 2000s viewed the installation of dashboard cameras as a way to track and prevent instances of racial profiling, dashboard video has failed to do so. Rather, dashboard camera footage has been most useful in prosecuting drunk driving and drug trafficking cases. Through new technology, the ability to use dashboard camera to gather evidence has only increased. Rather than expanding as a model in preventing racism from entering into police practices, the devices’ capabilities for evidence collection grew. A similar process will likely occur with body-worn cameras. Thus, police departments must continue to seek other solutions to repair damaged relations with the community and improve public perception.

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226. OFFICE OF CMTY. ORIENTED POLICING SERVS., supra note 78, at 22.
Legislation enacted in Pennsylvania properly emphasizes body-worn cameras as an evidence collection tool and protects the privacy interest of parties involved.\textsuperscript{227} By enabling officers to wear body cameras into private residences, the Pennsylvania General Assembly greatly expanded police officers’ ability to capture and collect evidence. The increased ability to record, though, simultaneously increases the potential for infringement upon the privacy rights of citizens. By amending Right-to-Know law to prevent the public from accessing body-worn camera footage, the Pennsylvania General Assembly properly directed body-worn cameras to function as evidence collection tools. The separate procedure for obtaining body camera footage will ultimately be easier to follow than the hodgepodge of inclusions and exclusions established in other states. Moreover, creating a separate procedure for obtaining body camera footage the Pennsylvania Legislature acknowledges the increased sensitivity of body-worn camera footage as compared to other records available under the Right-to-Know law.

Some body-worn camera proponents believe the Pennsylvania General Assembly defeated the purpose of the devices by limiting release; however, that argument rests on the premise that accountability can only come from public access. The impetus for change, however, comes not from publicly airing video, but from police departments feeling the pressure to use the footage as a tool to identify individual and structural problems within departments, reshape policy, and provide officers with better training.

IV. Conclusion

Rather than the panacea hoped for following the unrest in Ferguson, Missouri, it is clear the most useful function of body-worn cameras will be evidentiary. The brief history of video technology in policing shows recordation does not provide a solution to deep-reaching structural problems within police departments. Rather, body-worn cameras are simply a tool. While footage may be used to

\textsuperscript{227} See generally Pennsylvania District Attorneys Issue Best Practices on Body-Worn Cameras, supra note 209. See also id. for a discussion about this issue from Chester County District Attorney, Tom Hogan:

Pennsylvania legislators worked hard to amend the law to make it possible for the police to deploy body-worn cameras. Now that the law is in place, these best practices provide some simple and common sense guidelines for police to follow in using body cameras to ensure the integrity of prosecutions. . . . the recording in a potential criminal matter must be treated as evidence, preserved and safeguarded. If there are charges in the case, the recording will be turned over as evidence. These and other straightforward rules make the roll-out of body-worn cameras more effective for both law enforcement and the public.
ascertain problematic patterns within police departments or certain corrupt officers, documentation alone is not enough. Police departments must develop and implement further training based on identified issues in order for the effect to be felt in the community.

Within this framework, officer discretion remains necessary. As such, the public must come to understand that whether a police officer's actions were legally justified may not be apparent upon a public viewing of the video with untrained eyes. Legal standards for the proper exercise of police authority differ from what most citizens consider generally acceptable. Consequently, the public must reckon with the fact police officers exercise discretion, and sometimes there will be deviations when exercising that discretion. In turn, police departments must train officers to use discretion properly and within acceptable deviations. Body-worn camera footage can be especially useful in facilitating such training by showing recruits real-life encounters that fall within or without an acceptable use of discretion and by reviewing current officers' actions. These benefits, though, take place over time within the department and do not provide the public the oversight many felt body-worn cameras would offer. Furthermore, the process of properly drafting policies, obtaining, and training officers to use body-worn camera will take time. Thus, police departments must continue to implement other types of outreach, such as community policing, and work to improve relations with the community on a greater scale.

While the public may clamor to view an incident, the privacy rights of parties involved must remain paramount when drafting body-worn camera legislation. Ultimately, body-worn camera footage provides evidence that must be used within the bounds of the criminal justice system. Within this system the enduring value of body-worn camera footage will lie not in sharing it with the general public, but in providing jurors, who represent the community, with valuable evidence. Jurors may then use the footage, along with all of the other evidence presented, to make a carefully considered evaluation based on the applicable law rather than in the court of public opinion where while the outcry may be valid justice cannot properly be done.
The School of Hard Knocks: Examining How Pennsylvania School Disciplinary Policies Push Black Girls into the Criminal Justice System

Brazitte A. Poole

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I. INTRODUCTION

Currently, there is immense discussion regarding the “pipeline framework” of the School-to-Prison Pipeline epidemic; however, there is a demographic that is conspicuously missing from the discussion: Black girls. Harsh school disciplinary policies and discriminatory law enforcement policies intersect, feeding children into the criminal justice system. While dialogue regarding the criminalization of all children through inappropriate school discipline is vital, and arguably overdue, the current conversation heavily focuses on challenges faced by Black boys and other boys of color. While Black boys are more likely to be suspended than any other student group, recent studies show that Black girls are being suspended at increasing rates throughout the country. However, due to the disparity in the discipline of boys and girls and the non-traditional forms of confinement girls face, Black girls are often excluded from the School-to-Prison Pipeline discussion. As a result, the ways that Black girls are marginalized by disciplinary tactics used in schools is obscured. Recently, in the report Race, Gender, and the School to Prison Pipeline: Expanding Our Discussion to Include Black Girls, researcher Monique Morris analyzed how Black girls are impacted by criminalizing policies, many of which take place in an environment that should serve as a safe space for expression and cultivation of their talents: school. According to that research, our inability to understand how school disciplinary policies affect Black girls is due to the flawed ways in which the experiences of Black Girls have been perceived—even by advocates.

The best approach for advocating on behalf of Black girls against harmful school disciplinary policies is to focus directly on ending

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1. MONIQUE MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS 9 (2016). This article will follow the precedent of Critical Race Scholars by intentionally combating white supremacist language practices. Therefore, white, which is the racially dominant group, will appear as lower case and all references to People of Color will be capitalized.

2. NANCY A. HEITZEG, CRIMINALIZING EDUCATION: ZERO TOLERANCE POLICIES, POLICE IN THE HALLWAYS AND THE SCHOOL TO PRISON PIPELINE 3 (n.d).


5. Id.

6. MORRIS, supra note 1.

7. Id.

8. Id.
the criminalizing school policies and the unique forms of punishment Black girls endure as a result of these policies.\textsuperscript{9} Such policies often lead to non-traditional forms of incarceration and can have long term effects that go well beyond adolescence and into adulthood.\textsuperscript{10} Indeed, Black girls experience forms of confinement beyond going to jail or prison, such as “detention centers, house arrest, electronic monitoring, and other forms of social exclusion.”\textsuperscript{11} Thus, we must consider these diverse forms of confinement to fully understand this “school-to-confinement narrative.”\textsuperscript{12}

This article focuses on the unique way Black girls experience exclusion from school settings. First, I will discuss factors that play a significant role in the criminalization of Black girls’ identity, which perpetuates discriminatory practices that overtly and covertly contribute to the establishment and use of disciplinary policies that criminalize and harm them. Then, I will address Pennsylvania school policies that criminalize Black girls and the impact those punitive policies have. Finally, I will examine the rehabilitative goals of the juvenile justice system and propose alternative approaches to school discipline that may curb this push of Black girls from the classroom into the criminal justice system.

II. THE SCHOOL-TO-PRISON PIPELINE: AN OVERVIEW

Over the past twenty years, there has been a “surge in school punishments including suspensions, arrests, and referrals to juvenile court.”\textsuperscript{13} These punishments begin as early as pre-kindergarten, and almost always disproportionately involve students of color.\textsuperscript{14} The correlation between being punished at school and the likelihood of contact with the criminal justice system is now referred to as the “School-to-Prison Pipeline.”\textsuperscript{15} This concept represents the notion that trouble at school increases the likelihood of trouble with the criminal justice system.

The School-to-Prison Pipeline epidemic is not specific to any one state or region, rather, it is a problem being faced in numerous school systems across the United States. According to a 2014 report by the United States Department of Education Office for Civil

\textsuperscript{9} Id. at 12.
\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Id.
Rights, from 2011 to 2012, Black students were suspended and expelled at a rate three-times greater than their counterparts.\textsuperscript{16} Unfortunately, for Black children this began as soon as they entered into the learning environment. While comprising only 18\% of preschool enrollment, Black children represented 48\% of preschool children who received more than one out-of-school suspension.\textsuperscript{17} For Black girls, the data was even more disheartening. According to the same study, Black girls were suspended at higher rates than girls of any other race or ethnicity and most boys.\textsuperscript{18}

In many cases, it is the school that is directly pushing students into the criminal justice system, often by having students arrested in school.\textsuperscript{19} On one hand, while “[B]lack students [only] represent 16\% of [overall] student enrollment, they represent 27\% of students referred to law enforcement and 31\% of students subjected to a school-related arrest.”\textsuperscript{20} On the other hand, white students represent 51\% of overall enrollment, and a more proportionate 41\% of students referred to law enforcement, and 39\% of those arrested.\textsuperscript{21} Once students have contact with the criminal justice system as children, it is likely that they will have contact with the system as an adult.\textsuperscript{22}

III. THE CRIMINALIZATION OF THE BLACK GIRL’S IDENTITY

The marginalization of Black people is deeply rooted in United States history, and Black girls are not immune to the many forms that marginalization may take.\textsuperscript{23} Black girls’ marginalized identities of both \textit{Black} and \textit{female} cause them to experience race and gender in a unique way, different from all of their counterparts, including: Black boys, white boys, and white girls.\textsuperscript{24} Due to the complexity of this identity intersection, there may be countless factors that contribute to the criminalization of Black girls, however, available information suggests that “implicit biases, stereotyping, and

\begin{itemize}
\item \textsuperscript{16} U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (2014) (comparing general rates of 5\% suspension of white students with 16\% suspension of Black students).
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id.
\item \textsuperscript{20} U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, supra note 16, at 1.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} See Kirk, supra note 13.
\item \textsuperscript{23} See generally
\end{itemize}
other cultural factors” play a significant role in the way Black girls are perceived in the school environment.\textsuperscript{25} Thus, it is important to consider historical images of Black females—both women and girls—that form the basis for the harmful misunderstanding of Black girls’ identities and behaviors in the classroom.

Since the Slavery Era, Black women and girls have been portrayed as being outside of the “American ideal of womanhood.”\textsuperscript{26} During that time, the Black woman’s femininity was judged against the “prevailing vision of the True Woman, who was chaste, pure, and \textit{white}.”\textsuperscript{27} Out of this perception, socially constructed images of Black womanhood were created, including but not limited to, the “Sapphire,” “Jezebel,” and “Mammy” prototypes.\textsuperscript{28} The Sapphire represents the depiction of an angry Black female who is aggressive, emasculating, and unfeminine.\textsuperscript{29} The Jezebel represents the hypersexualized Black female, and the Mammy represents the nurturing asexual Black female.\textsuperscript{30} These oppressive depictions are ever-present in the ways Black girls are perceived, both inside and outside of school settings. Arguably, these images are present in everyday depictions in entertainment and impact the ways which Black girls are perceived by various types of people.\textsuperscript{31} The way Black girls are consistently depicted shows our failure as a society to imagine better futures for them.\textsuperscript{32}

Today, Black girls continue to deal with the strenuous balancing required for the participation in aforementioned “identity politics.”\textsuperscript{33} Similar to the ideal vision of womanhood during the Slavery Era, the standard for the \textit{appropriateness} of Black girls’ behavior is tied to social norms rooted in a “white middle-class definition of femininity.”\textsuperscript{34} The injustice of this narrow standard of appropriate-
ness is often at odds with the assumptions about Black girls’ behaviors and expressions.\textsuperscript{35} As a result, when Black girls act in ways that are common amongst all children, such as throwing tantrums or lashing out, those actions are often subjected to negative responses from school staff and teachers.\textsuperscript{36}

For instance, in 2007, a six-year-old Black girl was placed in handcuffs for throwing a “kicking and scratching” tantrum in a Florida classroom.\textsuperscript{37} In 2012, another six-year-old Black girl was arrested for throwing books and toys in a Georgia classroom, resulting in the child suffering from paranoia due to the trauma of the incident.\textsuperscript{38} Unfortunate incidents like these are the result of the current construction of the Black girls’ identity. For instance, Signithia Fordham examined the stereotype of “loudness” assigned to Black girls in “Those Loud Black Girls.”\textsuperscript{39} In her work, Fordham asserts that loudness becomes a metaphor for Black girls’ resistance to “proclaimed nothingness.”\textsuperscript{40} Essentially, Black girls use their voice to make themselves visible and audible in environments where they usually may be invisible or silenced.\textsuperscript{41} Still, Black girls deal with the results of these harmful identity constructions in many different ways.

A. Adultification: Black Girls Are Treated Like Adults

The theory of Adultification contributes to the disparate treatment of Black girls and can take two forms.\textsuperscript{42} The first form occurs through a socialization process where children function in a mature adult-like manner based on necessity; this is especially true for Black girls who are raised in environments with few resources, placing them at the center of the disciplinary power of poverty management.\textsuperscript{43} The second form is based on social stereotypes centered on how “adults perceive children in the absence of knowledge of [the] children’s behavior and verbalizations.”\textsuperscript{44} This form often encompasses a racial component that is helpful in analyzing the way in which Black girls are perceived.\textsuperscript{45} The way that Black girls engage
with the world is often scrutinized harshly, and their expressions are often assigned adult-like characteristics.\textsuperscript{46} Essentially, when a Black girl behaves in a way that a school official deems inappropriate, she is treated as if she has the maturity of a woman and should have the wisdom to act better or have more discipline and self-control.\textsuperscript{47} This does not just happen in schools; it happens to Black girls in all walks of life. For example, a study conducted by Georgetown University found that, compared to white girls of the same age, Black girls were perceived by participants to be more independent and know more about adult topics (such as sex), and needing of less nurturing, less protection, less support, and less comfort.\textsuperscript{48} According to the study, Black girls are viewed as “behaving and seeming older than they actually are” at as early as age five by adults of different racial, educational, and ethnic backgrounds.\textsuperscript{49} As a result of the assignment of more adult-like qualities than their counterparts, Black girls are often treated as though they are willfully engaging in behavior expected of Black women, which is often met with hostility.\textsuperscript{50}

The ramifications of the Adultification of Black girls can be seen in numerous reports of adults handling them in rough and inappropriate ways. For example, in 2012, Alexis Sumpter, a fifteen-year-old Black girl, was handcuffed by New York City Police Officers because they perceived her to be too old to use a student subway pass.\textsuperscript{51} The officers refused to let her go until her mother appeared and convinced them of her age.\textsuperscript{52} Due to the trauma she suffered from the incident, Sumpter had to be treated with on-going therapy.\textsuperscript{53} Another example can be found in a South Carolina classroom where student footage went viral of a police officer dragging a Black girl from her seat across the floor, handling her in a hyper-aggressive manner, which is ordinarily (and reasonably) considered an inappropriate way to deal with a child.\textsuperscript{54} The results of the Georgetown study, along with incidents such as these, suggests that Black girls are often on the receiving end of a double-edge

\textsuperscript{46} MORRIS, supra note 1, at 34-35.
\textsuperscript{47} Id. at 34.
\textsuperscript{48} EPSTEIN ET AL., supra note 28, at 1.
\textsuperscript{49} Id.; see also Collier Meyerson, Adults Think Black Girls are Older Than They Are—and It Matters, NATION (July 6, 2017), https://www.thenation.com/article/adults-thinks-black-girls-are-older-than-they-are-and-it-matters/ (surveying 325 adults: 74% white and 62% female).
\textsuperscript{50} MORRIS, supra note 1, at 34.
\textsuperscript{51} Meyerson, supra note 49.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
sword. On one hand, they are viewed as more adult-like than their counterparts and are punished more because of this perception. On the other hand, however, this flawed perception makes them more vulnerable to mistreatment—often by authority figures who are charged with protecting their general welfare.

B. Black Girls Are Seen as Less Innocent Than Their Counterparts

Black girls do not have a chance to fully experience the innocence that separates childhood from adulthood. Childhood is a stage where children learn, make mistakes, and have experiences that will lead them to who they will ultimately become as an adult. Ideally, this stage of development should be met with lots of patience, love, and respectful correction of improper behavior by teachers and adults, but unfortunately that is not the case for Black girls. The incessant assignment of maturated qualities to Black girls perpetuates the narrative that their mistakes, misbehaviors, or child-like mischiefs are “intentional and malicious,” rather than a consequence of a child’s immature reasoning. According to another Georgetown University study, this is particularly true for Black girls. Jamilia J. Blake, a researcher for the Center on Poverty and Inequality at Georgetown University, asserts that "if authorities in public systems view [B]lack girls as less innocent, less needing of protection, and generally more like adults, it appears likely that they would also view [B]lack girls as more culpable for their actions and, on that basis, punish them more harshly despite their status as children." In the education system, this tendency to view Black girls as less innocent may explain instances where Black girls are subjected to harsh treatment and punishment for relatively minor offenses. For instance, Kiera Wilmot, a sixteen-year-old Black girl, was conducting a volcano experiment for her science class in the hallway of her

55. Id.
56. Id.
60. Id.
61. Id.
62. Id. at 8.
high school, when the lid popped off and released smoke.\textsuperscript{63} While no one was hurt and nothing was damaged, school officials accused her of making a “bomb” and referred her to the police.\textsuperscript{64} As a result, she was charged with two felonies: possession of a weapon on school property and discharging a destructive device.\textsuperscript{65} In another instance, a teen-aged Black girl was punched in the mouth by a California police officer and bitten by a police dog after being mistaken for a male suspect on the loose.\textsuperscript{66} In that situation, Tatyana Hargrove stopped her bike for a drink of water when she found herself surrounded by police.\textsuperscript{67} When questioned, the officers claimed that they mistook Hargrove for a male suspect who was involved in an armed incident nearby.\textsuperscript{68} According to Hargrove’s father, the male suspect being sought was “5-feet-10 and about 170 pounds,” while his daughter was only “5-feet-2 and 115 pounds.”\textsuperscript{69} These situations help demonstrate how Black girls are vilified due to social constructions that dismiss their childhood innocence.

C. Black Girls’ Bodies and Appearance Are Over-Policed

Negative perceptions about Black girls’ appearance often leave them vulnerable to policies that exist to punish them for their physical qualities, essentially punishing them for “who they are.”\textsuperscript{70} This is demonstrated in policies that regulate natural hair textures and styles, as well as other aspects of Black girls’ appearance, such as the way clothes fit. For example, a Black girl at a Pennsylvania school was suspended for wearing colored braids to school.\textsuperscript{71} This is not an isolated incident applicable to the school in question; similar policies can be found throughout the country. Another example


\textsuperscript{64} Id.

\textsuperscript{65} Id.


\textsuperscript{67} Id.

\textsuperscript{68} Id.

\textsuperscript{69} Id.

\textsuperscript{70} MORRIS, supra note 1, at 92.

is found in a Kentucky school’s policy on hair.\textsuperscript{72} In Kentucky, a school banned dreadlocks and twists, common hairstyles in Black culture.\textsuperscript{73} Policies like these are not only harmful to Black girls, but serve to reinforce negative social constructs about Black beauty, which is harmful to society as a whole and contributes to the vicious cycle of Black girls being punished for simply existing.\textsuperscript{74} Notably, similar policies are enforced in professional, adult settings, making the policing of appearance a life-long struggle for Black girls and Black women.\textsuperscript{75}

The policing of Black girls’ appearance may be more nuanced when considering how lightness or darkness of their skin tone affects the likelihood of being disciplined in school. A 2013 study examining whether skin tone affects the likelihood of suspension in school found that while Black youth are much more likely to be suspended at school than other racial groups, Black girls with darker skin tones are most likely to be suspended from school.\textsuperscript{76} This is rooted in the concept of “colorism.”\textsuperscript{77} Colorism refers to “prejudicial or preferential treatment of same-race people based solely on their color.”\textsuperscript{78} The concept of colorism suggests a racial hierarchy where minorities with skin tones that are closer to that of the dominant group are awarded certain privileges, in the context of school discipline, a lower likelihood of being suspended from school.\textsuperscript{79} Skin darkness and the likelihood of suspension are positively correlated.\textsuperscript{80} In other words, it is about three times as likely for a Black girl with the darkest skin tone to be suspended compared to one with the lightest skin.\textsuperscript{81} For the female sample of the study, the

\begin{itemize}
\item \textsuperscript{73} Id.
\item \textsuperscript{74} See Janel A. George, \textit{Stereotype and School Pushout: Race, Gender, and Discipline Disparities}, 68 ARK. L. REV. 101, 106-07 (2015).
\item \textsuperscript{75} See, e.g., EEOC v. Catastrophe Mgmt. Solutions, 852 F.3d 1018, 1035 (11th Cir. 2016) (finding an employer's enforcement of a ban on dreadlocks is not a violation of Title VII's prohibition of racial discrimination); Campbell v. Ala. Dep't of Corr., No. 2:13-CV-00106-RDP, 2013 WL 2248086, at *3 (N.D. Ala. May 20, 2013) (granting motion to dismiss gender and race discrimination claims regarding a policy that prohibited female employees from wearing their hair in dreadlocks); Carswell v. Peachford Hosp., No. C80-222A, 1981 WL 224, at *2 (N.D. Ga. May 26, 1981) (holding that an employer’s prohibition of Black woman’s beaded hairstyles is not discrimination).
\item \textsuperscript{76} See LANCE HANNON ET AL., \textit{THE RELATIONSHIP BETWEEN SKIN TONE AND SCHOOL SUSPENSIONS FOR AFRICAN AMERICANS} 2, 5 (2015).
\item \textsuperscript{77} Id. at 5.
\item \textsuperscript{78} Id. at 6 (quoting Pulitzer Prize winner Alice Walker).
\item \textsuperscript{79} See id.
\item \textsuperscript{80} Id. at 17.
\item \textsuperscript{81} Id. at 18-19.
\end{itemize}
odds of a suspension rise by a factor of over three moving from the lightest to the darkest skin tone.\textsuperscript{82} Therefore, not only are Black girls more likely to be disciplined in school than their white female counterparts, but even within the Black female demographic, the darker skinned Black girls are more likely to be subjected to disciplinary policies than their lighter-skinned Black peers.\textsuperscript{83}

IV. THE SCHOOL-TO-CONFINEMENT PIPELINE

The School-to-Prison pipeline is a result of schools' use of "disciplinary policies that push students out of the classroom and into the criminal justice system at alarming rates."\textsuperscript{84} Over the last two decades, schools have taken a penal approach to discipline giving rise to severe school punishments, including, but not limited to, suspensions, arrests, and referrals to juvenile court.\textsuperscript{85} These punishments can start as early as pre-kindergarten, and almost always disproportionately involve students of color.\textsuperscript{86} Research has uncovered that excessive use of these severe punishments in schools are an immense part of the pipeline to larger problems for students in the future, such as dropping out of school, which often leads to higher chances of students entering into the criminal justice system.\textsuperscript{87}

