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Sane Gun Policy From Texas? A Blueprint For Balanced State Campus Carry Laws

*By Aric Short**

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American universities are caught in the crosshairs of one of the most polarizing and contentious gun policy debates: whether to allow concealed carry on campus. Ten states have implemented "campus carry" in some form. Sixteen new states considered passage in 2017, and a growing wave of momentum is building in favor of additional adoptions. Despite this push towards campus carry, most states adopting the policy fail to strike an effective balance between the competing rights and interests involved. When states give universities the option to opt out of the law, for example, they almost always do. Other states impose a rigid campus carry framework on universities, denying them the ability to customize implementation. The recent Texas campus carry law, in contrast, carves out a unique and effective middle ground: it requires public universities to allow concealed handguns on campus, but it empowers each university to adopt meaningful firearms policies, including the identification of campus-specific gun-free zones, based on that school's unique operations and safety concerns.

This article explores the Texas law as a model for other states considering campus carry. First, as context, the Article examines recent data on campus crime and the impact of liberalized gun laws on crime rates. Notwithstanding the safety arguments of gun-rights advocates, studies within the past year have proven that a proliferation of guns results in increased crime rates. Second, this article surveys the other nine states that have adopted some form of campus carry, highlighting the flexibility and rigidity of each state's approach. Third, the article explores the Texas law, in particular: its history, structural framework, and implementation by Texas universities. Finally, the article closes with conclusions from the early stages of adoption in Texas, emphasizing that the Texas law and its implementation provide a valuable blueprint for other states choosing campus carry.

I. INTRODUCTION

At 2:21 p.m. on February 14, 2018, a 19-year-old, carrying an AR-15 assault rifle and a backpack full of ammunition, walked into the Parkland, Florida high school that had recently expelled him and opened fire.[1] Six minutes later, the slaughter was over. Twelve victims died inside the school building; two just outside; one in a nearby street; and two at a local hospital.[2] In all, 17 students,

1 Richard Fausset et al., *On a Day Like Any Other at a Florida School, 6 Minutes of Death and Chaos*, N.Y. TIMES (Feb. 16, 2018), https://www.nytimes.com/2018/02/16/us/stoneman-douglas-shooting.html.

2 Oliver Laughland et al., *Florida School Shooting: At Least 17 People Dead on "Horrific, Horrific Day"*, GUARDIAN (Feb. 15, 2018, 3:53 AM), https://www.theguardian.com/us-news/2018/feb/14/florida-shooting-school-latest-news-

teachers, and staff were dead, and many more were injured.[3] The Parkland, Florida attack is the eighth deadliest school shooting in U.S. history,[4] and it was the sixth school shooting in 2018 resulting in either physical injury or death.[5]

The Parkland shooting revived a number of challenging gun policy debates, most of which focus on campus safety. The President of the United States rushed into the fray by arguing that school teachers should receive pay bonuses for carrying firearms in the classroom.[6] Teachers with guns, he maintained, would step in to save their students by confronting and killing any violent intruder.[7] With armed teachers randomly scattered around schools, campuses would transform from soft targets into fortified compounds, and criminals would consciously avoid them.[8] The State of Florida apparently agreed, enacting a state law after the Parkland shooting that required all schools to have armed guards or police on site when classes resumed in the fall of 2018.[9] Florida and the President took these positions despite the fact that an armed security guard employed by the high school, as well as at least three Broward County Sheriff's deputies, were present on campus at the time of the shooting.[10]

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stoneman-douglas.

3 Kaitlyn Schallhorn, *Parkland Shooting Victims Include Young Students, Coach Who Saved Others in Florida High School*, Fox News (Feb. 20, 2018), https://www.foxnews.com/us/parkland-shooting-victims-include-young-students-coach-who-saved-others-in-florida-high-school.

4 Laughland et al., *supra* note 2.

5 John McCarthy, *Florida School Shooting: Worst School Shootings in U.S. History*, Naples Daily News (Feb. 15, 2018, 10:28 AM), https://www.naplesnews.com/story/news/2018/02/15/florida-school-shooting-worst-school-shootings-u-s-history/340493002/.

6 Julie Hirschfield Davis, *Trump Suggests Teachers Get a "Bit of a Bonus," to Carry Guns*, N.Y. Times (Feb. 22, 2018), https://www.nytimes.com/2018/02/22/us/politics/trump-guns-school-shootings.html.

7 *Id.*

8 *Id.*

9 Brittany Wallman et al., *School District Came Up Short with School Guards, Needed Assist from Fort Lauderdale*, S. Fla. Sun Sentinal (Aug. 15, 2018, 6:15 PM), https://www.sun-sentinel.com/local/broward/parkland/fflorid-school-shooting/fl-sb-school-security-lauderdale-20180814-story.html.

10 Daniella Silva, *Parkland Shooting: Armed School Resource Officer "Never Went In" to School During Shooting*, NBC News (Feb. 22, 2018, 7:53 PM), https://www.nbcnews.com/news/us-news/parkland-shooting-armed-school-resource-officer-never-went-school-during-n850441; Jake Tapper, *Sources: Coral Springs Police Upset at Some Broward Deputies for Not Entering School*, CNN (Feb. 24, 2018, 10:01 AM), https://www.cnn.com/2018/02/23/politics/parkland-school-shooting-broward-deputies/index.html.

The President's comments on arming teachers represent the latest version of statements made in 2012 by the president of the National Rifle Association (NRA) following the killing of 26 people at a school in Newtown, Connecticut. Resisting calls for increased gun regulations in response to that tragedy, the NRA president stated, "The only way to stop a bad guy with a gun is with a good guy with a gun."[11] In particular, he advocated for the hiring of armed security guards at schools across the United States.[12] Since then, the "good guy with a gun" has been a powerful image invoked to support a particular position on addressing violent crime. We become safer, the argument goes, if we put more guns in the hands of more people who are law-abiding and trustworthy; they will react quickly and effectively if confronted with an armed assailant.

The "good guy with a gun" approach to safety has been applied in a wide range of settings outside the elementary or high school context. Perhaps nowhere has this argument been advanced more passionately or successfully than in the context of debates over "campus carry," or the carrying of concealed firearms on college campuses. Those advocating for campus carry point to a fundamental right in the Second Amendment to have a firearm in their possession wherever they go, including on campuses. But the real heart of the pro-campus carry argument typically lies in the concept of safety: acts of violence on campus occur frequently and quickly, with no time for even fast-reacting first responders to defuse the situation. Instead, law-abiding citizens should be allowed to carry their weapons into classrooms, dormitories, cafeterias, and faculty offices so they are ready to respond immediately when a threat arises, thereby protecting themselves and all of the potential victims around them.[13]

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11 Meghan Keneally, *Breaking Down the NRA-Backed Theory that a Good Guy with a Gun Stops a Bad Guy with a Gun*, ABC NEWS (Oct. 29, 2018, 2:03 PM), https://abcnews.go.com/US/breaking-nra-backed-theory-good-guy-gun-stops/story?id=53360480.

12 Mark Berman & David Weigel, *NRA Goes on the Offensive After Parkland Shooting, Assailing Media and Calling for More Armed School Security*, WASH. POST (Feb. 22, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/02/22/after-silence-on-parkland-nra-pushes-back-against-law-enforcement-the-media-and-gun-control-advocates/.

13 *See, e.g.*, Erik Gilbert, *Campus Carry is Not About Preventing Mass Shootings*, INSIDE HIGHER ED (June 12, 2017), https://www.insidehighered.com/views/2017/06/12/campus-carry-about-right-individual-self-defense-not-preventing-mass-shootings (discussing various reasons why advocates for campus carry support this position).

Texas governor Greg Abbott made this point recently after an Ohio State University student, thought to have been inspired by ISIS terrorist propaganda, careened his Honda Civic onto a university sidewalk filled with people in Columbus, Ohio.[14] After crashing into the crowd, the driver began attacking terrified students with a butcher knife.[15] At least one bystander tried and failed to disarm the attacker, getting slashed in the process.[16] Soon after, the perpetrator of these crimes was shot and killed by a policeman who was fortuitously in the area on another call,[17] but not before thirteen people were injured in an attack that lasted approximately two minutes.[18] In response to this attack, Gov. Abbott remarked, "It's instances like this where kids on campus can have guns [so] they could have been able to respond initially . . . . [O]n a college campus [] here in Texas, people will think twice before waging an attack like this knowing that they could be gunned down immediately."[19]

14 Kathy Lynn Gray et al., *Ohio State Student Identified as Campus Attacker; Nearly a Dozen Hospitalized*, Wash. Post (Nov. 28, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/11/28/ohio-state-university-warns-of-active-shooter-on-campus/?utm_term=.588c8a0ee7d7; Mitch Smith et al., *Suspect Is Killed in Attack at Ohio State University That Injured 11*, N.Y. Times (Nov. 28, 2016), https://www.nytimes.com/2016/11/28/us/active-shooter-ohio-state-university.html.

15 Tracy Connor, *Ohio State Victim Says Attacker Vowed to Kill Her*, NBC News (Dec. 1, 2016, 10:39 AM), http://www.nbcnews.com/news/us-news/ohio-state-victim-says-attacker-vowed-kill-her-n690306.

16 Michele Newell, *Army Vet Fought Ohio State Attacker as He Tried to Help Others After Car Crash*, ABC 6 News (Nov. 29, 2016), https://abc6onyourside.com/news/local/victim-grabbed-knife-as-he-tried-to-help-others.

17 Andrew Welsh-Huggins & Julie Carr Smyth, *Terrorism Suspected in Car-and-Knife Attack at Ohio State*, U.S. News & World Rep. (Nov. 28, 2016, 10:42 PM), https://www.usnews.com/news/us/articles/2016-11-28/ohio-state-tweets-that-active-shooter-is-on-campus.

18 Jackie Borchardt, *11 Injured, Suspect Dead After Attack on Ohio State University Campus*, Cleveland.com (Nov. 28, 2016), https://www.cleveland.com/metro/2016/11/ohio_state_university_attack.html.

19 Lauren McGaughy, *Abbott Says Campus Carry Will Make Attackers "Think Twice" About Targeting Texas Schools*, Dall. News (Nov. 29, 2016), https://www.dallasnews.com/news/guns/2016/11/29/texas-gov-greg-abbott-ohio-state-campus-carry-will-make-shooters-think-twice-attacking-colleges. The Governor's provocative comments received immediate attention, including from J. Blair Blackburn, then-President of East Texas Baptist University: "We cannot assume that the mere possession of a concealed carry weapon is going to prevent someone from launching a terrorist attack or an isolated active shooter situation." Christina Lane, *ETBU President Responds to Governor's Statement About Ohio State*, Marshall News Messenger (Nov. 30, 2016), https://www.marshallnewsmessenger.com/news/etbu-president-responds-

The Texas law that would force would-be attackers to "think twice," according to Gov. Abbott, was less than four months old at the time. Effective August 1, 2016 for four-year universities and August 1, 2017 for community colleges, this new law was the most recent state-level victory for gun rights advocates in an ongoing battle that has placed college campuses in the crosshairs.[20] Under the Texas version of "campus carry," all individuals who hold state-issued handgun licenses, which allow them to carry their weapons openly in public, are also authorized to carry their weapons in a concealed manner on public college campuses.[21] The new law was controversial, and it passed the Texas Legislature in 2015 after years of failed attempts to enact similar bills.[22]

When that law went into effect, fifty years after the first U.S. campus mass shooting at the University of Texas in Austin (UT Austin),[23] Texas was the eighth state to explicitly authorize campus carry by statute or court decision.[24] Two additional states have followed since then, and now over 200 universities across the country allow campus carry.[25] In addition, the last several years have seen a flurry of legislative efforts to pass similar laws in other states, with a clear wave of momentum in favor of campus carry.[26] With the recent one-year anniversary of full enactment of the Texas law, it is useful to reflect on the law's impact and how it has been implemented.

There is particular value in analyzing the Texas statutory framework because of its unique structure. In other states that have adopted campus carry, the framework is usually rigid and standardized, sometimes allowing entire campuses to opt out, but providing little, if any, flexibility in implementation for individual

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to-governor-s-statement-about-ohio-state/article_e4f4e4b5-4363-5cf2-8a1e-889503b79c9a.html.

20 Trymaine Lee, *New Texas Law Allows College Students to Carry Guns on Campus*, NBC NEWS (Aug.1, 2016, 12:51 PM), https://www.nbcnews.com/news/us-news/new-texas-law-allows-college-students-carry-guns-campus-n620911.

21 *See id.*

22 *See infra* notes 195–298 and accompanying text.

23 Ben Wofford, *Inside the Fight Over Guns on Campus*, ROLLING STONE (Mar. 30, 2017, 2:24 PM), https://www.rollingstone.com/politics/politics-features/inside-the-fight-over-guns-on-campus-126622/.

24 Matthew Watkins, *With Texas Now a Campus Carry State, Here's What You Need to Know*, TEX. TRIB. (Aug. 1, 2016), https://apps.texastribune.org/guns-on-campus/texas-now-campus-carry-state-what-you-need-to-know/.

25 Wofford, *supra* note 23.

26 *See infra* notes 126–31 and accompanying text.

campuses.[27] In Texas, by contrast, the president of each university is empowered to promulgate firearms regulations, including the creation of handgun exclusion zones, based on that campus's unique operations, population, and safety considerations.[28] By including this flexibility, Texas introduced a degree of balance and discretion absent in other states' campus carry schemes. This approach provides an intriguing middle ground in the contentious debate about guns on college campuses.

However, a middle ground may not be palatable to all. Those strongly opposed to guns on campus will reject even customizable concealed carry at universities, and those who argue for unfettered campus carry bridle at what might appear to others to be reasonable restrictions.[29] This article does not take a normative position on whether allowing concealed carry on campus is good policy, although it does open with a brief discussion of data addressing whether campus carry, in particular, and more relaxed gun laws, in general, result in increased safety.[30]

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27 *See infra* notes 132–76 and accompanying text.

28 Tex. Gov't Code § 411.2031(d-1) (West 2019). As described below, this discretion is not absolute. The Board of Regents for each university must review the president's implementation rules and has the power to revise those rules, in whole or in part, by a two-thirds vote. *See infra* notes 359–61 and accompanying text.

29 *See* Adam Winkler, Gun Fight: The Battle Over the Right to Bear Arms in America 8–12 (2013) (describing the extreme polarization of gun debate in the United States).

30 Arguments in favor of and in opposition to relaxed gun laws, in general, and campus carry, in particular, have been extensively explored in other contexts. *See, e.g.*, Nate G. Hummel, Comment, *Where Do I Put My Gun?: Understanding the Texas Concealed Handgun Law and the Licensed Owner's Right-to-Carry*, 6 Tex. Tech J. Tex. Admin. L. 139, 143 (2005); Brian J. Siebel, *The Case Against Guns on Campus*, 18 Geo. Mason U. C.R.L.J. 319, 323–36 (2008); Brian Vasek, Note, *Rethinking the Nevada Campus Protection Act: Future Challenges & Reaching a Legislative Compromise*, 15 Nev. L.J. 389, 399–406 (2014). In addition, a large number of organizations and associations have taken positions on this issue, both officially and unofficially. *See, e.g.*, Joint Statement from the Am. Ass'n of Univ. Professors, Opposing "Campus Carry" Laws (Nov. 12, 2015), https://www.aaup.org/file/CampusCarry.pdf (signed also by the American Federation of Teachers, the Association of American Colleges and Universities, and the Association of Governing Boards of Universities and Colleges) (opposed); Position Statement from the Nat'l Behavioral Intervention Team Ass'n, Concealed Carry Legislation Related to Mass Shootings, https://cdn.nabita.org/website-media/nabita.org/wordpress/wp-content/uploads/2018/01/2016MarchNaBITA-GunsPositionStatement.pdf (opposed); Position Statement from the Int'l Ass'n of Campus Law Enf't

Instead, it takes as a given that the campus carry movement has been in full swing for the past ten years, and that interest group pressure and the political will are generating what seems to be an unavoidable march towards new campus carry bills in a number of states.[31] Furthermore, because no federal law governs this issue, each state choosing to implement campus carry is left to navigate its own way.[32] The question, then, may not be whether campus carry will continue to expand across the country, but what form it should take when it does expand.

Standing in the middle of emotionally charged debates about guns on campus, universities confront entrenched and unyielding interests on all sides.[33] Chancellors, faculty, parents, administrators, and most students usually strongly oppose campus carry,[34] as do many police officers.[35] Opponents cite concerns about accidental gun discharges; the danger of mixing firearms with the high stress of

Adm'rs, Inc., Concealed Carrying of Firearms Proposals on College Campuses (Aug. 12, 2008), https://www.okhighered.org/campus-safety/resources/CBP-guns-iaclea-statement.pdf (opposed); Position Statement from the Am. Psychiatric Ass'n, Proposed Legislation Permitting Guns on College and University Campuses (July 2011), https://www.psychiatry.org/file%20library/about-apa/organization-documents-policies/policies/position-2011-gun-college-campus.pdf (opposed).

31 *See infra* notes 126–31 and accompanying text.

32 Kerry Brian Melear & Mark St. Louis, *Concealed Carry Legislation and Changing Campus Policies*, *in* COLLEGE IN THE CROSSHAIRS: AN ADMINISTRATIVE PERSPECTIVE ON PREVENTION OF GUN VIOLENCE 59, 61 (Brandi Hephner LaBanc & Brian O. Hemphill eds., 2015).

33 *Id.*

34 *See, e.g.*, *id.* at 59 (citing data that approximately 80% of students at Midwestern universities oppose campus carry). One of the more colorful student campaigns opposing campus carry was "Cocks Not Glocks," organized by students at UT Austin. The campaign encouraged students, faculty, and staff to publicly carry dildos on campus, offering "a multicolored counterpoint to the concealed weapons" that can also be carried on campus. *See* Alex Samuels, *UT-Austin Students Snatch Up Free Dildos for Gun Protest*, TEX. TRIB. (Aug. 23, 2016, 7:00 PM), https://www.texastribune.org/2016/08/23/students-distribute-4500-sex-toys/ (reporting on an event in Austin that distributed 4,500 free dildos). *Rolling Stone* described one protest: "Students gathered under the UT Tower, as young women tossed dildos with the frenzy of a humanitarian mission. 'If they're packing heat,' one sophomore protester yelled, hoisting a giant dildo with both hands, 'then we're packing meat!'" Wofford, *supra* note 23.

35 Melear & St. Louis, *supra* note 32 (noting that in 2013, 95% of university presidents opposed campus carry); Wofford, *supra* note 23; *see* Dave Philipps, *What University of Texas Campus is Saying About Concealed Guns*, N.Y. TIMES (Aug. 27, 2016), https://www.nytimes.com/2016/08/28/us/university-of-texas-campus-concealed-guns.html.

college, even without the addition of drugs, alcohol, depression, and anxiety, which are widespread in college; the chilling of academic freedom caused by guns in the classroom; and the problems that "good guys with guns" pose for first responders in an active shooter scenario. On the other hand, universities, through their state legislatures, are facing increasing pressure from powerful gun lobby groups and some gun owners who cite a concern about personal safety and demand that their Second Amendment rights be respected on college campuses.[36] All of these pressures make the college campus, according to one expert, "the fundamental battleground over guns and self-defense."[37] In the face of these seemingly irreconcilable and hopelessly entrenched positions, perhaps an all-or-nothing approach to guns on campus does not adequately balance the rights and interests involved. Instead, a more nuanced approach to campus carry, one that allows for discretion and flexibility in implementation, may be a productive way forward.

This article analyzes the new Texas law as just such a potential model for other states considering the implementation of campus carry. As context, Part II provides a brief overview of the current state of campus safety in the United States, as well as a look at recent studies analyzing the actual safety impact of relaxed gun possession laws. As this recent data demonstrates, liberalized gun laws undermine public safety. Part III traces the development of campus carry laws and describes their legal structure in states that allow it. Part IV discusses the Texas law: the overall context of gun rights in Texas, a historical look at enactment of campus carry in the state, and the details of the Texas campus carry law. Part IV also looks at which Texas universities have opted out of the law and how other universities have implemented it, focusing on common themes and areas of disagreement. Part IV concludes with observations about the early stages of campus carry adoption in Texas. As described in more detail below, the Texas version of campus carry provides a useful blueprint for other states that will be adopting legislation to allow firearms on campus. Texas universities have implemented the new law with regulations that customize campus carry for their unique campus needs and operations. In doing so, they have successfully created firearms policies that respect the underlying right of license holders to carry concealed weapons on campus while, at the same

36 *See, e.g.*, Melear & St. Louis, *supra* note 32, at 59.
37 Wofford, *supra* note 23 (quoting Adam Winkler).

time, regulating firearms, including the creation of gun-free zones based on each university's unique operations. What is more, Texas universities have struck this delicate balance with relatively little administrative expense or difficulty.

II. CAMPUS CRIME, RELAXED GUN LAWS, AND PUBLIC SAFETY

The campus carry movement has taken place against a backdrop of generally decreasing crime rates on university campuses.[38] Between 2001 and 2006, the year before the campus shootings at Virginia Tech University, which served as the primary impetus for campus carry legislation,[39] the total number of on-campus crimes increased across the country by seven percent.[40] In 2006, however, the total number of reported crimes on college campuses began a significant decline.[41] From 2006 to 2014, the number of reported campus crimes decreased 39%, from 44,500 incidents in 2006 to 27,000 in 2014.[42] That represented a drop in criminal incidents per 10,000 students from 35.6 in 2001 to 17.9 in 2014.[43] This overall reduction from 2006 to 2014 held true across all types of higher education institutions.[44] And from 2001 to 2014, the rate of all crime, other than forcible sex offenses and negligent homicide, decreased on college campuses.[45] Simple assaults are typically the most common offense committed on college campuses,

38 THE NAT'L CTR. FOR EDUC. STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2016, at vii, ix (2017).

39 *See infra* notes 106–11, 126, 198 and accompanying text.

40 THE NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 38, at 122. During this time period, total enrollment on college campuses also increased, and at a higher rate than the growth in reported crimes. *See id.* at 123. As a result, the number of reported crimes per 10,000 students decreased from 35.6 in 2001 to 33.3 in 2006. *See id.*

41 *Id.* at 122–23.

42 *Id.* at 122. Although the total number of reported crimes declined during this timeframe, overall enrollment increased, affecting the statistic of reported crimes per 10,000 students. *See id.* at 123.

43 *Id.* at 123.

44 *Id.* at 124. During this period, on-campus crime decreased from 35.5 to 19.5 per 10,000 students at public four-year institutions; from 57.7 to 30.1 per 10,000 students at nonprofit four-year institutions; and from 15.4 to 7.7 per 10,000 students at public two-year institutions. *Id.*

45 *Id.* at 122. During that timeframe, the rate of forcible sex offenses on campus climbed from 1.9 to 3.3 per 10,000 students, and the number of negligent homicides remained the same (two incidents). *See id.* at 112; THE NAT'L CTR. FOR EDUC. STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2015, at 112 (2016).

with their rates much higher than those of sexual assault, robbery, or aggravated assault.[46] Homicide rates, in particular, are extremely low on college campuses as compared to the overall homicide rate in society, with .007 homicides per 100,00 students, compared to 5.7 per 100,000 individuals in general society, and 14.1 per 100,000 individuals age 17 to 29 in general society.[47]

Despite these overall reductions in crime rates, gun violence in higher education has increased in recent years, from ten incidents in 2001–2002 to 29 incidents in 2015–2016.[48] The total number of victims killed or wounded in these gun attacks grew substantially, as well, from 20 in 2001–2002 to 78 in 2015–2016.[49]

This general timeframe also saw a "professionalization" of campus police departments,[50] as universities expended significant resources to keep their student, staff, and faculty populations safe, adding armed officers and police departments, establishing formal relationships with municipal police departments, installing safety equipment throughout campuses, and actively engaging in community awareness and education programs.[51] In the most recent data available, 95% of all four-year campuses with 2,500 or more students operated their own campus law enforcement office,[52] and those offices have been increasingly active. In contrast to the declining rate of crime on college campuses, the number of on-campus arrests between 2001 and 2011 increased from 40,300 to 54,300.[53] The rate of weapons arrests per 10,000 students has remained relatively unchanged from 2001 to 2014, but the rate of arrests for drug law

46 Bonnie S. Fisher & John J. Sloan, III, *Campus Crime Policy: Legal, Social, and Security Contexts*, *in* Campus Crime: Legal, Social, and Policy Perspectives 3, 10 (Bonnie S. Fisher & John J. Sloan III eds., 3d ed. 2013).

47 *Guns on Campus' Laws for Public Colleges and Universities*, Armed Campuses, http://www.armedcampuses.org/ (last updated 2016) (citing 1999 data).

48 Ashley Cannon, Citizens Crime Comm. of N.Y.C., Aiming at Students: The College Gun Violence Epidemic 2 (2016).

49 *Id.*

50 Fisher & Sloan, *supra* note 46, at 17.

51 Brian A. Reaves, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Campus Law Enforcement, 2011–12 (2015); *see generally* Max L. Bromley, *The Evolution of Campus Policing: An Update to "Different Models for Different Eras"*, *in* Campus Crime: Legal, Social, and Policy Perspectives, *supra* note 46, at 293, 297–99.

52 Reaves, *supra* note 51, at 21.

53 The Nat'l Ctr. for Educ. Statistics, *supra* note 38, at 124 (noting that since 2011, however, the number has decreased).

violations has increased from 10.2 to 12.8.[54]

In addition to university police involvement, higher education institutions have been actively using their internal administrative procedures to deal with university rule violations. From 2001 to 2014, the number of referrals for disciplinary actions related to weapons, drugs, and liquor violations rose 140% from 23,900 to 57,400.[55] Importantly, as schools consider how to regulate campus carry, 90% of the referrals from 2014 related to rule violations occurring in residence halls, with over half involving alcohol.[56] To some extent, these increases in raw numbers are attributable to increases in overall student populations on campus over the years, but the timeframe 2001 to 2014 saw a significant jump in the rate of disciplinary referrals per 10,000 students for drug violations (20.5 to 38.1) and liquor violations (111.3 to 141.6).[57]

Against a general backdrop of decreasing crime rates on college campuses, the total number and rate of forcible sex crimes are clear outliers. The raw number of forcible sex crimes reported between 2001 and 2014 rose from 2,200 to 6,700, an increase of 205%.[58] Reports of these crimes jumped 34% in just one year from 5,000 in 2013 to 6,700 in 2014.[59] Whether these numbers represent an actual increase in sexual assaults on college campuses or an increased willingness to report such crimes, or some combination of those factors, is unclear. However, 26.1% of college female seniors in a recent study reported having been the victim of sexual contact by force or incapacitation during their undergraduate years.[60] Other studies have found the rate of sexual assault as high as 38% among college females at some schools.[61]

54 *Id.* at 124.
55 *Id.* at 125.
56 *Id.*
57 *Id.*
58 *Id.* at 122.
59 *Id.* Beginning in 2014, data on "forcible sex crimes" were reported in a more granular way than in prior years. In particular, those crimes were broken down between rape and fondling incidents in 2014, whereas data before 2014 did not include that distinction. In 2014, approximately 4,400 rapes and 2,300 fondling incidents were reported to police. *See id.*
60 DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, at xiii (2015).
61 CHRISTOPHER KREBS ET AL., CAMPUS CLIMATE SURVEY VALIDATION STUDY FINAL TECHNICAL REPORT 73 (2016). Beyond actual assault, 47.7% of college students report being the victim of sexual harassment while in school. *See* CANTOR ET AL., *supra* note 60, at xvi.

In light of decreasing reported crime on college campuses, increased campus safety measures being implemented by universities, and increasing numbers of both arrests and disciplinary adjudications by schools, do we have reason to believe that campus carry will make our universities even safer? This may be a difficult question to answer, in part, because of a 1996 amendment to a Congressional spending bill that prohibited the Centers for Disease Control (CDC) from spending money to "advocate or promote gun control."[62] Although the CDC was not barred from studying gun violence, per se, its funding was reduced by Congress in the amount it had spent on that research.[63] As a result, there has been little public research into this general topic since 1996.[64] However, research conducted outside the CDC may prove informative.

In considering whether campus carry makes our universities safer, it may be useful to look briefly at three of the primary arguments advanced by gun advocates in light of available data: that campus carry should be allowed to harden colleges as targets, because mass shootings often take place in softer-target areas that have been designated "gun free zones"; that civilians with firearms are likely to stop an armed attacker; and that more relaxed gun laws lead, in general, to lower crime rates.[65]

First, do mass shooters frequently seek out targets that are gun-free zones to maximize the damage they inflict or decrease the chances that they will be apprehended? A study of the 111 "high-fatality mass shootings," which involved six or more murdered victims, that have taken place in the United States since 1966 found that only 18 occurred in a gun-free or gun-restricted zone.[66] Nearly 90% of these mass attacks took place in areas where civilians were allowed to carry firearms or where armed security guards were

62 Sarah Zhang, *Why Can't the U.S. Treat Gun Violence as a Public-Health Problem*, Atlantic (Feb. 15, 2018), https://www.theatlantic.com/health/archive/2018/02/gun-violence-public-health/553430/.

63 *Id.*

64 Research by the CDC prior to 1996 had suggested certain connections between guns and violence, such as increased rates of suicide in homes with guns. *See id.*

65 Daniel W. Webster et al., Firearms on College Campuses: Research Evidence and Policy Implications 9–15 (2016) (citing Louis Klarevas, Rampage Nation: Securing America from Mass Shootings (2016)).

66 *Id.* at 9.

present.[67] This should not be surprising, as studies usually find that those perpetrating mass shootings are motivated by a desire to lash out because of a specific grievance with individual victims, institutions, or groups of people.[68] In the university mass shooting context—which is extremely rare, in comparison to overall crime rates on college campuses—reports of the motivations of shooters bears this out, as shooters often have a troubled history with the school itself or particular students enrolled there.[69]

Second, are civilians with concealed weapons likely to stop an armed attacker on campus? Beyond the campus environment, concealed permit holders almost never use their weapons to stop a criminal attack. In a Federal Bureau of Investigation (FBI) report from 2014 analyzing 160 active shooter incidents between 2000 and 2013, armed civilians intervened just once to end the attack, and that situation involved intervention by a U.S. Marine.[70] In comparison, 21 of the incidents ended when unarmed citizens safely and successfully restrained the shooter.[71]

Furthermore, another recent study found that in a country with over 300 million guns, victims of violent crime fail to defend themselves or threaten the perpetrator with a weapon 99.2% of the time.[72] In the context of school shootings, that number rises even higher. There has not yet been a school shooting stopped by

67 *Id.*

68 *Id.* at 10; *see* N.R. Kleinfield, et al., *Mass Murderers Fit Profile, as Do Many Others Who Don't Kill*, N.Y. TIMES (Oct. 3, 2015), https://www.nytimes.com/2015/10/04/us/mass-murderers-fit-profile-as-do-many-others-who-dont-kill.html.

69 Stephanie A. Miller, School Shootings Perpetrators' Self-Reported Motives: A Qualitative Analysis of Manifestos and Other Writings 27–31 (Apr. 2017) (unpublished B.A. thesis, Georgia Southern University), https://digitalcommons.georgiasouthern.edu/cgi/viewcontent.cgi?article=1327&context=honors-theses (reviewing literature and concluding that a significant number of school shooters felt bullied, harassed, or rejected by fellow students).

70 WEBSTER ET AL., *supra* note 65, at 11 (citing J. PETE BLAIR & KATHERINE W. SCHWEIT, FED. BUREAU OF INVESTIGATIONS, STUDY OF ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES BETWEEN 2000 AND 2013 (2013)).

71 *Id.*

72 JOHN J. DONOHUE ET AL., RIGHT-TO-CARRY LAWS AND VIOLENT CRIME: A COMPREHENSIVE ASSESSMENT USING PANEL DATA, THE LASSO, AND A STATE-LEVEL SYNTHETIC CONTROLS ANALYSIS 5 (2017) (citing MICHAEL PLANTY & JENNIFER TRUMAN, FIREARM VIOLENCE, 1993-2011 (2013)).

an armed civilian.[73] One reason more civilians do not respond to violent crime by brandishing a weapon is that doing so effectively, in the heat of emotional chaos, is incredibly difficult, even for trained professionals. Hormones surge, vision narrows, and hearing becomes impaired.[74] The situation is further complicated by factors like distance from the target, lighting, and the mental state of the license holder.[75] When trained law enforcement officers respond with gunfire in the context of a violent crime, they are rarely accurate. In a 2008 RAND Corporation study of the New York Police Department, it was determined that between 1998 and 2006, the hit-rate by officers in gunfights was 18%; when the target did not return fire, the hit-rate rose to only 30%.[76] There is little reason to believe that college students, staff, and faculty will respond effectively and with accuracy in an active shooter situation with only minimal state-required training.[77]

Finally, from a macro perspective, is there reason to believe that campus carry, as an example of more relaxed gun laws, may reduce crime rates? One recent comprehensive report, which confirms findings in prior studies, strongly suggests that more relaxed gun laws do not lead to a reduction in crime; instead, and in contradiction to earlier, less-complete reports, they appear to correlate with increased crime over time.[78] That recent report, a working paper published in June of 2017 and revised in November of 2018 by the National Bureau of Economic Research (NBER) looked at whether "right to carry" laws decrease crime rates.[79] A state is considered to be a "right to carry" (RTC) state or a "shall issue"

73 Wofford, *supra* note 23.

74 Nate Rawlings, *Ready, Fire, Aim: The Science Behind Police Shooting Bystanders*, Time (Sept. 16, 2013), http://nation.time.com/2013/09/16/ready-fire-aim-the-science-behind-police-shooting-bystanders/; Wofford, *supra* note 23 (reporting on a police study simulating armed assailants entering a classroom with armed students; the students were "consistently mowed down in seconds . . . often before [any student] could unholster a gun").

75 Webster et al., *supra* note 65, at 10.

76 Rawlings, *supra* note 74.

77 *Id.*

78 *See* Maura Ewing, *Do Right-to-Carry Gun Laws Make States Safer?*, Atlantic (June 24, 2017), https://www.theatlantic.com/politics/archive/2017/06/right-to-carry-gun-violence/531297/; Evan Defilippis & Devin Hughes, *Gun-Rights Advocates Claim Criminals Don't Follow Gun Laws. Here's the Research that Shows They're Wrong*, Trace (Sept. 8, 2015), https://www.thetrace.org/2015/09/gun-control-criminals-research/.

79 Donohue et al., *supra* note 72.

state if its requirements for gun possession do not leave discretion with the permitting agency; that is, a state falls into this category if an applicant for a handgun license must be issued a license if she satisfies all of the statutory requirements in the jurisdiction.[80] Texas is an RTC state.[81]

The NBER study used new analytical methods to assess a longer and deeper set of data, from 1979 to 2014 and covering 33 states, than had earlier studies that purported to show a decrease in crime in RTC states.[82] Those earlier conclusions, in papers and books, may have helped fuel the initial legislative push for states to adopt RTC laws.[83] In summary, the recent NBER study found that RTC states had aggregate crime rates seven percent higher after five years and 14% higher after ten years than they would have been without the laws.[84] Texas was a special focus in the report, though its results were consistent with the overall findings. Ten years after adopting its RTC law in 1996, violent crime in the state was nearly 17% higher than it would have been without the law.[85] While Texas experienced a drop in its violent crime rate of 19.7% during the same period, the new modeling in the NBER study concluded that without the RTC law, Texas would have experienced a decrease in violent crime of 31%.[86]

Little data exists to support the argument that mass shooters seek out gun-free zones for attack, that civilians are likely to be successful as a "good guy with a gun," or that more relaxed gun laws lead to lower crime rates. In fact, recent data and studies strongly suggest that states enacting more liberalized gun laws experience higher crime rates than they would otherwise.[87] Nevertheless, emotions to the contrary run strong. In particular, there is widespread sentiment that guns on campus make those communities safer. One UT Austin student personalized this view: "I'll feel much safer after the implementation of [c]ampus [c]arry. . . . I'll be able to protect myself if the occasion ever arose where I needed a gun in a potentially

80 *Concealed Carry*, GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/ (last visited Apr. 15, 2019).
81 DONOHUE ET AL., *supra* note 72, at 37.
82 *Id.* at 2–3.
83 *Id.*
84 *Id.* at 42.
85 *Id.* at 29.
86 *Id.* at 30.
87 *See id.*, *supra* note 72.

life or death situation. Being a female, and with the stigma of the high number of sexual assaults on college campuses, I'll definitely feel much safer with a gun, especially if I'm by myself."[88]

III. GUNS ON CAMPUS IN AMERICA

Despite an apparent lack of safety-related data to support the value of campus carry laws, they continue to proliferate. While campus carry began in Utah in 2004, the movement had its emotional genesis several years later following a mass shooting in Virginia. Since then, it has spread to ten states, from coast to coast, and is being actively considered for adoption in many more.

A. Virginia Tech Rampage and its Aftermath

In April 2007, a senior at Virginia Polytechnic Institute and State University killed two fellow students in a dormitory at 7:15 a.m.[89] During the following two hours,[90] the shooter returned to his dorm room, changed clothes, traveled to a nearby post office, mailed a package containing a manifesto, letter, and video clips to NBC News, and then returned to campus.[91] At approximately 9:15 a.m., he traveled to an engineering building on campus, carrying with him with two handguns and hundreds of rounds of ammunition.[92] After entering the building, the shooter used chains to lock the three main entrances from inside.[93] He then proceeded classroom-to-classroom, shooting professors and students, including through barricaded doors.[94] He lined up some of his victims against classroom walls and shot them one at a time.[95] The shooter continued his slow march

88 Kris Seavers & Ashika Sethi, *We Asked Eight UT Students What They Think About Campus Carry*, Austin Monthly (Aug. 1, 2016), http://www.austinmonthly.com/Austin-Amplified/August-2016/We-Asked-Eight-UT-Students-What-They-Think-About-Campus-Carry/.

89 Virgina Tech Review Panel, Mass Shootings at Virginia Tech April 16, 2007: Report of the Review Panel 22–25 (2007).

90 The ensuing two hours appear to have been filled with frustratingly slow and confused responses from law enforcement. *See id.* at 25–26. The first Virginia Tech email to the campus community, notifying them of the dorm shootings, was sent at 9:26 a.m. *Id.* at 26. First period classes began at 8:00 a.m., and second period classes started at 9:05 a.m. *Id.* at 25–26.

91 *Id.*

92 *Id.* at 26, 89.

93 *Id.*

94 *Id.* at 26–27.

95 Christine Hauser & Anahad O'Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. Times (Apr. 16, 2007), http://www.nytimes.com/2007/04/16/

through the building, sometimes returning to classrooms he had already attacked, shooting more victims.[96]

Police[97] used a shotgun to blast open a fourth entrance to the building at 9:50 a.m.[98] The shooter killed himself one minute later.[99] During that 11-minute attack on the students and faculty of Virginia Tech, the shooter fired 174 rounds of ammunition, killed 30 students and faculty, and wounded 17 more people.[100] In total, 33 individuals, including the gunman, died.[101] The Virginia Tech massacre remains the deadliest school shooting in U.S. history, and the third overall deadliest shooting in the United States.[102]

While there had been prior incidents of university shootings, including shootings that resulted in multiple fatalities, the massacre at Virginia Tech in 2007 was "the first rampage in higher education to result in official public scrutiny."[103] Official commissions at the federal, state, and university levels investigated all aspects of the shootings and identified the various circumstances and failings that existed to allow the tragedies to occur.[104] Beyond official investigations, the Virginia Tech massacre "touched off an intense debate over whether colleges should remain gun-free zones, or whether allowing students and faculty to carry concealed weapons

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us/16cnd-shooting.html?_r=0.

96 VIRGINIA TECH REVIEW PANEL, *supra* note 89, at 27–28.

97 The university police force had in place a mutual aid agreement with the Blacksburg Police Department and operated an emergency response team. *Id.* at 11.

98 *Id.* at 28.

99 *Id.*

100 *Id.*

101 *Id.* at 28–29.

102 *Deadliest Mass Shootings in U.S. History Fast Facts*, CNN (Dec. 15, 2018), http://www.cnn.com/2013/09/16/us/20-deadliest-mass-shootings-in-u-s-history-fast-facts/.

103 Helen Hickey de Haven, *The Elephant in the Ivory Tower: Rampages in Higher Education and the Case for Institutional Liability*, 35 J. C. & U. L. 503, 554 (2009).

104 VIRGINIA TECH REVIEW PANEL, *supra* note 89, at 19–20; *see* U.S. DEP'T OF HEALTH & HUMAN SERVS. ET AL., REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY (June 13, 2007), https://www.justice.gov/archive/opa/pr/2007/June/vt_report_061307.pdf; SEC. INFRASTRUCTURE WORKING GRP., PRESIDENTIAL WORKING PAPER (Aug. 17, 2007), https://vtnews.vt.edu/content/dam/vtnews_vt_edu/documents/2007-08-22_security_infrastructure.pdf; INTERFACE WORKING GRP., PRESIDENTIAL INTERNAL REVIEW PAPER (Aug. 17, 2007), http://www.vtnews.vt.edu/documents/2007-08-22_internal_communications.pdf.

might have resulted in fewer deaths."[105]

As the country reeled from the horrors of Virginia Tech, Republican presidential candidate Fred Thompson stated that same year that he would support arming students on college campuses to avert future attacks.[106] While the NRA shied away from this idea,[107] a small group of conservative college students from the University of North Texas picked it up and ran, launching a Facebook group called "Students for Concealed Carry on Campus" (SCCC).[108] The group's prominence increased after it was covered by Glenn Beck on CNN and following another campus shooting several months later in Illinois.[109] After Virginia Tech and the establishment of SCCC, the campus carry movement accelerated.[110] Its growth following Virginia Tech would be ironic, no doubt, to the drafters of the official university investigative report following that tragedy. In its Recommendation VI-5, that panel encouraged that "guns be banned on campus grounds and in buildings unless mandated by law."[111]

B. Snapshot of State Campus Carry Laws

Describing the current state of campus carry is challenging, as the number of states considering some version of the law shifts every year. Nevertheless, this section provides a brief snapshot of campus carry across the country, including some detail on how the law is being implemented in the states where it has been adopted. This perspective allows a more thoughtful consideration of the Texas law in later sections.

105 Will Buchanan, *Three Years After Virginia Tech Shooting, College Gun Bans Prevail*, Christian Sci. Monitor (Apr. 16, 2010), http://www.csmonitor.com/USA/Education/2010/0416/Three-years-after-Virginia-Tech-shooting-college-gun-bans-prevail; *see also* U.S. Dep't of Educ., Higher Educ. Ctr. for Alcohol, Drug Abuse, & Violence Prevention, Guns on Campus: A Current Debate (Jan. 2010), https://files.eric.ed.gov/fulltext/ED538206.pdf.

106 *Fred Thompson: Interview with Tim Russert on NBC News' "Meet the Press"*, Am. Presidency Project (Nov. 4, 2007), https://www.presidency.ucsb.edu/documents/interview-with-tim-russert-nbc-news-meet-the-press-5.

107 Wofford, *supra* note 23.

108 *FAQ*, Students for Concealed Carry, http://concealedcampus.org/faq/; *see* Wofford, *supra* note 23.

109 Wofford, *supra* note 23.

110 Abby Jackson & Skye Gould, *10 States Allow Guns on College Campuses and 16 More are Considering It*, Bus. Insider (Apr. 27, 2017), http://www.businessinsider.com/states-that-allow-guns-on-college-campuses-2017-4.

111 Virginia Tech Review Panel, *supra* note 89, at 76.

As a starting point, each of the 50 states allows certain individuals to carry concealed handguns in particular circumstances, assuming that state requirements are satisfied.[112] States diverge significantly, however, when it comes to whether concealed handguns may be carried on college campuses. As of the time of this article, 16 states, including California, Florida, Massachusetts, New Jersey, and New York, prohibit the carrying of weapons on university campuses.[113] Twenty-three states give discretion to the individual university whether to allow concealed handguns on campus.[114] Among states in this second category are Alabama, Maryland, Pennsylvania, Virginia, and Washington.[115]

In 2004, three years before Virginia Tech, Utah became the first state to allow the concealed carry of handguns on public college campuses.[116] Prior to 2004, Utah had in place a prohibition that barred state entities from excluding weapons from their property.[117] In that year, the state extended its prohibition to explicitly include "state institutions of higher education"[118] and prohibited those entities from enacting or enforcing any rule that

112 *Guns on Campus: Overview*, NAT'L CONF. ST. LEGISLATURES (Aug. 14, 2018), http://www.ncsl.org/research/education/guns-on-campus-overview.aspx.

113 *Id.*; Neal H. Hutchens & Kerry B. Melear, *More States Are Allowing Guns on College Campuses*, CONVERSATION (Aug. 17, 2017), https://theconversation.com/more-states-are-allowing-guns-on-college-campuses-81791.

114 Teri Lyn Hinds, *Campus Carry: 2017 State Legislation Round-Up*, NAT'L ASS'N STUDENT PERSONNEL ADMIN. (July 13, 2017), https://www.naspa.org/rpi/posts/campus-carry-2017-state-legislation-round-up; *Guns on Campus: Overview*, *supra* note 112. Within this category, states have adopted a sometimes-confusing mixture of rules. In Minnesota, for example, public universities may adopt rules prohibiting their students or employees–but not members of the public–from carrying concealed weapons on campus, but these universities may not regulate firearm possession by anyone in the universities' parking areas. *See* MINN. STAT. ANN. § 624.714, subd. 18(a)–(c) (West 2019).

115 *Guns on Campus: Overview*, *supra* note 112.

116 Hutchens & Melear, *supra* note 113; Associated Press, *Utah Only State to Allow Guns at College*, NBC NEWS (Apr. 28, 2017), http://www.nbcnews.com/id/18355953/ns/us_news-life/t/utah-only-state-allow-guns-college/#.WnoxIUtMFBx [hereinafter *Utah Only State to Allow Guns at College*].

117 *Utah Only State to Allow Guns at College*, *supra* note 116. The Utah Supreme Court includes a discussion of the disagreements surrounding the University of Utah's weapons policy in its decision ultimately finding that policy inconsistent with state law. *See* Univ. of Utah v. Shurtleff, 144 P.3d 1109, 1112 (Utah 2006).

118 Uniform Firearm Laws, ch. 264, § 63-98-102(6)(b) (2004) (codified as amended at UTAH CODE § 53-5a-102(6)(b)).

"in any way inhibits or restricts the possession or use of firearms on either public or private property."[119] That extension conflicted with a long-standing University of Utah rule that prohibited, for safety reasons, the carrying of weapons on campus.[120] Litigation ensued following passage of the 2004 amendment.[121] Two years later the Utah Supreme Court ruled that the University of Utah was subject to the new law and was required to lift its weapons ban.[122] Under current Utah law, individual universities are authorized by statute, through the state's educational board, to designate one room on campus as a gun-free "hearing room" and to allow students living in dormitories to request roommates who are not licensed to carry firearms.[123] Outside of these very narrow exceptions, universities are not authorized to regulate firearms on their campuses;[124] instead, that right is explicitly reserved for the state legislature.[125]

Since 2004, nine states have followed in Utah's footsteps, authorizing campus carry in some capacity, and all following the Virginia Tech massacre.[126] The other states falling into this category are Arkansas, Colorado, Georgia, Idaho, Kansas, Mississippi, Oregon, Texas, and Wisconsin.[127] An additional state that is sometimes included in that general category, Tennessee, allows faculty members who have received a license from the state to carry their weapons on campus, but that same right does not extend to members of the general public or students.[128]

Even beyond the states that allow campus carry, there has been a significant legislative push at the state level to enact similar laws. In 2017, at least 16 additional states considered campus carry bills,[129] but none of these were enacted. New York was one of

119 *Id.* § 63-98-102(5).

120 Gregory T. Croft, *University of Utah Can't Ban Firearms on Campus*, ABC News (Sept. 20, 2006), http://abcnews.go.com/US/LegalCenter/story?id=2469016&page=1.

121 *Utah Only State to Allow Guns at College*, *supra* note 116.

122 *Shurtleff*, 144 P.3d, at 1121.

123 Utah Code Ann. § 53B-3-103 (West 2019).

124 *Id.* §§ 63-98-102(6)(b), 53B-3-103 (2004). The University of Utah's weapons policy simply states that the university enforces state law regulating firearms on campus. *See Policy 1-003: Firearms on Campus (Interim Policy)*, U. of Utah (Sept. 24, 2007), http://regulations.utah.edu/general/1-003.php.

125 Utah Code Ann. § 53B-3-103(2)(a)(ii).

126 *Guns on Campus: Overview*, *supra* note 112.

127 *Id.*

128 *Id.*

129 Hutchens & Melear, *supra* note 113.

the most surprising states to consider a new campus carry law in 2017.[130] 2015 and 2016 saw a similar number of campus carry bills introduced and debated in other states, most of which were never passed into law.[131] Among the ten states, other than Texas, that have enacted campus carry, the details of the laws vary dramatically.

In Idaho, for example, public universities may not prohibit the carrying of firearms on university property, including within all campus buildings, with exceptions only for student residence halls and arenas or stadiums seating at least 1,000 persons.[132] However, the right to carry on campus applies only to individuals who have obtained an "enhanced license to carry concealed weapons,"[133] which requires additional training beyond the traditional concealed carry license issued by the state.[134] While the governing boards of public universities in Idaho have the power to "prescribe rules and regulations relating to firearms,"[135] that power explicitly does not extend to prohibiting firearms on campus.[136]

In Kansas, the "Personal and Family Protection Act" mandates that the concealed carrying of handguns may not be prohibited in state or municipal buildings, which include those of public universities.[137] The only major exception to this general rule is for areas where "adequate security measures [are in place] to ensure that no weapons are permitted," as long as proper notice is posted.[138] Adequate security measures, by statute, include the use of electronic equipment and armed staff to detect and restrict the carrying of weapons into the building through public entrances.[139] The Kansas statutory framework also lists additional limited

130 Jackson & Gould, *supra* note 110.

131 *2015 Guns on Campus Bill Status*, CAMPAIGN TO KEEP GUNS OFF CAMPUS (Sept. 9, 2015), https://keepgunsoffcampus.org/wp-content/uploads/2013/03/2015-guns-on-campus-bills1.pdf; *2016 State Legislation – Guns on Campus Bills*, CAMPAIGN TO KEEP GUNS OFF CAMPUS (Aug. 1, 2016), https://keepgunsoffcampus.org/wp-content/uploads/2013/03/2016-State-Legislation-%E2%80%93-Guns-on-Campus-Bills1.pdf.

132 IDAHO CODE ANN. § 18-3309(2) (West 2019).

133 *Id.* § 18-3302K.

134 The enhanced license in Idaho requires, among other things, a training course of at least eight hours taught, in person, by a certified instructor and including the firing of at least 98 rounds by the student. *See id.* § 18-3302K(4)(c).

135 *Id.* § 18-3309(1).

136 *Id.* § 18-3309(2).

137 KAN. STAT. ANN. § 75-7c20(a), (j) (West 2019).

138 *Id.* § 75-7c20(a).

139 *Id.* § 75-7c20(m)(1).

exceptions, including hospitals associated with the University of Kansas.[140] Universities are not, however, granted any other flexibility in their implementation of concealed carry, including the ability to create limited gun-free zones within their campus communities.

In Wisconsin, concealed weapons license holders may carry their handguns, as a general matter, on public or private property.[141] That broad authority would extend to all premises of Wisconsin universities. However, Wisconsin also grants all universities, public and private, the power to opt out of the default law.[142] As a result, if a university posts notice that handguns are not allowed in specific areas of campus, up to and including all areas of campus, then campus carry is not lawful.[143] In practice, no private or public university in Wisconsin allows the carrying of weapons inside buildings, and no private university allows weapons on campus grounds.[144] As a result, while Wisconsin is technically within the group of states that has authorized campus carry, that right does not exist in practice at any university in the state.

The state of Arkansas requires individuals who wish to carry concealed weapons onto university campuses to undertake training beyond that required of ordinary license holders.[145] Persons completing that enhanced training may possess concealed handguns "on the grounds of a public university, public college,

140 *Id.* § 75-7c20(k)(6). Other areas specifically exempted by the Kansas statute include state-owned hospitals, adult care homes, mental health facilities, and indigent health care facilities. *Id.* § 75-7c20(k)(2)–(5).

141 Wis. Stat. Ann. § 175.60 (West 2019).

142 *Id.* § 943.13(1m)(c)5.

143 *Id.*

144 *Laws Concerning Carrying Concealed Firearms on Campus in Wisconsin*, Armed Campuses, http://www.armedcampuses.org/wisconsin/ (citing data as of October 1, 2016); *see Concealed Carry*, U. Wis. Alumni Ass'n, https://www.uwalumni.com/support/advocate/current-issues/concealed-carry/ (last visited Apr. 17, 2019) (stating that The University of Wisconsin-Madison "has designated all campus buildings as weapon-free facilities"); *Weapons Policy*, Marquette U., http://www.marquette.edu/weapons-policy/ (last visited Apr. 17, 2019) (explaining that the university prohibits weapons in all university buildings, including academic, residence, and office areas); *Firearms and Dangerous Weapons*, U. Wis.-Milwaukee, http://uwm.edu/legal/firearms-and-weapons/ (last visited Apr. 17, 2019)(stating that weapons are prohibited in all university buildings, residence halls, vehicles, and special events).

145 Ark. Code Ann. § 5-73-322(g)(1) (West 2019) (requiring, among other things, training of a maximum of eight hours, four of which may be waived if the licensee has undergone prior training within at past ten years).

or community college, whether owned or leased" by the school.[146] Private universities may opt out of the law by adopting a policy to that effect and posting appropriate notices,[147] but the Arkansas statute creates only limited exceptions to the default campus carry rule for public universities. For example, license holders may not store their handguns in university-operated dormitories.[148] In addition, license holders may not carry their concealed weapons into a location where a disciplinary or grievance procedure is taking place.[149] Beyond those limited exceptions that apply to all universities, the Arkansas law does not allow universities to establish firearms regulations.

In Colorado, the state legislature enacted the Concealed Carry Act in 2003, which allows a license holder to carry a concealed handgun "in all areas of the state."[150] Specific limited exceptions are recognized by statute, including the premises of a public elementary, middle, junior high, or high school;[151] public buildings where permanent screening devices are installed and security personnel screen all persons entering the building so that weapons can be left with the security staff;[152] and private property where the owner has chosen to exclude weapons.[153] An explicit exemption for college campuses was considered and rejected by the legislature.[154] When this law was enacted, Colorado State University immediately complied and allowed concealed carry throughout the campus, other than in residence halls and dining facilities.[155] The University of Colorado at Boulder, however, refused to comply with the law and was supported by the state's Attorney General. That office issued an opinion in 2003 stating that the university was, despite the broad concealed carry law, authorized to prohibit weapons throughout the university's premises.[156] A lawsuit brought by SCCC followed

146 *Id.* § 5-73-322(b).
147 *Id.* § 5-73-322(c)(2).
148 *Id.* § 5-73-322(d).
149 *Id.* § 5-73-322(e)(1).
150 COLO. REV. STAT. ANN. § 18-12-214(1)(a) (West 2019).
151 *Id.* § 18-12-214(3).
152 *Id.* § 18-12-214(4).
153 *Id.* § 18-12-214(5).
154 David Kopel, *Guns on University Campuses: The Colorado Experience*, WASH. POST (Apr. 20, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/20/guns-on-university-campuses-the-colorado-experience/?utm_term=.033ba9fc867d.
155 *Id.*; *Weapon Storage and Information*, COLO. ST. U., https://police.colostate.edu/weapon-storage-and-information/.
156 Regents Control of CU Weapons Control Policy, No. 03-03 Opp. Att'y Gen. of

several years later, which worked its way up to the Colorado Supreme Court. In 2012, that court ruled that the broad language of the concealed carry statute, combined with the narrow exceptions carved out in the statute, reflected the clear legislative intent to divest the University of Colorado's authority to regulate the possession of concealed handguns on campus.[157] As a result, the University of Colorado now allows the carrying of concealed weapons by license holders throughout its premises, with the exception of ticketed public performance venues, dining halls, and residence halls.[158]

Mississippi is one of currently 11 states that has authorized "constitutional carry," or the right of individuals to carry a concealed weapon in public without receiving any governmental license.[159] Although that general right does not extend to the unlicensed carry of concealed weapons on university campuses, Mississippi offers an Enhanced Carry Permit, which does.[160] As a result, individuals who satisfy the heightened license requirements for this enhanced permit have the right to carry their concealed weapons onto the premises of all colleges and universities in Mississippi.[161] Despite that authorization, Mississippi universities continue to implement regulations that restrict the carrying of concealed weapons on their

Colo. 6 (June 17, 2003).

157 Regents of the Univ. of Colo. v. Students for Concealed Carry on Campus, LLC, 271 P.3d 496, 497 (Colo. 2012).

158 *Weapons on Campus*, U. Colo. Boulder, https://www.colorado.edu/police/services-faqs/weapons-campus (last visited Apr. 17, 2019). The exceptions to campus carry carved out by both The University of Colorado Boulder and Colorado State University appear to be based on the general idea that the universities may regulate weapons in limited circumstances in contractual or licensor-licensee arrangements, such as in the dining hall, residence hall, or sports arena context. *See generally Laws Concerning Carrying Concealed Firearms on Campus in Colorado*, Armed Campuses, http://www.armedcampuses.org/colorado/ (last visited Apr. 17, 2019); *see also Policy on Firearms, Explosives, and Other Weapons* § 2.5, Colo. Sch. Mines (Oct. 1, 2013), https://inside.mines.edu/UserFiles/File/PoGo/Policies/STU/STU_Firearms_Policy.pdf (recognizing the broad right to concealed carry on campus for license holders, but reserving the right to prohibit weapons in any buildings where access is granted pursuant to a contractual relationship, such as in the housing context).

159 *See* Miss. Code Ann. § 45-9-101(24) (West 2018); Geoff Pender, *How to Carry a Gun in Mississippi: New Laws Explained*, Clarion-Ledger (May 14, 2016), https://www.clarionledger.com/story/news/politics/2016/05/14/mississippi-gun-laws/84164140/.

160 Re: City Ordinance Prohibiting the Carrying of Firearms, 2013-00217 Opp. Att'y Gen. of Miss. 4 (Dec. 2, 2013).

161 *Id.*; Pender, *supra* note 159.

campuses. For example, both the University of Mississippi and Mississippi State University prohibit concealed carry, despite the existence of Enhanced Carry Permits, in all academic buildings, classrooms, laboratories, administrative offices and buildings, athletic facilities, residence halls, and other areas where university events are scheduled.[162] The universities appear to base these exclusions on the fact that the no-weapons areas are not open to the public and are sensitive in nature.[163] As a result, it appears that some confusion currently exists around the topic of campus carry in Mississippi. Reflecting one aspect of that confusion, the Mississippi Legislature considered, but did not pass, a bill that would have allowed holders of Enhanced Carry Permits the right to sue to enforce their right to carry weapons onto university property.[164]

Despite vetoing a similar bill in 2016, Georgia's governor made that state the most recent to authorize campus carry on July 1, 2017.[165] That enactment occurred despite the unified opposition of school presidents, university police chiefs at the University system

162 *Weapons on Campus*, U. MISS., https://secure24.olemiss.edu/umpolicyopen/GetPdfActive?pol=12092519&ver=active&file=12092519_active_20160902.pdf (last visited Apr. 17, 2019); *OP 91.20: Possession of Firearms, Explosives, or Other Devices, Substances, or Weapons*, MISS. ST. U. 1–2 (2016), http://www.policies.msstate.edu/policypdfs/91120.pdf.

163 *Weapons on Campus*, *supra* note 162 (stating that Enhanced Carry Permit holders may not bring concealed weapons into the listed areas, which have been "designated as sensitive or non-public areas"). A similar distinction was made by the Mississippi Attorney General's Office in the context of analyzing whether the state's weapon permitting scheme allowed for the carrying of concealed weapons onto the premises of public schools. Re: Concealed Weapon on a Public School Campus, 2013-00023 Opp. Att'y Gen. of Miss. 4 (Oct. 1, 2013). The Attorney General explained that, "[a]lthough an enhanced licensee may carry into the public areas of a school facility, the enhanced license does not authorize him to enter onto parts of property where the public is not generally allowed." *Id.* That opinion also cited *Digiacinto v. Rector and Visitors of George Mason University*, 704 S.E. 2d 365, 370 (Va. 2011) for the proposition that, "[a] university, unlike a public street or park, is not traditionally open to the public." *Id.*

164 H.B. 1083, 2018 Reg. Sess. (Miss. 2018), http://billstatus.ls.state.ms.us/2018/pdf/history/HB/HB1083.xml.

165 Kathleen Foody, *Georgia Governor Approves Concealed Guns on Campus*, U.S. NEWS & WORLD REP. (May 4, 2017), https://www.usnews.com/news/best-states/georgia/articles/2017-05-04/georgia-governor-approves-carrying-concealed-guns-on-campus; Ramsey Touchberry, *What Georgia's New Concealed Campus Carry Law Means for Students and Faculty*, USA TODAY COLLEGE (July 12, 2017), http://college.usatoday.com/2017/07/12/what-georgias-new-concealed-campus-carry-law-means-for-students-and-faculty/.

of Georgia's 28 educational institutions, and the Atlanta Chief of Police.[166] Under the new campus carry law in Georgia, handgun license holders may carry their weapons in a concealed manner in any building or on the real property of any public college or university.[167] The statutory scheme specifies several limited exception areas where concealed carry is prohibited at all public colleges and universities, including in buildings used for sporting events; student housing, including fraternity and sorority houses; areas where childcare is provided; rooms where high school students are enrolled in dual credit programs; faculty, staff, and administrative offices; and rooms where disciplinary proceedings are conducted.[168] Georgia does not include in its statutory framework any discretion for universities in implementing the new law or in promulgating rules to regulate campus carry. The University System of Georgia's Chancellor made this point clear in his Guidelines for the Implementation of House Bill 280: "Institutions . . . may not place additional restrictions or prohibitions on the carrying of handguns beyond those contained in the law."[169]

In Oregon, the state of campus carry is a confused mix of state statutory law, judicial opinions, and contradictory but apparently unenforced university and board of education policies. In 2011, the Oregon Court of Appeals struck down a board of education regulation[170] that banned guns on university campuses as inconsistent with the state's law reserving all power to regulate firearms to the legislature.[171] Following this decision, the Oregon

166 Foody, *supra* note 165; Lisa Hagen, *Flipping on the Issue, Georgia Governor Signs Campus Carry Bill*, NPR (May 4, 2017), https://www.npr.org/2017/05/04/526971357/flipping-on-the-issue-georgia-gov-signs-campus-carry-bill.

167 Ga. Code Ann. § 16-11-127.1(20)(A) (West 2019).

168 *Id.* § 16-11-127.1(20)(A)(i), (ii), (iv), (v). The law also does not require posting of notice outside areas where weapons are prohibited, thereby putting the burden of knowing where weapons are allowed squarely on the license holder. Chancellor Steve Wrigley, *Guidelines for the Implementation of House Bill 280*, U. Sys. Ga., https://www.usg.edu/news/release/guidelines_for_the_implementation_of_house_bill_280 (May 24, 2017).

169 Wrigley, *supra* note 168.

170 The rule in question was promulgated by the Oregon State Board of Higher Education and the Oregon University System. *See* Or. Firearms Educ. Found. v. Bd. of Higher Educ., 264 P.3d 160, 161 (Or. Ct. App. 2011).

171 *Id.*; *see also* Or. Rev. Stat. Ann. § 166.170 (1) (West 2019) ("Except as expressly authorized by state statute, the authority to regulate in any matter whatsoever the sale, acquisition, transfer, ownership, possession, storage,

University System issued a new "policy" in 2012 that had the same impact as its prior "rule": a prohibition, citing security concerns, on the carrying of firearms on university property by students, employees, anyone attending events on campus, and anyone renting university property, "whether or not that person possesses a concealed handgun license."[172] Although the Oregon University System disbanded in 2015,[173] individual universities had already adopted internal policies consistent with that 2012 state-wide policy. For example, The University of Oregon prohibits firearms on campus, referencing the 2012 State Board of Higher Education policy.[174] In the face of these contradictory policies and rulings, at least some Oregon university students are choosing to carry concealed weapons on campus, in defiance of their schools' prohibitions.[175] It is unclear whether Oregon universities are enforcing their individual prohibitions on firearms at this time, thus making the current state of campus carry in Oregon uncertain.[176]

In summary, the status of campus carry in the nine states that currently allow it is confused, inconsistent, and dominated by polarized positions. At the very least, these states have done a poor job balancing the right of license holders to carry firearms on

transportation or use of firearms or any element relating to firearms and components thereof, including ammunition, is vested solely in the Legislative Assembly.").

172 *Policy on Firearms*, U. OR. POLICE DEP'T (Mar. 2, 2012), http://police.uoregon.edu/sites/police.uoregon.edu/files/OUS-Policy-on-Firearms.pdf. The prior board of education "rule" authorized sanctions against any person who possessed or used firearms on university property. *See Or. Firearms Educ. Found.*, 264 P.3d at 161 (referencing State Board of Higher Education rule OAR 580-022- 0045(3)).

173 Dash Paulson, *The End of the Oregon University System*, EUGENE WEEKLY (July 9, 2015), https://eugeneweekly.com/2015/07/09/the-end-of-the-oregon-university-system/.

174 *Firearms*, U. OR. POLICE DEP'T, https://policies.uoregon.edu/vol-4-finance-administration-infrastructure/ch-5-public-safety/firearms. Other Oregon universities follow suit. *See also Drug, Alcohol, and Weapons Policies, FAD.025*, S. OR. U. (Oct. 5, 2015), https://inside.sou.edu/assets/policies/docs/drug-alcohol-weapons.pdf (prohibiting all weapons on campus); *Firearms Policy*, O.S.U. (Mar. 2, 2012), https://policy.oregonstate.edu/policy/firearms (prohibiting the carrying of weapons by students, employees, contractors, and event attendees).

175 Alex Yablon & Olivia Li, *Oregon Colleges Ban Guns. Students Tote Them Anyway. Here's Why*, TRACE (Oct. 7, 2015), https://www.thetrace.org/2015/10/oregon-community-college-gun-free-zone/.

176 *Id.* (Oregon universities "would likely see their policies regulating guns on campus get overruled in court should they ever try to enforce them.").

campus with the need to provide individual flexibility to universities in implementation.

IV. TEXAS CAMPUS CARRY

Against this backdrop of U.S. campus carry laws, the following section looks in more depth at Texas: the general structure of guns laws in the state, a brief history of the enactment of campus carry in Texas, the framework of the state's campus carry law, and how universities have implemented it.

A. Context of Texas Gun Laws

Although Texas has a reputation as being a bastion for gun rights,[177] it also has a long history of regulating firearm possession, dating to at least 1866.[178] Then in 1870, the Texas Legislature limited the carrying of firearms in a variety of settings, including at polling places and public assemblies.[179] A broader framework limiting the carrying of firearms in public was enacted in 1871, with exceptions for militiamen, police, property owners on their premises, travelers, and persons in fear of unlawful immediate attack.[180] Although challenges to these laws were brought on constitutional grounds,[181] such concerns were largely resolved by case law the following year[182]

177 Mike Ward, *Gun-Related Bills Are Moving Slowly*, Austin Am.-Statesman, May 1, 2013, at A1.

178 Hummel, *supra* note 30, at 143; Riley C. Massey, *Bull's-Eye: How the 81st Texas Legislature Nearly Got it Right on Campus Carry, and the 82nd Should Still Hit the X-Ring*, 17 Tex. Wesleyan L. Rev. 199, 203 (2011) (citing Act of Nov. 6, 1866, 11th Leg., R.S., ch. 92 § 1, 1866 Tex. Gen. Laws 90, *reprinted in* 5 H.P.N. Gammel, The Laws of Texas 1822-1897, at 1008, 1008-09 (Gammel Book Co. 1898) (making trespass with a firearm an offense punishable by a maximum ten-dollar fine and ten-day incarceration in the county jail)).

179 Massey, *supra* note 178, at 203 (citing Act of Aug. 12, 1870, 12th Leg., 1st C.S., ch. 46 § 1, 1870 Tex. Gen. Laws 63, *reprinted in* 6 H.P.N. Gammel, The Laws of Texas 1822–1897, at 237 (Gammel Book Co. 1898) (codified as amended at Tex. Gov't Code § 411.202)).

180 *See* Massey, *supra* note 178, at 203 (citing Act of Apr. 12, 1871, § 1, 1871 Tex. Gen. Laws 25); Brownlee v. State, 32 S.W. 1043, 1044 (Tex. Crim. App. 1895) (addressing the "immediate threat of attack" defense); Baird v. State, 38 Tex. 599, 601–02 (1873) (addressing property owners on their own premises); Waddell v. State, 37 Tex. 354, 356 (1873) (requiring a traveler's pistol be carried in his baggage); *see generally* Robert G. Newman, *A Farewell to Arms? –An Analysis of Texas Handgun Control Law*, 13 St. Mary's L.J. 601, 603 (1982).

181 Hummel, *supra* note 30, at 143; Massey, *supra* note 178, at 204.

182 Massey, *supra* note 178, at 204 (citing English v. State, 35 Tex. 473, 477 (1872)).

and an amendment to the Texas Constitution in 1875 that expressly recognized the State's power to prevent crime through the regulation of an individual's right to carry firearms.[183]

For the first time in over 100 years, the Texas Legislature passed a bill in 1995 allowing concealed carry of handguns (CCH) for self-protection.[184] The Texas CCH law created a non-discretionary right to a CCH license for individuals who met all statutory application requirements, making Texas an RTC state.[185] The Texas CCH law, which was considered relatively restrictive when compared to those of other states, allowed CCH license holders to carry their weapons in a concealed manner in public locations, with certain limitations.[186] The Texas Legislature enacted various amendments to the CCH law over the years for clarity and to promote the uniform application of the law.[187] The CCH framework remained in Texas until January 1, 2016, when the State's new "open carry" law, passed in the spring of 2015, went into effect.[188] Under that new law, the open carry of firearms is allowed by handgun license holders, with generally the same limitations that existed under the prior CCH statutory scheme.[189] No additional training or license was required of CCH license holders—now simply referred to as license holders—to be allowed to open carry after enactment of the new law.[190]

183 Hummel, *supra* note 30, at 143; Newman, *supra* note 180, at 603–04 (citing TEX. CONST. art. I, § 23: "[T]he legislature shall have the power, by law, to regulate the wearing of arms, with a view to prevent crime."); Massey, *supra* note 178, at 204.

184 Concealed Handgun Act, 74th Leg., R.S., ch. 229, § 1, 1995 TEX. GEN. LAWS 1998; Massey, *supra* note 178, at 204 (citing Robert A McCulloch & Sandra G. Wilkinson, *Concealed Weapon Laws: Their Potential Impact on the Workplace*, 13 A.B.A. COMPLEAT LAWYER LN1, LN2 (1996)).

185 TEX. GOV'T CODE ANN. § 411.172 (West 2019).

186 Hummel, *supra* note 30, at 144; McCulloch & Wilkinson, *supra* note 184, at LN3.

187 Hummel, *supra* note 30, at 144 (citing Act of Apr. 3, 2003, 78th Leg., R.S., ch. 1178, § 1, 2003 TEX. GEN. LAWS 3364).

188 H.B. 910 § 49, 84th Leg., Reg. Sess. (Tex. 2015), https://capitol.texas.gov/tlodocs/84R/billtext/pdf/HB00910I.pdf.

189 *See id.* Texas accomplished this outcome largely by striking the word "concealed" in the various statutory provisions that had referenced "concealed handguns." *Id.*; Eduardo F. Cuaderes Jr., et al., *Open Carry and Campus Carry: Expanded Handgun Rights in Texas in 2016 and Beyond*, LITTLER INSIGHT (Aug. 7, 2015), https://www.littler.com/publication-press/publication/open-carry-and-campus-carry-expanded-handgun-rights-texas-2016-and/.

190 H.B. 910 made no changes to the Texas handgun licensing requirements found in TEX. GOV'T CODE § 411.172 other than deleting the word "concealed." *See*

One of the few exceptions to the state's concealed and then open carry laws has been the college campus, where weapons were generally not allowed.[191] In reality, though, weapons were only prohibited within buildings on college campuses. Since 1995, license holders in Texas have been authorized to carry their handguns in outdoor areas of colleges, including sidewalks, parking lots, and breezeways.[192] However, because license holders were not allowed to carry their weapons into college buildings, the number of weapons being carried on sidewalks between buildings was likely low prior to the enactment of campus carry.[193] In 2013, Texas loosened its gun laws slightly by prohibiting universities from regulating the storage of lawfully-possessed firearms in motor vehicles located on college campuses.[194]

B. Legislative Battle to Enact Campus Carry in Texas

Serious efforts to enact campus carry in Texas began in 2009 and were ongoing through eventual passage of the law in 2015. Even in a state as gun-friendly as Texas, campus carry took six years to pass and faced considerable opposition and split public opinion along the way.

In 2009, companion bills S.B. 1164 and H.B. 1893 were introduced in the Texas Legislature to authorize campus carry on the premises of both public and private institutions, with no opt-outs.[195] Official motivations underlying these bills focused on personal safety and logistical challenges posed to license holders from the patchwork of conflicting rules related to carrying handguns across Texas.[196] The Legislature's Bill Analysis of H.B. 1893 noted that the pre-campus carry legal landscape created "legal and geographical barrier[s] for concealed handgun licensees who visit or who live,

H.B. 910 § 17, 84th Leg., Reg. Sess. (Tex. 2015).

191 *See* Tex. Penal Code § 46.035(a-1) (West 2019).

192 *Id.* § 46.035(a-1)(2); *see* Lee, *supra* note 20.

193 *Campus Carry General Information: Facts*, U. Tex. Austin, http://campuscarry.utexas.edu/ (last visited Apr. 17, 2019).

194 *See* Gov't § 411.2032(b).

195 S.B. 1164, 81st Leg., Reg. Sess. (Tex. 2009), http://www.legis.state.tx.us/tlodocs/81R/billtext/pdf/SB01164I.pdf#navpanes=0; H.B. 1893, 81st Leg., Reg. Sess. (Tex. 2009), http://www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB01893I.pdf#navpanes=0.

196 Driver, Public Safety Committee Report (Substituted), H. 81-22633, 81st Leg., Reg. Sess., at 1 (Tex. 2009),http://www.capitol.state.tx.us/tlodocs/81R/analysis/pdf/HB01893H.pdf#navpanes=0.

work, or study on a college or university campus, denying them the right to protect themselves in these settings."[197] The right of self-protection on a college campus was viewed as especially important given the attacks at Virginia Tech just two years earlier, which were explicitly referenced.[198] The Legislature's analysis also noted that concealed license holders go through extensive handgun training and are usually law-abiding and responsible citizens, further justifying the proposed law.[199] Despite having 75 primary, joint, and co-authors, and being voted out of the House Committee on Public Safety, H.B. 1893 was never voted on by the full House.[200] S.B. 1164, with 13 primary and co-authors, was approved by the Senate and voted out of the House Committee on Public Safety, but it died before being considered by the full House.[201]

The push to allow handgun carry on Texas campuses gained momentum in 2011. In that legislative session, at least five proposed campus carry bills were introduced.[202] Although they all sought to authorize the concealed carry of handguns throughout college campuses, they varied on topics such as storage of handguns in dormitories;[203] whether private universities would be obligated to comply;[204] and whether hospitals operated by universities would be

197 *Id.*

198 HOUSE RESEARCH ORG., BILL ANALYSIS OF H.B. 1893, 81st Leg., Reg. Sess., at 3 (Tex. 2009), https://capitol.texas.gov/billookup/Text.aspx?LegSess=81R&Bill-HB1893#.

199 DRIVER, PUBLIC SAFETY COMMITTEE REPORT (SUBSTITUTED), H. 81-22633, 81st Leg., Reg. Sess., at 1 (Tex. 2009).

200 *H.B. 1893: History*, TEX. LEG. ONLINE, https://capitol.texas.gov/BillLookup/History.aspx?LegSess=81R&Bill=HB1893 (last visited Apr. 17, 2019).

201 *S.B. 1164: History*, TEX. LEG. ONLINE, https://capitol.texas.gov/BillLookup/history.aspx?LegSess=81R&Bill=SB1164 (last visited Apr. 17, 2019).

202 *See, e.g.*, H.B. 86, 82nd Leg., Reg. Sess. (Tex. 2011), https://capitol.texas.gov/BillLookup/History.aspx?LegSess=82R&Bill=HB86; H.B. 750, 82nd Leg., Reg. Sess. (Tex. 2011), https://capitol.texas.gov/BillLookup/History.aspx?LegSess=82R&Bill=HB750; H.B. 1167, 82nd Leg., Reg. Sess. (Tex. 2011), https://capitol.texas.gov/BillLookup/History.aspx?LegSess=82R&Bill=HB1167; H.B. 2178, 82nd Leg., Reg. Sess. (Tex. 2011), https://capitol.texas.gov/BillLookup/History.aspx?LegSess=82R&Bill=HB2178; S.B. 354, 82nd Leg., Reg. Sess. (Tex. 2011), https://capitol.texas.gov/BillLookup/History.aspx?LegSess=82R&Bill=SB354.

203 For example, H.B. 86 and H.B. 750 both would have given universities the power to regulate some aspects of handgun storage, while H.B. 1167 and H.B. 2178 would not. *See supra* note 202.

204 H.B. 1167 would not have applied to private universities, but the remaining bills would have, and all would have applied to public universities. *See supra*

exempt.[205]

The most promising of those 2011 legislative efforts was originally S.B. 354, co-authored by Sen. Wentworth and endorsed by the Texas Governor.[206] Sen. Wentworth's motivation was avoiding another school massacre: "to give faculty, staff and students a way to defend themselves when some deranged person comes on campus intending to commit suicide and take as many people with him as he can like they did at Virginia Tech several years ago."[207] By empowering law-abiding citizens to carry a firearm on a university campus, Wentworth hoped to "put an element of doubt in a potential shooter's mind."[208] Without that protection, students, faculty, and staff would be easy targets for a campus shooter: "A [gun-free zone] means it's a victim zone."[209]

S.B. 354 would have barred public universities from implementing rules that prohibited concealed carry of handguns on campus by license holders, although private universities would have had the choice of opting out of the law.[210] Other than granting public universities a limited right to regulate firearm storage in university-owned dormitories on campus, the proposed bill did not authorize universities to regulate weapons on campus.[211] In committee, Sen. Wentworth's bill was amended in various ways, including insertion of a prohibition on concealed carry in hospitals operated by a college or university.[212] He fought off other attempted modifications of his bill in committee, including a push to allow public universities to

note 202.

205 The Senate Committee Substitute for S.B. 354 explicitly excluded hospitals operated by a university. *See* S.B. 354, 82nd Leg., Reg. Sess. (Tex. 2011) (Senate Committee Substitute, as introduced Apr. 5, 2011), https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=82R&Bill=SB354.

206 *See* S.B. 354, 82nd Leg., Reg. Sess. (Tex. 2011); William James Gerlich, *Survivors Decry Campus Gun Legislation*, Daily Texan (Feb. 18, 2011), https://www.dailytexanonline.com/news/2011/02/18/survivors-decry-campus-gun-legislation.

207 Melissa Ayala, *Legislators Push for Guns on Campus*, Daily Texan (Feb. 4, 2011), http://www.dailytexanonline.com/news/2011/02/04/legislators-push-for-guns-on-campus.

208 Ayala, *supra* note 207.

209 *See* Gerlich, *supra* note 206.

210 S.B. 354, 82nd Leg., Reg. Sess. (Tex. 2011).

211 *Id.*

212 *S.B. 354: History*, Tex. Leg. Online, https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=82R&Bill=SB354 (last visited Apr. 17, 2019).

opt out of the law altogether.[213]

The real battle over S.B. 354 was not in the detail of its content; it was whether, and if so, how, the bill would even make it out of the Texas Senate. Chamber rules required a two-thirds Senate vote to bring a bill up for debate.[214] Although Sen. Wentworth made multiple attempts to garner the necessary votes to have his bill considered by the Senate, he was unsuccessful each time.[215] That difficulty was "surprising in a Republican-controlled legislative chamber that generally is friendly to gun-rights legislation and approved a similar bill two years ago by a 20-11 vote."[216] If the bill could somehow pass the Senate, it faced a less rocky future in the House, where it had 80 co-authors and Republicans held a 101-member supermajority.[217] Unable to bring his bill up for debate on its own, Sen. Wentworth attempted a different procedural tack: he tried to attach S.B. 354 as an amendment to another Senate bill with more support.[218] Bringing a bill up for debate in the Senate would have required 21 votes.[219] An amendment would require only 16 votes.[220] Rep. Wentworth had 20.[221]

Rep. Wentworth's new approach targeted the legislative efforts of Sen. Zaffirini, who was Chairman of the Senate Higher Education Committee. He first tried to attach his campus carry language to an uncontroversial but important college administration bill sponsored by Sen. Zaffirini.[222] Sen. Zaffirini was so opposed to campus carry that she ultimately chose to withdraw and kill S.B. 5 rather than allow it to be amended to include Sen. Wentworth's

213 *College Liberals Attempt to Gut Campus Carry Bill*, AMMOLAND (Apr. 8, 2011), https://www.ammoland.com/2011/04/college-liberals-attempt-to-gut-campus-carry-bill/#axzz5j8gqktvx.

214 *See* SENATE OF TEX., SENATE RULES, S. 82-36, Reg. Sess., at 24, 26 (2011); *College Liberals Attempt to Gut Campus Carry Bill*, *supra* note 213.

215 Mike Ward, *Campus-Carry Bill in Trouble*, AUSTIN AM.-STATESMAN, Apr. 12, 2011, at A1.

216 *Id.*

217 *Id.*

218 Mike Ward, *Campus-Carry Bill Gambit Stalls*, AUSTIN AM.-STATESMAN, Apr. 28, 2011, at B1.

219 *See* SENATE OF TEX., SENATE RULES, S. 82-36, Reg. Sess., at 24, 26 (2011) (requiring a two-thirds majority of those present in order to bring a bill up for debate), https://lrl.texas.gov/collections/rulesandprecedents.cfm.

220 *See id.* at 107–08.

221 Ward, *supra* note 218.

222 *Id.*

proposed language.[223] Undaunted, Sen. Wentworth sought other bills that could help him move campus carry forward: "There are several ways to skin a cat in this legislative body," he told reporters.[224] Several days later, Sen. Wentworth was successful in attaching his language to a higher-education finance amendment sponsored by Sen. Zaffirini. Republican Sen. Ogden, author of the underlying S.B. 1581, accepted Sen. Wentworth's proposed amendment.[225] With a vote of 19-11, the Texas Senate approved campus carry.[226] After weeks of political wrangling—labeled "Groundhog (With a Gun) Day" by Sen. Patrick[227]—it appeared that campus carry was headed for smooth sailing in the more conservative-leaning House.

Even so, guns on campus had "quickly boiled into one of [the] most controversial issues of the session,"[228] and the fight was not over. After reviewing S.B. 1581, the Texas House of Representatives declared that Sen. Wentworth's amendment to the finance bill was procedurally improper, and the House returned the bill to the Senate for removal of the campus carry language.[229] Proponents of campus carry in the Senate scrambled to respond to this surprise move, attempting passage of campus carry as a stand-alone bill.[230] As with similar attempts earlier in the session, that effort failed.[231] When it did, campus carry in 2011 was dead in the Texas Legislature.

While it is unclear exactly why Sen. Wentworth was unable to garner the necessary support for campus carry in the conservative Texas Legislature in 2011, it is apparent that significant opposition to

223 *Id.*

224 Mike Ward, *Campus-Carry Revived*, Austin Am.-Statesman, May 4, 2011, at B1.

225 Mike Ward, *Campus Guns Bill Receives New Life*, Austin Am.-Statesman, May 10, 2011, at A1; *S.B. 1581: History*, Tex. Leg. Online, https://capitol.texas.gov/billlookup/History.aspx?LegSess=82R&Bill=SB1581 (last visited Apr. 17, 2019).

226 *See* S. Journal, 82nd Leg., Reg. Sess., 2687 (Tex. 2011).

227 Joe Holley, *The 82nd Legislature: Senate Oks Bill for Guns on Campuses*, Hous. Chron., May 10, 2011, at A1.

228 Jim Vertuno, *Republicans in Texas Senate Approve Guns on Campus*, NBC DFW (May 9, 2011), https://www.nbcdfw.com/news/local/Republicans-in-Texas-Senate-Approve-Guns-on-Campus-121533294.html.

229 *See* H. Journal, 82nd Leg., Reg. Sess., 4301 (Tex. 2011) (sustaining the point of order that H.B. 1581 violated the one subject rule and returning the bill to the Senate); Mike Ward, *Campus Gun Bill's Chances Look Bleak*, Austin Am.-Statesman, May 21, 2011, at A1.

230 Ward, *supra* note 229.

231 *Id.*

the measure came from certain constituent groups.[232] In particular, the University of Texas System Chancellor, Francisco Cigarroa, vocally opposed campus carry in a letter to Gov. Perry: "I must concur with all the concerns and apprehensions expressed to me, that the presence of concealed weapons, on balance, will make a campus a less-safe environment."[233] The UT Austin Faculty Council and the Texas A&M University Faculty Senate also opposed campus carry in 2011.[234] Pressure also came from outside Texas, including from the national press[235] and organizations such as the Brady Campaign to Prevent Gun Violence.[236]

After coming so close to passage in 2011, campus carry in Texas appeared poised for adoption during the 2013 Legislative Session.[237] However, while the arguments swirling around campus carry were not new, the overall societal context had changed. Less than a month before the start of the 2013 regular session, the Newtown, Connecticut school shooting left 26 people dead, including 20 children between the ages of five and ten years old.[238] The horror of this monstrous violence against children in the school setting, committed with a rifle and two handguns, appears to have subdued at least some of the pro-gun members of the Texas Legislature in 2013.[239]

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232 *Id.*

233 Ben Wermund, *Chancellor Says Guns on Campus a Bad Idea*, AUSTIN AM.-STATESMAN, Feb. 26, 2011, at B1.

234 Alex Hannaford, *The Campus Carry Movement Stutter-Steps Across America*, ATLANTIC (May 10, 2011), https://www.theatlantic.com/politics/archive/2011/05/the-campus-carry-movement-stutter-steps-across-america/237915.

235 *Guns on Campus Could Cause More Tragedy Than They Avert*, USA TODAY, Mar. 1, 2011, at 6A.

236 *See* Hannaford, *supra* note 234.

237 Other bills relating to guns on campus were considered in 2013, including one that would have allowed for "secret 'school marshals' with concealed-handgun licenses and 80 hours of special training" and one that would have allowed teachers to be specially trained to deal with school shooting incidents before law enforcement arrived on the scene. Mike Ward, *Emotional Divide Over Weapons on Campus*, AUSTIN AM.-STATESMAN, Mar. 15, 2013, at A01.

238 James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. TIMES, Dec. 14, 2012; Steve Vogel et al., *Sandy Hook Elementary Shooting Leaves 28 Dead, Law Enforcement Sources Say*, WASH. POST, Dec. 14, 2012 (putting the death toll at 28, to include the shooter and his mother, who he shot before going to the school).

239 While an aversion to introducing guns into schools following Sandy Hook may be reasonable, that same tragedy could have rallied further support for

Nevertheless, Texas legislators filed almost 100 bills related to guns during the 2013 session, twice the number filed in the prior session,[240] including bills that would have allowed school teachers designated as marshals to carry weapons in classrooms.[241] And when legislative hearings on campus carry rolled around, passionate standing room only crowds showed up and were vocal.[242]

Supporters often referenced the importance of personal safety in the classroom and the fundamental right to bear arms.[243] Sen. Birdwell, who introduced a campus carry bill in 2013, said that the issue was not simply about guns: "It's about trusting citizens with their God-given, constitutional rights."[244] Another pro-campus carry legislator looked forward to a time when his 23-year-old son

campus carry and reinvigorated the Legislature's desire to enact universal concealed carry for protection. Ward, *supra* note 237 (stating that, "This year, with the Connecticut school massacre in December heightening public fears about school security, supporters hope they stand a better chance" of seeing campus carry legislation passed); David Below, *Texas Campus-Carry New Gun Bill Filed by State Senator Brian Birdwell*, Tex. Conservative Republican News (Jan. 21, 2013) (stating that "[g]un-rights advocates hope that tragedy will lead lawmakers and the public to view allowing guns at colleges as making campuses safer"), http://www.texasconservativerepublicannews.com/search?q=Texas+Campus-Carry+New+Bill+Filed. In fact, some evidence suggests that state legislative activity on campus carry increased immediately following this attack. *See* Melear & St. Louis, *supra* note 32, at 61.

240 Ward, *supra* note 177.

241 *See* H.B. 1009, 83rd Leg., Reg. Sess. (Tex. 2013), https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=83R&Bill=HB1009.

242 The first legislative hearing on campus carry in 2013 drew dozens of supporters and opponents. Ward, *supra* note 237. Later public hearings were also well-attended with high emotions on both sides of the issue. Mike Ward, *House Tentatively Oks a Dozen Pro-Gun Bills*, Austin Am.-Statesman, May 5, 2013, at B1; *see also* Claire Cardona, *Committee Hears Testimony from Both Sides of Guns on Campus Debate*, Dall. Morning News, Mar. 14, 2013.

243 State Representative Dan Flynn explained the reason for a 2013 committee hearing to consider campus carry: "The Second Amendment was not created for the purpose of allowing people the opportunity to hunt, fish[,] or collect firearms; the purpose of the Second Amendment was to grant each and every individual the right to protect themselves from whoever and whatever they felt were a threat to their wellbeing. That fundamental right is why we were here today discussing these issues." Representative Dan Flynn, *Committee on Homeland Security and Public Safety Hears Controversial Gun Legislation*, Tex. House of Representatives (Mar. 15, 2013), https://house.texas.gov/news/press-releases/?id=4429.

244 Kolten Parker, *Legislature Might Revisit Issue of Guns on Campus; Bill Wouldn't Let Colleges Prohibit Weapons*, San Antonio Express-News, Jan. 18, 2013, at B1.

in college could defend himself if needed: "I'd love to know if some lunatic gets loose on campus with an AK-47 in his classroom, it's going to be a short-lived episode."[245] Many university administrators were opposed, citing safety concerns with having more guns on campus and the poor fit of a one-size-fits-all approach in a state as geographically diverse as Texas.[246] Officials from UT Austin, in particular, strongly opposed the proposed campus carry measure.[247] Policy and lobbying groups also became involved in the debate over guns on campus, including the Texas State Rifle Association (TSRA),[248] Students for Gun-Free Schools in Texas,[249] and Texas Gun Sense.[250] Officials at universities in Texas and throughout the country were also asked about their positions on campus carry and were forced to formulate and issue public statements.[251] While many universities were noncommittal and simply stated their plan to follow whatever law was enacted,[252] two private universities, Wayland Baptist University and Lubbock Christian University, came out early in the 2013 legislative session opposed to campus carry.[253]

Despite public rhetoric and engagement on the issue, the primary campus carry bill in the Senate quickly became stuck in the Senate Criminal Justice Committee. The chair of that committee,

245 Brittany Hoover, *Area Legislators Share Thoughts on Higher Education Issues*, LUBBOCK AVALANCHE-J., Jan. 8, 2013.

246 Some university administrators were not opposed to the general idea of allowing concealed carry on campus, but believed that the decision whether to allow guns should be made on a campus-by-campus basis. *See* Parker, *supra* note 244.

247 Mike Ward, *House Tentatively Oks a Dozen Pro-Gun Bills*, AUSTIN AM.-STATESMAN, May 5, 2013, at B1.

248 Ben Kamisar, *Senator Files Campus Gun Bill*, AUSTIN AM.-STATESMAN, Jan. 18, 2013, at B01 (quoting Alice Tripp, legislative director for the TSRA as stating that, "There's a more compelling reason than ever for adults with a concealed handgun license attending a college or university (to) be allowed to have that personal protection option").

249 *Id.*

250 Kolten Parker, *Campus Gun Bill is Declared Dead*, HOUS. CHRON., Apr. 25, 2013.

251 In an attempt to sway policymakers, university presidents from across the country signed a letter at www.collegepresidentsforgunsafety.org opposing campus carry legislation. Several Texas universities, including Austin College, Trinity University, the University of Dallas, and Southwestern University, signed the letter. *See* Brittany Hoover, *Area University, College Leaders React to Planned Campus Carry Bill*, LUBBOCK AVALANCHE-J., Jan. 19, 2013.

252 *Id.* (citing Texas Tech University, South Plains College, Western Texas College, and Howard College as examples of Texas colleges that had not taken a stance on campus carry early in the 2013 legislative session).

253 *Id.*

John Whitmire, called campus carry "a very divisive issue"[254] and publicly voiced opposition to the bill: "After Sandy Hook and all the other tragedies we've seen in recent months, we need a cooling off period before we start approving guns in a lot of other public places. . . . I respect the status quo right now."[255] On the other hand, the House version of campus carry, H.B. 972, passed out of committee to the full House.[256] It was approved by the House on a 102-41 vote, with supporters fending off various attempted amendments, including one that would have exempted universities within 75 miles of the Texas-Mexico border.[257]

The Senate Criminal Justice Committee did ultimately pass the House version of campus carry contained in H.B. 972 on May 14, 2013.[258] That version would have allowed public universities to opt out of campus carry and private universities to opt in, and all campuses covered by the law would have been required to reapprove their policies each year.[259] Prohibitions to campus carry would have existed for sporting events, elementary schools on college campuses, official mass gatherings, and at campuses that included "biocontainment" laboratories.[260] Sen. Whitmire, Chairman of the committee, urged passage of the bill and warned that failure to do so would result in a "more stringent" campus carry bill during a special

254 Mike Ward, *Bill Lets Older Students Keep Guns in Cars*, Austin Am.-Statesman, Apr. 15, 2013, at B6.

255 *Id.*

256 H. Journal, 83rd Leg., Reg. Sess. 2501 (Tex. 2013), https://journals.house.texas.gov/HJRNL/83R/PDF/83RDAY66FINAL.PDF; Parker, *supra* note 250, at A1.

257 *See* H. Journal, 83rd Leg., Reg. Sess. 2501 (Tex. 2013), https://journals.house.texas.gov/HJRNL/83R/pdf/83rday66final.pdf; Ward, *supra* note 247; Kolten Parker et al., *Legislative Notebook*, Hous. Chron., May 7, 2013, at B3; Mike Ward, *Weaker Campus Carry Measure Passes House*, Austin Am.-Statesman, May 7, 2013, at B3.

258 *See* S. Journal, 83rd Leg., Reg. Sess. 1869 (Tex. 2013), https://journals.senate.texas.gov/sjrnl/83r/pdf/83rsj05-15-f.pdf; Mike Ward, *Senate Panel Passes Gun Legislation*, Austin Am.-Statesman, May 14, 2013, at B5.

259 *See* H.B. 972, 83rd Leg., Reg. Sess. (Tex. 2013), https://capitol.texas.gov/tlodocs/83R/billtext/pdf/HB00972E.pdf#navpanes=0 (amending Chapter 411 of the Tex. Gov't Code); Ward, *supra* note 258, at B5; Mike Ward, *Weaker Campus Carry Measure Passes House*, Austin Am.-Statesman, at B3 (May 7, 2013).

260 *See* H.B. 972, 83rd Leg., Reg. Sess. (Tex. 2013), https://capitol.texas.gov/tlodocs/83R/billtext/pdf/HB00972E.pdf#navpanes=0; Ward, *supra* note 259, at B5.

session in the summer of 2013.[261] Although the bill was passed out of committee,[262] it came up two votes short in the full Senate.[263]

Supporters of campus carry urged the Texas Governor to add the topic to the agenda for a summer special legislative session, in part because the threshold for allowing Senate consideration of a bill would have been lower.[264] Despite pressure from various legislators and interest groups, including the TSRA and SCCC, the subject was not added to any of the three special sessions called by the Governor.[265]

Campus carry ultimately passed in the 2015 Texas legislative session, but the process was not without some political drama and wrangling. Emotions on this issue remained high, and it became caught up in the broader "open carry" debate that took center stage that year. During the early stages of the 2015 session, "the behavior of some gun rights activists led to the installation of new panic buttons in legislative offices."[266] One Democratic lawmaker added a security detail after receiving death threats following his decision to "kick a group of open carry advocates out of his office."[267] One organization, Moms Demand Action for Gun Sense in America, confirmed that because of death threats before a public hearing in 2015, it had hired armed security for its testimony.[268]

Texas voters were split on campus carry in 2015, with 47% in favor and 45% opposed.[269] Beyond the usual personal safety arguments that had always been made in favor of campus carry, a related argument, made with increasing frequency, began to resonate

261 H.B. 972, 83rd Leg., Reg. Sess. (Tex. 2013), https://capitol.texas.gov/tlodocs/83R/billtext/pdf/HB00972E.pdf#navpanes=0; Ward, *supra* note 258, at B5.

262 *See* S. JOURNAL, 83rd Leg., Reg. Sess. 1869 (Tex. 2013), https://journals.senate.texas.gov/SJRNL/83R/PDF/83RSJ05-15-F.PDF.

263 Eva Ruth Moravec & Kolten Parker, *Legislative Notebook: Whitmire Calls 'Campus Carry' Dead this Session*, SAN ANTONIO EXPRESS-NEWS, May 22, 2013, at A6.

264 David Saleh Rauf & Kolten Parker, *Pushing Campus Carry: Gun Rights Backers Eye Special Session*, SAN ANTONIO EXPRESS-NEWS, Aug. 5, 2013, at A3.

265 Mike Ward & Tim Eaton, *Campus Carry Backers Upset*, AUSTIN AM.-STATESMAN, July 13, 2013, at B1.

266 Morgan Smith, *Gun Control Group Hires Security for Capital Hearing*, TEX. TRIB. (Feb. 11, 2015), https://www.texastribune.org/2015/02/11/pro-gun-control-group-gets-security-capitol-hearin/.

267 *Id.*

268 *Id.*

269 Chuck Lindell, *Texas Voters Split Over Campus Guns*, AUSTIN AM.-STATESMAN, Feb. 25, 2015, at A11.

with lawmakers: arming female students would help reduce sexual assaults.[270]

University leaders also became more vocal that year, with the UT Austin faculty and administration firmly opposed to campus carry yet again.[271] In contrast, the Chancellor and student body at Texas A&M University were supportive of the proposed law.[272]

Possible administrative challenges to implementation were also raised in 2015, with The University of Texas and University of Houston systems estimating that it would cost nearly $47 million over six years to implement campus carry through updated security systems, the construction of gun storage facilities, and bolstering campus police units.[273] The sponsor of S.B. 11, Sen. Birdwell called the prospect of such efforts and expenses, "patently absurd."[274]

On January 26, 2015, legislators in both the Texas House and Senate filed identical campus carry bills, which became the basis for the law ultimately enacted in Texas: H.B. 937 and S.B. 11.[275] The general framework of both initial bills was similar to prior efforts. They barred public and private universities from adopting rules that prohibited license holders from carrying their weapons on campus in a

270 Alan Schwarz, *A Bid for Guns on Campuses to Deter Rape*, N.Y. Times (Feb. 19, 2015), https://www.nytimes.com/2015/02/19/us/in-bid-to-allow-guns-on-campus-weapons-are-linked-to-fighting-sexual-assault.html; Jackson & Gould, *supra* note 110.

271 *See* Eleanor Dearman, *UT Students and Professors Testify Against Campus Carry*, Daily Texan, Mar. 17, 2015, at 1 (recounting public testimony of faculty and students at a House committee meeting on campus carry); Samantha Ketterer, *Student Government Votes to Oppose State Senate "Campus Carry" Proposal*, Daily Texan, Feb. 18, 2015, at 1 (noting that 21 of the UT student government organization's 27 members voted to oppose campus carry); Ralph K.M. Haurwitz, *UT Faculty Panel Unanimous in Opposing Guns on Campus*, Austin Am.-Statesman, Feb. 17, 2015, at A4 (reporting that UT Faculty Council voted unanimously to oppose campus carry); *Colleges Need Last Say on Campus Carry*, Austin Am.-Statesman, Jan. 29, 2015 (noting that the Chancellor of the University of Texas System and the UT Austin President "have publicly opposed efforts to allow students, faculty and the public to carry guns on campus.").

272 Haurwitz, *supra* note 271.

273 Lauren McGaughy, *Campus Carry Would Cost Texas Colleges Millions*, Hous. Chron. (Feb. 21, 2015), https://www.houstonchronicle.com/news/houston-texas/texas/article/Campus-carry-would-cost-Texas-colleges-millions-6094445.php.

274 *Id.*

275 Eleanor Dearman, *Republicans Fire First Shot in Campus Carry Debate*, Daily Texan, Jan. 27, 2015, at 1.

concealed manner.[276] The draft bills did provide administrators some flexibility, however. Guns could be prohibited in various specified areas, including residence halls, sporting events, university-operated hospitals, and on-campus preschools.[277] However, no general right to create gun-free zones was accorded to universities.[278] In addition, private universities were given the power to opt out of the proposed law altogether.[279]

While the basic approach of these bills was similar to earlier failed attempts, there were at least two reasons to predict a higher likelihood of passage at the beginning of the 2015 legislative session. First, gun rights were a hot topic in the 2014 Texas gubernatorial election, with both major party candidates announcing their support for the open carry of weapons.[280] Greg Abbott, who won a resounding victory in that election, came out during the campaign strongly in favor of expanded rights for gun owners, including the right to carry concealed weapons on college campuses.[281]

Second, the Texas Senate changed a critical procedural rule in 2014. The prior rule, which had been in place for nearly seventy years,[282] had played a major role in the stalling of earlier campus carry efforts.[283] The revised rule, effective for the first time during the 2015 session,[284] appeared to significantly increase the chances

276 *See* H.B. 937, 84th Leg., Reg. Sess. (Tex. 2015), https://capitol.texas.gov/tlodocs/84R/billtext/pdf/HB00937H.pdf#navpanes=0; S.B. 11, 84th Leg., Reg. Sess. (Tex. 2015), https://capitol.texas.gov/tlodocs/84R/billtext/pdf/SB00011E.pdf#navpanes=0.

277 *See id.*

278 *See id.*

279 *See id.*

280 Jim Vertuno, *Wendy Davis Joins Greg Abbott in Supporting "Open Carry" Gun Law*, DALL. MORNING NEWS (Feb. 6, 2014), https://www.dallasnews.com/news/local-politics/2014/02/06/wendy-davis-joins-greg-abbott-in-supporting-open-carry-gun-law.

281 *Abbott Strongly Believes in Second Amendment*, PRAIRIE: W. TEX. A&M U., Oct. 29, 2014, at 1 (quoting Gov. Abbott's tweet during a Twitter Town Hall discussion on October 17, 2014: "Yes, I'll sign campus carry & open carry into law").

282 *See* SENATE OF TEX., SENATE RULES, S. 82-36, Reg. Sess., at 24, 26 (2011); Morgan Smith, *Dan Patrick and the Two-Thirds Rule: A Primer*, TEX. TRIB., Jan. 10, 2015.

283 *See* Chuck Lindell, *Early Senate Vote Oks Campus Carry Measure*, AUSTIN AM.-STATESMAN, Mar. 19, 2015, at A1.

284 *Compare* SENATE OF TEX., SENATE RULES, S. 82-36, Reg. Sess., at 24, 26 (2011) (requiring 2/3 vote) *with* SENATE OF TEX., SENATE RULES, S. 84-39, Reg. Sess., at 24, 27 (2015) (requiring 3/5 vote).

of similar legislation passing in the Senate. In 2013, Senate rules required two-thirds support, or 21 senators, to bring a bill up for debate on the Senate floor.[285] That year, campus carry advocates were able to muster the support of only 19 senators, and the bill stalled before being considered by the full Senate.[286] Just prior to the 2015 session, the Senate changed its rules to require the support of only three-fifths of the 31 senators, or 19 senators, to bring a bill up for discussion in the full Senate.[287] In the 2015 legislative session, there were 20 Republican members of the Senate, and 19 of them had signaled their support for campus carry by signing on as authors of two draft bills.[288]

The initial public hearing on S.B.11 was long and heated, and lasted nine hours with testimony from more than 100 witnesses.[289] The Senate State Affairs Committee then voted along party lines to pass the bill out of committee to the full Senate.[290] The only change made to the bill was to clarify that even if open carry legislation passed in Texas, S.B.11 would authorize only concealed carry on college campuses.[291] S.B.11 then passed out of the Texas Senate, over the objections of various groups, including law enforcement officials.[292]

Although it appeared headed for uneventful passage in the

285 *See* Senate of Tex., Senate Rules, S. 83-4, Reg. Sess., at 24, 27 (2013) (requiring 2/3 vote).

286 *See supra* notes 237–65 and accompanying text; *see also* Dearman, *supra* note 275; Mike Ward, *Campus-Carry Falls Short Despite Dewhurst Push*, Austin Am.-Statesman, May 23, 2013, at B5 (citing Sen. Birdwell as saying that the proposed campus carry bill fell two votes short from being considered by the full Senate).

287 Dearman, *supra* note 275.

288 *See* H.B. 937, 84th Leg., Reg. Sess. (Tex. 2015), https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=84R&Bill=HB937; S.B. 11, 84th Leg., Reg. Sess. (Tex. 2015), https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=84R&Bill=SB11.

289 Chuck Lindell, *Open Carry, Campus Carry Bills Move Ahead in Senate*, Austin Am.-Statesman, Feb. 13, 2015, at A1 (reporting that, among those testifying against campus carry were the Austin Police Chief, the first victim shot by Charles Whitman from the UT Austin tower in 1966, and a student shot four times during the 2007 Virginia Tech massacre).

290 Birdwell, S. Comm. on State Affairs, Comm. Substitute for S.B. No. 11, 84th Leg., Reg. Sess. (Tex. 2015), https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=84R&Bill=SB11.

291 *Id.*

292 *See S. Journal*, 84th Leg., Reg. Sess. 506 (Tex. 2015); *see also Listen to All Texans on Gun Rights Bills*, Austin Am.-Statesman, Mar. 20, 2015.

House, campus carry stalled there for several weeks as legislators worked through a number of behind-the-scenes issues, including who would get credit for the bill.[293] Near the midnight end of the legislative session, it appeared that Democrats had lined up enough potential amendments to the bill to delay its consideration beyond the legislative deadline, effectively killing it;[294] however, an overwhelming number of Republican members had coalesced in support of the bill, and the Democratic opponents were forced to withdraw their proposed amendments at the last minute.[295] Campus carry was then passed by the Texas House[296] and signed into law by Gov. Abbott.[297] The ultimate version of the bill included critical language not present in its original version, including an opt-out provision for private universities, the ability of all universities covered by the law to regulate implementation, including the creation of gun-free zones, and the requirement that each university's board of directors approve or modify the university's rules by a two-thirds vote.[298]

C. Framework of the Texas Campus Carry Law

The novel aspect of the Texas law is the discretion it gives to individual universities to create campus-specific implementation rules, including regulation of handgun carry and the establishment gun-free zones—language that was added in the final stages of the law's passage. The following two subsections explore, first, the overall structure of Texas's new law as context, and second, the unique flexibility it provides in implementation.

1. General Structure

The Texas campus carry law is situated within a broader new statutory scheme for firearms in the state. Beginning August 1, 2016, "open carry" of firearms by license holders became the default

293 Chuck Lindell, *Deal Revives Campus Carry Bill*, AUSTIN AM.-STATESMAN, May 7, 2015.

294 Chuck Lindell, *Democrats Poised to Kill Campus Carry Bill*, AUSTIN AM.-STATESMAN, May 27, 2015.

295 Keith Herman, *Even Time Abandons Outgunned Democrats*, AUSTIN AM.-STATESMAN, May 28, 2015.

296 S. JOURNAL, 84th Leg., Reg. Sess. 3616 (Tex. 2015).

297 *See S.B. 11: History*, TEX. LEG. ONLINE, https://capitol.texas.gov/billlookup/History.aspx?LegSess=85R&Bill=SB11 (last visited Apr. 19, 2019).

298 *See id.*; Chuck Lindell, *Guns-on-Campus Bill Given Senate Approval*, AUSTIN AM.-STATESMAN, May 31, 2015.

background law, with limited exceptions for areas where weapons could not be carried.[299] Among the areas excluded from open carry are the "physical premises of [] school[s] [and] educational institution[s]."[300] While open carry of firearms is not allowed in those locations, they were singled out for special treatment in the campus carry legislation that passed the same year.[301]

Under this new campus carry law, covered Texas universities—all public universities and private universities that do not opt out—may not prohibit the carrying of concealed handguns by license holders on their campuses.[302] Four-year universities were required to implement the law on August 1, 2016,[303] and junior colleges had one year longer, until August 1, 2017,[304] for implementation. All individuals, including students, staff, faculty, and guests who have been issued a license to carry by the Texas Department of Public Safety, fall within the scope of the statute.[305] Their weapons must

299 *See* Tex. Penal Code § 46.03(a)(1)(b) (West 2019).

300 *Id.* § 46.03(a)(1)(b) (making it an offense to intentionally, knowingly, or recklessly carry a firearm onto the premises of an educational institution). Other areas where open carry of firearms is not allowed include polling places on election day, racetracks, secure areas of airports, and near official places of execution on the days of scheduled execution. *Id.* § 46.03(a)(2)–(6).

301 *Id.* § 46.03(a)(1)(b) (exempting from the penal code provisions an individual who possesses a license to carry under Texas law and carries his weapon in a concealed manner onto the premises of an educational institution).

302 Gov't § 411.2031(c). Although the default open carry law in Texas extends to all firearms, including rifles and pistols, the campus carry law only covers handguns. As a result, rifles and shotguns are prohibited on university campuses in Texas.

303 S.B. 11, 84th Leg., Reg. Sess. (Tex. 2015) (Engrossed Version), https://capitol.texas.gov/tlodocs/84R/billtext/html/sb00011f.htm.

304 *Id.* One of the reasons community colleges may have been given an additional year to implement the new law is because of complex issues relating to their student populations, including the large number of underage students who study at two-year institutions as part of dual credit programs with participating high schools. Mathew Watkins, *Most Community Colleges Won't Ban Guns in Classrooms with Minors*, Tex. Trib., Mar. 2, 2017.

305 A person is entitled to receive a license to carry a firearm under Texas law if various statutory requirements are met. Specifically, an individual must: be a legal resident of the state for at least six months prior to application; be at least 21 years old; not be convicted of a felony; not have been charged with certain misdemeanors or their equivalents; not be a fugitive from justice; not be chemically dependent; not be incapable of exercising sound judgment with respect to the proper use and storage of a handgun; not have been convicted of committing certain misdemeanors within the past five years; qualified under federal and state law to purchase a firearm; not be delinquent in the payment of child support or taxes; not be restricted under a court protective order or

be kept "on or about the license holder's person" and concealed at all times.[306] An individual loses the protection of the statute if her handgun becomes even partially visible, regardless of whether it is holstered.[307]

"[C]ampus" has a broad meaning in the new law, including all land and structures owned or leased by the university.[308] Prior to August 1, 2016 and since 1995, holders of concealed carry licenses in Texas could carry their weapons on outdoor property of universities, including sidewalks, breezeways, and parking lots.[309] The campus carry law extends the areas for concealed carry to all other non-excluded areas of campus, including classrooms,[310] faculty and staff offices,[311] cafeterias, hallways, lounges, libraries, conference and meeting rooms, and administrative areas. In other words, the concealed carry of handguns by license holders is allowed throughout all locations of college campuses implementing the law, unless the area is covered by some university exclusion or other limitation imposed by state or federal law.

Both Texas and the federal government do, in fact, prohibit

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subject to a restraining order affecting the spousal relationship; and have not, within the past ten years, "been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony." GOV'T § 411.172(a)(1)–(12).

306 *Id.* § 411.2031(b).

307 PENAL § 46.035(a-1).

308 GOV'T § 411.2031(a)(1).

309 Lee, *supra* note 20; Ruby Samuels, *Texas College Students are Planning on Protesting 'Campus Carry' Laws by Carrying Sex Toys*, BUS. INSIDER (Aug. 3, 2016), https://www.businessinsider.com/texas-students-to-protest-gun-laws-by-carrying-dildos-2016-8.

310 While there may have been some disagreement among legislators about whether the Texas law allows universities to generally prohibit weapons in classrooms, the Texas Attorney General's Office has taken the position that it does not. *See* Authority of an Institution of Higher Education to Establish Certain Rules Regarding the Carrying of Handguns on Campus, KP-0051 Op. Att'y Gen. of Tex. 2 (2015). Although recognizing that particular classrooms might be used for sensitive purposes such that weapons should be prohibited in those areas, it also made clear that if a university banned weapons in a "substantial number" of classrooms, the campus carry law would likely be violated. *See id.* at 1–2.

311 Although the Texas law does not expressly include an exclusion for offices, UT Austin has implemented a rule that allows employees who are "solely assigned to an office" to prohibit concealed carry in those areas, assuming that oral notice is provided to anyone who enters. *See Campus Carry: Information for Faculty*, U. TEX. AUSTIN, http://campuscarry.utexas.edu/faculty (last visited Apr. 9, 2019).

the carrying of weapons in various locations and settings, including some that might overlap with college campuses. Under Texas law, for example, weapons are not allowed at polling places on election day;[312] on the premises of government courts or offices used by courts;[313] at racetracks;[314] in the secured areas of airports;[315] within 1,000 feet of premises designated as places of execution on the day of execution;[316] at a correctional facility[317] and on the premises of a civil commitment facility.[318] Beyond those areas where firearms are flatly prohibited, Texas also allows the exclusion of properly licensed weapons in other specific settings if the license holder has been given proper notice,[319] including on the premises of a business authorized to sell alcohol;[320] at a collegiate sporting event;[321] on the premises of a state-licensed hospital or nursing home;[322] at amusement parks;[323] at a place of religious worship;[324] and at meetings subject to the state's Open Meetings Act.[325] Federal law creates additional exclusion areas, prohibiting weapons at any "federal facility," including presidential libraries, nuclear facilities, and multi-program research facilities.[326] Furthermore, in addition to all of these areas of exclusion, a license holder in Texas commits a criminal offense if he carries a handgun in any location, regardless of whether it is concealed, while intoxicated.[327] All these state and federal prohibitions trump the default right to campus carry in Texas.

The new Texas law affords universities the power to treat certain living areas differently, although the exact scope of that power

312 Penal § 46.03(a)(2).
313 *Id.* § 46.03(a)(3).
314 *Id.* § 46.03(a)(4).
315 *Id.* § 46.03(a)(5).
316 *Id.* § 46.03(a)(6).
317 *Id.* § 46.035(b)(3).
318 *Id.* § 46.035(b)(7).
319 *Id.* §§ 30.06, 30.07.
320 *Id.* § 46.035(b)(1), (k).
321 *Id.* § 46.035(b)(2), (l). An exception exists if the handgun is used by a competitor as a normal part of the sporting event. *Id.* § 46.035(b)(2).
322 *Id.* § 46.035(b)(4), (i).
323 *Id.* § 46.035(b)(5), (i).
324 *Id.* § 46.035(b)(6), (i).
325 *Id.* § 46.035(c), (i).
326 18 U.S.C. § 930 (2017). "Federal facility" is defined as any building or part of a building "owned or leased by the Federal Government, where Federal employees are regularly present for the purpose of performing their official duties." *Id.* § 930(g)(1).
327 Penal § 46.035(d).

may be uncertain.[328] Universities may now enact rules relating to the storage of handguns in residential facilities, including dormitories, owned or leased by the institution and located on campus.[329] The Texas Attorney General's Office has interpreted this statutory language as empowering universities to regulate, short of prohibiting, gun storage in on-campus housing.[330] However, in implementation, universities have split on this issue. Schools including UT Austin, the University of Houston, Texas Tech University, and Texas Southern University have enacted rules prohibiting gun storage in dormitories.[331] Others, including Texas A&M University, Texas State University, the University of North Texas, and Stephen F. Austin State University, allow gun storage but take various approaches to regulation, including whether students must provide their own gun safes.[332] At least one university has remained silent on the issue of handgun storage or possession in student housing.[333] Student housing facilities owned and operated by third parties, such as certain sorority- and fraternity-owned housing, fall outside the campus carry law and are exempt from university regulation.[334]

The concept of notice to license holders is critical in understanding the Texas campus carry law. Sometimes referred to as "30.06 notice" because of its location in the Texas Penal Code, proper notice must be given to license holders in at least two categories of situations. First, as described above, Texas law identifies a variety of locations, such as collegiate sporting events and places of religious worship, where weapons may be excluded, but only if proper notice

328 *See infra* notes 352–53 and accompanying text.

329 GOV'T § 411.2031(d).

330 Authority of an Institution of Higher Education to Establish Certain Rules Regarding the Carrying of Handguns on Campus, KP-0051 Op. Att'y Gen. of Tex. 3 (2015).

331 Watkins, *supra* note 24; *see infra* notes 405–13 and accompanying text.

332 Watkins, *supra* note 24.

333 *See* Memorandum from Michael A. Olivas, Interim President, Univ. of Houston-Downtown, to All UH-Downtown/PS Holders on Campus Carry Policy (Aug. 1, 2016), https://www.uhd.edu/administration/employment-services-operations/resources/Documents/PS01A16.pdf.

334 *See, e.g.*, *Campus Carry: Facts*, U. TEX. AUSTIN, http://campuscarry.utexas.edu/ (last visited Apr. 9, 2019) (explaining that "S.B. 11 'covers concealed carry only on campus and the buildings owned or leased by the University. Fraternity and sorority houses are neither on campus nor owned or leased by the university . . . and the University is not authorized to enact rules or regulations regarding concealed carry" in these locations).

has been given to license holders.[335] Notice is proper if it complies with section 30.06.[336]

Second, whenever a university implements regulations that create areas on campus where concealed weapons may not be carried, thereby modifying the background rule of concealed carry on campus, proper notice under section 30.06 must be provided.[337] Although such notice may technically be oral in nature,[338] the most efficient way for universities to provide notice is through signage that complies with the statute's very particular requirements: it must include the specific wording contained in the statute in both English and Spanish; it must be printed in block letters at least one-inch high with contrasting colors; and it must be displayed in a conspicuous manner that is easily viewable by the public.[339]

Without 30.06 notice, a license holder's concealed carry in that area is not criminal.[340] However, if a license holder brings a concealed weapon into an area where the weapon is lawfully prohibited, and proper notice of that prohibition has been provided orally or in writing complying with the statutory requirements, the individual commits a Class C Misdemeanor and is subject to a fine of up to $200.[341]

In contrast, and providing an insight into gun priorities in Texas, a state entity that posts signage prohibiting concealed carry where it is legally allowed violates state law and is subject to a fine

335 According to the Texas Government Code, a university "must give effective notice under Section 30.06, Penal Code, with respect to any portion of a premises on which license holders may not carry." Tex. Gov't Code § 411.2031(d-1) (West 2019).

336 *See, e.g.*, Penal § 46.035(l), (i) (requiring 30.06 notice if firearms are prohibited at collegiate sporting events, hospitals, nursing homes, places of religious worship, and at a location of any meeting subject to Texas's Open Meetings Act).

337 Gov't § 411.2031(d-1) (requiring that a university "give effective notice under Section 30.06, Penal Code, with respect to any portion of a premises on which license holders may not carry").

338 Penal § 30.06(b). Although written and posted notice appears to be the norm, UT Austin requires oral notice where a sole occupant of an office chooses to exclude handguns. *See Campus Carry: Information for Faculty*, *supra* note 311.

339 Penal § 30.06(c)(3)(B).

340 *Id.* § 46.035(l), (i) (requiring 30.06 notice if firearms are prohibited at collegiate sporting events, hospitals, nursing homes, places of religious worship, and at a location of any meeting subject to Texas's Open Meetings Act).

341 *Id.* § 30.06(d). The offense rises to a Class A Misdemeanor if the individual is given oral notice of the prohibition after entering the property but fails to leave. *See id.*

of at least $1,000 on the first day and up to $10,500 per day after that, with each day of wrongful posting a separate violation of the law.[342] State law also allows individuals who believe that exclusion signage has been wrongfully posted to file complaints with the Texas Attorney General's Office, which can then assess fines against the government entity if the signage defects exist and are not cured.[343] Not surprisingly, a significant number of complaints have been filed with the Attorney General's Office alleging improper exclusion of handguns, and that office has actively sought the removal of signs it believes were wrongfully posted at various locations across the state, including at the City of Austin's City Hall and the Fort Worth Zoo.[344] There are currently no reports of Attorney General investigations into allegedly defective 30.06 notices on college campuses in Texas, but universities must ensure that their exclusion signage is accurate and consistent with state law or risk significant fines.

Finally, the new Texas law extends previously existing qualified immunity to universities and university employees adopting campus carry. Section 411.208 of the Texas Government Code now grants immunity from civil suit to those entities and individuals, shielding them from any damages associated with the actions of a handgun license holder.[345] Consistent with preexisting law, that

342 GOV'T § 411.029(a)–(c). The statutory language creates two areas of potential notice jeopardy for universities. First, civil damages are triggered if a university attempts to prohibit handguns in areas where they may not be lawfully prohibited. *See* Questions regarding a notice prohibiting entry with a handgun onto certain premises under section 30.06 of the Penal Code and section 411.209 of the Government Code, KP-0049 Opp. Att'y Gen. of Tex. 4 (2015) (opining that "a court would likely construe section 411.209 to be implicated by any type of notice that seeks to improperly prohibit handguns"). Beyond civil damages, notice that does not comply with the Texas Penal Code would appear to be defective and, as a result, ineffective in prohibiting concealed carry in the relevant location. PENAL §§ 30.06(b), (c)(3).

343 GOV'T § 411.029(d)–(g).

344 Matt Largey, *Texas Attorney General Sues City of Austin Over City Hall Gun Ban*, AUSTIN AM.-STATESMAN (July 28, 2016), http://kut.org/post/texas-attorney-general-sues-city-austin-over-city-hall-gun-ban; Anna M. Tinsley, *New Texas Law Takes Aim at Erroneous Gun-Ban Signs*, FORT WORTH STAR-TELEGRAM (Sept. 1, 2015), http://www.star-telegram.com/news/politics-government/article32747301.html; *see also Guns at Zoos? Texas Says No as It Sorts Out Concealed Carry Law*, CBS NEWS (Dec. 3, 2016), https://www.cbsnews.com/news/guns-at-zoos-texas-says-no-as-it-sorts-out-concealed-carry-laws/ (noting that as of the time of the date of the article, more than 120 complaints had been filed with the Office of the Attorney General of Texas).

345 GOV'T §§ 411.208(a)–(b).

immunity does not extend to acts committed by a state employee that are arbitrary or capricious or to an official's conduct involving his or her own handgun.[346]

2. Individualized University Implementation Rules

At the heart of the Texas law is the power it gives university presidents to create and implement a regulatory plan for concealed carry on campus, up to and including the establishment of limited handgun exclusion areas. Rather than a one-size-fits-all approach, the law provides flexibility to each university to consider whether, and if so, how, the concealed carry of handguns is consistent with all aspects of each university's operations. While the flexible implementation structure of the Texas law is unique and noteworthy, it is also circumscribed in a number of important ways.

The power to establish implementing regulations rests with each university president, rather than with other actors, such as individual staff or faculty members or an assigned committee.[347] A recent Texas Attorney General's opinion supports this reading of the new law, concluding that it does not allow faculty members or others to promulgate implementing rules. Rejecting the alternative of what it labeled potential "piecemeal" regulation of handguns on campus,[348]

346 *Id.* § 411.208(d). The immunity provisions of the new law have been critiqued as still allowing suits for damages caused by individuals who do not possess licenses to carry, as well as negligence suits under the Clery Act. *See* Shaundra K. Lewis & Daniel Alejandro De Luna, *Symposium on "Texas Gun Law and the Future": The Fatal Flaws in Texas's Campus Carry Law*, 41 Tex. Marshall L. Rev. 135, 146–48 (2016).

347 Gov't § 411.2031(d-1) (vesting the power to establish implementing rules with the "president or other chief executive officer" of each university and stating that "[t]he president or officer may amend the provisions as necessary for campus safety"). This rule promulgation structure, driven by university presidents, presumably extends to the creation of all campus carry-related regulations, even where the new law is not entirely clear. *See, e.g.*, *id.* § 411.2031(d) (stating that "[a]n institution of higher education or private or independent institution of higher education in this state may establish rules, regulations, or other provisions" relating to handgun storage in certain residential facilities). Nevertheless, this ambiguity leaves open the possibility that certain types of campus carry rules could be promulgated by another authority, such as a campus carry taskforce chairperson.

348 Authority of an Institution of Higher Education to Establish Certain Rules Regarding the Carrying of Handguns on Campus, KP-0051 Op. Att'y Gen. of Tex. 2 (2015). The reasoning of the Attorney General's Office is unconvincing. The Office explains that the law's requirement that implementation rules be distributed to all faculty, among others, suggests that the Legislature

the Attorney General's Office did not read into the law any discretion to delegate each president's rule-making power. As a result, while committees or taskforces formed to consider campus carry rules may operate in an advisory capacity, final responsibility for those rules rests with each university's president.[349] Any implementation discretion that other individual actors may exercise must flow from the university's rules, established by the president.[350]

The Texas law also identifies the stakeholder groups that must be consulted and the specific subjects that should be addressed in those consultations. In particular, the statute specifies that input should be solicited from students, staff, and faculty.[351] Presumably, the Legislature intended this to be a listing of the stakeholders that *must* be consulted in some way, but other interested groups, including alumni, a community board of advisors, campus security staff, and local law enforcement personnel could and should also provide input during the rule formulation stage.

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did not intend faculty to actually draft any of those rules. *See id.* In other contexts, faculties are tasked with promulgating all manner of rules relating to their schools' academic programs and operations, and those rules are routinely distributed to all members of the faculty once they are finalized. There is no objective policy reason why rules relating to handguns should be treated differently. The Office also states that, "as a practical matter," if individual faculty members could establish "individualized" campus carry rules, adequately providing 30.06 notice would be "unmanageable." *Id.* It is unclear why this is necessarily so. The new law allows oral notice of handgun exclusion areas, and any faculty members choosing, for example, to exclude guns from their offices could post signage complying with the new law. UT Austin's rules require similar notice to be provided by officeholders wishing to ban concealed carry in their offices. *See infra* note 401 and accompanying text.

349 In fact, it appears that most Texas universities covered by the new law followed a similar pattern of creating an advisory committee of stakeholders that recommended a set of campus carry rules to the university president for consideration. *See, e.g.*, *Campus Carry Policy Working Group, Final Report*, U. TEX. AUSTIN 3 (Dec. 2015), https://utexas.app.box.com/v/CCWorkingGroup-FinalReport (describing the establishment of the university's Campus Carry Policy Working Group to provide policy recommendations); Michael K. Young, *Update from President Michael K. Young on Campus Carry*, TEX. A&M U. (Apr. 13, 2016), http://www.tamu.edu/statements/campus-carry.html (explaining the process of receiving recommendations from his university's Campus Carry Policy Task Force).

350 Authority of an Institution of Higher Education to Establish Certain Rules Regarding the Carrying of Handguns on Campus, KP-0051 Op. Att'y Gen. of Tex. 2 (2015).

351 GOV'T § 411.2031(d-1).

With guidance from students, faculty, and staff from their institutions, university presidents may consider three factors in evaluating possible regulations: the "nature of the student population, specific safety considerations, and the uniqueness of the campus environment."[352] The Legislature did not provide guidance about what these areas of inquiry were intended to encompass. As a result, and because the language chosen by the Legislature is relatively generic, these factors may be too vague to be of much assistance during the rule formulation process. For example, it may be difficult to understand how the creation of specific gun rules might be guided in any meaningful way by evaluating the "nature of the student population" at most universities.[353]

However, at the very least, these factors do emphasize that each university's rules must focus on the actual operations, students, and safety issues relevant to that particular institution. This focus excludes broader arguments, for instance, about whether guns should generally be allowed on university campuses. And by focusing on university-wide considerations, this statutory language appears to also exclude from consideration any personal arguments a student, staff member, or faculty member might raise seeking individualized treatment, most likely in the form of an exclusion, from a university's general gun rules.[354]

The broad but university-specific factors that must be considered by each president provide universities significant flexibility to implement rules specific to their operations. Indeed, as discussed below, universities have used that flexibility to craft a wide range of gun-related regulations under the new law, addressing topics such as the proper storage of handguns in dormitories;[355]

352 *Id.*

353 *But see* Lewis & De Luna, *supra* note 346, at 144 (arguing that factors such as an unusually high level of stress on a university campus should justify stringent handgun limitations).

354 Some universities nevertheless see in the new law sufficient flexibility to allow the creation of individualized exclusion areas by employees, such as in the context of faculty offices that are assigned to one individual and not open to the public. *See, e.g.*, *Campus Concealed Carry*, U. Tex. Austin, at VII.(c)(1) (Aug. 1, 2016), https://policies.utexas.edu/policies/campus-concealed-carry (stating that "[t]he occupant of an office to which the occupant has been solely assigned and is not generally open to the public is permitted, at the occupant's discretion, to prohibit the concealed carry of a handgun in that office.").

355 *See, e.g.*, *Possession and Storage of Handguns in Tarleton State University On-Campus Residential Housing Facilities*, Tarleton St. U., https://www.tarleton.edu/

the types of laboratories weapons may be carried into;[356] whether handguns may be stored on campus overnight by faculty and staff;[357] and areas of animal care facilities where weapons are prohibited.[358]

Although university presidents have the power to promulgate campus carry rules for their schools, the Texas law subjects those rules to an additional level of scrutiny. Within 90 days of the establishment of a university's campus carry regulations by its president, the board of regents of that university must review the provisions.[359] By a vote of two-thirds, the board may amend the university's regulations in whole or in part.[360] A university's final regulations are those that are amended by its board of regents[361] or, if no amendments exist, the set of rules promulgated by the university's president.[362] This layer of evaluation above the university level provides at least two benefits. First, it builds into the system an additional review of each university's regulations to ensure compliance with the relevant statutes. Second, it allows the governing body for the university to review consistency of that school's regulations with any other universities that are joined within a system of educational institutions under that board's purview.[363]

The most significant limitation on a university's

finadminweb/safety/handgun-policy.html (last visited Apr. 20, 2019).

356 *See, e.g.*, *Procedures for Implementation of Campus Carry*, TEX. A&M U. (Oct. 27, 2016), http://rules-saps.tamu.edu/PDFs/34.06.02.M1.01.pdf.

357 *See, e.g.*, *Manual of Procedures 07.01.05: Campus Carry Policy*, U. HOUS., at § V.A. (Dec. 15, 2017), http://www.uh.edu/af/universityservices/policies/mapp/07/070105.pdf.

358 *See, e.g.*, *Concealed Handguns and Weapons Policy, App. A (Exclusion Areas)*, U. TEX. EL PASO, https://www.utep.edu/vpba/hoop/section-9/ch-10.html (last visited Apr. 20, 2019).

359 TEX. GOV'T CODE § 411.2031(d-2) (West 2019). For universities that do not have a formal board of regents, the statute gives the oversight power to whatever "governing board" might exist. *See id.*

360 *Id.*

361 *Id.*

362 *Id.* § 411.2031(d-1).

363 The Texas structure of higher education includes six multi-university systems: The Texas A&M University System, The Texas State University System, The Texas Tech University System, The University of Texas System; The University of Houston System; and the University of North Texas System. *See* Texas Higher Education Coordinating Board, *Public Universities*, TEX. HIGHER EDUC. DATA, http://www.txhighereddata.org/InteraInter/Institutionsshow.cfm?Type=1&Level=1 (last visited Mar. 30, 2019). The requirement for board of regents approval was apparently a last-minute amendment to the bill, offered by Democrats seeking to "water[] . . . down" the campus carry law. *See* Herman, *supra* note 295.

implementation of campus carry regulations is the statute's admonition that those regulations may not generally prohibit or have the effect of generally prohibiting campus carry.[364] The law is silent on where the line is between permissible regulation of weapons on campus, including the prohibition of concealed carry in certain locations, and regulations that go too far, resulting in the effective prohibition of campus carry. Certain activities and areas are likely to be considered at the core of a university's operations and mission and may receive more careful scrutiny. Classrooms, for example, appear particularly sensitive for the Texas Attorney General's Office. "[A]-ttending or teaching class is the primary reason most individuals are on campus."[365] As a result, if a university prohibits concealed carry in a "substantial number of classrooms," the Office of the Attorney General believes that a court would likely conclude that the school's regulations would violate the campus carry law.[366] Even in that context, however, the Attorney General's Office recognized that the concealed carrying of weapons in certain classrooms, such as ones where grade school children are present, "may pose heightened safety concerns" justifying regulation of handguns in those areas.[367]

Once a university promulgates its campus carry rules through its president's office, and its board of regents amends or approves those rules, the Texas statutory scheme provides one additional requirement. Every two years, each university must compile a concealed handgun report for the Texas Legislature. Each report must include an explanation of the university's handgun regulations and an explanation of the "reasons the institution has established those provisions."[368] Presumably this mechanism allows the Legislature to monitor implementation of campus carry to ensure that each university's rules do not have the effect of generally prohibiting concealed carry.

D. Observations on Early Implementation of Texas's Campus Carry Law

Campus carry in Texas has been implemented in a staged

364 Gov't § 411.2031(c), (d-1).
365 *See* Authority of an Institution of Higher Education to Establish Certain Rules Regarding the Carrying of Handguns on Campus, KP-0051 Op. Att'y Gen. of Tex. 1–2 (2015).
366 *Id.*
367 *Id.* at 1.
368 Gov't § 411.2031(d-4).

manner, with four-year colleges subject to the law's provisions as of August 1, 2016, and community colleges as of August 1, 2017. A more complete perspective on the law's implementation will be possible with time. However, below are several initial observations that flow from the first two years of the law's enactment.

1. Public Sentiment Divided but Universities Generally Opposed

Despite its general reputation as a gun-friendly state, polling from 2015 found that only 47% of those surveyed in Texas supported campus carry, and 45% opposed it, with eight percent undecided.[369] Polling from 2013 found a similar split in responses.[370] Republican males were most likely to support concealed carry on campus, with respondents self-identifying as Tea Party members by far the strongest supporters.[371] Other polls suggest even less support for campus carry in the state.[372] In 2016, following passage of both the Texas campus carry law, as well as the broader open carry law in effect outside the campus context, 22% of Texans reported feeling more safe, while 37% reported feeling less safe, and 34% of respondents reported no change.[373] In addition, most university chancellors and presidents, parents, students, professors, and campus security staff remain opposed to campus carry.[374]

369 Jim Henson & Joshua Blank, *Reviewing Texas Attitudes Toward Campus Carry as Law Goes into Effect*, TEX. POL. PROJECT U. TEX. AUSTIN (Aug. 1, 2016), https://texaspolitics.utexas.edu/blog/reviewing-texas-attitudes-toward-campus-carry-law-goes-effect; Ross Ramsey, *UT/TT Poll: Voters Less Open to Open Carry*, TEX. TRIB. (Feb. 24, 2015), https://www.texastribune.org/2015/02/24/uttt-poll-voters-less-open-open-carry/.

370 Henson & Blank, *supra* note 369 (reporting that 48% of respondents supported campus carry in 2013, and 47% opposed it).

371 *Id.* (reporting that 55% of those strongly supporting campus carry affiliated with the Tea Party).

372 SURVEY USA, RESULTS OF SURVEY USA NEWS POLL #22139 (2015), http://progresstexas.org/poll/tx-poll-campus-carry (finding that 72% of respondents opposed students bringing concealed handguns to class in a March 2015 poll); Tom Benning, *Group Opposed to 'Campus Carry' Says its Polling Shows Most Texans Do Too*, DALL. MORNING NEWS (Mar. 17, 2015), https://www.dallasnews.com/news/politics/2015/03/17/group-opposed-to-campus-carry-says-its-polling-shows-most-texans-do-too (reporting opposition to campus carry at 63% in Texas).

373 Henson & Blank, *supra* note 369.

374 Michael S. Rosenwald, *Guns Go to College: Everything You Need to Know About Campus Carry*, WASH. POST (July 31, 2016) (reporting significant opposition to campus carry among staff and students at Texas Tech University), https://

Beyond polls, another way to gauge the popularity of a law is in the details of its implementation. In Texas, as in some of the other states that have adopted campus carry, the law applied to all public universities, but private universities were given the option to opt out.[375] If they did not formally opt out, private universities in Texas would have been bound by the law. When given that option, private universities in Texas overwhelmingly rejected campus carry. Out of 38 private universities in Texas,[376] only one adopted campus carry: Amberton University.[377] All of the other private universities in Texas, which include major research institutions such as Rice University and small, religiously affiliated schools like Lubbock Christian University, took affirmative steps to avoid campus carry.[378] In the words of Rice University President, David Leebron, "there is no evidence that allowing the carrying of guns on our campus will make the campus safer."[379]

Amberton University, it is worth noting, is a relatively unusual university. This small, nonprofit school states that its enrollment is "limited to the mature, working adult" who seeks to complete an undergraduate degree or begin a graduate program.[380] Many, if not most, of its courses are online, and the university offers "no campus housing, no sporting events, no social clubs, and no dining facilities."[381] Furthermore, alcohol consumption on campus is prohibited.[382] In light of "the unique nature of the Amberton student and the campus environment," Amberton University chose to be covered by the campus carry law.[383] Two additional schools, East Texas Baptist University and Southwestern Assemblies of God

www.washingtonpost.com/news/local/wp/2016/07/30/everything-you-need-to-know-about-campus-carry/?utm_term=.504e72c5fb06; *see also* Wofford, *supra* note 23.

375 *See supra* notes 142, 147, 279 and accompanying text.

376 Texas Higher Education Coordinating Board, *supra* note 363.

377 *Amberton University's Position on Campus Carry (Senate Bill 11)*, Amberton U., http://www.amberton.edu/help-and-advice/campus-carry.html (last visited Apr. 20, 2019) [hereinafter *Amberton*].

378 Mathew Watkins & Madeline Conway, *Only One Private Texas University Adopting Campus Carry*, Tex. Trib. (July 29, 2016), https://www.texastribune.org/2016/07/29/all-one-private-university-texas-are-opting-out-ca/.

379 *Id.*

380 *Amberton*, *supra* note 377. Enrollment at Amberton University is limited to adults 21 and older. *See* Watkins & Conway, *supra* note 378.

381 *Amberton*, *supra* note 377.

382 *See id.*

383 *Id.*

University, allow some faculty or staff to carry concealed weapons, but firearms are otherwise prohibited.[384]

While the general sentiment on Texas university campuses is opposed to concealed carry, there are exceptions. For instance, the Texas A&M University Student Senate "overwhelmingly supports" the policy,[385] and the Chancellor of the Texas A&M University System agrees. Explaining that campus carry "does not raise safety concerns for me personally," the Chancellor said the issue boils down to a simple question: "Do I trust my students, faculty and staff to work and live responsibly under the same laws at the university as they do at home? Of course I do!"[386]

As a result, even in a gun-friendly state, public opinion polls suggest tepid support, at most, for campus carry. Although some pockets of support exist for concealed carry within Texas universities, those with the option have overwhelmingly chosen to exclude themselves from the law.

2. Customized University Rules

The beginning stages of campus carry implementation across Texas public universities appear consistent with the legislature's likely intent in this area. License holders have the general right to carry concealed weapons throughout the premises of public universities, but each institution has carved out exclusion areas and promulgated other regulations that reflect that school's unique operations and priorities.[387]

One broad area of uniform treatment is the traditional learning environment. No university generally prohibits guns in classrooms, despite the fact that the prospect of guns in the classroom generates significant concern among those opposed to campus carry.[388] This

384 Watkins & Conway, *supra* note 378.

385 Sam Peshek, *Aggies, Texas A&M Faculty, Staff Split on Campus Carry Laws*, EAGLE (Mar. 6, 2015), https://www.theeagle.com/news/local/aggies-texas-a-m-faculty-staff-split-on-campus-carry/article_b227aa1b-59e9-5dc4-86c2-cb7c900cb227.html.

386 Lauren R. McGaughy, *A&M Chancellor Backs Campus Carry Bill*, HOUS. CHRON. (Feb. 12, 2015), https://www.chron.com/about/article/A-M-chancellor-backs-campus-carry-bill-6078017.php.

387 *See* Aric K. Short, *Guns on Campus: A Look at the First Year of Concealed Carry at Texas Universities*, 80 TEX. B.J. 516 (2017).

388 *See* Colleen Flaherty, *Not in My Classroom*, INSIDE HIGHER ED (Apr. 28, 2017), https://www.insidehighered.com/news/2017/04/28/study-professors-widely-oppose-campus-carry-inimical-academic-freedom-fewer-would (discussing faculty concerns with allowing guns in college classrooms).

approach tracks the opinion of the Texas Attorney General's Office, which concluded that, with limited exceptions, prohibiting concealed carry in classrooms would violate the Texas law.[389] A number of universities have built limited classroom exclusion zones into their implementation rules, prohibiting concealed carry in classrooms where elementary or high school students may be present.[390]

University policies differ, however, when addressing the private office. Most universities do not give office occupants the ability to exempt themselves from general campus carry rules.[391] This fact has caused significant concern among some faculty members who have expressed anxiety at the prospect, for example, of meeting individually in an office with a student who is upset about a grade, never knowing if the student might be carrying a weapon.[392] That fear has led some faculty members and graduate students to consider online office hours[393] or to hold them in off-campus locations that do not allow concealed weapons, such as restaurants and bars.[394]

While some universities explicitly prohibit the creation of gun-free zones in offices,[395] a number of universities, most notably

389 *See supra* note 310 and accompanying text.

390 *See, e.g.*, *Manual of Procedures 07.01.05: Campus Carry Policy*, *supra* note 357, at V.L.1.; *Concealed Carry on Campus*, Stephen F. Austin St. U., http://www.sfasu.edu/campuscarry/ (last visited Mar. 31, 2019).

391 *See, e.g.*, *Carrying Concealed Handguns on Campus*, Tex. A&M U. (Aug. 1, 2016), http://rules-saps.tamu.edu/PDFs/34.06.02.M1.pdf; *Policy 04.001: Carrying Concealed Handguns on Campus*, U.N.Tex. (Aug. 1, 2016) 3, http://policy.unt.edu/sites/default/files/04.001_CarryingOfConcealedHandgunsOnCampus_2016.pdf.

392 *See* Ian Bogost, *The Armed Campus in the Anxiety Age*, Atlantic, Mar. 9, 2016. While this general concern is understandable, to the extent a university did not screen for weapons at its entrances before campus carry went into effect, it has always been possible for someone to illegally enter a Texas university with a handgun.

393 Anna M. Tinsley, *Concealed Handguns Allowed at Many Texas Colleges Starting Aug. 1*, Fort Worth Star-Telegram (July 30, 2016), https://www.star-telegram.com/news/politics-government/article92804247.html (stating that some UTA professors may conduct "virtual" office hours after implementation of campus carry).

394 Lindsay Ellis, *Austin Bars Provide Gun-Free Haven for UT Grad Students and Platform for Protest*, Hous. Chron. (Feb. 14, 2017), https://www.houstonchronicle.com/news/houston-texas/houston/article/Campus-carry-dissent-Austin-bars-provide-10932176.php (describing UT graduate students moving their office hours to the Cactus Café, which serves alcohol and, as a result, does not allow guns).

395 *See, e.g.*, *Campus Carry: Frequently Asked Questions*, U. Tex. Arlington,

UT Austin, do allow office occupants to prohibit concealed carry.[396] Under that institution's rules, a faculty or staff member who is solely assigned to a particular office may choose to prohibit the concealed carry of handguns there.[397] For office occupants exercising that right to exclude, UT Austin requires that they provide oral, not written, notice to all guests.[398] Other University of Texas System schools, including The University of Texas at Dallas, the University of Texas at El Paso (UTEP), and the University of Texas at San Antonio (UTSA) follow a similar approach to that of UT Austin, allowing sole occupants of offices to provide oral notice excluding concealed carry in those locations.[399] UTSA also states that notice, "[w]hen feasible," should also be provided in writing;[400] however, UT Austin and UTEP clearly state that written notice is inadequate to effectively ban handguns from offices.[401] UTEP adds a unique detail to its policy, stating that if the excluding office occupant has as a part of his or her duties the regular interaction with individuals who may be license holders, the office occupant "must make reasonable arrangements to meet them in another location" other than the gun-free office.[402] Texas Southern University also allows office occupants to ban handguns, assuming the office is "generally not open to the public."[403] Acceptable notice for that university includes written notice satisfying the statutory requirements.[404]

Texas universities also approach the topic of gun storage in various ways. A significant number of universities explicitly require that licensed students in campus housing store their weapons in

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https://www.uta.edu/news/info/campus-carry/faqs.php (explaining that individual offices are not gun-free zones).

396 *Campus Carry: Information for Faculty*, *supra* note 311.

397 *Id.*

398 *Id.*

399 *Campus Carry Home*, U. TEX. DALL., http://www.utdallas.edu/campuscarry/ (last visited Apr. 20, 2019); *Campus Concealed Carry Information for Faculty*, U. TEX. EL PASO, https://www.utep.edu/campuscarry/_Files/docs/CC_Faculty.pdf (last visited Apr. 20, 2019); *Campus Carry Policy*, U. TEX. SAN ANTONIO, https://www.utsa.edu/campuscarry/policy.html (last visited Apr. 20, 2019).

400 *Campus Carry Policy*, *supra* note 399.

401 *Campus Carry: Information for Faculty*, *supra* note 311; *Campus Concealed Carry Information for Faculty*, *supra* note 399.

402 *Campus Concealed Carry Information for Faculty*, *supra* note 399.

403 *Campus Carry Policy*, TEX. S. U. (Aug. 1, 2016), at (IV)(A)(4.1)(x), http://www.tsu.edu/mapp/pdf/operations-services/040629-campus-carry-policy.pdf.

404 *Id.* at (V)(B)(4.2).

an appropriately secure safe.[405] Six of those universities, such as Texas A&M University, require those students to rent or purchase gun safes from the university,[406] presumably ensuring an acceptably secure gun safe for each gun-toting resident. An additional 16 universities requiring gun safes for campus residents with licenses allow students to acquire their safes from other sources.[407] Midwestern State University, for example, imposes the requirement that any gun safe acquired and used by a student to store a weapon in a campus residence must comply with federal law on what constitutes "secure gun storage."[408] Lamar University explicitly requires students to store handguns in gun safes in dormitories, and those safes must be approved by the university.[409]

Other universities limit the presence of licensed handguns to areas where younger students are not present. For example, the University of Houston has identified all residential facilities as exclusion areas, other than one: Calhoun Lofts.[410] That residence is available only to college juniors or other students who are at least 21 years old.[411] One university, Texas Southern University, prohibits

405 *See, e.g.*, *Carrying Concealed Handguns on Campus*, Midwestern St. U. (Aug. 5, 2016), https://msutexas.edu/human-resources/policy/4-general-university-policies/4.116-Carrying-Concealed-Handguns-On-Campus.asp; *Carrying Concealed Handguns on Campus*, *supra* note 391 (describing concealed campus policy for Texas A&M, including Galveston campus); *Carrying Concealed Handguns on Campus*, Tex. A&M U. Texarkana (Aug. 1, 2016), http://assets.system.tamus.edu/files/communications/pdf/ccrules/TAMU-T.PDF; *Carrying Concealed Handguns on Campus*, Tex. A&M U. Kingsville (Feb. 8, 2018), https://www.tamuk.edu/policy/rules/pdf/34-06-02-K1.pdf; *Carrying Concealed Handguns on Campus*, W. Tex. A&M U. (Aug. 1, 2016), https://www.wtamu.edu/webres/File/About/Administration/Rules/34_06_02_W1-Carrying-Concealed-Handguns-on-Campus.pdf.

406 *See, e.g.*, *Carrying Concealed Handguns on Campus*, *supra* note 391.

407 *See, e.g.*, *Campus Carry Rules/Policies*, Midwestern St. U., https://mwsu.edu/campus-carry/rules-policies (last visited Apr. 20, 2019). Texas Tech University follows a similar policy. *Concealed Carry of Handguns on Campus*, Tex. Tech U. (May 23, 2016), at § 4, http://www.ttu.edu/campuscarry/op10.22.pdf.

408 *Campus Carry Rules/Policies*, *supra* note 407 (citing 18 U.S.C. § 921(a)(34)(c)(2017)).

409 *Concealed Handgun Policy*, Lamar U., at (V)(1), https://www.lamar.edu/faculty-staff/policy/campus-carry/concealed-handgun-policy.html (last visited Mar. 25, 2019).

410 *Campus Carry—S.B. 11 Frequently Asked Questions*, U. Hous. Police Dep't, http://www.uh.edu/police/campus-carry/faq.html (last visited Apr. 20, 2019).

411 *See University Lofts*, U. Hous., http://www.uh.edu/housing/housing-options/university-lofts%20/ (last visited Apr. 20, 2019).

firearms in all residential facilities.[412] Finally, if a university does not provide campus housing for students, the decision on whether firearms are allowed in student housing rests with the private company supplying that service.[413]

Beyond classrooms, offices, and residential areas, Texas universities have promulgated rules regulating, or more accurately prohibiting, handguns in a variety of settings. Those regulations reflect each university's determination of when campus carry is consistent with its operations and when an exclusion area must be carved out. For example, some but not all universities exclude weapons from athletic facilities such as gyms and practice fields.[414] Although there is little clear consistency to their rules, Texas public universities have identified gun-free zones in a number of other areas associated with especially sensitive locations or activities, including mental health treatment facilities;[415] locations where elementary students might be present;[416] places of religious worship;[417] health care facilities;[418] areas where the board of regents meets;[419] dining halls;[420] museums;[421] counseling centers;[422] the university post

412 *Campus Carry Policy*, *supra* note 403, at (IV)(A)(4.1)(h).

413 *See, e.g.*, *Carrying Concealed Handguns on Campus*, TEX. A&M U. CORPUS CHRISTI, at 2 (Aug. 1, 2016), http://academicaffairs.tamucc.edu/rules_procedures/assets/34.06.02.C1_carrying_concealed_handguns_on_campus.pdf.

414 *Compare id.* at 2–3 (prohibiting concealed carry at the university tennis center, baseball and softball fields, gym, wellness center, locker rooms, sports building, and field house) *with Campus Carry: Information for Students*, U. TEX. AUSTIN, http://campuscarry.utexas.edu/students (prohibiting weapons at intercollegiate sporting events but silent on whether weapons in general athletic facilities are prohibited) (last visited Apr. 20, 2019).

415 *Campus Concealed Carry: Exclusion Zones*, U. TEX. EL PASO, https://www.utep.edu/campuscarry/exclusion-zones/index.html (last visited Apr. 20, 2019).

416 *See, e.g.*, *Campus Carry Home*, *supra* note 399.

417 *Carrying of Concealed Handguns on Campus*, U. N. TEX. 3 (Aug. 1, 2016), http://policy.unt.edu/sites/default/files/04.001_CarryingOfConcealedHandgunsOnCampus_2016.pdf.

418 *See, e.g.*, *Concealed Handguns and Other Weapons on Campus*, U. TEX. RIO GRANDE VALLEY (Aug 1, 2016), http://www.utrgv.edu/campuscarry/_files/documents/campus-carry-policy.pdf.

419 *See Gun Free Zones (Campus Carry) Policy*, TEX. WOMAN'S U. (Feb. 14, 2019), https://servicecenter.twu.edu/TDClient/KB/ArticleDet?ID=34877.

420 *See, e.g.*, *Campus Carry Policy*, *supra* note 399.

421 *Id.*

422 *See, e.g.*, *Carrying Concealed Handguns on Campus*, *supra* note 413, at 2–3.

office;[423] animal care facilities;[424] a law school clinic;[425] portions of libraries;[426] university-owned automobiles;[427] storage buildings where combustible items are stored;[428] areas where alcohol is served;[429] marine vessels;[430] playgrounds;[431] "[a]reas containing critical university infrastructure";[432] certain laboratories;[433] and areas where formal disciplinary adjudications of students take place.[434]

Universities have also developed processes to identify additional locations that might be designated, on either a permanent or temporary basis, as gun-free if the need arises.[435] In particular, a number of universities allow their presidents to create temporary exclusion zones, sometimes with rule-based guidance on what circumstances would warrant such designations[436] and sometimes without such guidance.[437] While initial promulgation of firearm

423 *See Carrying Concealed Handguns on Campus*, Tex. A&M U. Com. (Aug. 1, 2016), https://www.tamuc.edu/aboutUs/policiesProceduresStandardsStatements/rulesProcedures/34SafetyOfEmployeesAndStudents/34.06.02.R1.pdf.

424 *See Campus Concealed Carry: Exclusion Zones*, *supra* note 415.

425 *See Carrying Concealed Handguns on Campus*, *supra* note 391.

426 *Campus Carry Policy*, *supra* note 399.

427 *See Campus Carry Policy*, *supra* note 403, at (IV)(A)(4.1)(t).

428 *See Campus Carry Policy*, *supra* note 399.

429 *See id.*

430 *See Carrying Concealed Handguns on Campus*, *supra* note 391.

431 *See Gun Free Zones*, Tarleton St. U., https://www.tarleton.edu/finadminweb/safety/documents/campus-carry/campuscarry-rackcard.pdf.

432 *See Campus Carry—S.B. 11 Frequently Asked Questions*, *supra* note 410.

433 *See Campus Concealed Carry Information for Faculty*, *supra* note 399.

434 *See Campus Carry Policy*, U. Hous. Clear Lake 3 (July 7, 2016), https://www.uhcl.edu/policies/documents/administration/campus-carry-policy.pdf.

435 *See Carrying of Concealed Handguns on Campus*, U. N. Tex. Dall. (Aug. 8, 2017), https://www.untdallas.edu/sites/default/files/12.006_carrying_of_concealed_handguns_on_campus.pdf; *Carrying Concealed Handguns on Campus*, Midwestern St. U. (Aug. 5, 2016), https://msutexas.edu/human-resources/policy/4-general-university-policies/4.116-Carrying-Concealed-Handguns-On-Campus.asp; *Concealed Carry of Handguns on Campus*, Angelo St. U. (May 4, 2018), https://webstage.angelo.edu/content/files/22963-op-0210-concealed-carry-of-handguns-on-campus.

436 *See, e.g.*, *Carrying of Concealed Handguns on Campus*, U. N. Tex. Dall. (Aug. 8, 2017), https://www.untdallas.edu/sites/default/files/12.006_carrying_of_concealed_handguns_on_campus.pdf (giving factors that should be considered in determining whether a 72-hour exclusion zone should be established by the president, including whether the activity has a history of violence).

437 *See Concealed Handgun Policy*, *supra* note 409, at V.6. (stating that at the discretion of the president, "other Lamar University premises associated with temporary events involving safety considerations" may be designated gun-free zones).

regulations under the law requires board of regent's approval, it does not appear that any later safety-related designations must necessarily be approved beyond the level of the university's president.[438] This power to promulgate additional exclusion zones and handgun regulations appears based in the language of Texas's campus carry law, which states that "the president may amend [the university's campus carry rules] as necessary for campus safety."[439]

While the discretion given by the law to universities allows a more customized implementation of campus carry, it also leads to an inconsistent web of handgun regulations across public universities. However, the obligation that universities must provide statutory notice of any exclusion zones[440] helps mitigate concerns about inconsistent rules between university campuses.

Comparison of campus-specific implementation rules also helps identify areas where uncertainty has been created. For instance, at least 26 universities are silent on the topic of whether, and if so, how, employees may store handguns on campus.[441] A number of practical challenges arise because of this omission. For example, if a licensed employee moves into a campus location where guns are excluded, what should the employee do? Should the employee store the weapon in a gun safe in her office? In her desk drawer? If so, may she store it there overnight? Is she required to purchase a gun safe for her office? What if she shares office space with other co-workers who object to concealed carry? Because the basic structure of the new law puts the burden on the license holder to comply with properly-posted exclusion notices,[442] presumably the general response to the above questions is simply, "The employee must figure out a way not

438 *See* TEX. GOV'T CODE § 411.2031(d-1) (West 2019).

439 *Id.*

440 *Id.* (requiring that a university "give effective notice under Section 30.06, Penal Code, with respect to any portion of a premises on which license holders may not carry").

441 *See, e.g.*, *Campus Carry Quick Information*, STEPHEN F. AUSTIN ST. U., http://www.sfasu.edu/campuscarry/images/Campus_Carry_Quick_Info_Sheet_A.pdf (last visited Apr. 20, 2019); *Concealed Carry Campus Policy*, SAM HOUSTIN ST. U., https://www.shsu.edu/dept/dean-of-students/guidelines/concealed-carry (last visited Apr. 20, 2019); *Concealed Handgun Policy*, *supra* note 409; *Carrying Concealed Handguns on Campus*, W. TEX. A&M U. (Aug. 1, 2016), https://www.wtamu.edu/webres/File/About/Administration/Rules/34_06_02_W1-Carrying-Concealed-Handguns-on-Campus.pdf; *Campus Concealed Carry*, *supra* note 354 (imposing storage requirements only for full time employees who are required to live on campus).

442 *See supra* note 168 and accompanying text.

to carry a concealed weapon into excluded areas." That response does not address security and safety concerns that might arise for the broader university community, however, depending on how an employee chooses to comply with the university's regulations.