Exploring this phenomenon deeper, scholars have found that a similar pipeline exists where school disciplinary policies act as vehicles that push Black girls from the classroom into the criminal justice system, where they experience various forms of exclusion and confinement.\textsuperscript{88} Scholars suggest that racial and gendered biases play a significant part in the formation of disciplinary patterns in schools that reflect stereotypical perceptions about Black womanhood in general.\textsuperscript{89} As a result, Black girls are consistently subjected to exclusionary discipline including "out-of-school suspensions, expulsions, [and other punishments]."\textsuperscript{90} Indeed, approximately 12% of Black girls are suspended during their primary or

\textsuperscript{82} Id.
\textsuperscript{83} Id. at 30.
\textsuperscript{84} Marilyn Elias, The School-to-Prison Pipeline, TEACHING TOLERANCE, Spring 2013, at 1.
\textsuperscript{85} Candace Moore, Advocating for Access to Education Breaking the School to Prison Pipeline, CBA REC., October 2015, at 29.
\textsuperscript{86} See Kirk, supra note 13.
\textsuperscript{87} See generally MORRIS, supra note 1.
\textsuperscript{88} Monique W. Morris, Education and the Caged Bird: Black Girls, School Pushout and the Juvenile Court School, 22 POVERTY & RACE 5, 5 (2013); see also supra Section III.
\textsuperscript{89} Morris, supra note 89.
secondary education, a rate higher than girls of any other race.\textsuperscript{91} Additionally, Black girls are also disproportionately referred to law enforcement for criminal punishments by school personnel, which pushes them into criminal confinements, such as juvenile detention centers and court-ordered residential placements.\textsuperscript{92} Being placed in these juvenile facilities removes Black girls from their homes and confines them to prison-like atmospheres.\textsuperscript{93}

Even after being confined in a juvenile detention center or a court-ordered residential placement, Black girls cannot escape the exclusionary punishments of this criminalizing system.\textsuperscript{94} Consider a study that examined the educational experiences of Black girls confined in Northern California.\textsuperscript{95} Almost all of the girls who participated in the study reported being removed from classrooms within detention centers, referred to as “juvenile court schools” or “juvenile court classrooms,” for stereotypical reasons such as “talking back.”\textsuperscript{96} Moreover, most of the participants reported occurrences that mirror experiences of Black girls in traditional classrooms who are stuck in this criminalizing structure.\textsuperscript{97} Over 88% of the participants reported a history of suspension from their traditional schools, and 65% reported a history of expulsion from their traditional schools.\textsuperscript{98} Further, over 50% of participants reported being subjected to exclusionary discipline, such as suspension and expulsion, as early as elementary school.\textsuperscript{99} The criminalizing disciplinary school policies at the crux of the School-to-Confinement epidemic have been in existence for a long time. These policies include, but are not limited to, Zero Tolerance policies, police presence in schools, and disparate numbers of suspensions and expulsions.\textsuperscript{100}

A. Zero Tolerance Policies

Zero Tolerance policies are perhaps one of the most prevalent factors that force Black girls out of school and into the criminal system.

\begin{itemize}
\item \textsuperscript{91} U.S. DEPT OF EDUC. OFFICE FOR CIVIL RIGHTS, supra note 16, at 1.
\item \textsuperscript{92} Am. Civil Liberties Union of Pa., Q&A on Discipline and Policing, END ZERO TOLERANCE, https://www.endzerotolerance.org/discipline-q-a (last updated Jan. 7, 2019).
\item \textsuperscript{93} See generally Morris, supra note 89.
\item \textsuperscript{94} Monique Morris, Black Girls Disproportionately Confined; Struggle for Dignity in Juvenile Court Schools, PITT. COURIER (Dec. 18, 2013), https://newpittsburghcourieronline.com/201312/18/black-girls-disproportionately-confined-struggle-for-dignity-in-juvenile-court-schools/.
\item \textsuperscript{95} Id.
\item \textsuperscript{96} Id.
\item \textsuperscript{97} Id.
\item \textsuperscript{98} Id.
\item \textsuperscript{99} Id.
\item \textsuperscript{100} See generally MORRIS, supra note 1.
\end{itemize}
Generally, a Zero Tolerance policy is a school policy that “assigns explicit, predetermined punishments to specific violations of school rules, regardless of the situation or context of the behavior.”\textsuperscript{101} Initially, Zero Tolerance policies were implemented for practical safety reasons, such as keeping weapons out of school.\textsuperscript{102} However, these policies greatly expanded after Congress passed the Gun-Free Schools Act in 1994, which requires states to maintain laws requiring schools to expel students who bring a firearm to school or are caught in possession of a firearm in school.\textsuperscript{103} The mandatory expulsion period is to be no less than one year.\textsuperscript{104} Today, Zero Tolerance policies are applied more broadly. As these policies were implemented through differing state laws, their use was not confined to only firearms nor the most serious situations, instead the policies were applied liberally throughout schools.\textsuperscript{105} In some states, the definition of what is considered a “weapon” expanded the definition contained within the Gun-Free Schools Act, and added other offenses not included within the Act.\textsuperscript{106} This opened the flood gates for defiant or disruptive behavior to be punished under these punitive policies.\textsuperscript{107} Thus, under the guise of the firm stance on safety permitted by Gun-Free Schools Act, states were able to maintain practices that mandated or facilitated the removal of students for an infinite range of behaviors.\textsuperscript{108}

These policies have been devastating for Black girls. Under the great variance of states’ implementation of the Gun-Free Schools Act, Black girls have become the fastest-growing demographic to be subject to expulsions and school suspensions.\textsuperscript{109} Varying Zero Tolerance policies give great latitude to school personnel to disproportionately punish Black girls under the ambiguity of the term willful defiance.\textsuperscript{110} Generally, willful defiance is a subjective term assigned to student conduct that a teacher finds undesirable.\textsuperscript{111} This catch-
all category can encompass all sorts of student behaviors, from simple back-talk to failure to adhere to a dress code. Schools’ adherence to such policies only serve to thwart the voices of Black girls in the learning environment.

Harmful social constructions affect the way Black girls’ expressions are perceived, leaving them vulnerable to suspension or expulsion for making any assertion that is not aligned with the teacher’s ideology or perspective. For example, India Landry, a Black girl in a high school in Houston, Texas, decided to sit quietly in her seat during the Pledge of Allegiance to show unity with recent protests against police brutality, in which notable National Football League (NFL) players refuse to stand during the national anthem. As a result of refusing to stand during the Pledge of Allegiance, Landry was expelled from school. Landry expressed that she refused to stand because she did not believe that the “flag is for what it says it’s for, liberty and justice.” This conscientious choice was met with hostility from school officials who proclaimed that “this isn’t the NFL,” and that Landry was going to “stand for the pledge like the other African American[s] in her class.” Incidents such as this are prime examples of how Black girls’ choices that conflict with their teachers’ ideology are punished, resulting in the disruption of their education.

B. Outsourcing Discipline to Officers and Juvenile Courts

The rise of Zero Tolerance policies birthed the adoption of policies that permitted the stationing of police in schools. While it is reasonable to expect police to respond to emergency situations that occur in schools, the permanent stationing of police in schools is one of major concern with regard to Black students. The concern is

112. Id.
113. See generally Am. Psychologist Ass’n Zero Tolerance Task Force, Are Zero Tolerance Policies Effective in Schools? An Evidentiary Review and Recommendations, 63 AM. PSYCHOLOGIST 852, 860 (2008) (“Its application in suspension and expulsion has not proven an effective means of improving student behavior. It has not resolved, and indeed may have exacerbated, minority over-representation in school punishments.”).
115. Id.
116. Id.
117. Id.
118. Am. Civil Liberties Union of Pa., supra note 92.
119. Id.
that police officers treat schools as their “beat” and interject in disciplinary matters that are not dangerous or violent, thereby making what may otherwise be a minor infraction that could be handled by school administration, into one that subjects a student to law enforcement and possibly the juvenile justice system.\textsuperscript{120} For instance, a South Carolina student who had taken her phone out in class was violently ripped from her desk by a school-stationed police officer and criminally charged for the incident.\textsuperscript{121} The student’s classmate who criticized the officer’s actions was also charged.\textsuperscript{122} Essentially, if a teacher perceives a Black girl’s behavior to be inappropriate, he or she may contact the school-stationed police officer to intervene instead of a member of the school’s administration, thereby unnecessarily escalating the disciplinary situation. Another example can be found in Oklahoma City, Oklahoma, where a school police officer punched a student in the face for refusing to get out of the hallway without a hall pass.\textsuperscript{123} Yet another example can be found in Houston, Texas, where a tenth-grade girl was tackled to the ground by three school police officers for using her phone to call her mother—a simple matter of school discipline that required only administrative consequences and not the involvement with law enforcement.\textsuperscript{124} For Black girls, this police-in-school dynamic can blur the boundaries of authority and cause confusion. In essence, it may be difficult to determine who is the proper authority in any given situation—the teacher or the police officer.\textsuperscript{125} In reality, school officials have authority over day-to-day, in-school disciplinary matters; however, if an officer stationed at a school oversteps his or her authority, there is no way for a student to know what recourse is available in that situation.\textsuperscript{126}

Another pressing concern that comes with having police officers stationed in schools is the impact it can have on students’ rights and the increased possibility of entering the criminal justice system. Schools maintain a significant amount of private information on students.\textsuperscript{127} This information may include, among other things,

\textsuperscript{120} Id.
\textsuperscript{121} AM. CIVIL LIBERTIES UNION, BULLIES IN BLUE: THE ORIGINS AND CONSEQUENCES OF SCHOOL POLICING 17 (2017).
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 15.
\textsuperscript{124} Id. at 15-16.
\textsuperscript{125} See id.
\textsuperscript{126} See id. at 16-17.
\textsuperscript{127} Id. at 16.
discipline reports, video recordings, medical information, and digital information.\textsuperscript{128} Constitutional privacy protections and statutory law can limit how this information can be used and who has access to it.\textsuperscript{129} However, school collaboration with school-based police officers invite opportunities for overreach of authority in this area.\textsuperscript{130} In some school districts, school officials are encouraged to share student information with school-based police officers.\textsuperscript{131} In addition, some school districts may classify certain information in a way that makes it freely accessible to law enforcement to be shared among other law enforcement agencies in criminal investigations.\textsuperscript{132} Therefore, police being stationed in schools creates a greater risk for criminalization of school students.

\section*{C. Suspensions and Expulsions}

Suspensions and expulsions are punitive tools used to exclude Black girls from the classroom. According to the United States Department of Education Office for Civil Rights, Black students are suspended at higher rates than their counterparts; this is especially true for Black girls.\textsuperscript{133} In 2014, the Department of Education Office for Civil Rights released the Civil Rights Data Collection Snapshot that contained school disciplinary information from years 2011-2012 for every public school and district in the nation.\textsuperscript{134} The research revealed that nationally, Black girls are suspended at a rate of approximately 12\%.\textsuperscript{135} The findings in the data snapshot also revealed that eleven states reported higher gaps than the nation regarding the suspension rates of Black students and white students for both boys and girls: Arkansas, the District of Columbia, Illinois, Indiana, Michigan, Missouri, Nebraska, Ohio, Pennsylvania, Tennessee, and Wisconsin.\textsuperscript{136} The snapshot also explored the racial and gender disparities of school discipline on a state-by-state

\begin{footnotes}
\footnotetext[128]{Id.}
\footnotetext[129]{Id.; see also, e.g., U.S. CONST. amend. IV (protecting citizens from unreasonable searches and seizures); Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g(b)(1)(L)(2) (2013) (prohibiting funds to educational institutions that have a policy or practice of releasing, or providing access to, any personally identifiable information in education records without written consent).}
\footnotetext[130]{AM. CIVIL LIBERTIES UNION, supra note 121, at 16.}
\footnotetext[131]{Id.}
\footnotetext[132]{Id.}
\footnotetext[133]{See U.S. DEPT OF EDUC. OFFICE FOR CIVIL RIGHTS, supra note 16, at 1 (based on data collection from 2011-2012).}
\footnotetext[134]{Id.}
\footnotetext[135]{Id.}
\footnotetext[136]{Id. at 11.}
\end{footnotes}
basis.\textsuperscript{137} This state-centered approach revealed that Black girls account for extremely disproportionate rates of all out-of-school suspensions in some states, but more particularly in Wisconsin, Indiana, and Pennsylvania.\textsuperscript{138}

In September 2017, the National Black Women’s Justice Institute conducted an analysis of the United States Department of Education Office for Civil Rights’ statistics for the 2013-2014 school year, which was made available in June 2016.\textsuperscript{139} This study examined “the extent of disparate school disciplinary practices for female students nationwide,” focusing in part on Black girls in comparison to their white female counterparts.\textsuperscript{140}

The report analyzed the prevalence of disciplinary practices for female students by region.\textsuperscript{141} In the Northeast, 45,302 total female students received one or more out-of-school suspensions, with over half of the female students in Northeast schools identifying as white, and nearly 19% of the female students identifying as Black.\textsuperscript{142} The data indicated that Black female students were six times more likely to receive one or more out-of-school suspensions than white females.\textsuperscript{143} Schools in the Midwest were even worse for Black girls. In the Midwest, 90,927 total female students received one or more out-of-school suspensions, with over two-thirds of the female students in those schools identifying as white, and 14% identifying as Black.\textsuperscript{144} There, Black female students were ten times more likely than white female students to receive one or more out-of-school suspensions.\textsuperscript{145}

In the South, 140,027 total female students received one or more out-of-school suspensions.\textsuperscript{146} White female students accounted for approximately 45% of all female students, while Black female students accounted for 24% of all female students in the South.\textsuperscript{147} Research revealed that Black girls were over five times more likely than white girls to receive one or more out-of-school suspensions in

\begin{itemize}
  \item[\textsuperscript{137}] Id. at 12-19.
  \item[\textsuperscript{138}] Id. at 14-15 (finding that Black girls received out-of-school suspensions 21% annually in Wisconsin, 16% annually in Indiana, and 13% annually in Pennsylvania).
  \item[\textsuperscript{140}] Id.
  \item[\textsuperscript{141}] Id. at 4.
  \item[\textsuperscript{142}] Id. at 6.
  \item[\textsuperscript{143}] Id.
  \item[\textsuperscript{144}] Id. at 7.
  \item[\textsuperscript{145}] Id.
  \item[\textsuperscript{146}] Id. at 8.
  \item[\textsuperscript{147}] Id.
\end{itemize}
the South.\textsuperscript{148} Finally, in the West, the data indicated that a total of 48,562 female students received one or more out-of-school suspensions.\textsuperscript{149} Black female students accounted for 5\% of total female students in the West, but were five times more likely to receive one or more out-of-school suspensions, while white female students accounted for 38\% of total female students, but were nearly five times less likely to receive one or more out-of-school suspensions as their Black female counterparts.\textsuperscript{150} Thus, Black girls are forced to spend exceedingly more days outside of the learning environment than their counterparts.

\section*{D. Confinement}

For Black girls, trouble in the classroom may lead to trouble with the juvenile justice system, which upon an adjudication of delinquency, may lead to various forms of confinement. Since 1997, there has been an overall reduction in the confinement of both Black and white girls.\textsuperscript{151} This fact, however, can be deceiving on its face. Between 1997 and 2013, the percentage of white girls in confinement dropped from 49\% to 41\%, while the percentage of Black girls in confinement only dropped 3\%, decreasing from 34\% to 31\%.\textsuperscript{152} However, despite the reduction in confinement, Black girls are still being confined for “status offenses.”\textsuperscript{153} Status offenses are offenses that are criminal simply because of the girl’s age, and includes non-violent behaviors such as truancy, curfew violations, and running away from home.\textsuperscript{154} Adjudication for one of these offenses drives Black girls into confinement, such as juvenile detention centers and residential facilities, at disproportionate rates.\textsuperscript{155} Consequently, Black girls are confined at a rate of 123 per 100,000 girls, while their white counterparts are confined at a rate of 37 per 100,000 girls for the same behaviors.\textsuperscript{156}

\begin{thebibliography}{99}
\bibitem{148} Id.
\bibitem{149} Id. at 9.
\bibitem{150} Id.
\bibitem{152} THE SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS 4 (2015).
\bibitem{153} Id.
\bibitem{155} HALYARD, supra note 151, at 3-4.
\bibitem{156} Id. at 4.
\end{thebibliography}
Confinement can take many forms. Many states utilize various juvenile correctional systems, such as residential treatment centers, boot camps, group homes, or home detention. Additionally, states heavily rely on locked long-term youth correctional facilities, which are typically operated under prison-like conditions that include correctional guards, locked cell blocks, and individual cells. Confusion and inconsistency in the terminology used for confinement creates on-going problems with uncovering statistical data on how many Black girls are subjected to certain types of confinement. Currently, there is no standard definition for “residential treatment programs” and they may be referred to by many different names depending on the state. Some alternative names include: “detention centers, juvenile halls, reception and diagnostic centers, correctional facilities, wilderness camps, residential treatment centers, training schools, shelter care, and group homes.”

This varying definition is due, in part, to the lack of federal laws establishing a uniform standard of what constitutes a residential program or facility. As a result, confinement can take place in settings that range from “relaxed group homes or halfway houses to extremely structured, hospital-like environments.” Black girls may be confined at residential facilities that vary considerably in important programming and structural components, such as “program goals, security features, physical environment, facility size, length of stay, treatment services, and targeted population.” Some of these girls may find themselves in facilities or programs that resemble adult prisons or jails, while others may be placed in programs that resemble campuses or houses. Additionally, security features will vary depending on the type of placement. In more secure detention centers, there are usually cells and locks, but less secure confinements may allow the girls to come and go based on certain structural rules. However, these unclear and wide-

158. Id.
159. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, RESIDENTIAL PROGRAMS 1 (2010).
160. Id.
161. Id. at 2.
162. Id.
163. Id.
164. Id.
165. Id.
166. Id.
ranging definitions of different types of residential treatment programs make it difficult to determine which treatment options work best, especially for vulnerable demographics, such as Black girls.\textsuperscript{167}

Black girls that are confined outside of their homes in more secure detention centers are more likely to suffer harm. Cases from the past fifty years regarding the conditions of juvenile detention centers demonstrate the harsh reality of how traumatic juvenile detention centers can be for Black girls. In 1972, an Indiana federal district court addressed abuse in a juvenile detention center where confined juveniles were beaten with boards by staff members for violating institutional rules, the center’s nurse injected overwrought youths with tranquilizing drugs in the absence of medical staff to monitor potentially serious medical side effects, and some youths were placed in solitary confinement in nine-by-twelve-foot locked cells on any staff member’s request for as long as half a year.\textsuperscript{168} Two years later, remedial measures were ordered at juvenile institutions in Texas where widespread physical and psychological brutality was a regular occurrence.\textsuperscript{169}

Indiana and Texas were not alone in the disgusting conditions of juvenile detention centers. Indeed, after Congress found atrocious conditions of juvenile facilities across the nation, the Civil Rights of Institutionalized Persons Act (“CRIPA”) was enacted in 1980.\textsuperscript{170} CRIPA authorizes the Justice Department to sue state and local governments to remedy “egregious or flagrant” conditions that deny constitutional or federal statutory rights to persons residing or confined in public institutions, including juvenile correctional facilities.\textsuperscript{171} After learning of alleged constitutional or statutory violations from any source, Justice Department personnel inspect a juvenile facility.\textsuperscript{172} The Department’s report detailing constitutional and statutory violations opens negotiations with the state for corrective action, with the prospect of a federal enforcement lawsuit

\textsuperscript{167} Id. at 3.
\textsuperscript{168} Nelson v. Heyne, 355 F. Supp. 451, 454-56 (N.D. Ind. 1972); see also, e.g., Training Sch. v. Affleck, 346 F. Supp. 1354, 1360 (D.R.I. 1972) (describing a juvenile correction institution maintained a dusky, cold solitary confinement room where youth were held for as long as a week, wearing only their underwear, and without toilet paper, sheets, blankets, or changes of clothes); Lollis v. N.Y. State Dep’t of Soc. Servs., 322 F. Supp. 473, 482 (S.D.N.Y. 1970), modified, 328 F. Supp. 1115 (S.D.N.Y. 1971) (granting temporary injunction on the ground that defendant agency violated the Eighth Amendment Cruel and Unusual Punishment Clause by confining a fourteen-year-old girl in a stripped room in night clothes with no recreational facilities or reading material for two weeks).
for violations left un-remedied.\footnote{Id.} After finding such a report was ignored in Louisiana, the Louisiana Court of Appeals found the Tal-lulah Correctional Center for Youth remained marked by a “culture of violence.”\footnote{Id.} These stories indicate the larger problem: Black girls being pushed into the criminal justice system are at risk of being victimized further while confined.

V. THE JUVENILE JUSTICE SYSTEM

The juvenile justice system was created to give youth a second chance by rehabilitating them, allowing them to become productive members of society. The first juvenile court was developed in 1889, recognizing that children are different from adults and should be treated differently, especially because the adolescent brain is not “fully formed or functional.”\footnote{Christa Jacqueline Groshek, The Wisdom Of Juvenile Court: The Case For Treating Children Differently Than Adults, 2012 WL 3279185, at *2.} Research has proven:

that the frontal lobe undergoes far more change in adolescence than at any other stage of life. It is also the last part of the brain to develop, which means that even as they become fully capable in other areas, adolescents cannot reason as well as adults and therefore are far more impulsive.\footnote{Id. (noting the work of Dr. Elizabeth Sowell, a member of the UCLA Brain Research Team).}

Biologically, the age of maturation is closer to the age of twenty or twenty-two.\footnote{Id. at *1.} Adolescence is a transitional period where an adolescent is experiencing “changes where emotions, hormones, judgment, identity, and the physical body are so in flux that even parents and experts struggle to fully understand.”\footnote{Id.} In general, we have recognized the limitations of adolescents and their ability to make vital decisions. As a result, we restrict their activities such as voting, jury duty, alcohol consumption, explicit entertainment, and marriage.\footnote{Id.} The United States Supreme Court also acknowledged the developmental differences between adolescents and

\footnote{173. Id.}
\footnote{174. State ex rel. S.D., 832 So. 2d 415, 437 (La. Ct. App. 4th Cir. 2002) (holding that juvenile's constitutional rights were violated when a guard repeatedly punched the juvenile in the face causing a broken jaw).}

\footnote{175. Id.}

\footnote{176. Id. at *2.}

\footnote{177. Id. (noting the work of Dr. Elizabeth Sowell, a member of the UCLA Brain Research Team).}

\footnote{178. Id.}

\footnote{179. Id.}
adults and has rendered decisions anchored in a body of social science and neuroscience research.\(^{180}\)

Pennsylvania’s Juvenile Act has, in theory, the same rehabilitative approach. Under the Act, the primary objective is balancing the rehabilitative approach to juvenile justice with the public safety.\(^{181}\) Specifically, the Act states,

> Consistent with the protection of the public interest, to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community.\(^{182}\)

Pennsylvania courts have also taken opportunities to give youth a chance at redemption and rehabilitation, interpreting the record expungement provision of another statute, Pennsylvania’s Criminal History Record Information Act as, “an opportunity for children who crash upon the reef of criminal behavior to leave behind the damaging effect of such collision upon a showing that they had exercised sufficient restraint as to reasonably assure the authorities that total redemption was justified.”\(^{183}\) This is consistent with society’s promise “to insulate the child from the harshness of the criminal law and to provide treatment and rehabilitation instead of punishment.”\(^{184}\) The intent of Pennsylvania law is clear: to provide juveniles the opportunity to correct their behavior and continue on to become productive and responsible citizens.\(^{185}\) Regrettably, Black

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\(^{180}\) See Miller v. Alabama, 567 U.S. 460, 465 (2012) (holding mandatory life imprisonment without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment’s prohibition on cruel and unusual punishments); Graham v. Florida, 560 U.S. 48, 82 (2010) (holding Eighth Amendment prohibits imposition of life without parole sentence on juvenile offender who did not commit homicide); Roper v. Simmons, 543 U.S. 551, 569 (2005) (outlawing the death penalty for juveniles and recognizing the “underdeveloped sense of responsibility” found in youth); Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982) (noting juveniles are more vulnerable or susceptible to negative influences and outside pressures than adults).