In all, however, a detailed look at how Texas's public universities have initially implemented campus carry reflects that universities have, for the most part, thoughtfully assessed their student populations, safety concerns, and campus environments, and then determined how to overlay concealed carry onto their operations. In doing so, they have created firearm regulations, including exclusion zones, that fit their needs, while not "generally prohibiting license holders from carrying concealed handguns."[443]

3. Potential Free Speech Issues

Crafting gun policy frequently brings competing rights and freedoms into conflict. Navigating that tension can be an enormous challenge. One area where such conflict may exist under current university rules relates to free speech. Under Texas law, license holders are required to present both their official identification, such as their driver's license, and their handgun license if they are requested by a peace officer to provide identification when they are carrying their weapon.[444] Because Texas law is silent on whether license holders are obligated to disclose their licensee status in any other setting or to any other person, it is assumed that no such obligation exists.

Several Texas schools have addressed this topic in their campus carry rules, specifically limiting inquiries into individuals' status as license holders. For example, Texas Tech University states that employees, other than members of law enforcement "may not, under any circumstances, require students or employees to disclose their concealed carry license status."[445] The University of Texas–Rio Grande has adopted a rule with similar language.[446] Texas A&M University's version states that "[u]niversity administrators, faculty, staff and students should not request individuals to indicate whether they have a license.[447]

Without an official explanation of these policies, it is unclear

443 Gov't § 411.2031(d-1) (West 2019).
444 *Id.* § 411.205.
445 *Concealed Carry of Handguns on Campus*, *supra* note 407, at § 2(e).
446 *Concealed Handguns and Other Weapons on Campus*, *supra* note 418.
447 *Procedures for Implementation of Campus Carry*, *supra* note 356.

exactly what concern is motivating the universities. Perhaps because license holders are not legally required to disclose their status other than to peace officers, and because the possibility exists that license holders might feel singled out or intimidated if they were asked to voluntarily identify themselves, the universities have adopted policies that limit such inquiries.[448] But in doing so, the universities may be seen as proscribing or discouraging, depending on the rule, speech that is not prohibited by law. These policies target content-based expression, and may, at the very least, have a chilling effect on the free speech of employees or students.[449] To the extent there is a compelling governmental interest involved, which seems doubtful, it appears likely that more narrowly tailored means to achieve those goals are possible.[450] For example, a university concerned about intimidation of license holders could prohibit any adverse impact on a student or employee because of her status as a license holder.

4. Post-Implementation Reaction

Prior to the initial implementation of campus carry in Texas on August 1, 2016, significant concerns existed about the new law. On the legal front, three UT Austin professors filed suit against their university and the state, arguing that the law was an "overly solicitous, dangerously-experimental gun polic[y]," and that it violated both the First and Second Amendments to the U.S. Constitution.[451] The American Association of University Professors, joined by the Giffords Law Center to Prevent Gun Violence and the Brady Center to Prevent Gun Violence, filed an amicus brief in support of the plaintiffs' claims.[452] Among the arguments made by

448 License status is also exempt from disclosure under the Public Information Act. *Frequently Asked Questions*, TEX. DEP'T OF PUBLIC SAFETY, https://www.dps.texas.gov/RSD/LTC/faqs/index.htm (last visited Apr. 20, 2019).

449 Content-based restrictions are presumptively unconstitutional. R.A.V. v. St. Paul, 505 U.S. 377, 382 (1991).

450 *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983); *see generally* Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL'Y 481, 497–500 (2009) (discussing content-based discrimination in, as well as the chilling effect of, campus speech codes).

451 Matthew Watkins, *Three UT Professors Sue to Block Campus Carry Law*, TEX. TRIB. (July 6, 2016), https://www.texastribune.org/2016/07/06/3-ut-austin-professors-sue-state-over-campus-carry/.

452 Brief of American Ass'n of Univ. Professors et al. as Amici Curiae in Support of Plaintiffs-Appellants, Glass v. Paxton, 900 F.3d 233 (2018) (No. 17-50641), available at https://www.aaup.org/file/Glass_campus_carry_0.pdf.

the plaintiffs in that case was that the "possibility of the presence of concealed weapons in a classroom impedes [their] ability to create a daring, intellectually active, mutually supportive, and engaged community of thinkers."[453] In his ruling, Judge Lee Yeakel of the Western District of Texas described the plaintiffs' standing claim as one "based on their self-imposed censoring of classroom discussions caused by their fear of the possibility of illegal activity by persons not joined in this lawsuit."[454] Concluding that the professors had not provided any "concrete evidence to substantiate their fears," and because any alleged injury to them was not traceable to any conduct by the defendants, Judge Yeakel dismissed the lawsuit for lack of standing.[455] Judge Yeakel's opinion did not address the plaintiffs' Second Amendment or Equal Protection claims.[456]

Among the concerns raised by plaintiffs in their case was the chilling effect that campus carry would have on class content and discussions: that professors would avoid controversial subjects or points of view, fearful that a student upset with the discussion might draw a concealed weapon.[457] Professors also frequently deal with students in emotional crisis because of school problems, failed exams, cheating allegations, or general life pressures, and the dangers associated with those crises become heightened in a world of concealed carry.[458] Many faculty members report being anxious or fearful of how the new law will impact them personally and professionally, as well as how it will affect their classrooms and student interactions.[459] The faculty senate of the University of Houston, apparently in response to that anxiety, created a presentation for faculty there suggesting that they "may want to" take various steps in response to the new campus carry law, including

453 Glass, et al. v. Paxton, et al., No. 1 :16-CV-845-LY, 2017 WL 4506806, at *3 (W.D. Tex. July 6, 2017) (order granting motion to dismiss).

454 *Id.*

455 *Id.*

456 *See id.*; Mathew Watkins, *Federal Judge Throws Out Effort by UT Professors to Overturn Campus Carry*, Tex. Trib. (July 7, 2017), https://www.texastribune.org/2017/07/07/federal-judge-dismisses-ut-professors-attempt-overturn-campus-carry/.

457 Brief of American Ass'n of Univ. Professors, et al. as Amici Curiae in Support of Plaintiffs-Appellants, *supra* note 452, at 3–4.

458 Steven J. Friesen, *I'm a Professor in Texas and I'm Worried About Students Who Can Now Carry Guns in My Class*, Pub. Radio Int'l (Aug. 18, 2016), https://www.pri.org/stories/2016-08-18/im-professor-texas-and-im-worried-about-students-who-can-now-carry-guns-my-class.

459 *See id.*; Flaherty, *supra* note 388.

"drop[ping] certain topics from [the] curriculum"; and only meeting "'that student' in controlled circumstances."[460]

Preliminary information is now available regarding the impacts, if any, that might be felt on academic freedom as a result of campus carry. In a study performed by Joslyn Krismer, a Ph.D. candidate at UT Austin, faculty members at a "large Southern research university" were polled about their attitudes towards campus carry and how the prospective law would affect their teaching.[461] Seventy-one percent of faculty agreed that campus carry laws "will have a negative impact on the free and robust exchange of ideas at the my university [sic]."[462] However, 53% of professors reported that their approach to teaching controversial or emotional topics would not change,[463] and 58% reported that they would not omit course content because of the new law.[464] Forty percent of professors reported that they would "tone down" their normal approach when dealing with sensitive or controversial subjects.[465] Female professors were slightly more opposed to campus carry than their male colleagues, and Asian professors were more likely to report that they would change their course coverage or teaching style because of the law.[466]

Superficially, these data may suggest that concerns voiced by campus carry opponents about its impact on the classroom environment, course content, or teaching style may be overblown. However, there are reasons not to draw too many definitive conclusions from this preliminary information. First, assuming the survey was conducted at a Texas university, it was administered just before the new law went into effect.[467] As a result, while the survey may reflect what faculty members expected the impact of

460 Sharon Grigsby, *Response at University of Houston is Exactly Why We Feared Campus Carry*, DALL. MORNING NEWS (Feb. 23, 2016), https://www.dallasnews.com/opinion/opinion/2016/02/23/university-of-houston-response-is-exactly-why-we-feared-campus-carry-in-texas.

461 It is unknown whether this survey was definitely conducted in Texas, but the location of the researcher and the timing of the study, just as campus carry became law in Texas, strongly suggest that it was. Flaherty, *supra* note 388 (the actual study has been presented at two conferences but is not publicly available for citation).

462 *Id.*

463 *Id.*

464 *Id.*

465 *Id.*

466 *Id.*

467 The survey appears to have been distributed to faculty members in the spring of 2016, before the law went into effect on August 1, 2016. *See id.*

campus carry would be on their teaching and course coverage, it may not reflect what the effect actually was. In addition, while there was a relatively even split between faculty members who believed that campus carry would change their coverage and teaching and those who did not, there was also a significant number of "unsure" responses.[468] Approximately 14-18% of respondents were uncertain whether, and if so, how, campus carry might impact their classrooms.[469] In addition, further research should be conducted about the impact of campus carry on the classrooms of minority and female teachers to better understand the law's effects. Finally, the question of whether a professor's course coverage changes after implementation of campus carry is separate from the question of whether the law creates concern and worry on the part of professors.[470] The answer to the latter question is clearly yes for many faculty members. Countless faculty members have expressed significant apprehension about allowing guns into their classrooms and offices, and many have talked and written about the combustible environment they inhabit in higher education, one in which high student pressure often mixes with depression, anxiety, and alcohol and drug use.[471] Inserting more guns into that environment, they argue, is a recipe for disaster.[472] The anxiety those faculty members feel every day walking into a campus carry environment is real.

Beyond potential and actual impacts on the classroom learning environment, the Texas campus carry law has led to faculty resignations, withdrawals of candidates for teaching and administrative positions, decisions by prospective students not to apply, and rescission of acceptances by visiting faculty and guest speakers.[473] The most well-known example was Fritz Steiner,

468 *See id.* (finding 46% of professors surveyed would not change, 40% would, and 14% were unsure).

469 *Id.*

470 One professor explained that professors may be "scared stiff" about the prospect of having guns in their classrooms, but "on principle refuse to change" their interactions with students. *Id.*

471 *See supra* notes 451–60 and accompanying text.

472 *See* Flaherty, *supra* note 388.

473 *See generally* Eleanor Dearman & W. Gardner Selby, *Professor: 'Concrete examples' of Teachers, Students Spurning University of Texas Due to Gun Law*, PolitiFact Tex. (Aug. 26, 2016), http://www.politifact.com/texas/statements/2016/aug/26/lisa-moore/professor-concrete-examples-teachers-students-spur/; *The Impact of Campus Carry: Recruitment, Retention, Reputation Damage*, Gun Free UT, http://gunfreeut.org/resources/impact-of-campus-carry/ (listing a variety of harms that have flowed from Texas's adoption of campus carry,

who resigned after fifteen years as dean of UT Austin's College of Architecture.[474] According to Dean Steiner, who then accepted a deanship at the University of Pennsylvania, "I would have never applied for another job if not for campus carry."[475] In another well-publicized example, Siva Vaidhyanathan, a professor of media studies at The University of Virginia, withdrew from being considered as a finalist for the position of dean at the Moody College of Communication at UT Austin.[476] Describing the "chilling effect" that campus carry would have on the classroom learning environment, Prof. Vaidhyanathan said he would likely side with concerned faculty members who wanted guns excluded from their classrooms.[477] Because in that case he anticipated that he would be "fired immediately,"[478] he withdrew his name for further consideration in the dean search process at UT Austin.[479] Among the other lost candidates for faculty or administrative positions in Texas as a result of campus carry are Thomas C. Sudhof, a Stanford University Nobel Laureate who declined a position at UT-Southwestern; Robin Bernstein, a professor and chair at Harvard University, who declined a senior chair position at UT Austin; Daniel Hammermesh, economics professor emeritus at UT Austin, who resigned that position and moved to the Royal Holloway University of London; and Kimberly Tallbear-Dauphine, associate professor of anthropology at UT Austin, who resigned and took a position on the faculty at the University of Alberta.[480]

Aside from these challenges with recruitment and retention, the first stages of campus carry implementation have gone smoothly and have had relatively little impact on campuses across the state. During the first year of campus carry, there were no intentional

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including impacts on hiring and retention at universities and decisions by guest lecturers and performers to decline invitations to appear at Texas schools) (last visited Apr. 20, 2019).

474 Matthew Watkins, *UT Architecture Dean Cites Campus Carry as a Reason for Departure*, TEX. TRIB. (Feb. 25, 2016), https://www.texastribune.org/2016/02/25/ut-architecture-dean-cites-campus-carry-reason-dep/.

475 *Id.*

476 Ralph K.M. Haurwitz, *Campus Carry Law Kept This Scholar from Pursuing a Deanship at UT*, LOWDOWN ON HIGHER EDUC. (Feb. 18, 2016), http://highered.blog.statesman.com/2016/02/18/campus-carry-law-kept-this-scholar-from-pursuing-a-deanship-at-ut/.

477 *Id.*

478 *Id.*

479 Dearman & Selby, *supra* note 473.

480 *The Impact of Campus Carry: Recruitment, Retention, Reputation Damage*, *supra* note 473.

shootings on university property by any license holders, and just one accidental discharge that occurred at Tarleton State University, with only minor property damage.[481] The first year of campus carry saw, in general, no significant increase in gun violence, or violence at all, on university property. For example, at Texas Tech University in the year prior to campus carry, there were five gun-related incidents on campus; there were six in the twelve months following implementation of campus carry.[482] University officials overseeing implementation of the new law voiced nearly identical reactions to the first year of allowing concealed carry on campus: "very smooth[] and without incident";[483] "[v]irtually no impact at all";[484] "[a]mazingly quiet";[485] "I expected it to be largely uneventful, and those expectations have been pretty much borne out."[486] These Texas experiences are consistent with those of other states, where campus carry implementation has been relatively quiet with "little noticeable impact."[487] In addition, while there had been some initial estimates that complying with the law might cost around $50 million across Texas universities, the actual cost appears dramatically lower.[488] For example, the estimated cost of implementing campus carry in Tarrant County, Texas, has been just $20,000.[489] And a spokesman for The University of Texas System, which had projected campus carry costs of approximately $39 million, described the system's

481 Emma Platoff, *After a Quiet Year of Campus Carry, Community Colleges Get Guns Next*, Tex. Trib. (Aug. 1, 2017), https://www.texastribune.org/2017/08/01/campus-carry-one-quiet-year/.

482 *Id.*

483 *Id.* (quoting Harry Battson, Tarleton State University Assistant Vice President for Marketing and Communications).

484 *Id.* (quoting Chris Meyer, Texas A&M University).

485 *Id.* (quoting Lawrence Schovanec, Texas Tech University president).

486 *Id.* (quoting Phillip Lyons, Dean of the Sam Houston State University College of Criminal Justice).

487 Dave Phillips, *What University of Texas Campus is Saying About Concealed Guns*, N.Y. Times (Aug. 27, 2016), https://www.nytimes.com/2016/08/28/us/university-of-texas-campus-concealed-guns.html.

488 Anna M. Tinsley, *Campus Carry in Texas: At What Cost?*, Fort Worth Star-Telegram (Sept. 28, 2016), http://www.star-telegram.com/news/politics-government/article102651657.html.

489 *Id.* (discussing costs incurred by Tarrant County universities implementing campus carry or providing notice that the campus is exempt, including at Texas Christian University, Texas A&M University School of Law, the University of North Texas Health Science Center, the University of Texas at Arlington, Southwestern Baptist Theological Seminary, and Tarleton State University – Fort Worth).

actual costs as "minimal."[490]

V. CONCLUSION

Recent data show that liberalized gun laws do not increase public safety; just the opposite. Nevertheless, a clear wave of momentum exists across the country in favor of campus carry. While various options exist for states considering implementation of campus carry, the extremes are problematic. Statutes that allow universities to completely opt out of the law will result, experience across the country shows, in the vast majority of schools not allowing guns on campus. On the other hand, statutes that impose a rigid framework on universities do not allow for exceptions based on each school's operations. The recent Texas campus carry law is an exception to these extreme approaches and embodies a compromise: the underlying right to concealed carry exists on university premises, but each school has the power to create a customized implementation plan that identifies areas where handguns are not allowed. Early stages of implementation in Texas show that this model is working well: universities have promulgated reasonable regulations, including establishing limited gun-free zones, that reflect their unique operations, campus populations, and safety concerns. They have done so with little administrative difficulty or financial expenditure, although there have been losses of small numbers of talented faculty and administrators opposed to the law. At a time of entrenched, polarizing opinions about gun policy, the Texas statutory framework provides a balanced middle-ground that should serve as a blueprint for other states planning to adopt campus carry.

490 *Id.*

Let's Make a Green New Deal:

An Analysis of State Carbon Taxes as a Foundational Piece of Climate Legislation in the United States

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I. Introduction

The planet is undeniably experiencing "atmospheric concentrations of carbon dioxide, methane and nitrous oxide that are unprecedented in at least the last 800,000 years."[1] This is according to the Fifth Assessment Report ("AR5") of the Intergovernmental Panel on Climate Change ("IPCC"), the international organization created in 1988 to assess climate change-related science.[2] AR5, published in 2014, highlights the broad scientific consensus that exists among the world's leading climate scientists regarding these concentrations: that they are due to man-made, or anthropogenic, greenhouse gas emissions that "have increased since the pre-industrial era . . . and are now higher than ever."[3] Moreover, scientists agree that these emissions "are extremely likely to have been the dominant cause of the observed warming since the mid-20th century."[4] In AR5's Summary for Policymakers, the IPCC concluded that continued emissions of greenhouse gases "will cause further warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive and irreversible impacts for people and ecosystems."[5]

Regarding these "severe, pervasive and irreversible impacts,"[6] limiting global warming to two degrees Celsius "has often been regarded as the threshold for so-called 'dangerous' climate change."[7]

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1 Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2014 Synthesis Report Summary for Policymakers* 4 (2014), https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf.

2 *Id.*; Intergovernmental Panel on Climate Change, *IPCC FactSheet: What is the IPCC?* (Aug. 30, 2013), https://www.ipcc.ch/news_and_events/docs/factsheets/FS_what_ipcc.pdf.

3 IPCC, *supra* note 1. Numerous studies demonstrate that there is a roughly 97% consensus among climate scientists that agree with the IPCC's conclusions on anthropogenic climate change. *See* John Cook et al., *Consensus on consensus: a synthesis of consensus estimates on human-caused global warming*, 2016 Envtl. Research Letters 11 (Apr. 2016), at 1, 6, http://iopscience.iop.org/article/10.1088/1748-9326/11/4/048002/pdf ("[T]he scientific consensus on [anthropogenic global warming] is robust, with a range of 90%-100% depending on the exact question, timing, and sampling methodology.").

4 IPCC, *supra* note 1. *See* Cook, *supra* note 3, at 1 ("Climate scientists overwhelmingly agree that humans are causing recent global warming.").

5 IPCC, *supra* note 1, at 8.

6 *Id.*

7 Chris Mooney, *We Only Have a 5 Percent Chance of Avoiding 'Dangerous' Global Warming, a Study Finds*, Wash. Post: Energy & Env't (July 31, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/07/31/we-only-have-a-5-percent-chance-of-avoiding-dangerous-global-warming-a-

Two studies published in 2017 concluded that there is an extremely slim chance that Earth's warming will stay below that two-degree threshold.[8] One of the studies found "a 5% chance of less than 2C warming, and a 1% chance of less than 1.5C."[9] In early October, 2018, the IPCC released a Special Report "on the impacts of global warming of 1.5ºC above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty."[10] This report concluded that "[h]uman activities are estimated to have caused approximately 1.0ºC of global warming above pre-industrial levels . . . [and] [g]lobal warming is *likely* to reach 1.5ºC between 2030 and 2052 if it continues to increase at the current rate."[11] The planet is already experiencing some of climate change's severe effects, with multiple 'once in a generation' storms now happening within the span of a few years in regions around the globe.[12]

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study-finds.

8 *See id.*

9 Adrian E. Raftery et al., *Less Than 2ºC Warming by 2100 Unlikely*, 7 NATURE CLIMATE CHANGE 637, 639–40 (2017).

10 Intergovernmental Panel on Climate Change, *Global Warming of 1.5ºC: Summary for Policy Makers*, 3 (Oct. 6, 2018), http://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf.

11 *Id.* at 4. The IPCC made its conclusion with a *"high confidence,"* its strongest possible conclusion. *Id.*

12 *See* Cara Anna, *Mozambique City Fought Climate Change, But Cyclone Roared In*, WASH. POST (Mar. 27, 2019), https://www.washingtonpost.com/world/africa/mozambique-city-battled-climate-change-then-came-a-cyclone/2019/03/27/6b9a0e5e-5070-11e9-bdb7-44f948cc0605_story.html? ("This cyclone destroyed everything we built for more than 100 years."); Matthew Cappucci, *Once-in-a-Generation Flooding Possible in Boston – For the Second Time This Year*, WASH. POST (Mar. 1, 2018), https://www.washingtonpost.com/news/capital-weather-gang/wp/2018/03/01/once-in-a-generation-flooding-possible-in-boston-friday-and-saturday/?utm_term=.715d7cd9ffb8; Meghna Chakrabarti, *Cyclone Idai Leaves More Than 750 Dead, Thousands Stranded in Southern Africa*, WBUR (Mar. 28, 2019), https://www.wbur.org/onpoint/2019/03/28/cyclone-idai-africa-climate-change ("Cyclone Idai is one of the worst weather-related catastrophes in the history of Africa."); Eric Holthaus, *Record-Breaking Flooding in Nebraska is Visible From Space*, GRIST (Mar. 18, 2019), https://grist.org/article/record-breaking-flooding-in-nebraska-is-visible-from-space/; IPCC, *supra* note 1, at 7–8; Umair Irfan, *The Midwest Floods are Going to Get Much, Much Worse*, VOX (updated Mar. 27, 2019, 2:21 PM), https://www.vox.com/2019/3/22/18277244/nebraska-flood-2019 ("An 'unprecedented' flood season lies ahead this spring, according to NOAA."); Marissa Miley, *Hurricane Season: With Climate Change, 'Once in a Lifetime Storm'*

Climate change will have impacts on both natural and human systems, amplifying existing risks and creating entirely new ones.[13] These systems are interrelated, with impacts in one system having ripple effects that reverberate into others.[14] For example, AR5 projects that climate change will undermine food security in various ways around the planet.[15] Some ecosystems will suffer reductions in marine biodiversity that "will challenge the sustained provision of fisheries productivity" while other regions will see reductions in wheat, rice, and maize production.[16] Besides the economic loss of decreased food production, these impacts will also have substantial human costs.[17] One study estimated that climate change "is responsible for 59,300 suicides in India" over the past 30 years.[18] The study argues that during India's agricultural growing season on days above 20ºC, "a 1ºC increase in a single day's temperature causes [about] 70 suicides, on average."[19] This correlation was only found during the agricultural season, when hotter temperatures reduce crop yields.[20]

Climate change is projected to have significant impacts in both urban and rural areas of human society. Urban areas will likely see increased "risks for people, assets, economies and ecosystems" while rural areas will likely "experience major impacts on water availability and supply, food security, infrastructure and agricultural incomes."[21] A 2014 report, "The Economic Risks of Climate Change in the United States," attempted to summarize the risks in the U.S. over the next few decades and found that: 1) coastal storms could cost $35 billion annually "within the next 15 years"; 2) some agricultural regions might see crop production decrease "more than 10% over the next 5 to 25 years"; 3) electricity could cost up to $12 billion more each year within the next 5 to 25 years; and 4) "by 2050 between $66 billion and $106 billion worth of existing coastal

is The New Normal, The GroundTruth Project (Sept. 12, 2018), http://thegroundtruthproject.org/hurricane-florence-climate-change/.

13 IPCC, *supra* note 1, at 13.

14 *See id.* at 13–16.

15 *Id.* at 13–15.

16 *Id.* at 13.

17 *Id.* at 13–16.

18 Tamma A. Carleton, *Crop-Damaging Temperatures Increase Suicide Rates in India*, 114 Proc. Nat'l Acad. Sci. 8746 (2017).

19 *Id.*

20 *Id.*

21 IPCC, *supra* note 1, at 15–16.

property will likely be below sea level nationwide."[22] The March 2019 floods in the midwestern United States are a prime example of these devastating impacts, with record flooding that has already "caused at least $3 billion in damage to the region, and more than one-third of the tally is from agriculture, according to officials."[23]

Although these new studies paint a bleak picture for keeping global warming below the two-degree threshold, "staying within something like 2.5 degrees still seems quite possible if there's concerted action."[24] And concerted action on the issue has begun to take shape, most notably with the signing and ratification of the Paris Agreement, which entered into force on November 4, 2016.[25] The Agreement's main goals are quite ambitious: keep global warming below the two-degree threshold as well as pursue "efforts to limit the temperature increase to 1.5°C above pre-industrial levels."[26] As of March 31, 2019, 185 of the 197 Parties to the Convention have ratified the Agreement.[27]

One of the significant hurdles in achieving the Agreement's main goals is that despite the enormity of the costs and effects stemming from climate change, they are generally not accounted for in the economy because "market prices do not reflect the social and environmental cost of economic activity."[28] The problem is

22 THE RISKY BUSINESS PROJECT, RISKY BUSINESS: THE ECONOMIC RISKS OF CLIMATE CHANGE IN THE UNITED STATES 3–4 (2014), http://riskybusiness.org/site/assets/uploads/2015/09/RiskyBusiness_Report_WEB_09_08_14.pdf.

23 Jeff Daniels, *The Farm Belt Faces an Expensive Cleanup After Already-Costly Record Flooding*, CNBC (Mar. 29, 2019, 2:12 PM), https://www.cnbc.com/2019/03/29/farm-belt-faces-an-expensive-cleanup-after-already-costly-record-flooding.html; *see also* Mitch Smith et al., *'It's Probably Over for Us': Record Flooding Pummels Midwest When Farmers Can Least Afford It*, N.Y. TIMES (Mar. 18, 2019), https://www.nytimes.com/2019/03/18/us/nebraska-floods.html ("The record floods that have pummeled the Midwest are inflicting a devastating toll on farmers and ranchers at a moment when they can least afford it, raising fears that this natural disaster will become a breaking point for farms weighed down by falling incomes, rising bankruptcies and the fallout from President Trump's trade policies.").

24 Mooney, *supra* note 7.

25 *Paris Agreement—Status of Ratification*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/paris_agreement/items/9444.php (last visited Mar. 31, 2019).

26 UNITED NATIONS, *Paris Agreement*, Art. 2.1(a) (2015), https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

27 *Paris Agreement—Status of Ratification*, *supra* note 25.

28 TED HALSTEAD, CLIMATE LEADERSHIP COUNCIL, UNLOCKING THE

that CO2-emitting products and activities "are relatively too cheap because individuals will not consider the costs the emissions impose on others, including on future generations."[29] As Ted Halstead, founder of the Climate Leadership Council, wrote, "This, more than any other single factor, is to blame for our climate predicament."[30] The International Monetary Fund has estimated that market prices of goods that emit greenhouse gases, most notably fossil fuels, fail to account for a majority of their social and environmental costs, creating an annual negative externality of $5.3 trillion worth of social and environmental costs that remain unaccounted for.[31]

Corrective taxes, also called Pigouvian taxes,[32] levied on the activities or goods that create such negative externalities are widely considered by economists to be "the most effective solution to climate change."[33] In particular, adopting nationwide carbon taxes would be one of the simplest and most effective ways to achieve the goals of the Paris Agreement,[34] because "it is pricing, first and

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Climate Puzzle 5 (2017), https://www.clcouncil.org/media/Unlocking_The_Climate_Puzzle.pdf.

29 Gilbert E. Metcalf & David Weisbach, *The Design of a Carbon Tax*, 33 Harv. Envtl. L. Rev. 499, 500 (2009).

30 Halstead, *supra* note 28, at 5.

31 International Monetary Fund, *IMF Survey: Counting the Cost of Energy Subsidies* (July 17, 2015), https://www.imf.org/en/News/Articles/2015/09/28/04/53/sonew070215a (citing David Coady et al., *How Large Are Global Energy Subsidies?*, International Monetary Fund: IMF Working Paper 15/105 (May 2015)).

32 The name is derived from the writings of economist Arthur Pigou that discuss how to internalize externalities. Metcalf & Weisbach, *supra* note 29, at 500 (citing Arthur Cecil Pigou, The Economics of Welfare 192–93 (Transaction ed. 2002)).

33 Halstead, *supra* note 28, at 6; *see also* Gary M. Lucas, Jr., *Voter Psychology and the Carbon Tax*, 90 Temp. L. Rev. 1, 5–7 (2017); *Economists' Statement on Carbon Dividends*, Wall St. J. (Jan. 16, 2019), https://www.clcouncil.org/economists-statement.

34 *See* Halstead, *supra* note 28, at 7. *See also* Steven Rattner, *Yes, We Need a Green New Deal. Just Not the One Alexandria Ocasio-Cortez Is Offering*, N.Y. Times (Mar. 20, 2019), https://www.nytimes.com/2019/03/20/opinion/green-new-deal-carbon-taxes.html ("[A] carbon tax has been judged by climate hawks like Resources for the Future to be far more effective in reaching the goals of the Paris agreement than the well-intended regulations put in place by President Barack Obama and his predecessors."); Metcalf & Weisbach, *supra* note 29, at 501 ("[C]ollecting the [carbon] tax upstream would make it possible to accurately and cheaply cover 80% of U.S. emissions . . . and . . . it would be possible to cover close to 90% of U.S. emissions at a modest additional cost.").

foremost, that dictates whether utilities and governments build a coal power plant or a wind farm, whether factories install the latest energy efficient technology or whether companies choose video conferencing or flying."[35] On January 17, 2019, a statement signed by 3,508 U.S. economists—including four former Federal Reserve Chairs, 27 Nobel Laureate economists, 15 former Chairs of the Council of Economic Advisers, and two former Secretaries of the U.S. Department of Treasury—appeared in the *Wall Street Journal*, with five policy recommendations relating to the implementation of a nationwide carbon tax.[36] The first recommendation states that a:

> [C]arbon tax offers the most cost-effective lever to reduce carbon emissions at the scale and speed that is necessary. By correcting a well-known market failure, a carbon tax will send a powerful price signal that harnesses the invisible hand of the marketplace to steer economic actors towards a low-carbon future."[37]

However, politics can be fickle, and elections can change a country's stance on any given issue, including policies on climate change. The United States is the prime example of this: after the election of President Donald Trump, the State Department formally notified the United Nations on August 4, 2017 "that the U.S. will pull out of the [Paris Agreement] as soon as it can under the terms of the . . . accord."[38] But in the spring of 2019, a new "hot item on the political agenda" emerged: the 'Green New Deal'.[39] On February 7, 2019, Senator Ed Markey and Representative Alexandria Ocasio-Cortez submitted a resolution calling for the creation of a Green New Deal.[40] The resolution is not actual legislation, but rather a

35 HALSTEAD, *supra* note 28, at 6. Similarly, at an individual level, consumer-facing prices affect daily purchasing decisions. *Id.*

36 *Economists' Statement on Carbon Dividends*, *supra* note 33.

37 *Id.*

38 Ari Natter, *Donald Trump Notifies UN of Paris Exit While Keeping Option to Return*, TIME: BLOOMBERG (Aug. 5, 2017), http://time.com/4888705/donald-trump-notifies-united-nations-paris-exit/; *see also* Press Release, U.S. Department of State, Communication Regarding Intent to Withdraw From Paris Agreement (Aug. 4, 2017), https://www.state.gov/r/pa/prs/ps/2017/08/273050.htm.

39 David Roberts, *There's Now an Official Green New Deal. Here's What's In It.*, VOX (last updated Feb. 7, 2019, 12:58 PM), https://www.vox.com/energy-and-environment/2019/2/7/18211709/green-new-deal-resolution-alexandria-ocasio-cortez-markey.

40 Recognizing the duty of the Federal Government to create a Green New Deal,

framework "that lays out the goals, aspirations, and specifics of the program in a more definitive way."[41] Among other things, the goals of the Green New Deal include achieving "net-zero greenhouse gas emissions through a fair and just transition for all communities and workers . . . [and investing] in the infrastructure and industry of the United States to sustainably meet the challenges of the 21st century."[42] Moreover, the truly ambitious aspect of the resolution is the call for all of the Green New Deal's goals to "be accomplished through a 10-year national mobilization."[43]

While the Green New Deal resolution was voted down in the Senate on March 26, 2019,[44] it has nonetheless catapulted climate change and climate policy discussion to the forefront of American political debate.[45] The resolution does not mention putting a price on carbon in its goals and projects, but in all likelihood carbon taxes will be a necessary and vital component in accomplishing the Green New Deal's goals.[46] Furthermore, a carbon tax is one of the few climate mechanisms that has growing bipartisan support, with both Democrats and Republicans sponsoring and introducing multiple carbon pricing bills in 2018 and planning to do the same in 2019.[47]

These bills are notable and should be considered significant progress, but even in the U.S.'s changing political environment, the

H.R. Res. 109, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-resolution/109/text (introduced Feb. 7, 2019).

41 Roberts, *supra* note 39.

42 H.R. Res. 109, *supra* note 40.

43 *Id.*

44 Li Zhou & Ella Nilsen, *Senate Democrats Broadly Shut Down Republican Trolling on the Green New Deal*, Vox (updated Mar. 26, 2019, 5:05 PM), https://www.vox.com/2019/3/26/18281323/green-new-deal-democrats-vote.

45 *See* Justin Worland, *How the Green New Deal is Forcing Politicians to Finally Address Climate Change*, Time (Mar. 21, 2019), http://time.com/5555721/green-new-deal-climate-change/.

46 H.R. Res. 109, *supra* note 40; Nick Sobczyk, *Carbon Tax Backers Grapple With 'Green New Deal'*, E&E Daily (Jan. 23, 2019), https://www.eenews.net/stories/1060118143 ("[A] carbon fee is starting to look like a piece of a bigger puzzle. . . . A carbon price could be part of a 'Green New Deal.'").

47 Sobczyk, *supra* note 46 (discussing the "Energy Innovation and Carbon Dividend Act," introduced in 2018 by then-Representative Carlos Curbelo (R-Fla.), another carbon pricing bill that Representative Francis Rooney (R-Fla.) will introduce in 2019, a cap-and-dividend bill called the "Healthy Climate and Family Security Act" that Senator Chris Van Hollen (D-Md.) and Representative Don Beyer (D-Va.) plan to reintroduce in 2019, and the "American Opportunity Carbon Fee Act" that Senators Brian Schatz (D-Haw.) and Sheldon Whitehouse (D-R.I.) plan to reintroduce in 2019).

chances of adopting a national carbon tax in the near future "are remote" at best.[48] Multiple polls were conducted in late 2018 on Americans' stance regarding climate change and carbon pricing, with some interesting findings.[49] The Yale Program on Climate Change Communication and the George Mason University Center for Climate Change Communication issued a joint report "based on findings from a nationally representative survey—*Climate Change in the American Mind*," conducted between November 28 and December 11, 2018, that found that "seven in ten Americans (73%) think global warming is happening," and 51% of Americans "are 'extremely' or 'very' sure it is happening, an increase of 14 percentage points since March 2015."[50] Another survey, conducted in November 2018 by the Energy Policy Institute at the University of Chicago (EPIC) and the Associated Press-NORC Center for Public Affairs Research, found that 44% of Americans support a carbon tax, 29% oppose such a tax, and 25% have a neutral opinion.[51] However, of those surveyed, 67% "would support a carbon tax" if the revenue was used to restore natural features to counter CO2 effects, 59% said they would support a carbon tax if the revenue was used to fund research and development for renewable energy programs, and 54% said they would support such a tax if the revenue was used to develop or

48 Ian Parry, *Summary for Policymakers*, *in* ROUTLEDGE EXPLORATIONS IN ENVIRONMENTAL ECONOMICS, IMPLEMENTING A US CARBON TAX xxiii, xxv (Ian Parry, Adele Morris & Roberton C. Williams III eds., 2015). For a discussion on "the dilemma of implementing a carbon tax system at the federal level" in the United States, see Kathryn Kisska-Schulze & Darren A. Prum, *States Taxing Carbon: Proposing Flexibility and Harmonization in the Movement Toward Environmental Reform in the U.S.*, 40 ENVIRONS ENVTL. L. & POL'Y J. 87, 98–105 (2017).

49 *See* Michael J. Coren, *Americans: "We Need a Carbon Tax, But Keep the Change"*, QUARTZ (Jan. 22, 2019), https://qz.com/1529997/survey-finds-americans-want-a-carbon-tax/; *see also* Robinson Meyer, *The Unprecedented Surge in Fear About Climate Change*, THE ATLANTIC (Jan. 23, 2019), https://www.theatlantic.com/science/archive/2019/01/do-most-americans-believe-climate-change-polls-say-yes/580957/.

50 ANTHONY LEISEROWITZ ET AL., CLIMATE CHANGE IN THE AMERICAN MIND 3 (2018), http://climatecommunication.yale.edu/wp-content/uploads/2019/01/Climate-Change-American-Mind-December-2018.pdf.

51 *New Poll: Nearly Half of Americans Are More Convinced Than They Were Five Years Ago That Climate Change is Happening, With Extreme Weather Driving Their Views*, ENERGY POLICY INSTITUTE AT THE UNIVERSITY OF CHICAGO (Jan. 22, 2019), https://epic.uchicago.edu/news-events/news/new-poll-nearly-half-americans-are-more-convinced-they-were-five-years-ago-climate.

expand public transportation.[52]

While these polling numbers and the increased number of carbon pricing bills in Congress are encouraging, it does not mean a nationwide carbon tax is likely to happen in the near future.[53] But that limited probability does not necessarily extend to the state level,[54] where carbon taxes can also have a significant impact on the national economy and reductions in greenhouse gas emissions. In the first quarter of 2017, the U.S. generated 19.35% of its electricity from renewable energy sources, an amount that far surpassed the U.S. Energy Information Administration's predictions.[55] One of the main drivers of this incredible growth has been state and local political leadership, with growing bipartisan support in many states "to pass renewable portfolio standards, enhanced automotive standards, and air quality improvement plans."[56] If even a few states can harness this political energy and adopt a state carbon tax, more states could follow in their footsteps until there is enough support to adopt a carbon tax at the national level. State-level carbon taxes could also

52 Michael Greenstone, *Voter Support For Carbon Tax May Depend on How Revenue is Used*, Axios (Jan. 23, 2019) (citing Energy Policy Institute, *supra* note 51), https://www.axios.com/voter-support-for-carbon-tax-may-depend-on-how-revenue-is-used-9609ff4a-80f4-4587-bcc5-baf0a3b42dfa.html.

53 *See* Kisska-Schulze & Prum, *supra* note 48, at 98–105; Mark Matthews, *Want a Carbon Tax? Wait Until Next Year, Advocates Say*, Scientific American: E&E News (Sept. 11, 2018), https://www.scientificamerican.com/article/want-a-carbon-tax-wait-until-next-year-advocates-say/ ("Just a few months ago, the House passed a resolution sponsored by House Majority Whip Steve Scalise (R-La.) that labeled carbon taxes as 'detrimental' to the U.S. economy."); David Roberts, *The 5 Most Important Questions About Carbon Taxes, Answered*, Vox (updated Oct. 18, 2018, 11:11 AM), https://www.vox.com/energy-and-environment/2018/7/20/17584376/carbon-tax-congress-republicans-cost-economy (stating that two carbon-tax proposals released in 2017 and 2018 do not have "a snowflake's chance in hell of passage any time soon").

54 *See* Marianne Lavelle, *A Carbon Tax Wave? 7 States Considering Carbon Pricing to Fight Climate Change*, Inside Climate News (Nov. 29, 2018), https://insideclimatenews.org/news/28112018/state-carbon-pricing-tax-fee-climate-change-washington-oregon-new-jersey-virginia-hawaii-massachusetts-new-york ("At least seven state governments are poised at the brink of putting a price on climate-warming carbon emissions within the next year. Some are considering new carbon taxes or fees.").

55 Joshua S. Hill, *US Renewable Energy Provides 19.35% of US Electricity in First Quarter*, Clean Technica (May 31, 2017), https://cleantechnica.com/2017/05/31/us-renewable-energy-provides-19-35-us-electricity-first-quarter.

56 Andrew Beebe, *The Death of 'Alternative Energy'*, Greentech Media: Industry Perspective (Aug. 1, 2017), https://www.greentechmedia.com/articles/read/the-death-of-alternative-energy.

serve as building blocks and significant components of any Green New Deal mechanisms or legislation as the U.S. moves further into 2019 and beyond.[57]

Canada is a useful case study, where the Canadian federal government has implemented a "federal carbon pricing system . . . [as of] January 1, 2019, as a backstop in any jurisdiction that does not put its own carbon pricing system in place that meets the federal standard."[58] This federal system was based on the carbon tax that British Columbia introduced in 2008, which was successful because it covered roughly 70% of the province's greenhouse gas emissions,[59] reduced gasoline sales by 11% to 17%, and reduced the province's "greenhouse gas emissions by between about 5% and 15%."[60] Another significant aspect to British Columbia's carbon tax was its revenue neutrality and emphasis on giving tax credits to low-income households in particular.[61] A notable characteristic of Canada's clean

57 *See* Ed Dolan, *A Carbon Tax Should Be the Centerpiece of the Green New Deal*, NISKANEN CTR.: CLIMATE & ENERGY POL'Y (Feb. 5, 2019), https://niskanencenter.org/blog/a-carbon-tax-should-be-the-centerpiece-of-the-green-new-deal/; Editorial Board, *Want a Green New Deal? Here's a Better One*, WASH. POST (Feb. 24, 2019), https://www.washingtonpost.com/opinions/want-a-green-new-deal-heres-a-better-one/2019/02/24/2d7e491c-36d2-11e9-af5b-b51b7ff322e9_story.html ("Green New Dealers are right that a big problem requires a big solution. Only one serious option—putting a price on carbon—would encourage every sector of the economy to green up in equal measure. . . . Start with carbon pricing. Then fill in the gaps."); Erich Pica, *Role of Carbon Tax in Green New Deal*, THE HILL (Feb. 22, 2019, 3:30 PM), https://thehill.com/opinion/energy-environment/431189-role-of-carbon-tax-in-green-new-deal ("[T]axing carbon merely would be one way of raising funds for this massive transition, one that was done in a socially conscious and just way."); Rattner, *supra* note 34 ("In addition to cutting consumption, raising the price of carbon would arguably do more to encourage development of alternative power sources than all the massive new government spending programs that advocates of the Green New Deal envision.").

58 *Putting a Price on Carbon Pollution in Canada*, ENVTL. AND CLIMATE CHANGE CANADA, https://www.canada.ca/en/environment-climate-change/news/2018/04/putting-a-price-on-carbon-pollution-in-canada.html (last modified May 1, 2018).

59 *British Columbia's Revenue-Neutral Carbon Tax*, BRITISH COLUMBIA: CLIMATE PLANNING & ACTION, http://www2.gov.bc.ca/gov/content/environment/climate-change/planning-and-action/carbon-tax (last visited Dec. 17, 2018); *see also Putting a Price on Carbon Pollution in Canada*, *supra* note 58.

60 Brian Murray & Nicholas Rivers, *British Columbia's Revenue-Neutral Carbon Tax: A Review of the Latest "Grand Experiment" in Environmental Policy*, 86 ENERGY POL'Y 674, 678 (2015).

61 *Id.* at 676–77. *See also* David Roberts, *What We Can Learn About Carbon Taxes From British Columbia's Experiment*, VOX (Nov. 3, 2016, 8:30 AM), https://www.

growth and climate action plan is that it reserves a substantial amount of autonomy for the provinces, allowing "provincial and territorial governments to design an approach to pricing carbon pollution that meets the federal standard in a way that works for their particular circumstances."[62] The key to this strategy of building local power is to ensure that initial state carbon taxes are successful. They must prove to be an effective and efficient way of limiting greenhouse gas emissions while simultaneously improving states' economies and building positive public opinion on carbon taxes.

Another reason why state carbon taxes could have a significant, far-reaching impact relates to the fact that some U.S. states have significant economies of their own. The most notable state is California, which had the world's fifth-largest economy as of the spring of 2018, trailing only Germany, Japan, China, and the U.S.[63] In terms of CO2 emissions, California alone emitted 364 million metric tons of CO2 in 2015.[64] Compared with 2015 data at the nation level, if California were a country it would rank seventeenth in the world, ranked above Italy and Turkey and just below Australia.[65] However, California was only the *second-biggest* U.S. state in terms of CO2 emissions in 2015, with Texas emitting 626 million metric tons of CO2 that year.[66] Texas ranks seventh when compared to countries' 2015 data, below Germany and above South Korea, Iran, Canada, and Saudi Arabia.[67] Five other U.S. states each emitted over 200 million metric tons of CO2 in 2015.[68] Given the magnitude of these individual states' emissions, even one, or a

vox.com/energy-and-environment/2016/11/2/13491818/carbon-taxes-british-columbia-experiment; Chris Mooney, *Here's Why B.C.'s Carbon Tax is Super Popular—and Effective*, Grist (Mar. 27, 2014), https://grist.org/climate-energy/heres-why-b-c-s-carbon-tax-is-super-popular-and-effective/.

62 *Putting a Price on Carbon Pollution in Canada*, *supra* note 58.

63 Kieran Corcoran, *California's Economy is Now the 5th-Biggest in the World, and Has Overtaken the United Kingdom*, Business Insider (May 5, 2018, 7:09 AM), https://www.businessinsider.com/california-economy-ranks-5th-in-the-world-beating-the-uk-2018-5.

64 *State Carbon Dioxide Emissions*, U.S. Energy Info. Admin. (Oct. 24, 2017), https://www.eia.gov/environment/emissions/state/ (click and open "Summary" Excel file for data).

65 *Each Country's Share of CO2 Emissions*, Union of Concerned Scientists, https://www.ucsusa.org/global-warming/science-and-impacts/science/each-countrys-share-of-co2.html (Oct. 11, 2018).

66 *State Carbon Dioxide Emissions*, *supra* note 64.

67 *Each Country's Share of CO2 Emissions*, *supra* note 65.

68 *State Carbon Dioxide Emissions*, *supra* note 64.

few, carbon taxes enacted in such states could result in a substantial reduction in CO2 emissions.

Such a substantial reduction in CO2 emissions does not seem outside the realm of possibility, with thirteen states considering carbon pricing policies as of January 2019.[69] Combined, these thirteen states emitted 696 million metric tons of CO2 in 2015, a significant amount that would displace Texas as the seventh-largest emitter if they were considered a single country.[70] When these CO2 reduction figures are considered in combination with state carbon taxes' potential significance as a critical piece of Green New Deal legislation, the necessity to further analyze adoption of carbon taxes at the state level becomes readily apparent. The rest of this Note will address the potential benefits of a carbon tax, the main technical issues of administrability, scope, and regressivity, and possible constitutional barriers to implementing a carbon tax at the state level. Then, with a clearer understanding of those issues, the proposed carbon tax legislation in Massachusetts, Connecticut, Rhode Island, Vermont, and Washington will be analyzed alongside British Columbia's existing carbon tax structure. The analysis will seek to identify common factors and barriers to implementation while also determining a legally and politically viable tax structure that could serve as a template and foundational piece of future Green New Deal legislation.

II. Major Benefits of a Carbon Tax

There are three key potential benefits of a carbon tax: revenue, efficiency and incentive, and distribution. Certain benefits are emphasized more than others for a given tax depending on its technical structure, which will be discussed in Section III.

A. Revenue

Well-designed carbon taxes have the potential to raise significant amounts of revenue.[71] Various studies have shown that

69 *Carbon-Pricing: State Information*, NAT'L CAUCUS OF ENVTL. LEGISLATORS, https://www.ncel.net/carbon-pricing/ (last visited Jan. 6, 2019). The states are Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, and Washington. *Id.*

70 *State Carbon Dioxide Emissions*, *supra* note 64; *Each Country's Share of CO2 Emissions*, *supra* note 65.

71 *See* William G. Gale et al., *Carbon Taxes as Part of The Fiscal Solution*, *in* ROUTLEDGE EXPLORATIONS IN ENVIRONMENTAL ECONOMICS, *supra*

at the federal level, a carbon tax could create net revenues "ranging from 0.5 percent of GDP for a $15 per ton tax . . . to 0.8 percent of GDP for a $31 per ton tax."[72] These calculations also accounted for reduced revenues from other taxes, which are lowered in most proposals to offset the added burden of a carbon tax on consumers.[73] However, due to the fact that a majority of voters are resistant to new or higher taxes,[74] most carbon tax proposals do not include increased tax revenues. Thus, as of the spring of 2019, the majority of carbon tax proposals are revenue-neutral, with no increase for taxpayers.[75] In light of the new polling data from late 2018 discussed above, which found that Americans were more amenable to a carbon tax where the revenue was used for various climate change mitigation programs,[76] new proposals will hopefully deviate from this revenue-neutral status quo. However, revenue-neutral carbon tax structures

note 48, at 7; Lucas, Jr., *supra* note 33, at 7; Metcalf & Weisbach, *supra* note 29, at 517.

72 Gale et al., *supra* note 71, at 7; *see also* Metcalf & Weisbach, *supra* note 29, at 517 ("[T]he revenues raised by a carbon tax are likely to be significant—in the range of $100 billion per year . . . .").

73 Gale et al., *supra* note 71, at 7.

74 *See* Marjorie E. Kornhauser, *People Don't Like Paying Taxes. That's Because They Don't Understand Them*, Wash. Post (Apr. 14, 2017), https://www.washingtonpost.com/posteverything/wp/2017/04/14/people-dont-like-paying-taxes-thats-because-they-dont-understand-them/?utm_term=.324bc443722f; Lucas, Jr., *supra* note 33, at 30 (citing David Gamage & Darien Shanske, *Three Essays on Tax Salience: Market Salience and Political Salience*, 65 Tax L. Rev. 19, 49–54 (2011)) ("Americans appear to suffer from tax-label aversion."). With Pigouvian taxes in particular, studies have shown that "many people . . . rejected Pigouvian taxes even when the tax would have benefitted them and even when researchers carefully designed the tax so that it unambiguously enhanced the welfare of every participant in the experiment." *Id.* at 17 (citing Todd L. Cherry et al., *The Impact of Trial Runs on the Acceptability of Environmental Taxes: Experimental Evidence*, 38 Resource & Energy Econ. 84, 86 (2014); Steffen Kallbekken et al., *Do You Not Like Pigou, or Do You Not Understand Him? Tax Aversion and Revenue Recycling in the Lab*, 62 J. Envtl. Econ. & Mgt. 53, 56 (2011); Todd L. Cherry et al., *Worldviews and the Opposition to Effective Environmental Policies: Evidence from Laboratory Markets* 14 (Oct. 30, 2015) (unpublished manuscript), http://www.econ.gatech.edu/sites/default/files/seminars/201508/55_Cherry%20Seminar.pdf.

75 *See, e.g.*, *Economists' Statement on Carbon Dividends*, *supra* note 33; Sobczyk, *supra* note 46 (discussing, among other bills, the revenue-neutral "Energy Innovation and Carbon Dividend Act" and "American Opportunity Carbon Fee Act"); Mary C. Serreze, *Massachusetts Senate Approves Revenue-Neutral Carbon Tax as Part of Energy Bill*, MassLive (June 15, 2018), https://www.masslive.com/politics/index.ssf/2018/06/massachusetts_senate_passes_ca.html.

76 *See supra* notes 50–52.

are still analyzed in this Note because of their prevalence in the existing carbon tax landscape.[77]

The prime example of a revenue-neutral carbon tax is the plan implemented in British Columbia, Canada—a case study that this Note will analyze in several areas. From 2008 to 2015, the tax was revenue-negative, generating C$6.1 billion while "corresponding tax cuts [totaled] more than C$7.1 billion."[78] While revenue-neutral or revenue-negative structures are considered more politically appealing, it would be a much greater benefit to states if they could adopt revenue-positive carbon taxes.[79] The funds collected from the tax could be used in a variety of ways to help combat climate change through renewable energy subsidies, energy-efficiency programs, and increased public transportation funding, or to help improve other government services.[80]

B. Efficiency & Incentive

A carbon tax "receives high marks on efficiency criteria," mainly due to the fact that it "can improve the efficient allocation of

77 Marianne Lavelle, *Carbon Tax Plans: How They Compare and Why Oil Giants Support One of Them*, INSIDE CLIMATE NEWS (Mar. 7, 2019), https://insideclimatenews.org/news/07032019/carbon-tax-proposals-compare-baker-shultz-exxon-conocophillips-ccl-congress (analyzing two revenue-neutral national carbon tax proposals, the "Energy Innovation and Carbon Dividend Act" and a proposal by the Climate Leadership Council).

78 Murray & Rivers, *supra* note 60, at 677.

79 *See* Lucas, Jr., *supra* note 33, at 7 (citing Roberton C. Williams III & Casey J. Wichman, *Macroeconomic Effects of Carbon Taxes*, *in* ROUTLEDGE EXPLORATIONS IN ENVIRONMENTAL ECONOMICS, *supra* note 48) ("The government could use [carbon tax] revenue to fund additional spending . . . [or] to reduce the deficit . . . ."); Kisska-Schulze & Prum, *supra* note 48, at 118–19 (citing Michael Waggoner, *Why and How to Tax Carbon*, 20 COLO. J. INT'L ENVTL. L. & POL'Y 1, 4 (2008); Reuven S. Avi-Yonah & David M. Uhlmann, *Combating Global Climate Change: Why a Carbon Tax Is a Better Response to Global Warming Than Cap and Trade*, 28 STAN. ENVTL. L.J. 3, 5 (2009)) ("Imposing a carbon tax scheme at the state level would generate another avenue of innovative revenue that states could use to build economic well-being within their borders [. . .] including . . . increasing revenue to help fund green technology research and development . . . .").

80 *Infra* subsection C, "Distribution". *See also* Metcalf & Weisbach, *supra* note 29, at 517 ("[S]hifting to a low-carbon economy may require significant changes in infrastructure, and some of the [carbon] tax revenues could be used to pay for those changes."); Lucas, Jr., *supra* note 33, at 41 ("A second possible use for carbon tax revenue is to increase spending on government programs. . . . [S]ome economists support spending at least part of any carbon tax revenue on, for instance, improvements to infrastructure.").

resources by accounting for externalities in the market price."[81] The most efficient carbon tax "would force consumers and producers to internalize the carbon externality and reduce the production and consumption of carbon-intensive goods to the economically efficient level."[82] Looking to British Columbia, a 2012 University of Ottawa study determined that reductions in greenhouse gas emissions were 5.3% greater in the province compared to "the rest of Canada, where comprehensive carbon taxes were not applied."[83]

A well-structured carbon tax would create a "permanent change in price signals" that leads to greater "incentives for energy conservation, the use of renewable energy sources, and the production of energy-efficient goods."[84] Besides helping to correct the negative externality of carbon emissions by compelling emitters to pay a monetary cost for the harm their activities cause, a carbon tax could also lead to improvements in other economic incentives if the tax is combined with reductions in other taxes.[85] For example, a carbon tax combined with reductions in sales tax could lead to more consumer spending on goods. Income taxes could also be adjusted to offset "the distributive effects of a carbon tax."[86] Implementing such reductions assumes that the efficiency of existing taxes is not optimal, which would have to be taken into account when deciding which taxes to reduce in combination with a carbon tax, and by how much.

C. Distribution

There are several ways to distribute carbon tax revenues or use the money to change a state's overall tax structure.[87] The funds are generally allocated for initiatives like corporate tax cuts, reducing individual taxes, providing environmental subsidies, increasing the level of tax-exempt income, giving a larger share of tax revenue to low-income households to "offset the burden of the tax," or

81 Gale et al., *supra* note 71, at 8.
82 Lucas, Jr., *supra* note 33, at 6; *see also Economists' Statement on Carbon Dividends*, *supra* note 33.
83 Gale et al., *supra* note 71, at 8.
84 *Id.* at 7–8.
85 *Id. See also* Lucas, Jr., *supra* note 33, at 41 ("[M]any economists support using a large portion of the revenue to cut existing taxes because doing so would address the tax-interaction effect.").
86 Metcalf & Weisbach, *supra* note 29, at 513.
87 *See, e.g.*, Lucas, Jr., *supra* note 33, at 41; Metcalf & Weisbach, *supra* note 29, at 513–16.

funding infrastructure projects that reduce emissions, like public transportation improvements.[88] The main method of distribution discussed is rebates or tax credits for taxpayers, reflecting either the entire amount of the carbon tax revenues or a predetermined portion.[89] For political reasons, these refunds are often emphasized because it is a way of gaining political support for such a tax by showing that it would not increase the amount of taxes residents pay annually, potentially even giving individuals a net benefit.[90] The other initiatives discussed above are also likely more politically viable actions than using the revenue to reduce a state's budget deficit.[91]

III. Administrability, Design, and Scope of a Carbon Tax

Like any tax, "effective administration of a [carbon tax]… requires a well-defined tax base."[92] For CO2 emissions, the obvious choice for a tax base is fossil fuel users and producers.[93] In 2010, "fossil fuel combustion accounted for 70 percent" of total U.S.

88 Gale et al., *supra* note 71, at 9; *see also* Metcalf & Weisbach, *supra* note 29, at 513–17; Lucas, Jr., *supra* note 33, at 41.

89 *See* Metcalf & Weisbach, *supra* note 29, at 513–17; Lucas, Jr., *supra* note 33, at 7, 23; *see generally* Kisska-Schulze & Prum, *supra* note 48 (discussing various carbon tax plans at the state level).

90 *See* Lavelle, *supra* note 77 ("Both the Baker-Shultz proposal and the Energy Innovation and Carbon Dividend Act would return all of the tax revenue to American households in the form of monthly rebate checks. For most households, the rebates would exceed the increased costs they would pay for fuel."). In this article, Carlton Carroll, a spokesperson for Americans for Carbon Dividends, a group supporting the Baker-Shultz plan, argues that "one lesson from Washington State and France is that proceeds must be returned to the people in order to be politically viable and popular." *Id.* In German and Danish focus groups on energy taxes, such taxes were seen "as a 'punishment' because reducing energy consumption was difficult for them." Lucas, Jr., *supra* note 33, at 28–29. The focus groups "proposed instead that their governments use 'carrots', such as providing rebates to people who achieve an energy conservation target. *Id.* at 29.

91 *Cf.* Lucas, Jr., *supra* note 33, at 30 ("While the government could accomplish the goals of many tax expenditures more simply and efficiently using direct spending, tax expenditures are more politically popular.").

92 Jack Calder, *Administration of a US Carbon Tax*, *in* ROUTLEDGE EXPLORATIONS IN ENVIRONMENTAL ECONOMICS, *supra* note 48, at 38, 41. *See also* Metcalf & Weisbach, *supra* note 29, at 521 ("To determine the optimal tax base, the administrative savings of a narrow base must be compared to the efficiency benefits of a broad base. In particular, the tax base should be set so that the benefit of a small expansion in the base is equal to the increase in administrative or compliance costs.").

93 Metcalf & Weisbach, *supra* note 29, at 522–29.

CO2 equivalence emissions, which also includes other greenhouse gases like methane and nitrous oxide.[94] Furthermore, fossil fuel combustion totaled 94.4% of all CO2 emissions in 2010, with electricity generation (39.6%), transportation (30.6%), industrial fuel use (13.6%), residential use (6.0%), and commercial uses (3.9%) as the main contributors to U.S. CO2 emissions.[95]

There are four distinct, identifiable stages with fossil fuel use: (i) production (discovery and extraction), (ii) processing, (iii) combustion, and (iv) consumption of the energy created through combustion.[96] It is important to emphasize that "CO2 emissions from fossil fuels almost all occur at the combustion stage," but consumption usually happens later on, with a "transmission or distribution stage" in between.[97] In the process of selling electricity, for example, fossil fuel combustion can be used to create steam that powers a turbine, which then generates electricity.[98] This electricity is then distributed to consumers using electrical grids owned and operated by utility companies.[99] There are similar distribution stages between combustion and consumption for many products that use CO2-emitting fossil fuels in their production stages, either through direct use of fossil fuels or by using fossil fuel-generated electricity in factories or in other manufacturing processes.[100] Consumption of these products happens much later than when the fossil fuel combustion occurs.[101] Nevertheless, when discussing where to impose a carbon tax in this process, consumption and combustion are both considered "downstream" taxation.[102] The other method,

94 *See* Calder, *supra* note 92, at 39–40.

95 *Id.*

96 *Id.* at 43.

97 *See id.* at 43–44.

98 *Electricity Explained: How Electricity is Generated*, U.S. Energy Info. Admin., https://www.eia.gov/energyexplained/index.cfm?page=electricity_generating (last updated Nov. 15, 2018).

99 Calder, *supra* note 92, at 38, 43–44.

100 *See* Metcalf & Weisbach, *supra* note 29, at 524 n.97 ("[C]arbon pricing schemes . . . tend to be imposed midstream on large industrial point sources of emissions, such as power plants and industrial users of fuel.").

101 *Cf.* Lucas, Jr., *supra* note 33, at 6 (describing how, with an upstream carbon tax, "[f]ossil fuel suppliers would then pass on most of the cost to consumers, thereby increasing the prices of carbon-intensive goods, which would encourage emissions reductions across all sectors of the economy . . . .").

102 Calder, *supra* note 92, at 44; *see also* Metcalf & Weisbach, *supra* note 29, at 526 (discussing the possibility of taxing coal downstream because "[a]lmost 93% of coal is used in electricity generation . . . [and] . . . [t]here are 1470 coal-fueled electric generating units in the United States, so taxing the power

called "upstream" taxation, is a tax imposed at any stage before combustion/consumption.[103] Regardless of which stage a carbon tax is imposed on, the main requirement is that it "should apply only once"[104] ideally to 100%, or as much as feasibly possible, of the CO2 generated in the state in question.[105]

At the state level, a downstream taxation method that combines a tax on combustion from power and industrial plant emissions with a tax on consumption seems to be the best option.[106] Taxing large emitters at the combustion stage "may be seen as more consistent with the 'polluter pays' principle,"[107] because the state is penalizing those actors that actually emit CO2. Of course, this penalty will probably be passed on to the final consumer, with utility companies simply raising the electricity prices they charge their customers.[108] Although frustrating for customers, technically this structure meets the carbon tax's purpose of placing a one-time penalty on CO2 emissions.[109]

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plants would not be more difficult than taxing at the mine and would have only a slightly smaller base.").

103 Calder, *supra* note 92, at 44; *see also* Metcalf & Weisbach, *supra* note 29, at 523 (describing an upstream carbon tax as being imposed "at the earliest point in the production process").

104 Calder, *supra* note 92, at 44.

105 *See* Metcalf & Weisbach, *supra* note 29, at 501 (arguing that an upstream carbon tax at the federal level is the best option for a carbon tax because it would be the most effective and efficient way to cover up to almost 90% of U.S. CO2 emissions). Moreover, this article stresses that another strength of a carbon tax is that "in deciding where to impose the tax . . . one can focus on minimizing collection and monitoring costs while ensuring maximum coverage." *Id.* at 523.

106 *Cf.* Metcalf & Weisbach, *supra* note 29, at 524 n.97 (noting that "[n]one of the existing carbon pricing schemes is imposed upstream and hypothesizing that the European Union's "more expensive downstream tax" was a compromise to exclude the transportation sector because "it was already subject to high taxes on motor fuels."). States could similarly exclude the transportation sector with their own downstream carbon taxes if so desired.

107 Calder, *supra* note 92, at 48.

108 *See id.*; *see also* Metcalf & Weisbach, *supra* note 29, at 527 ("The most important issue with respect to the regulated power industry is to ensure that the tax is included in the operating cost component of rates so that it is passed on to customers.").

109 *See* Metcalf & Weisbach, *supra* note 29, at 527–28 ("If [the tax] is not [passed on to customers], users will not see the appropriate price, defeating part of the reason for the tax. This should not be an issue with a tax on the fuel purchased by the utility: if the tax is imposed upstream, it would simply be embedded in the price and naturally flow into electricity rates through fuel costs.").

One disadvantage highlighted with a tax on combustion is that it will not reach all of the emissions released within the state.[110] However, this is not as serious of an issue at the state level because an upstream tax would have even less coverage, as there are so few fossil fuel-processing entities within the entire U.S.[111] This would make the carbon tax ineffective in reducing CO2 emissions because it would likely put the tax burden on a limited number of emitters and leave a substantial percentage of the state's CO2 emissions uncovered by the tax. Furthermore, in those states where a majority of production takes place, like Texas, California, and Pennsylvania,[112] the politics of imposing an upstream carbon tax would be difficult with the backlash from those powerful industries and their lobbyist allies.

A more serious issue is the "technical difficulty of measuring CO2 emissions" at the combustion stage.[113] A tax on combustion has been criticized as imposing "major bureaucratic burdens on businesses, such as measuring fuel inputs and applying emissions coefficients" that businesses would not otherwise do.[114] However, this has been changing as of 2014, with large companies like Disney, Google, Mars, and Microsoft beginning to keep internal records of their CO2 emissions.[115] While this is a major step towards proving the inherent value and feasibility of a carbon tax, the complication with a state carbon tax on combustion would be the burden placed on small and medium-sized businesses rather than industrial titans.[116] These smaller businesses do not typically monitor their

110 Calder, *supra* note 92, at 49 ("Most countries that tax on this basis cover less than 50 percent of their GHG emissions.").

111 *See id.* at 45 (concluding that "possibly not more than…1,250 to 1,500 taxpayers could account for [carbon tax] on the vast bulk of fossil fuels if taxed upstream," in the entire U.S.). *See also* Metcalf & Weisbach, *supra* note 29, at 501 (showing that an upstream federal carbon tax collected "at fewer than 3000 points" would cover 80% of all U.S. CO2 emissions).

112 *State Carbon Dioxide Emissions*, *supra* note 64.

113 Calder, *supra* note 92, at 49.

114 *Id.*

115 Lauren Hepler, *How Putting a Price on Carbon Saved Microsoft $10 Million a Year*, GreenBiz (Apr. 16, 2015, 3:00 AM), https://www.greenbiz.com/article/how-microsofts-internal-price-carbon-saved-it-10-million-year; Sophie Yeo, *General Motors, Disney, Shell and 1,200 Other Companies are Taking Steps to Fight Climate Change, Report Says*, Wash. Post (Sept. 12, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/09/12/general-motors-disney-shell-and-1200-other-companies-are-taking-steps-to-fight-climate-change-report-says/?utm_term=.60a46d9f4083.

116 *See* Monique Moreau & Emilie Poitevin, Can. Fed'n of Indep. Bus.,

carbon emissions, so a requirement to do so would add significant costs that would likely mean even larger increases in their prices to customers.[117] In addition to higher costs for consumers, these increases could lead to smaller businesses being unable to compete in the marketplace[118] and having to go out of business. One possible remedy is using a percentage of a state's carbon tax revenue towards these monitoring costs, but only using those funds for businesses whose monitoring costs make up more than a specific percentage of their income.

A tax at the consumption stage would also create monitoring cost dilemmas.[119] If such a tax were imposed on all goods within a state, the monitoring and reporting required would be impractical because of the cost of implementation for a majority of companies.[120] Some goods are so complex that accurately calculating the final product's CO2 emissions would be extremely difficult, if not impossible.[121] Even producing a loaf of bread, while much simpler than manufacturing a larger consumer product like a car, includes multiple ingredients and the energy required to power the manufacturing processes. The CO2 emissions of each of those ingredients must be calculated, as well as the transportation costs of getting the bread to stores and markets. For a small bread company, those reporting costs could

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SMALL BUSINESS PERSPECTIVES ON THE ENVIRONMENT AND CARBON PRICING 4 (2016), https://www.cfib-fcei.ca/sites/default/files/2017-12/rr3423.pdf (finding that small "business owners are concerned about their ability to absorb the planned five year implementation of carbon taxes."). *See also* Calder, *supra* note 92, at 49 ("It is often considered impractical to impose such burdens on any but the largest businesses (for example, the Australian [carbon tax] applies . . . to only around 300 companies . . .).").

117 *See* MOREAU & POITEVIN, *supra* note 116, at 4 ("72 percent [of small business owners] said that [carbon pricing] would increase their operating or input costs.").

118 *See id.* (finding that small businesses "worry about being able to stay competitive in the global economy, where some of their competitors may not face the same financial constraints").

119 *See* Calder, *supra* note 92, at 50 ("It would be impractical to impose [a carbon tax] at the point of consumption if by this is meant taxing millions of end consumers.").

120 *See id.* at 49–50.

121 *See id.* at 50 ("[I]t would be impracticable to impose [a carbon tax] on retail distributors of manufactured goods, since it would be extremely difficult and administratively onerous to calculate the GHG emissions involved in the manufacture of complex goods such as cars, which have hundreds of components with different origins, manufacturing histories, power inputs, and so on.").

have a significant impact on their income.

One solution to this difficulty of calculating CO2 emissions for complex products is to limit the carbon tax to companies that emit a certain threshold amount of CO2, which means that they are either CO2 intensive or very large companies.[122] Another option is to only impose a tax "on retail sales of fuel for transport and domestic consumption," combined with a tax on power and industrial plant emissions.[123] If utility companies' electricity generation was also accounted for, a large percentage of a state's CO2 emissions would likely be covered by such a carbon tax.[124]

British Columbia's carbon tax is a good example of a selective downstream carbon tax, with the carbon tax rate of C$30 per ton translated for each of these three fuel types: gasoline (6.67 cents/liter); diesel (7.67 cents/liter); and natural gas (5.7 cents/cubic meter).[125] British Columbia has received international recognition for its carbon tax,[126] and various studies estimate emissions in the province have decreased by roughly 5% to 9% from 2007 to 2014 with no negative economic effects, evidenced by British Columbia's real annual GDP growth rate of 0.5% from 2008 to 2013.[127]

With a consumption-based carbon tax, the issue of multi-state competition when other states do not impose a similar tax can be partially addressed through border adjustments, which are also known as "use taxes" or "border taxes."[128] A use tax is when

122 *See id.* at 49 ("The Australian CT applies only to around 300 companies emitting more than 25,000 tons.").

123 *Id.* at 50.

124 *Cf.* Metcalf & Weisbach, *supra* note 29, at 526 (internal citation omitted) ("Almost 93% of coal is used in electricity generation."). In 2017, "about 34% of the total U.S. energy-related CO2 emissions" were generated "by the U.S. electric power sector." *Frequently Asked Questions: How Much of U.S. Carbon Dioxide Emissions Are Associated with Electricity Generation?*, U.S. Energy Info. Admin., https://www.eia.gov/tools/faqs/faq.php?id=77&t=11 (last updated June 8, 2018).

125 Murray & Rivers, *supra* note 60, at 676.

126 In 2016 British Columbia received a 'Momentum for Change' award at the 22nd session of the United Nation's Conference of the Parties (COP 22) in Marrakech, Morocco. *B.C.'s Innovative Carbon Tax Recognized with International Award*, BC Gov News (Nov. 16, 2016, 11:30 AM), https://news.gov.bc.ca/releases/2016ENV0062-002359.

127 Murray & Rivers, *supra* note 60, at 677–79. British Columbia's 0.5% growth rate during this time was higher than that of the rest of Canada, at 0.4%. *Id.* at 679.

128 *See* Metcalf & Weisbach, *supra* note 29, at 502, 540–52 (2009) ("[B]order tax adjustments for a carbon tax are necessary and appropriate.").

CO2-emitting products that are used within the state, but were not subject to the carbon tax, would be required to pay an equivalent amount in the form of such a use tax.[129] There are exceptions for products that already paid a carbon tax in the state of purchase. If the state of purchase had a carbon tax equal to the state where the product was used, no use tax is required.[130] If the carbon tax in the state of purchase was lower than the tax in the state of use, the person or business would pay the difference in the form of a use tax.[131] Though effective in theory, use taxes are harder to implement at the state level in the U.S. because of complications involved in tracking products and enforcing payment by consumers.[132] As a result, use taxes are typically imposed on producers, prompting them to collect the tax from customers in the given state, usually by adding the tax to the price of the product.

Another complication is determining which companies should be required to collect such a use tax, which is a Commerce Clause question that will be covered in Section V. Furthermore, there is the added issue of calculating CO2 emissions involved in each product, and whether a state can force out-of-state companies to monitor those emissions. That is a Commerce Clause regulatory issue that will also be analyzed in Section V.

A final note in this section is on a significant technical aspect of a carbon tax that has garnered much debate: determining what dollar amount carbon should be taxed at and how that tax rate should increase over time.[133] In the Climate Leadership Council's

129 For an analysis of border taxes at the national level, see *id.* at 540–52 ("Imports from countries without an adequate carbon price would, however, most likely need to be subject to a tax at the border as a substitute for their lack of a carbon price . . . .").

130 *See id.* at 541 ("So long as the two trading countries both have the same carbon price, however, border tax adjustments are not necessary.").

131 *See id.* at 540–52.

132 *Cf. id.* at 540–45 (describing how a border tax works at the national level because imports and exports are recorded and tracked between countries, which allows a border tax to be effectively applied as necessary). A use tax, at the state or national level, "will require significant information gathering, documentation, categorization, and recordkeeping." *Id.* at 551.

133 *See e.g.*, *Economists' Statement on Carbon Dividends*, *supra* note 33; Editorial Board, *supra* note 57; Editorial Board, *Best Way to Fight Climate Change? Put an Honest Price on Carbon*, N.Y. TIMES (Oct. 29, 2018), https://www.nytimes.com/2018/10/29/opinion/climate-change-carbon-price.html ("As of [2018], about 40 governments around the world, including the European Union and California, have put a price on carbon . . . with an average price per ton of $8, nowhere near the level the I.P.C.C. thinks necessary (at least $135 a

economists' statement, the second policy recommendation focused on the rising nature of the tax, emphasizing that "[a] carbon tax should increase every year until emissions reductions goals are met . . . . A consistently rising carbon price will encourage technological innovation and large-scale infrastructure development. It will also accelerate the diffusion of carbon-efficient goods and services."[134] Of course, it goes without saying that the higher the tax, the greater the amount of CO2 emissions cuts.[135] A carbon tax not set high enough "is a failure of design and political will."[136] In order to send a strong enough price signal to the market and consumers, a carbon tax must "start high and rise higher."[137] Even with the changing political landscape of 2018 and 2019 that seems to be leaning towards a more favorable view of carbon taxes as discussed above, a carbon tax starting above $100 is not politically feasible.[138] However, even a carbon tax at an initial rate of $43 per ton of CO2 with an annual increase of 3% or 5% above inflation would lead to greater emissions reductions than those required by the U.S.'s commitment to the Paris Agreement.[139] If a carbon tax is implemented, at either the state or national level, the initial rate and subsequent rate increases will be critical in ensuring that meaningful CO2 reductions occur. However, the issue of gaining public support for a carbon tax rate high enough to achieve significant climate change mitigation is a matter outside the scope of this paper.

IV. Regressivity of a Carbon Tax

The distributional benefits of a carbon tax and the various

ton by 2030, if not much higher) to cause meaningful reductions."); Mark Jaccard, *Want an Effective Climate Policy? Heed the Evidence*, Policy Options Politiques (Feb. 2, 2016), http://policyoptions.irpp.org/magazines/february-2016/want-an-effective-climatepolicy-heed-the-evidence/ (arguing that carbon taxes used in Canada are far lower than necessary to reach 2030 CO2 reduction targets); Rattner, *supra* note 34.

134 *Economists' Statement on Carbon Dividends*, *supra* note 33.

135 *See* Editorial Board, *supra* note 57 ("The [IPCC] found [in 2018] that an average carbon price between 2030 and the end of the century of $100, $200, or even $300 per ton of carbon dioxide would result in huge greenhouse-gas emissions cuts, could restrain warming to the lowest safety threshold of 1.5 degrees Celsius and would almost certainly prevent the world from breaching the traditional warming limit of 2 degrees Celsius.").

136 *Id.*

137 *Id.*

138 *See generally* Kornhauser, *supra* note 74.

139 Rattner, *supra* note 34.

possible approaches to administration and scope go hand-in-hand with the issue of regressivity and the burden a carbon tax puts on groups with different income levels.[140] A downstream carbon tax imposed on consumption will most likely have regressive characteristics because "low-income households devote a higher proportion of their income to consumption and will thus bear a higher burden of the tax relative to high-income households."[141] If a tax is imposed on combustion, some of the costs levied on power plants and manufacturing plants will most likely be shifted to consumers.[142] The degree of the shift will depend on the elasticity of demand and whether competitors will also have to increase their prices by similar amounts because of the carbon tax.[143]

With a consumption-based tax, the regressivity depends on

140 Regressivity is where a tax has a "greater proportional burden on those with lower incomes . . . [applying] more often or with a higher rate to, the poor . . . a regressive tax is structured so that a greater proportion of the income of a lower-wage earner is paid in taxes than a higher-wage earner." Stephen Michael Sheppard, *Regressive Tax (Regressivity)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (2012). As the Bouvier Law Dictionary definition on regressive taxes states:

> A tax can be structured in a regressive manner by applying only to those with low incomes; being applied only to goods or sales frequented by the poor; or by incorporating deductions or exemptions accessible only to the rich. Many taxes that appear uniform, such as a sales tax on food, in fact fall disproportionately on the poor because the fixed percentage of the price of food is a higher percentage of the income of a poor person than a wealthy person.

Id.

141 *See* Gale et al., *supra* note 71, at 9. Additionally, research from 2016 found that low-income and minority households "spend a much higher share of their income on energy." Michael Isaac Stein, *Energy Efficiency is Leaving Low-Income Americans Behind*, GRIST (Feb. 21, 2018), https://grist.org/article/energy-efficiency-is-leaving-low-income-americans-behind/ ("A 2016 study by the American Council for an Energy Efficient Economy (ACEEE) and Energy Efficiency for All (EEFA) . . . found that median energy burdens for low-income households are more than three times higher than among the rest of the population."). *See also* Metcalf & Weisbach, *supra* note 29, at 513 ("Depending on one's frame of reference, a carbon tax is likely to be modestly to highly regressive.").

142 *See* Metcalf & Weisbach, *supra* note 29, at 527–28.

143 *See generally Elasticity and Tax Revenue*, KHAN ACADEMY, https://www.khanacademy.org/economics-finance-domain/microeconomics/elasticity-tutorial/price-elasticity-tutorial/a/elasticity-and-tax-incidence (last visited Mar. 31, 2019) ("When supply is more elastic than demand, buyers bear most of the tax burden. When demand is more elastic than supply, producers bear most of the cost of the tax.").

which products are taxed. If a carbon tax is imposed on products mainly consumed by wealthier consumers, the tax would be less regressive compared to a tax imposed on products primarily consumed by lower-income consumers.[144] This is because the burden of the tax would fall more heavily on wealthier consumers if they are the ones who purchase a majority of the taxed products.[145] The scale of the burden also depends on the factors analyzed to determine taxation, including "whether incidence is measured on a current income versus lifetime basis, with the tax being more regressive when measured on a current income basis relative to lifetime income basis."[146] A 2008 study focusing on the best way to design a national carbon tax with the goal of reducing greenhouse gas emissions, using data from 1999 and 2003, found that "the bottom half of the population faces losses in after-tax income ranging from 1.8 to 3.4 percent of its income, whereas the top half of the population faces losses between 0.8 and 1.5 percent of its income."[147] This study used a carbon tax on all U.S. CO2 emissions and assumed that the tax burden was completely shifted from producers onto consumers.[148] Therefore, while the study paints a helpful guiding picture, regressivity could be considerably different at the state level.

Regardless of the level of regressivity created by a certain state's carbon tax, studies have also shown that a carbon tax's regressive nature "could be offset in any of a number of ways."[149] One

144 *See* Lucas, Jr., *supra* note 33, at 7 (citing Adele Morris & Aparna Mathur, *The Distributional Burden of a Carbon Tax: Evidence and Implications for Policy*, *in* Implementing a US Carbon Tax, *supra* note 48, at 97, 101–07 (Ian Parry, Adele Morris & Roberton C. Williams III eds., 2015)) ("While economists debate exactly how regressive a carbon tax would be, the burden of it would likely fall disproportionately upon the poor given that they spend a larger share of their incomes on carbon-intensive goods.").

145 *Cf.* Lucas, Jr., *supra* note 33, at 7.

146 *Elasticity and Tax Revenue*, Khan Academy, https://www.khanacademy.org/economics-finance-domain/microeconomics/elasticity-tutorial/price-elasticity-tutorial/a/elasticity-and-tax-incidence (last visited Mar. 31, 2019).

147 Gilbert E. Metcalf, *Designing a Carbon Tax to Reduce U.S. Greenhouse Gas Emissions*, 3 Rev. of Envtl. Econ. & Pol'y 63, 71 (2009).

148 *Id.* at 69–70.

149 Gale et al., *supra* note 71, at 10 (citing Terry Dinan, *Offsetting a Carbon Tax's Costs on Low-Income Households* (Cong. Budget Office, Working Paper No. 2012-16, 2012)). *See also* Lucas, Jr., *supra* note 33, at 7 (citing Aparna Mathur & Adele C. Morris, *Distributional Effects of a Carbon Tax in Broader U.S. Fiscal Reform*, 66 Energy Pol'y 326, 333 (2014)) ("[E]conomists estimate that the government could eliminate the burden on the poor—for example, by mailing them rebate checks or increasing the earned income tax credit—using only a

study highlighted a Congressional Budget Office ("CBO") analysis regarding a national carbon tax, suggesting "that fully offsetting the effects of carbon taxes for households in the lowest quintile would require about 12 percent of gross revenues, while fully offsetting the effects for households in the second quintile would require 27 percent of gross revenues."[150] These numbers will vary at the state level, but they are a good estimate for the amount of revenue likely required to mitigate a state carbon tax's regressivity. Taxpayers in the lower quintiles could receive greater refund amounts than those in the wealthier quintiles, and income taxes could be modified through tax breaks for those in the lowest income tax brackets. Even though taxpayers in the lowest quintiles pay little to no income tax in the first place, a further reduction or elimination altogether in these tax rates will still be useful in offsetting a carbon tax's regressivity when combined with other methods.

British Columbia tried to limit its carbon tax's regressivity with "revenue recycling mechanisms."[151] These included: 1) a Low Income Climate Action Tax Credit, which annually returns a certain amount of Canadian dollars per adult and child "to households with incomes of less than about $31,700 (for singles) or $37,000 (for couples)"; 2) a 5% reduction in the lowest two personal income tax brackets, which includes households with incomes up to roughly $75,000; and 3) a Northern and Rural Homeowner tax credit for rural households that were initially disadvantaged compared with urban households.[152] Another factor that could help limit a tax's regressive nature would be using a portion of the revenue on public transportation improvements and reduced fare prices,[153] because more low-income households rely on public transportation as a

small fraction of carbon tax revenue.").

150 Gale et al., *supra* note 71, at 10 (citing Terry Dinan, *Offsetting a Carbon Tax's Costs on Low-Income Households* (Cong. Budget Office, Working Paper No. 2012-16, 2012)).

151 Murray & Rivers, *supra* note 60, at 680.

152 *Id.*

153 *See* MADELAINE CRIDEN, THE STRANDED POOR: RECOGNIZING THE IMPORTANCE OF PUBLIC TRANSPORTATION FOR LOW-INCOME HOUSEHOLDS 2 (2008) (quoting Dennis M. Brown & Eileen S. Stommes, *Rural Governments Face Public Transportation Challenges and Opportunities*, AMBER WAVES, Feb. 2004), https://nascsp.org/wp-content/uploads/2018/02/issuebrief-benefitsofruralpublictransportation.pdf ("[F]or low-income rural residents, long commutes and lack of transportation are barriers to working. Limited transportation options also isolate the rural poor from government services and programs designed to lift them out of poverty.").

means of transport.[154] Public transit users will not be paying higher carbon taxes that would be imposed on transportation fuels, but if the carbon tax applies to other products that these low-income consumers buy, public transportation funding could help reduce the tax's regressive nature. All of these factors depend on the public transportation system of the state in question, the scope of the carbon tax's base, and how the tax is administered.

One example of a U.S. carbon tax proposal that thoroughly addresses the regressivity of its structure is in Massachusetts, with a bill filed in 2017 in the Commonwealth's House of Representatives by Representative Jennifer Benson.[155] The proposed carbon tax is revenue-positive, with the revenue allocated to multiple funds.[156] The Green Infrastructure Fund would receive 20% of the tax's revenue, which "will support investments in transportation, resiliency and clean energy projects that reduce greenhouse gas emissions, prepare for climate change impacts, assist low-income households and renters in reducing their energy costs, and create local economic development and employment."[157] To combat regressivity, a minimum of one-third of the Green Infrastructure Fund "shall be distributed to neighborhoods, municipalities, groups of municipalities, or regional agencies representing neighborhoods or municipalities whose median incomes per household are in the lowest third of median incomes for all municipalities in the Commonwealth."[158]

The remaining 80% of the revenue is given to a greenhouse gas pollution charges fund.[159] A portion of the revenue generated from household purchases or uses would be redistributed to households,

154 *See* Monica Anderson, *Who Relies on Public Transit in the U.S.*, Pew Research Ctr. (Apr. 7, 2016), http://www.pewresearch.org/fact-tank/2016/04/07/who-relies-on-public-transit-in-the-u-s/ ("Americans who are lower-income . . . are especially likely to use public transportation on a regular basis."); Gillian B. White, *Stranded: How America's Aging Public Transportation Increases Inequality*, The Atlantic (May 16, 2015), https://www.theatlantic.com/business/archive/2015/05/stranded-how-americas-failing-public-transportation-increases-inequality/393419/ ("In many cities, the areas with the shoddiest access to public transit are the most impoverished—and the lack of investment leaves many Americans without easy access to jobs, goods, and services.").

155 *See* An Act to Promote Green Infrastructure, Reduce Greenhouse Gas Emissions, and Create Jobs, H.R. 1726, 190th Gen. Ct. (Mass. 2017), https://malegislature.gov/Bills/190/H1726.

156 *Id.* at ll. 104–11, 159–65.

157 *Id.* at ll. 108–11.

158 *Id.* at ll. 138–41.

159 *Id.* at ll. 160–63.

and a portion of the revenue generated from employers' purchases or uses redistributed to the state's employers.[160] One issue the bill does not address is how to determine whether charges come from household purchases or employer purchases, which is a significant factor in the implementation of the refunds and must be addressed before the carbon tax is operational.

Regressivity is addressed by allocating 10% of the household rebate funding to households in the lowest-income group, Quintile One, another 10% to those households in Quintile Two, and 5% to the households in Quintile Three.[161] After the amount from motor vehicle fuel sales is taken out and redistributed, with greater rebates to rural households,[162] a percentage of the outstanding funds are then allocated to the Low Income Home Energy Assistance Program,[163] with the remaining household revenue distributed equally to all households.[164] Thus, all households in Massachusetts would receive a rebate, with those households in the lowest three quintiles receiving a much greater rebate that likely offsets the regressive nature of the carbon tax.

The critical question with this carbon tax proposal is its administrability. The bill does not explain how the state determines which quintile a household is in, nor how the state should distribute the carbon tax rebates to those households who don't file tax returns, which are probably the low-income residents most severely affected by the regressivity of the tax. The bill only says that that the Department of Revenue Commissioner must coordinate with officials in various government departments and offices "in making all reasonable efforts to identify the names and addresses of all residents, with special attention to the names and addresses of low-income residents, so that they can receive rebates expeditiously."[165] One possible method would be to use information from household utility accounts, because low-income residents in Massachusetts are eligible for a discounted electricity rate.[166] This rate could be used as an indicator to see which households are likely in the lowest

160 *Id.* at ll. 160–71.
161 *Id.* at ll. 5–6, 177–94.
162 *Id.* at ll. 195–218.
163 *Id.* at ll. 219–22.
164 *Id.* at ll. 223–27.
165 *Id.* at ll. 228–33.
166 M.G.L. c. 164, § 1F(4)(i) ("The department shall require that distribution companies provide discounted rates for low income customers comparable to the low-income discount rate in effect prior to March 1, 1998.").

quintile, and whether they are the taxpayers who are supposed to receive the largest rebates from the carbon tax revenue.

Massachusetts State Senator Michael Barrett has also introduced a carbon tax bill in the state Senate that was approved on June 13, 2018.[167] However, this bill has major differences regarding distribution and regressivity in comparison with Representative Benson's House bill. All of the revenue from Senator Barrett's proposed carbon tax is redistributed to residents and employers in the state;[168] there is no funding set aside for renewable energy incentives or public transportation investment. Similar to the House bill, the Senate carbon tax revenue distributed to residents is reasonably equivalent to the amount collected from residents' purchases and uses of taxable sources, and likewise for employers' purchases.[169]

The major difference between the proposals is in the household rebate. The Senate bill's household carbon tax revenue is distributed equally to each resident of Massachusetts.[170] There is no mention of income quintiles or greater rebates for lower-income residents; the only reference to low-income households is that "special attention to the names and addresses of low-income residents" should be made when distributing the rebates.[171] Although Senator Barrett's approach *appears* more regressive than Representative Benson's, it arguably also has strong progressive qualities. Equal rebates for all households is arguably a progressive approach because wealthier households' "lavish lifestyles" typically translate to larger carbon footprints due to their overall greater consumption of greenhouse gas-emitting goods.[172]

167 Serreze, *supra* note 75.

168 An Act Combating Climate Change, S. 1821, 190th Gen. Ct., ll. 62–69 (Mass. 2017), https://malegislature.gov/Bills/190/SD1021.

169 *Id.* at ll. 68–76. Similar to Mass. H.R. 1726, Mass. S. 1821 does not mention how it determines which purchases are from households and which are from employers.

170 Mass. S. 1821, ll. 79–83.

171 *Id.* at ll. 95–99.

172 *See* Halstead, *supra* note 28, at 8; *see also* Joseph Rosenberg et al., Distributional Implications of a Carbon Tax 22 (2018), https://www.taxpolicycenter.org/sites/default/files/publication/155473/distributional_implications_of_a_carbon_tax_5.pdf ("[B]y offering a $990 [lump sum] rebate to all individuals . . . [t]axpayers in the bottom income quintile would on average receive a net tax cut of 4.4 percent of pretax income [while] . . . taxpayers in the top quintile would face a net tax increase of between 0.3 percent of pretax income in the 80th to 90th income percentiles

Similarly, an equal rebate is inherently progressive because the fixed amount will constitute a larger percentage of a low-income household's income as compared to a wealthy household's. Thus, an equal rebate for all residents means that lower-income taxpayers who do not buy a lot of fuel, or use other greenhouse gas emitting products, will gain a net benefit from their rebate. Wealthier households that use a lot of such products, however, will have a net loss after the rebate and will proportionally contribute much more to the overall tax revenue.

Furthermore, one of the rationales behind an equally distributed rebate is that it will incentivize residents to alter their behavior in fuel-efficient ways, like "insulating your home, switching to a more fuel efficient or electric car, or putting solar panels on your roof," so they receive a bigger net benefit from their rebate.[173] With equal rebates, the less you contribute to the tax revenue base, the greater your net benefit. However, low-income households often do not have the income or savings necessary to make such long-term investments, even if it would save them money in the long run.[174] This type of incentive is more often taken advantage of by middle-class and wealthier households, and therefore does not effectively offset the regressivity of the tax.[175] The ineffectiveness of the incentivization strategy is an argument for using other methods to alleviate the tax's regressivity, like the non-rebate portions of Representative Benson's House bill.

V. Possible Constitutional Challenges to a State Carbon Tax

The main constitutional challenges that could complicate a state carbon tax are interstate commerce issues, which arise when a state imposes a tax on goods originally sold or produced in other states. The Commerce Clause gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and

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and 0.7 percent of pretax income in the top 1 percent.").

173 HALSTEAD, *supra* note 28, at 8.

174 Stein, *supra* note 141 ("Even programs that subsidize efficiency upgrades may be inaccessible to, or underutilized by, low-income households because they still require upfront investment and won't yield benefits for years. For many, the need for aid is immediate.").

175 *See id.* ("A revolution in efficiency programs and home weatherization has opened the door to the world's cheapest energy source: avoided energy waste. But for the most part, it is only accessible to people who can afford an upfront investment.").

with the Indian Tribes."[176] The Dormant Commerce Clause refers to an implied prohibition in the Commerce Clause, developed by the Supreme Court to prevent states from enforcing laws that burden interstate commerce.[177]

The Supreme Court's modern jurisprudence on Dormant Commerce Clause tax issues experienced a fundamental shift with the Court's June 21, 2018, 5-4 decision in *South Dakota v. Wayfair*.[178] Prior to *Wayfair*, the 1992 Supreme Court case of *Quill Corp. v. North Dakota* was "the controlling precedent on the issue of Commerce Clause limitations on interstate collection of sales and use taxes."[179] In *Quill*, the Court reaffirmed the four-part test of *Complete Auto Transit, Inc. v. Brady* and held that it would "sustain a tax against a Commerce Clause challenge so long as the 'tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.'"[180] However, the Court went further regarding the substantial nexus part of the test and affirmed the ruling from *National Bellas Hess, Inc. v. Department of Revenue of Illinois* that "a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause."[181] Ambiguity from *Quill* on what qualifies as "substantial nexus" has led to "extensive litigation in state courts,"[182] but that ambiguity did not extend to the holding that a state "may not require a business to collect its sales tax if the business lacks a physical presence in the State."[183]

The majority opinion in *Wayfair*, written by Justice Kennedy, reverses the holding from *Quill* that physical presence in a state is required in order to have a substantial nexus sufficient for the state

176 U.S. Const. art. I, § 8, cl. 3.

177 First originated in dicta by Chief Justice Marshall in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824) (describing Commerce Clause power as that "which…can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant").

178 138 S. Ct. 2080 (2018).

179 *Wayfair*, 138 S. Ct. at 2089 (internal citation and quotations omitted).

180 Quill Corp. v. North Dakota, 504 U.S. 298, 311 (1992) (quoting Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)).

181 *Id.* at 311, 318–19.

182 Walter Hellerstein et al., State and Local Taxation: Cases and Materials 42 (10th ed. 2014).

183 *Wayfair*, 138 S. Ct. at 2088 (citing National Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967) and *Quill*, 504 U.S. 298).

in question to collect taxes from out-of-state companies.[184] Although this reversal will certainly have a dramatic impact on which companies states can impose sales taxes on,[185] the decision also reaffirmed the overall four-part *Complete Auto* test in its original form, describing it as the "now-accepted framework for state taxation."[186] With *Quill* soundly overruled, states are now free to tax a much larger base of entities that would have previously been 'unconstitutional' under *Quill*'s physical presence requirement.[187]

Commerce Clause issues will still arise with a state carbon tax, but "[i]n the absence of *Quill* and *Bellas Hess*, the first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State."[188] Substantial nexus "is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction."[189] In *Wayfair*, the Court offers a type of threshold, arguably not even a minimum threshold based on the language used, for what meets the substantial nexus requirement when it discussed South Dakota's specific Act.[190] The Court held that the Act only applied to companies who had "avail[ed themselves] of the substantial privilege of carrying on business in South Dakota" based on the fact that it only applies "to sellers that deliver more than $100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis."[191]

184 *Id.* at 2092, 2098–99. *Wayfair* deals with South Dakota's attempt to enforce a 2016 Act its legislature passed that "requires out-of-state sellers to collect and remit sales tax 'as if the seller had a physical presence in the state.'" *Id.* at 2089 (quoting S.B. 106, 2016 Legis. Assemb., 91st Sess. § 1 (S.D. 2016)). Pursuant to this Act, South Dakota sought an injunction requiring Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc., "to register for licenses to collect and remit sales tax" even though they "are merchants with no employees or real estate in South Dakota." *Id.*

185 Emily Stewart, *One Chart Shows the Impact of the Supreme Court's Big Sales Tax Decision*, Vox (June 21, 2018, 11:40 AM), https://www.vox.com/policy-and-politics/2018/6/21/17488472/south-dakota-wayfair-amazon-stock.

186 *Wayfair*, 138 S. Ct. at 2091.

187 *See* Stewart, *supra* note 185 ("The Government Accountability Office estimates that state and local governments could have collected up to $13 billion more in 2017 had they been allowed to require sales tax payments from online sellers.").

188 *Wayfair*, 138 S. Ct. at 2099 (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)).

189 Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 11 (2009).

190 *See Wayfair*, 138 S. Ct. at 2099.

191 *Id.* at 2099 (citing S.B. 106, 2016 Legis. Assembly, 91st Sess. § 1 (S.D. 2016)).

States can now be confident that a carbon tax imposed on companies that meet these basic economic and virtual contacts in their state will not be overturned on Commerce Clause grounds.

Additionally, it would be difficult for a court to find discrimination on interstate commerce grounds if a carbon tax was equally imposed on all CO2-emitting products, *regardless* of whether they were produced domestically or out-of-state, as long as they meet the "substantial nexus" requirement. This is because such a tax does not discriminate against out-of-state producers and therefore it is within "the boundaries of a State's authority to regulate interstate commerce."[192] A state would have to be careful when creating its carbon tax to only impose it on out-of-state companies that arguably have a "substantial nexus" with the state. Using the guidelines set in *Wayfair* regarding South Dakota's Act, discussed above, is a solid way for a state to ensure it is only taxing companies with a "substantial nexus" in its state.

There could also be Commerce Clause challenges with a consumption-based carbon tax if the tax is imposed on products in relation to their CO2 emissions during production. A state would again have to ensure that the tax only affected out-of-state companies with a "substantial nexus" to the state, that it was fairly apportioned to all subjected goods sold within its borders, and that it applied equally to domestic and out-of-state products.[193] Issues on such a tax's ability to meet the *Complete Auto* test are readily apparent using a simple product as an example.

Imagine that there are two bread companies that sell bread in a carbon taxing state: one domestic (Company A) and one based in a neighboring state (Company B). Both companies bake their bread using fossil fuel-powered manufacturing equipment, but Company B does not have any production plants in the taxing state. That company's only CO2 emissions within the taxing state occur when transporting its bread from production plants to the sale points in the carbon taxing state. In light of *Wayfair*, the companies' physical presence in the state will not matter for meeting the *Complete Auto* test.[194] As long as Company B avails itself of the substantial privilege of carrying on business in the state it will have a substantial nexus

192 *Id.* at 2090.

193 *See* Quill Corp. v. North Dakota, 504 U.S. 298, 311 (1992) (quoting *Complete Auto*, 430 U.S. at 279).

194 *See Wayfair*, 138 S. Ct. at 2092, 2098–99.

for tax purposes.[195] Going forward, the other three parts of the *Complete Auto* test will take on greater importance. For example, in this bread hypothetical, the fourth prong of being fairly related to services provided by the state does not appear to be met.[196] This is because the tax's purpose of reducing CO2 emissions in the state in order to improve its environment and create a sustainable life for future state citizens is arguably not related to a company's CO2 emissions outside of the taxing state.

If a state wants to impose a carbon tax on out-of-state companies that sell products within the state, it will have to ensure that the tax is only imposed on companies that meet *Complete Auto*'s requirements. This is a case-specific inquiry, but using the loaf of bread example, a state should make sure that the bread company emits enough CO2 within its borders to create a substantial nexus if it does not already have a substantial nexus based on other economic or virtual contacts. A state would need a CO2 threshold amount that can be scientifically proven to meet the tax's purpose of improving the state's environment if such CO2-emitting companies are forced to comply. Regardless of *Wayfair*, if the bread company has manufacturing plants within the state, or if it has its own retail outlets in the state that emit CO2, the state would have a better chance of meeting *Complete Auto*'s four prongs regarding a carbon tax.

Related to the *Complete Auto* test, the 1996 case of *Fulton Corp. v. Faulkner* is an application of *Complete Auto*'s discrimination prong to facially discriminatory taxes that are "compensatory taxes."[197] In *Associated Industries v. Lohman*, the Supreme Court articulated an exception to the general facially discriminatory tax prong for compensatory taxes, holding that "a facially discriminatory tax that imposes on interstate commerce the equivalent of an identifiable and substantially similar tax on intrastate commerce does not offend the negative Commerce Clause."[198] The Court identifies this as the compensatory tax doctrine, whereby a compensatory tax is one "designed simply to make interstate commerce bear a burden already borne by intrastate commerce."[199] In *Faulkner*, using

195 *See id.* at 2099.
196 *See id.* at 2091 (citing *Complete Auto*, 430 U.S. at 279).
197 Fulton Corp. v. Faulkner, 516 U.S. 325, 331 (1996).
198 Assoc. Indus. of Mo. v. Lohman, 511 U.S. 641, 647 (1994) (internal quotations and citation omitted).
199 *Id.*

conditions distilled in Supreme Court precedent, the Court held that a valid compensatory tax has three necessary conditions:

> [1] a State must, as a threshold matter, 'identif[y]… the [intrastate tax] burden for which the State is attempting to compensate'…[2] the tax on interstate commerce must be shown roughly to approximate – but not exceed – the amount of the tax on intrastate commerce . . . [3] the events on which the interstate and intrastate taxes are imposed must be 'substantially equivalent'; that is, they must be sufficiently similar in substance to serve as mutually exclusive 'prox[ies]' for each other.[200]

The Court has highlighted the fact that "use taxes on products purchased out of state are the only taxes we have upheld in recent memory under the compensatory tax doctrine."[201] *Faulkner* applies to a carbon tax imposed as a compensatory tax on products manufactured or purchased outside of the taxing state, like the bread manufacturing example.[202]

Regarding the first condition, the intrastate tax that the compensatory tax seeks to compensate "must serve some purpose for which the State may otherwise impose a burden on interstate commerce."[203] In terms of the carbon tax serving a legitimate local purpose, the strongest argument is that it serves the local purpose of protecting the state's environment and air, and that numerous studies have shown a carbon tax is the most effective method of achieving these goals.[204] Moreover, a state arguably has a "sovereign interest in being compensated" for CO2-emitting products used within its borders that were purchased out of state because those emissions equally affect the state's environment as similar products purchased within the state.[205] The main issue is whether the tax

200 *Fulton Corp.*, 516 U.S. at 332–33.
201 *Id.* at 338.
202 *See generally id.* at 332–47.
203 *Id.* at 334.
204 *See e.g., Economists' Statement on Carbon Dividends*, *supra* note 33; HALSTEAD, *supra* note 28, at 6; Rattner, *supra* note 34.
205 *Contra* Maryland v. Louisiana, 451 U.S. 725, 759 (1981) (holding that Louisiana could not impose a compensating "[f]irst-[u]se" tax on natural resources produced out of state but used within Louisiana because "Louisiana has no sovereign interest in being compensated for the severance of resources

could apply to the out-of-state bread company with no physical presence in the taxing state. It seems that such a tax would not be upheld for the same reasons discussed in relation to *Complete Auto*: taxing an out-of-state bread company whose production processes emit no CO2 in the taxing state serves no legitimate local purpose.[206] Thus, a compensatory carbon tax could only be upheld when applied to products that emit CO2 within the taxing state, either through the emissions of products themselves or if the production process emits CO2 in the state.

Regarding the second *Faulkner* condition, a carbon use tax on interstate commerce must be exactly equal to or less, never exceeding, the carbon tax imposed on intrastate carbon commerce.[207] If the purchase had no carbon tax attached to it, the use tax is the full amount of the Consumption State's carbon tax. If the Purchase State had a carbon tax, and that tax rate was lower than the Consumption State's carbon tax, the purchase is only taxed the difference between the two carbon taxes that equals, but does not exceed, the Consumption State's carbon tax rate. Related to both the first and second conditions, a state's carbon tax can only apply to CO2 emissions from delivery of goods that take place within the taxing state's borders. A tax on delivery emissions that occur outside of the state does not meet a legitimate local purpose and it would likely make the carbon tax on interstate commerce *greater* than the tax on domestic goods, because out-of-state goods often travel longer distances than locally produced products.

As long as the carbon tax is limited to products that emit CO2 within the state, either directly or during production, *Faulkner*'s third condition of having the tax imposed on "substantially equivalent" events is met because both the carbon sales and use taxes are levied on the same thing: CO2-emitting products.[208] The only difference is that one tax is on products purchased out of state, while the other is on those products purchased in state.

A third Commerce Clause question associated with imposing a carbon tax on out-of-state companies is a regulatory issue: whether a state can impose CO2 reporting requirements on out-of-state companies solely for the purpose of the state's carbon tax scheme. Returning to the example of the two bread companies, would it be

from … federally owned . . . land.").

206 *See Fulton Corp.*, 516 U.S. at 344.

207 *See id.* at 336–38.

208 *See id.* at 338–42.

constitutional for a state to impose CO2 reporting requirements on a small bread producer in a neighboring state that has substantial nexus with the carbon taxing state?

This question requires use of the Supreme Court's three-pronged "balancing" test regarding the Dormant Commerce Clause.[209] Created in *Hughes v. Oklahoma*, the Court held that an inquiry must look at:

> (1) whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce. [210]

When a party successfully demonstrates that the statute in question discriminates against commerce, "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."[211]

Imposing emissions-monitoring requirements on out-of-state companies may not survive Dormant Commerce Clause challenges because such a requirement, while facially regulating domestic and out-of-state companies equally, could have severe effects on companies that would not otherwise monitor their CO2 emissions. Depending on the complexity of the product, the costs of monitoring CO2 emissions could be very high,[212] possibly high enough to put a company out of business. In such cases, the carbon tax would almost certainly fail the *Hughes* balancing test, because a court would likely conclude that there are alternative means to regulating CO2 emissions that impose less of a burden on out-of-state companies.[213]

209 Hughes v. Oklahoma, 441 U.S. 322, 336–39 (1979).

210 *Id.* at 336.

211 *Id.* (quoting Hunt v. Washington Apple Advert. Comm'n, 432 U.S. 333, 353 (1977)).

212 *See generally* Moreau & Poitevin, *supra* note 116, at 4.

213 *See Hughes*, 441 U.S. at 336–38 (holding that Oklahoma's statute forbidding the transportation of minnows out of state "for purposes of sale" was "far from . . . the least discriminatory alternative" because Oklahoma "places no

Thus, in order for a state's carbon tax to withstand Dormant Commerce Clause challenges, the state must ensure that the tax only reaches out-of-state companies that have a substantial nexus to the taxing state, and that it only taxes emissions that occur within the state's borders. Of course, CO2 emissions do not stay in one place once emitted and it would be impossible to contain or accurately track them across state lines for tax purposes. However, this is a technical problem outside the scope of this paper that is probably too complex to be accounted for in tax jurisdiction issues.

VI. Current State Carbon Tax Legislation

Carbon tax proposals have been on the rise in U.S. state legislatures since 2018, with thirteen states considering carbon pricing policies as of January 2019.[214] There has even been movement at the federal level, as Representative Carlos Curbelo, a Florida Republican, introduced a bill in the U.S. House of Representatives in 2018 calling for a nationwide carbon tax.[215] Although a step in the right direction, no U.S. state has an existing carbon tax that can be used as a successful example. This is why British Columbia's carbon tax is an excellent case that states can to look to for guidance.

Various elements of British Columbia's carbon tax have been mentioned in previous sections, but the main characteristic of the tax "is its intended revenue-neutrality . . . wherein carbon tax revenues are countered by cuts in other taxes or direct transfers to households."[216] As discussed previously, this tax is only on "the purchase and use of fuels," specifically gasoline, diesel, and natural gas.[217] Nonetheless, "the tax covers approximately 70 percent of B.C.'s total greenhouse gas (GHG) emissions,"[218] making a strong

limits on the numbers of minnows that can be taken by licensed minnow dealers; nor does it limit in any way how these minnows may be disposed of within the State.").

214 NAT'L CAUCUS OF ENVTL. LEGISLATORS, *supra* note 69. Carbon pricing legislation has been introduced in Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, New York, Oregon, Rhode Island, Utah, Vermont, and Washington. Legislation to study the effects of carbon pricing has been introduced in New Hampshire and New Mexico. *Id.*

215 David Morgan, *Republican Introduces Bill Calling for Carbon Tax*, REUTERS (July 23, 2018), https://www.reuters.com/article/us-usa-tax-carbon/republican-introduces-bill-calling-for-carbon-tax-idUSKBN1KD21Q.

216 Murray & Rivers, *supra* note 60, at 677.

217 *Id.* at 676; *British Columbia's Revenue-Neutral Carbon Tax*, *supra* note 59.

218 *British Columbia's Revenue-Neutral Carbon Tax*, *supra* note 59; *see also* Murray &

argument that a limited carbon tax can still significantly reducing CO2 emissions.

The two Massachusetts carbon tax bills have also been discussed at length. As mentioned, both the House and Senate bills are lacking in certain details about the scope and administration of the tax, which must be addressed now that State Senator Barrett's bill has been approved by the Massachusetts Senate.[219] That bill must still survive debate in the Massachusetts House of Representatives before it becomes law,[220] where it will likely face compromises with Representative Benson's revenue-positive bill.

Both taxes are on "[g]reenhouse gas-emitting priorities," defined as "matter that emits or is capable of emitting a greenhouse gas when burned or released to the atmosphere and is identified as a priority under the terms" of the legislation in question.[221] Both bills include "natural gas, petroleum, coal, and any solid, liquid or gaseous fuel derived therefrom" as priorities to be taxed,[222] which is very similar to British Columbia's carbon tax.[223] It seems that the tax will be imposed downstream on consumption that is close to combustion, with the tax collected "on the distribution or sale of greenhouse gas-emitting priorities."[224] In each case, the commissioner shall make "all reasonable efforts" to impose the tax at the "earliest possible" (Senate) or "first" (House) "point of distribution or sale."[225]

An interesting note about Massachusetts is that the state is part of the Regional Greenhouse Gas Initiative ("RGGI"), "the first mandatory market-based program in the United States to reduce greenhouse gas emissions."[226] Because of this pre-existing

Rivers, *supra* note 60, at 676 ("[The tax] covers 70–75% of the province's GHG emissions.").

219 Serreze, *supra* note 75.

220 *Id.*

221 An Act Combating Climate Change, S. 1821, 190th Gen. Ct., ll. 17–20 (Mass. 2017), https://malegislature.gov/Bills/190/SD1021; An Act to Promote Green Infrastructure, Reduce Greenhouse Gas Emissions, and Create Jobs, H.R. 1726, 190th Gen. Ct., ll. 23–26 (Mass. 2017), https://malegislature.gov/Bills/190/H1726.

222 Mass. S. 1821, ll. 17–20; Mass. H.R. 1726, ll. 23–26.

223 Murray & Rivers, *supra* note 60, at 676 ("The tax covers greenhouse gas emissions resulting from the combustion of all fossil fuels used within the province, with some minor exceptions.").

224 *See* Mass. S. 1821, ll. 33–34; Mass. H.R. 1726, ll. 66–68.

225 Mass. S. 1821, ll. 131–33; Mass. H.R. 1726, ll. 90–93.

226 *Welcome*, Regional Greenhouse Gas Initiative, https://www.rggi.org/

mechanism affecting Massachusetts' CO2 emissions, both bills exempt all power plants already regulated under RGGI from having to comply with the carbon tax.[227] In effect, this exemption means that no electricity generated in the state would be subject to the carbon tax because it is already accounted for under the RGGI plan. This point could possibly come up in other states that are members of RGGI or other CO2-related agreements.

The other three New England states with proposed carbon tax legislation—Connecticut, Vermont, and Rhode Island—are also members of RGGI.[228] Connecticut and Rhode Island's proposed legislation are almost identical to each other in a number of sections.[229] Like Massachusetts' proposed tax, both of these states' tax would be on fossil fuels, including "coal, oil, natural gas, propane," and any other petroleum product.[230] Rhode Island's bill states that the carbon tax would be "on all fossil fuels within the state for purposes of distribution or use within the state," while Connecticut's further specifies that it is "on all fossil fuels *sold* in" the state.[231] Moreover, the taxes would be imposed at the "first point of sale" within each state.[232] One significant difference from Massachusetts' tax is that Connecticut and Rhode Island's taxes charge electricity suppliers for

(last visited Dec. 18, 2018) ("[RGGI] is a cooperative effort among the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont to cap and reduce power sector CO2 emissions."); *Elements of RGGI*, REGIONAL GREENHOUSE GAS INITIATIVE, https://www.rggi.org/program-overview-and-design/elements (last visited Dec. 18, 2018).

227 Mass. S. 1821, ll. 57–61; Mass. H.R. 1726, ll. 63–65.

228 *Welcome*, REGIONAL GREENHOUSE GAS INITIATIVE, *supra* note 226. Maryland, New York, and New Hampshire are also RGGI members. *Id.*

229 *See* An Act Establishing a Carbon Price for Fossil Fuels Sold in Connecticut, S. & H.R. 5363, Sec. 1(a)(7), 2018 Gen. Assemb., Feb. Sess. (Conn. 2018), https://www.cga.ct.gov/2018/TOB/h/2018HB-05363-R00-HB.htm; An Act Relating to Health and Safety—Energize Rhode Island: Clean Energy Investment and Carbon Pricing Act of 2018, H.R. 7400, Title 23 Ch. 82.1-4.8, 2018 Gen. Assemb., Jan. Sess. (R.I. 2018), http://webserver.rilin.state.ri.us/BillText/BillText18/HouseText18/H7400.pdf.

230 An Act Establishing a Carbon Price for Fossil Fuels Sold in Connecticut, S. & H.R. 5363, Sec. 1(a)(7), 2018 Gen. Assemb., Feb. Sess. (Conn. 2018), https://www.cga.ct.gov/2018/TOB/h/2018HB-05363-R00-HB.htm; An Act Relating to Health and Safety – Energize Rhode Island: Clean Energy Investment and Carbon Pricing Act of 2018, H.R. 7400, Tit. 23 Ch. 82.1-4.7, 2018 Gen. Assemb., Jan. Sess. (R.I. 2018), http://webserver.rilin.state.ri.us/BillText/BillText18/HouseText18/H7400.pdf.

231 Conn. S. & H.R. 5363, Sec. 1(b); R.I. H.R. 7400, Ch. 82.1-5(a) (italics added).

232 Conn. S. & H.R. 5363, Sec. 1(b); R.I. H.R. 7400, Ch. 82.1-5I.

the electricity distributed to their customers and end users "on the basis of each kilowatt-hour of electricity used by each" consumer.[233] To address their RGGI commitments and to ensure there is no double-taxation, both bills state that "an amount equal to the amount such electricity supplier or distributor paid during the same year for the purpose of [RGGI] auctions" shall be deducted from the carbon tax imposed on those electricity suppliers.[234]

Both proposed taxes also create restricted revenue fund accounts where a portion of the overall tax revenue is allocated to specific programs.[235] Connecticut's bill has a fund account titled "clean energy and jobs," where 45% of revenue goes to state employers as dividends, 50% is equally distributed to state residents as direct dividends, and not more than 5% goes to the administrative costs of collecting the tax.[236] Rhode Island's bill establishes an "Energize Rhode Island fund" that allocates specific percentages of the carbon tax revenue to various programs.[237] The funds are broken down as follows: 1) 28% "shall go to support climate resilience, renewable energy, energy efficiency, and climate adaptation in Rhode Island" with at least one-third of this being distributed to programs utilized by residents "whose median incomes per household are in the lowest third of median incomes . . . in the state"; 2) 30% provides "direct dividends to employers in the state"; 3) 40% provides direct dividends to Rhode Island residents, in equal amounts for each resident; and 4) up to 2% goes towards administrative costs.[238] Connecticut and Rhode Island's bills are more like the Massachusetts' House bill, which is revenue-positive and uses a significant portion of the carbon tax revenue to fund climate change mitigation efforts.[239]

The proposed legislation in Vermont is quite different and

233 *Compare* Conn. S. & H.R. 5363, Sec. 1(b)(3), *and* R.I. H.R. 7400, Ch. 82.1-5(f), *with* Mass. S. 1821, ll. 33–36 (charging based on each ton of CO2 emissions).

234 Conn. S. & H.R. 5363, Sec. 1(b)(3)(C). The wording in R.I. H.R. 7400, Ch. 82.1-5(f)(3) is a little different but has the same meaning.

235 Conn. S. & H.R. 5363, Sec. 1(c); R.I. H.R. 7400, Ch. 82.1-6.

236 Conn. S. & H.R. 5363, Sec. 1(c).

237 R.I. H.R. 7400, Ch. 82.1-7.

238 *Id.*

239 *See* An Act to Promote Green Infrastructure, Reduce Greenhouse Gas Emissions, and Create Jobs, H.R. 1726, 190th Gen. Ct., ll. 23–26 (Mass. 2017), https://malegislature.gov/Bills/190/H1726. Revenue-positive means that the tax creates "net revenue gains" that can be used for deficit reduction purposes. *See* Donald B. Marron & Eric Toder, *Carbon Taxes and Corporate Tax Reform*, *in* Routledge Explorations in Environmental Economics, *supra* note 48, at 152–54.

would "return all of the revenues from [the carbon tax] to customers on their electric bills."[240] The tax would be "on the carbon content of fuel applied to the sale in the State of each fuel by a distributor."[241] Sales of "electricity, dyed diesel fuel, or jet fuel" are all exempt from the tax.[242] Vermont's bill remits all the revenues as rebates to its residents through the state's retail electricity providers on their customers' electricity bills.[243] The total revenues are broken down into three classes for distribution: commercial, industrial, and residential.[244] For the residential class, 50% is provided in equal amounts to each residential customer.[245] The remaining 50% is equally divided into additional rebates for rural customers and customers with low and middle incomes, defined as having an "annual household income . . . below 300 percent of the federal poverty level."[246] The political climate is interesting in Vermont because lawmakers were pushing forward with this bill even though the state's governor, Phil Scott, vetoed conducting a study on the effects of taxing fossil fuels earlier in 2018.[247]

The last state under consideration is Washington, which arguably has had the most complex and unique carbon tax legislation of the five states discussed. A bill from Washington's 2017 regular state senate legislative session is an ideal example for discussion because it is the most detailed tax structure put forth by any state. The tax would be "levied and collected on the carbon content of fossil fuels and electricity, including imported electricity, sold or used within" Washington.[248] While similar to other states' carbon

240 An Act Relating to a Carbon Charge that is Refunded on Electric Bills, H.R. 791, 2017-2018 Gen. Assemb., Jan. Sess., p. 1, ll. 18–19 (Vt. 2018), https://legislature.vermont.gov/assets/Documents/2018/Docs/BILLS/H-0791/H-0791%20As%20Introduced.pdf.

241 *Id.* at 4, ll. 13–14.

242 *Id.* at 5, ll. 1–2.

243 *Id.* at 7, ll. 19–22, at 8, l. 1.

244 *Id.* at 8, ll. 13–16.

245 *Id.* at 9, ll. 5–12.

246 *Id.* at 9–10.

247 Mike Polhamus, *Lawmakers Forge Ahead with Carbon Tax Plan*, VT DIGGER (Feb. 1, 2018), https://vtdigger.org/2018/02/01/lawmakers-forge-ahead-carbon-tax-plan/.

248 An Act Relating to Promoting an Equitable Clean Energy Economy by Creating a Carbon Tax That Allows Investment in Clean Energy, Clean Air, Healthy Forests, and Washington's Communities, S. 5509, Part II, Sec. 202(1), 65th Leg., Reg. Sess. (Wash. 2017), http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Senate%20Bills/5509.pdf.

tax legislation regarding what stage the tax would be imposed at, this bill gets more specific, saying it will be "imposed only once with respect to the same fossil fuel or electricity, at the time and place of the first sale or use taxable event within this state, and upon the first taxable person within this state."[249] The bill also includes a provision exempting "electricity and fuels subject to a similar tax or price imposed in another jurisdiction…from the portion of the tax equal to the amount paid the other jurisdiction,"[250] which would help ensure the carbon use tax's constitutionality.[251] The provision stresses that "the sum of the tax rates paid in Washington and another jurisdiction for electricity and fuels imported into Washington may not exceed" the state's overall carbon tax rate.[252]

Additionally, the tax is imposed on "the light and power business" for electricity production, and states that wholesale light and power customers "must pay the tax directly" for electricity consumed if the tax for that electricity "has not been paid by a light and power business."[253] The bill also contains certain exemptions for "fossil fuels used for aviation or maritime purposes"[254] and specific "energy-intensive and trade-exposed facilities…[including] but…not limited to metal, glass, cement, and pulp and paper manufacturers."[255] This method of taxation, including electricity as taxable but also having certain exemptions for specific uses and manufacturers, offers a way to broaden the tax base while garnering political support and ensuring that primary state economic actors are not irreversibly harmed.

Washington's carbon tax legislation is also the most detailed and unique in terms of revenue distribution. The bill creates an "equitable transition fund…to facilitate a just transition to a clean energy economy and to mitigate the impact of this transition on fossil fuel workers and workers in energy-intensive and trade-exposed facilities who may lose their jobs due to the transition."[256] Funding for this program is allocated before any other revenue distribution

249 *Compare id.* Sec. 202(3), *with* H.R. 7400, 2018 Gen. Assemb., Reg. Sess. Ch.23–82.1–5(e) (taxing at first point of sale), *and* S. & H.R. 5363, Gen. Assemb, Reg. Sess. § 1(b) (Conn. 2018) (taxing at first point of sale).
250 S. 5509, 65th Leg., Reg. Sess., pt. II, § 202(7) (Wash. 2017).
251 *Supra* Section V.
252 S. 5509, *supra* note 250.
253 *Id.* § 203(1).
254 *Id.* § 207(1)(d).
255 *Id.* at pt. I, § 110(1).
256 *Id.* § 111(1).

occurs, and the legislature's intent is to distribute fifty million dollars into the program during the first year of the tax, "after which additional money will be allocated over time as necessary."[257]

After those funds are taken out, 70% of revenue is deposited into the "clean energy account," whose goal is to "stimulate new dangerous air pollutant reduction projects."[258] Thirty-five percent of this money is allocated to the "carbon reduction investment fund within the account…[which] must be used for greenhouse gas emission reduction projects in Washington or that reduce emissions directly connected to energy use and other activity in Washington state."[259] The remaining 65% is "allocated to the sustainable infrastructure fund."[260] This money "must be used for greenhouse gas emission reduction projects in Washington that achieve indirect carbon reductions, [or] have long-term or difficult to quantify emission reduction prospects. . . ."[261] Certain percentages of these funds are reserved for transportation projects (35%), land use projects (50%), and power sector projects (15%).[262]

Of the remaining overall 30% of revenue, two-thirds will be allocated to the clean water climate program account, where the money must be used "to provide grants and loans for sustainable water projects and activities that consider climate impacts in their planning, siting, design, and implementation."[263] The final one-third of the remaining 30% of revenue shall be allocated to the sustainable forest health account and "used for projects that improve forest health, prevent wildfires, increase forests' ability to filter pollutants, sequester dangerous air pollutants, and provide longer-term climate resilience benefits."[264]

This proposed carbon tax noticeably differs from all the other states' proposals by having none of its revenue allocated directly to the state's citizens in dividends. The bill includes a "low-income carbon pollution mitigation tax grant" that is determined based on residents' "adjusted gross income reported on the federal personal income tax return."[265] This grant would help deal with the typical

257 *Id.* § 111(3).
258 *Id.* § 103(2).
259 *Id.* § 104(1).
260 *Id.* § 105(1).
261 *Id.*
262 *Id.* § 105(2)–(4).
263 *Id.* § 108(1).
264 *Id.* § 109(1).
265 S. 5509, 65th Leg., Reg. Sess., pt. II, § 211(2)–(3) (Wash. 2017).

regressivity of a carbon tax in place of larger dividends to low-income households.

Obviously, the political situation and atmosphere of each state will play a significant role in what type of carbon tax legislation is able to gain momentum and eventually become law in a given state. Excluding Washington's legislation, the other states' carbon tax bills all use some type of direct dividend to residents as a way to gain support for their legislation. As discussed in previous sections, adopting a revenue-positive carbon tax, like Washington's proposal, would be the optimal outcome in terms of climate change mitigation efforts and improvements in government services. However, the possibility of such a proposal becoming law depends on a myriad of factors (political, economic, and others). Based on the late 2018 polling data showing increasingly favorable views of revenue-positive carbon taxes,[266] perhaps enough factors will begin to turn in favor of such a tax as we move into the 2020s.

VII. Conclusion

Advocacy groups have been pursuing greater collective action towards climate change mitigation in highly visible ways, like Sunrise Movement's sit-in protests in multiple state capital buildings around the country to demand that states reject fossil fuel money,[267] in addition to the highly publicized sit-in of Minority Leader Nancy Pelosi's Washington, D.C. office in November 2018, calling for a "Green New Deal."[268] Renewable energy sources like wind and solar have become increasingly cost competitive each year, but "their full potential will remain hamstrung as long as fossil fuel prices stay low"[269] and the negative externality of CO2 emissions is not accounted for in prices. State carbon taxes can be excellent and

266 *See* Leiserowitz et al., *supra* note 50; Energy Policy Institute, *supra* note 51; Greenstone, *supra* note 52.

267 *See, e.g.*, Andrea Germanos, *Climate Activists Turn Up the Heat on NY Gov. Cuomo With Sit-In*, EcoWatch (Aug. 8, 2018, 12:59 PM), https://www.ecowatch.com/climate-activists-cuomo-sit-in-2593991149.html; Dave Levitan, *Young People Are Convincing Politicians to Stop Taking Fossil Fuel Money*, Earther (Aug. 10, 2018, 11:30 AM), https://earther.gizmodo.com/young-people-are-convincing-politicians-to-stop-taking-1828253151.

268 Felicia Sonmez, *Ocasio-Cortez Rallies Protesters at Pelosi's Office, Expresses Admiration for Leader*, Wash. Post (Nov. 13, 2018), https://www.washingtonpost.com/politics/ocasio-cortez-addresses-environmental-protesters-waging-sit-in-in-pelosis-office/2018/11/13/abd39c38-e766-11e8-bbdb-72fdbf9d4fed_story.html?utm_term=.a1eabad489c9.

269 *See* Halstead, *supra* note 28, at 4.

effective prototypes that could build toward national carbon taxes, as evidenced by British Columbia's province-wide carbon tax leading to Canada's "announced plans for a coordinated nation-wide carbon price" starting in 2018.[270] Yet even before building the political momentum necessary for federal legislation on carbon taxation, state carbon taxes have the potential to significantly reduce CO2 emissions on their own.

The best method for offsetting a carbon tax's regressive nature seems to be redistributing a certain portion of the tax revenue to low-income households so they receive a significantly greater rebate than all other residents.[271] Some policymakers may say that too much of a focus on low-income rebates will face opposition from conservative groups and politicians. To counter such opposition, combining low-income rebates with tax cuts, as well as allocating a portion of revenue for investment in public transportation or green energy businesses, may be more palatable to all sides. This is the structure of revenue distribution that British Columbia adopted, and their carbon tax system was revenue-negative for many years.[272]

Although carbon taxes have the potential to generate significant state revenue, the political ramifications of perceived tax increases has led most carbon tax proposals to be revenue neutral, either giving all the revenue back to the state's residents in rebates or adopting a carbon tax in conjunction with cuts in other tax rates.[273] However, the best way to increase state action on climate change would be to adopt a revenue-positive carbon tax like Washington's proposed Senate bill.[274] The issue then would be how to make such

270 *British Columbia's Revenue-Neutral Carbon Tax*, *supra* note 59.

271 *See* Gale et al., *supra* note 71, at 10 (citing Terry Dinan, *Offsetting a Carbon Tax's Costs on Low-Income Households* (Cong. Budget Office, Working Paper No. 2012-16, 2012)); Lucas, Jr., *supra* note 33, at 7 (citing Aparna Mathur & Adele C. Morris, *Distributional Effects of a Carbon Tax in Broader U.S. Fiscal Reform*, 66 ENERGY POL'Y 326, 333 (2014)).

272 *See* Murray & Rivers, *supra* note 60, at 677.

273 *See, e.g.*, *id.*

274 *See* Roberts, *supra* note 53 (arguing that the U.S. "is nowhere near overtaxed" and that a revenue-positive carbon tax could be implemented where enough revenue is rebated to low- and middle-income households, with "the rest [used] for clean energy infrastructure and transition assistance for vulnerable communities"); Matthew Yglesias, *The Case for a Carbon Tax*, VOX (Oct. 10, 2018, 1:00 PM), https://www.vox.com/2018/10/10/17959686/carbon-tax (stating that one key advantage of a carbon tax over supply-side restrictions is that a "carbon tax raises revenue as it raises prices, and that revenue can be put to work").

a proposal politically appealing, which seems less difficult in light of 2018 polls showing the beginnings of a favorable view of revenue-positive carbon taxes where the revenues are used for climate change mitigation programs.[275] Some ideas could center on a revenue-positive tax that only increases taxes on wealthy individuals, with low-income households still receiving rebates and having no net increase in their taxes, and the additional revenue generated going to public transportation and green energy development. A proposed carbon tax that uses all of its revenue toward increased government funding, like Washington's, should be framed to demonstrate that there is no increased tax burden when benefits from the carbon tax funded programs are accounted for, in addition to arguing that the tax is necessary to protect the state's environment.

Constitutionally, it seems that a state carbon tax would survive Dormant Commerce Clause challenges as long as the tax only reaches activities that emit CO2 within the taxing state. Taxing emissions that occur outside the state's borders is where a tax would likely be held unconstitutional under the *Complete Auto* test. This idea is reinforced by the fact that no states' proposed carbon tax bills extend the tax to emissions occurring outside their borders, and none of the bills include a tax on products that do not emit CO2. With bipartisan support building for action on climate change in several state legislatures,[276] one state's adoption of a carbon tax, if successfully implemented, could be the catalyst that leads to widespread adoption of carbon taxes and builds greater momentum for significant Green New Deal legislation. Successful state carbon taxes, ideally culminating in a nation-wide carbon tax, is arguably the type of foundational framework required for the Green New Deal to come to fruition. Such a framework has the potential to create a greener future for the U.S., environmentally *and* economically.

275 Leiserowitz et al., *supra* note 50; Energy Policy Institute, *supra* note 51; Greenstone, *supra* note 52.

276 In the Utah House of Representatives in March 2018, Democratic Representative Joel Briscoe and Republican Representative Becky Edwards cosponsored a bill that would put a price on carbon emissions. It is the first state that has introduced bipartisan carbon pricing legislation. *See First-ever Bipartisan Carbon Pricing Bill Introduced in Utah*, Utah House Democrats (Mar. 15, 2018), http://www.utahhousedemocrats.org/news/2018/3/15/first-ever-bipartisan-carbon-pricing-bill-introduced-in-utah.

Remixing Rawls: Constitutional Cultural Liberties in Liberal Democracies

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This article develops a liberal theory of cultural rights that must be guaranteed by just legal and political institutions. People form their own individual conceptions of the good in the cultural space constructed by the political societies they inhabit. This article argues that only rarely do individuals develop views of what is valuable that diverge more than slightly from the conceptions of the good widely circulating in their societies. In order for everyone to have an equal opportunity to autonomously form their own independent conception of the good, rather than merely following others, culture must be democratically controlled. Equal respect for members of a liberal democracy requires that all citizens have roughly equal opportunities to do things like make movies, publish novels, and exhibit paintings. This article contends that the contemporary American legal order fails to guarantee that all citizens have roughly equal opportunities to shape and influence their shared culture. Guaranteeing the liberty to do so would require reforms to many areas of law, including applying anti-discrimination law more broadly to the conduct of cultural organizations, expanding fair use protections in copyright law, limiting the ability of businesses to arbitrarily refuse service to customers, and restricting private control of capital in order to democratize the means of cultural production.

INTRODUCTION

When, in 2016, for the second year in a row, exclusively white actors were nominated for Oscar awards, protests erupted on social media and prominent actors and filmmakers announced that they would boycott the Academy Awards ceremony.[1] The #OscarsSoWhite protests did not argue that the First Amendment free speech rights of minority actors and directors had been abridged. Legally, minority actors and directors have the same rights as white directors to go out and make movies. The complaint of #OscarsSoWhite was that minority actors and filmmakers cannot use their rights to write and speak and create culture as effectively as white actors and filmmakers can. Minority filmmakers do not have equal access to Hollywood gatekeepers.

The argument of #OscarsSoWhite seems political in nature,

1 *See* Tim Gray, *Academy Nominates All White Actors for Second Year in Row*, VARIETY (Jan. 14, 2016, 7:16 AM), http://variety.com/2016/biz/news/oscar-nominations-2016-diversity-white-1201674903/ (discussing #OscarsSoWhite protests on social media); David Ng, *Spike Lee and Jada Pinkett Smith to Boycott Oscars; Academy Responds*, L.A. TIMES (Jan. 18, 2016, 7:50 PM), http://www.latimes.com/entertainment/movies/moviesnow/la-et-spike-lee-to-boycott-oscars-html-20160118-htmlstory.html (discussing boycotts of the Academy Awards Ceremony).

even though it is not about First Amendment rights or state action. #OscarsSoWhite protests are about systemic racism, but they are also about cultural elites refusing to let a diversity of approaches to film and storytelling into their prestigious institutions and about a failure of citizens to regard one another as equally capable of contributing to their shared culture. Some of the moral force of #OscarsSoWhite protests may be about employment discrimination, but the force of the protest is not confined to fairness in employment. Even if, counterfactually, minority actors and filmmakers could find work in Hollywood as easily as white actors and filmmakers, and even if winning Academy Awards were unimportant for the career prospects of actors and filmmakers, it would still be troubling for the Oscars to honor only white people. The trouble is that the whiteness of the Oscars signals that not all members of our society are, in the words of W.E.B. Du Bois, "co-worker[s] in the kingdom of culture."[2]

Liberal political philosophers have debated at length how citizens should treat one another as participants in politics, focusing on rights of political participation and reciprocity in describing the conditions of democratic legitimacy.[3] These philosophers have paid less attention to what obligations of justice arise from citizens' participation in cultural activity.[4] This article contends that rights of

2 W.E.B. Du Bois, The Souls of Black Folk: Essays and Sketches 4 (8th ed. 1909).

3 *See, e.g.*, Arthur Ripstein, *Authority and Coercion*, 32 Phil. & Pub. Aff. 2, 26–29 (2004).

4 *See, e.g.*, John Rawls, Justice as Fairness: A Restatement 43–44 (Erin Kelly ed., 2001) (arguing that "[i]n all parts of society" there should be "roughly the same prospects of culture and achievement for those similarly motivated and endowed" but excluding "prospects of culture" from the equal basic liberties protected by the lexically prior first principle of justice). In contrast with the emphasis on political liberties and the distribution of economic goods that take center stage in much contemporary liberal political philosophy, scholars of law and aesthetics who study free speech, copyright, intellectual property, remixes, and internet culture have increasingly argued that it is important for liberal democracies to promote and protect not just a democratic system of politics but also a democratic culture. *See* Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 Berkeley Tech. L.J. 229, 232 (2014). This article builds on the work of legal scholars who have developed theories that focus, among other things, on the satisfaction of cultural conditions necessary for the exercise of human capabilities or for human flourishing, *see* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1659, 1746–50 (1988), how to politically design an attractive culture, *see* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79

cultural participation and reciprocity also matter for a constitution's legitimacy. Specifically, a legitimate democracy must ensure that all citizens have a fair, roughly equal opportunity to shape their shared culture. Satisfying this requirement in the United States requires extensive changes to contemporary public and private law.[5]

Part I describes the philosophical argument for the norm that legitimate democracies must ensure that all citizens have roughly equal opportunities to influence the political process. Citizens of a democracy remain free and equal by mutually committing to an ideal of political equality, so that each person is both ruled and a participant in ruling.[6] In legitimate democracies, citizens equally share the burdens of living together in a community and regard one another as political equals, respecting one another's rights to participate in the democratic process by voting and holding office.[7] Liberal legitimacy also requires that citizens take one another seriously as contributors to political dialogue.[8] For instance, a society in which everyone had an unquestioned right to vote and run for office but where men made up their minds in advance that they would not seriously entertain any political arguments advanced by women could not be a legitimate democracy, for the members of such a society would fail to equally share the burdens and opportunities that come from living together in a community.

In describing the liberal argument for rights of political participation, this article focuses on John Rawls's argument that the "fair value" of the "equal political liberties" must be guaranteed to all citizens.[9] Rawls's argument provides a useful starting point

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N.Y.U. L. REV. 1, 3–4 (2004), what conditions must hold for individuals to act and express themselves autonomously, *see* Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUD. 449, 469–71 (1992), and how law affects a society's political culture, *see* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996).

5 In this article, the term "citizens" is used to denote equal participants in a scheme of political cooperation. However, the obligations and rights of reciprocity likely extend beyond those members of existing political societies who are presently accorded *legal* citizenship. *See* Sarah Song, *The Significance of Territorial Presence and the Rights of Immigrants*, *in* MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP 225, 233–34 (Sarah Fine & Lea Ypi eds., 2016); *see also* Sarah Song, *Democracy and Noncitizen Voting Rights*, 13 CITIZENSHIP STUD. 607, 608–11 (2009).

6 *See* JOHN RAWLS, POLITICAL LIBERALISM 4–6 (expanded ed. 2005).

7 RAWLS, *supra* note 4, at 191–92.

8 *Id.* at 91.

9 *Id.* at 149.

for theorizing about cultural rights for two reasons. First, Rawls's theory of justice provides a compelling and generative account of why the fair value of the political liberties matters for the legitimacy of a constitution.[10] Second, his method of "reflective equilibrium," which works back and forth between our judgments about specific cases and our general philosophical judgments about ethics until we reach justified conclusions, is particularly well suited for evaluating the concrete legal reforms needed to make a constitution legitimate.[11]

After describing the rationale for ensuring that all citizens have a fair, roughly equal chance to participate in politics in Part I, Part II argues that anyone who accepts a guarantee of the fair value of the political liberties as a condition of democratic legitimacy should also embrace a guarantee of cultural liberties. In a just society with a legitimate constitution, rights of cultural participation must be insulated from the distorting effects of wealth, social power, and persistent bias. Because culture is where citizens figure out who they are and what they value in conversation with one another, the urgency of cultural liberties is so great that their fair value is a constitutional essential. To be morally legitimate, a constitution must guarantee that all similarly talented and motivated citizens have roughly an equal chance to shape and influence the culture in which they live, just as they must have a roughly equal chance to shape and influence the government's laws and policies.[12] When some citizens can influence the cultural life of a society more than others, simply because of their wealth, racial or sexual privilege, or membership in elite cultural networks, equality of citizenship is undermined. If overwhelmingly white Academy Awards reflect a restriction of cultural influence to people who have racial or economic privilege, then the conditions of liberal legitimacy have not been satisfied. To diagnose and identify remedies for these failures of equal citizenship, this article develops a theory that I call semiotic justice because it focuses attention on how obligations of justice apply to collective practices of meaning-making.[13]

10 *See* Frank I. Michelman, *Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment*, 72 Fordham L. Rev. 1407, 1417–18 (2004); *see also* Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. Pa. L. Rev. 962, 990–91 (1973).

11 *See* Rawls, *supra* note 4, at 29–32.

12 Whether such constitutional provisions would need to be judicially enforceable is a separate question. For a discussion of this issue, see *infra* note 117.

13 "Semiotic justice" modifies John Fiske's phrase, "semiotic democracy." *See* John Fiske, Television Culture 236–39 (1987) (arguing that television

Guaranteeing the fair value of cultural liberties—ensuring that similarly endowed and motivated citizens have roughly the same chance to shape the culture in which they live—has broad implications for the interface of a society's political structure and its cultural order, giving rise to obligations related to anti-discrimination law, free speech law, copyright and property entitlements, and the state action doctrine. Because the fair value of liberties to participate in culture can be guaranteed with many different legal arrangements, the implications of semiotic justice for law and policy are most clearly illustrated by considering failures to ensure the fair value of the cultural liberties. Part III of this article considers several such failures: the whiteness of the Academy Awards, the ability of incumbent artists to use copyright to block the creation of appropriation art, and the ability of business owners to arbitrarily refuse to serve customers.

In response to these violations of the fair value of the cultural liberties, semiotic justice suggests that the state must organize its economic system so that citizens have free time to participate in culture, adequately fund public schools and universities so that citizens can acquire the skills they need to express their beliefs about the good life, narrow the scope of property rights to prevent the wealthy from turning economic power into cultural control, and provide public funding for the arts and humanities.[14] The fair value of liberties of cultural participation are among the equal basic liberties that must be guaranteed in a legitimate democratic society.

I. RAWLS'S JUSTICE AS FAIRNESS AND THE FAIR VALUE OF THE POLITICAL LIBERTIES

John Rawls's theory of *justice as fairness* has served as the

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fosters a "semiotic democracy" through its playfulness); *see also* WILLIAM W. FISHER III, PROMISES TO KEEP 28–31 (2004) (deploying the phrase "semiotic democracy" in a theory of intellectual property).

14 Many of these reforms are already suggested by Rawls's guarantee of the fair value of the political liberties or by the requirements of fair equality of opportunity, but semiotic justice goes beyond the reform agenda contained in Rawls's political liberties because it puts the fair value of cultural liberties on a level with the value of formal equal basic liberties. *See generally* Seana Valentine Shiffrin, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 FORDHAM L. REV. 1643, 1644 (2004). In this respect, my argument in this article has a close affinity to Seana Shiffrin's argument that the fair equality of opportunity should be "elevat[ed] . . . to a higher level of priority" in Rawlsian theory. *Id.* at 1644.

focal point for much liberal political philosophy in the past five decades and provides a prominent example of contemporary liberal thought about how citizens can live together as equal members of a democratic society.[15] This Part briefly sets out Rawls's theory of justice as fairness and explores why Rawls believes that a legitimate democracy must guarantee the fair value of the political liberties to its citizens.

For Rawls, the idea of society as a fair system of cooperation is "[t]he most fundamental idea in [the] conception" of justice as fairness.[16] This idea has, for Rawls, three essential features. First, social cooperation is more than mere activity coordinated by the dictates of a central government. Social cooperation is "guided by publicly recognized rules and procedures which those cooperating accept as appropriate to regulate their conduct."[17] Second, social cooperation is marked by a commitment to reciprocity, including "the idea of fair terms of cooperation" that everyone could "reasonably accept, and sometimes should accept, provided that everyone else likewise accepts them."[18] Third, social cooperation includes the idea that participants pursue their "rational advantage," which specifies what the social cooperators "are seeking to advance from the standpoint of their own good."[19]

Society regarded as a fair system of cooperation is composed of free and equal persons who have two fundamental "moral powers":

> (i) One such power is the capacity for a sense of justice: itis the capacity to understand, to apply, and to act from (and not merely in accordance with) the principles of political justice that specify the fair terms of social cooperation.
>
> (ii) The other moral power is a capacity for a conception of the good: it is the capacity to have, to revise, and rationally to pursue a conception of the good. Such a conception is an ordered family of final ends and aims which specifies a person's conception

15 *See* Henry S. Richardson, *John Rawls* (1921–2002), Internet Encyclopedia of Phil., http://www.iep.utm.edu/rawls (last visited Mar. 27, 2019).
16 *See* Rawls, *supra* note 4, at 5.
17 *Id.* at 6.
18 *Id.*
19 *Id.*

> of what is of value in human life or, alternatively, of what is regarded as a fully worthwhile life. The elements of such a conception are normally set within and interpreted by, certain comprehensive religious, philosophical, or moral doctrines in light of which the various ends and aims are ordered and understood.[20]

These powers are not momentary but instead are realized over the course of a full life.[21]

To illustrate the political meaning of the two moral powers, Rawls constructs a thought experiment, which he calls the original position.[22] Hypothetical representatives of citizens who wish to come together to form a political society meet in the original position to agree on a conception of justice. In the original position, these trustees are situated behind a "veil of ignorance" and "are not allowed to know the social positions or the particular comprehensive doctrines of the persons they represent," although they know "the general commonsense facts of human psychology and political sociology."[23]

Within the original position, and given the conception of persons as having the two moral powers, Rawls argues that the representatives will select two principles of justice to guide constitution-making, legislating, and adjudication:

> (a) Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and
>
> (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).[24]

20 *Id.* at 18–19.
21 *Id.* at 19.
22 *Id.* at 14.
23 *Id.* at 15, 101.
24 *Id.* at 42–43. The difference principle means that "unless there is a distribution that makes both persons better off . . . an equal distribution is to be preferred."

These principles are lexically ordered, meaning that the basic liberties guaranteed by the first principle cannot be traded off to provide more material goods, even to the worst off, pursuant to the second principle.[25] Political power can only be legitimately exercised in a liberal democracy when it is exercised in accordance with "a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason," where the constitutional essentials include the first principle of justice along with a "social minimum providing for the basic needs of all citizens."[26]

The basic liberties are those liberties that are essential to providing the political and social conditions necessary for free and equal persons to develop and exercise the two moral powers.[27] Rawls divides up the basic liberties into two categories. First, there are those that "enable citizens to develop and exercise [the moral] powers in judging the justice of the basic structure of society and its social policies," which are "the equal political liberties and freedom of thought."[28] Second, there are those liberties that "enable citizens to develop and exercise their moral powers in forming and revising and in rationally pursuing (individually or, more often, in association with others) their conceptions of the good."[29] Thus, securing the basic liberties should ensure that people who participate in a project of social cooperation can realize the two moral powers. Cooperators would not give up these basic liberties, or even risk doing so, because of the centrality of the moral powers to the conception of the person that Rawls presupposes.[30]

Rawls's difference principle may allow for significant social and economic inequality, provided that such inequality is to the advantage of the least well off.[31] There is a risk that such inequalities might distort equal access to the public political forum, turning the political liberties guaranteed by the first principle into empty formalities. For instance, if everyone had the same right to political speech but only a few could spend great sums on political campaigns,

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John Rawls, A Theory of Justice 76 (1971).

25 Rawls, *supra* note 4, at 43.

26 Rawls, *supra* note 6, at 137, 228–29.

27 Rawls, *supra* note 4, at 45.

28 *Id.*

29 *Id.*

30 *Id.* at 102.

31 *Id.* at 158; *see also* Shiffrin, *supra* note 14, at 1647.

the liberty of free political speech would be worth more to wealthy citizens than to the poor.[32]

To prevent the equal political liberties from becoming empty formalities, Rawls describes his first principle as including a "proviso" according to which "the fair value of the equal political liberties" (and only these liberties) must be guaranteed to every citizen.[33] This proviso responds to the objection that the equal liberties in a modern state are merely formal:

> [T]he worth of the political liberties to all citizens, whatever their economic or social position, must be sufficiently equal in the sense that all have a fair opportunity to hold public office and to affect the outcome of elections and the like . . . . The requirement of the fair value of the political liberties . . . is part of the meaning of the two principles of justice.[34]

Rawls reasons that the proviso "secures for each citizen a fair and roughly equal access to the use of a public facility designed to serve a definite political purpose, namely, the public facility specified by the constitutional rules and procedures which govern the political process and control the entry into positions of political authority."[35] Additionally, Rawls concedes that the difference principle is, by itself, insufficient to prevent the distortion of the value of the equal political liberties. The "public facility" of political institutions has "limited space," and "[w]ithout a guarantee of the fair value of the political liberties, those with greater means can combine together and exclude those who have less. . . . The limited space of the public political forum . . . allows the usefulness of the political liberties to be far more subject to citizens' social position and economic means than the usefulness of other basic liberties."[36]

For Rawls, the guarantee of the fair value of political liberties

32 RAWLS, *supra* note 6, at 358; *see also* Norman Daniels, *Equal Liberty and the Unequal Worth of Liberties*, *in* READING RAWLS 253, 254–58 (Norman Daniels ed., 1975); Liam Murphy, *Why Does Inequality Matter: Reflections on the Political Morality of Piketty's Capital in the Twenty-First Century*, 68 TAX L. REV. 613, 615–16 (2015) ("[T]he power that comes with great wealth, especially, seems to have a force in political life that no kind of legal regulation is likely to undo.").

33 RAWLS, *supra* note 6, at 149.

34 *Id.*

35 *Id.* at 150.

36 *Id.*

suggests that *Buckley v. Valeo*, in which the Supreme Court struck down limits on campaign expenditures in favor of individual candidates as contrary to the First Amendment,[37] violates justice as fairness. *Buckley* "seems to reject altogether the idea that Congress may try to establish the fair value of the political liberties" by limiting wealthy citizens' use of economic clout to influence the political process.[38]

Guaranteeing the fair value of the political liberties does not require that every single citizen have an equal chance of becoming president, that democracies conduct elections by lot, that every citizen should be equally provided with airtime on television to express their political views, or that the state handicap particularly eloquent political speakers to keep all citizens' chances of attaining political office roughly equal. Guaranteeing the fair value of the political liberties ensures that "citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority irrespective of their economic and social class."[39] Rawls means that citizens who are equally gifted and motivated at politics must have an equal chance to influence policy and attain public office. Guaranteeing the fair value of the political liberties insulates a democracy's political life from non-political influences and guards against political outcomes that reflect inequalities of wealth or status rather than citizens' considered judgments about how best to achieve justice.

Rawls insists that the fair value of the equal political liberties extends only to the equal political liberties and no further, because securing the fair value of all of the basic liberties would be "either irrational, or superfluous, or socially divisive."[40] If such a requirement meant "that income and wealth are to be distributed equally," the requirement would be irrational because it would "not allow society to meet the requirements of social organization and efficiency."[41] If, on the other hand, such a condition would require that "a certain level of income and wealth is to be assured to everyone in order to express their ideal of the equal worth of the basic liberties" then it would be superfluous.[42] This is both because the difference principle requires the basic structure to be

37 Buckley v. Valeo, 424 U.S. 1, 45 (1976).
38 Rawls, *supra* note 6, at 360.
39 *Id.* at 358.
40 Rawls, *supra* note 4, at 150–51.
41 *Id.*
42 *Id.*

arranged in a way that will guarantee that every individual has the greatest level of wealth possible, consistent with the first principle of justice and the fair equality of opportunity,[43] and because a "social minimum" is among the constitutional essentials.[44] On the other hand, if guaranteeing the fair value of the basic liberties "means that income and wealth are to be distributed according to the content of certain interests regarded as central to citizens' plans of life, for example, religious interest, then it is socially divisive."[45] Allocating extra social resources to citizens who claim religious needs to erect magnificent temples would violate justice as fairness.[46] Thus, Rawls concludes that while the equal political liberties must provide all citizens roughly equal chances to influence public policy and hold public office, such a requirement cannot be extended to the other basic liberties.

II. CULTURAL LIBERTIES AND SEMIOTIC JUSTICE

Rawls argues that a legitimate constitution in a just society must ensure that rights of political participation are insulated from the distorting effects of money and social power.[47] The formal political liberties must be guaranteed their "fair value" for all citizens in a democracy so that "all have a fair opportunity to hold public office and to affect the outcome of elections, and the like."[48] In this Part, I argue that a just democracy must ensure that all citizens have a real chance to participate in the cultural life of their community and must protect citizens from having their views about the shape of their shared culture disregarded by other citizens for reasons that have nothing to do with what any individual citizens think culture should look like or that merely reflect unequal allocations of cultural capital.[49]

The political liberties are the subset of the equal basic liberties that are concerned with political participation, like the right

43 *See id.*
44 RAWLS, *supra* note 6, at 228–29.
45 RAWLS, *supra* note 4, at 151.
46 *See id.*
47 *See id.* at 150.
48 *Id.* at 149.
49 *See* Pierre Bourdieu, *The Forms of Capital*, *in* READINGS IN ECONOMIC SOCIOLOGY 280, 282–86 (Nicole Woolsey Biggart ed., 2002) (describing cultural capital as a variety of capital that takes the form of dispositions of mind and body acquired through education and which can be institutionalized through formal credentials such as academic qualifications).

to vote and the right to participate in political debates.[50] The *cultural liberties* are the subset of the equal basic liberties that enable citizens to participate in shaping their culture, like the right to contribute to artistic expression and to share one's views about what a good life looks like. Just as guaranteeing the fair value of political liberties is necessary for the development and exercise of the first moral power (the capacity for a sense of justice), it is necessary to guarantee the fair value of cultural liberties to ensure that people can develop and exercise the second moral power (the capacity for a conception of the good). I designate my theory of the fair value of the cultural liberties semiotic justice. Relying on arguments drawn from literary and cultural theory, I argue that the ability to participate in shaping what a culture looks like is a necessary element of expressing and developing one's own conception of the good, and I argue that many of the reasons that it is important to guarantee the fair value of the political liberties apply to cultural liberties as well. Ultimately, the urgency of cultural liberties is so great that their fair value is a constitutional essential: a legitimation-worthy constitution is one that guarantees the fair value not only of the political liberties but also of the cultural liberties.[51]

A. Semiotic Justice: The Fair Value of the Cultural Liberties

For Rawls, the equal political liberties appear on the list of the basic liberties because they, along with freedom of thought, allow citizens to develop their first moral power: "to understand, to apply, and to act from (and not merely in accordance with) the principles of political justice that specify the fair terms of social cooperation."[52] Citizens' representatives in the original position would insist on guaranteeing the fair value of the equal political liberties because doing so is essential to protecting the indispensable first moral power.[53]

They would be equally unwilling, however, to gamble with the second moral power.[54] Liberty of conscience and freedom of

50 Rawls, *supra* note 4, at 44.

51 The locution "legitimation-worthy" is due to Frank Michelman. *See* Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 Int'l J. Const. L. 663, 674–75 (2008). This article will use "legitimate" and "legitimation-worthy" interchangeably.

52 Rawls, *supra* note 4, at 19.

53 *Id.* at 106–10.

54 Many or all of the basic liberties play important roles in the realization of both moral powers. However, the emphasis of the political liberties is on their

association are, Rawls says, connected with "the capacity for a (complete) conception of the good," and this explains their inclusion on the list of the equal basic liberties.[55] This Part argues that, like the political liberties, the cultural liberties deserve special constitutional protection from exercises of financial, political, or social clout in order to ensure that citizens can develop the second moral power. Citizens need a voice in what their cultural world looks like. If wealth or social prestige determines what television shows and novels get produced and published and talked about at bars and coffee shops, democracy is out of reach. Citizens' representatives in the original position would be unwilling to risk losing a voice in what their shared cultural world looks like and would, therefore, insist on a proviso of semiotic justice parallel to the proviso of the fair value of the equal political liberties.

1. The Political Economy of Culture

The argument for a semiotic justice proviso is rooted in the notion that trustees in the original position know certain "general commonsense facts" about culture, just as they know "the general commonsense facts of human psychology and political sociology."[56] These commonsense facts include an understanding of how political and economic realities predictably and systematically shape cultural production and consumption.

Culture is a public space in which members of a society articulate and develop their conceptions of the good and the meaning of life.[57] I take "culture" to mean this space rather than any particular set of conceptions deployed within it. What constitutes culture, like the basic liberties, is given by a list of practices that express what people value non-instrumentally.[58] Roughly speaking, culture is "all those practices, like the arts of description, communication,

connection with the first moral power while the emphasis of the liberty of conscience and freedom of association is their connection with the second moral power. *See id.* at 45.

55 *Id.* at 113.

56 *Id.* at 101.

57 *See* RAYMOND WILLIAMS, CULTURE AND SOCIETY, 1780–1950, at 34 (1958) (drawing from Wordsworth to argue that "Culture, the 'embodied spirit of a People', the true standard of excellence, became available, in the progress of the [Nineteenth Century], as the court of appeal in which real values were determined, usually in opposition to the 'factitious' values thrown up by the market and similar operations of society").

58 *See* EDWARD SAID, CULTURE AND IMPERIALISM, at xii (1993).

and representation, that have relative autonomy from the economic, social, and political realms and that often exist in aesthetic forms, one of whose principal aims is pleasure."[59] People use these mechanisms to share and learn about their own and other's conceptions of value, meaning, and the good. This list is vague because the precise contours of "culture" shift over time and from place to place. The list is expansive because limiting culture to certain varieties of human behavior risks treating culture as something that people do outside of and apart from their daily lives.[60] While the list is vague and expansive, it is restricted to activities that reflect peoples' views about what is non-instrumentally valuable or worthwhile. Culture does not include activities that are pursued only to accumulate wealth, political power, or social capital in order to pursue other

59 *Id.*; *see* Balkin, *supra* note 4, at 36 ("By 'culture' I mean the collective processes of meaning-making in a society. The realm of culture, however, is much broader than the concern of the First Amendment or the free speech principle. Armaments and shampoo are part of culture; so too are murder and robbery. And all of these things can affect people's lives and shape who they are."). The practices that constitute culture have only relative autonomy from politics. In many ways, culture is intensely political. *See, e.g.*, Edward W. Said, Humanism and Democratic Criticism 128–29 (2004). But while politics and culture connect in many ways, culture has a domain that is at least partially its own and that is meaningfully distinct from the domain of politics. *See* Pierre Bourdieu, The Field of Cultural Production 37–38 (Randal Johnson trans., 1993) ("[T]he literary and artistic field . . . is contained within the field of power . . . while possessing a relative autonomy with respect to it, especially as regards its economic and political principles of hierarchization.").

60 Selma James explains why culture cannot be narrowly delimited:

> The life-style unique to themselves which a people develop once they are enmeshed by capitalism, in response to and in rebellion against it, cannot be understood except as the totality of their capitalist lives. To delimit culture is to reduce it to a decoration of daily life. Culture is plays and poetry about the exploited; ceasing to wear mini-skirts and taking to trousers instead; the clash between the soul of Black Baptism and the guilt and sin of white Protestantism. Culture is also the shrill of the alarm clock that rings at 6 a.m. when a Black woman in London wakes her children to get them ready for the baby minder. Culture is how cold she feels at the bus stop and then how hot in the crowded bus. Culture is how you feel on Monday morning at eight when you clock in, wishing it was Friday, wishing your life away. Culture is the speed of the line or the weight and smell of dirty hospital sheets, and you meanwhile thinking what to make for tea that night. Culture is making the tea while your man watches the news on the telly.