\(^{181}\) 42 PA. CONS. STAT. § 6301(b)(2) (1978).

\(^{182}\) Id.


\(^{184}\) Interest of Jacobs, 483 A.2d at 909.

\(^{185}\) See 42 PA. CONS. STAT. § 6301(b)(2) (1978).
girls do not enjoy the benefits of a rehabilitative approach to juvenile offenses. At virtually every stage of the criminal justice process, Black girls “tend to benefit the least from opportunities for diversion from or lenient treatment within the system.”

Injury to an adolescent’s reputation and future is inherent in the adjudicatory process. “Even if no direct economic loss is involved,” and the juvenile is able to eventually secure employment as an adult, the injury to her reputation may be substantial. Moreover, there are multiple ways that a juvenile record may adversely affect an individual, even after she has paid her debt to society. “Opportunities for schooling, employment, or professional licenses may be restricted or non-existent.” In more serious situations, arrest records can affect an individual’s constitutional rights for the rest of her life. All of these factors serve to haunt an individual that has a criminal record. Thus, an adjudication of delinquency can open the flood gates for a substandard life for Black girls.

VI. PENNSYLVANIA’S SCHOOL-TO-CONFINEMENT PIPELINE

Pennsylvania schools also subject juveniles to Zero Tolerance policies as an approach to school discipline. In order to receive federal funding under the Gun-Free Schools Act, Pennsylvania is required to enact a state law requiring “local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school.” The Act’s Zero Tolerance approach to discipline places severe minimum standards for punishment in the event of a violation, which includes alternative education services for expelled students and automatic referral to law enforcement for any student that brings a firearm to school. The Act

186. See infra Section VI.
187. See, e.g., Taylor-Thompson, supra note 154, at 1137-38 (discussing how prosecutors dismiss seven out of every ten cases involving white girls as opposed to three out of every ten cases for Black girls); see also infra Section VI.
189. Id.
190. Id.
191. Id. (noting an arrest record may be used to determine whether to arrest the individual concerned, bring formal charges against an individual already arrested, deciding whether to allow a defendant to present his/her story without impeachment by prior convictions, or as consideration by a judge in determining the sentence to be given a convicted offender).
193. Id. § 7961(b)(2); Id. § 7961(b)(1).
uses the traditional definition for “firearm” and this sets the minimum parameters of what constitutes a weapon in a school.\textsuperscript{194} However, school districts may adopt more expansive definitions for weapons, and Pennsylvania schools have.

In adopting this federal mandate, similar to other Zero Tolerance approaches to school discipline, Pennsylvania enacted an expansive definition of “weapon.”\textsuperscript{195} Pennsylvania’s Public School Code of 1949 defines “weapon” as “any knife, cutting instrument, cutting tool, nunchaku, firearm, shotgun, rifle and any other tool, instrument or implement capable of inflicting serious bodily injury.”\textsuperscript{196} Essentially, this gives school administrators more discretion in determining what constitutes a weapon, thereby making more children susceptible to expulsion under the statute.\textsuperscript{197} This precise situation occurred in Mount Carmel, Pennsylvania, when a five-year-old girl was issued a ten-day suspension for saying she would “shoot” her classmates and then herself with a \textit{Hello Kitty bubble gun}.\textsuperscript{198} Even though she did not have the bubble gun with her at school when she made the statement, the school district still imposed a ten-day suspension.\textsuperscript{199} Eventually her suspension was reduced to two days after her mother zealously advocated against the suspension.\textsuperscript{200}

Pennsylvania’s Zero Tolerance approach to school discipline has left Black girls susceptible to another form of exclusionary discipline: out-of-school suspensions. Across the state, Black girls make up approximately 13\% of all suspensions.\textsuperscript{201} Pittsburgh Public Schools’ Zero Tolerance approach to discipline demonstrates the detrimental effects of this trend. In the 2015-2016 school year, there was a total of 8,247 out-of-school suspensions, with students

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{194} 18 U.S.C. § 921(3) (2012) (defining weapon to include “(A) any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device”).
\item \textsuperscript{195} 24 PA. CONS. STAT. § 13-1301-A (2018).
\item \textsuperscript{196} Id.
\item \textsuperscript{197} See Russell J. Skiba et al., \textit{African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy}, 54 N.Y. L. SCH. L. REV. 1071, 1079 (2010) (“[T]he power to suspend or expel a student from school is based on state law, the use of these punishments varies between jurisdictions. Also, although the state determines the policies, local school districts have discretion to institute more detailed discipline policies than those described by the state. Thus, even within a state, policies may differ from school to school.”).
\item \textsuperscript{199} Id.
\item \textsuperscript{200} Id.
\item \textsuperscript{201} U.S. DEPT OF EDUC. OFFICE FOR CIVIL RIGHTS, supra note 16, at 15.
\end{enumerate}
\end{footnotesize}
missing 16,005 days of school due to the use of out-of-school suspensions for discipline.\textsuperscript{202} Black girls made up approximately 30% of the total suspensions, and were suspended for 5,321 total days.\textsuperscript{203} Compare that to the suspensions of white girls, who only account for 5% of the total suspensions and were only suspended for a total of 632 days.\textsuperscript{204} Black girls as young as kindergarteners were subject to suspension, with Black girls in kindergarten through fifth grade accounting for 730 out of the 3,160 total suspension days for the entire kindergarten through fifth grade group.\textsuperscript{205} Again, Black girls’ suspensions are substantially higher than the suspensions of their white female counterparts for the same age group, who only account for sixty-two days of suspension out of the 3,160 total suspension days for the group.\textsuperscript{206} A similar situation can be found in Philadelphia, Pennsylvania, where 25% of Black girls received out-of-school suspensions, compared to only 2% of white girls.\textsuperscript{207}

Pennsylvania’s use of school-based police officers has also disparately impacted Black girls. As recently as 2012, Pennsylvania had the highest student arrest rate in the country.\textsuperscript{208} During the 2013-2014 school year, Pennsylvania’s student arrest rate was more than twice that of the United States overall.\textsuperscript{209} Although a multitude of factors impact school arrest rates, “the presence of school-based law enforcement correlates to racial and ethnic disparities in rates of arrest.”\textsuperscript{210} For the 2013-2014 school year, Black students were four-and-a-half times more likely to be arrested than white students in Pennsylvania schools.\textsuperscript{211} While Black students made up only 15% of student enrollment, they constituted 40% of student arrests in Pennsylvania.\textsuperscript{212} Conversely, white students in Pennsylvania

\begin{flushright}
203. Id. at 3.
204. Id.
205. Id. at 5.
206. Id.
209. Id. (comparing 1 out of every 714 students arrested in the United States overall, with 1 out of every 337 Pennsylvania students having been arrested).
210. Id.
211. Id. (finding that Pennsylvania’s school arrest rate is two-and-a-half times greater than the national rate for Black students).
212. Id.
\end{flushright}
schools comprised 69% of students, but received 41% of student arrests.\textsuperscript{213}

As a result of Pennsylvania’s use of exclusionary school disciplinary policies such as suspensions and increased police presence in schools, Black girls have been pushed into the juvenile justice system at alarming rates.\textsuperscript{214} On a national scale, Black girls are referred to the juvenile justice system three times more often than white girls; however, in Allegheny County, Pennsylvania, Black girls are referred to the juvenile justice system \textit{eleven} times more often than white girls.\textsuperscript{215} At the same time, Black girls in Allegheny County are less likely to be diverted from formal processing in the juvenile justice system than their counterparts.\textsuperscript{216} In addition, 33% of Black girls in Philadelphia were referred to law enforcement as opposed to 2% of white girls.\textsuperscript{217} As a result, Black girls across Pennsylvania are vulnerable to the trauma resulting from the consequences of being adjudicated delinquent in the juvenile justice system.

Once adjudicated delinquent in juvenile court, Black girls may be subject to various forms of confinement.\textsuperscript{218} In 2015, for every 100,000 Black female juveniles in Pennsylvania, 206 were placed in residential placement.\textsuperscript{219} Contrastingly, for every 100,000 white female juveniles in Pennsylvania, merely twenty-six were placed in residential placement.\textsuperscript{220} This demonstrates the extent that Black girls are disproportionately confined outside of their homes as a form of punishment. While confined in residential placements, Black girls in Pennsylvania continue to suffer from discriminatory discipline.

Notably, parents of children affected by harmful school disciplinary practices in Pennsylvania schools have been proactive in taking a stand against the discrimination, by responding with legal action against schools who allow harmful school discipline. Five former students of Woodland Hills High School, in which two of the students are Black girls, brought suit against the Woodland Hills

\begin{thebibliography}{9}
\bibitem{213} Id.
\bibitem{214} [Sara Goodkind, Inequities Affecting Black Girls in Pittsburgh and Allegheny County 11 (2016)].
\bibitem{215} Id.
\bibitem{216} Id. (comparing 40% of Black girls who are diverted from formal processing versus 47% of white girls).
\bibitem{217} Booker, supra note 207.
\bibitem{218} Juveniles in Corrections: Demographics, OFF. JUV. JUST. & DELINQ. PREVENTION (June 1, 2017), https://www.ojjdp.gov/ojstatbb/corrections/qa08209.asp?qaDate=2015&text=no&maplink=link.
\bibitem{219} Id.
\bibitem{220} Id.
\end{thebibliography}
School District in United States District Court for the Western District of Pennsylvania, “alleging a culture of abuse at the hands of high school administrators, security members, and school resource officers.”\(^\text{221}\) The students referred to specific incidents of harmful discipline that included school resource officers (school-based police officers) shocking students with stun guns and using body-slams.\(^\text{222}\) The lawsuit also claims that school administrators “intentionally discriminated” against students because of their race and filed false charges to cover up abuse.\(^\text{223}\) Most of the incidents that form the basis for the lawsuit have been captured on cell phone recordings; however, school administrators allege that they are powerless to intervene against school resource officers when they cross the line because they are fearful that they will be arrested for “impeding arrest.”\(^\text{224}\)

A significant milestone in the fight against disparities in school discipline includes the creation of the Pittsburgh Board of Education Office of Equity—a component of the Pittsburgh Board of Education tasked with maintaining equity in Pittsburgh Public Schools.\(^\text{225}\) The creation of the office was in response to a complaint from Advocates for African American Students against the Pittsburgh Board of Public Education.\(^\text{226}\) In the complaint, the advocates alleged that the school district had, among other things, “unlawfully discriminated against its [Black] students with respect to


\(\text{222}\) *Id.* (including recorded incidents of resource officers shocking a fifteen-year-old with a stun gun, shoving another student into a locker while shocking the student with a stun gun, and another incident where a behavioral specialist threatened to punch a fourteen-year-old special education student in the face).

\(\text{223}\) *Id.* (noting an incident where a student was charged with aggravated assault and disorderly conduct, but the lawsuit was subsequently dismissed when the district attorney reviewed video of the behavioral specialist slamming a student to the ground and breaking the student’s wrist).


\(\text{226}\) *Id.*
suspensions and discipline . . . in violation of the Pennsylvania Human Relations Act.”

The use of exclusionary discipline may continue to drive legislative and policy efforts in Pennsylvania.

VII. ALTERNATIVE APPROACHES TO SCHOOL DISCIPLINE AND CONFINEMENT

In January 2014, the United States Department of Justice and the United States Department of Education issued a joint letter to assist schools in lawfully disciplining students without discriminating on the basis of race, color, or national origin. The letter offered guidance to educators on how to administer “comprehensive, appropriate, and effective programs” to balance the need to reduce classroom disruption and misconduct, while also reinforcing positive student behavior to help students succeed in school. Both departments clarified that any disciplinary approach used must not discriminate based on immutable characteristics, such as race or color, in conformance with federal law.

In response to the “Dear Colleague” letter, school districts in Pennsylvania began implementing new approaches to school discipline. Philadelphia Public Schools instituted a Police School Diversion Program, which is open to students who are at least ten-years-old that have no prior delinquency adjudications and are not currently under juvenile probation supervision. Social workers and law enforcement work closely together to reduce incidences of students entering into the juvenile justice system by first identifying issues that may be affecting the student’s behavior and then referring the student and his/her family for services that are appropriate to address the identified issues.

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227. Id.; see also PA. CONS. STAT. § 958 (2018) (establishing a multicultural educational program to promote cultural understanding and appreciation “without regard to race, color, familial status, religious creed, ancestry, age, sex, national origin, handicap or disability;” allowing any problem of racial discrimination or racial tension arises to be settled through an investigatory hearing).
229. Id.
230. Id. at 2-3 (citing to Title IV of the Civil Rights Act of 1964, which prohibits discrimination in public elementary and secondary schools based on race, color, or national origin).
232. Id. at 7.
Various counties throughout Pennsylvania are also utilizing Youth Aid Panels. These panels are designed to use trained community volunteers to hear cases of first-time offenders. The hearings, which are similar to interviews, are intended to help the juvenile understand all the aspects and effects of the charges he or she is facing, but without involvement with law enforcement or the courts. A contract is developed during the panel to help the youth engage in balanced and restorative justice principles. The juvenile may have to complete tasks to fulfill their obligations, such as community service, writing an essay, writing a letter of apology to the victim, paying restitution, completing an art project, or joining an extracurricular activity. If the contract is successfully completed, the youth avoids being adjudicated delinquent for the charges resulting from the incident. Essentially, the use of such panels are an opportunity to divert juveniles and Black girls from delinquency adjudications. Pennsylvania has also used more targeted approaches for students in kindergarten through fifth grade. Recently, the Pittsburgh Public School Board successfully passed an amendment to discontinue use of suspensions in kindergarten through second grade for non-violent infractions. However, there is not a state-wide policy specifically enacted to protect Black girls from exclusionary disciplinary tactics.

Stopping the School-to-Confinement Pipeline that plagues Black girls by pushing them out of the classroom and into the juvenile justice system requires creative approaches to discipline. Although Pennsylvania has taken some steps in the right direction, there are other approaches to be considered that have been successful in other states. For instance, in Buffalo Public Schools of New York, the Board of Education approved a new student code of conduct as a response to the death of a student who was shot and killed while on suspension from school for roaming the halls. Under Buffalo’s

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234. *Id.* at 1.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
new policy, suspensions will no longer be used to address disciplinary issues such as “truancy, cheating, cutting class, running in the halls, smoking or violating dress codes.”\(^{241}\) Additionally, California implemented state-wide reform through amending its education code. California AB 420 amended California Education Code section 48900(k) by eliminating the authority to suspend a student out-of-school or in-school in kindergarten through third grade for “disruption” or “willful defiance.”\(^{242}\) This amendment also prevents a school from expelling a student for “disruption” or “willful defiance.”\(^{243}\)

The best approach for Pennsylvania to create non-exclusionary school disciplinary policies that do not push Black girls into the juvenile justice system is to design a uniform policy that will be followed by the entire Pennsylvania Public School System.\(^{244}\) The United States Department of Education has released a resource to guide schools in improving school climate and discipline that could serve as a great starting point in reversing problematic disciplinary policies.\(^{245}\)

First, educators should take an instructional approach to discipline.\(^{246}\) A productive education environment does not necessarily require the complete elimination of discipline for students who misbehave.\(^{247}\) On the contrary, creating a positive learning environment involves a balance between supporting students and holding them accountable for behaving improperly in the classroom.\(^{248}\) In fact, a component of a positive school environment is disciplinary policies that lay out clear, developmentally appropriate, and proportionate consequences for misbehavior.\(^{249}\) Behavioral correction should help students learn from their mistakes and ultimately improve their behavior.\(^{250}\)

\(^{241}\) Id.

\(^{242}\) CAL. EDUC. CODE § 48900(k)(2) (2018) (amending the code to eliminate these types of suspensions beginning July 1, 2018).

\(^{243}\) Id. § (k)(1).

\(^{244}\) See, e.g., Skiba et al., supra note 197, at 1075, 1096 (citing Sherpell v. Humnoke School Dist. No. 5 of Lonoke County, Ark., 619 F. Supp. 670, 677 (E.D. Ark. 1985)); Susan C. Kaeser, Suspensions in School Discipline, 11 EDUC. & URB. SOC’Y 465, 465-84 (1979) (discussing the inconsistency in the application of school suspension and expulsion appears to be due to variations in student behavior, however, some non-behavioral student characteristics (e.g., race) made a more significant contribution to predicting school suspension than student behavior and attitude).


\(^{246}\) Id. at 11-12.

\(^{247}\) Id.

\(^{248}\) Id. at 11.

\(^{249}\) Id. at 3.

\(^{250}\) Id.
should involve families and school personnel in the development of disciplinary policies, keep those stakeholders updated on the policies, and solicit feedback from them regularly.\textsuperscript{251} Essentially, this gives advocates for Black girls equitable opportunity to identify flaws in disciplinary policies or give feedback on what policies are working appropriately.

Next, educators should exclude students from the classroom only as a last resort.\textsuperscript{252} Maintaining the integrity of the learning environment is, and should be, the primary concern in any discipline policy.\textsuperscript{253} Yet, research has established that relying on out-of-school suspension or expulsion for minor behavioral issues is counterproductive in reaching the overall goal of helping students develop necessary skills to assess and improve their own behavior, and suspending or expelling students fails to improve the overall safety of the school environment.\textsuperscript{254} Before these exclusionary discipline tactics are used, Pennsylvania schools should ensure that other constructive interventions are used to avoid exclusion from the classroom.\textsuperscript{255} Prohibiting the use of exclusionary discipline for infractions that do not pose an immediate threat to the safety of students or school personnel, such as “tardiness, loitering, use of profanity, dress code violations, and disruptive or disrespectful behaviors,” will limit the unnecessary disruption of student learning.\textsuperscript{256} Black girls will benefit immensely from this more comprehensive approach because the subjective way in which schools apply dress codes and policies on disrespect may be curbed. In the event that exclusion from the classroom is necessary, which ideally would only occur in emergency situations where there are safety concerns, Pennsylvania school policy should prioritize facilitating a smooth classroom return for excluded students.\textsuperscript{257} By putting intensive services in place for students reentering the classroom after exclusion, students have a greater chance to succeed.\textsuperscript{258}

Finally, Pennsylvania school policies should carefully clarify the role of school-based police officers as being solely responsible for school safety.\textsuperscript{259} School-based police officers can be a useful component to maintaining a comprehensive school disciplinary policy;

\textsuperscript{251} Id.
\textsuperscript{252} See id. at 14.
\textsuperscript{253} Id.
\textsuperscript{254} Id.
\textsuperscript{255} Id. at 14-15.
\textsuperscript{256} Id. at 9-10.
\textsuperscript{257} Id. at 16.
\textsuperscript{258} See id.
\textsuperscript{259} Id. at 10.
however, Pennsylvania schools must develop clear guidelines of which responsibilities belong to these officers. In recognizing that in-school arrests and referrals to law enforcement can have life-long consequences for Black girls, Pennsylvania schools should ensure that school-based police officers understand that their role is narrowly focused on maintaining physical safety of the school environment and preventing criminal conduct. Thus, explicit, written documentation that plainly defines officers’ roles and responsibilities is crucial. Additionally, Pennsylvania schools should provide uniform training for both school-based police officers and school administration to ensure all school personnel have a clear understanding that school-based police officers should not be involved in responding to behaviors that can be appropriately handled by school staff. This approach can help lessen the contact between Black girls and school-based police for minor infractions, such as an attitude issue or dress code violation, thereby lessening the chances for inappropriate referrals to law enforcement and involvement with the juvenile justice system.

VIII. CONCLUSION

The challenge of balancing appropriate school discipline without disparately excluding Black girls from the learning environment presents a formidable task for educators, school administration, and advocates of Black girls because school disciplinary policies vary greatly from state-to-state and even between school districts. Black students’ academic performance is more directly linked to their relationship with teachers, which may be problematic given that black children are often labeled as “less conforming and more active” than their white counterparts, resulting in interactions with teachers that are “characterized by more criticism and less support.” However, with intentional, uniform steps, geared towards creating a culture of consciousness regarding identity intersectionality, especially in regard to the complexity of Black girls’ identity intersection of race and gender, Pennsylvania can move in the right direction and ensure that minor disruption in the classroom is not a future prison sentence for Black girls.

260. Id. at 9.
261. Id. at 10.
262. Id. at 10-11.
263. MORRIS, supra note 1, at 38.
School discipline has two main purposes: ensuring a safe learning environment for those within the school and creating an “environment conducive to learning.” In order to properly use exclusionary disciplinary policies in ways that are not detrimental for Black girls, there needs to be a consistent limited use of these exclusionary policies—ideally only to be used in relatively serious situations involving threats to school safety or the learning environment. An educational approach that combines a deep understanding of identity intersectionality, a limited use of exclusionary discipline such as suspensions and expulsions, and clear school policies outlining administrator and school-stationed police officers’ responsibilities, are the first steps to improving the educational experience of Black girls.