Selma James, Sex, Race and Class 13 (1975).

distinct ends.[61]

Cultural space is not wholly defined by the political practices of the state. It also reflects informal networks and practices of cultural dissemination, which makes it somewhat more removed from the principles of political justice than the facility of political space.[62] However, cultural space is defined in important ways by the rules that the state institutes to regulate it and it is, in this way, part of the basic structure of society.[63] The expressions of conceptions of the good that occupy the space of culture powerfully shape the resources that citizens who partake of the culture have available to them when forming, revising, and pursuing their own conceptions of the good.

The public facility of culture is a limited space, as is politics, where "[n]ot everyone can speak at once, or use the same public facility at the same time for different purposes."[64] Public attention is a limited resource because humans have limited attention spans and can only take in so much information at a time. The limited nature of this space combined with its semi-autonomy from economics and politics makes it likely that differences of wealth and status that are permissible under Rawls's difference principle will be amplified. Wealth cannot be directly converted into academic credentials, professional reputation, and membership in networks of artists or authors, but it can facilitate the acquisition of these resources. In turn, these resources can provide their holders with an outsized voice in articulating conceptions of the good in the space of culture.[65]

The case of literature illustrates how representatives in the original position might understand culture to operate. In the domain of literature, "prestige is the quintessential form [that] power takes . . . the intangible authority unquestioningly accorded to the oldest, noblest, most legitimate (the terms being almost synonymous) literatures . . . ."[66] Domination in "world literary space" exists in a variety of forms, including "linguistic, literary and

61 Thus, "culture" in modern times could provide "the rickety shelter where the values and energies which industrial capitalism had no use for could take refuge . . . ." TERRY EAGLETON, AFTER HOURS THEORY 25 (2003).

62 *See* Bourdieu, *supra* note 49, at 283.

63 *See* RAWLS, *supra* note 4, at 10.

64 *Id.* at 111.

65 *See* PIERRE BOURDIEU, THE SOCIAL STRUCTURES OF THE ECONOMY 11 (Chris Turner trans., 2005).

66 Pascale Casanova, *Literature as a World*, 31 NEW LEFT REV. 71, 83 (2005).

political domination."[67] These three forms of domination "overlap, interpenetrate and obscure one another to such an extent that often only the most obvious form—political-economic domination—can be seen,"[68] but because literature has its own non-economic measures of worth, literary domination differs from political and economic domination. Nobel Prizes in literature, for instance, are not awarded exclusively to authors from wealthy countries but are awarded exclusively to authors whose writing engages in a particular manner with a chain of canonized literature going back to writings produced several hundred years ago in the Rhine Valley.[69] Because literary power can be accumulated semi-independently of economic and political power, inequalities permitted by Rawls's difference principle can grow into intractable domination in literary space, allowing those individuals—like authors and editors—and entities—like the Nobel Prize committee—who control access to literary prestige to act as gatekeepers, determining who can and cannot contribute their expression to world literary space.[70]

I take the foregoing description of the economics of literary production to be sufficiently abstract to count as general knowledge about political sociology available to the parties in the original position. Likewise, it seems apparent that something like this account can be extended to visual art as well.[71] Extending this theory of how bourgeois "high" art and literature operate to "low" cultural production is trickier. Does the production of, for instance, television programming allow individuals and institutions to accumulate power over time, gradually leading to the accentuation and exaggeration of inequalities? An optimistic view is taken by John Fiske, who argues that television is "a text of contestation which contains forces of

67 *Id.* at 72, 86.

68 *Id.* at 86.

69 *See id.* at 74–75, 83.

70 Such control is not just arbitrary; power can be accumulated in world literary space over time precisely because access to the literary center is determined by how literary texts relate to the existing world literary canon. If an author writes a novel that engages in the "right way" with the tradition that makes up the global literary center, the gatekeepers are supposed to grant the novelist admission, and they often actually do so. This is demonstrated by the entry of "post-colonial" authors from Jean Rhys to Salman Rushdie into the world literary canon. This non-arbitrary control is still a form of domination insofar as the standards for literary prestige are set by an elite cartel, rather than democratically. *See* Pascale Casanova, The World Republic of Letters 117–18 (M.B. DeBevoise trans., 2004).

71 *See* Bourdieu, *supra* note 61, at 40–41.

closure and of openness and . . . allows viewers to make meanings that are subculturally pertinent to them . . . ."[72]

Other cultural theorists, however, are not as sanguine about the "openness" of late capitalist cultural production. Max Horkheimer and Theodor Adorno argue that the "culture industry" dominates the field of popular production, and that accumulations of capital are necessary to develop mass culture.[73] Only "those who are already part of the system or are co-opted into it by the decisions of banks and industrial capital, can enter the pseudomarket [of culture] as sellers."[74] Liberties to write, to make music, or to make movies are not worth the same amount to everyone. Some people are far better positioned to make use of these liberties than are others.

One may wonder whether technological developments in the past-half century, and especially the internet, have fragmented "the culture industry." The development of networked information economies has increased the number of people who participate in cultural production and who can define what culture they consume and how they consume it.[75] Nevertheless, contemporary cultural theorists suggest that in spite of technological changes in cultural production, it is still dominated by heavily capitalized institutional actors that aim to satisfy highly conventional consumer preferences.[76] When the technological platforms on which cultural consumers and producers rely encourage users to create in a manner that is primarily lucrative for media corporations, the potentially "critical" cultural

72 FISKE, *supra* note 13, at 239.

73 MAX HORKHEIMER & THEODOR W. ADORNO, DIALECTIC OF ENGLIGHTENMENT: PHILOSOPHICAL FRAGMENTS 131 (Gunzelin Schmid Noerr ed., Edmund Jephcott trans., 2002).

74 *Id.*

75 YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 138–39 (2006).

76 *See* ZEYNEP TUFEKCI, TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST 137 (2017); *see also* Jessa Crispin, *Bookslut Was Born in an Era of Internet Freedom. Today's Web Has Killed It*, GUARDIAN (May 16, 2016, 8:50 EDT), http://www.theguardian.com/books/booksblog/2016/may/16/bookslut-was-born-in-an-era-of-internet-freedom-todays-web-has-killed-it (explaining that the literary website, *Bookslut*, closed because "[i]n order to make enough money to run a real publication [online], you have to write about books everyone has already heard of. You have to indulge in clickbait. You have to narrow your conversation down to the one that is already happening elsewhere. This reinforces the white male-dominated paradigm, where one type of voice is elevated above all others.").

speech of users is reabsorbed into preexisting media models.[77]

Furthermore, historical and empirical scholarship suggests that the disruptive effects of innovations like the development of the internet on cultural production may be short-lived. Tim Wu argues that innovations, including radio and film, initially disrupted culture industry incumbents but grew over time to be dominated by monopolists or cartels that centralized economic and cultural power.[78] Bradi Heaberlin and Simon DeDeo argue that when Wikipedia began it was characterized by a decentralized, democratic system of editing, but over time a "leadership class with privileged access to information and social networks" emerged that relies on norms created early in Wikipedia's existence and gradually institutionalized over time to sustain its power.[79] These findings suggest that there is a good reason to worry that even strongly consumer-driven internet culture is susceptible to risks of centralization of gate-keeping power in the hands of a small number of corporations or individuals.

This description of culture as a limited space relies on a premise that culture is, in some respects, a competitive space. Scholars of culture do not universally accept this premise.[80] However, there is at minimum a meaningful risk of the centralization and de-democratization of cultural power even in societies with democratic political institutions and technologies, like the internet, that lower barriers to entry into the ranks of cultural producers. However the basic structure of society is constituted, cultural space will tend to

77 *See generally* Eduardo Navas, *Culture and Remix: A Theory of Cultural Sublation*, *in* The Routledge Companion to Remix Studies 102 (Eduardo Navas, Owen Gallagher & xtine burrough eds., 2015).

78 Tim Wu, The Master Switch: The Rise and Fall of Information Empires 159–67 (2011).

79 Jennifer Ouellette, *Wikipedia Is Basically a Corporate Bureaucracy, According to a New Study*, Gizmodo (Apr. 25, 2016, 7:15 PM), http://gizmodo.com/wikipedia-is-basically-a-corporate-bureaucracy-accordi-1746955234 (quoting Simon DeDeo); Bradi Heaberlin & Simon DeDeo, *The Evolution of Wikipedia's Norm Network*, Future Internet (Apr. 20, 2016) https://www.mdpi.com/1999-5903/8/2/14/htm; see also Jinhyuk Yun, Sang Hoon Lee & Hawoong Jeong, Intellectual Interchanges in the History of the Massive Online Open-Editing Encyclopedia, Wikipedia, 93 Physical Rev. E 012307-1, 012307-9 (2016) (articles on English language Wikipedia that people are highly attracted to edit grow longer, which reduces the number of editors willing to participate and brings about inequality among the editors, which becomes more severe with time).

80 *See, e.g.*, Jonathan Riley, *Defending Cultural Pluralism: Within Liberal Limits*, 30 Pol. Theory 68, 78–91 (2002) (defending a liberal pluralist theory of culture).

be limited because it, like politics, is a shared public facility. There is, therefore, a risk that cultural power will tend to accumulate in a few hands when moderate economic inequality is tolerated.[81]

The picture of culture as a limited and competitive space is crucial to establishing that semiotic justice is required by Rawls's first principle. Anyone who denies that cultural power is distinct from underlying economic and political power is likely to think that any principle of political justice focused specifically on cultural liberties is superfluous. If cultural space does not systematically tend to allow accumulation of cultural power, then Rawls's two principles may produce the best outcomes for cultural liberties that can be achieved in a democratic society without incorporating additional protections specifically for the cultural liberties. Those who reject the view of culture presented here might, however, agree that it is important to protect the fair value of the cultural liberties as a constitutional essential, for the reasons presented in the following section, but locate the rationale for doing so in the need to protect the fair value of the political liberties.

2. Culture and the Good

Having established the "general commonsense facts" about culture that trustees in the original position possess, the second step in the argument for the proviso of semiotic justice is to establish that the shape of a culture is tightly connected to the ability of participants to form, revise, and pursue their own conceptions of the good. While the range of possible conceptions of the good is not strictly limited to the exact set of such conceptions in a culture in which one is born, the vast majority of conceptions of the good that persons exercising the second moral power will form over the course of a complete life will fall more or less in the range of conceptions of the good in the society or societies in which they live most of their lives.[82] Cognitive psychologists might describe this as the result

81 *Cf.* Daniels, *supra* note 32, at 257 ("If one thought that the mechanisms through which unequal wealth operates to destroy equal liberty were simple and insolatable, then perhaps constitutional provisions could be devised to solve the problem. Rawls . . . suggests constitutional provisions for the public funding of political parties and for the subsidy of public debate. . . . But there is little reason to believe that the mechanisms are so simple and that such safeguards would work.").

82 *See* Talcott Parsons, *The Place of Ultimate Values in Sociological Theory*, 45 INT'L J. ETHICS 282, 295–96 (1935); Ronald Fischer & Ype H. Poortinga, *Are Cultural Values the Same as the Values of Individuals? An Examination of Similarities in Personal,*

of an availability heuristic.[83] This availability may also harden, in certain circumstances, into something like "ideology," systematically foreclosing particular conceptions of the good.[84] Furthermore, culture is one of the vital fields in which conceptions of the good are presented, worked out, revised, and evaluated in public.

One of the central insights of democratic theories of culture developed by intellectual property scholars is the claim that decisions about how to organize public cultural spaces deeply impact individuals' ability to autonomously shape their own understandings of what a good life looks like.[85] As Jack M. Balkin argues,"[p]articipation in culture is important because we are made of culture; the right to participate in culture is valuable because it lets us have a say in the forces that shape the world we live in and make us who we are."[86] Try as one might to make oneself independent from others, one's ideas of what a good life looks like depend deeply on others.[87] An individual can build on others' ideas, but, at least for the vast majority of people, it is possible to diverge only so far from other people's conception of the good. Certain forms of life appear as "necessary" or "impossible" because of settlement of both politics and culture.[88]

For instance, imagine a society in which almost all cultural expression expressed the beliefs that "the relation of male to female is that of natural superior to natural inferior"[89] and that "a man's and a woman's courage and temperance differ."[90] If the cultural understanding of gender were thick enough, there would be no

Social and Cultural Value Structures, 12 Int'l J. Cross Cultural Mgmt. 157, 165–66 (2012).

83 *See* Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 Cognitive Psychol. 207, 208–09 (1973).

84 *See, e.g.*, Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 Signs 515, 542–43 (1982) (describing how "male power" acts as an ideological "myth that makes itself true").

85 *See* Bracha & Syed, *supra* note 4, at 254–56.

86 Balkin, *supra* note 4, at 6.

87 *See* Frank I. Michelman, *The Priority of Liberty: Rawls and "Tiers of Scrutiny", in* Rawls's Political Liberalism, 175, 188–89 (Thom Brooks & Martha Nussbaum eds., 2015) (noting the importance of "open access to the conversation of humankind distant and close" to the "formation, revision, and pursuit of an individual conception of the good. . . .").

88 *See* Roberto Mangabeira Unger, The Self Awakened: Pragmatism Unbound 49 (2007).

89 Aristotle, Politics 1254^{b}13–15 (C.D.C. Reeve trans., 1998).

90 *Id.* at 1277^{b}20.

reason to see gendered differences in distribution as requiring any sort of special scrutiny. If the least advantaged members of a society turned out to be women, this would provide no reason for suspicion about the justice of the basic structure: from the standpoint of the hypothetical society, women are naturally ruled by men, so it should not come as any surprise if most government offices are held by men. Furthermore, people might see this difference as advantageous for women: their temperaments are fundamentally different from those of men, and they do not benefit from offices that require them to lead public lives.[91]

In such a society, claims about gender would not present themselves as political claims. The political discourse of the hypothetical society could be completely devoid of any discussion of gender, and such claims would present themselves as "general commonsense facts of human psychology."[92] Perhaps Rawls's political conception of the person in its articulation through the two principles of justice could solve much of this problem. The use of primary goods to measure welfare in the difference principle should guarantee women access to as many primary goods as men. Additionally, fair equality of opportunity will ensure that a system of "careers open to talents" prevails as part of the constitutional essentials and will ensure that women who wish to pursue the talents necessary for a career have access to the resources, like education, necessary to do so.[93] The first principle will also guarantee that all of the basic liberties are, at the least, formally open to women as well as men.[94] But ensuring that these liberties have their fair value to women seems much harder: women might not participate in public cultural expression, but, the hypothetical society might say, there is no reason that this is unfair; it simply reflects the lesser talent of women, who have the rights to write novels and act in plays but choose not to do so because of their feminine temperament or their lack of talent. If it so happens that, over time, it becomes harder and harder for women to participate in shaping the culture because networks that control access to cultural production are controlled

91 *See* CORDELIA FINE, DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE 67–77 (2010) (describing and debunking such theories).

92 RAWLS, *supra* note 4, at 101.

93 *See id.* at 47 ("[S]ome principle of opportunity is a constitutional essential—for example, a principle requiring an open society, one with careers open to talents . . . .").

94 *See id.* at 167.

by men who share the background cultural beliefs about gender, this may be no cause for concern, because the people getting shut out from cultural production are the people with less talent.

Perhaps such an accumulation of power would violate fair equality of opportunity. But in a society that operated with a definition of "native endowments" that saw gender as part of one's endowment of talent to accomplish particular aims, the hypothetical society's interpretation of fair equality of opportunity might be permissible.[95]

The difference principle might require that women have other opportunities open to them, but this is possible in the hypothetical society. Women might, for instance, have opportunities to excel in domesticity that men do not have. At the legislative stage, when the legislators make complex inferences about social and economic facts, it is difficult to see how justice as fairness could exclude the cultural background that shapes beliefs about the reality of gender. The thick cultural belief about gender that I described applies equally to all domains of the hypothetical society. Women could participate in government in this society—and could even think of themselves as political equals of men—but could remain committed to the social inequality of men and women.

Now, perhaps this hypothetical society is not so bad; at the very least, with all of its constitutional safeguards in place, it looks like the sort of decent hierarchical society that Rawls thinks liberal societies should tolerate.[96] However, it is hard to believe that such a society is made up of free and equal citizens.[97] This problem could be overcome with a constitutional guarantee of the fair value of the cultural liberties, clearly spelling out that the liberties of participating in culture must have roughly the same worth for all citizens. To avoid illegitimacy, all citizens must have a meaningful chance to challenge the culture that makes some social arrangements seem possible and others impossible. Any social arrangements that allow some citizens' cultural contributions to be disregarded because they are disliked by a clique of non-democratic elites, or because other citizens will

95 For Rawls, fair equality of opportunity requires that, "supposing that there is a distribution of native endowments, those who have the same level of talent and ability and the same willingness to use these gifts should have the same prospects of success regardless of their social class of origin . . . ." *Id.* at 44.

96 *See* John Rawls, The Law of the Peoples 62–70 (1999).

97 *See* Susan Moller Okin, Political Liberalism, Justice, and Gender, 105 Ethics 23, 29 (1994); *see also* Justin Schwartz, *Rights of Inequality: Rawlsian Justice, Equal Opportunity, and the Status of the Family*, 7 Legal Theory 83, 87 (2001).

not listen to the contributors' ideas due to the contributors' race, gender, class, or social position, fail to provide the fair equal access to culture needed for liberal legitimacy.[98]

If this picture of cultural power is correct, the ability of certain actors to accumulate cultural capital and exercise disproportionate power over the field of culture that prevents other citizens from participating in the give and take of cultural life, in turn, prevents citizens from forming their own conceptions of the good. Because of the extent to which conceptions of the good are endogenous to the articulations of these conceptions in cultural space, in order to fully develop and realize the second moral power, citizens must be able to participate in shaping culture, expressing their conceptions of good in the shared facility of culture.

3. A New Proviso and Its Meaning

It is possible that access to cultural space will be distorted by otherwise-permissible inequalities in wealth, power, and prestige in much the same way that political space would be so distorted without Rawls's proviso of the fair value of the equal political liberties. Such a distortion will similarly undermine the capacities of the parties to social cooperation to develop the two moral powers, particularly the second, over the course of their lives. To address the possibility of such distortions, it is necessary for Rawlsian political theorists to modify the two principles of justice with an additional proviso of semiotic justice. The proviso of semiotic justice provides the following:

> (1) The worth of all cultural liberties to all citizens, whatever their economic or social position, must be sufficiently equal in the sense that all have a fair opportunity to contribute to public cultural expression and to affect the content of artistic, literary, media,

98 Rawlsian liberals might worry that such a requirement slides toward compelled listening. A constitutional guarantee of the fair value of the cultural liberties does not suggest that citizens must be legally compelled to listen to one another's cultural contributions, as the constitutional essentials might be satisfied by a wide range of legal regimes. The suggestion made here is that citizens must not reject other citizens' cultural contributions because of their gender, just as citizens must not refuse to vote for candidates for public office because of their gender. *Cf.* RAWLS, *supra* note 4, at 166 ("If the so-called private sphere is a space alleged to be exempt from justice, then there is no such thing.").

> and other cultural production.

As with the proviso of the fair value of the equal political liberties, this idea "parallels that of fair equality of opportunity in the second principle."[99]

> (2) Furthermore, when the parties adopt the two principles of justice in the original position, they understand the first principle to include the proviso of semiotic justice.

When integrated into Rawls's account of justice, semiotic justice will lead to the inclusion in the first principle of justice of "a proviso that the equal political liberties [and the cultural liberties,] and only these liberties, are to be guaranteed their fair value."[100]

Rawls's proviso of the fair value of political liberties insulates a democracy's political life from non-political influences. It guards against political action that reflects inequalities of wealth or status rather than citizens' considered judgments about how best to achieve justice.[101] Similarly, semiotic justice protects a democracy's cultural life from unfair control by economically or politically powerful people. It insulates the judgments that citizens make about what is valuable or worthwhile in life from being shaped or unfairly influenced by inequalities of wealth or status that have nothing to do with citizen's autonomous, non-instrumental judgments about the good. This is not to deny that cultural liberties and political liberties overlap. Similar basic liberties, including rights of freedom of conscience and expression, enable citizens to participate in both the political life and the cultural life of their communities.[102] The novel feature of semiotic justice is that it protects the fair value of liberties that are not needed to realize the first moral power but are nevertheless needed to realize the second.[103]

99 *Id.* at 149.

100 *Id.*

101 *See id.* at 51.

102 *See* Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 Nw. L. Rev. 1053, 1054 (2016) ("Freedom of speech does more than protect democracy; it also promotes a democratic culture."); *see also* Rawls, *supra* note 4, at 169 (describing the role that free speech plays in the political life of liberal democracies).

103 Rawls might note that our shared culture shapes our understanding of what social arrangements are politically possible. Therefore, respecting the fair

There are two manners in which semiotic justice can be violated. First, semiotic justice is violated when attempts at cultural participation (e.g., submissions of manuscripts for publication, attempts to secure production money for screenplays, or efforts to sell records to consumers) are assessed other than on the basis of what individual citizens, in their role as primary evaluators of culture, believe to be culturally good or worthwhile.[104] When some citizens cannot participate in cultural production because they hold a view of the good that diverges from the view of the good held by non-democratic gatekeepers—such as when elite networks of tastemakers whose views of the good do not represent those of typical citizens control access to cultural markets—access to the second moral power is compromised.[105]

Second, even in the absence of non-democratic gatekeepers, semiotic justice is violated when the access of some citizens to a cultural voice is foreclosed because other citizens refuse to entertain their proposed contributions to the culture on the basis of features that do not reflect their cultural talent and motivation, such as their race, gender, class, or social position.[106] When citizens cannot have their voices heard about what a good culture looks like, not because others disagree with them about the nature of the good but because of who they are, the second moral power is compromised.[107]

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value of the political liberties already requires guaranteeing the fair value of cultural liberties. On this interpretation, the fair value of the political liberties would entail exactly the same reform agenda as semiotic justice. While I would be happy with this outcome, I argue directly from the two moral powers to a guarantee of the fair value of the cultural liberties because I regard culture as semi-autonomous from politics and so regard this strategy as overly reductive in its description of culture. *See supra* note 62 and accompanying text.

104 This claim raises questions about how minority tastes get developed and published. See *infra* note 140 and accompanying text for a discussion of the role of subcultural tastes in semiotic justice.

105 *See* RAWLS, *supra* note 4, at 18–19.

106 *Social position* is defined here to encompass socially salient ideological commitments about the good that are associated with membership in or control of institutions that manage or restrict access to a society's cultural space, like religion, as well as personal characteristics, like personal grooming, tone of voice, and physical appearance. *Cf.* Harris v. Capital Growth Inv'rs XIV, 805 P.2d 873, 874, 883, 897 (Cal. 1991) (defining "personal characteristics").

107 This relies on a background claim that racist judgments are not judgments about what is non-instrumentally worthwhile but are instead instrumental actions, aimed at reinforcing social hierarchies and subordination. A Nietzschean white supremacist might insist that his racist dismissal of cultural contributions actually is a non-instrumental judgment about the

Because the fair value of the cultural liberties can be compromised even in the absence of non-democratic gatekeepers, respecting the requirements of semiotic justice requires that citizens make their own autonomous judgments about the value of contributions to culture. Citizens must not outsource such judgments by relying on irrelevant social markers that bear no relationship to their own judgments about what is non-instrumentally good, like race or gender.

This is not to suggest that semiotic justice is violated simply by the fact that some people are popular or influential creators or critics of cultural goods. Just as Rawls's fair value proviso is not violated simply because one person happens to have a better chance than another of being elected president because they are a more charismatic political speaker, semiotic justice is not necessarily violated if one person publishes a novel while another does not.[108] Even if only a small number of people get their novels published or their movies produced, semiotic justice is not violated as long as the secondary markets through which those novels and films get made operate fairly.[109] If citizens all had roughly the same opportunity to influence which novels are published then it would not be a problem from the standpoint of semiotic justice if one person could not get anyone to publish their novel. On the other hand, semiotic justice might be violated if only novelists who had already published, or only novelists who wrote in the style endorsed by a small, non-democratic cartel of publishers, could publish. If citizens all had roughly equal economic resources, they could vote with their pocketbooks for the sort of novels that they think are worthwhile. When secondary markets efficiently aggregate the autonomous cultural judgments of economically equal citizens, they can provide a mechanism for the democratic control of culture. If, on the other hand, such markets are controlled by cultural elites who do not respond to economic incentives, or if citizens possess greatly unequal economic resources, then secondary markets cannot, by themselves, provide for semiotic justice.[110]

good, because a white culture is non-instrumentally valuable, but such a racist is already far beyond the bounds of liberal reciprocity. *See* Rawls, *supra* note 96, at 126.

108 I owe this point to Seana Shiffrin (personal conversation).

109 I owe this point to Robert D. Goldstein (personal conversation).

110 It might be worried that semiotic justice will lead to a decimation of "high culture," leading to an end to publicly supported art that is valuable but unpopular, since high concept poetry and avant-garde theater might be

The fact that semiotic justice may be violated if publishers only accept novels from novelists who inhabit elite social circles or who write in the style that the cartel of publishers endorses as acceptable does not suggest that blind review by publishers should be legally mandated. The laws required to ensure semiotic justice need not include the direct legal regulation of how publishers make decisions about what to print. There are a range of institutional configurations that can provide the conditions for the fair value of cultural liberties. The legal apparatus used to guarantee semiotic justice could function by limiting accumulations of wealth that tend to produce inequalities of status and power over time, by ensuring more competition among publishers, or by sponsoring publicly funded presses that are controlled by democratically elected officials.[111] At the same time, direct legal regulation of publishers' decisions cannot be flatly excluded on the grounds of free speech, because the fair value of cultural liberties is as primary as are the other equal basic liberties. When these liberties conflict in particular cases, "their claims must be adjusted to fit into one coherent scheme of liberties."[112]

Semiotic justice is neither exclusively about rights to participate in cultural production nor exclusively about rights to participate in cultural consumption. Semiotic justice aims to guarantee everyone a fair chance to have a say about the culture that they live in. Productive cultural activities, like writing poetry or making paintings, can obviously contribute to the shared culture that people inhabit. Consumptive choices also shape the culture, both by serving as a form of self-expression[113] and by incentivizing the production of certain cultural goods by creating a market for them. A reader who purchases a novel helps to create a market for the novel

thought to have little "democratic appeal." This concern is misplaced because people can have different higher and lower order cultural preferences and can reflectively endorse the difference between the two. A reader can want complex fiction with temporally discontinuous narratives to be funded and produced even if, more often than not, they would rather read "trashy" science fiction.

111 *See* Jen Kreder, *Should Government Publish Books?*, PRAWFSBLOG (Feb. 26, 2018, 9:45 AM), http://prawfsblawg.blogs.com/prawfsblawg/2018/02/should-government-publish-books.html (arguing in favor of public sponsorship of university presses on the grounds that "[t]he impact of writing . . . is in the dissemination of the ideas expressed to an audience—now or in the future" and "[i]t is the rare self-published book that finds a significant audience.").

112 RAWLS, *supra* note 4, at 104.

113 *See* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 567–68 (2004).

and others of its kind, and if they form their own interpretations of the novel as they read it, they may then discuss their interpretation with their friends and thereby help to shape the cultural reception of the novel. Semiotic justice requires a rough equality of access to all culture-shaping activities, both the productive and the consumptive, because these activities are the mechanisms through which individuals exchange views and coordinate with one another about conceptions of the good.[114]

Finally, semiotic justice is a statement of a constitutional essential that is integrated into the first principle of justice, rather than a clarification of the meaning of the principle of fair equality of opportunity and the difference principle, which apply to laws regulating culture in the legislative and judicial stages. The urgency of the cultural liberties is so great that they number among the constitutional essentials for a just society: if the fair value of liberties to contribute to public cultural expression and to affect the content of artistic, literary, media, and other cultural production is not guaranteed, citizens risk losing the opportunity to develop their second moral power, a risk that they must be unwilling to take, given Rawls's political conception of the person.[115] The constitutional essentials—those items necessary for a constitution to be legitimate—include the first principle of justice along with some narrow principle "requiring an open society, one with careers open to talents" and a "social minimum providing for the basic needs of all citizens."[116] The principle of an open society and the social minimum are much narrower than the principle of fair equality of opportunity and the difference principle, respectively, but the first principle in its entirety forms a constitutional essential. That the proviso of semiotic justice is a constitutional essential is not the same as saying that it should be judicially enforceable, however.[117] A

114 However, because productive activities tend to shape culture more significantly than do consumptive activities, semiotic justice will tend to require that all citizens have roughly equal ability to participate in culture as producers, not just as consumers.

115 *See* Rawls, *supra* note 4, at 105.

116 *Id.* at 47–48.

117 *See* Frank I. Michelman, *The Constitution, Social Rights and Liberal Political Justification*, *in* Exploring Social Rights: Between Theory and Practice 21, 26 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007) (noting that some constitutional norms are meant to be fully binding and obligatory for officials to whom they apply even though "we do not expect or wish our judiciary to get too much mixed up with enforcing compliance" with them).

constitution could include the proviso of semiotic justice, but this proviso might be accompanied by a "judges, keep out" sign leaving enforcement of the proviso up to the legislature, the executive, and the citizens themselves.[118]

In many respects, the requirements of semiotic justice are similar to those of fair equality of opportunity. Fair equality of opportunity, like semiotic justice, requires that positions of cultural prestige be open to all who are equally talented and motivated to contribute to culture.[119] However, for Rawls, fair equality of opportunity is not part of the constitutional essentials of a liberal democracy, so it must give way when and if it comes into conflict with guaranteeing the equal basic liberties of the first principle.[120] Seana Shiffrin has argued that fair equality of opportunity *should* be included among the constitutional essentials, even if Rawls failed to explicitly locate it there.[121] In Shiffrin's view, "insulat[ing] access to employment and positions of power from the influence of morally arbitrary factors, such as race, gender, and class position" makes "perfect sense" given the moral interests of parties to democratic social cooperation.[122] The argument for semiotic justice is compatible with, yet distinct from, Shiffrin's argument. While Shiffrin's argument focuses on the connection between *work* and the formation and pursuit of conceptions of the good,[123] semiotic justice focuses on the role that participating in culture, whether or not as part of one's occupation, plays in realizing the moral powers.

118 *See* Lawrence Sager, *Material Rights, Underenforcement, and the Adjudication Thesis*, 90 B.U. L. REV. 579, 580 (2010) ("[A] conscientious constitutional court will on some occasions stop short of fully enforcing the Constitution because of particular features of the judicial process, but . . . these institutional limitations on the judiciary do not mark the substantive boundaries of the Constitution."); Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 244 (2008); *see also* Rehan Abeyratne, *Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy*, 39 BROOK. J. INT'L L. 1, 7 (2014) (discussing the Directive Principles of State Policy in the Indian constitution in the framework of Rawlsian constitutional theory). *But see* Shiffrin, *supra* note 14, at 1675 (arguing that the vagueness of fair value rights is often no worse for judicial enforcement than is the vagueness of formal equal basic liberties).

119 *See* RAWLS, *supra* note 24, at 73 ("In all sectors of society there should be roughly equal prospects of culture and achievement for everyone similarly motivated and endowed.").

120 *See* RAWLS, *supra* note 4, at 47.

121 Shiffrin, *supra* note 14, at 1672–73.

122 *Id.* at 1653.

123 *Id.* at 1666

B. Objections

Rawls might offer three objections to the argument that a guarantee of the fair value of the cultural liberties must be added to his first principle of justice. This section considers and responds to each of these objections.

1. Why Extend the Fair Value of Equal Basic Liberties Beyond Discrete Competitions?

In arguing that Rawls's rationale for guaranteeing the fair value of the political liberties also applies to the fair value of the cultural liberties, this article has assumed that Rawls's proviso of the fair value of political liberties should be broadly interpreted to protect the exercise of these liberties in a wide range of settings where citizens pursue their conceptions of justice, including elections, formal and informal debates about policy proposals, and also public discussions about the proper aims of government.[124]

An alternative reading of Rawls's proviso regards it as more narrowly focused on political contests, like elections, which are discrete events with clear winners and losers.[125] Under this reading, the purpose of the proviso is to insulate elections from the influence of money and so allow the outcomes of elections to be guided by citizens' political commitments weighted roughly equally, rather than by the political commitments of the wealthiest or most powerful citizens.[126] The "limited space of the public political forum" refers to the limited space of electoral discourse, where there are a small number of discrete options to be debated by citizens.[127] This interpretation of Rawls's proviso is attractive because the public facility consisting of elections and party politics is designed to "control the entry into positions of political authority," and this facility needs protection to ensure that equal citizenship is not undermined over time.[128]

Additionally, narrowing the scope of Rawls's proviso prevents it from becoming unworkable. Because beliefs about justice

124 *See supra* notes 39, 50 and accompanying text.

125 *See* Shiffrin, *supra* note 14, at 1670–71.

126 *See id.* at 1649.

127 *See* Rawls, *supra* note 4, at 150.

128 *Id.* at 149–50; *see* Robert C. Hughes, *Responsive Government and Duties of Conscience*, 5 Juris. 244, 245 (2014) (arguing that for a government to be democratic, "[c]itizens who regard the law as unjust and who diligently advance a sensible argument for changing it must be justified in believing that their efforts could, in time, help to bring about the change they seek.").

connect with so many other aspects of life, protecting the fair value of the political liberties under the broad reading might require guaranteeing, as a matter of the constitutional essentials, the fair value of all of the equal basic liberties. While we might worry about violations of the fair value of basic political liberties in contexts other than elections, proponents of the narrow reading might argue, such violations are unlikely to cascade into an entrenched advantage in the way that unfair control over electoral processes are. As long as the electoral processes remain fair, these processes can be used to reassert democratic control of other political institutions.[129] If Rawls's fair value proviso applies only to discrete political contests, it might be much less contentious than the proviso of semiotic justice, which cannot be limited in application to discrete contests because culture, for the most part, lacks contests with clear winners and losers.

In spite of its attractions, however, the narrow reading of Rawls's fair value proviso should be rejected in favor of a broader understanding of the settings to which fair value applies. One aim of guaranteeing the fair value of the political liberties "is to enable legislators and political parties to be independent of large concentrations of private economic and social power," but the rationale for protecting the political liberties extends beyond elections.[130] As donors seeking to influence elections have long realized, money can be used to help shape electoral outcomes even when it is not spent advocating for or against the election of particular candidates, but also when it is spent on ideological advocacy for certain political issues in the lead up to an election.[131]

If Rawls's fair value proviso applies only to elections and other contest-like political activities, it could still be interpreted

129 *See* ALEXANDER M. BICKETL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 18–19 (2d ed. 1986).

130 RAWLS, *supra* note 4, at 150; *see* Meena Krishnamurthy, *Completing Rawls's Argument for Equal Political Liberty and Its Fair Value: The Argument from Self-Respect*, 43 CAN. J. PHIL. 179, 199 (2013) ("[T]hough equal political liberty requires that equal voting rights are ensured, the fair value of political liberty requires more than this, that is, if each of those holding votes are to have equally effective influence over political decision-making.").

131 *See* Floyd Norris, *A Fine Line Between Social and Political*, N.Y. TIMES, May 17, 2013, at B1 (noting that large numbers of "social welfare" nonprofits spent large amounts of money in the 2012 presidential election on advertisements "to promote issues" that "did not actually back a candidate" so that they "could qualify as . . . nonpolitical issue advertisement[s]").

expansively to limit the role that money can play in electioneering issue ads meant to influence the outcomes of elections. However, even this interpretation is insufficiently broad. The outcomes of elections can be influenced more indirectly. As Jane Mayer has documented, in the late twentieth-century United States, conservative organizations backed by wealthy donors sought to wage a battle of ideas to make libertarian free-market commitments more palatable to mainstream politicians.[132] Sophisticated conservative foundations sought to affect political outcomes not just by influencing voters but by injecting their ideological stances into universities, think tanks, and nonprofits.[133] Even if one rejects the empirical details of Mayer's account of the influence of conservative foundations on American politics, the possibility that a democracy's political culture can be reshaped by wealthy individuals or institutions suggests that the guarantee of the fair value of the political liberties should be expanded beyond elections and party politics. The exercise of the first moral power is just as imperiled by the possibility that a whole political culture can be influenced by money as by the possibility that elections can be influenced. Interpreting Rawls's proviso to constitutionally guarantee the fair value of the political liberties in all the domains of life in which political values are collectively formulated and contested ensures that a democracy's political culture cannot be compromised by the powerful.[134]

The broad interpretation of Rawls's proviso advanced here still regards politics as a competition about political values, where succeeding at the competition means having one's political values accepted by the community. Similarly, culture is a competition about access to a space that people pay attention to. In the limited public facility of culture, people compete to articulate their ideas of the

132 *See generally* Jane Mayer, Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right (2016).

133 *See id.* at 93, 102, 156; *see also* John J. Miller, Strategic Investment in Ideas: How Two Foundations Reshaped America 17 (2003), https://www.philanthropyroundtable.org/docs/default-source/guidebook-files/how_two_foundations_reshaped_america1.pdf?sfvrsn=9891a740_0 (praising the John M. Olin foundation for its success at bringing about long-term change in the United States' political culture by using its financial clout to establish "beachheads at the nation's elite colleges and universities").

134 The domain of politics still has "limited space" under this interpretation because there is a limited amount of attention that the members of a community can devote to politics and justice. *See* Rawls, *supra* note 4, at 150.

good and of how best to live together.[135] Just as the moral powers—especially the first—would be compromised if money shaped the political ideas that a community collectively paid attention to, so too the second moral power would be compromised if a wealthy foundation or religious organization used its material resources to systematically alter a community's beliefs about the good. To avoid this possibility, democracies should embrace the proviso of semiotic justice.

Of course, political communities do not inescapably coordinate about the good, as they must coordinate about the right and about government. However, in a community that is committed to ensuring that everyone has an equal opportunity to form their own values and judgments of the good, some degree of coordination about the good is required to ensure that arbitrary entitlements do not leave some citizens with a much greater chance than others to form their own conception of the good. For this reason, semiotic justice might be understood to require modifications to Rawls's political conception of the person. For Rawls, the person is conceptualized as a free rational person reaching an agreement with other free rational persons and is understood to reach a reciprocal agreement as a citizen with other citizens.[136] The reciprocal cooperation that the members of a cooperating society agree upon is cooperation as citizens. Elevating cultural liberties to the level of a constitutional essential reflects a concern with something other than citizenship; now a commitment to creating a space in which people can pursue and revise conceptions of the good *with each other* is on par with the political aims of Kantian persons.[137] Rawls's account of the parties to the original position as reciprocal cooperators might still be

135 Claiming that culture is a competition is not to suggest that culture is merely a struggle for elevated social recognition or for fame. The contest of culture involves taking up existing cultural materials and amplifying, transforming, or destroying them. Culture is competitive because our views of the good life are typically about a good life *together with other people* rather than alone in the wilderness, and because the cultural resources that we take up and transform are shared resources. As success in the competitive space of politics is marked not by achieving power but by achieving one's conception of justice, so success in the competitive space of culture is marked not by achieving fame but by achieving one's conception of the good. *See supra* notes 82–88 and accompanying text.

136 *See* RAWLS, *supra* note 4, at 16.

137 RAWLS, *supra* note 24, at 445 ("[T]he Kantian interpretation of the original position means that the desire to do what is right and just is the main way for persons to express their nature as free and equal rational beings.").

sustained, but the reciprocity cannot be simply reciprocity as citizens.

One might yet wonder whether culture requires the same sort of connection to the state that politics does: because of the role of the basic structure in allocating scarce resources and regulating interpersonal relationships, the first moral power cannot be pursued in isolation in a small enclave cut off from the state. Perhaps the second moral power, in contrast to the first, can be realized in a subculture or a dissident culture that is largely disconnected from mainstream politics and culture.[138] However, because pursuing a conception of the good typically requires access to material resources (cameras to make movies and the like), cultural source material to work with, and the capacity to impact others, the space of culture cannot be strictly segregated from the space of politics.[139] Furthermore, while affordances to participate in subcultures provide a way of exercising the second moral power, subcultural creation does not happen in a vacuum. The broader culture helps to shape what conceptions of the good are thinkable and unthinkable, even for the avant-garde.[140] As soon as the state is involved in shaping the broad cultural landscape by creating schools and universities, regulating school curricula, and funding the arts, humanities, and sciences, the possibility of cordoning culture off from politics is lost.

2. Why Make Semiotic Justice a Constitutional Essential?

Rawls might respond to semiotic justice by arguing that there is no need to turn this additional proviso into a constitutional essential. The fair value of the political liberties is a constitutional essential because of the usefulness of these liberties in making the whole basic structure function effectively and justly.[141] Rawls might highlight four features of justice as fairness: first, guarantees in the first principle of freedom of conscience; second, the likelihood that there would be some overlap in practice between semiotic justice and the guarantee of the fair value of the political liberties; third, the difference principle; and fourth, the principle of fair equality of

138 *See* Paul Gilroy, The Black Atlantic: Modernity and Double Consciousness 7 (1993); Paul C. Taylor, Black is Beautiful: A Philosophy of Black Aesthetics 14–15 (2016).

139 *See* Rawls, *supra* note 4, at 114 ("[A] sufficient material basis for personal independence and a sense of self-respect . . . are essential for the adequate development and exercise of the moral powers.").

140 *See* Rosalind E. Kraus, The Originality of the Avant Garde and Other Modernist Myths 162 (1986).

141 *See* Rawls, *supra* note 4, at 28.

opportunity operating at the legislative stage.[142] Rawls might ask why this set of factors is not good enough to ensure that the cultural liberties have their fair value. These guarantees, Rawls might insist, suffice to ensure that everyone has the best chance to participate in culture that they possibly could have, consistent with the other requirements of justice. For instance, fair equality of opportunity is precisely about the equal opportunity to fully and adequately develop and exercise the first and second moral powers.[143] Fair equality of opportunity would, therefore, likely require the legislature to adopt antitrust-like laws designed to counteract accumulations of cultural power. What difference does it make to put this into the constitution, rather than to leave it to the legislative stage?

To understand the importance of constitutionalizing semiotic justice, consider why Rawls insists that the fair value proviso for the equal political liberties needs to be part of the first principle, rather than postponed to the legislative stage. Rawls suggests that the political liberties are of special importance, because "unless the fair value of these liberties is approximately preserved, just background institutions are unlikely to be either established or maintained."[144] By guaranteeing the fair value of the political liberties at the outset, before the legislative stage is reached, a society can ensure that everyone will be able to fairly participate in the legislative process.[145] If all citizens are able to have their voices heard by the legislature, this will ensure that "the [other] basic liberties are not merely formal."[146] Like Chief Justice Warren's description of the right to vote freely as "preservative of other basic civil and political rights,"[147] or John Hart Ely's advocacy of "a representation-reinforcing approach to judicial review" that supports "the underlying premises of the American system of representative democracy,"[148] the fair value of the equal political liberties is particularly urgent because it makes the political system work, which in turn ensures that the other basic liberties will be realized. The legislative stage cannot take care of the fair value of the political liberties if access to that stage is not itself fair. The reasons for treating the proviso of the fair value of the

142 *See id.* at 44, 47, 61, 148.
143 *Id.* at 20.
144 RAWLS, *supra* note 6, at 327–28.
145 *Id.* at 330.
146 *Id.*
147 Reynolds v. Sims, 377 U.S. 533, 562 (1964).
148 JOHN HART ELY, DEMOCRACY AND DISTRUST 88 (1980).

political liberties as part of the first principle, and hence as part of the constitutional essentials, boils down to the claim that it is "more urgent to settle" the fair value of the political liberties than of the other basic liberties.[149]

My response to this objection has two parts. First, as I have argued above, the contours of culture shape what is politically possible. As the hypothetical society shot through with sex inequality that I describe above illustrates, an undemocratic culture can undermine the conditions necessary for democratic politics.[150]

Second, the fair value of the cultural liberties is particularly urgent because guaranteeing such liberties creates the conditions necessary for political philosophy to do its work. The political philosophizing that gives rise to the political conception of the person is worked up from the "public political culture of a democratic society, in its basic political texts (constitutions and declarations of human rights), and in the historical tradition of the interpretation of those texts."[151] If there are blind spots in the historical traditions in which justice as fairness goes to work, justice as fairness is likely to suffer from similar oversights.[152]

However, a commitment to making culture open and to allowing the conditions against which political philosophy grows up to be contested by all of the people of a cooperating society, provides an avenue to address these oversights. Interventions in culture can bring to light previously unrecognized ways of life,[153] providing resources with which individuals may develop their conceptions of the good and showing philosophers where political philosophy should play its "realistically utopian" role, "probing the limits of practical political possibility."[154] Cultural participation is the sort of expression that creates the conditions of awareness that political

149 Rawls, *supra* note 4, at 49.

150 *See supra* notes 89–98 and accompanying text.

151 Rawls, *supra* note 4, at 19.

152 One piece of evidence for this claim is that Rawls's theory of justice has frequently been criticized for failing to pay sufficient attention to global justice, *see, e.g.*, Thomas W. Pogge, World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms 104–08 (2002), women's rights, *see, e.g.*, Susan Moller Okin, *Justice and Gender: An Unfinished Debate*, 72 Fordham L. Rev. 1537 (2004), and disability, *see, e.g.*, Martha C. Nussbaum, *Capabilities and Disabilities: Justice for Mentally Disabled Citizens*, 30 Phil. Topics 133 (2002), all topics that have historically been overlooked in the history of elite American political discourse.

153 *See* Richard Rorty, Contingency, Irony, and Solidarity 94 (1989).

154 Rawls, *supra* note 4, at 4.

philosophy can then work to incorporate, seeking out voices that cannot be understood in the realm of political philosophy unless they are first articulated in cultural space. For instance, Julie Cohen discusses how the "to and fro" play of culture, which is "neither entirely random nor wholly ordered . . . supplies the unexpected inputs to creative processes, fuels serendipitous consumption by situated users, and inclines audiences toward the new."[155] The unpredictability of culture's movements in response to inputs provides a further resource for destabilizing and rethinking political theory.

Guaranteeing the fair value of the cultural liberties is of similar urgency to guaranteeing the fair value of the political liberties because the cultural background against which politics works, and which informs its conception of the person, determines what sort of institutional arrangements appear reasonable from the perspective of politics. Guaranteeing the fair value of the cultural liberties ensures that the ability to develop and pursue conceptions of the good is a real opportunity to do so, rather than merely an opportunity to endorse the prevailing conceptions of the good in a cooperative society.

3. Is Semiotic Justice Socially Divisive?

A third objection to semiotic justice is that guaranteeing the fair value of basic liberties other than the equal political liberties is socially divisive because it requires committing to a particular conception of the good.

To the contrary, semiotic justice does not articulate a preference for certain conceptions of the good over others within the space of culture that it opens up. This is not to say that semiotic justice is indifferent among all possible conceptions of the good; it excludes conceptions of the good that require a closed or static culture.[156] However, within the space of permissible cultural contestation, semiotic justice need not make controversial suppositions about the good life. Semiotic justice does not assume that participating in culture is necessarily an important and valuable part of individuals' lives, but instead supposes that citizens who wish to pursue their own conception of the good need a cultural environment that is

155 Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1191–92 (2007).

156 *See supra* notes 109–10 and accompanying text.

conducive to that pursuit.[157] Justice as fairness identifies certain "worthy" forms of life and provides sufficient space within itself for those ways of life while also excluding other forms of life.[158] This is permissible for Rawls because the exclusion of some ways of life is based on a political conception of justice that is, "or could be, shared by citizens generally regarded as free and equal" and "do[es] not presuppose any particular fully (or partially) comprehensive doctrine."[159] Semiotic justice's preferences for certain forms of life are likewise rooted in the political conception of the person as having the first and second moral powers, rather than in any commitment to a particular comprehensive conception of the good. Semiotic justice sets up a space of culture, and while it may foreclose the development of conceptions of the good outside of that space, it commits to allowing all of the different conceptions of the good that are able to fit within that space to play out against one another.

III. SEMIOTIC JUSTICE AND LAW

This article has argued that, given several plausible descriptive assumptions about the political economy of culture, Rawls's first principle of justice must guarantee semiotic justice.[160] Just as the fair value of the political liberties is among the constitutional essentials of a liberal society governed by justice as fairness, so too is the fair value of the cultural liberties. This emendation of the first principle is necessary to constitutionally guarantee that a nation's culture is controlled democratically, rather than by the wealthy or the powerful. In this Part, I turn to the question of what it means, in practice, to respect the fair value of the cultural liberties.

Adding items to Rawls's list of constitutional essentials is no simple matter, for Rawls's first principle requires not that each person have a right to each of the equal basic liberties but that each person have a right to "a fully adequate *scheme* of equal basic liberties" that is compatible with everyone else having the same scheme of liberties.[161] The items included among the constitutional essentials may trade off with one another and are treated as equally significant

157 *Cf.* Shiffrin, *supra* note 14, at 1667 (advancing a similar argument that guaranteeing the fair equality of opportunity in employment does not rely on "controversial assumptions about the nature of the good for individuals").

158 *See* RAWLS, *supra* note 4, at 155 n.30.

159 *Id.* at 141.

160 *See supra* Section II(A)(1)–(2).

161 RAWLS, *supra* note 4, at 42–43 (emphasis added).

when they come into conflict.[162] Any resolution of practical conflicts among the constitutional essentials that maintains a scheme of constitutional essentials that is as conducive as possible to every citizen's realization and development of the moral powers and that satisfies the demands of public reason meets the requirements of constitutional legitimacy.[163] Thus, it does not immediately follow from adding the fair value of cultural liberties to the list of constitutional essentials that a political community's laws must be revised in order to be legitimate. To determine what revisions to a partially just society's laws and political institutions would satisfy the requirements of semiotic justice, one must consider whether the totality of the society's laws adequately enable citizens to develop the two moral powers by providing them with a scheme that includes the each of the formal equal basic liberties, a basic social minimum, the fair value of the political liberties, and the fair value of cultural liberties, where all of these liberties are regarded as equally significant.[164]

Like justice as fairness, the constitutional requirements of semiotic justice are multiply realizable.[165] For this reason, the significance of semiotic justice for constitution-making, legislating, and adjudication can best be understood by examining cases that present failures of semiotic justice and considering the reforms that might bring a constitutional order into compliance with the requirements of justice as fairness, generally, and the semiotic justice proviso, specifically. Three cases are presented that illustrate failures of semiotic justice and discuss the range of policy reforms that might bring the constitutional order elucidated by each of these cases more closely into alignment with the requirements of semiotic justice. These cases highlight the range of disparate laws and institutions

162 *See id.* at 149. *But see* Shiffrin, *supra* note 14, at 1672 (arguing that "the idea that whether something is a constitutional essential or not is co-extensive with its place in the system of lexical priority" may be mistaken).

163 Michelman, *supra* note 87, at 195.

164 Here, I follow Frank Michelman in regarding not only written constitutions but also the "governmental totality" of "the entire aggregate of concrete political and legal institutions, practices, laws, and legal interpretations currently in force or occurrent in the country" as potentially relevant to assessing the legitimation-worthiness of a society's constitution. Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 FORDHAM L. REV. 345, 347 (2003).

165 *See* RAWLS, *supra* note 4, at 138 (noting that the principles of justice can be satisfied in a range of economic regimes, including both "property-owning democracy" and "liberal socialism").

that play a role in guaranteeing or undermining the fair value of the cultural liberties. Together, these cases show how the requirements of semiotic justice intersect not only with constitutional law, but also with features of private law that often appear politically "neutral." A full evaluation of the reforms surveyed in response to each of these cases is beyond the scope of this Article, as is an assessment of the reforms' political feasibility; rather, the aim is to model how semiotic justice provides a "template against which to assess our achievements" and "a norm against to which to assess what we have neglected and failed to protect."[166]

A. #OscarsSoWhite: Race Discrimination and Cultural Accolades

In 2016, for the second year in a row, exclusively white actors were nominated for Oscar awards by the Academy of Motion Picture Arts and Sciences. A significant number of critically acclaimed films with minority directors and notable performances by black actors were eligible for the 2016 Oscars, including Creed, Straight Outta Compton, Chi-raq, and Beasts of No Nation.[167] Straight Outta Compton, directed by and starring African-Americans but written by a team of white screenwriters, was nominated only for Best Original Screenplay.[168] Protestors objected that the mono-racial Oscar nominations failed to honor the contributions of minority actors, directors, and writers to cinema in 2015.[169] The complaint of protestors was not that the Academy violated state or federal anti-discrimination laws, nor did actors and filmmakers who boycotted the awards ceremony seek interventions from lawmakers or politicians to address discrimination in Oscar nominations.[170] Nonetheless, the phenomenon of #OscarsSoWhite represents a failure of semiotic justice.

To see why the fact that the Academy of Motion Picture Arts and Sciences nominated exclusively white actors for Academy

166 Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 8 (2007).

167 Gray, *supra* note 1.

168 *See id.*

169 Jack Shepherd, *Oscars 2016: Everyone Who Boycotted the Academy Awards and Why, from Jada Pinkett Smith to Spike Lee*, INDEPENDENT (Feb. 28, 2016, 21:47 GMT), http://www.independent.co.uk/arts-entertainment/films/news/oscars-2016-everyone-boycotting-the-academy-awards-and-why-from-jada-pinkett-smith-to-spike-lee-a6902121.html; Ng, *supra* note 1.

170 *See* Ng, *supra* note 1.

Awards in 2015 and 2016 provides prima facie evidence of a failure of the constitutional order of the United States to guarantee the fair value of the cultural liberties, several additional premises are required. First, the Academy Awards serve as the most visible institutional gatekeeper of cinematic prestige in the United States.[171] Such prestige is connected to, but partially independent from, the economics of the film industry. For instance, the Academy does not simply respond to economic indicators when deciding which films and performances to nominate for Oscars—in fact, the films that make the most money at the box office often are not considered "Oscar material."[172] Winning or being nominated for an Oscar can help a film sell tickets, but these accolades also provide a special sort of cultural recognition and canonization for films, making it more likely that audiences and other filmmakers will pay attention to and be influenced by a film.[173] In this institutional and cultural context, mono-racial Oscar nominations constitute a failure of semiotic justice because the decision of the Academy not to nominate African-American filmmakers or actors both provides evidence of and causally contributes to the inability of minority filmmakers—relative to white filmmakers—to participate in shaping American cinematic culture.

It may be objected that no state action is involved—the Academy is a private association, conferring private honors—and so it is inapt to describe its failings as failings of justice. It might further be objected that even if the Academy's failings are failings of justice, they cannot affect the legitimacy of the United States' constitutional order.

While the Academy is indeed a private association, this is not

171 *See, e.g.*, Colleen Kennedy-Karpat, *Trash Cinema and Oscar Gold: Quentin Tarantino, Intertextuality, and Industry Prestige*, *in* ADAPTATION, AWARDS CULTURE, AND THE VALUE OF PRESTIGE 173, 187 n.2 (Colleen Kennedy-Karpat & Eric Sandberg eds., 2017) (treating Academy Awards as the primary marker of prestige in Hollywood).

172 *See* K.K. Rebecca Lai & Jasmine C. Lee, *Box Office Hit or Best Picture at the Oscars? You Can Rarely Have Both*, N.Y. TIMES (Mar. 4, 2018), https://www.nytimes.com/interactive/2018/03/03/movies/oscars-best-picture-box-office.html ("Hit movies rarely go on to become Oscar best picture winners, reflecting a difference in taste between moviegoers and film industry professionals. In the past 30 years, only four movies were named best picture while topping box office charts.").

173 *See* Colleen Kennedy-Karpat & Eric Sandberg, *Adaptation and Systems of Cultural Value*, *in* ADAPTATION, AWARDS CULTURE, AND THE VALUE OF PRESTIGE, *supra* note 171, at 1, 5.

enough to settle the question of whether its decisions in nominating films for Oscars can count as a failure of justice. The Academy's actions constitute one small part of the basic structure and thus only constitute a small part of the failure of semiotic justice in this case.[174] It is not the failure of the Academy by itself that constitutes a failure of constitutional legitimacy, but the total arrangement of laws and political institutions that make it possible for the Academy to exercise a great deal of gatekeeping power over cinematic prestige together with the revealed preference of the Academy's members to exclude minority actors from access to the prestige-conferring Oscars. Even if the Academy is not part of the basic structure, the failure of the Academy to nominate minority actors provides evidence of a failure by the state to respect semiotic justice. A culture in which minority actors and filmmakers do not have fair equal access to the main markers of cultural prestige in the film world is a culture that fails at reciprocity, and failures of reciprocity indicate that a constitutional order is illegitimate.[175]

Consider the following three reforms that the legal and political institutions of the United States (e.g., Congress, legislatures, state and federal courts, and state and federal agencies) could implement in response to #OscarsSoWhite in order to bring the American constitutional order closer to legitimation-worthiness.

First, Congress and state legislatures or state and federal courts could extend anti-discrimination laws to prohibit racial discrimination in the provision of offices and awards held out to the public as honors to be respected.[176] Congress and state legislatures

174 Some of the most prominent actors and filmmakers to boycott the 2016 Oscars, including Jada Pinkett-Smith and Spike Lee, invoked the memory of Martin Luther King in explaining their decision to boycott. *See* Shepherd, *supra* note 169. King, whose campaigns served as an exemplary touchstone for Rawls's conceptions of justice as fairness and political liberalism, targeted economic elites, social organizations like churches, and ordinary citizens "because he conceived of justice as a virtue of persons and civil society, as well as the state or the 'basic structure' of society." Brandon M. Terry, Critical Race Theory and the Tasks of Political Philosophy: On Rawls and "The Racial Contract" 29 (n.d.) (unpublished manuscript on file with the author). As King recognized, the basic structure of society is inextricable from the organization of private institutions and the dispositions of private citizens. *See id.*

175 *See* Rawls, *supra* note 6, at 137.

176 For instance, California could amend its Unruh Civil Rights Act, which states that all persons are "entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of any kind whatsoever" regardless of their race. Cal. Civ. Code § 51(b) (Deering

could, at the same time, modify anti-discrimination laws to allow disparate impact—rather than disparate treatment—to establish a violation of these laws.[177] This strategy would aim to ensure that the Oscars honor more diverse filmmakers and actors in order to avoid liability for violating state or federal anti-discrimination law.

Second, the federal or state governments could provide a universal basic income,[178] institute more progressive property and income taxes,[179] provide reparations for slavery to the descendants of slaves,[180] and increase investments in arts and humanities education in public schools and universities so that the writing and artistic skills needed to contribute to film are more widely accessible.[181] This suite of reforms would aim to change the behavior of the Academy Awards indirectly. By helping to equalize the purchasing power of minority and white movie audiences, these wealth transfers would address the possibility that the decision of the Academy to honor predominantly white filmmakers reflects audience preferences, with white audiences exercising disproportionate influence because of their greater disposable incomes that enable them to spend more on movie tickets, rentals, and purchases.

2019). The California legislature could add a clause entitling all persons to full and equal privileges from "all organizations offering offices and awards that are held out to the public as honors to be respected." Alternatively, the California courts could interpret "all business establishments of every kind whatsoever" to include the Academy of Motion Picture Arts and Sciences' Academy Awards and interpret "full and equal . . . privileges" to include nomination and selection for Academy Awards. *See id.*

177 *See* Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1135–36 (2010) (describing the importance of disparate impact claims); *see also* Ann C. McGinley, Ricci v. DeStefano*: Diluting Disparate Impact and Redefining Disparate Treatment*, 628 NEV. L.J. 626, 629–35 (2012) (describing the distinction between disparate impact and disparate treatment in contemporary federal anti-discrimination law).

178 *See* PHILIPPE VAN PARIJS & YANNICK VANDERBORGHT, BASIC INCOME: A RADICAL PROPOSAL FOR A FREE SOCIETY AND A SANE ECONOMY 5–28 (2017) (articulating a concrete proposal for implementing a universal basic income).

179 *See* Thomas Piketty, *Property, Inequality, and Taxation: Reflections on Capital in the Twenty-First Century*, 68 TAX. L. REV. 631, 638–41 (2015); *see also* C. Ronald Chester, *Inheritance and Wealth Taxation in a Just Society*, 30 RUTGERS L. REV. 62, 66–72 (1976).

180 *See* BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS 8–29 (2d ed. 2003); *see also* Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 294–308 (2003).

181 *See* SEFAN COLLINI, SPEAKING OF UNIVERSITIES 193–205 (2017).

Third, Congress could establish and fund a National Endowment for Film with a mandate to honor and promote excellence in the cinematic arts and directions to establish an annual awards program for excellence in filmmaking and acting.[182] This strategy would aim not to change the behavior of the Academy of Motion Picture Arts and Sciences but instead to change the Academy's role in the culture of the contemporary United States, displacing it as the primary gatekeeper of cinematic prestige so that its failure to honor minority actors would not prevent minority actors from having a roughly equal opportunity to participate in the shared culture. This reform strategy would not render a failure of the Academy to honor diverse actors morally permissible, but it would help to establish a more legitimate constitutional order.

These three reform strategies demonstrate how semiotic justice, like justice as fairness more generally, is multiply realizable: there are different points of intervention in the legal-constitutional schema, each of which would have a somewhat different effect on the legitimacy of the constitution. Because semiotic justice elevates the fair value of the cultural liberties to the level of a constitutional essential, the fair value of the cultural liberties has the same priority as the formal basic liberties, including the right to free speech.[183] The first reform option mentioned above, which involves expanding anti-discrimination law to directly regulate the Academy's decisions of which movies to honor, might be objected to on the grounds that it interferes with the Academy's freedom of speech (or with the freedom of speech of its members). However, because the formal liberty of free speech and the fair value of the cultural liberties both number among the constitutional essentials according to semiotic justice, this objection is not decisive. In Rawls's view, the Supreme Court erred in *Buckley v. Valeo* when it struck down the Federal Election Campaign Act of 1971's limits on election spending as violating the First Amendment.[184] While the limits on election spending restricted the formal liberty of free speech, such limits advanced the fair value of the equal political liberties by ensuring that citizens have roughly equal opportunities to influence electoral outcomes, regardless of wealth.[185]

182 *Cf.* Fisher, *supra* note 13, at 200 (discussing direct government funding for the production of public goods).

183 *See* Rawls, *supra* note 4, at 46–47, 104–06.

184 Buckley v. Valeo, 424 U.S. 1, 58–59 (1976); Rawls, *supra* note 6, at 359–63.

185 Rawls, *supra* note 6, at 449; *see Buckley,* 424 U.S. at 23. Because the equal

Likewise, treating the formal liberty of free speech as settling the question of whether the Academy's decisions of which films to honor can be regulated by anti-discrimination laws would be to privilege formal rights over other rights—namely, the fair value of the cultural liberties—that are equally important for the two moral powers. Restricting the formal free speech rights of the Academy might be precisely what is needed to ensure that citizens have roughly equal opportunities to accrue cinematic prestige and recognition. On the other hand, the formal liberty of free speech might require that the second or third reform strategy be adopted instead of the first, at least insofar as the first strategy restricts freedom of expression that is valuable for the first and second moral powers.[186] The different reform strategies that I have sketched entail different baskets of formal basic liberties and substantive political and cultural liberties; settling on which reform schemes semiotic justice endorses requires determining which schemes, if any, adequately guarantee access to *all* the equal basic liberties.

Fair equality of opportunity would propose exactly the same sort of legal reforms that semiotic justice suggests, except that the legal reforms proposed by the fair equality of opportunity might be more tightly constrained by the need to respect the formal equal basic liberties, including the freedom of speech. However, Rawls's principle of fair equality of opportunity fails to treat the case of #OscarsSoWhite as involving the issue of *legitimacy*.[187] This is a mistake on Rawls's part, because, like the fair value of the equal political liberties, the fair value of the cultural liberties is a field in which the failure of reciprocity can have widespread downstream effects, infecting our very ability to theorize a good culture.[188] Furthermore, while the #OscarsSoWhite case concerns discrimination along the lines of a protected category (i.e., race), semiotic justice demands equal access

basic liberties should be understood in association with one another, the point might also be put in another way: on the best understanding of the formal liberty of free speech, the right of free speech does not include a right to make unlimited campaign expenditures. A right to free speech that does not include such a right to make campaign expenditures is not a "compromised" formal right of free speech—it is simply the best understanding of the *meaning* of free speech.

186 *See* RAWLS, *supra* note 4, at 41, 45.

187 *See, e.g.*, THOMAS W. POGGE, REALIZING RAWLS 164–65 (1989). Shiffrin's reading of fair equality of opportunity is a notable exception. Shiffrin, *supra* note 14, at 1660.

188 *See supra* note 70 and accompanying text.

on the ground of the right at issue, rather than on the basis of the classification that forms the basis for the discrimination. In this sense, the constitutional question posed by semiotic justice is more one of "fundamental rights" than one of "suspect classifications" in the vocabulary of American constitutional jurisprudence.[189]

B. Copyright Law and Appropriation Art

The following cases about an appropriation artist will help to further distinguish the reform agenda of semiotic justice from that of Rawlsian fair equality of opportunity[190]:

> Morgan, a semi-professional Los Angeles artist, creates a screen-printed T-Shirt riffing on an iconic photograph of a surfer catching a wave, taken a decade ago by Quinn, one of Morgan's favorite professional photographers. Morgan uses a digital image of the photograph as a reference image when she designs her T-shirt but modifies it heavily, removing much of the detail present in the photograph and adding visual elements that call attention to what Morgan regards as the typically overlooked influence of punk rock on Quinn's photographic aesthetic, as well as other images and text referring to the history of street art in Los Angeles. Morgan makes twenty copies of the T-shirt and sells half of them, for thirty dollars each, at a semi-commercial street-art festival. Quinn happens to attend the festival and sees Morgan's T-shirt; the following day, Quinn's attorney contacts Morgan demanding that she cease production of the T-shirts, destroy her existing inventory, and turn over her profits plus a $5,000 licensing payment to Quinn. Morgan believes that her T-shirt constitutes

189 *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (striking down a law prohibiting inter-racial marriage on the basis of both the suspect nature of racial classifications and a fundamental right to marry).

190 Appropriation art "takes over pre-existing images to re-employ them unchanged in a different context or with a different purpose in mind, thus altering [their] meaning." Edward Lucie-Smith, The Thames & Hudson Dictionary of Art Terms 17 (2d ed. 2004); *see also* Simon Wilson & Jessica Lack, The Tate Guide to Modern Art Terms 20–21 (1st ed. 2008) (offering a similar definition of appropriation art but noting that appropriation can involve not just existing works of art but any "real object").

a fair use of Quinn's image,[191] but after speaking with a lawyer, she learns that determining whether her T-shirt is a fair use is a fact-intensive inquiry that would likely be settled only after discovery if Quinn were to sue.[192] Moreover, she learns that if a court determined that her T-shirt were not a fair use, Quinn could be awarded both a disgorgement of her (miniscule) profits and statutory damages, perhaps in the tens of thousands of dollars, if it proved difficult for him to establish actual damages.[193] Quinn might even be awarded attorney's fees and costs, on top of damages.[194] Morgan believes that there is a ninety percent likelihood that she would prevail at trial on a fair use defense, but because of the cost of retaining a lawyer and the risk of losing a trial and being bankrupted, Morgan decides she does not want to chance it.[195] She offers to license the image from Quinn for a reasonable fee, and even to turn over all profits from the shirt to Quinn, since she is more concerned about disseminating her art than making money from it. But Quinn refuses to entertain the possibility of a license, telling Morgan, through his attorney, "I decide when and where my art gets displayed. Anyway, punk is a crap aesthetic and I want

191 *See* 17 U.S.C. § 107 (2017) (fair use provision of U.S. copyright law).

192 *See, e.g.*, Sony Corp of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 n.31 (1984) (describing fair use as "an equitable rule of reason"); DC Comics, Inc. v. Reel Fantasy, Inc., 696 F.2d 24, 28 (2d Cir. 1982) ("The four [fair use] factors listed in [17 U.S.C.] Section 107 raise essentially factual issues and . . . are normally questions for the jury.").

193 *See* 17 U.S.C. § 504(b) (2017) (providing for actual damages for copyright infringement in addition to disgorgement of infringer's profits); 17 U.S.C. § 504(c)(1) (providing that a copyright owner may elect to receive statutory damages rather than actual damages, to be awarded in an amount between $750 and $30,000 per work); 17 U.S.C. § 504(c)(2) (providing that statutory damages may be increased up to the amount of $150,000 per work in the case of copyright infringement "committed willfully").

194 *See* 17 U.S.C. § 505.

195 *Cf.* Meir Feder, Edwin Fountain & Geoffrey Stewart, *What's Wrong with the Copyright Regime*, *in* William W. Fisher, Frank Cost, Shepard Fairey, Meir Feder, Edwin Fountain, Geoffrey Stewart & Marita Sturken, *Reflections on the Hope Poster Case*, 25 HARV. J. L. & TECH. 243, 298–305 (2012) (noting that jury trials can be particularly risky for copyright defendants asserting a fair use defense because of jury bias against people who copy the work of others).

> nothing to do with it." Feeling that she has no other choice, Morgan negotiates a settlement with Quinn's lawyer, agreeing to cease production of her T-shirt, destroy her inventory, turn over all of her profits from selling the shirt, and issue a public apology.[196]

This case might initially seem less like a violation of semiotic justice than the case of #OscarsSoWhite. In the Oscars case, Academy members failed to take minority actors and filmmakers seriously as contributors to cinematic culture: where reciprocity requires a serious engagement with the cultural contributions of minority actors and filmmakers, there was instead racial bias. In this case, the problem is not that Quinn is unwilling to entertain Morgan's contribution to artistic culture. He does not like her T-shirt's "punk aesthetic," but his rejection of a licensing agreement does not result from racial or gender discrimination against Morgan. To see why this story about appropriation art also demonstrates a failure of semiotic justice, we need to consider the broader socio-legal context of the interaction between Quinn and Morgan.

Copyright law confers on creators an exclusive, property-like entitlement "to prepare derivative works based upon" the work in which they hold a copyright.[197] In the case described above, Quinn exercises this right to regulate the conditions under which later entrants can contribute to the culture, restricting Morgan from making a T-shirt highlighting what she sees as the continuities between punk and Quinn's photographic style. The failure of semiotic justice does not come from the one-off interaction between Morgan and Quinn, or even from the Copyright Act in isolation. Rather, the combination of many elements, including the breadth of copyright entitlements, the fact sensitivity of fair use determinations, the cost of hiring intellectual property lawyers and defending a lawsuit to the point of summary judgment, the absence of a strong welfare net providing insurance against the risk of a massive civil damages award, and the potential non-dischargability of copyright damages

196 While this case is hypothetical, its general shape is taken from a copyright dispute in which the author represented an appropriation artist in settlement negotiations. Some elements of the hypothetical are also drawn from the "Hope Poster" case, Fairey v. Associated Press, No. 09-01123, 2009 WL 319564, (S.D.N.Y. Mar. 11, 2011), in which, as a law student, the author served as a member of Shepard Fairey's pro bono legal team.

197 17 U.S.C. § 106 (2017).

in bankruptcy,[198] collectively confer a broad discretionary power on incumbent creators as a class to control which creative works that appropriate or riff on the incumbents' works can legally be distributed to wide audiences. As a result, the formal rights of cultural participation are more useful to the class of incumbent creators, the group most likely to compose a non-democratic cultural elite, than to the class of new artistic creators, violating the guarantee of the fair value of the cultural liberties.

It might be objected to semiotic justice that any system of copyright law gives an entitlement to incumbent creators, and that semiotic justice reaches too far in claiming that fact patterns like the vignette about Morgan and Quinn provide evidence of an illegitimate constitution. However, the problem with American copyright law, from the standpoint of semiotic justice, is not just that it provides incumbent artists with the right to be compensated for uses of their works—the problem is the arbitrary control conferred on incumbent creators. The present system of copyright law fails to respect the capacity of new creators (relative to incumbent creators) to make contributions to culture. This failure of respect is clearest in cases in which conferring an entitlement on copyright holders does nothing to incentivize creative activity.[199]

Consider the following five reform strategies, which illustrate the range of legal reforms—some, but not all of which directly involve copyright law—that might be adopted in responses to cases like that of Morgan and Quinn to make the American constitutional order more legitimate.

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198 *See* Star's Edge, Inc. v. Braun (*In re* Braun), 327 B.R. 447, 450 (Bankr. N.D. Cal. 2005) ("Statutory damages for copyright infringement are also indicative of injury and, therefore, are nondischargeable in bankruptcy."); Feder, Fountain & Stewart, *supra* note 195, at 312.

199 In *Eldred v. Ashcroft*, the Supreme Court upheld the Copyright Term Extension Act, which extended the duration of copyright from "creation until 70 years after the author's death." 537 U.S. 186, 195–98 (2003). Congress extended the term in spite of the fact that "from a rational economic perspective the time difference among these periods makes no real difference." *Id.* at 255–56 (Breyer, J., dissenting). The majority did not disagree with Breyer's assessment of economic rationality, but simply stated that it was deferring to Congress on the matter. *Id.* at 207 n.15. At the same time, extending the copyright term by twenty years makes it significantly harder for authors to engage with and make use of works that would otherwise have fallen into the public domain. *See* NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 175 (2008). Such transfers of cultural power to incumbent actors that do not directly incentivize further creativity are likely to undermine the fair value of the cultural liberties.

First, Congress could reform damages provisions of copyright law, eliminating statutory damages for copyright infringement involving appropriation art.[200] At the same time, Congress could direct courts not to award attorneys' fees to successful copyright plaintiffs in cases involving appropriation art and could encourage artists to assert fair use rights by establishing a presumption that courts will award costs and attorney's fees to appropriation artists who successfully assert fair use as a defense.[201] This reform strategy would not alter which exclusive rights accrue to copyright holders under the Copyright Act, or even change what uses count as "fair use," but would aim to make it less risky for non-incumbent creators to assert fair use rights and so to limit the degree to which incumbent creators can make use of the fact-sensitivity of fair use determinations to control appropriation art.

Second, Congress could institute compulsory licensing for appropriation art, modeled on existing compulsory licenses, such as compulsory licenses for making recordings of nondramatic musical compositions.[202] Under such a program, artists like Quinn would retain an exclusive right to create derivative works but, when copyright owners were unwilling to bargain for a license or demanded unreasonably high licensing fees, creators of appropriation art like Morgan could obtain a license at a rate set by the Copyright Royalty Board, just as musicians can now obtain a compulsory license to create a "cover" of a song when a composer refuses to negotiate.[203] In combination with this compulsory licensing scheme, Congress could institute a system of progressive taxation and wealth transfers to the poor to ensure that poor creators are not financially excluded from the possibility of purchasing compulsory licenses.[204] This strategy would leave incumbent creators with exclusive rights to produce derivative works but would limit their discretionary control to deny licenses. Artists like Quinn would receive compensation for appropriation art that made use of their copyrighted work but could not refuse to grant licenses on the grounds that they dislike the aesthetic qualities of an appropriative work.

200 17 U.S.C. § 504 (2017); *see* Netanel, *supra* note 199, at 192–93.

201 17 U.S.C. § 505; *see* Feder, Fountain & Stewart, *supra* note 195, at 311.

202 17 U.S.C. § 115; *see* Fisher, *supra* note 13, at 252–58.

203 *See* 17 U.S.C. § 115.; U.S. Copyright Office, Compulsory License for Making and Distributing Phonorecords (2018), https://www.copyright.gov/circs/circ73.pdf; *see also* Fisher, *supra* note 13, at 41.

204 *See supra* notes 184–87.

Third, federal courts could amend their interpretations of fair use to more clearly and explicitly privilege appropriation art. While the statutory codification of fair-use doctrine lists four factors for courts to evaluate when determining whether a use is "fair," this determination often boils down to the question of whether a use is "transformative."[205] Courts presently adopt a range of interpretations of transformativeness, but they could adopt a uniform interpretation according to which a work is transformative "if it either constitute[s] or facilitate[s] creative engagement with intellectual products."[206] This strategy, which would not require legislative action, would narrow the scope of the copyright entitlement enjoyed by incumbent creators by restricting copyright holders' rights to control the preparation of derivative works, eliminating the need for appropriation artists to secure licenses to ensure that their work is non-infringing.[207] The class of incumbent creators would lose the ability to exercise the sort of control that Quinn seeks over Morgan's work.

Fourth, state legislatures and insurance commissions could make it easier to insure against awards of damages in copyright lawsuits, requiring, for instance, that liability insurance provided through homeowners' and renters' policies cover damages awards for copyright infringement when an infringing work is *creative*.[208] At the

205 17 U.S.C. § 107 (2017); *see* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

206 William W. Fisher III, *How to Handle Appropriation Art*, *in* Fisher et al., *supra* note 195, at 323 (internal quotation marks omitted) (quoting Fisher, *supra* note 4, at 1768); *see also* Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 654 (1997) (arguing that "fan fiction" should be uniformly protected as fair use "because it gives authors and readers meaning and enjoyment, allowing them to participate in the production of culture without hurting the legitimate interests of the copyright holder").

207 17 U.S.C. § 106 ; *see* Tushnet, *supra* note 206.

208 *See Evaluating Homeowners and Renters Insurance Policies*, DIGITAL MEDIA LAW PROJECT, http://www.dmlp.org/legal-guide/evaluating-homeowners-and-renters-insurance-policies (last updated 2014) (surveying common homeowners insurance policies and concluding that "copyright [and] trademark infringement . . . do not appear to fall within most homeowners insurance policy definitions, and it is therefore unlikely that your homeowners insurance will cover you if you are sued for copyright or trademark infringement."); *cf.* Myoda Comput. Ctr. v. Am. Family Mut., 909 N.E.2d 214, 216 (Ill. App. Ct. 2009) (enforcing a commercial insurance policy that expressly provided for coverage of injury arising out of "infringement of copyright, title, or slogan"); Christopher French, *Debunking the Myth that Insurance Coverage Is Not Available or Allowed for Intentional Torts or Damages*, 8 HASTINGS BUS. L.J. 65, 69 n.20

same time, state bars could relax rules restricting who can practice law, increasing the supply of lawyers and thereby decreasing the cost of retaining counsel to defend against copyright infringement lawsuits.[209] This set of reforms would not involve any changes to title 17 of the United States Code but would give a group of repeat players in the courts (i.e., insurance companies) a strong financial incentive to litigate fair use cases and advocate for clearer judicial statements of which uses are fair. It would also, like the first set of reforms, make it less risky for non-incumbent creators to assert fair use rights, limiting the ability of artists like Quinn to restrict the contributions of artists like Morgan to our shared culture.

Fifth, Congress could eliminate copyright and replace it with a system combining financial prizes for artists, authors, and musicians who make popular works of art with grants for artists, authors, and musicians administered by the National Endowment for the Arts and National Endowment for the Humanities.[210] This more radical reform would eliminate the risk of incumbent creators controlling what later creations can enter culture by bringing all creative works into the public domain and incentivizing the creation of such goods through direct payments from the government rather than by granting limited-term monopolies.