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264. Skiba et al., supra note 197, at 1074.
265. Id.
Bailout: Leaving Behind Pennsylvania’s Monetary Bail System

Amy McCrossen*

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I. Introduction

In Summer 2010, Mustafa Willis—24 years old at the time—was arrested walking down the street in Newark, New Jersey. Suddenly, police officers swarmed Willis. They had found a gun at the scene and placed Willis under arrest for unlawful possession of a firearm. Once Willis was taken to jail, however, he was unable to post his five thousand dollar bail. As a result, he was unable to return to work and to his family. He was unable to gather evidence to support his defense that the gun was not his. Willis was faced with a choice: wait in jail until his trial, or plead guilty to a crime he did not commit. Willis refused to plead guilty to a crime he did not commit, and as a result he lost his job and missed his cousin’s funeral. After a few months, the court reduced Willis’s bail to three thousand dollars, and he was able to post bail. Willis was then able to find a video that proved the gun did not belong to him. Prosecutors then dismissed the charges. Willis was not completely unimpacted, however—he had spent three months in jail, he owed his bail bondsman three thousand dollars, he lost time with his family, and lost his job. Bail—the criminal justice
scheme designed to protect defendants who have yet to be convicted of any crime from being detained pre-trial—was precisely what kept Willis in jail.¹

Mustafa Willis’s story illustrates the impact of this country’s current reliance on a primarily monetary bail system. The injustice suffered by Willis illustrates how a bail system, while well intentioned, can have adverse consequences for some defendants. These consequences raise questions. How effective is a monetary bail system? If the system is truly ineffective, and the problems outweigh the benefits of the current system, what changes can be made to the pre-trial detention system? Does an entirely new pre-trial detention system need to be designed and implemented?

This article explores the problems associated with Pennsylvania’s current monetary bail system. The various problems associated with a monetary bail system merit attention, and this article therefore proposes a solution that will combat these problems. Part II provides an overview of the history and purpose of bail in our criminal justice system. Part III describes Pennsylvania’s current monetary bail system in detail and provides data that reveal Pennsylvania’s overreliance on monetary bail conditions.

Practical problems associated with a monetary bail system are explained in Part IV, which reviews the negative impacts of monetary bail on the accused, how the bail system undermines its own purpose of ensuring appearance in court, and the long-term impacts that the bail system has on the criminal justice system as a whole. Additionally, Part IV examines how courts have exposed and addressed problems associated with a bail system, the importance of protecting an individual’s liberty, and the importance of monetary bail alternatives—particularly for indigent defendants. The existing literature, reviewed in Part IV, calls for reform to the current bail systems. Reform must be individualized by jurisdiction, and Part IV reviews the empirical data that reveal how Pennsylvania’s current monetary bail system causes the practical problems and impacts defendants and the criminal justice system as a whole.

Part V outlines different jurisdictions’ responses to a monetary bail system that focus on pre-trial release, community safety, and ensuring appearance. Part V’s review of other jurisdictions’ solutions establishes the foundation for proposing reform in Pennsylvania. Part VI then describes the efforts that Pennsylvania has taken to address some of its bail problems with the implementation of

risk-assessment tools. Part VII argues that while these reforms are certainly steps in the right direction, empirical data in Pennsylvania reveal that risk-assessment tools alone are insufficient and that radical change is needed. Finally, Part VIII proposes that Pennsylvania should combine an amendment to the Pennsylvania Constitution with non-monetary bail legislation.

II. HISTORY AND PURPOSE OF THE BAIL SYSTEM

A bail system is deeply rooted in the criminal procedures of both federal and state judiciaries. Bail controls the pre-trial detention procedures of defendants who have been charged, but not yet convicted, of a crime in every state.\(^2\) Bail is seen as a compromise between the criminal justice system and its defendants.\(^3\) Its purpose is two-fold.\(^4\) First, bail ensures that defendants will appear in court for their trial.\(^5\) Second, bail detains those who the court considers dangerous, thereby protecting public safety.\(^6\) Bail is also designed to protect the rights of defendants who have not yet been convicted of a crime by avoiding premature punishments, thus maintaining the presumption of “innocent until proven guilty.”\(^7\)

A bail system is also rooted in the United States Constitution. The Eighth Amendment of the United States Constitution provides that “[e]xcessive bail shall not be required.”\(^8\) This amendment is incorporated into the bail system to protect defendants from unwarranted pre-trial detention prior to conviction.\(^9\) Although there is no guaranty of bail,\(^10\) courts have held that bail is “excessive” when it is “set at a figure higher than an amount reasonably calculated to fulfill this purpose,” and fixing an unreasonably high bail amount to practically deny bail violates the Eighth Amendment.\(^11\)

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2. Id.
3. Id.
5. Id.
6. Id.
7. Planet Money, supra note 1.
8. U.S. CONST. amend. VIII.
9. See Stack v. Boyle, 342 U.S. 1, 4 (1951) (observing that “[t]his traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction”).
11. Stack, 342 U.S. at 5.
guarantee that bail not be excessive, however, is arbitrary in a monetary bail system, because even bail that is not excessive—not unreasonably high to fulfill its purpose—can effectively deny a particular defendant pre-trial release, regardless of the amount.

Bail originates at common law; the accused could be released prior to trial based on the good word of the accused’s relatives in addition to collateral. The United States continues to rely primarily on a cash bail system. Jurisdictions differ on how to set bail amounts: some set bail amounts based on the charges alone, while others consider a variety of circumstantial factors (sometimes including a defendant’s financial situation) to determine a bail dollar amount. Still others employ risk-based assessment tools that use objective factors in determining whether a defendant should be detained pre-trial. Regardless of the divergence among jurisdictions, the majority of states rely on monetary conditions of release. Pennsylvania is indicative of this type of bail system.

III. PENNSYLVANIA’S CURRENT MONETARY BAIL SYSTEM

Pennsylvania, like many other states, relies on a monetary bail system as a means of achieving the compromise between protecting the accused and ensuring public safety and trial appearance. Bail is defined as “the security or other guarantee required and given for the release of a person, conditioned upon a written undertaking, in the form of a bail bond, that the person will appear when required and comply with all conditions set forth in the bail bond.” After an individual is arrested, magisterial district judges determine whether that individual is eligible for release pending trial. In murder or voluntary manslaughter cases, a court of common pleas judge makes bail decisions. In Philadelphia and Pittsburgh, the Philadelphia Municipal Court and the Pittsburgh Magistrate Court, respectively, set and accept bail regardless of the underlying crime. The Pennsylvania State Constitution provides that “[a]ll

14. Id. at 890.
15. Id. at 891.
16. Id.
17. Id. at 885.
18. Id. at 891-92.
19. PA. R. CRIM. P. 103.
21. Id.
22. Id. §§ 1123(a)(5), 1143(a)(1).
prisoners shall be bailable by sufficient sureties” and lists two exceptions: (1) capital offenses for which the maximum sentence is life imprisonment, and (2) if no condition other than imprisonment will assure the safety to the community. 23 This language is also reflected in the Pennsylvania Code in its “Right to bail” statute. 24

If the defendant falls within one of these exceptions, a magisterial district judge may deem the defendant non-bailable. 25 A judge may also deny bail if there is sufficient proof to believe that the defendant will not show up for trial regardless of the amount of bail. 26 The non-bailable defendant is then detained in jail to await trial. 27 If the defendant does not fall within one of these exceptions, the defendant has a right to bail and is considered bailable. 28 There are several routes a magisterial district judge may employ once he or she considers a defendant bailable. 29 First, the judge may decide to release the defendant on his or her own recognizance, or on a personal promise by a defendant to appear for trial. 30 A second option is to release the defendant on nominal bail, where the defendant must pay a nominal amount of cash, typically one dollar, and the defendant is released based on a designated person or organization’s promise that the defendant will appear for trial. 31 Third, the judge may also decide to release the defendant with non-monetary conditions, such as pre-trial supervision or special rehabilitative programs. 32 Finally, the judge may decide to release a defendant by setting a monetary condition of release. 33

In determining monetary conditions of release, magisterial district judges exercise discretion. 34 When setting bail amounts, judges must consider the financial ability of the defendant, as well as factors that are relevant to a defendant’s likelihood of appearance at trial, including: the nature of the offense; record of flight to avoid prosecution; and the defendant’s employment status, family

25. PA. R. CRIM. P. 520; CRIMINAL JUSTICE POLICY PROGRAM, supra note 12, at 5.
26. CRIMINAL JUSTICE POLICY PROGRAM, supra note 12, at 5.
27. 6 P.L.E. Bail § 1 (2017).
28. 42 PA. CONS. STAT. § 5701.
29. PA. R. CRIM. P. 524(C).
30. PA. R. CRIM. P. 524(C)(1); CRIMINAL JUSTICE POLICY PROGRAM, supra note 12, at 5-6.
32. Id. at R. 524(C)(2), 527 (nonmonetary conditions of release include reporting requirements, restrictions on travel, or any other appropriate conditions to ensure appearance); CRIMINAL JUSTICE POLICY PROGRAM, supra note 12, at 6.
33. PA. R. CRIM. P. 524(C)(5). Judges may also release a defendant on an unsecured bail bond, which requires no money be deposited upon release but does impose monetary penalties if the defendant fails to appear. Id. at R. 524(C)(3).
relationships, length of time in the community, age, mental condition, reputation, addictions, previous appearances, criminal history, or use of false identification.\(^{35}\) The statute does not give weight to any particular factor nor does it require all of these factors be considered—that decision is at the discretion of the magisterial district judge.\(^{36}\) Notably, pre-trial risk-assessment tools\(^{37}\) may also be considered as a factor in reaching a bail determination, but may not be the only means.\(^{38}\)

Monetary bonds may be secured or unsecured.\(^{39}\) Unsecured bonds specify an amount of money owed to the court if the defendant fails to appear for their court date, but no money is required for release.\(^{40}\) Secured bonds also specify an amount of money owed to the court if the defendant fails to appear for his court date, but require no more than ten percent of that amount be posted before the defendant is released.\(^{41}\) If a defendant needs help posting his or her bond, he or she may seek help from friends, family members, or organizations.\(^{42}\) Other defendants seek help from a bail bondsman, who will post the defendant’s bail and require that the defendant pay the bondsman back, with a fee.\(^{43}\) In these scenarios, the friends and family members or the bondsman are accepting the risk if the defendant fails to appear in court.\(^{44}\) If the defendant cannot afford to post bond, they will remain detained pre-trial.\(^{45}\)

Despite the ABA’s requirement that monetary bail conditions should be imposed only when there is no other way to ensure a defendant’s subsequent appearances,\(^{46}\) monetary bail is imposed more often than the other options.\(^{47}\) For example, in 2014, the court imposed monetary conditions of release on over half of Allegheny County arrestees.\(^{48}\) Monetary bail conditions were imposed on seventy-nine percent of defendants charged with a felony and one-third

\(^{35}\) PA. R. CRIM. P. 528(A)(1)-(2), 523(A)(1)-(10).
\(^{36}\) See id. at R. 523(A)(1)-(10).
\(^{37}\) See, e.g., infra note 193 and accompanying text.
\(^{38}\) PA. R. CRIM. P. 523 cmt.
\(^{39}\) CRIMINAL JUSTICE POLICY PROGRAM, supra note 12, at 6.
\(^{40}\) Id.; PA. R. CRIM. P. 524(C)(3).
\(^{41}\) PA. R. CRIM. P. 524(C)(6), 528(C); CRIMINAL JUSTICE POLICY PROGRAM, supra note 12, at 6.
\(^{42}\) Wiltz, supra note 4.
\(^{43}\) See 42 PA. CONS. STAT. § 5741 (2017).
\(^{44}\) See CRIMINAL JUSTICE POLICY PROGRAM, supra note 12, at 6.
\(^{45}\) Id.
\(^{46}\) AM. BAR ASS’N, ABA CRIMINAL JUSTICE STANDARDS: PRETRIAL RELEASE 3 (3d ed. 2007).
\(^{48}\) Id.
of defendants charged with a misdemeanor.\textsuperscript{49} Therefore, although judges have several options within Pennsylvania’s bail statutes to determine pre-trial release criteria, the system is predominately monetary.

IV. PROBLEMS AND CRITICISMS OF A MONETARY BAIL SYSTEM

Pennsylvania’s current monetary bail system relies on “wealth based” pre-trial detention.\textsuperscript{50} For indigent individuals who are unable to post their bonds, the bail system, which is designed to protect defendants from unnecessary pre-trial detention, is precisely what keeps these individuals in jail.\textsuperscript{51} Despite the presumption of our criminal justice system—innocent until proven guilty—throughout the country there are 450,000 legally innocent individuals in jail awaiting trial simply because they cannot afford to post their monetary bail.\textsuperscript{52} Three-fifths of jail populations are defendants awaiting trial or plea resolution because they cannot afford even a low bail.\textsuperscript{53} The problems with the monetary bail system go beyond injustice. The system undermines its own purpose and also has broader implications on our criminal justice system. Part A of this section will discuss the practical problems and the impact of those problems on the accused. Part B of this section will discuss how courts have addressed the problems with a monetary bail system. Part C of this section will review the existing literature commenting on both the problems of a monetary bail system and proposed solutions. Finally, Part D of this section will discuss how empirical studies have revealed the problems with Pennsylvania’s monetary bail system.

A. Practical Problems and the Impact of a Monetary Bail System

i. Monetary Bail Fails to Ensure Appearance in Court

“Bail is supposed to make sure that you show up for court. How much money you have in your pocket shouldn’t determine that.”

\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{52} Planet Money, supra note 1.
\textsuperscript{53} Challenging the Money Bail System, supra note 50.
\textsuperscript{54} Sarah Lazare, Hundreds of Thousands Are Languishing in Jails Because They Can’t Afford Bail Bonds: A National Movement is Building to End This, JUST. POLY INST. (Dec. 22, 2016), http://www.justicepolicy.org/news/11103.
As mentioned earlier, the first purpose of bail in our criminal justice system is to ensure a defendant appears in court for trial. Eric Sterling, Executive Director of the Criminal Justice Policy Foundation, confirms that there is a growing recognition that a monetary bail system does not necessarily ensure that defendants will appear in court. Under the logic of the current system, a high bond should increase the chances that a defendant appears for trial as to not forfeit the money. Yet, results of the Pre-trial Justice Institute’s study on unsecured bond show that a higher bail amount does not correlate with an increase in court appearances. Additionally, results of a 2016 study entitled *The Heavy Costs of High Bail* analyzed the consequences of a money bail system in Philadelphia and Pittsburgh, the two largest cities in Pennsylvania, revealing that monetary bail has a negligible effect on appearance rates, if not increasing defendants’ failures to appear. In fact, individuals released on recognizance appear at the same rate as those with monetary bail conditions.

**ii. Monetary Bail Increases Recidivism and Creates an Illusion of Public Safety**

The second purpose of bail in our criminal justice system is to ensure the safety for the public. Under the logic of the current system, bail protects the public by keeping those accused of crimes from committing a new crime while awaiting trial, and this consideration must indeed be contemplated pursuant to Pennsylvania’s “Right to bail” statute. With a monetary bail system, however, money is the only factor separating pre-trial detainees from release. Yet the amount of money in a defendant’s pocket certainly

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55. See *supra* note 5 and accompanying text.
60. See *supra* note 6 and accompanying text.
61. See 42 PA. CONS. STAT. § 5701 (an individual is not bailable if “no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community”).
62. See generally PA. R. CRIM. P. 524(C)(5).
does not predict re-offense. In fact, incarceration alone makes it more likely that an individual will commit another crime. Defendants who are incarcerated before trial have higher rates of recidivism than those who were free awaiting trial. When compared to similar offenders released before trial, low-risk offenders held longer than three days are fifty percent more likely to be re-arrested within two years. According to the Arnold Foundation, an organization whose objective is to promote a fair criminal justice system, when a low-risk individual is incarcerated, even for less than twenty-four hours, he or she is more likely to commit a crime after that experience. A Pennsylvania House Representative agrees that antiquated bail practices have provided no proof of keeping the public safe.

Furthermore, the nature of corrections fails low-risk individuals who have yet to be convicted of any crime. Incarceration before trial may increase the chances of an individual’s involvement with crime after release. The default corrections route within our criminal justice system is institutionalization. Yet, according to John Wetzel, Secretary of Corrections for the Commonwealth of Pennsylvania, it is the least effective option. He confirms that “with low-risk individuals, [the Department of Corrections] do[es] very badly. They’re going to come out worse almost across the board.” When the criminal justice system forces those who will be better served outside of the criminal justice system into institutionalization based solely on their financial situation, it both fails the individual and undermines its purpose.

63. CRIMINAL JUSTICE POLICY PROGRAM, supra note 12, at 6.
64. Criminal Injustice: Correcting a Corrections Department, WESA (Sept. 19, 2017) (downloaded using iTunes).
67. Criminal Injustice: Correcting a Corrections Department, supra note 64.
69. Criminal Injustice: Correcting a Corrections Department, supra note 64.
70. Id.
71. Id.
72. Id.
73. Id.
iii. Monetary Bail has Negative Economic Impacts on Already Indigent Defendants

“The truth of the matter is a day in jail is too long if you don’t need to be there. The consequences of being removed from your job, your home, your car, your family when you shouldn’t be has a profound impact on that person, the jail population—everyone pays.”

– Elliot Howsie, Allegheny County Chief Public Defender

Spending time in jail awaiting trial perpetuates the cycle of poverty for indigent defendants. When a defendant is bailable but must stay in jail awaiting trial, it is likely that he or she cannot afford to pay for release. Because he or she is not released pretrial, the individual may lose their job, their housing, or their government assistance while waiting in jail. The defendant’s lack of money—the very reason they remained in jail in the first place—is now made worse because he or she was awaiting trial in jail. Indeed, Jeanne Pearlman, Senior Vice President for Program and Policy at the Pittsburgh Foundation, confirms that “the system perpetuating the conditions that keep people in poverty . . . incarceration . . . is a cause of poverty and it is an effect of poverty at the same time.” These circumstances can also have an impact on a defendant’s child custody determination and access to health care. Furthermore, when a defendant is no longer able to support his or her family while incarcerated, it puts an economic and emotional strain on the family. This may create a need for families to enroll in social welfare programs until the defendant is afforded a trial.

iv. Monetary Bail Contributes to Our Country’s Mass Incarceration Epidemic

Despite accounting for less than five percent of the world’s population, the United States houses twenty-five percent of the world’s prisoners. The United States incarcerates 693 people for every 100,000 residents, which is higher than any other country in the

74. Fraser, supra note 66.
76. Fraser, supra note 66.
77. Id.
78. CRIMINAL JUSTICE POLICY PROGRAM, supra note 12, at 7.
79. Criminal Injustice: Correcting a Corrections Department, supra note 64.
80. Id.
81. Memo on H.B. 1092, supra note 68.
Six out of ten adults in jails have not yet been convicted of a crime, despite our criminal justice system’s presumption of innocence. As a result, our jails and prisons are overpopulated. Pennsylvania is among the top ten states for the most overcrowded jails, housing 50,000 individuals despite having a capacity for only 47,000. The majority of individuals in Pennsylvania’s county jails are merely awaiting trial, having not yet been convicted of a crime. In fact, only twenty percent of Allegheny County’s jail population is actually serving a sentence. In Philadelphia County, sixty-five percent of inmates are pre-trial. Housing defendants before trial is expensive for taxpayers. For example, housing a single inmate for one day in Allegheny County jail costs taxpayers $86.77. Housing a pre-trial defendant in Philadelphia costs taxpayers $120 a day. As a result, incarcerating individuals yet to be convicted of a crime perpetuates the country’s reliance on incarceration.

v. Monetary Bail Increases the Number of Guilty Pleas

Defendants who are incarcerated before trial are more likely to be convicted than those released before trial. Defendants held in jail longer than three days are thirty percent more likely to be convicted or plead guilty, three times more likely to be sentenced to prison, and twice as likely to be sentenced for a longer period of incarceration. After spending time in jail, defendants are more likely to take a plea deal than spend more time in jail awaiting trial. This is especially true if defendants have already served a sentence that is long enough to satisfy the plea’s requirements while awaiting trial, known as the time-served plea. New Jersey Assistant Attorney General Elie Honig has suggested that the time-served plea is a common practice amongst prosecutors. After a few months in jail, prosecutors might offer defendants awaiting trial a plea deal. The defendants in these time-served plea deals

82. Fraser, supra note 66.
83. Wiltz, supra note 4.
84. Memo on H.B. 1092, supra note 68.
85. Fraser, supra note 66.
86. Id.
87. Memo on H.B. 1092, supra note 68.
88. Fraser, supra note 66.
89. Wiltz, supra note 4.
90. Fraser, supra note 66.
91. Id.
92. Wiltz, supra note 4.
93. Planet Money, supra note 1.
94. Id.
95. Id.
will have already served the requisite amount of time proposed by the prosecutor’s deal.\textsuperscript{96} If they take the plea, they can go home that day.\textsuperscript{97} Honig acknowledged the practice as an easy way to obtain guilty pleas.\textsuperscript{98} If the defendant takes this plea deal but did not actually commit the crime, the case is considered closed and law enforcement discontinues investigation.\textsuperscript{99} Yet, the individual who actually committed the crime remains free, affecting public safety and exposing the public to potential risk of subsequent crimes by this individual.\textsuperscript{100} Finally, if a defendant is not given a plea option and remains incarcerated until trial, he or she may not have the opportunity to gather the information needed to support a defense at trial.\textsuperscript{101}

\textit{vi. Overall Impact of the Practical Problems}

Taken together, pre-trial detention leads to long-term practical impacts on defendants, particularly indigent defendants who may be otherwise eligible for pre-trial release. Those problems reveal how the system undermines its own purpose of ensuring appearance in court and impacts the criminal justice system as a whole. The problems boil down to an over-reliance on monetary conditions of release and represent a call to action to the legislature. The legislature should respond with a restructured system that changes focus on monetary conditions of release and instead relies on more objective conditions of release that focus on risk of flight and community safety. The solution proposed in this article does precisely that, and suggests eliminating monetary conditions of release—combating these problems from the root.

\textbf{B. Problems with the Bail System Identified by Courts}

Courts have recognized that the bail system—particularly a monetary bail system—is not without problems and certain bail schemes may in fact raise constitutional issues. At the heart of the bail system is the practice of pre-trial detention in and of itself—a practice that is wholly constitutional.\textsuperscript{102} The United States Su-

\begin{itemize}
\item \textsuperscript{96} Id.
\item \textsuperscript{97} Id.
\item \textsuperscript{98} Id.
\item \textsuperscript{99} CRIMINAL JUSTICE POLICY PROGRAM, supra note 12, at 7.
\item \textsuperscript{100} Id.
\item \textsuperscript{101} Id. at 4.
\item \textsuperscript{102} United States v. Salerno, 481 U.S. 739, 741 (1987).
\end{itemize}
The Supreme Court in *United States v. Salerno* held that there is no absolute right to bail because while an individual has a strong interest in liberty, the government’s interest in preventing crime by arrestees is both legitimate and compelling. Therefore, while *Salerno* certainly recognizes that a bail system inherently comes with the problem of liberty infringement, pre-trial detention alone is not a problem that the Supreme Court has recognized as unconstitutional or detrimental.

Courts, however, have invalidated the practice of setting an unreasonably high bail, to the point of practically denying bail to a defendant, as a violation of the Eighth Amendment. In *Stack v. Boyle*, the United States Supreme Court recognized two problems with pre-trial detention: first, that freedom before conviction helps the defendant prepare a defense, and second, that pre-trial detention could be an infliction of punishment before conviction. The Court in *Stack* noted that the purpose of bail is to assure appearance at trial and therefore the defendant’s bail amount must be fixed individually. Similarly, in *Carlson v. Landon*, the United States Supreme Court found that the use of discretion in imposing pre-trial detention is not founded on any one fact or set of facts; rather, it is proper to consider all of the attending circumstances.