The five reforms surveyed here illustrate the range of legal domains involved in respecting semiotic justice.[211] Any of a number of highly divergent, even orthogonal, reform strategies can bring the overall constitutional order more closely into conformity with the requirement to guarantee the fair value of the cultural liberties.

In evaluating the different reform strategies that could address the failure of semiotic justice in cases of appropriation art, one must keep in mind the role that copyright law serves in a given legal order.

(collecting cases where liability insurance policies for advertising injury provided coverage for copyright infringement).

209 See William D. Henderson, Legal Market Landscape Report: Commissioned by the State Bar of California 19–20, 27–28 (2018), http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022382.pdf.

210 *See* Fisher, *supra* note 13, at 200–03 (proposing an alternative compensation system to replace copyright protection for many cinematic and musical creations).

211 Fully assessing reform strategies requires considering not only how copyright law intersects with other areas of law but also how copyright law intersects with material affordances and constraints on creativity. For instance, technologies that make it easier to create high quality sound recordings in a garage may change the relationship between copyright law and creativity.

If part of copyright law's function is to make it easier for citizens who are not wealthy to make a living as creative artists by enabling them to monetize their artistic, musical, literary, and cinematic creations,[212] restricting the rights accorded to copyright holders too severely might itself run afoul of semiotic justice. Because privileging creative copying as a fair use is unlikely to significantly affect the economic incentives to create new works,[213] the first four strategies surveyed here—each of which would marginally reduce the profits available to copyright holders—could, individually or together, satisfy the requirements of semiotic justice. However, if restricting the ability of creators like Quinn to extract statutory damages and attorneys' fees for unauthorized creative uses of their art reduced incentives to create too substantially, semiotic justice might require that the system of copyright be replaced by or supplemented with an alternative compensation system of the sort entertained in the fifth reform strategy.[214]

212 *See* Matthew Barblan, *Copyright as a Platform for Artistic and Creative Freedom*, 23 GEO. MASON L. REV. 793, 800 (2016). *But see* Raymond Shih Ray Ku, Jiayang Sun & Yiying Fan, *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 VAND. L. REV. 1669, 1672 (2009) (empirical study finding that greater protections for copyright do not lead creators to produce more work but rather "the historic growth in new copyrighted works is largely a function of population"); Ruth Towse, *Copyright and Artists: A View from Cultural Economics*, 20 J. ECON. SURVS. 567, 578 (2006) (surveying empirical studies and finding that "the main benefits of copyright are enjoyed by the 'humdrum' side of the cultural industries rather than the creators and . . . the distributions of royalties to artists other than the top few stars show how relatively little they get through the copyright system").

213 *See* Tushnet, *supra* note 113, at 541.

214 It might be objected to my application of semiotic justice to copyright that making it harder for artists to create appropriation art would actually encourage *more* artistic creativity, because artists who cannot rely on creative copying will instead come up with their own, more original creations. *See* Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1336 (2015). This objection relies on an empirical claim about the nature of creativity and the relationship between appropriation art and originality which some prominent copyright scholars reject. *See, e.g.*, Fisher, *supra* note 4, at 1769 (arguing that privileging creative copying as fair use would "create more opportunities for Americans to become actively involved in shaping their culture"). Evaluating this empirical debate is beyond the scope of this Article. Setting aside the empirical question, democratic control of culture is not merely about how much total creativity is present in a culture. Democratic control of culture requires that every citizen have an equal opportunity to help shape the culture. Even if Fishman's claim is correct—if some subset of citizens is most likely to contribute to the culture through appropriation art or

Considering the application of semiotic justice to appropriation art helps to show that semiotic justice entails different legal reforms than does Rawls's proviso of the fair value of the equal political liberties. Rawls's proviso might entail that all citizens must have a fair equal opportunity to create appropriative art that engages in social and political commentary,[215] but semiotic justice suggests that *all* contributions to culture should enjoy this protection in order to ensure that all citizens can participate in the collective articulation and working-out of views about what the good life and a good culture consist in.

C. Businesses' Right to Refuse Service

The significance of semiotic justice comes into even clearer relief if one considers not an area of law explicitly concerned with culture and creativity, like copyright, but an area of private law that does not, on its face, aim to regulate cultural participation, such as property law. Consider the following cases concerning the power of business to choose their customers and control their premises:

> A. Neha, the sole proprietor of an art supply shop, refuses to sell high quality paints and canvases to Juan because she thinks that Juan's art "exemplifies one of the most nihilistic styles in contemporary art."
>
> B. Khanhvy, a grocer, refuses to sell cheese to George because George has a tattoo of a snake on his neck, which Khanhvy dislikes.
>
> C. The Green Hill Apartment Complex, Inc., refuses to allow the Green Hill Tenants' Association to distribute its monthly newsletter (which is often critical of the Green Hill Apartment Complex's management) by slipping the newsletter under tenants' doors.[216]

fan fiction— respecting these members of the community as equal participants in the culture may require implementing one or more of the reform strategies discussed above.

215 *See* Cass R. Sunstein, Democracy and the Problem of Free Speech 152 (1993) (suggesting that "art and literature that have the characteristics of social commentary" deserve heightened protection under the First Amendment).

216 This hypothetical is loosely based on the facts of *Golden Gateway Ctr. v. Golden*

> D. The East Valley Feminist Reading Group meets weekly at JavaStop Coffee Shop to discuss works of feminist theory. Some of their discussions involve explicit descriptions of sexual activity. The JavaStop manager tells the reading group that they are no longer welcome to meet at JavaStop because JavaStop management is "uncomfortable" with their discussions and tells them that if they return to JavaStop he will call the police.
>
> E. Cakemaster, LLC refuses to sell a wedding cake to Tina and Lisa because Cakemaster "doesn't do same sex wedding cakes."[217]

The first four of these cases involve the typically absolute right of businesses (other than innkeepers and common carriers) to choose their customers, provided that they do not run afoul of civil rights statutes.[218] In almost all jurisdictions in the United States, businesses can arbitrarily exclude members of the public, refusing to allow them to engage in speech on the premises of the business and refusing to sell them goods or services, provided that the exclusion is not based on one of several grounds specifically proscribed in a public accommodation statute (such as race, gender, age, sexual orientation, marital status, and employment by the military).[219] The fifth case represents a broader assertion of free speech rights by businesses, asserting a right to refuse service to customers even when that right comes into conflict with the requirements of civil rights statutes.[220] Even scholars who think that businesses should not be able to claim exceptions from generally applicable anti-discrimination laws often think that businesses *should* have a right to

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Gateway Tenants Ass'n, 29 P.3d 797 (Cal. 2001).

217 This case is abstracted from the facts of *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

218 *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1291 (1996).

219 *Id.* at 1290–91. California provides a notable exception. *See infra* note 231.

220 Such a right was asserted by the petitioner in *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1726. The Supreme Court decided in favor of the plaintiff on narrow grounds without reaching the issue of whether the free speech rights of businesses can justify exemptions from generally applicable antidiscrimination laws. *See id.* at 1732 (Kagan, J., concurring).

arbitrarily refuse service because conferring such a right of arbitrary refusal on business owners advances the value of autonomy and makes business owners less likely to be alienated from their work.[221]

However, these cases present *prima facie* evidence of a failure of semiotic justice. They do so not as isolated cases, but as instances of a broader pattern. Conferring a right of arbitrary exclusion on business owners grants owners of capital greater power than non-owners of capital to control the shape of our shared culture. Conferring a right on art shop proprietors to marginally discourage artists whose style they do not like from making art, allowing small business owners to marginally discourage individuals from getting tattoos or wearing certain styles of clothes or encourage particular grooming habits, and enabling apartment building owners to regulate the sort of cultural communication that tenants engage in with one another in the hallways of apartment buildings all grant business owners as a class disproportionate power to control who can contribute to culture and how they can do so.[222] This represents a failure of constitutional legitimacy in that the legal order confers on owners of capital the ability to transform the material resources that they control into cultural clout. When the legal system endorses the free speech rights of petit bourgeois small business owners to arbitrarily refuse service, it makes formal rights of free speech less valuable for the rest of us when we wish to influence the shape of our shared culture.[223]

The violation of semiotic justice represented by the five scenarios described above might be partially remedied by any of the following three reform strategies:

First, states could adopt expansive public accommodations statutes that deny businesses the right to arbitrarily refuse service.[224] Among American jurisdictions, California stands out for its broad Unruh Civil Rights Act, which prohibits all arbitrary discrimination

221 *See, e.g.*, Amy J. Sepinwall, Commercial Complicity 41–42 (Feb. 18, 2018) (unpublished manuscript) (on file with author).

222 A different case—and one that is less obvious, from the standpoint of semiotic justice—would be presented if the businesses described here sought to exclude customers not because of the preferences of the owners of the business, but because the businesses were seeking to maximize profits and responded to the wishes of other customers. *See supra* Part II.A.3.

223 *See supra* notes 107–14 and accompanying text.

224 *See* Singer, *supra* note 218, at 1448 (arguing that a right of access should be extended to all places open to the public).

by "all business establishments of every kind whatsoever."[225] While the scope of the Unruh Civil Rights Act's protections has been curtailed by courts in the past thirty years,[226] California's public accommodation law continues to prohibit the exclusion of individuals from businesses for arbitrary reasons.[227] California courts could reinvigorate the statutory right of access to public businesses, barring businesses from refusing to sell to customers whose style, aesthetic sensibility, occupation, or politics they dislike,[228] and state legislatures and municipal governments in other jurisdictions could adopt California's broad statutory language guaranteeing individuals a right to be free from arbitrary discrimination by businesses. This reform would leave in place the economic inequalities that allow

225 Unruh Civil Rights Act, CAL. CIV. CODE § 51(b) (Deering 2019) ("All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."); *see In re* Cox, 474 P.2d 992, 995 (Cal. 1970) (holding that Unruh Civil Rights Act prohibits "all arbitrary discrimination by a business enterprise"); Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 120,122 (Cal. 1982) (noting that Unruh Civil Rights Act's list of protected categories, such as sex, color, race, religion, ancestry, and national origin, is illustrative rather than restrictive).

226 *See* Harris v. Capital Growth Inv'rs XIV, 805 P.2d 873, 880–83 (Cal. 1991) (narrowing the concept of arbitrary discrimination under the Unruh Civil Rights Act "to discrimination based on personal characteristics similar to the statutory classifications of race, sex, religion, etc." such as "a person's geographical origin, physical attributes, and personal beliefs" but not including "financial or economic status"); *see also* Sande L. Buhai, *One Hundred Years of Equality: Saving California's Statutory Ban on Arbitrary Discrimination by Businesses*, 36 U. S.F. L. REV. 109, 126–30 (2001) (arguing that recent decisions of lower courts in California have limited the broad protections afforded by the Unruh Civil Rights Act).

227 *Cox*, 474 P.2d at 994–95, 1001 (business may not exclude a customer because it dislikes the customer's hair or unconventional clothing); *see Harris*, 805 P.2d at 879 (declining to overrule *Cox*); *see* Butler v. Adoption Media, LLC, 486 F. Supp. 2d. 1022, 1029–32 (N.D. Cal. 2006) (noting that *Cox* remains good law in spite of its narrowing in Harris).

228 *See* Buhai, *supra* note 226, at 110, 140–41 ("[C]ourts should find a way to construe the Unruh Act to protect the rights of all persons to participate in a society free from arbitrary discrimination."); *see also id.* at 140–41 (arguing that courts should interpret Harris as subjecting discrimination on the basis of "personal characteristics" to heightened scrutiny and requiring "legitimate business reasons" for any discrimination other than on the basis of personal characteristics).

some people to own capital while others do not—which Rawls's difference principle may permit[229]—but would interrupt the link between economic power and cultural influence that comes from an arbitrary right to exclude, reasserting democratic control over the grounds on which market relationships can be refused.

Second, state and federal courts could expansively interpret constitutional guarantees of free speech to restrict the judicial enforcement of private property rights. This strategy would pare down the bundle of rights held by property owners,[230] restricting their ability to exclude individuals from speaking and being present in places open to the public.[231] Some state constitutions contain free speech provisions that encompass restrictions on free speech by private parties, as well as the state.[232] While state courts have often interpreted such rights of free speech against private parties narrowly,[233] they could limit the ability of capital owners to exercise

229 *See* Rawls, *supra* note 4, at 138–39.

230 For a discussion of the bundle theory of property rights, see, for example, Shane Nicholas Glackin, *Back to Bundles: Deflating Property Rights, Again*, 20 Legal Theory 1, 2 (2014) (defending a deflationary theory of property as a bundle of rights); Hugh Breakey, *Property*, Internet Encyclopedia of Philosophy, https://www.iep.utm.edu/prop-con/ (last visited Sept. 13, 2018) (describing the bundle theory of property rights).

231 *See, e.g.*, Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972) (finding that privately owned shopping center was entitled to exclude pamphleteers from its premises).

232 Cal. Const. art. I, § 2(a) ("Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right."); Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979) (applying the California Constitution's free speech provision to a privately-owned shopping center), *aff'd* 447 U.S. 74 (1980); *see* Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n., 29 P.3d 797, 826 (Cal. 2001) (Werdegar, J., dissenting) ("[T]he original state free speech clause, as originally enacted and as it appears today . . . grants a right of free speech running against private parties as well as state actors"). In 2001, a plurality of the California Supreme Court sought to impose a state action requirement on the California Constitution's free speech clause. *Golden Gateway Ctr.*, 29 P.3d at 810–11. However, a majority of the court has never adopted a state action requirement. Subsequent opinions have applied the California Constitution's free speech right to privately owned retail establishments without raising the question of state action. *See* Fashion Valley Mall, LLC v. Nat'l Labor Relations Bd., 172 P.3d 742, 743 (Cal. 2007) (holding the California Constitution's free speech rights includes the right to urge customers to boycott a store located in a privately-owned mall).

233 *See Golden Gateway Ctr.*, 29 P.3d at 810 (holding a tenants' association has no right under article I, section 2 of the California Constitution to distribute its

control over the shared space of culture by adopting more expansive interpretations, holding, for instance, that the same free speech rights that restrict the ability of publicly owned commercial entities to exclude individuals also restrict the judicial enforcement of private property rights by all businesses open to the public.[234] Courts in jurisdictions that lack constitutional free speech guarantees that directly apply to private parties could achieve the same outcome by expanding *Shelley v. Kraemer*'s conclusion that judicial enforcement of racially restrictive covenants constitutes state action to encompass *all* judicial enforcement of rights in real property.[235] This reform strategy would leave in place the economic inequalities that gave rise to the violation of semiotic justice in the five cases described above but would seek to take democratic control of the grounds on which police and courts can be asked to enforce prohibitions on trespassing.

Third, state or federal governments could expropriate some or all capital from private individuals and corporations, adopting an economic system of liberal socialism.[236] This strategy would require a radical rethinking of constitutional restrictions on takings, specifically,

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newsletter by slipping it under tenants' doors in a large apartment complex); Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8, 290 P.3d 1116, 1120 (Cal. 2012) (restricting the free speech right recognized by *Pruneyard* to the common areas of large shopping centers where shoppers are invited "to stop and linger and to leisurely congregate for purposes of relaxation and conversation").

234 *See* ACLU of Nev. v. City of Las Vegas, 333 F.3d 1092, 1094 (9th Cir. 2002) (holding that publicly-owned pedestrian mall constitutes a public forum for First Amendment purposes); *see also* Burton v. Wilmington Parking Auth., 365 U.S. 715, 719, 723–24 (1961) (holding that Equal Protection Clause applies to a private business leasing public property); Mark Cordes, *Property and the First Amendment*, 31 U. RICH. L. REV. 1, 27 (1997); *cf.* Balkin, *supra* note 4, at 3 ("Freedom of speech is rapidly becoming the key site for struggles over the legal and constitutional protection of capital in the information age.").

235 Shelley v. Kraemer, 334 U.S. 1, 20 (1948). In the federal courts, adopting this strategy would require overruling *Lloyd Corp. v. Tanner*, which held that protesters were not entitled to exercise free speech rights guaranteed by the First Amendment on the property of a privately owned shopping center, 407 U.S. 551, 562–63 (1972), and a return to the constitutional jurisprudence of Amalgamated Food Emps. Union v. Logan Valley Plaza, 391 U.S. 308 (1968), and Marsh v. Alabama, 326 U.S. 501 (1946).

236 *See* DAVID SCHWEICKART, AGAINST CAPITALISM 282–92 (1993); *see also* RAWLS, *supra* note 4, at 138 (describing liberal socialism and property owning democracy as the two types of economic system that might satisfy the requirements of justice as fairness).

and, more generally, of the state's role in the market.[237] Unlike the first two strategies, this strategy of state socialism could leave free speech and public accommodation law unchanged. By limiting the capacity of individuals and classes to amass economic control of institutions that provide opportunities for citizens to contest shared conceptions of the good, restricting private ownership of capital would interrupt the entrenchment of economic and cultural power that threatens to rob the cultural liberties of their fair value.[238] To satisfy semiotic justice, such public control of capital would need to be connected to effectively functioning political systems of democratic control in order to prevent political elites from simply taking over control from economic elites.[239] If, as some cultural theorists argue, a psychological tendency to defer to owners is so bound up with the history of private property that such deference is inextricable from the idea of property,[240] this strategy of liberal socialism might provide the only reform agenda that can fully satisfy the demands of semiotic justice.

The wide range of possible reform strategies—from

237 *See* U.S. Const. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation."). Such a rethinking might involve a radical expansion of the public trust doctrine, treating capital as a public resource held in trust by the government for the people, such that any legal framework that the state adopts allocating capital to private individuals may subsequently be rescinded. *Cf.* Ill. Central R. Co. v. Illinois, 146 U.S. 387, 455 (1892) (holding the state of Illinois lacked authority to transfer title to lands under Lake Michigan held in public trust as navigable waters); Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 53–54 (N.J. 1972) (holding modern changes in use of tidelands justify expanding the historical public trust doctrine).

238 This is not to suggest that minority cultures cannot develop in an illegitimate political order. *See* Stuart Hall, *Notes on Deconstructing "the Popular"*, *in* Cultural Theory and Popular Culture: A Reader 442, 446–48 (John Storey ed., 2d ed., 1998). What is compromised is not the possibility of countercultures but the realization of equality. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. Civ. Rts.-Civ. Liberties L. Rev. 323, 335 (1987).

239 *See* David Beetham, *Beyond Liberal Democracy*, 18 Socialist Reg. 190, 203–05 (1981); *see also* Owen M. Fiss, *Why the State?*, 100 Harv. L. Rev. 781, 787 (1987) ("[T]he state might act wrongfully, and thereby restrict or impoverish rather than enhance public debate . . . but . . . this same danger is presented by all social institutions, private or public, and that there is no reason for presuming that the state will be more likely to exercise its power to distort public debate than would any other institution.").

240 *See generally* David Graeber, *Manners, Deference, and Private Property in Early Modern Europe*, 39 Comp. Stud. Soc'y & Hist. 694 (1997).

expanding anti-discrimination laws, to narrowing the scope of private rights conferred by property ownership, to adopting a socialist organization of the economy—illustrates the range of options open to a community that wishes to make its constitution legitimate. As in the cases of #OscarsSoWhite and appropriation art, evaluating these reform strategies requires considering the relationship between the formal equal basic liberties and the fair value of the cultural liberties. Restrictions on political campaign expenditures constitute, in some respect, a restriction on formal liberty of speech but preserve the *value* of the right to engage in political speech for all citizens.[241] Similarly, the first and second reforms discussed here restrict the formal speech rights and associational rights of business owners in order to promote the fair value of the right to participate in cultural expression. The third reform strategy is the most economically radical of the three, but it provides a mechanism by which a state could enhance the fair value of the cultural liberties without curtailing formal free speech rights. Fully assessing these reforms would require evaluating the ways in which the different formal and substantive liberties promote the exercise of the two moral powers.[242]

It may be objected to semiotic justice that the logic that motivates the first two reform proposals discussed here threatens to undermine the state action doctrine of American constitutional law,[243] for it is not just business owners who turn economic resources into cultural clout. What about owners of large houses who regularly host literary salons, inviting friends and influential authors to gather for dinner? Does conferring the right on homeowners to exclude unwanted guests impermissibly grant a cultural power to a particular class (homeowners) that other citizens are denied?[244] I agree that

241 *See* RAWLS, *supra* note 6, at 361.

242 *See* RAWLS, *supra* note 4, at 149–50.

243 *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 923 (1982). *See generally* Terri Peretti, *Constructing the State Action Doctrine, 1940–1990*, 35 L. & SOC. INQUIRY 273 (2010) (providing a historical survey of the state action doctrine in U.S. courts).

244 *See* LAURENCE TRIBE, 2 AMERICAN CONSTITUTIONAL LAW 1691 (2d ed. 1988) ("[E]xempting private action from the reach of the Constitution's prohibitions . . . stops the Constitution short of preempting individual liberty—of denying to individuals the freedom to make certain choices . . . . Such freedom is basic under any conception of liberty, but it would be lost if individuals had to conform their conduct to the Constitution's demands."); Louis Henkin, Shelley v. Kraemer*: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 503–04 (1962).

the case of the salon host has the same structure as the case of the businesses arbitrarily excluding customers. If a state's constitutional order lets some citizens control much larger residences than others, and if citizens can convert such residential resources into cultural capital, the guarantee of the fair value of the cultural liberties may be violated. This is not to suggest that the remedy is for the police to refuse to help homeowners keep unwanted guests out of dinner parties. Assessing what to do requires balancing the formal rights guaranteed by the first principle of justice together with the fair value of the political and cultural liberties. If ensuring access to the scheme of equal basic liberties to all citizens requires conferring the right to exclude unwanted guests from dinner parties on bigoted private individuals, then other features of the constitutional order may need to give way.[245] For instance, inequalities in wealth that enable some individuals to control much larger residential spaces than others may be impermissible under semiotic justice. This example illustrates the significance of elevating the fair value of the cultural liberties to the level of the constitutional essentials. The question of whether homeowners can exclude unwanted guests is not settled by lexical priority of the formal liberty of freedom of association above the fair equality of opportunity; rather, we must balance competing constitutional rights to determine whether homeowners may legitimately claim such a power.[246]

The problem of businesses' abilities to arbitrarily exclude highlights the divergence of semiotic justice from Rawls's proviso of the fair value of the political liberties. While Rawls's proviso might require the expansion of rights to engage in political protests and to petition on private property, guaranteeing the fair value of the cultural liberties requires denying owners of capital the power to control who contributes to our shared culture.

IV. CONCLUSION

This article has argued that liberal theorists should endorse

245 *See* Mattias Kumm, *Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 German L.J. 341, 362–63 (2006) (arguing that "the application of constitutional rights to the private context does not undermine an important point of rights, which is to provide individuals with a private sphere within which they need not be concerned with being held publicly accountable").

246 In this respect, incorporating fair value guarantees into the first principle of justice limits the legal significance of the state action doctrine and pushes toward the full constitutionalization of private law. *See id.* at 368–69.

a constitutional guarantee of the fair value of the political liberties given their existing commitments to ensuring that individuals can develop and pursue their own conceptions of the good life. The cases described in Part III represent failures of the fair value of the cultural liberties. They also represent failures of citizens to reciprocally share the burdens and benefits of living together in a community. In the #OscarsSoWhite case, minority actors are treated as less than full contributors to elite cinematic culture. In the appropriation art case, new entrants to the art scene are treated as less entitled to mold the culture than are incumbent artists. In the cases of businesses refusing services and excluding speakers, members of the bourgeoisie are granted the entitlement to use material resources that other economic classes lack to impose their idea of what our shared culture should look like. Remedying this failure of reciprocity is necessary if we wish to build a legitimate constitutional order.

The discussion of the reforms that might help to bring about semiotic justice suggests that guaranteeing the fair value of the cultural liberties often requires the same sorts of reforms required by Rawls's proviso of the fair value of the equal political liberties but also often requires more. Depending on how we choose to resolve the conflict between formal liberties of free speech and association and the fair value of the cultural liberties, semiotic justice may require radical political and legal reforms, ranging from judicial modifications of copyright and property law to legislative revamping of our political and economic order. Because this article is concerned with articulating the normative reform agenda of semiotic justice, a consideration of the political likelihood and workability of the reforms suggested here is beyond the present scope.

However, this exploration of the reforms necessary to guarantee the fair value of the cultural liberties suggests that it may be much more difficult to achieve a legitimate constitution than we might previously have thought. Creating a constitutional order that embodies reciprocal respect among all citizens requires that we quarantine those economic and social inequalities authorized by the constitution to prevent them from undermining the democratic control of both culture and politics, a task that may seem impossible or nearly so in our present political moment. Building a legitimate constitution requires that we all come to see one another as "co-worker[s] in the kingdom of culture" and that our laws and

institutions embody this respect.[247]

247 Du Bois, *supra* note 2.

Contemporary Perspectives on Wrongful Conviction:

An Introduction to the 2018 Innocence Network Conference Scholarship Panel Articles

By Stephanie Roberts Hartung and Valena Beety***

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As the Innocence Movement enters its second quarter-century, exoneration numbers show no signs of dwindling. To the contrary, in 2018, the National Registry of Exonerations recorded 151 new exonerations.[1] The Registry's analysis of these exoneration cases demonstrates trends that closely align with the topics explored in this issue of the *Northeastern University Law Review*. Notably, official misconduct occurred in a record number of exoneration cases in 2018.[2] These cases involved a wide array of police, prosecutorial, and forensic analyst misconduct including threatening witnesses, falsifying test results and failing to disclose exculpatory evidence.[3] Additionally, although there have been significant reforms regarding police interrogation methods in recent years, over 10% of the exonerations in 2018 involved demonstrably false confessions.[4] Finally, the Registry's report discusses recent trends in post-exoneration compensation. Relying on the research of Professor Jeffrey Gutman, whose secondary compensation study is contained in this issue, the Exoneration Registry reports that fewer than half of all exonerees received any compensation for their years of wrongful incarceration.[5]

This issue explores these and other topics at the center of the current wrongful conviction dialogue, all of which were presented at the annual Innocence Network Conference in March 2018, in Memphis, Tennessee. The Innocence Network is an affiliation of organizations dedicated to remedying individual instances of wrongful conviction of the innocent, while working to address the systemic causes of wrongful convictions and supporting the exonerated after they are freed.[6] Each year, the Innocence Network Conference provides an opportunity for an international gathering of several hundred attorneys, legal scholars, social scientists, journalists, exonerees and their families and supporters. The Innocence Scholarship Panel is a regular feature of the conference, creating a venue for legal and social science scholars to showcase their research on emerging wrongful conviction topics. This field

1 *See Exonerations in 2018*, Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Documents/Exonerations%20in%202018.pdf (last visited April 18, 2019).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *About the Innocence Network*, Innocence Network, http://innocencenetwork.org/about.

of scholarship plays a critical role in chronicling and framing the direction of the Innocence Movement. The selected authors from the 2018 Scholarship Panel have conducted research and written pieces that address a range of issues going directly to the heart of wrongful conviction cases. This collection of articles explores police practices, coerced confessions, and other systemic factors leading to conviction of the innocent, while also analyzing post-exoneration compensation. These topics could not be more timely or relevant.

Klara Stephens, a member of the National Registry of Exonerations team and a research scholar, starts this series of papers with an article analyzing the findings of the National Registry of Exonerations. Through the use of case-studies and statistical analysis, Stephens identifies the types of police misconduct that lead to false convictions through examining exonerations in Chicago. In *Misconduct and Bad Practices in False Confessions: Interrogations in the Context of Exonerations,* Stephens explains how making threats of violence and providing false information to suspects are forms of misconduct that lead to false convictions.

Professor Julia Simon-Kerr, an evidence scholar, focuses on a particular form of official misconduct: deceptive police interrogation practices. In *Public Trust and Police Deception*, Simon-Kerr examines practices of police deceit in interrogations by weighing their moral legitimacy. Is it legitimate for a police officer to lie about evidence? To tell a suspect he or she has already been identified by the victim? Rather than accepting efficiency-based arguments in support of deceptive tactics, Simon-Kerr posits that public trust in the legal system is undermined by these tactics, with dire consequences.

Professor Jeffrey Gutman and Lingxiao Sun further the series with their article on compensation titled *Why is Mississippi the Best State in Which to be Exonerated? An Empirical Evaluation of State Statutory and Civil Compensation for the Wrongly Convicted*. This article arrives at perhaps surprising conclusions by conducting a state-by-state analysis of compensation for exonerees, along with documenting the available legal avenues in each state for exonerees to seek and obtain payment. The article relies on the National Registry of Exonerations and state law to determine what factors influence the kinds of compensation that are available for exonerees, as well as the amount of financial compensation that is available. These examined factors range from personal exoneree demographics to state location, however together they paint a picture of limited access to compensation across the United States.

Finally, Kim Rossmo and Joycelyn Pollock focus more broadly on systemic causes of wrongful convictions by incorporating the tool of sentinel event review. In their article, *Confirmation Bias and Other Systemic Causes of Wrongful Convictions: A Sentinel Events Perspective*, the authors apply sentinel events review to 50 wrongful convictions, treating these wrongful convictions as systemic failures. Their review deconstructs the major characteristics and interrelationships of each case, and ultimately deduce why the wrongful conviction occurred.

Collectively, these articles explore critical issues at the forefront of the Innocence Movement. Fundamentally, the authors address many of the primary factors giving rise to wrongful convictions, while at the same time considering how best to address the profound injustice involved in convicting an innocent person. These articles contribute to the wrongful conviction dialogue by shining a light on the flaws still pervasive in the criminal justice system—at both the investigatory and post-conviction stages—and by proposing long-overdue reforms.

Misconduct and Bad Practices in False Confessions: Interrogations in the Context of Exonerations

*By Klara Stephens**

* Denise Foderaro Research Scholar at the National Registry of Exonerations, University of Michigan Law School, J.D. May 2014. This essay would not have been possible without Samuel Gross and Barbara O'Brien, who spent countless hours with me formulating our thinking about this issue and reading drafts. Thank you. I also thank Catherine Grosso, Kenneth Otterbourg, and Maurice Possley for helpful comments; Nadine Kassem and Alison Swain for invaluable research and too many other things to count; Jennifer Chun, Michael Darling and Amanda Rauh-Bieri for their excellent research assistance; and Emily Goebel and Evelyne Huber for editing drafts and for moral support. I also write in memory of Benjamin HughL Stephens, without whose encouragement I never would have ventured into the law.

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I. Introduction

> In November of 1988, a 74-year-old woman was shot and beaten to death in Rochester, New York. Frank Sterling became a suspect and voluntarily went in for questioning multiple times, supplying an alibi that his co-workers corroborated. The investigation languished until 1991, when a new investigative team asked Sterling to come in again. Over the course of eight hours, he was hypnotized, shown photos of the crime to "help him remember," given a polygraph, and told he was justified in hurting the victim because she "deserved" it. Officers lied to Sterling, telling him his brother had implicated him. Finally, after eight hours, Sterling admitted he had committed the crime, although many of the details he gave were incorrect. His confession—but none of the interrogation—was recorded. He was convicted based on the confession. Twenty-two years later, in 2010, Sterling was exonerated after DNA evidence implicated a different suspect, who gave a detailed confession that corresponded to the facts of the crime.[1]

Confessing to a crime rarely furthers a suspect's interests.[2] That means police have to convince, trick, manipulate, or force suspects to do something that is deeply against their interests and their instincts. When police use trickery or manipulation, they sometimes cross the line and commit what is legally defined as misconduct. Other times they use those techniques without breaking the rules. Either approach can result in a false confession, but only

1 *Frank Sterling*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3662 (last updated June 29, 2017).

2 Yueran Yang & Max Guyll, Stephanie Madon, *The Interrogation Decision-Making Model: A General Theoretical Framework for Confessions*, 41 LAW & HUM. BEHAV. 80, 80 (2017) (concluding that a confession is powerful and "almost always leads to legal sanctions"); Allison D. Redlich et al., *The Influence of Confessions on Guilty Pleas and Plea Discounts*, 24 PSYCHOL. PUB. POL'Y & L. 147 (2018) ("Confession evidence is referred to as both the king and queen of evidence in the courtroom precisely because it tends to be synonymous with convictions." (internal quotations and citations omitted)).

one is sanctionable as misconduct. This article is about that line, and how crossing it often leads to false confessions.

Frank Sterling clearly did not want to confess. He had maintained his innocence throughout many interrogations. So, three years after the crime, Sterling's ultimate interrogators employed an array of tactics known to effectively induce confessions: deceptive interrogation practices such as lying to him about the evidence against him and administering a polygraph in a way that could not give an accurate reading. They also showed him pictures of the body and the crime scene and fed him details about a crime he knew nothing about. And while they videotaped the 20-minute-long confession Sterling eventually gave, they did not record the interrogation that led to that confession.[3] These tactics are all recognized as "bad practices" because they increase the likelihood of false confessions.[4] While they do produce confessions (some true and some false), they are *not* considered misconduct.

> In August 2006, a 70-year-old man was found shot dead in his car in an apparent robbery in New Haven, Connecticut. A suspect was arrested, and he claimed he committed the crime with 16-year-old Bobby Johnson. Johnson was picked up by detectives and interrogated. After he said he had been in a pharmacy at the time of the shooting, they let him go. A few days later, another detective—Clarence Willoughby, who claimed a "100% success rate" in solving homicides—joined the investigation, and Johnson was brought back in for questioning.
>
> Johnson's parents were not present during the interrogation, and Willoughby threatened

3 *Frank Sterling*, *supra* note 1.

4 *See* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum. Behav. 13 (2010) (identifying excessive interrogation time, presentations of false evidence, and minimization as risk factors in false confessions, among other issues, and recommending mandatory electronic video); Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. Am. Acad. Psychiatry & L. 332, 332–34 (2009) (explaining that "contamination"—in other words, feeding details whether on purpose or by accident—increases the risk of a false confession). *See generally* Jerome H. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, 11 Crim. Just. Ethics 3, 5–8 (1992) (discussing the morality of lying to suspects and how such lies can make suspects more likely to confess).

> Johnson with the death penalty if he did not confess and promised him probation if he did. He also told Johnson that if he did not confess, he would never see his family again, and that they had physical evidence tying him to the crime—which was a lie. Johnson ultimately gave a tape-recorded confession—which he practiced with the officers before they turned on the recorder. He was then permitted to go home. A few days later, ballistics tests showed that Johnson's confession was inconsistent with the physical evidence, so the detectives brought him back to the station and told him he had to "correct" his statement or his "deal" for probation would be revoked. Johnson made a second "revised" taped confession.
>
> Johnson eventually pled guilty to murder and was sentenced to 38 years in prison. He was exonerated in 2015, after it became known that Detective Willoughby had extracted other false confessions and false witness statements, and new evidence implicated another man in the murder.[5]

Unlike Frank Sterling's interrogation, the interrogation of Bobby Johnson was rife with misconduct. Plea bargaining with a suspect by a police officer, lying about the law that governs the case (Johnson, as a juvenile, was not even eligible for the death penalty), and threatening to take action against a suspect's family, are all prohibited actions that can, in theory at least, lead to sanctions. Sanctions might include discipline on the job or by outside regulators or courts for violating the law or departmental rules, civil liability for damages, and in extreme cases possibly even criminal prosecution of the interrogator.[6] In practice, discipline of any sort for misconduct in interrogations is rare.

This article uses cases from the National Registry of Exonerations ("the Registry")[7] to identify the most common forms

5 *See Bobby Johnson*, NAT'L REGISTRY OF EXONERATIONS (Sept. 6, 2015), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4751.

6 *See* discussion of Jon Burge *infra* Part IV Section A.

7 The Registry includes all known exonerations since 1989. We use publicly available information to write summaries of cases, and to code the case in our database. Unless otherwise indicated, every number and statistic used in this article is derived from this database.

of misconduct in interrogations that produced false confessions. The bulk of the misconduct falls into a broad category of "coercion." In these cases, the misconduct produced confessions that are considered "involuntary" in violation of the Due Process Clause of the Fifth and Fourteenth Amendments. The other common form of misconduct is fabrication of a confession: when manipulation and coercion do not produce what the officers want to hear, they sometimes just make it up.

False confessions are not easy to obtain. It is an "expensive procedure [that] is generally reserved for the most serious cases where there is no other evidence sufficient to convict—which usually means a murder with no surviving witnesses."[8] Thus, we see a much higher rate of confessions in murder cases. We also see a much higher rate of false confessions in Chicago.[9]

Table 1: Proportion of Exonerations with False Confessions In Chicago and Elsewhere

	Exonerations in Chicago	Exonerations Elsewhere	All Jurisdictions
Murder	54% (64/118)	18% (144/798)	23% (208/916)
All Cases	32% (74/230)	10% (218/2,170)	12% (292/2,400)

Peter Neufeld famously said, "[q]uite simply, what Cooperstown is to [b]aseball, Chicago is to false confessions. It is the Hall of Fame."[10] Indeed, Cook County, which includes Chicago, has far and away more exonerations based on false confessions than any other county in the country. A quarter of all exonerations with false confessions come from Chicago. Moreover, within Chicago, false confessions occur in a much higher proportion as compared to all exonerations elsewhere. Accordingly, we pay special attention to false confessions in Chicago.

8 Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 544–45 (2005).

9 *See infra* Table 1.

10 *60 Minutes: Chicago: The False Confession Capital* (CBS television broadcast Dec. 19, 2012).

II. What is Misconduct in Interrogations?

Brown v. Mississippi was one of the earliest cases in which the Supreme Court used the Due Process Clause of the Fourteenth Amendment to reverse a state court ruling. In *Brown*, the court held that the defendants' confessions could not be used at their trial, since they confessed under extreme torture.[11] This seems obvious now, but *Brown* marked the first time that the Supreme Court declared the use of a confession obtained by torture to be a violation of a criminal defendant's right to due process of law.

Twenty-five years later, in *Rogers v Richmond*, the Court agreed with the defendant that a confession obtained by police threats to arrest his wife could not be used against him. Justice Frankfurter noted that the Court's inquiry into voluntariness is not solely concerned with excluding *unreliable* confessions, but also with deterring police misconduct that "offend[s] an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system."[12] Under this doctrine, police behavior that is so "coercive" that it makes a confession "involuntary" violates the due process clause, and is therefore misconduct that requires the exclusion of the confession from evidence.

Over the decades since *Brown*, the Supreme Court and lower courts have identified several specific types of misconduct that may make confessions inadmissible because they are deemed "involuntary." In *Stein v. New York*, the court indicated that violence, or the threat of violence, is a species of misconduct that automatically requires exclusion of any resulting confession.[13] On other issues, courts weigh the "totality of [the] circumstances"[14] and determine whether the confession was sufficiently "involuntary" that its use violates due process.[15]

For example, in *Rogers* the Court addressed the issue of threats against third parties. It weighed the impact of the officers' threats to arrest the suspect's sick wife and concluded that it may have produced an involuntary confession.[16]

In other cases, courts applying the due process voluntariness standard have condemned sham "plea bargaining" by police officers

11 Brown v. Mississippi, 297 U.S. 278, 285–86 (1936).
12 Rogers v. Richmond, 365 U.S. 534, 540–41 (1961).
13 Stein v. New York, 346 U.S. 156, 182 (1953).
14 *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 513–14 (1963).
15 *Id.* at 514.
16 *Rogers*, 365 U.S. at 543–44.

such as improper promises of a lenient sentence,[17] forgoing charges,[18] or promises to obtain medical treatment for the suspect instead of jail.[19] On the other hand, vague promises of better treatment if a suspect confesses are not considered misconduct.[20] Lying to suspects about the law can also contribute to an involuntary confession,[21] but lying about the nature and strength of the evidence against the defendant is not misconduct.[22] Other impermissible tactics include extreme lengths of confinement[23] and interrogation,[24] as well as exploiting the threat of sexual assault in confinement.[25]

Miranda v. Arizona, as it was originally decided, provided that a suspect in police custody may not be questioned unless she has been informed that she has the rights to remain silent, to talk to a lawyer (free if necessary), and to have that lawyer present at the questioning—and unless she voluntarily waived those rights.[26] *Miranda*, of course, is easily the best known Supreme Court case that deals with confessions. Since it was decided, most litigation on confessions has focused on *Miranda*'s requirement that officers must warn suspects in custodial interrogation of their rights to remain silent and to have an attorney present at their interrogation.

Over the past 20 years, however, *Miranda* has been greatly limited by a series of Supreme Court decisions. In *Dickerson v. United States*,[27] for example, the Court pointed to these limitations—"our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief"[28]—as one reason why it was not necessary to overrule *Miranda* entirely.

The Court has also made it clear that statements obtained in

17 *See, e.g.*, United States v. Tingle, 658 F.2d 1332, 1335–36 (9th Cir.1981).
18 *See, e.g.*, United States v. Lall, 607 F.3d 1277, 1283 (11th Cir. 2010).
19 *See* State v. Howard, 825 N.W.2d 32, 41 (Iowa 2012); *see also* Commonwealth v. Magee, 668 N.E.2d 339, 344–45 (Mass. 1996).
20 *See, e.g.*, Commonwealth v. Mandile, 397 Mass. 410, 414 (1986).
21 State v. Walker, 493 N.W.2d 329, 334–35 (Neb. 1992).
22 Frazier v. Cupp, 394 U.S. 731, 739 (1969); *see also* Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 Mich. L. Rev. 1168, 1169 (2001).
23 *See, e.g.*, Davis v. North Carolina, 384 U.S. 737, 752–53 (1966).
24 *See, e.g.*, Ashcraft v. Tennessee, 322 U.S. 143, 153–55 (1944).
25 *See, e.g.*, Little v. United States, 125 A.3d 1119, 1127–28 (D.C. 2015).
26 384 U.S. 436, 467–73 (1966).
27 530 U.S. 428 (2000).
28 *Id.* at 443–44.

violation of *Miranda* may be used against other criminal defendants, or against the defendant who made them on rebuttal, and that a police officer may not be sued for civil damages for violating the requirements of *Miranda*.[29] In light of these cases, the best interpretation of current Supreme Court law on *Miranda* is that violating *Miranda* is not in itself "misconduct" but rather creates a limited opportunity for a defendant to prevent some statements that a defendant makes when being interrogated by police from being introduced by the prosecution in its case in chief at a trial of that defendant.

I discuss Registry cases involving these specific types of misconduct—as well as bad interrogation practices that are not considered misconduct—in the sections that follow.

III. Methodology

The Registry collects and records every known exoneration in the United States[30] from 1989 to the present.[31] For each exoneration, we collect court filings, news articles, and any other

29 Chavez v. Martinez, 538 U.S. 760, 772–73 (2003).

30 Our definition of exoneration is as follows:

> A person has been exonerated if he or she was convicted of a crime and, following a post-conviction re-examination of the evidence in the case, was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action. The official action may be: (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence; (ii) an acquittal of all charges related to the crime for which the person was originally convicted; or (iii) a dismissal of all charges related to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal. The pardon, acquittal, or dismissal must have been the result, at least in part, of evidence of innocence that either (i) was not presented at the trial at which the person was convicted; or (ii) if the person pled guilty, was not known to the defendant and the defense attorney, and to the court, at the time the plea was entered. The evidence of innocence need not be an explicit basis for the official action that exonerated the person. A person who otherwise qualifies has not been exonerated if there is unexplained physical evidence of that person's guilt.

Glossary, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (last visited Apr. 6, 2019).

31 NAT'L REGISTRY OF EXONERATIONS, https://www.exonerationregistry.org (last visited Apr. 6, 2019).

public information available about the case. Using this information, we record the stories of these exonerees and determine why these innocent people were convicted in the first place.

The phenomenon of false confessions is known to be one of the contributing factors to false convictions.[32] We define a confession as a statement by the exonerated defendant made to law enforcement at any point during the proceedings prior to conviction that was interpreted or presented by law enforcement as an admission of participation in or presence at the crime, even if the statement was not used at trial.[33] As of February 26, 2019, the Registry included the cases of 291 individuals who falsely confessed. Using information from public documents, as well as discussions with trial and appellate attorneys, we created a coding system that identifies relevant background characteristics of the exoneree and common attributes of the interrogations[34] during which the exoneree confessed.[35]

Some of these attributes of the interrogations constitute misconduct under the cases discussed above. We also identified another category of misconduct that does not fall within the categories of misconduct outlined above: fabrication. By "fabrication," we do

32 *See* Samuel R. Gross, *What We Think, What We Know and What We Think We Know about False Convictions*, 14 Ohio St. J. of Crim. L. 753, 754 (2017). *See generally* Richard A. Leo, Miranda*'s Revenge: Police Interrogation as a Confidence Game*, 30 Law & Soc'y Rev. 260, 281–82, 285 (1996).

33 Further caveats: a statement is not a confession if it was made to someone other than law enforcement. A statement that is not at odds with the defendant's defense to the charges is not a confession. (For example, an admission to hitting someone in an assault case is not a confession, if the exoneration is based on new evidence of self-defense.) A guilty plea is not a confession. We also include cases where such a statement was alleged to have been made, even if it never occurred.

34 For our purposes, we do not attempt to define the beginning and end of each interrogation with the same exacting scalpel as the courts. If an exoneree was in the presence of an officer who was asking her questions about the crime, this suffices as interrogation.

35 Of the 291 false confession cases in the Registry, only nine were unprompted by police interrogation. In five cases, exonerees took the blame for people they knew committed the crime (either because they were threatened, or because they were relatives of the guilty parties). In two cases, the exonerees thought their admissions would make them "immune" to prosecution. In one case, the exoneree became so distressed by being the primary suspect in his mother's murder, he just wanted the process "over with," and in the last case, the exoneree attempted to blame her abusive boyfriend for a crime and ended up admitting her part in it, just so he would be arrested.

not mean simply that the confession was false—all the confessions here are false, in that they describe something that the defendant never did—but rather that the fact that the defendant confessed was made up. In some cases, the fabrication occurred entirely outside of any interrogation: the defendants refused to confess, but the officers lied and said they did. In other cases, the misconduct occurred within the interrogation: the officers tricked suspects into signing or otherwise appearing to endorse confessions they never intended to make.

Table 2 presents our data[36] on the most common types of misconduct in interrogations that produce false confessions,[37] as well as the frequency of fabricated confessions.

Table 2: Misconduct that Produces False Confessions by Jurisdiction[38]

	Exonerations in Chicago	Exonerations Elsewhere	All Exonerations
Misconduct During Interrogations			
Violence	68% (50/74)	21% (46/217)	33% (96/291)
Sham Plea Bargaining	16% (12/74)	17% (37/217)	16% (48/291)
Threats to Third Parties	3% (2/74)	11% (23/217)	9% (25/291)
All Misconduct During Interrogations	76% (56/74)	46% (100/217)	53% (156/291)
Fabricated Confessions	15% (11/74)	12% (25/217)	12% (36/291)

36 Each case was coded independently by two research assistants to reduce discrepancies; I reviewed the coding of each case.

37 In addition, there are a few cases where there is other identified misconduct, including prolonged sleep deprivation and other impermissible threats.

38 Some cases include more than one type of misconduct.

IV. Coercion in Interrogations that Produce Involuntary False Confessions

The most obvious—and frequent—type of coercion is violence. In addition, some types of promises, lies, and threats are also considered sufficiently "coercive" to make a confession "involuntary."

A. Violence or Threatened Violence

The most common type of misconduct in interrogations that produce false confessions is the use of violence, or the threat of imminent violence. Both are criminal acts—assault and battery—and can incur criminal, civil, and professional sanctions. Some form of threatened or actual violence was employed in one-third of false confessions in the Registry.[39] At one end of the spectrum, sheriff's deputies in Lake County, Illinois "only" threatened to "beat the [expletive] out of" Jason Strong.[40] At the other end, Philadelphia police officers chained Edward Baker to a chair and beat him with sticks and a telephone book for hours.[41]

Judging from known exonerations, violence in interrogations occurs much more often in Chicago than anywhere else the country. In Chicago, 68% of false confessions were obtained in interrogations that included violence or threats of violence.[42] More than half of *all* known instances of violence in obtaining false confessions from exonerated defendants in the United States occurred in Chicago (50/96).[43]

In the rest of the country, the rate of violence in false confession cases is far lower: 21%. The Chicago police employed violence in interrogations at three times that rate. At first glance, we thought it might be a pattern of policing that also exists in other large cities. To examine that possibility, it is helpful to compare Chicago to New York City.

Chicago, with a population of 2.7 million,[44] has the second

39 *See supra* Table 2.

40 *Jason Strong*, Nat'l Registry of Exonerations (May 30, 2015), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4697.

41 *Edward Baker*, Nat'l Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3009 (posted before June 2012).

42 *See supra* Table 2.

43 *See id.*

44 *QuickFacts Chicago, Illinois*, United States Census Bureau, https://www.

largest police force in the United States after New York City,[45] with 8.6 million inhabitants.[46] Chicago has also produced more overall exonerations than New York, 230 compared to 174, and about as many murder exonerations, 118 compared to 89.[47] The rate of violence in interrogations in exonerations with false confessions is 36% in New York City (8/22)—double the 19% rate for the rest of the country (excluding New York and Chicago) (38/195), but much lower than the rate of violence in exonerations with false confessions in Chicago: 68%.

New York City also has far fewer known false confessions all told than Chicago. Only 13% of exonerations in New York City included false confessions (22/174)—about the same rate as the country as a whole—compared to 32% of Chicago's exonerations. In other words, exonerations in Chicago are almost three times as likely to include false confessions as those in New York, and those false confessions are almost twice as likely to have been obtained by violence.

One partial explanation is that scores of suspects were routinely the victims of violence at the hands of a group of detectives in Chicago under the command of Lieutenant Jon Burge.

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census.gov/quickfacts/chicagocityillinois.

45 The FBI's Uniform Crime Reporting Program lists 12,383 officers of the Chicago Police Department, and 36,378 in the New York City Police Department. Within New York City there are five counties—Bronx, Kings (Brooklyn), New York (Manhattan), Queens, and Richmond (Staten Island). Each has its own district attorney. However, the police force is not separated by counties. Chicago, on the other hand, is the inverse: Cook County includes Chicago and a few smaller townships with their own police forces. When looking at prosecutorial misconduct, we would look at the county level, and thus not compare the two cities, but for police misconduct we look at the police department, however it is structured. *See Full time Law Enforcement Employees*, F.B.I. UNIFORM CRIME REPORTING, https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-78/table-78.xls/view (last visited Apr. 6, 2019).

46 *QuickFacts New York City, New York*, UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/newyorkcitynewyork/PST045218 (last visited Apr. 11, 2019).

47 Chicago has had 230 exonerations—118 for murder, and New York City has had 174 exonerations—89 for murder. These high rates are partly due to very active conviction integrity units in both locations, and the number and age of innocence projects in those cities. By contrast, Los Angeles, with a population of 3.9 million and a police force of just under 10,000 (for the data on police forces, see discussion accompanying note 42), has had only 66 exonerations—36 for murder—and only two of which are partly the result of false confessions.

> In 1986, a couple was stabbed and mutilated in their apartment on the south side of Chicago. A few days later, a 15-year-old girl told police that Aaron Patterson had admitted to committing the murder, and a neighbor said he had seen Eric Caine in the vicinity. Patterson and Caine were arrested and taken for interrogation to the Area 2 police station under the command of Lieutenant Jon Burge.
>
> Caine, the son of a Chicago police officer himself, was told that Patterson had confessed that he and Caine had gone to the house to find weapons and ended up killing the couple. After Caine refused to confess, detectives beat him and took him to see Patterson, who had been beaten so badly he could barely speak. Caine then signed a confession.
>
> Patterson, left alone in the interrogation room with a confession to sign, used a paperclip to scratch a message onto a metal bench: "[p]olice threaten me with violence. Slapped and suffocated me with plastic. No lawyer or dad. Sign false statement to murders."
>
> Patterson and Caine were both convicted of murder in 1989. Patterson, who was sentenced to death, was pardoned based on actual innocence in 2003; Caine, who was sentenced to life in prison, was exonerated in 2011.[48]

The road to the exonerations of Caine and Patterson began in 1989, when Andrew Wilson sued the city for torture at the hands of Burge and his officers.[49] During the litigation, Wilson's legal team received a note from a police officer, who asked to remain anonymous, stating that Wilson's torture was part of a larger pattern of police torture.[50]

48 *See Aaron Patterson*, Nat'l Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3447 (last updated Feb. 12, 2019).

49 *Jon Burge and Chicago's Legacy of Police Torture*, Chicago Tribune (Sept. 19, 2018), https://www.chicagotribune.com/news/ct-jon-burge-chicago-police-torture-timeline-20180919-htmlstory.html. *See generally* John Conroy, *House of Screams*, Chicago Reader (Jan. 25, 1990), https://www.chicagoreader.com/chicago/house-of-screams/Content?oid=875107.

50 John Conroy, *The Persistence of Andrew Wilson*, Chicago Reader (Nov. 25, 1990), https://www.chicagoreader.com/chicago/the-persistence-of-andrew-

Ultimately, Burge escaped personal consequences in Wilson's lawsuit,[51] but the case set in motion an investigation of Burge and those under his command. The Office of Professional Standards at the Chicago Police Department was assigned to investigate the allegations and issued a report in 1990 (often referred to as the "Goldston Report") that ended by saying "the number of incidents in which an Area 2 command member is identified as an accused [in torturing suspects] can lead to only one conclusion. Particular command members were aware of the systematic abuse and perpetuated it either by actively participating in [the] same or failing to take any action to bring it to an end."[52] Burge was fired by the police board in 1993,[53] although he kept his pension.[54] In 2009, the state created a "torture commission" to review his actions, as well as the cases he oversaw.[55] In 2010 Burge was convicted of perjury and obstruction of justice in federal court, and imprisoned.[56] Twenty exonerees in the Registry falsely confessed under interrogation by Jon Burge and his officers.

But Burge's command is not the only reason for the disproportionate rate of violence in interrogations in Chicago. At least half of the 50 violent interrogations in Chicago exonerations were conducted by officers who were not part of Burge's unit; 13 of them occurred after Burge retired. It seems likely, however, that many other officers were aware not only that this behavior occurred, but that it was tolerated, if not actually condoned. That, some argue, created a culture of violence that allowed these coercive

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wilson/Content?oid=999832.

51 Wilson v. City of Chicago, 6 F.3d 1233, 1241 (7th Cir. 1993), *and modified on denial of reh'g denied* (Dec. 8, 1993).

52 CHI. POLICE DEP'T OFFICE OF PROF'L STANDARDS, SPECIAL REPORT, https://peopleslawoffice.com/wp-content/uploads/2012/02/Goldston-Report-with-11.2.90-Coversheet.pdf.

53 Aretina R. Hamilton & Kenneth Foote, *Police Torture in Chicago: Theorizing Violence and Social Justice in a Racialized City*, 108 ANNALS AM. ASS'N GEOGRAPHY 399, 400 (2018).

54 *See* Ray Long, *After Burge Kept Pension, Illinois House Votes to Curb Funds for Crooks*, CHICAGO TRIBUNE (Nov. 19, 2014, 7:10), https://www.chicagotribune.com/news/local/politics/chi-burge-pension-bill-illinois-house-20141119-story.html.

55 *TIRC Home: Mission and Procedures Statement*, ST. OF ILL. TORTURE INQUIRY AND RELIEF COMMISSION, https://www2.illinois.gov/sites/tirc/Pages/default.aspx (last visited Apr. 9, 2019).

56 *Id.*

interrogations to go unchecked.[57]

Once this pattern of torture was exposed, it facilitated the exonerations of defendants like Eric Caine, whose claims that he was forced to confess would otherwise probably have been ignored. There was no physical evidence linking Caine to the crime. Without Caine's false confession—and Patterson's—they would not have been imprisoned.[58] On the flip side, since so little evidence was used to convict, there was little evidence to undermine in a reinvestigation of the case: no eyewitnesses to recant, no biological evidence to test, no witness bias to uncover. Caine's primary option was to undercut the validity of his own confession, and until the torture was substantiated, it was his word against that of police officers. After dozens of other men were found to have been tortured, Caine's words did not stand alone.

When the only evidence of innocence is the coercive nature of the confession, exonerations are hard to obtain. Of the 46 exonerees outside of Chicago who falsely confessed due to violence or threats of violence, only three were exonerated solely by evidence that their confessions were coerced.[59] The other 43 relied on at least one other type of evidence: DNA tests, witness recantations, alibi witnesses, non-DNA forensic evidence, or information pointing to the real criminal.

If dozens of other men had not proven that they had been abused by the same officers, Caine would probably still be in prison for a crime he did not commit. Despite all the cases that have been exposed, we really do not know how many more Eric Caines had a Jon Burge whose misconduct was never exposed.

Additionally, researchers have shown repeatedly that people with mental illness or diminished intellectual capacities are more susceptible to confessing falsely.[60] Defendants with mental

57 *See* Editorial Board, *The Violent Legacy of Chicago's Police*, N.Y. Times (Apr. 21, 2015), https://www.nytimes.com/2015/04/21/opinion/the-violent-legacy-of-chicagos-police.html; Hamilton & Foote, *supra* note 53, at 403–04; *The Case of Jon Burge in Chicago*, National Religious Campaign Against Torture, http://www.nrcat.org/torture-abroad/shining-a-light-on-torture/does-torture-happen-in-the-us/the-case-of-john-burge-in-chicago (last visited Apr. 9, 2019).

58 *See Aaron Patterson*, *supra* note 48.

59 Robert Coney, William Oakes, and James Simmons.

60 *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in a Post-DNA World*, 82 N.C. L. Rev. 891, 970–71 (2004) (noting that the vulnerability of developmentally disabled defendants to false confessions is

disabilities make up 6% of all exonerees in the Registry (147/2400), but 35% of those who falsely confess (102/291). But they constitute a smaller proportion of exonerees who confessed after being subjected to violence—only 24% (23/96).[61]

The likely explanation is that police do not need to physically abuse defendants with mental disabilities to get them to confess—milder forms of coercion will do the trick. Indeed, half of the 23 mentally challenged exonerees who confessed after *some* use of violence by police experienced comparatively mild forms of violence—slapping, grabbing, or threatening. None was subjected to the kind of torture that was regularly used by Jon Burge and his crew.

B. Improper Plea Bargaining, Threats of Death Penalty, and Lying about the Law

When Detective Willoughby interrogated Bobby Johnson in Connecticut, he offered Johnson a deal he could never honor: probation in exchange for a confession. He also threatened him with the death penalty as the punishment for silence—a punishment that could never be inflicted given Johnson's age.[62] Two different forms of misconduct were at play here: an officer offering a plea bargain, and an officer lying to the suspect about the law as it applied to him and his case.

The power to decide whether to prosecute, and what charges to bring and when, rests entirely with prosecutors.[63] When a suspect confesses because he has been offered a benefit by a prosecutor, that is a calculated exchange he has made for himself. Plea offers

"well-documented in the false confession literature") (citing Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495 (2002) (arguing that developmentally disabled people do not understand *Miranda* warnings, nor do they understand the context in which interrogation occurs and the consequences of confessing)); *see also Age and Mental Status of Exonerated Defendants*, NAT'L REGISTRY OF EXONERATIONS (Dec. 31, 2017), http://www.law.umich.edu/special/exoneration/Documents/Table-%20Age%20and%20Mental%20Status%20of%20Exonerated%20Defendants%20Who%20Falsely%20Confess.pdf (showing the correlation between intellectual disabilities and high confession rates in exoneration cases).

61 A contributing factor to the higher count is that we may know more about mental illnesses in cases with false confessions, because attorneys are more likely to develop the record in those cases.

62 *See Bobby Johnson*, *supra* note 5.

63 *See* Bordenkircher v. Hayes, 434 U.S. 357, 362–64 (1978).

by prosecutors can put pressure on suspects to confess—sometimes extreme pressure—but that pressure is generally considered legitimate under our system of criminal procedure.[64] If the suspect actually is guilty, confessing in exchange for a lenient sentence could be to his benefit.[65]

Of course, pleading guilty is a form of a confession—admission to a crime—and, in return, there is usually some leniency given in sentencing. However, we do not count guilty pleas as "false confessions"—false confessions are made within the confines of an interrogation—while a guilty plea should—in theory at least—be made in consultation with an attorney, and only after all evidence is gathered.

As prosecutors have the exclusive right to charge and prosecute, police have no authority to offer plea deals and cannot force prosecutors to carry out any promises they make. Thus, it is misconduct when a police officer makes an offer to a suspect—as Detective Willoughby did when he offered probation to Bobby Johnson.[66] In one-sixth of the false confession cases in the Registry, an officer purported to offer a plea arrangement to a suspect that led the suspect to confess falsely to a crime (47/291). The unauthorized and unenforceable offers they made included probation, diversion from criminal prosecution, lenient sentencing, reduced charges, and psychiatric treatment in lieu of prison.

In two-thirds of these 47 cases, officers threatened the suspects with the death penalty if they did not confess (30/47)—and five other exonerees were threatened with sentences of life imprisonment without the possibility of parole. The clear implication is a commitment that if they do confess, they will not be sentenced to death, which (if true) would be a form of plea bargaining. Threats to use the death penalty seem to be effective. The prospect of "a needle in the arm" or "the chair" can be so terrifying that some suspects will do whatever they can to avoid it. But since police officers have no authority to make deals on sentencing, the implied promise is

64 *See* Brady v. United States, 397 U.S. 742 (1970).

65 It is important to note that these exchanges are binding on the prosecutor. Courts have agreed that "[p]lea agreements are contracts, and their content and meaning are determined according to ordinary contract principles." United States v. Schilling, 142 F.3d 388, 394 (7th Cir. 1998) (quoting United States v. Ingram, 979 F.2d 1179, 1184 (7th Cir. 1992)). "The government must fulfill any promise that it expressly or impliedly makes in exchange for a defendant's guilty plea." *Schilling*, 142 F.3d at 395.

66 *See Bobby Johnson*, *supra* note 5.

always empty and sometimes broken. Damon Thibodeaux, for example, was sentenced to death even after he falsely confessed in the face of threats of the death penalty.[67] In sum, in 16% of cases with false confessions by exonerated defendants, officers improperly offered benefits or threatened severe punishments in exchange for the confessions.

In some cases, officers threatened exonerees with charges or penalties that were not legally available at all—which added another layer of deception. For example, at the time Detective Willoughby threatened Bobby Johnson with the death penalty,[68] juveniles like Johnson could no longer be sentenced to death anywhere in the United States.[69] And when Edwin Chandler was interrogated in Louisville, Kentucky, he was told that if he did not confess, his sister would be charged with harboring a fugitive. But he was not a fugitive when this threat was made—he had not yet been charged with a crime—so she could not have been charged with harboring one.[70]

C. Threats to Third Parties

The threat to arrest Edwin Chandler's sister could not be carried out—as described above—but what are the odds that Chandler knew that? What he heard was that if he continued to refuse to confess, he would not only be putting himself in danger, but his innocent sister as well.

Judging from exonerations, police frequently threaten to take action against third parties in interrogations that produce false confessions, mostly by telling suspects they will arrest a family member or take away their children.[71]

> On March 8, 1987, Richard Lapointe[72] and his wife, Karen, went to the house of Karen's grandmother, Bernice Martin, in Manchester, Connecticut, and spent a few hours there visiting with her. They left at

67 *Damon Thibodeaux*, NAT'L REGISTRY OF EXONERATIONS (Sept. 28, 2012), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4004.

68 *See Bobby Johnson*, *supra* note 5.

69 *See id.*; Roper v. Simmons, 543 U.S. 551, 578 (2005).

70 *Edwin Chandler*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3098 (last visited Apr. 28, 2019).

71 *See, e.g.*, Lynumn v. Illinois, 372 U.S. 528, 534 (1963); *see also supra* Table 2.

72 "Lapointe" refers to the exoneree. His wife is addressed as "Karen."

> 4 p.m. At 8 p.m. they received a call from Bernice's daughter and Karen's aunt asking Lapointe to check on Bernice. Twenty-seven minutes later, Lapointe called 911 to report a fire at Bernice's house. Bernice was removed from the house, already dead from stab wounds.
>
> The murder investigation stalled for two years until a new detective took over and focused on Lapointe. During questioning, police told him his wife had implicated him in the murder and that they would arrest her and take his son away if he did not confess.
>
> Lapointe, who suffered from a congenital neurological disease, signed a confession after nine hours. The confession included numerous statements that were inconsistent with forensic evidence, and left out other key facts. Nonetheless, Lapointe was convicted in 1992, largely based on his confession. He was exonerated in 2015 after it was discovered that a fire investigator had said the fire began while Lapointe was still at home, and DNA tests excluded him as the source of the biological evidence found at the crime scene.[73]

In Lapointe's case, police might have had enough evidence to arrest his wife Karen, and if she were arrested, they would have called Child Protective Services to take their son. That made the threat credible: most parents have heard of "CPS being called." But that does not change the fact that officers threatened to arrest Karen in order to induce her husband to confess.[74] For that purpose, these threats were misconduct.

There are 25 cases in the Registry in which there is evidence that an exoneree falsely confessed after an officer threatened to arrest someone in the exoneree's family, to take away the exoneree's

73 *Richard Lapointe*, Nat'l Registry of Exonerations, (Oct. 10, 2015), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4766.

74 Ultimately, Lapointe's willingness to confess—unless it implicates his wife—should have no effect on an officer's decision to arrest his wife or to request the child be taken into protective custody, and thus the exchange is clearly meant to improperly induce a confession.

children or the children of other family members, or otherwise put the family in harm's way if the exoneree did not confess—9% of all exonerations with false confessions.

V. Fabrication and Perjury

Twelve percent of the false confessions reported in the Registry simply never happened (36/291). In some cases, officers—faced with suspects who refused to confess—just lied and said the suspects did confess.

We observed that fabricated confessions happened at two different stages in interrogations. In some of these cases, the confession was made up after the interrogation was over. Accordingly, the only evidence of the "confession" was the officer's word that the exoneree said it—which, in these cases, always prevailed over the defendant's denial. Making up fake confessions is indeed misconduct, but these kinds of confessions do not include misconduct *in the interrogation* process because the misconduct occurred after the interrogations were abandoned.

In other cases, the officers employed deception to obtain fake written confessions, typically by writing confessions and getting the exonerees to sign them without giving them the opportunity to read what they signed. The deception and manipulation that produced these fake "signed" confessions *is* misconduct *in the interrogation*. These cases are therefore included in our count of misconduct in interrogations. However, because many fabrications were entirely separate from interrogations, we consider the entire category of fabricated confessions separately.

> In January of 1982, a prosecution witness scheduled to testify in a murder trial in Chicago was found shot to death. Detectives arrested Melvin Jones while he was babysitting his girlfriend's child. A gun was found in a drawer in the child's room. Jones was taken to a police station, where over the course of four days, police Lt. Jon Burge and his officers beat him, administered electrical shocks to his feet, thighs and penis, and hit him on the head with a stapler. After four days, during which Jones refused to confess, the detectives gave up and charged him with unlawful use of a weapon, for which he was acquitted.
>
> A few months later, Jones was arrested

> following an unrelated triple homicide. He was never charged with those murders, but after another interrogation, he was charged with the earlier murder. Detectives said Jones confessed to the first murder because he believed he had gotten away with it and could not be charged.
>
> They had no record of the confession—nothing was written, signed, or recorded. They called in a prosecutor to take the confession, but Jones told the prosecutor he had not confessed. The officers said that after the prosecutor left, Jones confessed to them again.
>
> Jones was convicted based on the detectives' testimony about this "confession" (which he denied when he testified at trial) and testimony from an officer that a witness had both identified Jones and passed a polygraph test.[75] He was acquitted on retrial when the "eyewitness" said she had never been polygraphed and had never identified Jones. There was no evidence—other than the officers' words—that she had done either.[76]

Half of the fabricated confessions came after misconduct that did not produce the intended result. Nearly a third, as in Jones's case, were preceded by a beating or the threat of beating.

In some false confession cases, there is absolutely no evidence that the suspect had any role in the crime except for the officer's word that the defendant confessed. Failure to record an interrogation or a confession is not misconduct. However, proceeding to interrogate without a recording shields misconduct by making it difficult, if not impossible, to prove that the misconduct ever happened.

> In Phoenix, Arizona in 1990, Debra Milke was convicted of conspiring with James Styers and Roger Scott who killed her 4-year-old son, Christopher. The

75 The eyewitness did not testify at the trial. The conviction was vacated in part because the police officer's testimony about her supposed identification was inadmissible hearsay. *See Melvin Jones*, Nat'l Registry of Exonerations (May 18, 2013), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4176.

76 *Id.*

only evidence against her was her alleged confession, which Detective Armando Saldate, Jr. said he had procured.

After Scott implicated Milke, Detective Saldate went to Milke's parents' house, where she had been staying, and interrogated her. Detective Saldate's supervisor told him to record the interview, but he did not. At trial, Detective Saldate testified that during the interrogation, Milke flashed her breasts at him and offered sex if he would not arrest her, and then admitted she conspired with Styers and Scott to kill the boy to obtain insurance money.[77]

Milke was convicted and sentenced to death. While working on her appeal, defense attorneys found extensive impeachment evidence against Saldate, including judicial findings of misconduct in eight separate cases. Her conviction was overturned and ultimately dismissed by the Arizona Court of Appeals, which went on to summarize Saldate's known misconduct: "[t]his includes a five-day suspension for taking 'liberties' with a female motorist and then lying about it to his supervisors; four court cases where judges tossed out confessions or indictments because Saldate lied under oath; and four cases where judges suppressed confessions or vacated convictions because Saldate had violated the Fifth Amendment or the Fourth Amendment in the course of interrogations… And it is far from clear that this reflects a full account of Saldate's misconduct as a police officer. All of this information should have been disclosed to Milke and the jury, but the state remained unconstitutionally silent."[78]

77 James Styers admitted his part in the killing but said Milke was not involved. Roger Scott—who initially implicated her—later refused to testify against Milke, even in exchange for a plea to second degree murder. As of early 2019, they both remain on Arizona's death row.

78 *Debra Milke*, NAT'L REGISTRY OF EXONERATIONS (Mar. 19, 2015), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4660.

Debra Milke's case illustrates how officers get away with fabricating confessions. They do not record any part of the interrogation and rely on the courts to believe the officer rather than the defendant—which is likely, as long as any past misconduct of their own does not surface to undermine their credibility. If Milke's interrogation had been recorded, no officer—not even Armando Saldate—would have tried to fabricate a confession.

Thirteen percent of interrogations were electronically recorded, at least in part (37/291); of these, just over a fifth were recorded in full (8/37). Two fabricated confessions were presented in cases in which the interrogation was partly recorded—but, of course, both statements were alleged to have been made when the recorder was turned off. In 16% of exonerations with false confessions, only the confession but none of the interrogation was recorded (47/291). All told, in more than a quarter of interrogations a recording device was used but the interrogation was not fully recorded (76/291). In other cases, recording devices were available but were not used at all.[79]

Clearly, recording interrogations makes it much more difficult to hide misconduct. Recording makes it more likely that a false confession will be found to be inadmissible in court. False confessions in cases that led to exoneration were found inadmissible on some ground[80] in 8% of cases with no recording (17/207), 18% of cases with any sort of recording (15/84), 27% of cases with at least a partial recording *of the interrogation* (10/37), and 63% of cases with a full recording (5/8).

Some confessions that were used at trial might have been declared inadmissible on review if the issue had been squarely addressed, but the courts never reached the question. In DNA exonerations, for example, courts do not need to go beyond citing the ironclad evidence that someone else committed the crime for which the defendant was wrongfully convicted. It is not necessary for them to decide on the voluntariness of the confessions: they simply recognize the defendant is innocent and that ends the case.

79 Richard Lapointe's interrogation is an example. His wife was being interrogated in the same station at the same time, and her interrogation was recorded. His was not. *See Richard Lapointe*, *supra* note 73.

80 In some cases, courts ruled the confessions inadmissible for reasons other than violations of the Due Process Clause's voluntariness requirement. Some were ruled inadmissible because a defendant did not properly receive notice of or waive their *Miranda* rights. There were six rulings of inadmissibility, including *Miranda* cases, where we did not identify any misconduct.

VI. "Bad Practices" that Lead to False Confessions, but are Not Misconduct

We know that more than half of interrogations that led to false confessions were coercive—usually because of the use or threat of violence—but what of the other interrogations? We identified at least four broad categories of bad practices that do not rise to the level of "coercion:" lying about the facts of the case, making false promises that do not amount to plea bargaining, feeding the suspect details of the crime, and interrogating a minor without a parent present.[81] While these bad practices are often present in interrogations that include misconduct, it is useful to look at interrogations that were not "coercive" but where law enforcement used dangerous techniques to put pressure on the defendant all the same.[82]

Table 3: "Bad Practices" in Interrogations without Misconduct that Produce False Confessions, by Jurisdiction[83]

	Exonerations in Chicago	Exonerations Elsewhere	All Exonerations
Lying about the Case	21% (3/14)	23% (23/101)	23% (26/115)
False Promises	36% (5/14)	20% (20/101)	22% (25/115)
Feeding Details	29% (4/14)	46% (46/101)	43% (50/115)
No Parent Present	57% (8/14)	10% (10/101)	16% (18/115)
Any Identified Bad Practice	71% (10/14)	62% (63/101)	63% (73/115)

81 As mentioned above, youth and mental disability are probably the most determinative factor of whether someone will falsely confess, but interrogating a minor or someone with a mental disability are not themselves bad practices.

82 *Miranda* violations are also certainly "bad practices"—but because of the murky nature of jurisprudence surrounding *Miranda*, we cannot produce an accurate count of how many interrogations in false confession cases actually violated *Miranda*. There are six cases in which a court ruled the confession inadmissible because of *Miranda* violations, but other cases may involve *Miranda* violations that were never addressed by courts.

83 Some cases include more than one type of bad practice.

A. Lying about Facts of the Case

> In 2004, 20-year-old John Watkins confessed and pled guilty to raping a 48-year-old woman in Maricopa County, Arizona. He confessed after detectives brought him in for questioning because he resembled the woman's description of her attacker, who was a stranger to her. Officers told Watkins that they had recovered his fingerprints from the scene and that the victim had identified him. Watkins agreed to submit to a voice-stress analysis test and was told that he failed. In the face of this "evidence," Watkins confessed. It was all lies. They had no fingerprints, no identification, and he had not failed the voice test. In 2010, Watkins was exonerated by DNA evidence that proved he was not the rapist.[84]

Without those lies, it is hard to imagine that Watkins would have confessed—"you look like the guy who raped a woman" is barely accusatory. Presenting inculpatory evidence, even if manufactured, is permissible and can be highly effective in inducing a confession. In 23% of interrogations that produced false confessions but did not include misconduct, officers told such lies about the facts of the case or the investigation. Often, as in Watkins's case, they lied about physical evidence that supposedly linked the exoneree to the crime. In four cases, police manufactured the evidence by giving suspects polygraph tests and then falsely telling them they failed.[85]

Another common tactic is to lie and say that a witness to the crime identified the suspect, or that an alibi witness failed to support their defense. During the interrogation of John Horton in Rockford, Illinois, he said he was with his brother at the time of the murder. Ultimately, Horton falsely confessed to (and was wrongly convicted of) a murder after police lied and said they had spoken to his brother—Horton's alibi—and that his brother had repeatedly

84 *John Watkins*, Nat'l Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3725 (last visited Apr. 28, 2019).

85 In all interrogations that led to false confessions—including the ones with official misconduct—the rate remains about the same: 24 cases with polygraphs, and at least 13 where officers lied about the outcome.

denied seeing him the night of the murder.[86]

It is no surprise that lying to suspects about the evidence against them can be a powerful tool for obtaining confessions.[87] Sometimes these lies produce true confessions, but at least 23% of false confessions in exoneration cases that do not include other misconduct occurred partly because an officer lied to the suspect about some aspect of the case.

B. False Promises

Another form of lying is offering a promise or a bargain an officer has no intention of keeping. While explicit plea bargaining is misconduct, bargaining for some act the police can take is not misconduct—even if they have no intention of undertaking such act. The majority of these false promises involve promises that the suspects will be allowed to go home if they confess, or generalized promises of lenience—"things will go better for you if you confess." Indeed, some exonerees—like Bobby Johnson—*were* allowed to go home after they confessed.[88] They just did not get to stay there. Some promises were even more specific.

> In March 1997, 16-year-old Fancy Figueroa was raped by a stranger after she got home from school in Queens, New York. She was taken to a hospital for a rape kit, but when it was discovered she was pregnant, police concluded that she lied about the rape to cover up her pregnancy. "They told [her] if [she] wrote down on a piece of paper that [she] was lying, they would help [her] look for this guy." She complied, and was charged with and ultimately convicted of filing a false police report. Police did not follow up on the rape—they considered the matter closed by Figueroa's admission that she had lied. She was exonerated seven years later when the DNA from her rape kit matched a serial rapist.[89]

86 *John Horton*, NAT'L REGISTRY OF EXONERATIONS (Oct. 9, 2017), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5212.

87 *See supra* Section II.

88 *See Bobby Johnson*, *supra* note 5.

89 *Fancy Figueroa*, NAT'L REGISTRY OF EXONERATIONS (July 26, 2014) http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4474.

Officers promised to investigate Figueroa's report if she admitted it was a lie. This makes no sense, but it is still a permissible promise. In 22% of interrogations that produce false confessions that did not include misconduct, officers made some sort of permissible promise. In Chicago, the rate is 36%. Like Bobby Johnson, all five of the suspects in Chicago who received such promises were minors who were promised they could go home if they confessed.

C. Feeding Details that are not Publicly Known

Unlike lying or making a promise the officer does not intend to keep, providing a suspect with information that is not publicly known is something an officer can do without realizing it.[90] This may partly explain why it is the most common "bad practice" we identified in interrogations that produce false confessions.

In 54% of all exonerations with false confessions (157/291), including 43% of interrogations that did not involve misconduct, police fed details of the crime to the defendant. We exclude basic information from this category—the crime at issue (e.g. murder or rape), or the name of the victim, the date, etc. We are only concerned with cases in which details of the crime that were not publicly known—especially, how it was committed—were given to the defendant.[91]

How these details are given varies greatly from case to case. The process can be so subtle that police officers themselves are unaware that they are providing details to someone who may not otherwise know them. Often, this happens when they show the suspect pictures of the crime scene—presumably to elicit a reaction of guilt or remorse—or ask leading questions about what happened, such as "and then you strangled her, right?" or "that was behind the house?"

Occasionally, instead of showing crime scene photographs, suspects are taken on tours of the crime scene. Feeding details may not seem like bad practice if the person confessing is guilty, but determining whether or not he is guilty is much more difficult when

90 *See* James L. Trainum, How the Police Generate False Confessions: An Inside Look at the Interrogation Room 127–45 (2016).

91 Ultimately, this is probably an undercount. There may be cases where the confession was more elaborate than the exoneree could have known without police interference, but the documents we were able to obtain did not make that kind of assessment possible.

officers give away the corroborating information.[92] For example, Jerry Townsend, who was convicted of six murders and one rape in South Florida in the 1970s based almost exclusively on his confession, was led by the officers through the scenes of the crimes, where they recorded his confessions. Townsend, who experts later said had the mental capacity of an eight-year-old, was eventually cleared of the murders and rapes by DNA evidence.[93]

The most common form of feeding details is asking leading questions. Anyone who has viewed the Netflix series *Making a Murderer* has seen this in action. Brendan Dassey, a highly reticent suspect, was asked increasingly pointed, leading questions. For example, when Dassey refused (or was unable) to tell the officers how the victim was killed, the officers eventually asked him outright who shot the victim in the head.[94] Dassey has not been exonerated,[95] but this type of questioning is also prevalent in cases that resulted in known false confessions, including the well-known exonerations of the defendants commonly known as the Central Park Five.[96]

In some instances, feeding details was more akin to feeding the confession in its entirety. In those cases, it is hard to justify this practice on any grounds. Police in Detroit, Michigan interrogated 14-year-old Davontae Sanford several times as a suspect in a multiple murder. After the last session, detectives typed up a confession for him to read and sign. The only details in the confession that were correct were ones officers already knew. All the details Sanford provided were later proven to be wrong, and in some instances, impossible. For example, in the confession, Sanford said he met with another gunman at a local restaurant, but later investigation showed the restaurant had closed months before. Still, Sanford read and signed the confession, and was convicted and sentenced to 39 to 90 years in prison. He was exonerated in 2016 after the officer in charge admitted to fabricating evidence.[97]

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92 *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 17–27 (2011).

93 *Jerry Townsend*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3697 (last updated Dec. 21, 2017).

94 *Making a Murderer: Words and Words Only* (Netflix 2018).

95 *Making a Murderer: Trust No One* (Netflix 2018).

96 *See, e.g.*, *Korey Wise*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3761 (last updated Dec. 8, 2014).

97 *Davontae Sanford*, NAT'L REGISTRY OF EXONERATIONS (July 19, 2016),

D. Interrogation of Juveniles Without a Parent Present

Devontae Sanford is one of 76 exonerees who were under 18 when they falsely confessed. Juveniles are already at much higher risk of falsely confessing;[98] 36% of juveniles in the Registry falsely confessed—more than three times the rate of adults confessing. Of the juvenile interrogations that resulted in false confessions, we were able to determine that parents or other responsible adults were not present in 57% of cases (43/76).[99] In cases that did not involve misconduct, the rate remains the same as the overall rate: we were able to determine that over half of the minors were interrogated on their own (18/32).

Local law governs whether and under what circumstances conducting an interrogation of a minor with no parent present is misconduct. Some states require parents to be present if a child requests it.[100] Other states require notification to a legal custodian and either the custodian's presence or their waiver.[101] Some states require parental presence if the child is under 18,[102] and some only require it for those under 16.[103] The Supreme Court has not spoken on the issue, but, on a related issue, has ruled that "a child's age properly informs *Miranda*'s custody analysis."[104] Ultimately, the state rules governing parental presence are too variable for us to label interrogating a minor without a parent or guardian present as misconduct.[105] However, it is clearly a very risky practice. More

http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4913.

98 *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 945 (2004) (reporting that a "suspect's age is strongly correlated with the likelihood of eliciting a false confession"); *see also Age and Mental Status of Exonerated Defendants*, Nat'l Registry of Exonerations (Dec. 31, 2017), http://www.law.umich.edu/special/exoneration/Documents/Table-%20Age%20and%20Mental%20Status%20of%20Exonerated%20Defendants%20Who%20Falsely%20Confess.pdf.

99 Again, this is likely an undercount of how many interrogations happened without parents. In many of the cases, we could not determine whether parents were present.

100 *See, e.g.*, Ala. Code § 12-15-202 (2008).

101 *See, e.g.*, Me. Rev. Stat. Ann. tit. 15, § 3203-A (2011).

102 *See, e.g.*, Colo. Rev. Stat. § 19-2-511(1) (1996).

103 *See, e.g.*, N.C. Gen. Stat. § 7B-2101(b) (2015).

104 J.D.B. v. North Carolina, 564 U.S. 261, 265 (2011).

105 For example, in Chicago before 2016, juveniles could be interrogated without a parent or counsel present. After 2016, juveniles under 15 charged with murder were required to have counsel present. This may explain why Chicago exonerations include many more minors being interrogated without a parent

than half of juveniles who falsely confessed did so without a parent present in interrogation.

VII. Conclusion

Although confessing to a crime is rarely in a suspect's best interests, many suspects do end up confessing. In order to get a suspect to confess, police often use trickery and manipulation as well as prolonged questioning and isolation—"confessions don't come cheap." We know from hundreds of exonerations of innocent defendants that some of these confessions that police work so hard to get are false.

In 156 of 291 exonerations with false confessions, misconduct occurred in the interrogation that produced the false confession. The most common type of misconduct was violence or threats of violence, followed by sham plea bargaining, lying about the law, and threats to third parties. Chicago leads in exonerations with false confessions, and false confessions with violence and other misconduct. Only five of the false confessions that were obtained by misconduct were excluded from evidence at trial,[106] two of them only in part.[107] In other words, even when there was legally defined misconduct, the remedy—suppression—was only granted in 3% of cases. Part of this is the nature of misconduct—it is usually hidden.[108] The suspect knows about it, but nobody else, and when it is his word against an officer's, the latter usually wins out.

Moreover, it is not just "misconduct" that produces false confessions. In 115 cases that did not include misconduct, one or more bad interrogation practices were used to induce the innocent suspect to confess to a crime he did not commit. Most often the bad practice was feeding details of the crime to the suspect. Other

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or guardian. Juvenile Court Act of 1987, 705 ILL. COMP. STAT. 405/5-170 (1987) (amended 2017).

106 *Edward Baker*, *supra* note 41; *Luis Galicia*, NAT'L REGISTRY OF EXONERATIONS (June 21, 2012), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3919; *James Kluppelberg*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3908 (last updated Jan. 17, 2018); *Lorenzo Montoya*, NAT'L REGISTRY OF EXONERATIONS (June 19, 2014), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4446; *Lorenzo Nunez*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3510 (last updated Mar. 15, 2016).

107 *See Lorenzo Montoya*, *supra* note 106; *Lorenzo Nunez*, *supra* note 106.

108 In 106 of the 156 cases, some exculpatory evidence was concealed.

frequently used bad practices are lying to the suspect, making false promises, and interrogating children without their parent being present. Only two of these 115 false confessions were ruled inadmissible at trial, both only in part, and only because of *Miranda* violations.[109]

If "the law holds that it is better that ten guilty persons escape than that one innocent suffer,"[110] it is clear that judges, juries, and prosecutors should be more skeptical of confessions. Only 2% of these false confessions were suppressed at trial, in whole or in part, even though 93% of the interrogations that produced them included misconduct, or bad practices that often lead to false confessions, or both. We do not know how many more people who falsely confessed are currently in prison, and we do not know how many people confessed to crimes they did not commit after being subjected to these same practices. But we do know that innocent people regularly confess to crimes they did not commit after interrogations using these practices—which should give pause to anyone interested in justice.

109 *John Purvis*, Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3555 (last updated May 15, 2015); *David Vasquez*, Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3705 (last updated Mar. 11, 2014).

110 2 William Blackstone, Commentaries *358.

Public Trust and Police Deception

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At a time when truth is being contested in unprecedented ways in American history, it is more important than ever to expand our analytical toolset for assessing the costs, benefits, and moral implications of routine deception by those who hold positions of public trust. This paper takes up this project through the lens of deceptive interrogation by police. Deceptive interrogation is an anomaly in our legal system, which is otherwise facially committed to truth seeking. The main argument in favor of deceptive interrogation has been that it is effective, and most scholarship about this practice has focused on efficacy. Whether lies are in fact effective in interrogating suspects remains unproven. But deceptive interrogation also has important externalities that are rarely discussed. This Article explores the costs of deceptive interrogation to public trust and to the moral legitimacy of the legal system. It makes the case that even if deceptive interrogation can be effective, it is still deeply problematic and even destructive. Some sacrifice in utility is worth making for the sake of a society in which police model the respect for truth upon which the system of justice depends.

INTRODUCTION

In July of 2016, a military veteran who had served in Afghanistan opened fire on police officers who were providing security for a demonstration in Dallas against recent fatal police shootings of black men.[1] In the chaos that unfolded as the shooter fired from a building overlooking the protest, a man named Corey Hughes, approached police to offer his assistance.[2] His brother, Mark Hughes, who is African-American, was openly carrying a rifle in compliance with Texas open carry laws.[3] Some time later, Mark Hughes discovered that the police had tweeted his picture as a suspect in the attack.[4] He approached police officers to give his gun to them, but after some initial friendliness they took him to an interrogation room.[5] What happened next was a textbook American police interrogation. By Hughes' account, the police who questioned

1 Manny Fernandez et al., *Five Dallas Officers Were Killed as Payback, Police Chief Says*, N.Y. TIMES (July 8, 2016), https://www.nytimes.com/2016/07/09/us/dallas-police-shooting.html.

2 Ben Guarino, *Man Falsely Connected to the Shooting by Dallas Police is Now Getting 'Thousands' of Death Threats*, WASH. POST (July 8, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/07/08/during-deadly-dallas-shooting-confusion-swirled-around-armed-man-carrying-a-rifle/?utm_term=.ff0f4f757dab.

3 *Id.*

4 *Id.*

5 *Id.*

him assumed his guilt and focused primarily on getting him to admit it.[6] To this end, they spent much of their time asking Hughes why he wanted to shoot police.[7] Most shocking to Hughes, however, was that his interrogators told him that witnesses saw him firing his rifle.[8] As he explained to a CBS reporter shortly after he was released, that was "a lie."[9] "[T]he system," Hughes concluded, was "trying to get me."[10]

Hughes' assessment was not fanciful. In the American criminal justice system, lying by those tasked with enforcing the law is both legal and routine.[11] Deceptive interrogation is condoned by the courts and encouraged by leading interrogation manuals which detail how to use deception to get suspects to confess.[12] This article asks whether, notwithstanding its legality and ubiquity, such deception in interrogation is legitimate.

To answer this question, I focus on four conceptions of legitimacy drawn from various disciplines. The first is legal, meaning simply that a practice is legitimate if it is legal. The second I term pragmatic legitimacy, meaning that a practice is legitimate if it produces desired outcomes. These two conceptions are often invoked by scholars who focus on wrongful convictions and police interrogation practices.[13] The third conception I term perceived legitimacy. I draw my definition of perceived legitimacy from the procedural justice literature, which identifies the public's perception

6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*
11 *See, e.g.*, Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 Fordham Urb. L.J. 791 (2005) (describing legality of deceptive interrogation); *see also* Julia Simon-Kerr, *Systemic Lying*, 56 Wm. & Mary L. Rev. 2175, 2180–81 (2015) (describing formal and informal truth-enforcing mechanisms of the legal system).
12 *See, e.g.*, Fred E. Inbau et al., Essentials of the Reid Technique: Criminal Interrogation and Confessions (2d ed. 2015) (detailing various manipulative techniques used to elicit confessions as discussed *infra* Part I); *see also infra* Part III for data on the frequency of police lying in interrogation.
13 *See, e.g.*, Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581 (1979) (making case for unconstitutionality of deceptive interrogation); Saul M. Kassin, *Inside Interrogation: Why Innocent People Confess*, 32 Am. J. Trial Advoc. 525, 538–39 (2009) (arguing for reform in interrogation practices because the current method leads to wrongful convictions).

of police legitimacy as deriving from fair treatment rather than the legality of police actions or the outcomes they produce.[14] A final conception that has received little scholarly attention in this context is moral legitimacy.[15] I argue that moral legitimacy, by which I mean whether the practice is morally valid, should be a central area of focus in any analysis of deceptive interrogation and is, in fact, the most helpful in answering the legitimacy question. These categories admittedly have some overlap. Nevertheless, they are distinct enough conceptually to provide a useful structure for bringing insights from divergent approaches to bear on the question of deceptive interrogation.

This rubric of legitimacy offers a way to unify and expand relevant arguments that have been made by scholars in various fields in terms of legality, efficacy, procedural justice, and morality. In particular, this article focuses on two distinct literatures in the field of criminal law. First, an ever-growing body of work examines the causes of wrongful convictions, focusing on everything from the mishandling of forensic evidence to coercive interrogation tactics.[16] A second expanding field examines police practices on the ground, trying to identify ways in which routine police interaction can be changed to improve citizens' belief in and cooperation with the system.[17] Curiously, these two fields have had little to say to one

14 *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990) (offering seminal account of procedural justice).

15 *But see* SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY AND THE LAW 194–99 (2014) (offering brief moral analysis of deceptive interrogation).

16 *See, e.g.*, BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011) (examining first 250 convictions overturned based on post-conviction DNA testing); Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After A Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 825–26 (2010) (describing research into wrongful convictions); Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7 (2009) (arguing causes of wrongful conviction best identified in social science research); Rory K. Little, *Addressing the Evidentiary Sources of Wrongful Convictions: Categorical Exclusion of Evidence in Capital Statutes*, 37 SW. U.L. REV. 965 (2008) (describing role of forensic testimony in wrongful convictions).

17 *See, e.g.*, CHARLES R. EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP (2014) (offering a critique of some procedural justice research with new research into police stops); LORRAINE MAZEROLLE ET AL., THE CAMPBELL COLLABORATION, LEGITIMACY IN POLICING: A SYSTEMIC REVIEW (2013) (reviewing and compiling procedural justice research into policing); TYLER, *supra* note 14 (describing

another in the context of deceptive interrogation. Criminologists, legal scholars, and some social scientists have examined how the police function when they investigate crimes, what practices have led to so many errors, and what can be done to correct them.[18] Most defenders of deceptive interrogation and advocates for reform belong to this group.[19] They frame their arguments primarily around pragmatic legitimacy, with a focus on the perceived necessity of deception or, conversely, its tendency to produce false confessions.[20] The doctrinalists among them have addressed the legality of deceptive interrogation and its compliance with ideal constitutional norms.[21]

Yet, as this article shows, pragmatic legitimacy has drawbacks as a definitive lens for interrogating the legitimacy of deceptive

seminal research into police interactions and perceptions of legitimacy); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 Ann. Rev. Psychol. 375 (2006) (describing psychological property of legitimacy and its relationship to voluntary cooperation with authority).

18 *See, e.g.*, Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum. Behav. 3 (2010) (identifying certain interrogation tactics as risk factors in wrongful confessions) [hereinafter Kassin et al., *Police-Induced Confessions*]; Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 Law & Hum. Behav. 381, 388 (2007) (identifying commonly-used interrogation tactics using survey of police) [hereinafter Kassin et al., *Police Interviewing and Interrogation*]; Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 278 (1996) (studying deceptive tactics used by investigators); Robert A. Nash & Kimberley A. Wade, *Innocent but Proven Guilty: Eliciting Internalized False Confessions Using Doctored-Video Evidence*, 23 Applied Cognitive Psychol. 624 (2009) (assessing likelihood that false evidence during interrogation will create false memories in subject).

19 *See, e.g.*, Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far*, 99 Mich. L. Rev. 1168, 1209 (2001) (describing false confession evidence as "only . . . anecdotal" while asserting that "broad limits on deception could result in the loss of many thousands of confessions by guilty persons"); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891 (2004) (studying wrongful convictions and making suggestions for reform based on premise that interrogation-induced false confessions lead to miscarriages of justice); Kassin, *supra* note 13, at 538–39 (arguing for procedural reforms because false confessions are "real, and they are devastating"); Richard A. Leo & Brian L. Cutler, *False Confessions in the 21st Century*, Champion, May 2016, at 46, 50 (observing that the "widespread recognition of the role that false confessions play in wrongful convictions has led to procedural reforms" in some countries).

20 *See* sources cited *supra* note 19.

21 *See, e.g.*, Gohara, *supra* note 11 (arguing for doctrinal change in approach to deceptive interrogation); White, *supra* note 13, at 581–82 (describing doctrinal avenues for limiting deceptive interrogation).

interrogation. Existing studies of how well the practice works, while informative, are ultimately inconclusive.[22] The literature shows that deception does cause mistakes and there are reasons to believe that alternatives may produce fewer false confessions.[23] Studies to date, however, leave room for arguments that the number of mistakes is ultimately outweighed by the benefits of deception and that alternative methods have not been tested in conditions similar to those that exist in the United States.[24] In addition, the lens is too narrow, focusing primarily on those who are rightly or wrongfully convicted, but largely ignoring problems such as damage to community trust, harm to those interrogated and released, and the effects on officers who must lie on a routine basis.

Scholars who study what I term perceived legitimacy, by contrast, are less concerned with immediate outcomes and instead ask what makes people comply with the law.[25] The social scientists and legal scholars in this field have highlighted the importance of trust to public perceptions of police legitimacy.[26] They argue that changing police practices to make them more procedurally just can improve compliance.[27] People's perceptions of legitimacy, they find,

22 *See* sources cited *supra* note 18.

23 *See* sources cited *supra* note 19.

24 *See, e.g.*, Brian R. Gallini, *Police "Science" in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions*, 61 HASTINGS L.J. 529, 578 (2010) (noting that finding an interrogation error rate would "require knowing the actual or ground truth to determine whether interrogators successfully elicited a true confession"); Gisli H. Gudjonsson, *False Confessions and Correcting Injustices*, 46 NEW ENG. L. REV. 689, 694–95 (2012) ("It is not known how commonly false confessions occur, [or] how many result in a wrongful conviction . . . ."); Philip S. Gutierrez, Note, *You Have the Right to (Plead Guilty): How We Can Stop Police Interrogators from Inducing False Confessions*, 20 S. CAL. REV. L. & SOC. JUST. 317, 349 (2011) (observing that "the United States has different values, traditions, and crime problems" from the U.K., which complicates adopting U.K. interrogation reforms); Magid, *supra* note 19, at 1209 (arguing that "evidence of the false confession problem" is merely anecdotal while "limits on deception could result in the loss of many thousands of confessions by guilty persons").

25 *See, e.g.*, MAZEROLLE ET AL., *supra* note 17 (describing scholarship focused on improving perceptions of police legitimacy).

26 Elaine B. Sharp & Paul E. Johnson, *Accounting for Variation in Distrust of Local Police*, 26 JUST. Q. 157, 158 (2009) (describing trust as the "essential core of legitimacy").

27 *See, e.g.*, Tom R. Tyler, *Lecture, Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. J. CRIM. L. 307, 321 (2009) (arguing for police reform based on research showing that when "police use procedures that are fair, compliance increases substantially"); EPP ET AL., *supra* note 17, at

are driven more by procedural fairness than by outcomes.[28] Despite their focus on trust, however, these scholars have not examined deceptive interrogation. Although it would seem to implicate the public's ability to trust the police, deceptive interrogation has been studied in depth only by criminologists and others who frame arguments around investigative outcomes and wrongful convictions.

I argue that like pragmatic legitimacy, perceived legitimacy offers a helpful yet ultimately inconclusive lens on deceptive interrogation. This is in part because procedural justice scholars have largely ignored the practice, leaving us to speculate about the effect of police lies in interrogations on trust.[29] This lacuna may reflect methodological constraints, but it may also be the result of a vision of legitimacy in the procedural justice scholarship that by definition excludes the concerns over investigative outcomes that have preoccupied scholars of deceptive interrogation.

While both pragmatic and perceived legitimacy are important, neither is sufficient in assessing the legitimacy of deceptive interrogation. As a striking example of condoned, routine lying by officials in the criminal justice system, deceptive interrogation must be scrutinized not only for its impact on trust, but also for its broader moral implications. Occasionally, criminal law scholars have offered assessments of the morality of lying during interrogations, but these arguments have tended to fold back on the related question of the necessity for such deception.[30] Philosophers have also at times

161 (arguing that pretextual stops are "counterproductive to the core crime-fighting mission of policing" in part because they cause whole groups to view police as illegitimate).

28 *See, e.g.*, Tyler, *supra* note 27, at 320 (citing research concluding that in assessing an experience with the police or judicial system, people "react primarily to whether or not they receive fair treatment, rather than to the favorability or fairness of their outcomes").

29 Very few have addressed the effect of deceptive interrogation on trust in any depth, although Professor Margaret Paris has argued from a game theoretic perspective that deceptive interrogation has a negative impact on trust and thereby cooperation. Margaret L. Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3, 11–13, 37–38 (1995).

30 *See, e.g.*, Jerome Skolnick & Richard Leo, *The Ethics of Deceptive Interrogation*, 11 CRIM. JUST. ETHICS, Winter/Spring 1992, at 3, 7–10 (discussing ethics of deceptive interrogation with focus on necessity for the practice and potentially harmful consequences). A noteworthy exception is Chris Slobogin's argument that under Sissela Bok's account of the morality of lying, so-called "noncoercive" investigative lies would be permissible "once an individual has been identified as a suspect through the public proxy of a judge" and responses to that argument published in a 1997 symposium. *See*

offered moral accounts of deceptive interrogation.[31] Most recently, Seana Shiffrin includes in her work on freedom of speech and lying a brief yet helpful exposition of why deceptive interrogation is problematic from a moral perspective.[32]

This article situates the morality of deceptive interrogation alongside other accounts of its legitimacy. It concludes that moral legitimacy offers several of the most compelling arguments against deceptive interrogation. Diverse philosophical accounts of the morality of lying lead to the conclusion that the practice of institutionalized dishonesty by police is problematic. If all lies are wrong, then deceptive interrogation is clearly illegitimate. A more normatively neutral utilitarian view of the morality of lying suggests that we should at least account for the destructive power of lies, particularly for the actors who perpetrate them, in evaluating the costs and benefits of routine police deception. Under the stricter premise that lies should be avoided unless absolutely necessary, the condemnation of routine police lies becomes more robust. Such lies threaten trust and social cohesion, require the police to model conduct we would not wish others to emulate, and violate the principle that the lie should always be a last resort.

In previous work, I have argued that forms of routine and systematic lying in the legal system deserve scrutiny.[33] Among other reasons, I have cited their potential to undermine a commitment to truth that grounds our legal system, the problems of procedural fairness they create, and their potential to breed corruption and further undermine confidence.[34] The evaluation of deceptive interrogation that follows offers reasons to be wary of yet another form of potent and destructive legal lie.

This article proceeds in five parts. Part I offers an overview

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Christopher Slobogin, *Deceit, Pretext and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 815 (1997) [hereinafter Slobogin, *Deceit, Pretext and Trickery*]; Robert P. Mosteller, *Moderating Investigative Lies by Disclosure and Documentation*, 76 OR. L. REV. 833 (1997) (arguing that Slobogin's contention that a finding of "probable cause" by a judge renders a suspect an "enemy" under Bok's theory is overbroad); Margaret L. Paris, *Lying to Ourselves*, 76 OR. L. REV. 817, 819 (1997) (contending that Bok's exception for lying to enemies is in fact much narrower than interpreted by Slobogin); *see also* Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH. L. REV. 1275, 1276–77, 1284 (2007).

31 *See* SHIFFRIN, *supra* note 15, at 194–99.

32 *Id.*

33 *See generally* Simon-Kerr, *supra* note 11.

34 *Id.* at 2222–28.

of deceptive interrogation practices. Part II examines the legitimacy of deceptive interrogation from a legal perspective. Part III takes up the question of the pragmatic legitimacy of deceptive interrogation. Part IV focuses on perceived legitimacy. Part V offers an account of moral legitimacy.

I. DECEPTIVE INTERROGATION IN PRACTICE

American popular culture teaches that the "bad cop" and the falsely sympathetic "good cop" are both an inevitable and an effective part of the U.S. machinery of justice. From *NYPD Blue* to *The Wire* to *Making a Murderer*, police interrogation is depicted as a process that inevitably includes a bullying cop who uses antagonistic tactics, among them lying to suspects, to elicit information and also possibly a cajoling "good cop" who lures the suspect to confess by offering false sympathy, justifications or less grave ways to characterize the crime.[35] This is arguably the rare case in which a popular depiction of the justice system has some claim to accuracy. Since the 1940s, the most salient interrogation method in the United States has been what is commonly known as the Reid Technique.[36] This technique was pioneered by Professor Fred Inbau who later commercialized it in a partnership with John Reid.[37] The Reid technique asks interrogators to first assess whether they think a suspect is being truthful.[38] Once the interrogator has concluded that the suspect is lying, the interrogation proceeds from that assumption and becomes accusatory.[39] The Reid Technique is designed to elicit confessions from suspects who are presumed to be adverse to confessing because it is against their interests.[40] Accordingly, it offers methods

35 These tactics combine to form a type of narrative, or what Anne Coughlin refers to as a "mitigating yarn," whose ultimate aim is to get the suspect to "talk[] himself right into a prison cell." Anne M. Coughlin, *Interrogation Stories*, 95 Va. L. Rev. 1599, 1603 (2009).

36 Inbau et al., *supra* note 12, at vii–viii.

37 *Id.*; *see also* Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, *in* Interrogations, Confessions, and Entrapment 42 (G. Daniel Lassiter ed., 2004) (describing the founding of Reid & Associates in 1947 and the company's role in training police).

38 Inbau et al., *supra* note 12, at 4–7 (describing differences between a "nonaccusatory" interview and an interrogation).

39 *Id.* at 5 ("The fact that an interrogation is being conducted means that the investigator believes that the suspect has not told the truth during nonaccusatory questioning.").

40 *See id.* ("A deceptive suspect is not likely to offer admissions against his self-interest unless he is convinced that the investigator is certain of his guilt.").

for breaking down this resistance to confessing.[41]

The Reid Technique unabashedly recommends the use of lies to help elicit confessions.[42] Although the manual is not overt with its terminology,[43] the word "lies" is appropriate to describe what are, in essence, statements or actions "intended to mislead."[44] This police "trickery," as Professor Welsh White labeled it, takes many forms, but most involve misrepresentations intended to convince suspects to confess.[45] In one such permutation, officers suggest to a suspect that he was not responsible for his actions.[46] Police may suggest that the suspect is mentally ill, was coerced into the action by another more powerful figure, or even driven to commit the crime by the victim him or herself.[47] Similarly, the interrogator might trick a suspect into believing he or she is being questioned about a less serious crime.[48] All are "minimization" tactics that aim to convince the suspect that the consequences of a confession will be

41 *Id.* ("[N]onaccusatory questioning of the suspect is unlikely to elicit the presumed truth. Therefore, in an effort to persuade the suspect to tell the truth, the investigator will use tactics that make statements rather than ask questions.").

42 *See, e.g.*, *id.* at 119 ("[I]t is desirable for the investigator to pursue a practice of having a male suspect believe that his particular sexual irregularity is not an unusual one, but rather one that occurs quite frequently, even among so-called normal and respectable persons.").

43 *See, e.g.*, *id.* at 126 (asserting that a suspect is more likely to confess when "presented with false allegations concerning some elements of that crime or other possible crimes he committed" and instructing interrogators to "exaggerate[]" the crime "[w]henever circumstances permit").

44 I adopt a simple definition of the lie offered by philosopher Sissela Bok, which is that lies are statements intended to mislead. SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 6 (1999).

45 White, *supra* note 13.

46 Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME L. & SOC. CHANGE 35, 45–46 (1992) (describing interrogation tactic of "misrepresenting the moral seriousness of the offense"). The Reid and Inbau manual contains a section on "minimizing the moral seriousness" of the suspect's offense. INBAU ET AL., *supra* note 12, at 119–20.

47 Leo, *supra* note 46, at 45. The Reid and Inbau manual advises interrogators to "sympathize with the subjects" and suggest "anyone else under similar conditions or circumstances might have done the same thing." INBAU ET AL., *supra* note 12, at 118–19. It also explains how to "sympathize with the subject" by blaming the victim, an accomplice or someone else who may have "moral responsibility." *Id.* at 121–24.

48 INBAU ET AL., *supra* note 12, at 125–28 (describing tactic of "exaggerating the nature and seriousness of the offense itself").

less serious than reality would suggest.[49] Minimization is deceptive because it deliberately misrepresents the seriousness of the crime or the suspect's culpability in order to persuade the suspect to confess.

In another technique, interrogators try to establish themselves as the suspect's friend and not as an adversary.[50] Investigators may pretend sympathy or compassion and may suggest that a confession would be the "right" thing to do.[51] While confessing may be the "right" thing to do for some guilty suspects, the statement is misleading if the suspect is innocent and has nothing to confess.[52] Investigators may also suggest they are the suspect's allies in the face of less sympathetic figures, such as a fellow investigator or a police captain.[53] Again, this is misleading when the officer's sole goal in the interrogation is to elicit incriminating information. In addition to minimization and offers of false friendship, the officers may offer vague or indefinite promises of leniency, promises that deceive by creating false expectations in the suspect.[54]

Many of these deceptive techniques were used by detectives in the Brendan Dassey case, one of two cases that formed the subject of the Netflix documentary, *Making a Murderer*.[55] The show documents an investigation and trial in which Dassey's cousin, Steven Avery was accused and ultimately convicted of the rape, murder and dismemberment of 25-year-old Teresa Halbach.[56] Avery's nephew, sixteen-year-old Brendan Dassey was also convicted of crimes

49 Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 Law & Hum. Behav. 233 (1991).

50 Inbau et al., *supra* note 12, at 125 (encouraging "flattery" of the suspect as a way to "defuse the natural adversarial relationship that exists between the two.").

51 *Id.* at 127–28.

52 That innocent suspects are interrogated and do confess falsely is borne out by research. *See, e.g.*, Kassin, *supra* note 13 (describing false confessions by innocent people).

53 The Reid manual calls this the "Friendly-Unfriendly Act." Inbau et al., *supra* note 12, at 146–47.

54 *See, e.g.*, Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1097 (2010) (citing "several" false confession cases involving "offers of leniency should the suspect confess"). This technique has been officially foresworn by John E. Reid and Associates, *see* John E. Reid & Assocs., Position Paper, *The Reid Technique of Interviewing and Interrogation*, (Mar. 2016), http://www.reid.com/pdfs/reid_position_paper.pdf, but given the numbers of officers trained prior to this change in position, it is still undoubtedly in use.

55 *Making a Murderer* (Netflix 2015).

56 *Id.*

arising from Halbach's murder, including first-degree intentional homicide, mutilation of a corpse and first-degree sexual assault.[57] During questioning that took place at his school, police detectives pressured Dassey to give them incriminating information about Steven and himself.[58] This was not the first or the last interrogation of Dassey, but it proved something of a breakthrough in the case and it shows the power of the various deceptive strategies available to police detectives.[59]

Early in the interview one detective set a sympathetic and compassionate tone.[60] He told Dassey, "we're cops, we're investigators and stuff like that, but I'm not right now. I'm a father that has a kid your age too. I wanna be here for you. There's nothing I'd like more than to come over and give you a hug cuz [sic] I know you're hurtin."[61] He explained:

> We're here to give you the opportunity to come forward, to talk to us about what you did see, encountered out there that night. We want to know, a lot, a lot of the reason that we're doing this is because, how old are you 16, 17? You're a kid, you know and we got, we've got people back at the sheriff's dept., district attorney's office, and their [sic] lookin' at this now saying there's no way that Brendan Dassey was out there and didn't see something. . . . [W]hich would mean Brendan Dassey could potentially be facing charges for that. And Mark & I are both going well ah he's a kid, he had nothing to do with this, and whether Steve got him out there to help him build a fire and he inadvertently saw some things that's what it would be, it wouldn't be that Brendan act-actually helped him dispose of this body.[62]

57 Dassey v. Dittmann, 201 F. Supp. 3d 963 (E.D. Wis. 2016).

58 *See generally* Calumet County Sheriff's Department, Interview with Brendan Dassey, Mishicot High School (Feb. 27, 2006), *available at* http://www.stevenaverycase.org/wp-content/uploads/2016/02/Brendan-Dassey-Interview-at-School-Transcript-2006Feb27_text.pdf [hereinafter Dassey Interview].

59 By March 1, 2006, the police had questioned Dassey four times in 48 hours. *Dassey*, 201 F. Supp. 3d at 969–70.

60 Dassey Interview, *supra* note 58, at 443.

61 *Id.*

62 *Id.* at 442.

This statement accomplishes two things. First, it allies the detectives with Dassey and against the D.A. and other officers at the Sheriff's office. The deception in the technique is manifest: it creates "the illusion of intimacy between the suspect and the officer" and thereby misrepresents their actual adversarial relationship.[63] Second, it minimizes Dassey's alleged role in the crime, suggesting that he was simply a clueless kid who unwittingly helped build a fire to dispose of the body. Detectives used this technique repeatedly, telling Dassey that they were on his side and that he would feel "better about [him]self" if he confessed.[64] The supposed friendship and the suggestion that they believed Dassey was only minimally involved in the crime were both untrue.

During the school interrogation, the detectives also created a false expectation of leniency. One of them told Dassey, "I promise you I'll not let you hang out there alone, but we've gotta have the truth."[65] This assurance was repeated three more times as the detectives reiterated that they would not leave him "high and dry," and that they would "deal with this, the best we can for your good."[66] The officers also repeatedly invoked Dassey's family and his own conscience, telling him, for example, that "it's a big step . . . toward feeling better about yourself"[67] and suggesting that it would be better for everyone if he talked to the investigators.[68] Again, these vague suggestions that the officers would protect Dassey and possibly help him avoid prosecution gave the false impression that he would not be in much trouble and would actually be doing himself good if he told police what they wanted to hear. Dassey eventually told the officers that he was with his cousin and that he participated in the brutal assault and murder.[69]

The interrogation of Brendan Dassey was a success, if success is measured by the ability to elicit a confession, and it demonstrates why so many police departments have adopted the Reid Technique. Over the course of four such interrogations, Dassey, who has been described as "a profoundly naïve, learning-disabled teen-ager with no criminal record"[70] went from saying he knew nothing about the

63 Leo, *supra* note 46, at 45.
64 Dassey Interview, *supra* note 58, at 448, 467, 477.
65 *Id.* at 448.
66 *Id.* at 443, 451, 481.
67 *Id.* at 448.
68 *See id.* at 446–48.
69 *Dassey*, 201 F. Supp. 3d at 969–75.
70 Kathryn Schulz, *Dead Certainty: How "Making a Murderer" Goes Wrong*, New

crime to offering a description of the sexual abuse and torture of the victim.[71] Strikingly, Dassey had to be prompted to "remember" that the victim had been shot in the head.[72] When the detectives asked what happened to her head, he volunteered first that his uncle cut off her hair and then that his uncle punched her.[73] Only when asked directly who shot the victim did he seem to recall the event.[74] Dassey's ultimate confession to rape and murder, which he later recanted,[75] was the central evidence in the trial that led to his conviction and imprisonment.[76]

In another tactic suggested by the Reid manual, officers falsely imply that they have evidence or tell the suspect that an accomplice has confessed or given them other incriminating information.[77] Trainings in the use of this tactic direct the officer who has decided the suspect is lying to leave and come back with a folder.[78] The officer is instructed to claim the folder has the investigation results and to state, "we have no doubt that you committed the crime."[79] For purposes of the technique, it does not matter if the claims

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YORKER (Jan. 25, 2016), https://www.newyorker.com/magazine/2016/01/25/dead-certainty.

71 *Dassey*, 201 F. Supp. 3d at 969–75.

72 *Id.* at 972.

73 *Id.*

74 *Id.*

75 *Id.* at 972, 983.

76 Dassey's current attorneys sought post-conviction relief, arguing that his confession was coerced. *See* Ashley Louszko et al., *"Making a Murderer": The Complicated Argument over Brendan Dassey's Confession*, ABC NEWS (Mar. 8, 2016), http://abcnews.go.com/US/making-murderer-complicated-argument-brendan-dasseys-confession/story?id=37353929. Their federal habeas petition for relief was initially successful. The court concluded that his confession was involuntary under a totality of the circumstances test, citing his age, low I.Q., and the repeated assurances that he had nothing to worry about if he told the truth. *Dassey*, 201 F. Supp. 3d at 1006. A divided three-judge panel of the Seventh Circuit affirmed the district court's ruling, *Dassey v. Dittmann*, 860 F.3d 933 (7th Cir. 2017), before it was ultimately overturned by the Seventh Circuit sitting en banc. Dassey v. Dittmann, 877 F.3d 297 (7th Cir. 2017).

77 INBAU ET AL., *supra* note 12, at 132 ("The investigator may merely intimate to one offender that the other has confessed, or the investigator may actually tell him so.").

78 Douglas Starr, *The Interview: Do Police Interrogation Techniques Produce False Confessions?*, NEW YORKER, at 4 (Dec. 9, 2013), http://www.newyorker.com/magazine/2013/12/09/the-interview-7.

79 *Id.*

are true.[80] In practice, such claims are often false.[81] If the suspect denies involvement, however, officers are trained to respond to the denials with another assertion, "[t]here's absolutely no doubt that this happened."[82] Again, this assertion is also frequently untrue.[83] Interrogators are permitted to try outright lies by, for example, telling the suspect they found his or her fingerprints or DNA, whether or not such evidence has been found.[84]

An episode of the HBO show, *The Wire*, offers a classic example of this form of deception.[85] In the episode, a detective pretends to a suspect that the Xerox machine is a highly sophisticated and infallible lie detector.[86] The scene was evidently inspired by the actual practice of detectives in Detroit and elsewhere.[87] Reporter David Simon describes the tactic as follows in his book, written after a year spent with detectives from the Baltimore Police Department Homicide Unit:

> [T]he detectives, when confronted with a statement of dubious veracity, would sometimes adjourn to the Xerox room and load three sheets of paper into the feeder.
>
> "Truth," said the first.
>
> "Truth," said the second.
>
> "Lie," said the third.
>
> Then the suspect would be led into the room and told to put his hand against the side of the machine. The detectives would ask the man's name, listen to the answer, then hit the copy button.
>
> Truth.

80 *See, e.g.*, *id.* at 6 (referring to the interrogators' use of a "fake file" and "lies about the evidence").

81 One observational study found that police confronted suspects with false data in thirty percent of interrogations. Leo, *supra* note 18.

82 Starr, *supra* note 78.

83 *See, e.g.*, *id.* at 6 (describing the prevalence of the Reid technique across hundreds of interrogations regardless of whether guilt was certain).

84 *Id.* at 5. The interrogation of Brendan Dassey also included this tactic. Officers made the false assertion to Dassey that they knew his cousin, Steven Avery, "told [him] to say certain things when the police came and talked to [him]." Dassey Interview, *supra* note 58, at 446.

85 *The Wire: More with Less* (HBO television broadcast Jan. 6, 2008).

86 *Id.*

87 *The Wire: Ripped From Real Life*, New Republic (Jan. 4, 2008), https://newrepublic.com/article/38982/wire-ripped-real-life.

> And where do you live?
> Truth again.
> And did you or did you not kill Tater, shooting him down like a dog in the 1200 block of North Durham Street?
> Lie. Well, well: You lying motherfucker.[88]

Simon goes on to describe how a Baltimore detective once administered "the coordination test for drunk drivers ('Follow my finger with your eyes, but don't move your head ... Now stand on one foot')," to a particularly gullible suspect.[89] When the detective said his performance indicated that he was lying, the suspect confessed.[90]

These are illustrative but not exhaustive examples of the deception practiced by police when questioning suspects.[91] Undercover officers may also lie about their identities and officers may maneuver in various quasi-deceptive ways when trying to "interview" a suspect without triggering the need for *Miranda* warnings.[92] The frequency with which any of these tactics is used is hard to quantify, although it is getting increasingly easier as more police departments use audio and/or video to record interrogations.[93]

88 DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 213 (1991).
89 *Id.*
90 *Id.*
91 Many other excellent summaries exist. *See, e.g.*, Skolnick & Leo, *supra* note 30, at 5–7; White, *supra* note 13, at 581 n.1.
92 *See, e.g.*, Skolnick & Leo, *supra* note 30, at 5 (observing that police will "question suspects in a non-custodial setting" as a way to "circumvent the necessity" of providing a suspect with a *Miranda* warning). A recent case reports the use of deception to undermine a suspect's desire to have counsel present. Sessoms v. Grounds, 776 F.3d 615 (9th Cir., 2014) (en banc) (reversing District Court denial of habeas). After the suspect said his father wanted him to have a lawyer, the officers told him that "having a lawyer would only hurt him and that invoking his right to counsel would be futile since the police already knew what had happened." *Id.* at 619. Judge Kozinski, dissenting on the ground that the court had misapplied AEDPA deference, nevertheless said he was glad his view did not prevail, noting that he had "seen far too many cases where police extract inculpatory statements from suspects they believe to be guilty, then stop looking for evidence, confident that the courts will uphold the interrogation, no matter how tainted…This can lead to wrongful convictions, as innocent interrogation subjects confess with surprising frequency." *Id.* at 631. (Kozinski, J., dissenting).
93 The Innocence Project recently reported that at least 26 states have some sort of recording requirement for custodial interrogations, and in 4 additional states "more than 2/3 of the population . . . are covered by law enforcement agencies that record interrogations by police or practice." *False Confessions*

In one older study of police interrogations, Richard Leo found that deception was a routine feature.[94] For that study, Professor Leo spent nine months observing the Criminal Investigation Division of a major urban police department.[95] He found that in 90% of cases, detectives confronted suspects with evidence of guilt and then suggested that their self-interest would be advanced by confessing.[96] The evidence of guilt was false in 30% of these.[97] Detectives appealed to the suspect's conscience in 23% of cases and minimized the moral seriousness of the offense in 22% of cases.[98] Slightly more common were the tactics of offering psychological or moral excuses (34%) and using praise or flattery (30%).[99] General attempts to undermine the suspect's confidence in his or her denial of guilt happened in 43% of the cases Leo studied.[100]

Professor Saul Kassin, in a more recent survey of police officers from sixteen departments across the country, found that 7% acknowledged implying or pretending to have evidence of guilt, 8% acknowledged minimizing the moral seriousness of the offense, and 32% said they tried to gain the suspect's trust.[101] That deception of various types continues to play a role in police interrogation cannot be seriously disputed, if for no other reason than that the majority of American police officers are still trained in the Reid Technique.[102] A very recent survey of 340 police officers across the country found

& Recording of Custodial Interrogaitons, Innocence Project, https://www.innocenceproject.org/false-confessions-recording-interrogations/ (last visited Feb. 3, 2019). By contrast, as of 2005, only nine states had any type of legislative or judicially-mandated recording requirement for police interrogations. *See* Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras As Tools of Justice*, 23 J. Marshall J. Computer & Info. L. 771, 784–88 (2005).

94 *See* Leo, *supra* note 18, at 278 (1996) (describing study of deceptive tactics used by investigators).

95 *Id.* at 268.

96 *Id.* at 279.

97 *Id.* at 278.

98 *Id.*

99 *Id.*

100 *Id.*

101 Kassin et al., *Police Interviewing and Interrogation*, *supra* note 18, at 388.

102 *See, e.g.*, Hayley M.D. Cleary & Todd C. Warner, *Police Training in Interviewing and Interrogation Methods: A Comparison of Techniques Used with Adult and Juvenile Suspects*, 40 Law & Hum. Behav. 270, 274 (2016). This study surveyed a national sample of 340 police officers and found that 55.9% of respondents were trained in the Reid Technique. 48.8% of respondents reported receiving formal training in some other interviewing method. *Id.*

that 84.7% had been trained in "using deceit."[103]

II. LEGAL LEGITIMACY

In his work on Legitimacy and the Constitution, Richard Fallon underscores the need to clarify what is meant by "legitimacy."[104] Without such clarity, those who wish to contest the validity of a legal doctrine, ruling, or practice may end up talking past each other because each adopts a different understanding of legitimacy. One way to conceptualize legitimacy is as a product of legal norms. In such a definitional universe, as Fallon puts it, "[t]hat which is lawful is also legitimate."[105] Or, to rephrase Fallon, that which is not unlawful is legitimate. Few legal scholars would contend that legal legitimacy is the end of the inquiry when evaluating a law or practice, but it is an important starting point.

Deceptive interrogation owes its place in American police practice to the fact that it is not unlawful and thus has legal legitimacy. In most states and the federal system, lying in interrogations is not prohibited.[106] This is attributable in part to the Supreme Court's refusal to find any per se problem under the U.S. Constitution with police lies in interrogations. To the contrary, at least since a 1958 Warren Court decision, the Court has maintained that "[c]riminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police."[107] In *Miranda v. Arizona* itself, the Court cited the Reid interrogation technique extensively as it acknowledged that "the police may resort to deceptive stratagems such as giving false

103 *Id.* at 275. There are, however, signs of change. Concerns about the technique have prompted one of the nation's largest police consulting firms to stop training detectives in the method. *See* Radley Balko, *Big Changes May Be Coming to Police Interrogations*, WASH. POST (March 10, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/03/10/big-changes-may-be-coming-to-police-interrogations/?utm_term=.818074625134.

104 *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1789–90 (2005) ("Legitimacy is a term much bruited about in discussions of constitutional law.").

105 *Id.* at 1794.

106 Some states have created prohibitions on the use of manufactured evidence in interrogations. In Florida and New Jersey, for example, the courts have suppressed confessions made after the confessors were shown fabricated crime lab reports and staged recordings of fake eyewitness accounts. *See, e.g.*, State v. Cayward, 552 So. 2d 971 (Fla. Dist. Ct. App. 1989) (fake lab report); State v. Patton, 826 A.2d 783 (N.J. 2003) (fake recording of eyewitness); State v. Chirokovskcic, 860 A.2d 986 (N.J. Super. App. Div. 2004) (fake lab report).

107 Sherman v. United States, 356 U.S. 369, 372 (1958).

legal advice."[108] The Court declined to find such conduct coercive, ruling only that a suspect in a custodial interrogation could not be "threatened, tricked, or cajoled into a waiver" of his or her right to an attorney.[109] Three years after *Miranda*, the Court held that misrepresentations made by police officers during an interrogation did not render the resulting confession inadmissible.[110] The Court also subsequently clarified that in a non-custodial interrogation that does not otherwise trigger the requirement for a *Miranda* warning, lying to a suspect about a material fact will not render a non-custodial interrogation custodial.[111]

These precedents identify boundaries that police may not cross at the risk of rendering a confession involuntary. Lying in and of itself is not one of them. Instead, federal courts assess whether a confession is voluntary by applying a "totality of the circumstances" test under which deceptive interrogation techniques are frequently condoned.[112] In one often-cited case, for example, the Second Circuit held that an interrogation involving at least three significant lies by officers, including a false promise of leniency, an unjustified reference to the death penalty, and a false claim that the suspect's fingerprints matched evidence found at the scene, was not coercive and posed no constitutional problem.[113]

Judicial tolerance for police lies reflects an American political culture in which the lawfulness of deceptive interrogation is largely taken for granted. Yet, deceptive interrogation is not universally accepted. In the United Kingdom, for example, legislative reforms in the 1990s altered the focus of interrogations, requiring investigators to use methods that eschew deception and focus on gathering information rather than eliciting confessions.[114] In Norway, New Zealand and Australia interrogators now concentrate

108 Miranda v. Arizona, 384 U.S. 436, 455 (1966).

109 *Id.* at 476.

110 Frazier v. Cupp, 394 U.S. 731, 739 (1969) (applying totality of the circumstances test to find that false statement in interrogation that defendant's cousin had confessed did not render defendant's confession involuntary in absence of other extenuating factors).

111 *See* Oregon v. Mathiason, 429 U.S. 492, 495–96 (1977) (holding that an "officer's false statement about having discovered [the defendant's] fingerprints at the scene [of the crime] . . . ha[d] nothing to do with whether respondent was in custody for purposes of the *Miranda* rule").

112 Arizona v. Fulminante, 499 U.S. 279, 285–86 (1991).

113 Green v. Scully, 850 F.2d 894, 903–04 (2d Cir. 1988).

114 Tom Williamson, *Psychology and Criminal Investigations*, *in* Handbook of Criminal Investigation 68, 75 (Tom Newburn et al. eds., 2007).

on obtaining information and are correspondingly prohibited from lying or manipulating the suspect.[115] In Japan, although Japanese interrogators are instructed to apply psychological pressure using techniques similar to the Reid Technique, deliberate deception of a suspect about the evidence against him is normally out of bounds.[116] In Germany, the Code of Criminal Procedure explicitly prohibits interrogators from using methods, including "deception," that could impair "[t]he accused's freedom to make up his mind and to manifest his will."[117] This prohibition is taken so seriously that Germany is one of the few countries to have a corresponding rule requiring information obtained in violation to be excluded from evidence.[118]

In the United States, however, Congress has passed no laws banning deception in investigations by federal law enforcement officers. Nor have states or most police departments themselves created rules against it. Prosecutors are more restricted in how they can employ deception.[119] State and federal rules governing prosecutors invariably prohibit practices involving "dishonesty, fraud,

115 *See* Christian A. Meissner et al., *Interview and Interrogation Methods and Their Effects on True and False Confessions*, CAMPBELL SYSTEMATIC REVS., June 2012, at 9 ("[C]ountries, such as the United Kingdom, Norway, New Zealand, and Australia, have amended their interrogation practices to employ information-gathering methods of interrogation."); *see also* Ulf Stridbeck & Philos Svein Magnussen, *Prevention of Wrongful Convictions: Norwegian Legal Safeguards and the Criminal Cases Review Commission*, 80 U. CIN. L. REV. 1373, 1374 (2012). The Norwegian Criminal Procedure Act provides that confessions may lead to a shorter trial procedure if they are "corroborated by other evidence." STRAFFEPRESESSLOVEN [CRIMINAL PROCEDURES ACT], as amended June 30, 2006, at No. 53, § 96, *translation at* https://app.uio.no/ub/ujur/oversatte-lover/data/lov-19810522-025-eng.pdf (Nor.).

116 Daniel H. Foote, *Confessions and the Right to Silence in Japan*, 21 GA. J. INT'L & COMP. L. 415, 458 (1991) (citing Judgment of Nov. 25, 2970, Saikosai (Supreme Court), 24 Keishu 1670 (Okayama v. Japan)).

117 STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], as amended Apr. 7, 1987, at 1074, § 136a, *translation at* https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1126 (Ger.). The prohibition on lying is so serious that it is one of the only instances (in addition to physical interference, torment, and a few egregious comparators) in which the code imposes a mandatory exclusionary rule for evidence obtained through prohibited means. *Id.*; *see also* Ralph Grunewald, *Comparing Injustices: Truth, Justice, and the System*, 77 ALB. L. REV. 1139, 1177 (2014).

118 Grunewald, *supra* note 117.

119 *See* Rebecca B. Cross, *Ethical Deception by Prosecutors*, 31 FORDHAM URB. L.J. 215, 215 (2003).

deceit, or misrepresentation."[120] The Supreme Court has explained the stricter rules for prosecutors on the ground that prosecutors are "the representative . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."[121]

While this prohibition on prosecutorial lying appears stringent,[122] it becomes less so when coupled with the permissibility of police deception. At least in the federal system, so long as they are not making the misrepresentations themselves, prosecutors may "direct law enforcement agents to mislead suspects about the agents' identities and goals," and whether they are the subject of the investigation.[123] Thus permissive treatment of deceptive interrogation by police provides a form of legal legitimacy to prosecutorial deception as well. By using officers to speak for them, prosecutors can deceive suspects in ways that would be clearly prohibited were they to engage in the deception directly.

The legal legitimacy of deceptive interrogation raises the question why the police have been granted this unusual space for deception. The ethical rules governing prosecutors are just one example of a broader facial commitment in the United States to integrity in law enforcement. While many would argue, with justification, that our legal system does not always live up to this commitment,[124] we have not typically eschewed rules that, at least formally, serve to reinforce it. Like prosecutors, police represent the sovereign and presumably have the corresponding obligation

120 *See* Model Code of Prof'l Responsibility DR 1-102(A)(4) (Am. Bar Ass'n. 1980) (identifying conduct involving dishonesty, fraud, deceit, or misrepresentation as misconduct subject to discipline). In addition to this specific prohibition, the ABA Model Code is replete with standards stressing the need for the legal profession to maintain the highest standards of integrity. *See also* Cross, *supra* note 119 (discussing attorney ethical obligations and noting all states have rules barring dishonesty by attorneys).

121 Berger v. United States, 295 U.S. 78, 88 (1935).

122 For example, one prosecutor pretended to be a defense attorney during a phone call with a fugitive axe murderer, a pretense which ultimately resulted in the fugitive's surrender. Despite the potentially life-saving consequences of his lie, the prosecutor was suspended for three months after a disciplinary hearing. *In re* Paulter, 47 P.3d 1175 (Colo. 2002).

123 Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 Geo. L.J. 207, 231 (2000).

124 *See, e.g.*, Philip M. Stinson et al., *Police Integrity Lost: A Study of Law Enforcement Officers Arrested*, 63 Crim. Just. Fac. Publications (2016) (reporting data on rate of criminal police conduct in U.S.).

to act with integrity.[125] Scholars have for years offered cogent arguments that even under existing laws, deceptive interrogation is impermissible.[126] Yet, as it now stands, there is no doubt that on balance this deception is deemed lawful.

History, habit and perceived utility are likely contributors to the legal legitimacy of deceptive interrogation. Today's Reid Technique is a product of a transitional moment in the history of policing. The earliest iteration of the technique emerged after a period in which physically and psychologically abusive interrogation techniques referred to as the "third degree" predominated in U.S. police departments.[127] After a popular backlash against these tactics in the early decades of the twentieth century, Fred Inbau, a Professor of Law at Northwestern University, published the first edition of what would become the Inbau & Reid manual.[128] Inbau's approach focused on both the use of the polygraph and of physical clues to assess a subject's truthfulness, followed by an interrogation that used milder psychological rather than physical tactics to elicit a confession.[129] As Professor Leo has documented, this psychological focus seemed "progressive[] by the political standards of the 1930s."[130] It attempted to construct a scientific and more effective approach to interrogation and at the same time to provide a humane alternative to violence and intimidation.[131]

The technique's basis in science has since been discredited,[132]

125 As evidence of this, the New Orleans Police Department has recently adopted a new training program focused on teaching officers to intervene "when they see fellow officers on the verge of unethical behavior, no matter the circumstances." Campbell Robertson, *New Orleans Program Teaches Officers to Police One Another*, N.Y. TIMES (Aug. 28, 2016), https://www.nytimes.com/2016/08/29/us/a-new-orleans-program-teaches-officers-to-police-each-other.html.

126 *See* White, *supra* note 13, at 582–85 (referencing dicta in *Miranda*, among other case law, to argue that any confession that is not voluntary must be excluded from evidence).

127 Leo, *supra* note 37, at 42.

128 *Id.* at 63.

129 *Id.* at 64.

130 *Id.* at 63.

131 *Id.*

132 Jaume Masip et al., *Is the Behaviour Analysis Interview Just Common Sense?*, 25 APPLIED COGNITIVE PSYCHOL. 593, 594–95 (2011) (summarizing empirical research discrediting scientific basis of Reid technique); Timothy E. Moore & C. Lindsay Fitzsimmons, *Justice Imperiled: False Confessions and the Reid Technique*, 57 CRIM. L.Q. 509, 518 (2011) (describing Reid manual as "replete with unsupported pronouncements regarding what an innocent [compared to

but the veneer of scientific authority and the contrast with the coercive and violent regime that preceded it gave the Reid Technique an authoritativeness that was not seriously questioned for decades.[133] The perceived authority of the Inbau manual has been reflected in judicial opinions citing the utility of the technique[134] and may have become self-reinforcing. The common law is not adept at moving away from outmoded forms of evidence or outdated techniques. This phenomenon within the legal system is familiar to students of evidence, who have observed courts' refusals in recent years to acknowledge the scientific fallibility of long-established forensic techniques from ballistics to hair analysis to fingerprinting.[135]

Yet, the path from authoritativeness to legal legitimacy to entrenchment is not a straight line. Once a practice becomes entrenched, it is human nature to assume its efficacy. From the 1940s until today, the Reid Technique has been the "most well-known and influential in the United States,"[136] placing deception (and other forms of psychological manipulation) at the center of interrogation practice. The staying power of the Reid Technique within police departments and in judicial opinions approving it may help explain the perception that deceptive interrogation has instrumental value and therefore pragmatic legitimacy. In other words, the Reid Technique's long-standing usage likely contributes to the perception that deception is effective while the perception that deception is effective, in turn, likely contributes to its legal legitimacy, which in turn permits its continued use.[137]

A final contributor to the legal legitimacy of deceptive interrogation may be the courts' reluctance to create yet another

a guilty] suspect 'would do'").

133 *See* Leo, *supra* note 37, at 63–67 (emphasizing the popularity of the technique despite studies originating in the 90s which demonstrate that Inbau and Reid "misrepresent[ed] the academic support for their psychological theories").

134 *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 449 (1966) (describing Reid manual as "the most enlightened and effective means presently used to obtain statements through custodial interrogation").

135 *See, e.g.*, Jennifer L. Mnookin, *The Courts, the NAS, and the Future of Forensic Science*, 75 Brook. L. Rev. 1209, 1250 (2010) (describing judicial insistence that "the long and substantial history of the use of [fingerprinting] could provide what the court considered to be a form of 'implicit testing'").

136 Leo, *supra* note 37, at 64.

137 One scholarly defense of deceptive interrogation corroborates this intuition by invoking the ubiquity of police deception in its first sentence. "Virtually all interrogations," the article begins, "or at least virtually all successful interrogations . . . involve some deception." Magid, *supra* note 19, at 1168.

restriction on police procedure that might need to be enforced through an exclusionary rule. The United States has an extensive yet fraught tradition of banning the introduction of evidence illegally obtained.[138] Many agree that the exclusionary rule is an imperfect solution to criminal procedure violations, yet there is little consensus on how to improve it or find workable substitutes.[139] The Supreme Court's distaste for the exclusionary rule has become palpable in recent years through opinions crafting exceptions to the rule and muddying the conditions under which it would apply.[140] Many states have followed suit, although others have continued to embrace a more robust exclusionary rule.[141] At the same time, U.S. police departments and legislatures have not created effective alternative means for enforcing restrictions on police conduct that would minimize violations. Against this background, courts may be reluctant to create legal obstacles to deceptive interrogation that would only breed thorny and potentially costly enforcement problems.[142]

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138 If the exclusionary sanction were reserved solely to deal with improper use of deception, it might be considered more effective. Germany, for example, does exclude evidence obtained through police deception, but this is one of the only exclusionary sanctions in the German criminal code. STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], as amended Apr. 7, 1987, at 1074, § 136a, *translation at* https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1126 (Ger.).

139 *See, e.g.*, Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543, 1587–1608 (2015) (describing proposals, such as tailoring exclusion depending on the moral egregiousness of the crime, eliminating the good faith exception, replacing it with a reliance on civil damages as a deterrent and offering solution of "awareness-generating" judicial training or jury instructions).

140 *See* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV 1885, 1887 (2014) (describing Roberts' courts exclusionary jurisprudence as ushering in a new "period of crisis" for the exclusionary rule).

141 Thomas K. Clancy, *The Fourth Amendment's Exclusionary Rule As A Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357, 384 (2013) ("Many states continue to follow in lock-step United States Supreme Court analysis."); *see e.g.*, State v. Shannon, 222 A.3d 924, 929 (N.J. 2015) (LaVecchia, J., concurring) (citing New Jersey's long-standing rejection of the U.S. Supreme Court's good faith exception to the exclusionary rule as the "relevant point of divergence between state and federal law" in the area), *cert. denied*, 136 S. Ct. 1657 (2016).

142 Prominent scholars in the area advocate mandatory recording of all interrogations, which would be one first step toward enforcing a prohibition on lying and at a minimum help regulate the most coercive behavior by interrogators. *See, e.g.*, Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 416 (2015) (arguing that "recording entire

III. PRAGMATIC LEGITIMACY

Pragmatic legitimacy, or the question of how well deceptive interrogation works, is one foundation for the legality of the practice. Courts have assumed that deceptive interrogation does in fact work.[143] Scholars, in contrast, have debated its efficacy. This section reviews that debate and asks whether a definitive case can be made from this perspective for or against deceptive interrogation.

Whether deceptive interrogation has pragmatic legitimacy breaks down into two questions. First, what end is desired. Second, whether deception produces the desired goal. The answer to both questions depends on perspective. By one account, we should ask what narrow goal the police have in conducting an interrogation and whether the practice furthers it. Proponents of deceptive interrogation commonly reflect this perspective.[144] By another account, one that conceives efficacy more broadly, an interrogation practice should be judged for its ability to further the truth-seeking goals of the justice system or, at a minimum, to help police effectively perform their law-enforcing function. Scholars who contest the pragmatic legitimacy of deceptive interrogation commonly reflect this perspective. This part examines each of these accounts in turn.[145]

A. Efficacy as Confessions

Interrogation manuals are a good starting point for understanding the claim that deceptive interrogation has pragmatic

interrogations is an important first step" toward decreasing the number of wrongful convictions); Saul M. Kassin et al., *Does Video Recording Alter the Behavior of Police During Interrogation? A Mock Crime-and-Investigation Study*, 38 Law & Hum. Behav. 73, 81 (2014) (concluding based on laboratory experiment that police were less confrontational and more attentive in recorded interrogations); Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. 479, 523 (2006) (arguing for mandatory recording of entire interrogations to facilitate exposure of contaminated confessions).

143 *See supra* Part II.

144 *See, e.g.*, Inbau et al., *supra* note 12 (instructing police interrogators in Reid technique designed to elicit confessions); Magid, *supra* note 19, at 1168, 1198 (suggesting that police interrogators should aim to elicit confessions).

145 It is important to note that efficacy can be conceptualized still more broadly to embrace the concern that deceptive interrogation undermines public trust in the legal system. This concern is central to perceived and moral legitimacy, as discussed in Parts IV and V. Indeed, this Part concludes that the narrow focus of pragmatic legitimacy—its failure to situate deceptive interrogation in a larger framework of legitimacy—has impoverished the debate over the practice.

legitimacy. By their account, an interrogation is not an interview.[146] The goal is not to "obtain the truth through non-accusatorial, open-ended questioning" but instead to "elicit incriminating statements, admissions and/or confessions."[147] According to these manuals, "the singular purpose of American police interrogation is to elicit incriminating statements and admissions—ideally a full confession—in order to assist the State in its prosecution of the defendant."[148]

The notion that a method of interrogation should be judged solely for its ability to elicit confessions may seem surprising, given the broader role of police interrogation in a justice system seemingly committed to accuracy and procedural fairness. It requires us to assume first that the suspect is guilty and second that the purpose of an interrogation is to elicit a confession. Yet, these dubious assumptions have a basis not only in the interrogation manuals that propagate them, but also in Supreme Court pronouncements on policing.[149] Although the first assumption clashes with the presumption of innocence,[150] the Court has never found that the presumption controlled police in the investigative realm. To the contrary, while the Court has not said so directly, its holdings suggest that police operate under different rules from those that govern prosecutors and judges. For example, the Court has emphasized that "[t]he Constitution does not guarantee that only the guilty will be arrested"[151] and has held that if a suspect makes claims of innocence,

146 Drizin & Leo, *supra* note 19, at 911 (citing NATHAN GORDON & WILLIAM FLEISHER, EFFECTIVE INTERVIEWING & INTERROGATION TECHNIQUES 27–36 (C. Donald Weinberg ed., 2002)); FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 209–347 (Jones & Bartlett 4th ed. 2004) (1962). Drizin and Leo arrived at the above distinction between interrogation and interviewing by reading interrogation instruction manuals, in particular the Inbau and Reid manual and another popular manual by Nathan Gordon and William Fleisher. Drizin & Leo, *The Problem of False Confessions*, *supra* note 19, at 911.

147 Drizin & Leo, *The Problem of False Confessions*, *supra* note 19, at 911.

148 *Id.*

149 *See supra* Part II for a discussion of the Supreme Court's approval of confessions as a goal of interrogation and of the suspension of a presumption of innocence during interrogation.

150 In *Coffin v. United States*, 156 U.S. 432, 453 (1895), the Court referred to the presumption of innocence as "the undoubted law, axiomatic and elementary [whose] enforcement lies at the foundation of the administration of our criminal law."

151 Baker v. McCollan, 443 U.S. 137, 145 (1979). By contrast, prosecutors are directly called upon to carry out the justice system's "twofold aim . . . that guilt shall not escape or innocence suffer." Berger v. United States, 295 U.S.

those claims must be determined by "the judge and the jury."[152]

The Supreme Court has also identified confessions as an important tool of criminal justice. The Court has stated that "admission of guilt [is] consistent with the affirmation of individual responsibility that is a principle of the criminal justice system."[153] The Court has even gone so far as to declare that confessions "are more than merely 'desirable,' they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law."[154] This approach dovetails with American interrogation manuals' focus on approaching interrogation as a means to elicit a confession from a guilty party.[155]

Even if focusing on confessions leads to some mistakes, that too may not be a clear problem under current Supreme Court

78, 88 (1935). It is not hard to extrapolate from this that the goal of both interviewing and interrogation should be to elicit helpful information leading to the arrest and conviction of guilty parties. At the same time, interrogations should strive not lead to the arrest and conviction of innocent parties.

152 *Baker*, 443 U.S. at 146.

153 Minnick v. Mississippi, 498 U.S. 146, 155 (1990).

154 Moran v. Burbine, 475 U.S. 412, 426 (1986) (citing United States v. Washington, 431 U.S. 181, 186 (1977)). Of course, there are boundaries that cannot be crossed in eliciting confessions. *See* Miller v. Fenton, 474 U.S. 104, 109–10 (1985) (noting that certain interrogation techniques, such as "physical and psychological torture" would render a confession involuntary).

155 Whether the Supreme Court's view of the utility of confessions is a result of the predominance of interrogation manuals focused on eliciting confessions is difficult to parse. It seems likely that the Court's jurisprudence, coming primarily after deceptive interrogation was deeply-entrenched, is a reflection of that entrenchment rather than its cause. In any event, a given country's legal approach to confessions seems to dovetail with its view of interrogation. In countries that view confessions with skepticism, such as Norway, interrogators focus on obtaining information and are correspondingly prohibited from lying or manipulating the suspect. *See* Stridbeck & Magnussen, *supra* note 115, at 1374. The Norwegian Code of Criminal Law provides that confessions may lead to a shorter trial procedure if they are "corroborated by other evidence." Straffeprosessloven [Criminal Procedure Act], as amended June 30, 2006, at No. 53, § 96, *translation at* https://app.uio.no/ub/ujur/oversatte-lover/data/lov-19810522-025-eng.pdf (Nor.). Japan, by contrast at one time required as a matter of law that "all crimes shall be adjudicated on the basis of confessions," and still provides a twenty-three day window during which a suspect can be detained "for the purpose[] of . . . demanding a confession" before charges must be filed. Foote, *supra* note 116, at 422, 431 (quoting Japanese Ministry of Justice official). In Japan, interrogation manuals counsel that "obtaining confessions is . . . indispensable to criminal investigations." *Id.* at 437 (quoting M. Suzuki, Higisha Torishirabe No Jissai [The True Situation of Interrogation of Suspects] 144 (rev. ed. 1972)).

doctrine. The boundaries around police investigations are created largely by the due process clause.[156] Due process requires that the police have "probable cause" before making an arrest, but not that they investigate every claim of innocence or that they "perform an error-free investigation" of such a claim.[157] By the Supreme Court's account, due process does not require that states adopt best practices in criminal investigations.[158] Ultimately, the Court seems concerned with maintaining autonomy for the police to work even if that autonomy leads to error.[159] If criminal justice is to function at all, the Court has reasoned, it cannot be a requirement that "every conceivable step be taken . . . to eliminate the possibility of convicting an innocent person."[160] In short, as the law now stands, there is no legal barrier to police interrogations that assume the guilt of the suspect and have the single-minded goal of eliciting a confession. If we accept, then, that an interrogation should be assessed for its ability to elicit confessions, deceptive interrogation has pragmatic legitimacy. Deceptive interrogation is highly effective at extracting confessions, perhaps more so than any other method subject to recent study.[161]

B. Efficacy as Accurate Outcomes

Nevertheless, it would be a mistake to measure the efficacy of deceptive interrogation solely for its ability to extract confessions. Interrogation is one part of a broader system of criminal justice, one that has a mandate to locate and punish the guilty and err on the side of letting the guilty go free rather than convicting the innocent.[162]

156 *Baker*, 443 U.S. at 145–46.

157 *Id.*

158 *See, e.g.*, Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (finding no constitutional problem with a state procedure "because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar").

159 *See, e.g.*, Patterson v. New York, 432 U.S. 197, 208 (1977) (explaining that society's "fundamental value determination" that it is "far worse to convict an innocent man than to let a guilty man go free" is not without its limits).

160 *Id.*

161 *See, e.g.*, Meissner et al., *supra* note 115, at 28–30 (describing results of a meta-analysis of interrogation studies finding that Reid-style interrogation significantly increased the likelihood of both true and false confessions as compared with a control while they produce more false confessions than information-gathering techniques).

162 Alexander Volokh offers an interesting account of the jurisprudence surrounding how many guilty people should go free rather than convict one

Whether or not the police are bound by presumptions of innocence, their work must share in the system's ultimate commitment to protecting the innocent. If innocents confess, which we now know they do, an interrogation technique needs to be judged by something beyond its efficacy at eliciting confessions. Studies suggest that regardless of countervailing evidence, juries almost always convict if they hear a confession.[163] This means not only that confessions may be too narrow a metric for assessing deceptive interrogation, but that the rate of eliciting confessions could be a sign of negative rather than positive utility. As described below, other equally plausible interrogation methods exist and are used in countries with similar approaches to criminal justice, most notably the United Kingdom.[164] Assuming the police are intent on catching the right perpetrators, therefore, it cannot be a given that a quest for confessions is the best approach and that a technique's efficacy should be judged only by its ability to extract a confession. While a confession will make the prosecutor's job easier, the goal of the police investigator should be the accurate disposition of the case, a goal which may be antithetical to a practice that focuses exclusively on confessions.[165]

innocent one. Alexander Volokh, n *Guilty Men*, 146 U. Pa. L. Rev. 173, 198 (1997). He concludes that there is no consensus, but his sample suggests that in the United States the number of guilty men who should be allowed to go free to save an innocent is between 5 and 10, suggesting a strong commitment to avoiding punishing the innocent, even at the expense of catching the guilty. *Id.* at 201–04.

163 *See* Drizin & Leo, *supra* note 19, at 923 (suggesting that confessions are "so biasing that juries will convict on the basis of confession alone, even when no significant or credible evidence confirms the disputed confession and considerable significant and credible evidence disconfirms it"); Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 Law & Hum. Behav. 469, 469 (1997).

164 *See* Gudjonsson, *supra* note 24, at 704 (describing development and use of PEACE interrogation method in the U.K.).

165 Of course, this definition of what is at stake in an assessment of pragmatic legitimacy leaves out other concerns which could be conceptualized as related to efficacy. For example, Jerome Skolnick and Richard Leo have argued that "when urban juries are increasingly composed of jurors disposed to be distrustful of police, deception by police during interrogation offers yet another reason" for jurors to mistrust police witnesses, thereby "reducing police effectiveness as controllers of crime." Skolnick & Leo, *supra* note 30, at 9. This concern about the overall ability of the police to perform their function does have implications for pragmatic legitimacy, but I argue that it is better understood in terms of perceived legitimacy, a category which expressly examines what makes people obey the law and/or believe in the legitimacy of

Whether deception in interrogation furthers or hinders accurate outcomes is a more challenging question. If one believes that confessions are reliable indicators of guilt and deceptive interrogation helps secure them, then it may be that the tactic has pragmatic legitimacy. Indeed, most of the scholarship on deceptive interrogation centers around this vision of efficacy.[166] How well does deceptive interrogation do at helping to locate and convict the guilty? Or, more to the point for many of the researchers in this field, how frequently does it lead to false information, typically in the form of false confessions? One plausible answer is too frequently.

Researchers have argued that deception by police is a leading cause of false confessions. One of the iconic studies on the subject by Saul Kassin and Katherine Kiechel asked college students to type on a keyboard.[167] The students were told the study was gauging their reaction time.[168] At one point, the students were accused of pressing a key they had been told to avoid, causing the researcher's computer to crash and were asked to sign a confession.[169] In one variation, a second researcher would tell the student that he or she had seen the student press the forbidden key.[170] In another, the second researcher said she did not see what had happened.[171] Kassin found that the false assurance that a second researcher had seen the error increased the number of students who signed a written confession from 48% to 94%.[172] That effect has been replicated in subsequent studies.[173] In a more recent study, for example, subjects "carried

law enforcement officials. *See infra* Part IV.B.

166 *See, e.g.*, Magid, *supra* note 19, at 1209 (describing false confession evidence as "only . . . anecdotal" while asserting that "broad limits on deception could result in the loss of many thousands of confessions by guilty persons"); Miller W. Shealy, Jr., *The Hunting of Man: Lies, Damn Lies, and Police Interrogations*, 4 U. MIAMI RACE & SOC. JUST. L. REV. 21, 21–22 (2014) (arguing that police "trickery" is a useful tactic that does not increase the risk of false confessions). *But cf.* Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOL. 215 (2005) (describing research suggesting deception in interrogations contributes to false confessions); Kassin et al., *Police-Induced Confessions*, *supra* note 18, at 25–31 (recommending reform of interrogation practices due to risk of false confessions).

167 Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 126 (1996).

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.*

172 *See* Kassin, *supra* note 166, at 221 (describing previous results).

173 *See, e.g.*, *id.* at 221–22 (describing these studies); Allison Redlich & Gail

out a computerized gambling task that required them to take fake money from [a] bank" and then return the money after answering questions.[174] Later, they were accused of taking the money when they should have returned it and some subjects were shown a video that depicted them committing the theft.[175] The researchers found that all of the subjects signed the confession form, replicating the high compliance rates found in previous studies.[176] The researchers repeated their experiment with a less plausible accusation—that the subjects had failed to return money three times—and found that even in this implausible scenario, 93% of subjects confessed.[177]

Critics have argued that these laboratory studies are a poor measure of efficacy because they are so far removed from the conditions of a real world interrogation.[178] The suspects are accused of hitting a computer key, not committing a crime and the consequences in the simulations are nonexistent as compared with the threat of serious sanctions, including incarceration and possibly the death penalty.[179] These arguments are well-founded. Among other constraints, ethical restrictions limit the verisimilitude of false confession studies.[180]

At the same time, studies of actual interrogations are hampered in many ways. Police departments do not systematically collect data on their interrogations,[181] routine recording of

Goodman, *Taking Responsibility for an Act Not Committed: Influence of Age and Suggestibility*, 27 Law & Hum. Behav. 141, 142, 148 (2003).

174 Nash & Wade, *supra* note 18, at 625.

175 *Id.*

176 *Id.* at 630. The researchers were interested in whether tactics that cause subjects to internalize false memories are more likely to lead to false confessions. They concluded that viewing fabricated evidence "might" lead subjects to internalize the false belief that they had committed the act "more than being falsely told that evidence exists." *Id.*

177 *Id.* at 630–33.

178 Inbau et al., *supra* note 146, at 445 ("The fundamental problem with laboratory studies is the inability to generalize those findings to the field situation.").

179 *See id.* at 444 ("Even the naïve observer should recognize the inherent motivational differences between a laboratory subject who is unable to recall which words from a list were crossed off and an actual criminal suspect who may be facing life in prison if he acknowledges committing a crime.").

180 Krista D. Forrest et al., *The Role of Preexisting Stress on False Confessions: An Empirical Study*, 3 J. Credibility Assessment & Witness Psychol. 23, 27 (2002).

181 *See* Drizin & Leo, *supra* note 19, at 930 ("American police forces do not systematically collect, quantify, or tabulate data on the annual number or

interrogations is in its infancy,[182] and false confessions are difficult to identify without later solid proof, such as DNA evidence or a confession by the real perpetrator backed up by physical evidence.[183] These factors and others mean that the rate of false confessions may be seriously understated.[184] To date, no field experiment exists that could confirm a causal relation between deception in interrogations and false confessions using credible statistical identification, such as randomized controlled trials of various interrogation techniques. Assuming police departments could be convinced to cooperate in such studies, outcomes would be difficult to measure and the studies would require an extended time horizon.[185]

Nevertheless, careful studies of proven false confessions do exist. Although the data are limited, the results are instructive. In one such study, Professors Drizin and Leo collected a sample of 125 such cases.[186] The authors could not pinpoint the reason behind each false confession in their sample, but their detailed accounts make clear that many of the cases involved some form of deception by police interrogators.[187] In one case, the police faked a phone call and told the suspect that the lab had matched his DNA to blood found at the crime scene.[188] In another, the suspect was told he had

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frequency of their interrogations.").

182 *See, e.g.*, Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 416 (2015) (describing limited adoption of mandatory recording by police departments).

183 *See, e.g.*, Drizin & Leo, *supra* note 19, at 926 (describing case of Christopher Ochoa who confessed to murder and was later exonerated when another man confessed and led police to undiscovered murder weapon).

184 *See id.* at 925–28 (describing the difficulty of establishing that a "disputed confession" is "indisputably false").

185 Police departments in the U.S. and other countries have been known to participate in studies on policing tactics. Thus far, these studies have involved a department employing different training techniques or instructing officers to use a script during certain encounters with the public. *See, e.g.*, Emily G. Owens et al., PROMOTING OFFICER INTEGRITY THROUGH EARLY ENGAGEMENTS AND PROCEDURAL JUSTICE IN THE SEATTLE POLICE DEPARTMENT, U.S. DEP'T OF JUSTICE REPORT, May 2016 (describing study of effects of police training program employed by Seattle Police Department), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/249881.pdf; Lorraine Mazerolle et al., *Shaping Citizen Perceptions of Police Legitimacy: A Randomized Field Trial of Procedural Justice*, 51 CRIMINOLOGY 33 (2013) (describing procedural justice study in collaboration with Australian police department).