Moreover, courts have found that high bail amounts pose particular problems for indigent defendants. In *Jones v. City of Clanton*, the United States District Court for the Middle District of Alabama held that pre-trial detention due to the defendant’s inability to pay for release violates the Equal Protection Clause of the Fourteenth Amendment. There, the city used a generic bail schedule to determine the defendant’s bond amount and there was no option for release through recognizance or an unsecured bond. The court found that bail schedules without any individualized hearing regarding the person’s indigence and need for bail alternatives are unconstitutional and violate the Due Process Clause. The court noted that bail schedules imposing unnecessary pre-trial detention

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103. Id. at 748-49.
105. Id. at 4.
106. Id. at 5.
109. Id. at *3.
110. Id. at *7.
can detrimentally impact individuals, resulting in loss of a job, family life disruption, and idleness. Such pre-trial detention also impedes preparation of an individual’s defense, induces guilty pleas, burdens taxpayers, and possibly results in pre-trial detention that exceeds the expected sentence. Similarly, in State v. Blake, the Supreme Court of Alabama held that a bail system based solely on some form of monetary bail without options for release on recognizance in appropriate circumstances is unconstitutional.

Read together, these cases have addressed the problems associated with a bail system. Specifically, in the realm of constitutionality, courts have recognized that an individual’s liberty is certainly infringed with bail practices, and understanding the impact that a particular bail practice has on an individual’s liberty interest is important in determining constitutionality. Courts have also addressed the importance of having alternatives to monetary bail and the vulnerability of indigent defendants with a monetary bail system. Courts have noted the detrimental impact that deprivation of liberty can have on defendants, particularly when it is appropriate to offer defendants alternatives to monetary bail. Finally, courts have underscored the problem of using bail as a punitive tactic rather than an assurance for appearance.

In determining the constitutionality of bail practices, the judiciary has outlined the problems associated with current bail systems. State legislatures should respond in kind to address these problems. Importantly, despite the abundance of case law that signals the unconstitutionality of setting high bail to prevent defendants from being released pre-trial, this practice has increased with current monetary bail systems. Therefore, a gap still exists between the problems outlined by the courts and the legislature’s response to these problems. After reviewing how other jurisdictions and Pennsylvania have responded, this article proposes a solution for Pennsylvania that combats the problems courts have identified with a monetary bail system, particularly for indigent defendants.

C. Literature and Commentary Related to a Monetary Bail System

Existing literature related to monetary bail systems outlines several problems associated with the system and proposes solutions to
address these problems. Authors, however, differ in their proposed solutions.

Kyle Rohrer’s Bail Reform Act discussed the states’ failure to eliminate surety and cash bonds from their bail systems. Rohrer specifically identified the problems with cash bail systems: jail overcrowding, the disproportionate detention of indigent defendants pre-trial, and defendants’ inability to assist in defense preparation when detained pre-trial, leading to more wrongful convictions. He noted that the federal system utilizes pre-trial services that encourage non-financial release conditions over monetary bail conditions, while states still primarily use cash bail systems to determine whether a defendant will be detained pre-trial. Rohrer argued that states move away from a cash bail system through pre-trial services systems that employ risk-assessment tools to promote defendants’ pre-trial release.

A Symposium Note on the Wasteful Enterprise of America’s Bail System similarly suggested that a wealth-based bail system inhibits a defendant’s ability to assist in their defense, and also increases the likelihood of a guilty plea. It explained that monetary bail systems have a disproportionate effect on the indigent; an illusory impact on justice; a negative impact on the defendant’s family, education, housing, employment, connection to the community, and access to governmental services; an increase to guilty pleas; an increase to recidivism; and a negative impact on a defendant’s ability to establish a defense. Precisely because pre-trial incarceration is expensive to taxpayers and hurts a defendant’s long term productivity, community well being, and family unity, the Note called for policy reform. It discussed the implementation of risk-assessment tools in New York City and Washington, D.C., encouraging pre-trial release pending trial and combating the problems associated with wealth-based pre-trial detention systems. Unlike Rohrer’s article, however, this Note argued that determining bail decisions based on criteria such as socioeconomic background, neigh-

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116. Id. at 521-22.
117. Id. at 524-25.
118. Id. at 538.
119. Goff, supra note 13, at 881-82.
120. Id. at 886-901.
121. Id. at 882.
122. Id. at 887-88.
123. Id. at 893-95.
borhood, or education level only perpetuate the monetary bail system injustices. The Note called for state legislatures to reform bail policies that permit pre-trial detention only when “no reasonable set of conditions can allay concerns of failure-to-appear or community safety” and that any bail decision should not be determined solely through assessing an individual’s risk to public safety or flight risk.

In sum, existing literature surrounding a monetary bail system notes similar problems associated with a monetary bail system outlined previously in Part A and Part B of this section. As this article will also suggest, the existing literature calls for reform by the legislatures. The difference in opinion surrounding the appropriate solution reveals that there may be several appropriate reforms to the bail system. Additionally, perhaps jurisdictions must weigh the benefits and drawbacks of reform tactics—small steps versus sweeping reform. This article proposes a solution that adopts Rohrer’s proposition that risk-assessment tools are appropriate ways to determine pre-trial detention, while not contravening the Note’s assertion that risk-assessment tools can perpetuate the injustices of a monetary bail system. The proposed solution relies on a risk-assessment tool that uses objective factors that assess a defendant’s risk of flight and threat to the community—not criteria like education or socioeconomic status. In fact, the proposed solution for Pennsylvania goes beyond only using pre-trial risk-assessment tools in making bail decisions—it calls for completely eliminating the use of cash as a method of release. Importantly, this literature review reveals that in order to find the appropriate solution, jurisdictions must rely on the data of the current system in creating reform. The data, along with the current literature outlined in this section, can serve as a foundation for reform to Pennsylvania’s bail system.

D. Empirical Studies that Reveal Problems of a Monetary Bail System

Empirical studies reveal the arbitrariness of a monetary bail system because magisterial district judges, as decision makers, can

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124. Id. at 887.
125. Id. at 888.
126. Id. at 911.
127. For example, recall that in 2014 Allegheny County judges predominately imposed monetary bail conditions. See supra note 48 and accompanying text. Furthermore, empirical data regarding Pennsylvania’s current monetary bail system that can assist in finding the appropriate solution are outlined in part D of this section.
bring biases into their bail decisions.\textsuperscript{128} That is not to say that all bail decisions are grossly unfounded; however, it does create a system where a bit of luck comes into play. Outcomes, of course, depend on which judge is assigned the case. The 2016 \textit{Heavy Costs of High Bail} study of monetary bail implications in Philadelphia and Pittsburgh showed that “[a]ll else being equal, some judges assess money bail frequently, while others do so sparingly.”\textsuperscript{129} Furthermore, the imposition of money bail has a \textit{causal} impact on guilty pleas and recidivism.\textsuperscript{130} The study labeled the judges who frequently imposed money bail conditions as “severe,” and found that defendants who were assigned one of these more “severe” judges were more likely to be assigned money bail for reasons other than the defendant’s personal characteristics or the underlying facts of the case.\textsuperscript{131} Similarly-situated defendants may receive different bail assessments based on the “severity” of their assigned judge.\textsuperscript{132} In these two jurisdictions, judge assignment is essentially random.\textsuperscript{133} Philadelphia has a 24-hour bail court in a centralized location where judges rotate through hearing cases.\textsuperscript{134} Pittsburgh judges preside over bail hearings for the arrests that occur within that magisterial district judge’s jurisdiction, but some defendants may be assigned another magisterial district judge on nights or weekends.\textsuperscript{135} Therefore, the decision of whether to impose a monetary bail condition—the decision that has the power to predict the outcome of the defendant’s entire case—is based on essentially random magistrate assignment and granted extreme judicial discretion.\textsuperscript{136} Indeed, release before trial is the single most important decision made in the criminal justice system, because this first decision impacts each decision that follows, including length of incarceration and likelihood of recidivism.\textsuperscript{137} The criminal justice system is not perfect, having been “[c]reated by human beings . . . [and] at the mercy of human error, usually made in good faith, although occasionally with ill intent.”\textsuperscript{138} What we can expect, however, is that

\textsuperscript{128} Criminal Injustice: Correcting a Corrections Department, supra note 64.
\textsuperscript{129} Gupta et al., supra note 58, at 472.
\textsuperscript{130} Id. at 487, 495.
\textsuperscript{131} Id. at 472.
\textsuperscript{132} Id. at 481.
\textsuperscript{133} Id.
\textsuperscript{134} Id. at 477.
\textsuperscript{135} Id. at 478.
\textsuperscript{136} Id. at 472.
the front-end decisions be based on objective criteria, rather than subjectivity.

Overall, the empirical data reveal that current monetary bail practices in Pennsylvania are causing the practical problems and negative impacts outlined throughout this section. The legislature must respond with appropriate reforms in order to address these problems. This article ultimately proposes a solution for Pennsylvania that will combat the problems and reduce the arbitrary imposition of bail by completely eliminating the use of cash as a method of release. This solution eliminates a defendant’s economic status as a factor determining release, and instead proposes using risk-assessment tools to aid in pre-trial detention decisions.

V. HOW OTHER JURISDICTIONS HAVE ADDRESSED THE PROBLEMS WITH A MONETARY BAIL SYSTEM

“Solving this problem is really the lowest hanging fruit on the criminal justice tree. The solution is to move from an offense-based, money-based decision-making system to one that is risk-based. We know what to do. We know that it works. We know that we see immediate results.”

– Cherise Fanno Burdeen, Pretrial Justice Institute CEO

Fortunately, society has recognized the need to move away from a monetary bail system. Many jurisdictions have already taken action by way of reform to address the problems associated with a monetary bail system. This section explores some of those jurisdictions. These changes can serve as a model for reforming Pennsylvania’s monetary bail system.

A. The Federal Bail System

In 1984, Congress passed the federal Bail Reform Act. In the federal system, there is no right to bail—arrestees may be detained pre-trial if there is a finding that “no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.” The prosecutor bears the burden of showing, through a specific motion and evidence at a hearing, that a defendant should be detained

139. Fraser, supra note 66.
141. Id. § 3142(e)(1).
Generally, in ordering pre-trial detention, there is a presumption of release; however, with some specific crimes, there is a rebuttable presumption that no condition or combination of conditions will assure appearance as required for the safety of the community. In *United States v. Salerno*, the United States Supreme Court held that detaining a defendant without bail does not violate the Eighth Amendment because there is no absolute right to bail. However, under the federal system, if a judge orders that a person be released upon a condition or conditions pending trial, the judge must choose the least restrictive combination of conditions to assure appearance and community safety. Furthermore, if a monetary condition is imposed, it can only be by means of an unsecured bond—that is, the defendant or the defendant’s surety agrees only to forfeit money or property for failing to appear and is not required to pay any money for his release. The federal bail system has struck a balance between the presumption of release and the presumption of detention, while focusing on appearance and safety, rather than money, in its release decisions.

**B. Washington, D.C.**

Washington, D.C. was the first jurisdiction to eliminate a monetary bail system. Within the jurisdiction, eighty-eight percent of defendants are released based on non-financial conditions. The city has a pre-trial services program that determines the “risk” of a defendant based on their criminal history, potential risk of flight, risk to community safety, and if the defendant has substance abuse or mental health needs. Low-risk defendants are released, usually without monetary conditions. Examples of non-monetary

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142. *Id.* § 3142(f).
143. See *id.* § 3142(b).
144. *Id.* § 3142(e)(3) (setting forth circumstances in which there shall be a rebuttable presumption that no condition or combination of conditions will reasonably assure safety and appearance which include: an offense under the Controlled Substance Act for which the maximum term of imprisonment is ten years; the use of a firearm during a crime of violence or drug trafficking crime; conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country; acts of terrorism transcending national boundaries; federal crimes of terrorism; peonage; and some crimes involving a minor).
146. *Id.* at 753.
147. 18 U.S.C. § 3142(b), (c)(1)(B)(xi)-(xii).
148. *Id.* § 3142(b), (c)(1)(B)(xi)-(xii).
152. *Id.*
conditions include in-person or over-the-phone reporting to pre-trial agencies, electronic monitoring, or drug testing. Ninety percent of the defendants released without monetary bail return to court and remain arrest-free as they await trial.

While Washington, D.C.’s system is known as a “model” bail system, the uniqueness of the Washington, D.C. jurisdiction cannot go without mention. Such uniqueness may be a contributing factor to the program’s success: the federal government funds the pre-trial services agency, the District’s Public Defender Office is high-functioning and can handle representing indigent defendants at pre-trial detention hearings, and courts operate out of a single courthouse. Of course, these services are also expensive—the agency’s budget was $62.4 million in 2016. Nonetheless, these positive outcomes cannot be attributed solely to its uniqueness; employing similar methods in other jurisdictions can yield similarly positive outcomes, even if the positive outcomes are not as powerful as in Washington, D.C.

C. New Jersey

New Jersey has taken the most extreme stance on reforming and eliminating its monetary bail system. Like other jurisdictions, New Jersey observed that the monetary bail system was failing its criminal defendants. Forty percent of New Jersey inmates were incarcerated solely because they could not afford bail, and were waiting an average of 314 days for trial. Twelve percent of those in jail awaiting trial could not afford their bail bonds of less than two thousand dollars.

The road to New Jersey’s bail reform began with Chief Justice of the New Jersey Supreme Court Stuart Rabner calling for efforts to fix the bail system. As in Pennsylvania, the New Jersey Constitution used to contain a right to bail provision, which allowed all

153. Id.
154. Id.
155. Id.
156. CRIMINAL JUSTICE POLICY PROGRAM, supra note 12, at 15.
157. Id.
158. Wiltz, supra note 4.
160. Planet Money, supra note 1.
162. Planet Money, supra note 1.
persons to be “bailable by sufficient sureties, except for capital offenses.”164 In other words, defendants were entitled to bail—there were no conditions in which a defendant could be detained pre-trial without option for release.165

On November 4, 2014, however, by a vote of sixty-two percent to thirty-eight percent, New Jersey citizens voted by referendum to amend the constitution through the New Jersey Pre-trial Detention Amendment.166 Interestingly, the proposed amendment was phrased on the ballot to be relatively tough-on-crime, despite the fact that the non-monetary bail system would not generally be perceived as a tough-on-crime initiative. For example, a portion of the ballot read that “[f]or the change to the Constitution would mean that a court could order that a person remain in jail prior to trial, even without a chance for the person to post bail, in some situations.”167 It listed examples of when a court may decide that a defendant should be detained before trial: concerns that a defendant would not appear in court; concerns that the defendant is a threat to safety of another person or the community; or concerns the defendant might obstruct the criminal justice process.168 Notably, these changes are analogous to the practices in the federal system, where a defendant may be detained before trial and denied bail altogether.169

Specifically, the amendment authorized the New Jersey legislature to draft legislation regarding pre-trial release and detention and delayed the amendment’s effective date to January 1, 2017, to allow the legislature to establish such laws.170 This opened the door to the adoption of the New Jersey Bail Reform and Speedy Trial Act.171 The legislation completely eliminated bail for non-violent defendants and put initiatives in place to monitor defendants who

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165. Planet Money, supra note 1.
167. S. Con. Res. 128, 216th Leg. (N.J. 2014). The amendment removed the language “bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great” and added the language “[p]rettrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person’s appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process.” Id.
168. Id.
had been released. The purpose of the legislation was to “primarily [rely] upon pretrial release by non-monetary means” while protecting community safety, assuring appearance in court, and preventing the defendant from obstructing justice. The legislation and the constitutional amendment therefore have similar purposes. While there is a presumption of release, a prosecutor may move to order pre-trial detention, and such detention is authorized when, by clear and convincing evidence, no condition or combination of conditions can effectuate the purpose of the statute. Interestingly, the statute does contain a provision that allows monetary bail to be set only when no condition of release will reasonably assure appearance in court.

Similar to the pre-trial services programs enjoyed by Washington, D.C. defendants, New Jersey adopted the Public Safety Assessment (“PSA”), developed by the Laura and John Arnold Foundation, to determine whether defendants should be released or detained before trial. Rather than imposing arbitrary bail amounts, the PSA’s goal is to help judges make decisions regarding a defendant’s pre-trial detention based on evidence of a defendant’s potential risk. The assessment, based on 1.5 million cases from 300 U.S. jurisdictions, gives each defendant a score from one to six that represents the likelihood that a particular defendant will commit a new crime while released awaiting trial or will fail to appear for a future court appearance. The lower the score, the more compelling it is that a defendant should be released pending trial. The PSA uses nine factors to produce its score:

- Whether the current offense is a violent one;
- Whether the defendant has a pending charge at the time of the offense;
- Whether the defendant has a prior misdemeanor conviction;
- Whether the defendant has a prior felony conviction;

174. See id.
175. Id.
176. See supra note 151 and accompanying text.
178. Press Release, supra note 137.
179. LAURA & JOHN ARNOLD FOUND., supra note 177, at 2-3.
180. PBS News Hour, supra note 172.
• Whether the defendant has a prior conviction for a violent crime;
• Whether the defendant failed to appear pre-trial within the past two years, and, if so, how many times;
• Whether the defendant failed to appear pre-trial before the past two years;
• Whether the defendant was previously sentenced to incarceration; and
• The defendant’s age at the time of arrest.\textsuperscript{181}

Notably, the PSA does not consider discriminatory factors such as race, ethnicity, or geography.\textsuperscript{182} Additionally, as a safeguard, the PSA does not replace a judge’s discretion in determining whether a defendant should be detained or released pending trial.\textsuperscript{183} For example, a defendant may have a high PSA score but a judge may take into consideration that the defendant is working or supporting children to justify release.\textsuperscript{184}

Since the implementation of the New Jersey Bail Reform and Speedy Trial Act, New Jersey has monitored released defendants pre-trial through routine check-ins to pre-trial services and electronic monitoring.\textsuperscript{185} Defendants now get call, text, or email reminders about their court dates.\textsuperscript{186} As a result, New Jersey has seen a nineteen-percent decrease in its jail population.\textsuperscript{187} This sweeping reform has likewise altered the rhetoric used in the New Jersey criminal courts. Formerly known as a “bail hearing,” the hearing that determines whether a defendant should be detained pre-trial is now known as a “detention hearing.”\textsuperscript{188}

The new system is not immune to problems, however. In May 2017, the state needed to change its PSA algorithm to recommend detention automatically for defendants who re-offended while on release.\textsuperscript{189} Some police officers opposed the reform, citing anecdotal evidence that they are re-arresting defendants only days from the defendants’ release from a prior arrest.\textsuperscript{190} Not surprisingly, the bail bond industry has suffered as a result of the new reforms and the largest bail bond company in New Jersey is now out of business.\textsuperscript{191}

\\textsuperscript{181} LAURA \& JOHN ARNOLD FOUND., supra note 177, at 2.
\textsuperscript{182} See id.
\textsuperscript{183} Id.
\textsuperscript{184} PBS NEWS HOUR, supra note 172.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} ALL THINGS CONSIDERED, supra note 75.
As a leader in radical bail reform, New Jersey has certainly needed to work through some roadblocks; nonetheless, jurisdictions that follow in the footsteps of New Jersey can learn from any obstacles that New Jersey has overcome and address them proactively.

D. Lessons Learned

Monetary bail is losing favor, and jurisdictions have responded accordingly. Taken together, jurisdictions’ responses favor pre-trial release. In these jurisdictions, bail decisions focus on community safety and ensuring appearance. Furthermore, jurisdictions have successfully transitioned to bail systems that essentially eliminate monetary bail conditions. Using the actions of these jurisdictions as a foundation, along with empirical data from Pennsylvania that reveal the arbitrariness of bail decisions, this article proposes an objective bail system in Pennsylvania that focuses on keeping communities safe, assuring defendants’ appearances, and protecting indigent defendants from the arbitrariness of monetary bail conditions.

VI. PENNSYLVANIA HAS TAKEN STEPS IN THE RIGHT DIRECTION

Pennsylvania has taken steps to respond to the problems associated with a monetary bail system in two ways. First, as of 2015, thirty-seven of the sixty-seven counties throughout Pennsylvania have implemented pre-trial services programs, and twelve of those counties use a risk-assessment tool. Allegheny County, for example, has adopted the Arnold Foundation’s PSA—the same PSA implemented throughout New Jersey. Second, Pennsylvania’s General Assembly sought House Bill 1092, currently pending, seeks to implement these pre-trials and risk assessment tools into counties throughout the Commonwealth with House Bill 1092.

First, Allegheny County’s pre-trial services program reflects the Commonwealth’s recognition that the current bail system is arbitrary and unjust. Allegheny County acknowledges that bail amounts were arbitrary before 2007. As a precaution, bail amounts were typically set subjectively high. After criticisms of

193. Press Release, supra note 137.
196. Id.
Allegheny County’s previous pre-trial practices, Allegheny County Pre-trial Services was created in 2007.\textsuperscript{197} Part of Allegheny County’s Pre-trial Services is a Bail Investigation Unit, designed to combat high bail amounts and “get it right the first time.”\textsuperscript{198} The Bail Investigation Unit, located in the Allegheny County jail, interviews defendants face to face, verifies the information provided by the defendant, and identifies the defendants who are eligible for bail.\textsuperscript{199} The Bail Investigation Unit then makes pre-trial detention recommendations based on the defendant’s risk level using the Arnold Foundation’s PSA.\textsuperscript{200} The PSA helps provide judges with any background information necessary to determine appropriate bail amounts.\textsuperscript{201}

The program also has an alternative to establishing a monetary bail amount. Defendants can be granted release with conditions: in-person and over the phone reporting requirements; electronic monitoring; continued residence at a particular address; or avoiding contact with an alleged victim.\textsuperscript{202} Pre-trial services staff monitors defendants’ fulfillment of their conditions upon release.\textsuperscript{203} Since the implementation of its pre-trial services program, Allegheny County’s recidivism rate is down and court appearances are up.\textsuperscript{204} As of November 2016, eighty percent of defendants appeared at all of their hearings, seventy-nine percent of pre-trial defendants were not re-arrested while awaiting trial, and sixty-five percent of defendants were not charged with a new offense.\textsuperscript{205}

Second, because Pennsylvania introduced legislation to implement pre-trial services and risk-assessment tools throughout the Commonwealth,\textsuperscript{206} the Pennsylvania General Assembly has acknowledged the importance of moving away from an arbitrary bail system. Primarily sponsored by Representative Joanna E. McClinton, the purpose of House Bill 1092 was to promote safety, produce more effective outcomes, provide courts with fact-driven information to make bond decisions, and prevent unnecessary pre-

\textsuperscript{197} Id. at 3.
\textsuperscript{198} Id. at 4.
\textsuperscript{200} BARRON, supra note 195, at 4; Press Release, supra note 137.
\textsuperscript{201} Fraser, supra note 66.
\textsuperscript{202} BARRON, supra note 195, at 4-5.
\textsuperscript{203} Id. Since 2007, approximately three thousand individuals in Allegheny County are under pre-trial supervision during a given time. Id.
\textsuperscript{204} Id. at 4.
\textsuperscript{205} NORDENBURG & THIEMAN, supra note 47, at 4.
trial detention. The bill outlined the responsibilities of each county’s pre-trial services programs, which include the implementation of a risk-assessment tool, supervision of released defendants, and reminding defendants of their court dates. The bill still allowed judges to impose a monetary bail condition. On April 7, 2017, the bill was referred to the judiciary committee, but it failed.

VII. PENNSYLVANIA NEEDS MORE RADICAL CHANGE

Pennsylvania has taken steps in the right direction to address the problems associated with the monetary bail system. Its actions, however, are simply not radical enough to combat the gross injustices and arbitrariness of the current monetary bail system. Certainly, Allegheny County has seen positive results in its implementation of the pre-trial services program. The Pennsylvania General Assembly, by drafting House Bill 1092, recognized the need for these types of programs in counties as well. But because imposing monetary bail conditions remain an option, however, glaring problems still exist with the steps, albeit in the right direction, that Pennsylvania has implemented so far. First, the pre-trial services and risk-assessment tools can simply be used to perpetuate a cash bail system. Second, results from the *Heavy Costs of High Bail* study in Pittsburgh and Philadelphia, two areas that were using risk-assessment tools during that time, reveal there is still wide judicial discretion in the implementation of monetary bail conditions. Finally, magisterial judges are still influenced by their communities and have no obligation to follow pre-trial services’ recommendations. Each of these problems will be addressed in turn.

First, the pre-trial services and risk-assessment tools can simply be used to perpetuate, rather than eliminate, a cash bail system, because monetary bail is still available as a condition of a defendant’s release. In Allegheny County, for example, a county that uses

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207. Id. § 102.
208. Id. § 301(c).
209. Id. § 501(c)(5).
211. 2017 Legislative Outlook *H.B. 1092*, LEXISNEXIS, https://advance.lexis.com/ (navigate from home page to legislative materials, bill tracking, Pennsylvania, then search 2017 HB 1092, legislative outlook will be the first result).
212. See supra notes 204-05 and accompanying text.
213. Gupta et al., supra note 58, at 472.
214. Fraser, supra note 66.
the Arnold Foundation’s PSA, judges may still impose monetary bail as a condition of release.\textsuperscript{215} In 2014, seven years after Allegheny County implemented its pre-trial services program, over half of Allegheny County arrestees were given monetary conditions of release, and monetary bail conditions were exercised over seventy-nine percent of defendants charged with a felony and one-third of defendants charged with a misdemeanor.\textsuperscript{216} Therefore, because monetary conditions are implemented so frequently, the risk-assessment tools are simply being used by judges to decide whether to impose monetary bail conditions \textit{at all}, not decreasing the frequency of monetary bail impositions. The risk-assessment tool is only solving one flaw of the monetary bail system, namely arbitrariness, rather than solving the larger scope of intertwined problems.

Second, as the results of the 2016 study made clear, despite both counties’ use of an empirical risk-assessment tool, judges’ impositions of bail amounts—or their decision to impose monetary bail at all—vary considerably among similarly situated defendants.\textsuperscript{217} These results revealed that, despite the assessment’s push to standardize judicial decisions, a huge variation exists in outcomes for similar defendants.\textsuperscript{218} The study acknowledged that the results may have external validity outside of the precise jurisdictions examined;\textsuperscript{219} therefore, this variation in defendants’ outcomes will likely occur in other counties throughout Pennsylvania should other counties implement pre-trial services programs. These results reveal that the problems associated with the monetary bail system—even arbitrariness—will not be resolved through the use of pre-trial services programs alone.

Finally, magisterial district judges are still influenced by their communities and have no obligation to follow pre-trial services’ recommendations. Magisterial district judges are elected officials, who have a duty to represent the communities that elected them.\textsuperscript{220} Judges may exercise discretion in determining whether to follow the recommendations of the pre-trial risk assessments.\textsuperscript{221} Some judges may take community influence, and the possibility of reelection, into consideration when making pre-trial detention decisions and setting monetary bail amounts.\textsuperscript{222} Indeed, Allegheny County

\textsuperscript{215} See PA. R. CRIM. P. 524(C)(5); Press Release, \textit{supra} note 137.
\textsuperscript{216} \textit{Nordenburg} & \textit{Thiemann}, \textit{supra} note 47, at 6.
\textsuperscript{217} Gupta et al., \textit{supra} note 58, at 472-73.
\textsuperscript{218} Id.
\textsuperscript{219} Id. at 486.
\textsuperscript{220} Fraser, \textit{supra} note 66.
\textsuperscript{221} Id.
\textsuperscript{222} Id.
magistrates follow the Allegheny County Pre-trial Services’ bond recommendations only sixty-three percent of the time.\textsuperscript{223} Note, again, that these are bond recommendations coming from Allegheny County Pre-trial Services: a recommendation for a particular cash bail amount, not a recommendation for whether or not to detain a defendant pre-trial.\textsuperscript{224} The current use of pre-trial assessments, while a step in the right direction, are merely perpetuating a monetary bail system rather than eliminating it.

Furthermore, anecdotal evidence suggests that, if monetary bail remains an option, magisterial judges may use the assessment as reason to set higher bail. For example, Richard King, magisterial district judge for the district that includes the Pittsburgh neighborhoods of Mt. Oliver, Carrick, and Allentown, asserts that the risk assessment provides more insight into defendants’ situations.\textsuperscript{225} But, he is not using the pre-trial assessment’s recommendation.\textsuperscript{226} Mirroring the war-on-drugs mentality, King does not always agree with the assessment’s recommendation for drug offenses, because “[t]here are more heroin deaths than homicides. Why should [heroin dealers] not be [considered] a danger to the community?”\textsuperscript{227}

Therefore, despite taking a step in the right direction, implementation of pre-trial services programs in more counties throughout Pennsylvania is not enough. Current data supports this assertion because, despite the use of pre-trial services programs in some counties, the problems associated with a monetary bail system are still perpetuated.\textsuperscript{228} This article suggests that in order to combat the full scope of the problems, Pennsylvania must eliminate—completely—its monetary bail system. In order to determine whether this is an appropriate solution, the legislature could solicit data that compares defendants’ outcomes in counties where judges frequently or rarely impose monetary bail conditions. The legislature could also solicit a method to test defendants’ outcomes when monetary bail conditions are imposed. However, the best way to test the solution for Pennsylvania’s monetary bail system is to look at outcomes in other jurisdictions. Given the positive outcomes from jurisdictions that no longer impose monetary bail conditions, like Washington, D.C. and New Jersey, this article proposes a more radical solution that completely eliminates the imposition of monetary

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\textsuperscript{223} Id.
\textsuperscript{224} Id.
\textsuperscript{225} Id.
\textsuperscript{226} Id.
\textsuperscript{227} Id.
\textsuperscript{228} See supra notes 217-18 and accompanying text.
bail conditions. It is likely that the best way to test this solution is to implement the reform and use New Jersey as a guide—embracing New Jersey’s positive outcomes and working proactively to avoid any of New Jersey’s setbacks.

VIII. PROPOSED SOLUTION TO PENNSYLVANIA’S MONETARY BAIL SYSTEM

Pennsylvania should amend its Constitution to eliminate the Right to Bail provision. It should also afford courts the authority to detain defendants without an option of bail, and contemporaneously implement legislation that effectively eliminates monetary bail conditions and introduces a risk-based approach that favors conditional release of defendants.

Amending the Pennsylvania Constitution requires the Pennsylvania legislature to propose an amendment to be approved by referendum in the general election. The constitutional amendment for the proposed solution would require citizens to eliminate the Right to Bail provision of the Pennsylvania Constitution that protects defendants’ right to be released pre-trial. This right is afforded to the defendant for “sufficient sureties” unless the defendant’s alleged crime is a capital offense for which the maximum sentence is life imprisonment or if no condition other than imprisonment will assure the safety to the community. Eliminating Pennsylvania’s Constitution’s Right to Bail provision would eliminate a defendant’s right to pre-trial release and will allow judges to detain defendants without option for release, regardless of the underlying crime. As in the federal system, defendants will not enjoy an absolute right to bail. Finding that a defendant may be detained without bail does not violate the Eighth Amendment because the Eighth Amendment does not afford an absolute right to bail, so this proposed amendment to the Pennsylvania Constitution would not violate the United States Constitution.

While this type of constitutional amendment may seem counterintuitive to an article that, admittedly, has advocated for a decrease in pre-trial detention, it is the contemporaneous legislation in conjunction with this proposed amendment that will allow Pennsylvania to implement a bail system that is less reliant on defendants’ monetary resources and more focused on community safety. Here,

229. PA. CONST. art. XI, § 1.
as in New Jersey, a constitutional amendment, in conjunction with legislation, serves as the foundation of this proposed bail reform.\textsuperscript{233}

The contemporaneous legislation should require magistrate district judges to make pre-trial detention decisions—favoring release—based on a pre-trial risk assessment. Pre-trial services programs within each court,\textsuperscript{234} similar to those employed in Allegheny County,\textsuperscript{235} should conduct each defendants’ pre-trial risk assessment and determine the defendant’s risk to the public’s safety and risk of failure to appear in court. Practically, adopting the Arnold Foundation’s pre-trial risk assessment throughout Pennsylvania is the most sensible solution because Allegheny County can serve as a resource to other counties in the implementation and early stages. Furthermore, because the Arnold Foundation’s assessment is based on objective criteria specific to each defendant’s risk of flight and risk to community safety, rather than more subjective factors,\textsuperscript{236} this type of risk-assessment tool will perpetuate a more objective system. That is essentially the goal of this reform. The legislation should permit judges to decide that some defendants, based on their risk—not the underlying crime or the amount of money in the defendants’ pockets—will, in rare circumstances, need to be detained pre-trial. Legislation should make it clear that the option for pre-trial detention should only be employed in rare circumstances. It is not the underlying crime, like in Pennsylvania’s current bail statute, that triggers pre-trial detention. Instead, it is the defendant’s risk-assessment score that would warrant pre-trial detention, and pre-trial detention is never mandatory. Using the Arnold Foundation’s PSA as an example, the rare circumstances that would permit pre-trial detention should be interpreted to apply only to defendants whose risk-assessment score is a six.\textsuperscript{237}

The proposed legislation will go one step further in eliminating the use of monetary bail as a condition for release. This does not mean that release should be unconditional. Magistrate district judges should use their discretion creatively when imposing release conditions. Conditions adopted in other jurisdictions, such as in-person or over-the-phone reporting requirements,\textsuperscript{238} electronic

\textsuperscript{233} See supra note 170 and accompanying text.
\textsuperscript{234} The Pennsylvania Rules of Criminal Procedure allow each Court of Common Pleas to set up pretrial services programs. PA. R. CRIM. P. 530.
\textsuperscript{235} See supra notes 197-99 and accompanying text.
\textsuperscript{236} See supra notes 181-82 and accompanying text.
\textsuperscript{237} Recall that a six represents the highest possible risk-assessment score that a defendant might receive. See supra note 179 and accompanying text.
monitoring, maintaining residence at a particular address, curfews, rehabilitative classes, and maintaining employment are reasonable alternatives to pre-trial detention that a judge may choose to impose under the proposed bail system. Furthermore, as in New Jersey, the pre-trial services program that conducted the defendant’s risk assessment and monitors the defendant’s release conditions could call, text, or email defendants to ensure appearance at their court dates. This could safeguard court resources, like judges’, clerks’, and juries’ time, that may be wasted when defendants fail to appear. Unlike in New Jersey, however, Pennsylvania legislation should not contain a provision that still allows monetary bail to be set. Only a high pre-trial risk-assessment score under the proposed solution should warrant pre-trial detention.

In order for this legislation to be constitutional in Pennsylvania, there can be no constitutional Right to Bail provision, because such a provision is in direct contravention to the proposed legislation. Therefore, because it is imperative that the constitutional amendment works in conjunction with the legislation, the Pennsylvania General Assembly should take appropriate measures to ensure a constitutional amendment when proposing the legislation. Similar to New Jersey, Pennsylvania’s constitutional amendment should specifically authorize the Pennsylvania legislature to enact legislation regarding pre-trial detention. The Pennsylvania legislature should also take appropriate measures to ensure that the constitutional amendment and legislation are effective on the same date.

A. The Proposed Bail Reform in Pennsylvania Bodes Bipartisan Appeal

The proposed solution will set Pennsylvania apart as an exemplar of bail reform. The process of implementing this complete bail overhaul is certainly not simple, but with the right strategy in place it is achievable. Forty-five percent of individuals surveyed in a 2016

239. See supra note 185 and accompanying text.
241. See id. § (B)(vii).
242. See id. § (B)(iii).
243. See id. § (B)(ii).
244. See supra note 186 and accompanying text.
245. CRIMINAL JUSTICE POLICY PROGRAM, supra note 12, at 14.
247. See PA. CONST. art. XI, § 1.
248. See supra note 170 and accompanying text.
Gallup poll reported that the criminal justice system is not tough enough on crime, with only fourteen percent reporting that it was too tough and another thirty-five percent saying it was appropriate.\textsuperscript{249} The referendum vote must appeal to the public at large in order to pass; therefore, the language of the constitutional amendment will require phrasing that takes a more tough-on-crime approach, like in New Jersey.\textsuperscript{250} This tough-on-crime language suggestion is not to be perceived as a tactic to mislead the public. On the contrary, while the proposed solution is certainly designed to decrease the number of defendants detained pre-trial, this type of bail reform appeals to those who value a tough-on-crime approach as well as to those who, for a variety of reasons ranging from the recognition of flaws in the criminal justice system to a belief in alternative reforms, identify as softer on crime. Furthermore, bipartisan appeal increases the likelihood that the non-monetary bail legislation will gain enthusiastic support from both parties, increasing the likelihood of passage in the General Assembly and increasing the chance of judicial advocates fulfilling this legislation from the bench.

The proposed bail reform has bipartisan appeal for three reasons. First, appealing to conservative factions, a non-monetary bail system supports fiscal conservatism.\textsuperscript{251} Second, appealing to liberal factions, a non-monetary bail system takes steps toward more equal justice for those without the resources to post a monetary bond with respect to the discrimination that comes with the cyclical effects of poverty. Third, appealing to both factions, a non-monetary bail system appeals to a tough-on-crime approach, as well as a softer on crime approach by using logic in the criminal justice system.

First, a non-monetary bail system appeals to fiscal conservatism. At its most basic level, it costs taxpayers money to house the defendant pre-trial.\textsuperscript{252} Because this decision at the front end of the criminal justice system can increase recidivism, the current system does not respect taxpayer dollars—an increase in recidivism costs taxpayers more money long-term due to the costs associated with arrest, booking, pre-trial detention, courts, and housing should the defendant be convicted.\textsuperscript{253} Overall, the proposed solution creates a

\textsuperscript{250}. See supra note 167 and accompanying text.
\textsuperscript{251}. See Criminal Injustice: Correcting a Corrections Department, supra note 64.
\textsuperscript{252}. See supra notes 88-89 and accompanying text.
\textsuperscript{253}. See Criminal Injustice: Correcting a Corrections Department, supra note 64.
more fair and effective criminal justice system that starts with reducing corrections costs. In fact, the use of pre-trial services programs, like the risk-assessment tool, are proven to reduce the monetary and human cost of corrections.

Second, a non-monetary bail system takes steps toward more equal justice for those without the resources to post a monetary bond with respect to the discrimination that comes with the cyclical effects of poverty. The proposed system rests on data, rather than complete discretion, and promotes consistency in pre-trial detention decisions. Because the proposed solution relies objectively on risk in determining pre-trial release, defendants’ chances of pre-trial release are arguably more just because the amount of money they may have to post bond is no longer the determining factor of pre-trial release. This helps break the cyclical effects of poverty for indigent defendants. Many areas in our society already discriminate based on the amount of money an individual has, so creating a more objective foundation to our court system is crucial.

Third, a non-monetary bail system appeals to both a tough-on-crime and softer on crime approach to criminal justice. On one hand, the proposed solution bases its decisions on a reasoned foundation of safety, rather than an arbitrary foundation of money. The current bail system’s effect on public safety is illusory because individuals who can afford bail are released pre-trial, free to commit more crimes if they would so choose. On the other hand, the proposed solution will promote safety because without a right to bail, high-risk defendants can be detained pre-trial regardless of the underlying crime. This solution appeals to safety because it roots pre-trial detention decisions in the objective element of risk to the public.

Additionally, the proposal might appeal to individuals who may identify as softer on crime because it promotes logic in our criminal justice system. Critics of the criminal justice system and, more specifically, a monetary bail system, often cite the arbitrariness of wealth as the determining factor in whether a defendant is detained pre-trial. The proposed solution, however, is not based on the arbitrary factor of money and rather the objective factor of the de-
A defendant’s risk to the public. This solution combats the over-detaining of defendants because a judge may be uncertain of a defendant’s risk to the public. Overall, the solution appeals to a more well-reasoned, practical court order.

Under the proposed solution, judges can predict risk and make informed decisions based on objective factors. Regardless of an individual’s stance on crime or political leanings, all can agree that a pre-trial detention system rooted objectively in public safety should be the focus of the Pennsylvania General Assembly.

B. The Benefits of the Proposed Bail Reform Outweigh the Drawbacks

The proposed solution does not come without potential drawbacks. First, this solution will likely destroy the bail bondsman industry. Second, some conditions of pre-trial release, like electronic monitoring or rehabilitation classes that impose a cost on defendants, may still perpetuate the problems of a monetary bail system in a new manner. Finally, the referendum vote risks an increase in pre-trial detention if the legislature does not respond with non-monetary bail reform legislation.

First, this solution will likely destroy the bail bondsman industry, similar to what occurred in New Jersey. The bail bondsman industry, however, is highly criticized. Some bail bond companies will not help defendants post bail for low amounts. The industry is known for its aggressive pricing practices and coerciveness toward defendants. Bail bondsmen use tactics known as “bail capping,” where they compensate jailed inmates in exchange for recruiting new clients. Inmate recruiters pressure and threaten their recruits, capitalizing on the already predatory jail environment, into contracting with a bail bondsman. In return, the bail bondsman compensates their recruiters with phone calls and money on their commissary, because deposits are not tracked by the jail.

Outside of the United States, the only other country in the world

259. See supra note 191 and accompanying text.
260. See id.
262. Id. at 13.
264. Id.
265. Id.
that permits a bail bondsman industry is the Philippines.\textsuperscript{266} Because of these problems, the potential economic drawbacks that might occur from the destruction of the industry are far outweighed by the benefits of completely eliminating the problems associated with the industry—as well as the monetary bail system. Therefore, this potential drawback is not incredibly compelling.

Second, some conditions of pre-trial release, like electronic monitoring or rehabilitation classes that impose a cost on defendants, may still perpetuate the problems of a monetary bail system in a new manner. The proposed solution promotes conditional release, rather than pre-trial detention. Some release conditions, however, could still perpetuate the problems associated with a monetary bail system because they impose costs on defendants. If a defendant has to pay for his or her conditions of release, it is essentially the same as paying a bond in exchange for release. For example, in Allegheny County, electronic monitoring as a condition of release requires that the defendant pay for fees.\textsuperscript{267} Judges might also impose rehabilitation classes as a condition of defendants’ release, at the cost of the defendant. Because these types of conditions impose a cost on the released defendants, the problems associated with monetary bail are perpetuated, despite defendants’ release. Therefore, to prevent this potential drawback the proposed legislation must include sufficient safeguards. One such safeguard might be to use financial information, collected through the pre-trial assessment program, to ensure that any pre-trial release conditions that may cost a defendant money do not exceed a certain amount of the defendants’ income.\textsuperscript{268} Another safeguard might be to impose no costs on defendants’ conditions. Therefore, because the potential safeguards that can be drafted into the legislation can prevent the problems associated with the monetary bail system from re-manifesting in conditional release measures, this potential drawback is not particularly compelling.

Finally, the most compelling of potential drawbacks is that the referendum vote risks an increase in pre-trial detention if the legislature does not respond with non-monetary bail reform legislation. This risk could make the current system worse by perpetuating, and intensifying, the problems associated with the current system. The proposed constitutional amendment, without corresponding legislation that eliminates monetary conditions of release and

\textsuperscript{266} Criminal Justice Policy Program, supra note 12, at 13.
\textsuperscript{267} Adult Probation Special Units, FIFTH JUD. DISTRICT PA., https://www.alleghe-nycourts.us/criminal/adult_probation/special_units.aspx#a7 (last visited Feb. 5, 2019).
\textsuperscript{268} See Criminal Justice Policy Program, supra note 12, at 10.
maintains a presumption of release unless the risk assessment indicates otherwise, opens the door to detain even more defendants than Pennsylvania’s current system. Judges could choose to detain any or every defendant pre-trial. This risk is great because all problems currently associated with a monetary bail system would likely be amplified should the constitutional Right to Bail provision be eliminated without being complimented with proper legislation. Therefore, in order to prevent this problem, the Pennsylvania legislature should take appropriate measures to ensure the constitutional amendment specifically authorizes the Pennsylvania legislature to draft legislation regarding pre-trial detention, and legislation should be effective on the same date as the amendment. By using New Jersey’s reform action plan and timelines as a template, Pennsylvania can mitigate the risk that the constitutional amendment might increase the likelihood that defendants are detained pre-trial. Furthermore, the proposed legislation must have enthusiastic advocates in the Pennsylvania’s General Assembly, as well as from the bench, to ensure compliance and prevent amendments that could change the legislation’s purpose of decreasing pre-trial detention. While this potential drawback may be the most risky, by using New Jersey as a model, the risk of increasing pre-trial detention and perpetuating the problems of the current system can be mitigated.

IX. CONCLUSION

Understanding the history and purpose of bail in our criminal justice system and Pennsylvania’s current monetary bail system helps provide a foundation to build the reform of Pennsylvania’s bail system.

There are glaring practical problems and injustices associated with Pennsylvania’s current monetary bail system, particularly for the accused. The bail system undermines its own purpose of ensuring appearance in court. Long-term, the bail system has negative impacts on the criminal justice system as a whole. Courts, scholars, empirical data, and the current literature have all revealed and addressed problems associated with a bail system. Themes of this work reveal the importance of protecting liberty and also allowing for monetary bail alternatives, particularly for indigent defendants. The existing literature calls for reform to current bail systems.

Other jurisdictions have implemented bail reforms that promote pre-trial release, community safety, and ensuring appearance. Similar to these jurisdictions, Pennsylvania has taken steps in the
right direction with the implementation of risk-assessment tools in some counties and the General Assembly’s recognition of the importance of implementing risk-assessment tools in all counties. The data in Pennsylvania, however, show that the use of risk-assessment tools alone is insufficient. Therefore, more radical change is necessary.

This article proposes a solution to Pennsylvania’s current bail system that shifts to a non-monetary bail system. Through amending Pennsylvania’s Constitution and enacting concurrent legislation, Pennsylvania can begin to combat the problems associated with the current system. The proposed solution, rooted in logic and justice, appeals to all constituents, regardless of political leaning or position on crime. Finally, the benefits of the reform outweigh any potential drawbacks.

Most importantly, the proposed solution is designed to help people. If this solution is adopted in Pennsylvania, defendants like Mustafa Willis269 may be able to navigate the criminal justice system in a more objective and fair manner.

269. See supra note 1 and accompanying text.
The Federal Circuit’s Standard for Inequitable Conduct: Out of Step with Supreme Court Precedent

Alexandra Gvozdik*

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I. INTRODUCTION

For more than a decade, the United States Supreme Court has shown a strong and growing interest in patent law and, in particular, the standards for reviewing patent law issues promulgated by the United States Court of Appeals for the Federal Circuit. Most of

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the time, the Supreme Court has rejected the Federal Circuit’s tendency to create bright-line tests.¹

One important aspect of patent law is the duty of patent applicants to disclose material information to the United States Patent and Trademark Office (USPTO) during the patent examination process.² The intentional failure to disclose material information or an attempt to mislead the USPTO may result in a party alleging inequitable conduct as a defense to patent infringement if litigation is commenced.³ Inequitable conduct is a Supreme Court-created doctrine based in equity that is available to the parties challenging a patent in litigation.⁴ This defense finds its roots in the unclean hands doctrine, as well as common law fraud.⁵ The defense is often used in patent litigation because it can result in an


² See 37 C.F.R. § 1.56(a) (2012) (Applicable federal regulation requires that “[e]ach individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the . . . [USPTO], which includes a duty to disclose to the . . . [USPTO] all information known to that individual to be material to patentability as defined in this section.”).


⁵ Therasense, 649 F.3d at 1285, 1287. Unclean hands is a common law defense that is based in equity and requires that a party seeking redress in court must come to that court with clean hands. See, e.g., Keystone, 290 U.S. at 244-45. Typically, common law fraud has the following elements: “(1) a representation of a material fact, (2) the falsity of that representation, (3) the intent to deceive or, at least, a state of mind so reckless as to the consequences that it is held to be the equivalent of intent (scienter), (4) a justifiable reliance upon the misrepresentation by the party deceived which induces him to act thereon, and (5) injury to the party deceived as a result of his reliance on the misrepresentation.” Norton v. Curtiss, 433 F.2d 779, 793 (C.C.P.A. 1970).
entire patent, or patent family, being held unenforceable as compared with other defenses that typically result in individual patent claims being held invalid. It can also result in patent misuse and antitrust counterclaims being brought against the party asserting the patent.

Modification of the Therasense standard is appropriate in view of the Supreme Court’s recent guidance in Halo Electronics, Inc. v. Pulse Electronics, Inc., and Octane Fitness, LLC v. ICON Health & Fitness, Inc., in which the Supreme Court rejected other patent related Federal Circuit objective/subjective two prong standards, as well as the guidance provided by eBay Inc. v. MercExchange, L.L.C. Some form of a totality of the circumstances standard should be applied to inequitable conduct that is more akin to the unclean hands doctrine and provides greater flexibility and discretion to district courts in what to consider as well as what remedy to impose. In both Halo Electronics and Octane, the Supreme Court reviewed the Federal Circuit’s two prong bright-line objective/subjective tests and rejected those tests in favor of more holistic tests. The Supreme Court has repeatedly rejected the Federal Circuit’s special patent law standards and has, on numerous occasions, instructed the Court of Appeals to root its tests in the general body of jurisprudence.

In Therasense, the Federal Circuit articulated a much stricter, inflexible, inequitable conduct standard. This standard provides very little discretion to the district court both in what to look at and the remedy to impose. The Therasense inequitable conduct standard is out of step with the recent case law of the Supreme Court. Arguably, the Therasense decision pays, at best, passing homage to

6. Therasense, 649 F.3d at 1288.
7. Id. at 1289.
9. Halo Electronics, 136 S. Ct. at 1932-33, 1935-36; Octane, 572 U.S. at 550, 552-53; see also Lee, supra note 1, at 1424 ("[T]he Supreme Court has consistently embraced holistic standards over formalistic rules. As many commentators have observed, Federal Circuit patent doctrine generally takes the form of bright-line rules. . . . In its recent patent decisions, however, the Supreme Court has consistently rejected formalistic rules in favor of holistic standards.") (footnotes omitted); Linn, supra note 1, at 7 (Federal Circuit Judge Richard Linn stating, "[f]or the Supreme Court, bright-line rules are seldom endorsed.").
10. See supra note 1 and accompanying text.
11. Therasense, 649 F.3d at 1290, 1298.
12. Id.
the fact that the inequitable conduct is a doctrine that is based in the equitable doctrine of unclean hands.  

There is no reason why the inequitable conduct standard could not provide greater flexibility and discretion to district courts in not only what to consider, but also in what remedy to fashion. The Supreme Court has not heard an inequitable conduct case in many years, but given recent Supreme Court patent decisions and the Court’s heightened interest in patent jurisprudence, the time may be ripe for another Federal Circuit standard to fall under the Supreme Court’s gavel. The purpose of this article is to examine whether the standard for inequitable conduct set forth in the Federal Circuit’s en banc decision in Therasense, Inc. v. Becton, Dickinson and Co. should be modified or overruled. Part II of this article introduces the doctrine of inequitable conduct and briefly discusses how the test of inequitable conduct has evolved. Part III reviews some of the cases that the Supreme Court has heard on appeal from the Federal Circuit and why the Federal Circuit’s tests were vacated or overruled. Part IV provides the analysis of why the Federal Circuit’s two elements—one objective and the other subjective—for inequitable conduct may not be the appropriate standard for this defense.

II. INEQUITABLE CONDUCT

A. Inequitable Conduct—Setting the Stage

The defense of inequitable conduct is based on the duty of candor, good faith, and honesty that patent applicants, their assignees, and their attorneys have with respect to what is disclosed to the USPTO. In simple terms, the party applying for a patent must disclose to the USPTO all the material information it is aware of

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14. See discussion infra Section IV.

15. For an in-depth article on Therasense and inequitable conduct as the unclean hands doctrine, see Anenson & Mark, supra note 13, at 1441.

during the patent prosecution process. This duty of candor is typically transgressed when a patent applicant intentionally does not submit a material reference to the USPTO, or makes a false or misleading statement to the USPTO during patent prosecution. In the late 1980s, the USPTO changed its rules such that it would no longer investigate inequitable conduct concerns during patent prosecution, as it was not an appropriate venue for making such findings. Thus, the duty of candor is an important requirement for patent applicants in that there is a strong public interest in protecting the integrity of the patenting process and in preventing the enforcement of a patent that was procured by fraud.

A party that alleges inequitable conduct during litigation must provide clear and convincing evidence of both the materiality of the information and the intent to withhold such material information. If the evidence meets this threshold, then the district court judge must weigh the evidence presented and determine if equities warrant a conclusion of inequitable conduct. The conclusion is at the

17. *Molins*, 48 F.3d at 1179 (“Information is ‘material’ when there is a substantial likelihood that a reasonable [patent] examiner would have considered the information important in deciding whether to allow the application to issue as a patent.”); see also generally DONALD S. CHISUM, 6A CHISUM ON PATENTS §§ 19.03A, 19.03B (2019).
18. *McKesson Info. Sols., Inc. v. Bridge Med., Inc.*, 487 F.3d 897, 913 (Fed. Cir. 2007). Typically, the misconduct takes place before the USPTO, however, a recent Federal Circuit decision has opened up the possibility that the misconduct may include litigation misconduct. *See Regeneron Pharm., Inc. v. Merus N.V.*, 864 F.3d 1343, 1356-57, 1361, 1364 (Fed. Cir. 2017).

[T]he [USPTO examiner] does not investigate and reject original or reissue applications under 37 CFR [§] 1.56. Likewise, the [examiner] will not comment upon duty of disclosure issues which are brought to the attention of the [USPTO] . . . except to note, in appropriate circumstances, that such issues are not considered by the [examiner] during examination of patent applications.

Id. § 2010.
21. Under Federal Rules of Civil Procedure 9(b), inequitable conduct must be plead with particularity. *Fed. R. Civ. P.* 9(b). Rule 9(b) states “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” *Id.; see also Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1326-29 (Fed. Cir. 2009). “[T]he pleading must identify the specific who, what, when, where, and how of the material misrepresentation or omission [was] committed before the PTO.” *Id.* at 1328. Intent may be generally averred, but the pleading must include sufficient allegations of fact that a court may reasonably infer that “a specific individual (1) knew of the withheld material information or of the falsity of the material misrepresentation, and (2) withheld or misrepresented this information with a specific intent to deceive the PTO.” *Id.* at 1328-29; *see also Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1287, 1290 (Fed. Cir. 2011) (en banc) (stating that “[i]ntent and materiality are separate requirements”).
22. *Therasense*, 649 F.3d at 1287. Materiality and intent are factual issues reviewed on appeal under the clearly erroneous standard. *See JP Stevens & Co., Inc. v. Lex Tex Ltd.*,
sole discretion of the judge, and it is reviewed on appeal under an abuse of discretion standard.\textsuperscript{23}

Inequitable conduct is a well-discussed topic in patent literature and the available materials on the subject are vast.\textsuperscript{24} Since 1982, the Federal Circuit has several times modified the metes and bounds of the inequitable standard, but has always maintained it as a two-prong test based on materiality of the information and intent of the patent applicant.\textsuperscript{25} The Federal Circuit for several decades has been concerned about the proliferation of inequitable conduct claims in patent litigation.\textsuperscript{26} At various times the court has called it the “atomic bomb” of patent litigation and a “plague” on the patent system.\textsuperscript{27} In 1988, the Federal Circuit attempted to address the far too common practice of alleging inequitable conduct in patent litigations in \textit{Kingsdown Medical Consultants, Ltd. v. Hollister Inc.}\textsuperscript{28} In \textit{Kingsdown}, the Federal Circuit held that more than gross negligence was needed in order to show intent to deceive and articulated a “sufficient culpability” standard for the intent prong of inequitable conduct.\textsuperscript{29} However, over the next several years, Federal Circuit decisions backed away from the “sufficient culpability” standard and eventually went back to a negligence or “should have known” standard.\textsuperscript{30} To date, the Federal Circuit’s efforts, as reflected in its decisions, to curtail inequitable conduct allegations in patent litigation have had little impact.\textsuperscript{31} The ebb and flow of the wording around the two-prong test before \textit{Therasense} need not be
addressed in great detail because our focus is on the present *Therasense* standard.\textsuperscript{32}

**B. Inequitable Conduct and the Federal Circuit’s Current Standard**

At present, to establish the defense of inequitable conduct a party attacking a patent must show that when the patent application was pending before the USPTO, or before the patent was issued, the applicant: (1) withheld or misrepresented material information to the USPTO (objective element), and (2) did so with the intent to deceive the USPTO (subjective element).\textsuperscript{33} “[T]he materiality required to establish inequitable conduct is but-for materiality,” which means that if the USPTO had been aware of the information withheld or misrepresented, then the USPTO would not have allowed the patent application.\textsuperscript{34} With respect to the intent element, the finder of fact must find that the party asserting the defense has proven by “clear and convincing evidence that the applicant knew of the [material information], knew that it was material, and made a deliberate decision to withhold it.”\textsuperscript{35} In addition, *Therasense* recognized an exception to the but-for materiality prong in cases of “affirmative egregious misconduct,” such as false affidavits, submitting false evidence, perjury, suppression of evidence, and bribery.\textsuperscript{36}

**III. THE FEDERAL CIRCUIT AND ITS RELATIONSHIP WITH THE SUPREME COURT**

**A. The Troubled Relationship**

For more than a decade, the Supreme Court has shown a strong and growing interest in patent law issues and, in particular, the patent law standards of the Federal Circuit.\textsuperscript{37} Most of the time, the Supreme Court has rejected the Federal Circuit’s tendency to create

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32. Excellent summaries of the history to the ebb and flow of the two-prong inequitable conduct test are provided in the literature. See id. at 376-80; Eric E. Johnson, *The Case for Eliminating Patent Law’s Inequitable Conduct Defense*, 117 COLUM. L. REV. ONLINE 1, 7-12 (2017).


34. *Id.* at 1291.

35. *Id.* at 1290.

36. *Id.* at 1292-93.

37. See, e.g., Lee, *supra* note 1, at 1421-25 (discussing the Supreme Court’s negative treatment of Federal Circuit patent law decisions); Seidenberg, *supra* note 1 (discussing the same).
bright-line patent law tests in favor of application of more general law-based tests.\textsuperscript{38}

Congress created the Federal Circuit with the passage of the Federal Courts Improvement Act of 1982, which merged the United States Court of Customs and Patent Appeals and the appellate division of the United States Court of Claims.\textsuperscript{39} The Federal Circuit has almost exclusive national jurisdiction over patent law-based issues that are appealed.\textsuperscript{40} Prior to 2005, the Supreme Court pretty much left the decisions of the Federal Circuit stand and did not review many decisions of this appeals court.\textsuperscript{41} However, in 2005, the Supreme Court’s deference changed. Since 2005, the Supreme Court has reviewed over twenty-seven patent cases and in most of them have reversed the Federal Circuit.\textsuperscript{42} The Federal Circuit has replaced the Ninth Circuit as the most reversed circuit court in the United States.\textsuperscript{43} For example, in 2017 alone, the Supreme Court rejected the Federal Circuit’s precedent on venue, laches, and patent exhaustion.\textsuperscript{44} Some of these Federal Circuit standards of review had been part of the body of case law for decades.\textsuperscript{45} The totality of the Supreme Court decisions reversing or vacating Federal Circuit decisions, and the analysis of those decisions are beyond the scope of this article.\textsuperscript{46} However, an earlier Supreme Court decision

\begin{itemize}
\item \textsuperscript{38} See, e.g., Lee, supra note 1, at 1417, 1424-25; Linn, supra note 1, at 7 (Federal Circuit Judge Linn noting that “the Supreme Court . . . and not the Federal Circuit, has the final say . . . in patent decisions”); Seidenberg, supra note 1.
\item \textsuperscript{40} 28 U.S.C. § 1295(a)(1) (2012).
\item \textsuperscript{41} Peter Lee, Patent Law and Two Cultures, 120 YALE L.J. 2, 42 (2010); Seidenberg, supra note 1.
\item \textsuperscript{42} Seidenberg, supra note 1; see also Gugliuzza, supra note 39, at 1802; Lee, supra note 41, at 27-28, 46-47 (comparing the Supreme Court decisions that favor “holistic” standards over formalistic rules as favored by the Federal Circuit in various areas of patent law); O’Malley, supra note 1.
\item \textsuperscript{43} Seidenberg, supra note 1.
\item \textsuperscript{45} See Davis, supra note 44.
\end{itemize}
provides insight into how the Supreme Court might view and articulate a standard for inequitable conduct.

B. eBay Inc. is Instructive in Setting Patent Law Tests

In 2006, the Supreme Court in eBay Inc. vacated the Federal Circuit’s standard for granting permanent injunctions in patent infringement cases. Before eBay Inc., under the Federal Circuit case law, district courts routinely granted a permanent injunction when a patent holder prevailed in a patent infringement suit, absent some exceptional circumstances. The Supreme Court rejected this test and held that like other litigants seeking the equitable relief of a permanent injunction, the patentee must meet a four-prong test. Justice Thomas, writing for the unanimous Court in a short opinion, stated that the party asserting the patent must show: (1) that they have suffered irreparable injury; (2) that money damages are not adequate to compensate for that injury; (3) that, balancing the hardships between the patentee and the infringer, a remedy in equity is warranted; and (4) that the public interest would not be harmed by granting a permanent injunction. In admonishing the Federal Circuit, the Supreme Court held “that the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exer-


48. See MercExchange, L.L.C. v. eBay, Inc., 401 F.3d 1323, 1338-39 (Fed. Cir. 2005) (“Because the ‘right to exclude recognized in a patent is but the essence of the concept of property,’ the general rule is that a permanent injunction will issue once infringement and validity have been adjudged.”); see also W.L. Gore & Assocs. v. Garlock, Inc., 842 F.2d 1275, 1281 (Fed. Cir. 1988) (“This court has indicated that an injunction should issue once infringement has been established unless there is a sufficient reason for denying it.”).

49. eBay, Inc., 547 U.S. at 391.

50. Id.
cised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards.” 51 The Supreme Court also stated that a major departure from these long standing principles of equity is not to be undertaken lightly. 52

It is worth pointing out that the tradition of routinely granting permanent injunctions in patent cases had been in existence for decades and that the Federal Circuit was, in its defense, only carrying on that tradition. 53 However, the Supreme Court rejected this rigid test. 54 The Supreme Court may be read as conveying a message to the Federal Circuit. Patent law and patent law standards are not to be treated as exceptions to the general body of jurisprudence including the principles of law and equity enshrined in that general body of case law. 55

51. Id. at 394.
52. Id. at 391-92. By citing to and relying on 35 U.S.C. § 283 (1952), the Supreme Court also noted that nothing in the Patent Act of 1952 indicated that Congress did not intend such a departure. Id.
54. eBay Inc., 547 U.S. at 393-94. Two other examples of the earlier Supreme Court decisions rejecting the Federal Circuit’s tendency to adopt rigid patent standards are: KSR Intern. Co. v. Teleflex Inc., 550 U.S. 398 (2007) and Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722 (2002). In KSR, the Supreme Court, in a unanimous decision, rejected the Federal Circuit’s test for determining obviousness, which instructed that for a patent claim to be obvious, there should be some teaching, suggestion, or motivation to combine prior art to come up with the claimed inventions. 550 U.S. at 415-16. The Supreme Court rejected the Federal Circuit’s rigid approach to obviousness. Id. The Supreme Court noted that a more flexible approach was preferred and other factors other than a motivation to combine prior art may exist, such as “background knowledge possessed by a person having ordinary skill in the art” and “inferences and creative steps a person of ordinary skill in the art would employ.” Id. at 401. In Festo, the Supreme Court, in a unanimous decision, rejected the Federal Circuit’s en banc test for infringement under the doctrine of equivalents as too rigid. 555 U.S. at 739-41. The Federal Circuit held that no range of equivalents existed when a patentee narrowed a claim limitation during prosecution. Id. at 727-28. The Supreme Court held that infringement under the doctrine of equivalents may be available to claim limitations narrowed during patent prosecution if the equivalent at issue meets one of the three tests: unforeseeable, “no more than a tangential relation to the equivalent in question” and “amendment cannot reasonably be viewed as surrendering a particular equivalent.” Id. at 725, 738-41.
55. See Lee, supra note 1, at 1438-39; O’Malley, supra note 1, at 10 (Federal Circuit Judge O’Malley stated in a paper based on a lecture that “the Supreme Court has been telling the Federal Circuit that, as an Article III court, it is bound by the same civil rules, jurisdictional standards, and common law principles that govern all Article III courts -- in other words, that patent litigation must be treated like all other litigation.”).
IV. **Therasense—Inequitable Conduct Standard: Revisit, Revise, or Overrule?**

A. **Therasense and What is Wrong**

Under Therasense, inequitable conduct requires a showing that the patent applicant: (1) withheld or misrepresented “material” information to the USPTO (objective element), and (2) did so with the “intent” to deceive the USPTO (subjective element). Clear and convincing evidence is needed for both prongs of this test, and there is no sliding scale, as had been previously permitted. In other words, the accused infringer must prove by clear and convincing evidence that the applicant knew of the reference, knew that it was material, and made a deliberate decision to withhold it. The same would hold for misleading or false information. The majority stated that it was tightening “the standards for finding both intent and materiality in order to redirect a doctrine that has been over-used to the detriment of the public.”

The Federal Circuit should reconsider its inequitable conduct standard articulated in Therasense and apply the Supreme Court’s reasoning and analysis set out for fee shifting in exceptional cases under 35 U.S.C. § 285 (2012), and for increasing patent damages under 35 U.S.C. § 284 (2012). In addition, the Federal Circuit should take into account the Supreme Court’s guidance provided in eBay Inc., namely, that bright-line patent standards are not favored in application of equitable doctrines and treatment of such patent law issues should follow well-established principles of equity found in the general body of case law. If the Federal Circuit is not willing to reexamine its inequitable conduct standard, then the Supreme Court should consider granting certiorari in an appropriate.

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57. Id. at 1288. In the 1980s, the Federal Circuit placed “intent” and “materiality” on a “sliding scale,” so if there was a strong showing of intent coupled with a weak showing of materiality (or vice versa), inequitable conduct could be established. See Am. Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350, 1362 (Fed. Cir. 1984).
58. Therasense, 649 F.3d at 1290. The Federal Circuit also made it clear that “in assessing the materiality of a withheld reference, the court must determine whether the PTO would have allowed the claim if it had been aware of the undisclosed reference.” Id. at 1291.
59. Id. at 1290; see also supra Sections II.A & B. Thirty-four amicus curiae briefs were filed in the Therasense appeal. See Joy Lynn Bala, Amicus Briefs: Sounding Off on Reforming Inequitable Conduct, 45 Loy. L.A. L. Rev. 125, 143 (2011). There is little doubt that virtually the entire patent bar had a strong interest in what the Federal Circuit would do with inequitable conduct and still does today.
case and overruling or modifying the Federal Circuit’s present inequitable conduct standard because this standard is arguably not consistent with the Supreme Court’s current case law on such equitable and discretionary doctrines. The courts should determine inequitable conduct in patent cases under some form of a totality of the circumstances standard. In addition, the standard should provide more deference to the district court’s findings and conclusions, as well as provide the district court with more flexibility in what is and is not inequitable conduct. I do not advocate for or suggest that establishing inequitable conduct should be made easier, but rather the contrary, in that I propose the standard should be more akin to the unclean hands doctrine.

B. Octane Fitness, LLC v. ICON Health & Fitness, Inc. Provides Guidance

The Supreme Court has often chastised the Federal Circuit for its overuse of formulaic rigid standards on a range of patent law issues. In Octane, the Supreme Court unanimously overruled the

63. It is worth noting that the Supreme Court denied petitions for certiorari in 2013 and 2015. See Apotex Inc. v. UCB, Inc., 763 F.3d 1354 (Fed. Cir. 2014), cert. denied, 135 S. Ct. 2868 (June 22, 2015) (No. 14-1304). In its petition, Apotex argued that its “case is a perfect example of how inequitable conduct has strayed from this Court’s precedents—and how much this Court’s guidance is needed after the 70-plus years since it last addressed the precursor to that doctrine.” Brief for Petitioner at 32, Apotex Inc. v. UCB, Inc., 2015 WL 1951862 (2015) (No. 14-1304). However, the questions presented were narrow in scope and did not challenge the Federal Circuit’s standard for inequitable conduct. In Sony, the petition was much broader and argued some of the points raised in this article. Brief for Petitioner, Sony Comput. Ent., Inc. v. 1st Media, LLC, 2013 WL 859981 (2013) (No. 12-1086). The petition was denied. 1st Media, LLC v. Sony Comput. Ent., Inc., 694 F.3d 1367 (Fed. Cir. 2012), cert. denied, 134 S. Ct. 1144 (Oct. 15, 2013) (No. 12-1086).

64. See, e.g., Anenson & Mark, supra note 13, at 1444 (“The Therasense majority’s rejection of the history of inequitable conduct contravenes the last word of the Supreme Court on the defense in patent law, contradicts its more recent precedent on patent remedies, and departs from the Court’s equitable defense jurisprudence in other statutory contexts.”).

65. See, e.g., eBay Inc., 547 U.S. at 391 (“According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. . . . The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion. These familiar principles apply with equal force to disputes arising under the Patent Act.”) (internal citations omitted). See also SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954 (2017). In SCA Hygiene, the Supreme Court ruled that laches defense is not available as a defense to damages for patent infringements that take place within the six-year limit of 35 U.S.C. § 286. Id. at 967. The 2017 SCA Hygiene decision is another decision in a line of cases, including Octane and Halo Electronics, where the Supreme Court affirmed that “[p]atent law is governed by the same common-law principles, methods of statutory interpretation, and procedural rules as other areas of civil litigation.” Id. at 964 (quoting Judge Hughes’ concurring-in-part and dissenting-in-part opinion in SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC, 807 F.3d 1311, 1333 (Fed. Cir. 2015)).
Federal Circuit’s standard for awarding attorney fees to a prevailing party in a patent case where the case had been found exceptional under 35 U.S.C. § 285. Section 285 of the patent statutes states that “[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party.” The Federal Circuit’s test for determining if fee shifting was appropriate under 35 U.S.C. § 285 was first articulated in Brooks Furniture Manufacturing v. Dutailer International Inc.

In Brooks, the Federal Circuit stated that under 35 U.S.C. § 285, “[a] case may be deemed exceptional when there has been some material inappropriate conduct related to the matter in litigation, such as willful infringement, fraud or inequitable conduct in procuring the patent, misconduct during litigation, vexatious or unjustified litigation, conduct that violates [Federal Rule of Civil Procedure] 11, or like infractions.” The Court of Appeals further observed, “absent misconduct in conduct of the litigation or in securing the patent,” fees under 35 U.S.C. § 285 “may be imposed against the patentee only if both (1) the litigation is brought in subjective bad faith, and (2) the litigation is objectively baseless.” In other words, the Federal Circuit applies a “misconduct” standard. If that standard not met, then the court applies a two-part test: the first part is subjective, and the second part is objective. Several years later, in iLOR, LLC v. Google, Inc., the Federal Circuit further elaborated on the Brooks Furniture standard. “[T]he plaintiff’s case must have no objective foundation, and the plaintiff must actually know this. Both the objective and subjective prongs of Brooks Furniture ‘must be established by clear and convincing evidence.’”

68. Brooks Furniture Mfg. v. Dutailer Int’l, Inc., 393 F.3d 1378 (Fed. Cir. 2005). Under 35 U.S.C. § 285, the award of attorney fees is reviewed for abuse of discretion. See Superior Fireplace Co. v. Majestic Prods. Co., 270 F.3d 1358, 1376 (Fed. Cir. 2001); Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448, 1460 (Fed. Cir. 1998) (en banc) (“A district court abuses its discretion when its decision is based on clearly erroneous findings of fact, is based on erroneous interpretations of the law, or is clearly unreasonable, arbitrary[,] or fanciful.”).
69. Brooks Furniture, 393 F.3d at 1381.
70. Id.
71. Id.
72. Id.
73. iLOR, LLC v. Google, Inc., 631 F.3d 1372, 1378 (Fed. Cir. 2011).
74. Id. at 1377 (quoting Wedgetail Ltd. v. Huddleston Deluxe, Inc., 576 F.3d 1302, 1304 (Fed. Cir. 2009)).
In *Octane*, the Supreme Court rejected the Federal Circuit’s *Brooks Furniture* standard as being “unduly rigid” in that “it im-
permissibly encumbers the statutory grant of discretion to district
courts.” The Supreme Court held that an exceptional case is
“simply one that stands out from others with respect to the substan-
tive strength of a party’s litigating position . . . or the unreasonable
manner in which the case was litigated.” The Court additionally
gave much greater deference to the district court and instructed the
district court to consider 35 U.S.C. § 285 assertions on a “case-by-
case” basis in light of “the totality of the circumstances.”

The Supreme Court further criticizes the Federal Circuit in *Oc-
tane* as imposing “an inflexible framework onto statutory text that
is inherently flexible.” The Supreme Court noted that before
*Brooks Furniture* the Federal Circuit had been following the totality
of the circumstances standard under 35 U.S.C. § 285, but that it
abandoned this “holistic, equitable approach in favor of a more rigid
and mechanical formulation.” The Supreme Court also rejected
clear and convincing evidence as the evidentiary standard for pa-
ten litigants establishing entitlement fees. “Section 285 demands
a simple discretionary inquiry; it imposes no specific evidentiary
burden, much less such a high one. Indeed, patent-infringement
litigation has always been governed by a preponderance of the evi-
dence standard.”

**C. Halo Electronics, Inc. v. Pulse Electronics, Inc. Provides Fur-
ther Guidance**

In *Halo Electronics*, the Supreme Court built on the equitable,
flexible case-by-case approach articulated in *Octane*. Under 35
U.S.C. § 284, in a case involving patent infringement, the court
“may increase the damages up to three times the amount found or
assessed.” However, under the Federal Circuit’s two-part test in

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76. *Id.* at 554.
77. *Id.*
78. *Id.* at 555.
79. *Id.* at 550.
80. *Id.* at 557.
81. *Id.*
83. 35 U.S.C. § 284 (2012). Section 284 states:
Upon finding for the claimant the court shall award the claimant damages ade-
quate to compensate for the infringement, but in no event less than a reasonable
royalty for the use made of the invention by the infringer, together with interest
and costs as fixed by the court. When the damages are not found by a jury, the
court shall assess them. *In either event the court may increase the damages up*
In re Seagate Tech, LLC, damages may be increased under 35 U.S.C. § 284 only if the patent owner can show by clear and convincing evidence both that “the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent” and that the risk of infringement “was either known or so obvious that it should have been known to the accused infringer.” Only after both prongs of the test have been satisfied is the district court allowed to proceed with determining if it should exercise its discretion and enhance damages. Under this Federal Circuit standard, the objective recklessness is reviewed de novo; the second part, “subjective knowledge,” is reviewed for substantial evidence. A decision to award enhanced damages is reviewed under an abuse of discretion standard.

Upon review, the Supreme Court, in a unanimous decision, determined that the Seagate test was “unduly rigid, and it impermissibly encumbers the statutory grant of discretion to district courts.” The Supreme Court concluded that such a test “can have the effect of insulating some of the worst patent infringers from any liability for enhanced damages.” The Supreme Court held that a district court under 35 U.S.C. § 284 has the discretion to award enhanced damages against patent infringers but only in those “egregious” cases where the infringer’s misconduct goes beyond typical infringement. For example, the infringer is guilty of willful misconduct or some other appropriate bad act.

D. The Conflict between Therasense and Supreme Court Precedent

Since its inception, the Federal Circuit has struggled with articulating the appropriate standard for finding inequitable conduct in a patent case. Inequitable conduct is, at its heart, an equitable

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to three times the amount found or assessed. Increased damages under this paragraph shall not apply to provisional rights under section 154(d).

Id. (emphasis added).
84. In re Seagate Tech., LLC, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc).
86. Id.
87. Id.
88. Id. at 1932 (quoting Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 551 (2014)).
89. Id.
90. Id. at 1935.
91. Id. Additionally, in Halo Elecs., 136 S. Ct. at 1935-36, the Supreme Court also vacated and remanded a companion appeal, Stryker Corp. v. Zimmer, Inc., 782 F.3d 649 (Fed. Cir. 2015), under the same reasoning applied in Halo Electronics.
92. See supra Section II.A and the discussion reviewing the inequitable conduct standard and its ebbs and flows over time.
doctrine based on a patentee having unclean hands and not meeting the duty of disclosure before the USPTO, during the prosecution of the patent, or committing some other bad act. The words "inequitable conduct" do not appear in the Patent Act of 1952. This defense originated in large part because of the Court of Customs and Patent Appeals' decision in Norton v. Curtiss.

The majority in Therasense explained that inequitable conduct has evolved from three Supreme Court cases that applied unclean hands in patent contexts that involved egregious conduct. Chief Judge Rader, the author of the Therasense opinion, goes on to explain that inequitable conduct had evolved to encompass a much "broader scope of misconduct ... diverged from the doctrine of unclean hands." According to Chief Judge Rader, it evolved to include "the mere nondisclosure of information to the PTO ... [and] diverged from the doctrine of unclean hands by adopting a different and more potent remedy—unenforceability of the entire patent rather than mere dismissal of the instant suit." It is not entirely clear if Chief Judge Rader is providing rationale to support the test articulated in Therasense or just explaining the evolution of the inequitable conduct test. Either way, the Court of Appeals' reasoning still misses the point. First, this rationale is characterizing patent law issues as in need of special rules and tests, which is exactly what the Supreme Court has strongly discouraged.

Second, there is no reason why inequitable conduct has to result in the remedy of the entire patent being held unenforceable.

93. 35 U.S.C. § 282(b)(1) (2012) states that unenforceability (unclean hands) is a defense to patent infringement, however, the statute does not indicate a remedy. See also Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276, 1299 n.5 (Fed. Cir. 2011) (en banc) (discussing that unenforceability in § 282(b)(1) is a codification of the equitable defense of unclean hands); Consol. Aluminum Corp. v. Foseco Int'l, Ltd., 910 F.2d 804, 812 (Fed. Cir. 1990) ("Indeed, what we have termed 'inequitable conduct' is no more than the unclean hands doctrine applied to particular conduct before the PTO."); Robert D. Swanson, The Exergen and Therasense Effects, 66 STAN. L. REV. 695, 698-700 (2014).


96. See Therasense, 649 F.3d at 1287.

97. Id.; JP Stevens, 747 F.2d at 1559.

98. Therasense, 649 F.3d at 1287.


100. In 2011, Congress passed the Leahy-Smith America Inventors Act, resulting in substantial changes to Title 35 dealing with patent law. Leahy-Smith America Inventors Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (to be codified in scattered sections of 35 U.S.C.). Congress added a supplemental examination procedure that may provide a process for patent owner to cure inequitable conduct. 35 U.S.C. § 257(a) (2012) ("A patent owner may request
There is nothing inherent in this equitable defense that dictates such a complete bar. This “atomic bomb” or binary remedy removes a great deal of discretion from the district court. Other lesser remedies could be provided for inequitable conduct and could be within the sound discretion of the district court. The Supreme Court does not favor removing discretion in standards based in equitable doctrines.

Third, the intentional withholding of material information or misleading the USPTO is at the heart of the unclean hands doctrine. However, each situation should be looked at in the context of what occurred at the USPTO and the district court should have discretion as to how to deal with the withheld information. The fact that some cases may be worse than other does not change the nature of this improper act but may alter how the court addresses such an act. A totality of the circumstances standard is appropriate when there is no single deciding factor and the court should weigh a number of factors in making a determination on a case-by-case basis.

supplemental examination of a patent in the [USPTO] to consider, reconsider, or correct information believed to be relevant to the patent, in accordance with such requirements as the Director may establish."). See also Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 (1979) (stating that under general principles of equity the “remedy imposed by a court of equity should be commensurate with the violation ascertained.”); Therasense, 649 F.3d at 1299 (O’Malley, J., concurring in part and dissenting in part) (“While we have held previously that a finding of inequitable conduct renders unenforceable all claims of the wrongly procured patent and, in certain circumstances, related patents, this singular remedy is neither compelled by statute, nor consistent with the equitable nature of the doctrine.”); Star Scientific, Inc. v. RJ Reynolds Tobacco Co., 537 F.3d 1357, 1366 (Fed. Cir. 2008) (Chief Judge Michel noting that “[j]ust as it is inequitable to permit a patentee who obtained his patent through deliberate misrepresentations or omissions of material information to enforce the patent against others, it is also inequitable to strike down an entire patent where the patentee only committed minor missteps or acted with minimal culpability or in good faith”).


102. Chief Judge Rader of the Court of Appeals explained in some detail that inequitable conduct on the part of a patentee produces draconian results for the patent holder, especially in comparison to patent invalidity. See Therasense, 649 F.3d at 1288-89; see also supra Section II. A successful invalidity defense will typically be directed at certain claims in an issued patent but may not affect the entire patent. Therasense, 649 F.3d at 1288. In contrast, a finding of inequitable conduct on the part of the patentee will result in the entire patent being held unenforceable due to the unclean hands that underlies this doctrine. Id. Furthermore, a holding of unenforceability on a particular patent may infect and render unenforceable other patents in the chain, as well as other patents in the portfolio. Id. This is not the case with invalidity. Furthermore, once a patent is held unenforceable, this may often lead to viable antitrust and other related claims. Id. at 1289. Such antitrust claims will significantly increase the cost of the litigation. Id. They can also increase the potential for enhanced damages being awarded against the patent holder. Id.

103. See supra note 100 and accompanying text.


105. See supra note 91 and accompanying text.
A district court should be able to consider more than materiality and intent in its analysis in making an inequitable conduct determination. By applying a totality of the circumstances standard, it would give the district court greater latitude in examining the conduct of the patent holder before the USPTO. This is exactly what equitable doctrines are meant to be used for in our jurisprudence. The reasoning in *Octane* is applicable to the standard for inequitable conduct and it should be used in the inequitable conduct context.

The majority in *Therasense* also discusses in great detail that its most recent iteration of the inequitable conduct standard is based on a policy goal of curtailing the proliferation of such claims in litigation. Again, the Supreme Court has cautioned about the use of policy to alter legal tests based in equity. As with *Octane* and *Halo Electronics*, the Federal Circuit majority in *Therasense* has developed a highly restrictive standard based on public policy issues. This may be a laudable policy goal, but patent law standards based in equity that are too restrictive potentially run afoul of the Supreme Court’s treatment of such equity issues. This is exactly what happened to Federal Circuit decisions in *Octane*, *Halo Electronics* and *eBay Inc.*

Inequitable conduct is present in patent jurisprudence in order to ensure that patent applicants that come before the USPTO do so

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107. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 545 (2014) (“An ‘exceptional’ case is simply one that stands out from others . . . . District courts may determine whether a case is ‘exceptional’ in the case-by-case exercise of their discretion, considering the totality of the circumstances. As in the comparable context of the Copyright Act, ‘[t]here is no precise rule or formula for making these determinations,’ but instead equitable discretion should be exercised ‘in light of the considerations we have identified.’”) (footnote omitted) (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994)).

108. *See Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1285, 1289-90 (Fed. Cir. 2011) (en banc); *see also supra* Section II.

109. *See, e.g.*, *eBay Inc.*, 547 U.S. at 394.

110. *Therasense*, 649 F.3d at 1289. In *Therasense*, six of the participating Federal Circuit judges join the majority opinion of then Chief Justice Rader. *Id.* Judge O’Malley concurred in part and dissented in part. *Id.* Four judges dissented. *Id.* at 1282.

111. *See Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932 (2016) (Federal Circuit’s standard for enhancing damages is unduly rigid and hinders the district court’s discretion); *Octane*, 572 U.S. at 553 (the Federal Circuit’s test for awarding fees in an exceptional case is inflexible and does not provide enough deference to the lower court); *eBay Inc.*, 547 U.S. at 394 (a rigid rule of granting a permanent injunction in patent cases eliminates the district court’s right to exercise its equitable discretion).
with clean hands. Therasense is unduly narrow, restrictive, and removes too much discretion from the district court to judge the conduct of the parties. The district court is often in the best position to decide such issues and should be provided with greater flexibility. The district court hears witnesses, makes credibility determinations, and is much closer to the facts being litigated than an appeals court.

Judge O’Malley’s separate opinion, concurring in part and dissenting in part, provides instructive guidance and a roadmap to the potential problems and pitfalls with the majority’s opinion in Therasense. In her opinion, Judge O’Malley noted that “[t]he essence of equity jurisdiction [is] the power . . . to do equity and to mould each decree to the necessities of the particular case.” Judge O’Malley goes on to state that the majority cites no authority “for the proposition that inequitable conduct is somehow independent of the unclean hands principles the Supreme Court described and explained in its trilogy of cases.” In addition, the standard adopted by the majority “delimit[s] and narrow[s] the contours of the unclean hands doctrine when applied to the application process before the PTO” and does provide the district court with little flexibility in judging inequitable conduct. In short, Judge O’Malley argued that Therasense goes too far because it removes too much discretion.


113. See Anderson v. City of Bessemer, 470 U.S. 564, 565 (1985) (“If the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.”).

114. Therasense, 649 F.3d at 1296-1302 (O’Malley, J., concurring in part and dissenting in part).

115. Id. at 1297 (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982)). See also Holmberg v. Armbrrecht, 327 U.S. 392, 396 (1946) (“Equity eschews mechanical rules; it depends on flexibility.”).

116. Therasense, 649 F.3d at 1298; see also Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 818-20 (1945) (The assignee prosecuted the patent application before the USPTO knowing that the inventor had lied about the date of invention and deliberately kept this fact secret until after the patent was issued); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 240-41 (1944), overruled on other grounds by Standard Oil Co. v. United States, 429 U.S. 17 (1976) (The USPTO, to the public’s determent, issued a patent based on manufactured evidence); Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 243 (1933) (the patent applicant intentionally suppressed evidence of an invalidating prior use including paying a witness to keep the details of the prior use secret).

117. Therasense, 649 F.3d at 1298.
and flexibility from the district court and narrows the scope of the unclean hands doctrine pronounced by the Supreme Court in its trilogy of cases.\footnote{118}

This reasoning and analysis are mirrored in the Octane, Halo Electronics, and eBay Inc. Supreme Court opinions, as well as general principles of equity. Equity doctrines are typically not formulated as rigid standards.\footnote{119} Nor are they typically all or nothing doctrines as is the case with the current standard for inequitable conduct. Such doctrines are rooted in flexibility and discretion and permit courts to review the issue at hand on a case-by-case basis and this discretion should not be lightly departed from.\footnote{120} As may be expected, the Supreme Court has not set forth a precise standard for application of the unclean hands doctrine. However, the Supreme Court’s statement in Keystone that “[t]he equitable powers of [the] court can never be exerted in behalf of [one] who has acted fraudulently, or who by deceit or any unfair means has gained an advantage” provides reasonable guidance as to how to approach this equitable doctrine.\footnote{121} This guidance instructs against the Federal Circuit’s all or nothing rigid approach to inequitable conduct.

The Supreme Court’s elucidation of the unclean hands doctrine provides a rich basis for a challenge to the Therasense standard.\footnote{122} The Federal Circuit has arguably gone beyond the guidance provided by the Supreme Court.\footnote{123} There are valid policy concerns raised by the majority in Therasense. However, policy does not provide a basis for the Federal Circuit to arguably circumvent Supreme Court's guidance.

\footnote{118. See supra notes 115-16.}
\footnote{119. See, e.g., eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391-92 (2006) (stating that equity “principles apply with equal force to disputes arising under the Patent Act. As this Court has long recognized, a major departure from the long tradition of equity practice should not be lightly implied”); Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 386-87 (1970) (“In selecting a remedy the lower courts should exercise the sound discretion which guides the determinations of courts of equity, keeping in mind the role of equity as ‘the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.’”); Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944) (discussing that “[t]he historic injunctive process was designed to deter, not to punish . . . and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.”).}
\footnote{120. Keystone, 290 U.S. at 245.}
\footnote{121. Id.}
\footnote{122. See Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1932 (2016) (same sentiment about deference and quotes Octane); Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 553 (2014) (Federal Circuit test inflexible and not enough deference to lower court); eBay Inc., 547 U.S. at 391-92 (rejecting inflexible standard for injunctions).}
Court precedent. The Federal Circuit should reconsider its standard on inequitable conduct and modify the inequitable conduct test to some test or standard that is more akin to unclean hands. A test based more closely on the unclean hands doctrine could both be flexible and provide district courts with a great deal of discretion as to what facts to look at, and also at the same time, set a high bar for a lower court to determine inequitable conduct. Such a test would certainly include “intent” and “materiality” elements, but would also allow the district court to look on a case-by-case basis at whatever other factors the district court thinks are important to decide if the duty of disclosure has been intentionally circumvented. In short, the lower courts should have greater discretion as to what it considers in inequitable conduct claims, but it should be made clear that the patentee must have acted in a manner that shows unclean hands before the lower court can exercise its discretion.

If the Federal Circuit is not willing to reexamine its standard, then the Supreme Court should consider providing guidance as to what the standard should be for a review of inequitable conduct. It has been around seventy years since the Supreme Court has last visited unclean hands or inequitable conduct in a patent context. As case law develops under Therasense in lower courts and inequitable conduct defenses continue to be a too common occurrence in patent litigation, the Supreme Court, or the Federal Circuit, may be provided with an incentive to revisit this important patent doctrine.

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124. Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276, 1301-02 (Fed. Cir. 2011) (en banc) (O’Malley, J., concurring in part and dissenting in part) (“Policy concerns cannot, however, justify adopting broad legal standards that diverge from doctrines explicated by the Supreme Court. A desire to provide immutable guidance to lower courts and parties similarly is not sufficient to justify the court’s attempt to corral an equitable doctrine with neat tests.”).

125. See, e.g., Anenson & Mark, supra note 13, at 1452-53 (“Since its inception in 1982, the Federal Circuit has paid little attention to the doctrine’s equitable tradition. Hence, while Supreme Court equity jurisprudence still uses tradition as a principle to interpret equitable remedies and defenses, the equitable basis for inequitable conduct has been lost in translation.”) (footnotes omitted).

126. See, e.g., Keystone, 290 U.S. at 245-46 (discussing application of the unclean hands maxim and stating that a court is “not bound by formula or restrained by any limitation” that limits the court’s discretion); see also Anenson & Mark, supra note 13, at 1458-61 (stating that unclean hands is not a rigid formula).

V. CONCLUSION

Over the years, the Federal Circuit has modified the standard for determining inequitable conduct several times. To date, none of these modifications, including *Therasense*, have been particularly effective for reducing allegations of inequitable conduct in patent litigation. The Federal Circuit should reconsider its inequitable conduct standard and should develop a standard that is more consistent with the unclean hands principles set out in Supreme Court case law. If the Federal Circuit is not willing to reexamine its inequitable conduct standard, then the Supreme Court should consider granting certiorari in an appropriate case and provide guidance on how lower courts should determine inequitable conduct. Some form, or a hybrid, of a totality of the circumstances standard that gives greater deference and flexibility to the district court’s findings and conclusions is a reasonable starting point.