186 Drizin & Leo, *supra* note 19, at 891.

187 *Id.*

188 *Id.* at 969 (describing case of Allen Jacob Chesnet).

flunked a polygraph test, after which he confessed.[189] In yet another, the suspect testified that he confessed because the police promised him leniency and told him that he would not last long in jail.[190] And in another, the two boys who falsely confessed maintained that they did so in part because the police lied about the strength of the evidence against them.[191]

Drizin and Leo's cases involved additional risk factors.[192] The false confessors were young and vulnerable in various other ways.[193] Indeed, one analysis of wrongful convictions found that thirty-three percent of those who falsely confessed were "juveniles," while forty-three percent were "mentally disabled or ill."[194] Some of the interrogations described by Drizin and Leo lasted for hours or even days, another known risk factor contributing to false confessions.[195] Mental illness, intellectual disabilities and a prior history of being bullied or victimized have also been shown to increase the risk that suspects will falsely confess.[196] Scholars have also begun to examine the ways in which gender bears on the likelihood of a wrongful confession. One study found that women were "somewhat more likely to falsely confess than were men."[197]

These risk factors may make the affected groups more prone to false confessions for a variety of reasons, including vulnerability to deception.[198] What is clear is that deception has been "implicated in the vast majority of documented police-induced false confessions."[199] Another survey of suspects who confessed to crimes found that their

189 *Id.* at 972–73 (describing case of Michael Gales).
190 *Id.* at 978–79 (describing case of Frank Kuecken and Jonathan Kaled).
191 *Id.* at 981–82 (describing case of Calvin Ollins, Larry Ollins, Marcellus Bradford, and Omar Saunders).
192 *Id.* at 963–74.
193 *Id.*
194 Garrett, *supra* note 16, at 38.
195 *See, e.g.*, Gudjonsson, *supra* note 23, at 699 (describing length of interrogation as a "situational risk factor" in police-coerced false confessions).
196 *Id.* at 700. Other studies have found that actual innocence itself may contribute to false confessions because the suspect believes that the error will soon be rectified. *See, e.g.*, Kassin, *supra* note 166, at 224.
197 Elizabeth Webster & Jody Miller, *Gendering and Racing Wrongful Conviction: Intersectionality, "Normal Crimes," and Women's Experiences of Miscarriage of Justice*, 78 Alb. L. Rev. 973, 993 (2015) (linking women's increased rate of wrongful confession to the "disproportionate wrongful conviction" of women in cases involving children, in which they might be interrogated immediately after the death of a child).
198 Kassin et al., *Police-Induced Confessions*, *supra* note 18, at 16–21 (2010).
199 *Id.* at 12.

perception of the strength of the evidence against them was the major factor prompting the confession.[200] This finding further suggests that a false claim about the evidence implicating the suspect likely plays a role in many false confessions. Drizin and Leo thus argue that their study "put[s] to rest any doubts that modern psychological interrogation techniques can cause innocent suspects to confess."[201] Those confessions, in turn, led to wrongful convictions in 81% of the cases in which the innocent defendant decided to take his or her case to trial.[202]

From this, it seems certain that deceptive interrogation forms an important part of an interrogation technique that produces false confessions and subsequent wrongful convictions. From an efficacy perspective, the question then becomes how many mistakes are too many mistakes? Is a method that causes wrongful convictions in some presumably small and ultimately unknowable percentage of cases really a problem if we care only about efficacy?

The judicial answer seems to be that it depends. The Supreme Court, for example, has not made up its mind about how many of the guilty should go free in order to avoid convicting the innocent.[203] At one time, the Court stated that "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[204] Later, however, it suggested that there must be limits to how far we should go to protect the innocent.[205]

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200 Jannie van der Sleen, *A Structured Model for Investigative Interviewing of Suspects*, *in* HANDBOOK OF PSYCHOLOGY OF INVESTIGATIVE INTERVIEWING 35, 35–36 (Ray Bull et al. eds., 2009) (citing Gisli H. Gudjonsson & Hannes Petursson, *Custodial Interrogation: Why Do Suspects Confess and How Does It Relate to Their Crime, Attitude and Personality?*, 12 PERSONALITY AND INDIVIDUAL DIFFERENCES 295, 295–306 (1991)); Gisli H. Gudjonsson & Jon F. Sigurdsson, *The Gudjonsson Confession Questionnaire—Revised: Factor Structure and Its Relationship with Personality*, 27 PERSONALITY AND INDIVIDUAL DIFFERENCES 953–968 (1999); Jon F. Sigurdsson & Gisli H. Gudjonsson, *Alcohol and Drug Intoxication During Police Interrogation and the Reasons Why Suspects Confess to the Police*, 89 ADDICTION 985–997 (1991).

201 Drizin & Leo, *supra* note 19, at 995.

202 *Id.* at 995–96. It is possible that recording interrogations and playing them for jurors might ameliorate this problem, although some suggest that an expert would still be needed to "educate the jury on the risks" of various interrogation tactics. *See, e.g.*, Garrett, *supra* note 54, at 1112.

203 *See* Volokh, *supra* note 162, at 198–201 ("United States jurisprudence on the subject of n [guilty men] is contradictory and tormented.").

204 *In re* Winship, 397 U.S. 358, 364 (1970).

205 *See* Patterson v. New York, 432 U.S. 197, 208 (1977) ("Due process does not

One way to understand these statements from a perspective of pragmatic legitimacy is to conclude that a method that leads to convicting the innocent is a problem unless the costs of not using that method are particularly high. This perspective requires consideration of alternatives. Thus, a cost/benefit analysis of the Reid technique should account not only for its efficacy but also for the availability of alternative methods of interrogation and their efficacy. We now know that there are alternatives that seem to be effective.[206]

In England, a series of wrongful conviction scandals led to reforms in the training of police officers that were implemented in the early 1990s.[207] As a result, English investigators are now trained using a protocol developed by police officers in collaboration with psychologists and lawyers.[208] The new protocol, often identified with the acronym PEACE, uses an interrogation approach that does not employ deception.[209] Instead, the protocol instructs officers not to try to elicit confessions but instead to focus the interview on gathering information.[210] The police are trained to elicit a story through open-

require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.").

206 Gisli H. Gudjonsson & John Pearse, *Suspect Interviews and False Confessions*, 20 Current Directions in Psychol. Sci. 33, 35 (2011) (discussing the effectiveness of the PEACE method).

207 *See* Kassin et al., *Police-Induced Confessions*, *supra* note 18, at 13 (listing required procedures such as: informing the accused of their rights, requiring 8 hours of rest in any 24 hour period, allowing access to a responsible adult for young and mentally handicapped accused, and requiring that all interviews be electronically recorded).

208 *See* Thomas M. Williamson, *From Interrogation to Investigative Interviewing; Strategic Trends in Police Questioning*, 3 J. Community & Applied Soc. Psychol. 89 (1993) (describing and providing example of collaboration between English Commission on Criminal Justice and interrogation method researchers to arrive at new protocol).

209 *See* John Pearse, *The Investigation of Terrorist Offences in the United Kingdom: The Context and Climate for Interviewing Officers*, *in* Handbook of Psychology of Investigative Interviewing: Current Developments and Future Directions 71, 71–72 (Ray Bull et al. eds., 2009) ("[The PEACE method] was aimed at educating officers in the benefits of an information-gathering process . . . and to steer them away from seeking a confession per se towards a more ethical target of seeking the truth."). PEACE stands for Planning and preparation, Engage and explain, Account, clarification and challenge, Closure and Evaluation. *Id.* at 71.

210 Dave Walsh & Ray Bull, *What Really is Effective in Interviews with Suspects? A Study Comparing Interviewing Skills Against Interviewing Outcomes*, 15 Legal & Criminology Psychol. 305, 306 (2010) (describing use of "open questions" soliciting "an account of the events from the suspects themselves"

ended questions and then to go back over it to expose inconsistencies that are a common occurrence when a story is fabricated.[211] As one detective superintendent told reporter Douglas Starr, his "job was simply to get as much information as possible, which, along with corroborating evidence, would either inculpate the suspect or set him free."[212] Other countries, among them Norway, New Zealand and Australia have followed suit and adopted this method.[213]

Early studies of the ability of the PEACE method to elicit information leading to the arrest and/or conviction of the guilty and not the innocent show promising results.[214] Researchers to date have not uncovered any real life "false confession involving the PEACE model."[215] Although it is still too early to conclude that the PEACE model in fact yields fewer false confessions, they hypothesize that because "unlike the Reid technique, the PEACE model is neither guilt presumptive nor overtly confrontational it is less likely to elicit false confessions."[216] Laboratory studies support this intuition. In two studies, researchers found that information-gathering methods reduced the odds of a false confession by 74% and increased the odds of a true confession by 85% as compared with accusatorial approaches, such as the Reid technique.[217] Another study showed that the PEACE method increased "admissions from guilty suspects and . . . the number of critical details elicited."[218]

Although these laboratory results cannot replicate real world conditions, they suggest that rapport-based or collaborative interrogation techniques can produce high quality evidence.[219] Importantly, given the U.S. legal system's heavy reliance on confessions, the data so far show that "the PEACE method is still producing a high rate of confessions."[220] A caveat is in order,

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and probing of inconsistencies that arise).

211 *Id.*

212 Starr, *supra* note 78, at 13–14.

213 Meissner et al., *supra* note 115, at 9.

214 *See, e.g.*, Gudjonsson & Pearse, *supra* note 206, at 35 (finding PEACE method produces a high rate of confessions while eschewing manipulative questioning techniques).

215 *Id.* at 35.

216 *Id.* at 35–36.

217 Christian A. Meissner et al., *Improving the Effectiveness of Suspect Interrogations*, 11 ANN. REV. L. & SOC. SCI. 211, 221 (2015).

218 *Id.* (Techniques that "facilitat[e] the reporting of details by suspects can produce more effective and diagnostic confession evidence").

219 *Id.*

220 Gudjonsson & Pearse, *supra* note 206, at 35.

however. Some early studies suggest that police investigators in PEACE jurisdictions still resort to confrontational techniques when investigating more serious crimes, possibly muddying researchers' ability to draw conclusions about the technique in isolation.[221] As with any other interrogation technique, there is no reliable data on how many of the guilty go free when police interrogators employ the PEACE method.

What the research to date does suggest is that conducting interrogations with an emphasis on "fairness, openness, workability, [and] accountability,"[222] as opposed to psychological manipulation, has the potential to elicit fewer false confessions without diminishing the likelihood that a suspect will confess or offer useful information.[223] If we define the efficacy of an interrogation by its ability to help the system as a whole convict the guilty and not the innocent, this research should give us pause even though it has not produced hard data on comparative error rates.[224] Deception creates at least a risk that the suspect will produce the information the police have decided they want to hear rather than allow the suspect to reveal whatever the suspect may actually know. Wrongful confessions, in turn, have led to convictions of innocent people,[225] an outcome which is antithetical to the overall mandate of our justice system.

Ultimately, however, focusing on accuracy alone cannot resolve the questions of legitimacy that surround deceptive interrogation. It would require a herculean effort to obtain the kind of information on the rate of wrongful convictions that would be produced by double-blind controlled trials using actual police and actual suspects. In the absence of such an effort, which would only be possible with significant political will, defenders of deceptive interrogation will have a hard time proving its efficacy while detractors will be equally disadvantaged by a lack of concrete data. As a result of this data deficit, proponents and opponents of deceptive interrogation who ground their arguments in pragmatic legitimacy will likely continue to have no satisfactory objective way of resolving their disagreements

221 *Id.* at 34.
222 *Id.*
223 *Id.*
224 While time may yield a better understanding of how well the PEACE technique works, it will remain difficult, if not impossible, to quantify the number of wrongful convictions produced by deceptive interrogation and other techniques.
225 *See, e.g.*, Garrett, *supra* note 54 (describing cases of false confessions that led to convictions).

over efficacy. Putting aside the inconclusive internal debate, equally problematic is the fact that pragmatic legitimacy excludes from the cost/benefit other actors who may well be affected, including those like Mark Hughes who are lied to in interrogations and then released.

The narrowness of this lens, as well as its failure to provide definitive answers, helps motivate a reexamination of the terms of the debate. In a sense, this reexamination has already begun, as scholars employ arguments that sound in perceived or moral legitimacy in the service of their efficacy claims. Rather than subsume those arguments under the rubric of pragmatic legitimacy, however, this article contends that they should be examined on their own terms and that they are essential to a full accounting of the legitimacy of deceptive interrogation.

IV. PERCEIVED LEGITIMACY

Perceived legitimacy addresses how people perceive a particular system and measures legitimacy through that lens. This understanding of legitimacy, which is generally attributed to Max Weber,[226] has been developed by Tom Tyler and others who have studied what makes people accept the legitimacy of the legal system.[227] A governmental institution possesses legitimacy from this perspective if the public believes it deserves support for reasons that do not include a fear of sanctions or a hope for reward.[228] This "belief that authorities, institutions, and social arrangements are appropriate, proper, and just" makes people feel internally obligated to "defer to those authorities."[229]

In recent decades, scholars have sought to elucidate the sources of public perceptions of the legitimacy (or lack thereof) of the criminal justice system. Following work by Tom Tyler in the 1990s, this research has concentrated on the useful but admittedly

226 TYLER, *supra* note 14, at 26 (describing legitimacy in this context as "prominent in treatments of law by sociologists beginning with Weber"); Fallon, *supra* note 104, at 1795 (citing 1 MAX WEBER, ECONOMY AND SOCIETY 33–38 (1968)) ("'Legal legitimacy,' [Weber] thought, played the foremost role in explaining the generally law-abiding character of modern states.").

227 *See, e.g.*, TYLER, *supra* note 14 (describing Chicago study exploring the influence of citizens' perceived obligation to obey the law and support for legal authorities on compliance with the law); EPP ET AL., *supra* note 17 (describing study results focusing on relationship between race, police stops and perceived legitimacy of law enforcement).

228 Fallon, *supra* note 104, at 1795.

229 Tyler, *supra* note 17, at 376.

amorphous concept of "procedural justice."[230] Procedural justice is typically described as having four essential components.[231] They are: (1) citizens having a voice in proceedings; (2) a decision-making process that is perceived to be neutral; (3) a process that treats citizens with dignity and respect throughout; and (4) an authority perceived to have trustworthy motives.[232] Using a survey-based methodology, Tyler and others have shown that procedural justice leads to the perceived legitimacy of police because of the public perception that the police are fair and treat members of the public with respect.[233] Procedural justice scholars make the case that perceived legitimacy is critical because it increases citizen's willingness to obey the law and to cooperate with law enforcement.[234]

Recent work has problematized this narrative to a degree. Some procedural justice research has suggested that changes in the superficial features of a police stop, such as making eye contact or offering an explanation, would improve perceived legitimacy.[235] The primacy of the appearance of fairness, however, is belied by recent research by Charles Epp, Steven Maynard-Moody and Donald Haider-Markel.[236] After extensive research into traffic stops, they found that while fairness is indeed central to perceived legitimacy, it is actual fairness, not simply the mechanics of respectful behavior, that most informs how people perceive a police stop.[237] Still, as Epp and his colleagues note, their findings are consistent with the larger

230 Mazerolle et al., *supra* note 17, at 12–13 (describing background on procedural justice research for meta study). The seminal work in this area is Tom Tyler, Why People Obey the Law (1990).

231 Lorraine Mazerolle et al., *supra* note 17, at 8.

232 *Id.*

233 *See, e.g.*, Tom R. Tyler, *Policing in Black and White: Ethnic Group Differences in Trust and Confidence in the Police*, 8 Police Q. 322, 326–27 (2005).

234 Tyler, *supra* note 17, at 380 (describing studies demonstrating that procedural justice leads to "cooperation, including rule-following and making extra-role efforts to help" police).

235 *See* Lorraine Mazerolle et al., *Procedural Justice, Routine Encounters and Citizen Perceptions of Police: Main Findings from the Queensland Community Engagement Trial (QCET)*, 8 J. Experimental Criminology 343, 347, 351–53 (2012) (describing randomized trial in which officers were instructed to communicate at eye level and use a script designed to convey trustworthiness of police motives).

236 Epp et al., *supra* note 17, at 4, 143.

237 *Id.* at 4–5. They point out that their contribution does not upset the larger procedural justice narrative, which focuses on fair and neutral procedures, but that it does suggest that simply putting a more polite gloss on police-citizen interactions is not enough to improve perceived legitimacy. *Id.*

procedural justice narrative, which identifies fairness rather than favorable outcomes, as most critical to positive perceptions of the police.[238]

Monica Bell's work on legal estrangement offers a different challenge to the idea that an individual's own experiences of the police are the key to perceived legitimacy.[239] She suggests that a social structure that marginalizes certain groups, most notably African-Americans, precludes group members' sense of solidarity with law enforcement and can override impressions of the police that come solely from individual contact with the institution.[240] One of Bell's normative prescriptions is that in order to improve trust, we should focus on this problem of collective estrangement and the deep-seated social structures that cause it rather than on superficial improvements to individual interactions with police.[241] Accepting this more nuanced and group-based understanding of the origins of distrust in the police still situates fundamental fairness and its effects on trust at the center of the problem. Deception by the police is arguably systemic enough to be a structural cause of estrangement, and it is worth interrogating whether it is part of what leads individuals to "find the police as a whole too corrupt, unpredictable, or biased to deem them trustworthy" no matter their individual experiences.[242]

Perceived legitimacy is, of course, related to other modes of legitimacy. For example, if the legal system produces a significant number of erroneous outcomes or uses morally repugnant methods, public perceptions of legitimacy will be affected. In addition, procedural justice scholars in some respects place efficacy at the heart of their project, arguing that public perceptions of legitimacy are a central decision factor in whether people cooperate with law enforcement and the judicial system, which ultimately will impact how well the system as a whole functions.[243] As Tyler has pointed

238 *See id.* at 4 ("Drivers do value fair treatment and feel demeaned when treated unfairly.").

239 Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017).

240 *Id.*

241 *Id.* at 2082–83 (arguing that reforms brought about as a result of procedural justice scholarship have potential to produce "sham security," or apply a shiny veneer over more deeply-rooted problems).

242 *Id.* at 2087.

243 *See, e.g.*, Mazerolle et al., *supra* note 235, at 359–60 (2012) (framing experiment as successful because it shows tangible improvement in police-

out, the police have a role as government representatives working with people every day to keep the peace and identify those who break the law.[244] This role depends on cooperation by members of the community. When people or groups lose trust in the police, they no longer believe in the legitimacy of the institution, which causes certain functions to break down.[245] The ability of the police to rely on people for information when a crime is committed, for example, suffers when large numbers of community members no longer trust the police.[246] Thus, although perceived legitimacy does not depend on efficacy, it likely contributes to efficacy in the context of policing, where there is a high degree of interdependence between the police and the communities in which they operate.

By trying to account for the precise factors that affect public perceptions of legitimacy and compliance with the law—not simply whether suspects who are charged with crimes after being lied to in interrogations are rightly or wrongfully convicted—perceived legitimacy provides a much different understanding of efficacy and a complement to assessing legitimacy from a purely pragmatic or moral perspective.

A. Trust and Police Legitimacy

As this section will explain, trust is the key point of connection between perceived legitimacy and deceptive interrogation. Procedural justice researchers agree that building trust is essential to promoting perceived legitimacy and thereby cooperation with police. For example, Epp's findings that pretextual traffic stops erode trust in the police and thereby damage the institution, support the procedural justice notion that trust, legitimacy, and compliance with the law are deeply interconnected.[247] In the context of police-citizen interactions, Tyler and others have identified two important types of trust. One type derives from people's perceptions of individual officers' motives and reflects a belief that the police will behave in ways that are benevolent and in good faith.[248] Another is institutional and exists "when members of the public view the police as being

citizen interactions "to be gained by police approaching citizen encounters using the key ingredients of procedural justice").

244 Tyler, *supra* note 14, at 4.

245 *See, e.g.*, Epp et al., *supra* note 17, at 156–57.

246 *Id.* at 156.

247 *See id.* at 143–44, 156.

248 Tyler, *supra* note 233, at 325.

honest and competent authorities who [act] . . . on behalf of all citizens."[249] Institutional trust has been characterized as the more important of the two, forming the "essential core of legitimacy."[250] In short, of the components that make up perceived legitimacy, such as a perceived obligation to obey the police or an inference about the motivations of police officers, people's trust that the police are honest and competent has the most salience in predicting their compliance and cooperation with law enforcement.[251] This trust is said to reflect the "diffuse support that is essential for legitimacy."[252]

Although procedural justice research to date has not focused on deceptive interrogation,[253] its insight into the centrality of trust to

249 *Id.* at 324.

250 Sharp & Johnson, *supra* note 26, at 158; *see also* Michael D. Reisig et al., *The Construct Validity and Refinement of Process-Based Policing Measures*, 34 CRIM. JUST. & BEHAV. 1005, 1024 (2007).

251 Reisig et al., *supra* note 250, at 1024.

252 Sharp & Johnson, *supra* note 26, at 158 (citing Steven G. Brandl et al, *Global and Specific Attitudes Toward the Police:Disentangling the Relationship*, 11 JUST. Q. 119 (1994)).

253 This may seem a strange omission in a field consumed with the study of how to account for and increase citizens' trust in the police and thereby improve the operation of the criminal justice system, but the obvious explanation is that it is difficult to capture the effect of deceptive interrogation using survey studies of the general population. A survey of prisoners might capture that dynamic, but its findings might be limited by the likelihood that incarcerated individuals have a different relationship to the police than the general public and might be further skewed by experiences with prison authorities. For these and other reasons, procedural justice research to date has largely focused on elements of day-to-day police interactions frequent enough to be captured by community surveys. Researchers have queried many aspects of citizen-police interaction for their effect on legitimacy. Studies have focused on the quality and quantity of police-citizen interactions. They have investigated gains of police walking beats as opposed to staying in cars, for example, and how that impacts perceptions of police legitimacy. *See, e.g.*, James E. Hawdon et al., *Policing Tactics and Perceptions of Police Legitimacy*, 6 POLICE Q. 469, 481–82 (2003) (finding that "police visibility" increased trust). They have attempted to parse quality from quantity by surveying respondents about their interactions with police and their beliefs about police legitimacy. *See, e.g.*, Gary Cordner, *Community Policing*, *in* THE OXFORD HANDBOOK OF POLICE AND POLICING 158 (Michael D. Reisig & Robert J. Kane eds., 2014) (describing the "never-ending quality versus quantity debate" in policing studies). More recently, researchers have conducted controlled experiments in which some police are trained to interact with citizens in ways linked to procedural justice, by for example, making better eye contact or exhibiting great empathy or by using scripts provided by researchers. *See, e.g.*, Mazerolle et al., *supra* note 185 (describing study of police ability to enhance perceptions of legitimacy during a traffic stop by employing the "four key components of

police legitimacy has implications for the practice of lying to suspects. If trust is crucial to perceived legitimacy and thereby to system-wide efficacy, then there is reason to be skeptical of institutionalized lying. This becomes clear from an examination of trust as a social concept.

Social scientists, philosophers and others have offered myriad accounts of trust, but by any account routine, intentional deception is antithetical to it. Niklas Luhmann, for example, describes trust broadly as "confidence in one's expectations" in the face of risk.[254] This definition places trust at the heart of human existence, a condition without which "anything and everything would be possible," making the world unbearably complex.[255] Building confidence in one's expectations is a process of assessing how the world works.[256] For example, the sun has come up every day of my life so far, therefore it will come up tomorrow. My friend has been honest with me thus far, therefore he or she will be honest again. The government generally provides services, therefore I trust in the services, such as functioning traffic signals, and will rely on them in shaping my conduct. By contrast, if a person shows herself to be disingenuous or unreliable, the expectation that she will behave that way in the future can be characterized as distrust. Luhmann

procedural justice"—citizen participation, respect, neutrality, and trustworthy motives); *see also* Levin Wheller et al., Coll. of Policing, The Greater Manchester Polic Procedural Justice Training Experiment 7–8 (2013), http://library.college.police.uk/docs/college-of-policing/Practitioner-Paper.pdf (having certain members of police force attend training in using names, acknowledging emotional state of victims, making eye contact and supportive language, which improved aspects of victim experience). Some have found that mundane details, such as whether police offer explanations for their actions, can make a difference in perceptions of fairness. *See, e.g.*, Jason Sunshine & Tom R. Ryler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 Law & Soc'y Rev. 513, 542–43 (2003) (asking respondents in procedural justice survey whether police "give honest explanations for their actions"). Others, such as the study conducted by Epp and his colleagues, focus on the substance of police conduct. Epp et al., *supra* note 17, at 59–61. They show that when the police engage in obviously pretextual traffic stops, stopping people for "miscellaneous low-level violations" and then questioning or searching them, people perceive the stops as unfair. *Id.* African-Americans are stopped at three times the rate of whites for pretextual reasons. *Id.* at 155. This contributes to stark differences in the perception among African-Americans that the police are unfair as opposed to among whites that the police are fair. *Id.* at 143.

254 Niklas Luhmann, Trust and Power 5 (Christian Morgner & Michael King eds., 2017).

255 *Id.*

256 *See id.* at 5, 21–22.

suggests that trust "lies at the foundation of law" because it enables "total reliance upon other people."[257] It follows that lies, particularly frequent and institutionally condoned lies by government actors will contravene the ability to rely on those actors, at least for those who are aware of the lies.

Anthony Giddens offers a variation on Luhmann's definition, arguing that trust is "bound up . . . with contingency."[258] He defines trust more concretely as "confidence in the reliability of a person or system, regarding a given set of outcomes or events, where that confidence expresses a faith in the probity . . . of another, or in the correctness of abstract principles."[259] By this conceptualization, probity, which is commonly defined as "integrity, good character; honesty, [and] decency"[260] offers a more direct link between trust and truthfulness and, by extension, lying and a lack of trust. Lying is, by definition, antithetical to probity.[261] Under circumstances in which one party to the interaction routinely lies, such lies would make it impossible to trust.

Similarly, a definition offered by social psychologist Julian Rotter conceptualizes trust as "a generalized expectancy held by an individual that the word, promise, oral or written statement of another individual or group can be relied on."[262] His account makes the importance of truth-telling, promise-keeping and other forms of veracity even more apparent. If we know that the police are authorized to lie routinely, then there can be no "generalized expectancy" that their words are reliable. The philosopher Sissela Bok also makes a direct connection between truthfulness and trust.[263] She argues that whatever it is that is important to human

257 *Id.* at 39.

258 ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY 33 (1990).

259 *Id.* at 34.

260 *Probity*, OXFORD ENGLISH DICTIONARY, https://en.oxforddictionaries.com/definition/probity (last visited Apr. 5, 2019).

261 "Deceit," "dishonesty," and "lying" are all offered as antonyms of probity. *See Probity*, MERRIAM-WEBSTER.COM DICTIONARY, http://www.merriam-webster.com/dictionary/probity (last visited Apr. 5, 2019).

262 Julian B. Rotter, *Interpersonal Trust, Trustworthiness, and Gullibility*, 35 AM. PSYCHOL. 1, 1 (1980). Where this expectation comes from is another source of intrigue. Theorists have identified relevant factors that include education, age, and life experiences, which are in turn heavily influenced by race. *See* Sandra Susan Smith, *Race and Trust*, 36 ANN. REV. OF SOC. 453 (2010) (describing various theoretical explanations of trust).

263 BOK, *supra* note 44, at 31.

beings, "trust is the atmosphere in which it thrives."[264] According to Bok, therefore, "trust in some degree of veracity functions as a foundation of relations among human beings."[265]

For these scholars, trust is a way of describing the mechanism by which we rely on a person or entity or state of the world in conditions of uncertainty. Of course, the factors that bear on the formation of trust or distrust of individuals and institutions go beyond behavioral cues. Some argue that personality is central to trust, while others suggest that an ability to trust is a capacity that derives from childhood experiences.[266] Certain regions of the United States trust much more than others and rates of trust vary from country to country.[267] These complexities are important, but they should not obscure the basic point that if it is trust that allows us to rely on the probity of a person or institution, we should be less inclined to trust when the person or institution deceives us.

B. Deceptive Interrogation and Trust

Given the definitions of trust outlined above, a reasonable hypothesis would be that institutionalized lying would be a problematic feature of the legal system for the simple reason that lying is anathema to reliance, which is central to trust. At the same time, it is possible that such lying is not problematic for trust because many people may not imagine that they will ever be in police custody and the subject of a deceptive interrogation.[268] In the

264 *Id.*

265 *Id.*

266 *See, e.g.*, Barry R. Schlenker et al., *The Effects of Personality and Situational Variables on Behavioral Trust*, 25 J. PERSONALITY & SOC. PSYCHOL. 419 (1973) (describing and contributing to research into role of "individual differences" in the tendency to display trust); Anthony M. Evans & William Revelle, *Survey and Behavioral Measurements of Interpersonal Trust,* 42 J. RES. PERSONALITY 1585 (2008) (presenting evidence that propensity to trust is personality trait rather than transient psychological state).

267 *See, e.g.*, Brent Simpson, *The Poverty of Trust in the Southern United States*, 84 SOC. FORCES 1625, 1625, 1631 (2006) (describing intranational differences in trust in the U.S. and arguing variation is attributable to same forces that cause variations in international levels of trust, namely collectivist social relations); Jan Delhey & Kenneth Newton, *Predicting Cross-National Levels of Social Trust: Global Pattern or Nordic Exceptionalism?*, 21 EUR. SOC. REV. 311 (2005) (theorizing causes of varying baseline levels of trust across 60 countries).

268 Data on the NYPD's "stop & frisk" program, for example, supports the notion that not only will certain groups be much less likely to come into contact with law enforcement, making such an outcome harder to imagine, but that these differences fall along racial lines. Decio Coviello & Nicola Persico, *An Economic*

absence of any social-scientific research on the question, the harm to trust and thereby perceived legitimacy must remain to some degree a matter of speculation. The rest of this section engages in such speculation in order to provide an overview of the potential effects of deceptive interrogation on trust and to begin to clarify what is at stake for perceived legitimacy.

Although it has not received much sustained scholarly attention, the claim that police lies may be problematic for trust appears in a diverse subset of scholarship on deceptive interrogation. Jerome Skolnick and Richard Leo discuss it in a short piece on the ethics of deceptive interrogation that predated scholarship on procedural justice.[269] In that piece, they make the point that police misconduct ordinarily "undermines public confidence and social cooperation," especially in communities where residents may have a preexisting inclination to mistrust the police.[270] They extrapolate from police misconduct to police lying to suggest that police deception may "engender a paradoxical outcome" because it may actually cause jurors to mistrust police witnesses and therefore "reduce[] police effectiveness as controllers of crime."[271] Skolnick and Leo, in keeping with the discourse on deceptive interrogation, couch their argument in pragmatic terms.[272] Yet their claim that legally-sanctioned deception will undermine trust in the police highlights a problem of perceived legitimacy.

Margaret Paris makes a related argument that trust is essential in an interrogation situation because it will lead to better outcomes.[273] Unlike Skolnick and Leo, whose reasoning resonates with procedural justice concerns,[274] Paris bases her argument on the premise that an interrogation is a form of prisoner's dilemma game.[275] She argues that if certain people or groups have an awareness of

Analysis of Black-White Disparities in NYPD's Stop and Frisk Program, 44 J. LEGAL STUD. 315, 326 tbl.1 (2015). In New York, 11.8% of blacks were stopped while only 1.3% of whites experience a stop & frisk. *Id.*

269 Skolnick & Leo, *supra* note 30, at 9.

270 *Id.*

271 *Id.*

272 This framing makes sense if the goal is to persuade an audience that cares primarily about the efficacy of police deception *See id.* (arguing that conservatives, police, and prosecutors "affirm deceitful interrogative practices not because they think these are admirable, but because they believe such tactics are necessary").

273 Paris, *supra* note 29, at 10.

274 Skolnick & Leo, *supra* note 30, at 9.

275 Paris, *supra* note 29.

police deception in interrogation, a game theoretic model would predict that those people would be less likely to confide in an interrogator in the future.[276] In addition, Paris suggests that making predictions about trust in conditions of uncertainty is costly and leads to withholding of information even when sharing would be beneficial.[277] Relying on work by Carol Rose suggesting that legal rules can serve to facilitate trust, Paris argues that our legal system's embrace of deceptive interrogation is paradoxical because it is antithetical to trust in a situation in which trust is important: the interrogation room.[278]

Finally, in her exploration of the moral harms of deceptive interrogation, Seana Shiffrin makes a related claim. She argues that epistemic moral cooperation is central to the rule of law.[279] This cooperation, she suggests, is threatened by the use of lies in interrogation.[280] Like Paris and Skolnik and Leo, Shiffrin frames her argument in part on grounds of pragmatic legitimacy. "Because the mission of the police requires that they be taken at their word about legal matters in important circumstances," she writes, "the use of the lie in one such circumstance undermines their justified credibility in other structurally similar circumstances."[281] Yet her basic point is about perceived legitimacy—using lies in interrogation undermines trust. Without trust, in turn, people are less likely to comply with the law.

Whether, as these scholars have suggested, deceptive interrogation will affect perceived legitimacy depends, self-evidently, on public awareness that the police will lie in interrogations. In the absence of empirical studies on the question, it is reasonable to assume that the public is increasingly aware of the practice for two main reasons. First deceptive interrogation is not unlawful. As discussed earlier, various methods of trickery are advocated in training manuals and referred to in judicial opinions. Second, police deception is routinely shown in the mass media, in shows ranging from *Law and Order* to *CSI* to *The Wire* and on documentaries focused on particular cases, most recently *Making a Murderer*. The latter show,

276 *Id.* at 36.
277 *Id.* at 38–41.
278 *Id.* at 41–44, 62–66 (citing Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 B.U. L. Rev. 531 (1995)).
279 Shiffrin, *supra* note 15, at 197–98.
280 *Id.* at 194–99.
281 *Id.* at 199.

available on the streaming service, Netflix, was watched by over 19.3 million viewers in the first 35 days after its release.[282] That over six percent of the country's population would in the same month spend ten hours watching a documentary about small-town murder investigations is a testament to the quality of the show, but it may also have to do with increasing public interest in criminal justice issues. Police practices are under scrutiny,[283] and exonerations of innocent defendants convicted on the basis of false confessions are never out of the news for long.[284] Even if the use of deception in interrogations was not widely known in the past, it is becoming more so now.

Procedural justice research suggests further that if people are aware of police deception and it impacts their trust, they will be less interested in cooperating with police. This brings up two potential avenues for testing the hypothesis that deceptive interrogation harms trust and perceived legitimacy. First, how do people behave in interrogations given awareness of deceptive interrogation? And second, how do they behave more generally toward the police given that awareness? Neither has been tested empirically, but on the first issue, it is clear that at a minimum many suspects do continue to speak candidly and even confess to the police, at times to crimes they did not commit.[285] This may suggest that deceptive interrogation

282 Jason Lynch, *Over 19 Million Viewers in the U.S. Watched Making a Murderer in Its First 35 Days*, ADWEEK (Feb. 11, 2016), http://www.adweek.com/news/television/over-8-million-viewers-us-watched-making-murderer-its-first-35-days-169602.

283 *See, e.g.*, Kevin Johnson, *Amid Heightened Scrutiny, It's 'a Precarious Time' for U.S. Police Chiefs*, USA TODAY (May 24, 2016), http://www.usatoday.com/story/news/nation/2016/05/23/police-chiefs-ferguson-san-francisco/84785128/ ("The list of local police chiefs recently ousted in the wake of personnel disputes or racially charged episodes involving officers' conduct is long—and getting longer."); Jay Ransom, *He Spent 19 Years in Prison for Murder. Now Prosecutors Say His Confession Was Coerced*, N.Y. TIMES (Jan. 24, 2019), https://www.nytimes.com/2019/01/24/nyregion/huwe-burton-exoneration-bronx-murder.html.

284 *See, e.g.*, Steve Drizin, *2016:* Making A Murderer *Dominates The Year in False Confession News*, HUFFINGTON POST (Dec. 25, 2016), https://www.huffingtonpost.com/steve-drizin/2016-making-a-murderer-do_b_13805462.html (recapping news coverage of false confessions in 2016); Kristen Zambo, *John Horton of Rockford Free After More Than 2 Decades in Prison*, ROCKFORD REGISTER STAR (Feb. 16, 2017), https://www.rrstar.com/news/20170210/john-horton-of-rockford-free-after-more-than-2-decades-in-prison (describing wrongful conviction based on false confession).

285 *See, e.g.*, JAMES L. TRAINUM, HOW THE POLICE GENERATE FALSE

does not produce mistrust and non-cooperation. Yet there are other explanations.

First, the continued cooperation of suspects may be in part a psychological response to the conditions of interrogation. Research into the waiver of *Miranda* rights provides some insight into this paradox. Suspects overwhelmingly opt to waive their rights even though they have been told that they have the right to an attorney or to remain silent.[286] Researchers have found that suspects fail to act in their own best interests in this context because, although they are familiar with the concept of the *Miranda* warning and even its language, they are unable to understand the warning and/or to apply it to their situation.[287] If people have trouble applying an explicit warning about their rights in a custodial interrogation situation, it may be that they are equally unable to behave according to their own preconceived notions about police veracity. Stress, lack of understanding, or an inability to comprehend the seriousness of the situation may also be factors that cause people to mistakenly trust the police despite prior awareness that police may lie.

A second possibility is that deceptive interrogation techniques are extremely effective at engendering the trust even of those suspects who are inclined to be distrustful.[288] The Supreme Court has suggested as much.[289] In *Illinois v. Perkins*, one of the cases in which the Court declined to find a constitutional problem with

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Confessions: An Inside Look at the Interrogation Room 35 (2016) (describing how even with increased videotaping of interrogations, "false confessions still occur").

286 *See, e.g.*, I. Bruce Frumkin, *Psychological Evaluation in Miranda Waiver and Confession Cases*, *in* Clinical Neuropsychology in the Criminal Forensic Setting 135, 135 (Robert L. Denny & James P. Sullivan eds., 2008) (citing a study demonstrating that 80% of suspects waive their rights); Kassin et al., *Police Interviewing and Interrogation*, *supra* note 18, at 383 (suggesting 4 out of 5 people waive their *Miranda* rights).

287 Andrew Guthrie Ferguson, *The Dialogue Approach to Miranda Warnings and Waiver*, 49 Am. Crim. L. Rev. 1437, 1453–56 (2012) (describing explanations for suspects' failure to invoke *Miranda*).

288 Of course, the converse—that suspects will lie in response to police lies—is also a possibility. For example, as one victim of a wrongful conviction explained, "I has been in jail for five months on a murder that I did not [know] any [thing] about." Garrett, *supra* note 54, 1062–63 (2010). After five months, he gave a false confession because the "police say that they has proof to say us three was in that Lady house." *Id.* Even though, "we was not in her house that day or no where around her house," the victim explained, "I Lie on them because they Lie on me." *Id.*

289 Illinois v. Perkins, 496 U.S. 292, 292 (1990).

deceptive interrogation, the Court conceptualized the use of strategic deception in an interrogation as a way to take advantage of a suspect's "misplaced trust."[290] This vision of deceptive interrogation as an exercise in manipulating trust is embraced by the Inbau and Reid manual itself.[291] According to the manual, "[f]or the interrogation to be successful, the suspect must trust the investigator's objectivity and sincerity."[292] This trust is always misplaced because the investigator is neither sincere nor objective. He or she is trained to lie to elicit desired responses from the suspect and to presuppose the suspect's guilt, making objectivity impossible.[293] In this way, encouraging suspects to mistakenly trust interrogators is at the heart of the Reid interrogation technique and part of what has made it appear so successful. It also makes the police typical liars in the sense that, in Bok's words, "their choice to lie is one which they would like to reserve for themselves while insisting that others be honest."[294]

Whether people continue to trust police in general in the face of deceptive interrogation is an even more complicated question than how it affects behavior in the interrogation room. Trust in the police is impacted by so many variables that it is difficult to isolate the impact of awareness that police lie when they question suspects. Still, if it is widely known that police will lie in interrogations to elicit a confession, it would be rational for people to invoke the right to counsel at the first opportunity and to become extremely cautious before crediting anything they are told by officers. Given this response to an awareness of police lies, the current system would be unsustainable in the sense that the more people realize that police use deception the less likely it will be to work. At the same time, certain groups would undoubtedly remain more susceptible to police trickery because they fail to understand or respond rationally to police deception.[295] In this way, beyond creating a general lack of trust, the system of deceptive interrogation could prove both self-destructive and suspect from a distributional perspective.

One might also expect certain patterns that have emerged in other procedural justice research to appear in studies of the

290 *Id.*

291 *See* discussion *supra* Part I.

292 INBAU ET AL., *supra* note 12, at 6.

293 *See supra* Part I for a description of interrogation tactics.

294 BOK, *supra* note 44, at 23.

295 It is already clear that some in these categories are at greater risk of falsely confessing. *See, e.g.*, Kassin et al., *Police-Induced Confessions*, *supra* note 18, at 19–20 (2010).

perceived legitimacy of deceptive interrogation. One such pattern relates to exposure to certain types of police activity. For example, Epp and his colleagues show as part of their study of traffic stops that there is a "dramatic gulf between blacks and whites: blacks are much less trusting of the police than whites."[296] They attribute this gap, in part, to exponentially greater exposure of African Americans to pretextual traffic stops.[297] White drivers in their study viewed police as fair because they predominantly experienced traffic safety stops that seemed justified under the circumstances.[298] A similar pattern might emerge from a study of deceptive interrogation. Skolnik and Leo make such a claim, arguing that police lying "undermines public confidence and social cooperation" in particular in areas in which residents "have had negative experiences with police."[299] Although fewer people are exposed to interrogations than traffic stops, African Americans are more likely to be arrested and interrogated than whites and to know people who have been arrested and interrogated, particularly in high crime urban areas.[300] Under these circumstances, it may be easy to imagine being interrogated and lied to by the police. And anticipating being lied to or experiencing being lied to may impact trust.

By contrast, for many in the population, particularly people in predominantly white communities with little crime, it may be difficult to imagine ever being the subject of a police interrogation. In such circumstances, knowledge that the police may lie in an interrogation may have no impact on trust because people simply view the information as irrelevant. It may even bolster trust if people conceive of the deception as an interrogation tool used to elicit confessions from guilty suspects. The notion that the police lie to guilty people may seem fair and therefore unproblematic. Viewing oneself as a possible target of a deceptive police interrogation may thus be a more important determinant of the relationship between deceptive interrogation and trust than a simple public awareness that police lie during interrogations.

296 Epp et al., *supra* note 17, at 139–40.
297 *Id.* at 143.
298 *Id.*
299 Skolnick & Leo, *supra* note 30, at 9.
300 *See, e.g.*, Lauren Nichol Gase et al., *Understanding Racial and Ethnic Disparities in Arrest: The Role of Individual, Home, School, and Community Characteristics*, 8 J. Race & Soc. Probs. 296, 301 (2016) (describing survey results finding that 36.8% of blacks reported having been arrested as compared with 27.9% of whites and 30% of Hispanics).

It is clear that trust is at stake when police use deception in interrogation, but only further research can show how lawful police deception impacts trust and perceived legitimacy. There is some urgency to resolving this unanswered question. If we accept that trust is a central component of perceived legitimacy then there is every reason to believe that deceptive interrogation is problematic, at least for those within the population who live in communities with higher rates of arrest and interrogation. As others have pointed out, these communities may suffer from the absence of a cooperative relationship with law enforcement.[301] An institutionalized police tactic that embraces lying and blatantly abuses trust seems likely to contribute to the perception in those communities that the justice system is illegitimate.

For those scholars who embrace the broad project of improving police and community relations, therefore, the fact that the police may, and almost certainly will, lie once a suspect is being interrogated should be troubling. Much of the focus of procedural justice research has been on building trust on the street, but no matter how much progress is made in that arena, deceptive interrogation may remain a barrier to more cooperative and effective police-citizen interactions. It may be that institutionalized lying is unproblematic for some because it seems fair and targeted only at other people who are, by virtue of being in police custody, presumed to be guilty. More salient, however, is the possibility that deceptive interrogation will remain an impediment to trust in the police in the communities that could most benefit from such trust.

V. MORAL LEGITIMACY

Unlike pragmatic and perceived legitimacy, moral legitimacy offers an assessment of deceptive interrogation that is both multi-dimensional and conclusive. As this Part shows, no matter which foundational assumption about the morality of lying one chooses, deceptive interrogation is unjustifiable from a moral perspective. Moral legitimacy does not ignore concerns about efficacy. Indeed, many seminal philosophical accounts of the morality of lying depend on an assessment of the harms or benefits of telling a lie.[302] In part

301 *See, e.g.*, EPP ET AL., *supra* note 17, at 156 ("Crime is controlled primarily by communities working with the police, and not the police acting on their own.").

302 *See, e.g.*, BOK, *supra* note 44, at 32–46 (describing the debate between Kantians and others over whether a lie can be justified in order to save a life).

for this reason, the moral lens proves complementary to other modalities of legitimacy because it offers a way to untangle rather than discard the cost/benefit analysis that results from muddy data about interrogation outcomes. At the same time, it underscores otherwise overlooked problems with deceptive interrogation, such as the dangers to social cohesion and law enforcement itself from institutionalized lying by police. Moral legitimacy also provides a way to take into account a normative position about the institutional role of police in our epistemic environment apart from their ability—whether through skilled interrogation or cooperation from the public—to find and lock up the guilty. This Part canvasses three major moral philosophical conceptions of lying and their implications for deceptive interrogation and then examines the epistemic implications of the practice.

Before turning to that discussion, some framing is important. I want to begin by being clear about the type of moral problem deceptive interrogation presents. Deceptive interrogation is distinct in significant ways from other morally fraught interrogation practices, such as torture. Until now torture has only rarely been governmentally sanctioned[303] and by most accounts happens infrequently.[304] As such, it raises different issues from those brought up by deceptive interrogation, which is a routine and legally legitimate practice. One classic way to conceptualize the question of torture is to view it as a Dirty Harry problem, which centers on when a morally good end will justify the use of unethical means to achieve it.[305] In this problem's namesake film, *Dirty Harry*, the question is

303 *See, e.g.*, John T. Parry, *What Is Torture, Are We Doing It, and What If We Are?*, 64 U. Pitt. L. Rev. 237, 245 (2003) (describing U.S. definition of torture and State Department directive that torture is illegal in the United States).

304 *See, e.g.*, John T. Parry, *States of Torture: Debating the Future of Coercive Interrogation*, 84 Tenn. L. Rev. 639, 650–51 (2017) (arguing any current "use of torture consists of words and symbolic gestures," given the longstanding illegality of torture in the country, despite President Trump's pro-torture stance).

305 The 1971 film, *Dirty Harry*, has lent its name to a helpful version of this philosophical problem. *See, e.g.*, Carl B. Klockars, *The Dirty Harry Problem*, 452 Annals of the Am. Acad. Pol. & Soc. Sci. 33, 34 (1980) (describing "the Dirty Harry problem in policing"). When, if ever, will a morally good end ever justify the use of unethical means to achieve it? In the film, a police inspector, Harry Callahan, is trying to find a 14-year-old girl who has been kidnapped by a psychopathic killer. *Id.* After many plot twists, Harry breaks into the killer's apartment and finds incriminating evidence before confronting him and ultimately shooting him in the leg to prevent his escape. *Id.* at 34–35. Desperately trying to discover where the girl is hidden, Harry steps on the

whether Harry, a police detective, was justified in torturing a suspect by stepping on his wounded leg in order to find the location of a kidnapping victim.[306] Unless one's answer is that torture can never be justified, this hypothetical demands a granular moral calculus that takes into account the risks in the given case and the particular type of torture employed as well as more general considerations, such as the efficacy of torture, its effect on the justice system, and its impact on the torturer both as an individual and in his or her official capacity. Because torture is prohibited, the question becomes whether Harry was justified in breaking both moral and legal prohibitions in order to find the kidnapping victim.[307]

Deceptive interrogation does not present a Dirty Harry problem. In police departments around the country, interrogatory lies are viewed as both productive and mundane.[308] By accepting these lies as routine and lawful, we have excluded them from the moral domain and set them apart from the acknowledged moral quagmire of *Dirty Harry*. Yet, this feint does not mean there are no moral questions to be answered about deceptive interrogation. Rather, in assessing deceptive interrogation from a moral perspective, at least as the practice exists today, we must account for the systemic moral effects of routine deceptive interrogation rather than the wrongfulness of or costs and benefits entailed in each particular lie. The rest of this Part examines the moral costs of institutionalized and routine lying in interrogations.

A. A Philosophical Taxonomy of Deceptive Interrogation

Philosophical accounts of the morality of lying often begin by looking for boundaries.[309] They divide into roughly three camps. In

leg wound, ignoring the killer's request for a lawyer. *Id.* at 35. Of course, as it turns out, the girl is already dead and neither the incriminating evidence obtained without a warrant nor the confession obtained through torture are admissible in court. *Id.* The killer goes free and Dirty Harry gets his name. *Id.*

306 *See* DIRTY HARRY (The Malpaso Company 1971).

307 Undercover operations provide another point of comparison. They differ from torture in part because, like deceptive interrogation, they involve deception built into the system of policing. Some of the moral arguments presented here may well apply to undercover operations as well, although the pragmatic and perceived legitimacy concerns will be different. Most importantly, the utilitarian calculus will differ because each undercover operation, at least in typical conditions, has a specific target and a goal against which the costs of the deception can and generally will be measured.

308 *See* discussion *supra* Parts I, II.

309 BOK, *supra* note 44, at 46 (describing the "difficult task" of "drawing lines" in

the first are those who believe all lying is morally reprehensible.[310] In the second are utilitarians who accept lies as morally legitimate so long as the benefits of the lies outweigh the costs.[311] In the third, are those like Sissela Bok who view lies with skepticism while accepting that there may be times when the lie is justified.[312] This third approach creates a higher threshold for the need to lie, but still entails asking when, if ever, a morally good end will justify it. This Part next takes up these three conceptions as they apply to deceptive interrogation.

The moral legitimacy of deceptive interrogation is easy to assess if one believes that all lying is morally wrong. As Sissela Bok writes in her seminal work on lying, the "simplest answer to the problems of lying" is to prohibit all lies.[313] Theologians, such as St. Augustine,[314] as well as philosophers such as Immanuel Kant have championed this approach.[315] For these thinkers, there is no such thing as a justifiable falsehood, although by some accounts, such as Augustine's, certain lies can be more easily pardoned than others.[316] Those who favor prohibiting all lies must still define the term. For Kant, that definition was "an intentional untruthful declaration to another person."[317] For St. Augustine, it was believing one thing and uttering something different with the intention to deceive.[318] By either definition, some, if not all, forms of deception practiced lawfully by police in interrogations qualify as lying and are therefore morally illegitimate.

order to "determine more carefully what kinds of lies can be told").

310 *See, e.g.*, Immanuel Kant, Critique of Practical Reason and Other Writings in Moral Philosophy 347–48 (Lewis W. Beck ed., trans., 1949).

311 *See, e.g.*, Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (Oxford Univ. Press 1970) (1789) (developing theory of utilitarianism).

312 Bok, *supra* note 44, at 30 ("I believe that we must at the very least accept as an initial premise Aristotle's view that lying is 'mean and culpable' and that truthful statements are preferable to lies in the absence of special considerations.").

313 *Id.* at 33.

314 St. Augustine, Enchiridion on Faith, Hope, and Love 29 (Gateway Editions ed. 1996).

315 Kant, *supra* note 310.

316 *See, e.g.*, Bok, *supra* note 44, at 33 (describing room for pardons of certain lies under St. Augustine's prohibition on lying).

317 Kant, *supra* note 310, at 347.

318 St. Augustine, *supra* note 314 ("[E]very liar says the opposite of what he thinks in his heart, with purpose to deceive.").

The problem of the morality of deceptive interrogation becomes more complicated if one accepts that a lie might be justifiable.[319] Accepting that possibility leads to the two other main conceptions of the morality of lying: utilitarianism and Bok's skeptical approach. From a utilitarian perspective, any question of the morality of lying involves weighing costs and benefits. Unlike Kant and St. Augustine, utilitarian thinkers make no claim that lies are inherently wrong or even that they should be viewed with skepticism.[320] Bentham, not surprisingly, articulated this view without apology; he wrote that falsehood in and of itself "can never, upon the principle of utility, constitute any offense at all."[321] As Bok explains, utilitarians are agnostic about the value of lying and simply weigh "courses of action, be they deceptive or not."[322] Thus, the utilitarian calculus on the morality of lying arguably reduces to questions of pragmatic legitimacy or even perceived legitimacy, to the extent that perceived legitimacy has an effect on outcomes.

As the previous parts of this article make clear, however, neither pragmatic nor perceived legitimacy offers clear winners and losers of a cost/benefit assessment framed around efficacy. An analysis from the perspective of how many mistakes versus positive outcomes come from deceptive interrogations may never be conclusive because it depends on speculation about the number of errors the technique produces. Without a normative reference to tip the scales, this individual outcome-based utilitarian calculus offers little guidance on the legitimacy of deceptive interrogation.

Similarly, perceived legitimacy should be a fruitful area of study relevant to the utilitarian calculus because it too focuses on efficacy. Perceived legitimacy suggests that deceptive interrogation is likely to have negative effects on trust and cooperation with the police, particularly in communities with high rates of interaction with the justice system. At the same time, its effect may be limited to certain communities or difficult to separate from the result of other police interactions. Until procedural justice researchers address the practice we can only conjecture about these effects.

Utilitarianism may nevertheless offer insights about moral

319 BOK, *supra* note 44, at 32–39 (describing Kant and Augustine as holding views contrary to the majority who believe that lies may be justifiable).

320 *Id.* at 48–52 (describing utilitarian philosophers' consequentialist approach to the morality of lying).

321 BENTHAM, *supra* note 311, at 323.

322 BOK, *supra* note 44, at 49.

legitimacy that extend beyond the cost-benefit calculus of pragmatic legitimacy. Bok argues that a true utilitarian, despite believing that lies are morally neutral, should recognize that "most lies do have negative consequences" for the liar as well as those affected by the lie.[323] According to Bok, Bentham identified this destructive character of lies when he wrote that lies "combined with other circumstances" may operate to produce almost "any sort of pernicious effect."[324] If we accept that lies never occur in a vacuum, Bentham's position is more analogous to Bok's, which accounts for the destructive power of lies in weighing whether a lie is justified.[325]

Bok contends that even if no harm can accrue to others from a lie, lies nevertheless have inevitable negative consequences.[326] People who are lied to are deprived of the agency to make their own choices based on correct information.[327] They become "resentful, disappointed, and suspicious."[328] For those telling the lies, the negative consequences include a "loss of integrity," "having to lie again to shore up the first lie," and "a somewhat diminished resistance to lying . . . in the future."[329] Bok contends that liars are "peculiarly likely to be biased" when evaluating the consequences of their actions both with respect to their effect on others and the potentially negative consequences for themselves.[330] Lies also harm social cohesion. Bok writes that "as lies spread . . . trust is damaged."[331] She concludes that a true utilitarian calculus should take these costs into account and add a negative weight to lies as a "correction" of the "inaccurate and biased calculations of consequences made by any one liar."[332]

If we apply this reasoning to deceptive interrogation, it provides some clarity to the muddied cost-benefit analysis of pragmatic legitimacy. With no normative stance about lies, it may be difficult to authoritatively reject or embrace the use of deception in interrogation for all of the reasons described earlier. When measured

323 *Id.* at 50.
324 *Id.* at 47.
325 *Id.* at 30.
326 *Id.* at 24 (identifying "harm that lying does to the liars themselves and the harm done to the general level of trust and social cooperation").
327 *Id.* at 20.
328 *Id.*
329 *Id.* at 52.
330 *Id.* at 50.
331 *Id.* at 26.
332 *Id.* at 50.

against the goal of eliciting confessions that lead to punishment of the guilty, deceptive interrogation is imperfect yet not obviously inefficacious. But if one accounts for the inevitable harms Bok identifies, including those often overlooked, such as the loss of personal integrity of police officers and their potentially diminished resistance to lying in other circumstances, the balance may tip against the use of deception. A police force that is not only open to lying, but trained or permitted to do so routinely when interrogating suspects can be expected to regard lies as legitimate tools of the trade.[333] It would be difficult to measure how often this leads to lying in other, prohibited situations, such as planting evidence, mischaracterizing events leading to police violence, lying to prosecutors, or perjury. The point is simply that when lying is a tool in one circumstance, it is harder to put away in others.[334]

In a system that rejects lying as an interrogation tool, by contrast, officers not habituated to lying can be expected to think more carefully before resorting to the lie in any circumstance. Accounting for the harm suffered by those lied to and never charged as well as the potential loss of community trust in the police and obedience to the law further tilts the cost/benefit analysis against the use of deception. Bok's perspective thus provides a basis for rejecting all forms of deception as a routinized part of police interrogation.

To be sure, a different utilitarian calculus might weigh the costs and benefits of the lie in each interrogation according to the type of lie, the type of crime, and/or what was at stake in each case.

333 That police lie in prohibited situations is clear. *See, e.g.*, Joseph Goldstein, *"Testilying" by Police: A Stubborn Problem*, N.Y. TIMES, March 18, 2018 (describing investigation by New York Times finding evidence of over 25 instances of police perjury in New York City in prior three years).

334 *Cf.* Julia Simon-Kerr, *Systemic Lying*, 56 WM. & MARY L. REV. 2175, 2227, 2227 n.270 (2015) (arguing that "an officer who engages in testilying may graduate to coercion and evidence planting, extending the questionable moral imperative to lie in a case of obvious guilt to increasingly problematic scenarios" and giving examples). It is easy to find claims that police lying is rampant in non-sanctioned contexts. *See, e.g.*, Jeet Heer, *The Killing of Walter Scott Sheds Light on the Problem of Police Lying*, NEW REPUBLIC (Apr. 8, 2015), https://newrepublic.com/article/121486/walter-scott-killing-video-sheds-light-police-lying ("If officer Slager did fabricate his incident report in the Scott killing, he wasn't being a bad apple but rather adhering to a dishonesty that is all too common in American police forces."); *see also* Mitch Smith, *7 Chicago Officers Face Firing Over Laquan McDonald Cover-Up*, N.Y. TIMES, Aug. 18, 2016 (describing disciplinary actions taken against officers for corroborating false account of another officer who shot a fleeing teenager).

Yet that would miss the point, which is that by embracing most forms of deception as legitimate tools in interrogation, police investigators are not required to make any assessment, moral or otherwise, before employing deceit.[335] If court decisions or police policies instead directed officers to make a moral evaluation in every interrogation and decide whether a lie is justified, the utilitarian calculus might be more nuanced. We might need to account carefully for the type of lie or the degree of necessity and balance those against the possibility that opening the door to lies would damage the officer's integrity. This would bring deceptive interrogation into closer alignment with torture.[336] Today, however, deceptive interrogation integrates lying as an unquestioned, perhaps automatic police practice. Under such conditions, it is the systemic rather than individual cost of the lie that is most salient for its moral legitimacy.

Bok contends that even when we account for the often overlooked externalities of lying, the lens of utility is limited.[337] When we face difficult choices, reasonable minds may differ about the relative utility of lying versus truthfulness.[338] She advocates, instead, a moral approach that embraces the "principle of veracity."[339] She traces her view to Aristotle's premise that "lying is 'mean and culpable' and that truthful statements are preferable to lies."[340] Essentially, she advances a presumption against lying for reasons that have been canvassed already in this discussion. Lies have a negative impact on trust and cooperation, they have unintended and unacknowledged consequences for the liars, who become more prone to future lies and corruption, and liars will tend to underappreciate the destructive nature of their lies.[341] For these reasons, Bok would "place[] the burden of proof squarely on those who assume the liar's

335 This is implicit in the Reid manual's instruction to use deception once an officer has made a gut judgment that the suspect is guilty and therefore moves into the "interrogation" phase of the interview. *See* INBAU ET AL., *supra* note 12, at 3–8.

336 *See* Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CALIF. L. REV. 235, 239 (2007) (discussing this post-enlightenment prohibition in reference to the infamous 2004 leaked government memorandum justifying torture in the Middle East).

337 BOK, *supra* note 44, at 53.

338 *Id.*

339 *Id.* at 30.

340 *Id.* (quoting ARISTOTLE, NICOMACHEAN ETHICS bk. 4, ch. 7 (H. Rackam trans., Harv. Univ. Press 1934) (c. 340 B.C.E.)).

341 *Id.*

perspective."[342] In other words, "in any situation where a lie is a possible choice, one must first seek truthful alternatives."[343] The question of moral justification for the lie only becomes salient when the lie is a last resort.

This approach is also clarifying when applied to deceptive interrogation. As described above, the American practice of routinely using deception in interrogations cannot be characterized as a tool of last resort.[344] There are alternatives, such as the PEACE method, that seem to perform as well, if not better, than deception at meeting the goals of the justice system.[345] This method still elicits useful information and produces a high rate of confessions.[346] Bok argues that treating lies only as a method of last resort would "eliminate a great many lies told out of carelessness or habit or unexamined good intentions."[347] The example of deceptive interrogation illustrates this observation. The practice is now deeply engrained in the American legal system. It has legal legitimacy, and it benefits from a presumption of efficacy. Habit and unexamined good intentions are both no doubt at play in maintaining the privileged status of the practice. Yet if lies should only be considered as tools of last resort, it follows that routine deception is morally illegitimate. Even if the cost/benefit analysis of pragmatic legitimacy results in a wash between the PEACE method and deceptive interrogation, the latter cannot be considered the only possible effective system for interrogating suspects. As Bok writes, when "lies and truthful statements appear to achieve the same result . . . the lies should be ruled out."[348] For those who argue that the PEACE method has only been tested in countries with less violent crime than the United States, the counterargument is that the burden should lie with advocates of deceptive interrogation to prove the absolute necessity of the lies. Given the current state of the research, this cannot be done.

One counterargument to the above reading of Bok has been made by Christopher Slobogin.[349] Slobogin elaborates on what he terms Bok's "enemy exception" to argue that under certain conditions,

342 *Id.*
343 *Id.* at 31.
344 *See supra* Part III.
345 Gudjonsson & Pearse, *supra* note 206, at 34–35.
346 *Id.* at 35.
347 BOK, *supra* note 44, at 31.
348 *Id.*
349 Slobogin, *Deceit, Pretext, and Trickery*, *supra* note 30.

deceptive interrogation is morally correct.[350] In "On Lying," Bok canvases a variety of circumstances in which lies are frequently used and evaluates common justifications for such lies. She concludes that in some settings, such as during open warfare with an enemy, lies may be justified "if honesty is of no avail."[351] Slobogin contends that if deceptive interrogation happens after a judicial determination of probable cause,[352] it is moral under Bok's calculus because the lying is only being done to publicly-identified "enemies."[353] Bok refers vaguely to "criminals" to illustrate her point about public identification of enemies, which provides Slobogin with a jumping off point.[354] Slobogin reads Bok to suggest that publicly identifying the enemy is the key to making the lie morally justifiable.[355] This makes postarrest lying to suspects acceptable because a gatekeeper, in this instance a judge, has publicly identified the suspect as the "enemy."

As others have pointed out, Slobogin's reading of Bok is problematic.[356] Bok's goal in the section about lying to enemies is to caution against using the "enemy" label as a blanket justification for lying.[357] She warns of governments who "build up enormous, self-perpetuating machineries of deception in adversary contexts" and risk creating conditions in which they become impotent, undermined by the extreme cynicism they have bred.[358] In her view, the only lies to enemies that should be considered justified are ones that are not "spurious" and will not "backfire or cause harm to general trust."[359] Alternatives to lying must always be sought and "the more openly and clearly the adversaries . . . can be pinpointed . . . the more excusable" the lie may be.[360] Here, Bok herself calls attention to the major problem with arguing that deceptive interrogation has moral legitimacy under an "enemy" exception.[361] Police do not

350 *Id.* at 801, 810–11.
351 Bok, *supra* note 44, at 144.
352 For example, after an indictment or the issuance of an arrest warrant. Slobogin, *Deceit, Pretext, and Trickery*, *supra* note 30, at 810–11.
353 *Id.* at 805.
354 Bok, *supra* note 44, at 144.
355 Slobogin, *Deceit, Pretext, and Trickery*, *supra* note 30 at 801, 810–15.
356 In responses to Slobogin's argument, both Robert Mosteller and Margaret Paris make this point. Mosteller, *supra* note 30; Paris, *supra* note 30.
357 Bok, *supra* note 44, at 142–43.
358 *Id.*
359 *Id.* at 143.
360 *Id.* at 144.
361 *Id.*

use lies in interrogation only against carefully identified, openly proclaimed "enemies."[362] Instead, as the examples in Part I illustrate, they embrace most forms of deception as legitimate tools in any interrogation at any stage of an investigation. During a police investigation, interrogators are not required to make any assessment, moral or otherwise, before employing deceit.

While the police themselves may be convinced of a suspect's guilt, Bok warns against such self-fulfilling labeling. "If we want to produce excuses for lying to someone," she writes, "these excuses should be capable of persuading reasonable persons, not merely some particular public locked in hostility to a particular group."[363] The American legal system echoes this caution, demanding a procedurally correct trial or plea process before criminal penalties can attach. Yet police are not required to persuade anyone, including themselves, that an interrogatory lie is justifiable. This is a clear sign that what officers are doing is not lying to enemies, but rather lying during non-public hostilities against those they perceive to be guilty or potentially guilty. Far from being required to persuade reasonable—or better yet disinterested—people that a lie is justifiable, police face no obligations whatsoever before telling interrogatory lies.

As with the utilitarian calculus, the analysis might be different if we sought to judge the morality of any particular instance of deception in an interrogation. The stakes in any given investigation might be so high, the deception so trivial, or the alternatives so ineffective, that the moral calculus might change. Bok's foundational "last resort" premise does not foreclose this possibility.[364] Indeed, if we were to prohibit deceptive interrogation, the system would come closer to demanding the moral inquiry required before a lie can be told under Bok's thesis. In such a system, the possibility of lying to suspects would remain open as a deviation from the rules

362 As Professor Mosteller points out, most interrogations do not follow a judicial determination of probable cause, which often comes later and is bootstrapped to information collected in the interrogation. Mosteller, *supra* note 30, at 836. Both Mosteller and Paris also note that classifying arrestees as criminal enemies is problematic given the presumption of innocence. *Id.* at 833–35; Paris, *supra* note 30, at 820–25, 830. Paris makes the further point that classifying all arrestees as enemies justifies lying to even those accused of minor crimes, which seems quite far from the extraordinary circumstances Bok identifies as having the potential to justify lying to enemies. Paris, *supra* note 30, at 831.

363 BOK, *supra* note 44, at 145.

364 *Id.* at 31.

and would, presumably, require a great deal of thought or urgency before being deployed. Professor Slobogin's argument that lying is systematically justifiable under the enemy exception might become more relevant if we required formal processing before a judge prior to the use of lies in interrogations. Whether deceptive interrogation were fully prohibited, as in Germany,[365] or simply regulated and supervised more intensively, making it somewhat akin to the use of undercover agents, it would demand a moral calculus more in keeping with the premise that a lie should be viewed as dangerous and a tool of last resort. Neither of those hypotheticals exists in American police departments today, making the moral calculus both simpler and starker. From a perspective that views all lies as harmful and permits their use only in situations of great exigency, the routine use of interrogatory lies by police officers is morally indefensible.

B. Police as Moral Exemplars

One final way to conceptualize the moral legitimacy of deceptive interrogation comes from recent work by Seana Shiffrin.[366] In a brief portion of her book on lying and freedom of speech, she argues that the morality of deceptive interrogation should be examined independently of efficacy concerns.[367] In this way she seems to differentiate her position from that of Bok, whose "last resort" formulation leaves room for efficacy as a factor in moral decisionmaking. Shiffrin contends that even if we assume that deception in interrogation is more effective than other methods, "these lies, while understandable, are wrong."[368] Her argument emphasizes the role of law enforcement in our social world. Shiffrin argues that in a democratic society, people need to be able "to recognize our moral obligations and opportunities," which means that "we need a supportive, reliable epistemic environment."[369] Put another way, we need to have a way of defining and maintaining the shared moral commitments that allow society to function. According to Shiffrin, because state officials such as police are "in charge of putting our joint moral commitments into action and enforcing them," these

365 *See* Strafprozessordnung [StPO] [Code of Criminal Procedure], as amended Apr. 7, 1987, at 1074, § 136a, *translation at* https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1126 (Ger.).

366 Shiffrin, *supra* note 31.

367 *Id.* at 197.

368 *Id.*

369 *Id.*

officials "must aspire to be relevant epistemic authorities on the law and on at least that aspect of morality embodied in the law."[370] Police are a source of moral authority that we should be able to rely on both to reflect, reinforce and inform our moral duties.[371] Therefore, Shiffrin argues, "[w]e should be able to rely on their transmissions about the content of law, legally relevant morality, and legally relevant facts."[372]

Deceptive interrogation poses a problem from this perspective because by misrepresenting the legal consequences of a confession, the moral severity of the offence, or the evidence against a suspect, to take a few common examples, the police undermine their role "as a source of reliable and trustworthy moral knowledge."[373] Rather than being a point about trust or perceived legitimacy, this is an argument that we need the moral authority of law enforcement as a guide and reinforcer of shared norms. Shiffrin contends that the police have the duty to serve as a source of moral knowledge for everyone, but even more so to guilty parties who are most in need of guidance as they struggle "with moral and legal compliance issues."[374] And although the deception happens while the police are seeking to collect information rather than to disseminate it, Shiffrin contends these roles are conjoined in the sense that the police "engage in moral and legal representations" as they investigate crimes.[375] This is particularly salient when one considers that some large proportion of police lies in interrogations are likely told to innocent parties, like Mark Hughes, who are never charged.[376] The epistemic duty of the police, in other words, should not be put aside depending on the particular activity in which officers may be engaged.

Ultimately, the best moral account of deceptive interrogation is one that combines insights from Bok and Shiffrin. Both thinkers agree that deception is dangerous because it threatens to undermine the trust that binds us together into democratic communities.[377] Bok suggests that we should employ lies only as a last resort and demand that the liars prove their lies necessary,[378] and Shiffrin offers a reason

370 *Id.* at 198.
371 *Id.*
372 *Id.*
373 *Id.*
374 *Id.*
375 *Id.*
376 *See supra* Introduction.
377 BOK, *supra* note 44, at 24; SHIFFRIN, *supra* note 31, at 198–99.
378 BOK, *supra* note 44, at 31, 145.

why proponents of deceptive interrogation will almost never be able to meet that burden.[379] In addition to questioning the efficacy and necessity of our lies in interrogations, she suggests that we should also ask whether the lies are worth the sacrifice to our collective moral integrity and knowledge.[380] Shiffrin's answer seems to be that they never can be justified because such justification would change the epistemic environment into one in which lies are tolerated and/or embraced as productive. Even if we take efficacy into account, there is no overwhelming evidence that lies in interrogations work to the exclusion of truthful options, making it hard to imagine a world in which the epistemic sacrifice Shiffrin describes would be justified.

In the final analysis, moral legitimacy offers the clearest-sighted assessment of deceptive interrogation of the modalities explored here. It clarifies pragmatic cost-benefit analyses that are otherwise mired in inconclusive data. It also underscores the danger deceptive interrogation poses to trust, but shifts the emphasis from cooperation with the police to social cohesion itself. This perspective exposes any routinized lying by police as morally problematic, both because such lies have the potential to undermine a key component of our democratic society and because the police in particular are tasked with moral edification, not destruction.

Some may argue that focusing on moral legitimacy is hopelessly naïve and fails to account for the hard exigencies of a brutal and complicated world. Yet the entire system of law in this country is built on subjective judgments about how to allocate power, incentives, risk or reward. Oliver Wendell Holmes made this point when he wrote in *The Path of the Law* that logical certainty in the law is an "illusion."[381] Instead, he argued, decisions flow from "some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions."[382] As Tom Morawetz elegantly suggests, the law is a "deliberative practice" in which participants "agree on broad generalities about need and social value," on "procedures for debate and decision" and

379 *See* SHIFFRIN, *supra* note 31, at 194–99 (discussing deceptive interrogation).
380 *Id.* at 196–97.
381 Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465–66 (1897).
382 *Id.* at 466.

on "relevant arguments."[383] The "attitudes," "beliefs" and "values" that form a fundamental part of law and legal reasoning are all informed by moral conceptions of the world.[384] Thus, although the relationship is complex and varied, morality is inextricable from the law.

For those who are only amenable to pragmatic arguments, there is another way to articulate the salience of morality to legal questions. The strength of the law comes from its ability to reflect or at least not to violate too egregiously common values or mores.[385] Further, the moral lens is both a powerful and useful one, providing clarity when others fail. To dismiss the moral problems with deceptive interrogation is to disable a crucial piece of the navigation system for thorny terrain. More clearly than any other lens, it shows us that we are on an unnecessarily rough road, one with the potential to inflict grievous harm.

VI. CONCLUSION

At a time when public truth is being contested in unprecedented ways in American history,[386] it is more important than ever to expand our analytical tools for assessing the costs, benefits and moral implications of routine deception by those who hold positions of public trust. This article has attempted to begin that work in the context of deceptive interrogation. Although it is beyond the scope of this work, the framework of legal, pragmatic, perceived and moral legitimacy offers a rubric for investigating the utility and moral implications of routine lying by those in other facets of public service.

In the criminal justice context, where many law enforcement practices have received heightened scrutiny in recent years,[387]

383 Thomas Morawetz, *Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging*, 141 U. PA. L. REV. 371, 433 (1992).

384 *See id.* at 432–33.

385 *See* TYLER, *supra* note 14, at 36–38 (describing studies finding that "normative support for the system leads to compliant behavior").

386 *See, e.g.*, *Donald Trump and the Culture of Lying*, NEW YORKER (Feb. 17, 2017), https://www.newyorker.com/podcast/political-scene/donald-trump-and-the-culture-of-lying (conversation between Sissela Bok and Dorothy Wickenden) (describing prevalence of deception and accusations of lying in the political climate in the early days of the Donald Trump administration as more problematic for truth and trust than at other times in American History).

387 *See, e.g.*, Susan N. Herman, *Getting There: On Strategies for Implementing Criminal Justice Reform*, 23 BERKELEY J. CRIM. L. 32, 34, 36–37 (2018) (describing

routine and systematic lying by the police should be part of the reform conversation. Using legitimacy as a way to bring together different strands of research that have been or should be applied to deceptive interrogation exposes the inadequacy of certain popular areas of inquiry as well as the fact that more work needs to be done in others. If one focuses only on confessions and wrongful convictions, interrogation has costs and benefits that are difficult to quantify definitively. Although we may be able to come closer to understanding how deception functions as compared with other interrogation methods, we may never have definitive statistics because of insurmountable constraints in the studies that can be done and in what we can know about any conviction. Further, the perspective ignores other types of harms to trust or to individuals who are lied to but never charged.

This means that it is particularly important to turn to other ways to conceptualize the legitimacy of deception. One avenue that has yet to be explored is perceived legitimacy. Does the practice in fact affect our perceptions of the police? This unanswered question is important because lying has obvious ramifications for trust, which in other contexts is crucial to perceived legitimacy. Perceived legitimacy, in turn, affects compliance with the law. While studies may find that, in fact, the trust of some or all groups are unaffected by the possibility that police may lie to them, the question deserves to be answered.

Finally, moral legitimacy offers several avenues for conceptualizing the morality of deceptive interrogation. The most welcoming to lies, a utilitarian perspective, simply tracks the inconclusive analysis of pragmatic legitimacy, focusing on whether the costs of the practice outweigh its benefits. A more nuanced analysis of utility, however, accounts for the negative externalities of lying, which should tip the scale against deceptive interrogation. Putting aside utility, a moral assessment that understands all lies to be suspect makes the problem with deceptive interrogation even starker. The very casual and routine nature of the lies that are told on a day-to-day basis by law enforcement officers across the country is antithetical to the principle of veracity. A vision of the police as epistemic exemplars shows clearly why deceptive interrogation may be impossible to justify, no matter the costs or benefits. If what is

bipartisan agreement on need for criminal justice reform in areas of bail, prosecutorial discretion, excessive sentencing, prison overcrowding, and reducing the number of arrests, among other things).

at stake is the moral fabric of our society, then a sacrifice in utility would be worth making for the sake of a coherent normative world in which police model what we want and hope that our country can be.

Why is Mississippi the Best State in Which to be Exonerated?

An Empirical Evaluation of State Statutory and Civil Compensation for the Wrongfully Convicted

By Jeffrey S. Gutman and Lingxiao Sun***

 Jeffrey S. Gutman is a Professor of Clinical Law at The George Washington University Law School. He presented some of these findings at the 2018 Innocence Network Conference. I thank Dean Blake Morant of the George Washington University Law School for his support, Maurice Possley, Samuel Gross and Simon Cole of the National Registry of Exonerations, Professor Qing Pan of the George Washington University Department of Statistics, Linda Blumberg of the Urban Institute, Nick Brustin and Anna Benvenutti Hoffmann of Neufeld, Scheck & Brustin and students Barbara Horne-Petersdorf, Griffin Simpson and Julia Gutman for their assistance. A word about pronouns is in order. Professor Gutman has developed the database and the primary author of this article. Using SAS software, Ms. Sun developed and performed the statistical analysis, and explains in this article the more complex statistical analysis. Use of the pronoun "I" or "me" generally refers to Professor Gutman, who is solely responsible for any database errors.

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INTRODUCTION

Wrongful conviction has for decades been a subject of academic study, litigation, and policy reform, but its more recent reach into popular culture is reflected in an array of books,[1] documentaries,[2] podcasts,[3] movies,[4] and TV shows.[5] In both non-fiction and fiction, the theme of wrongful conviction marries a traditionally American revulsion of profound injustice with the captivation of the police procedural, dirty cops, forensic evidence, and the relentless fortitude of incarcerated innocents and their heroic lawyers.

The innocence movement lies at this intersection between law and popular imagination. As the attendance at the 2018 Innocence Network Conference[6] attests, the energy of the innocence movement over the last twenty-five years has not flagged. It continues to secure exonerations and to publicize them, to advocate for the appropriate use of scientifically sound forensic science, to press for improved police and investigative procedures, and to support the creation of conviction integrity units to revisit potential wrongful convictions.[7]

1 *See, e.g.*, Sarah Burns, The Central Park Five (2012); Gillian Flynn, Dark Places (2009); John Grisham, The Innocent Man (2006); Tayari Jones, An American Marriage (2018); Bryan Stevenson, Just Mercy (2014); Jennifer Thompson-Cannino and Ronald Cotton, Picking Cotton: Our Memoir of Justice and Redemption (2009).

2 *See, e.g.*, The Central Park Five (WETA & Florentine Films 2012); West of Memphis (WingNut Films & Disarming Films 2012); Southwest of Salem: The Story of the San Antonio Four (Sam Tabet Pictures 2016); Time Simply Passes (Tanman Films 2016). *See also* Innocence Project, *Must-See Wrongful Conviction Films and TV Shows*, Innocence Project (Oct. 28, 2016), www.innocenceproject.org/wrongful-conviction-media/.

3 *See, e.g.*, *In the Dark: Season 2: Curtis Flowers*, APM Reports (2018), https://www.apmreports.org/in-the-dark/season-two; *Accused: The Unsolved Murder of Elizabeth Andes*, Cincinnati Enquirer (Sep. 7, 2016), https://www.cincinnati.com/series/accused; Empire on Blood, Panoply (Feb. 28, 2018), (available on iTunes); *Wrongful Conviction with Jason Flom*, Revolver Podcasts (Oct. 3, 2016), https://wrongfulconvictionpodcast.com; *Serial*, Nat'l Pub. Radio (Oct. 3, 2014), https://serialpodcast.org; *Actual Innocence*, Borrowed Equip. Podcasts (Apr. 24, 2016), https://www.borrowedequipmentpods.com/actual-innocence/; *Misconduct: A True Crime Podcast*, Stitcher (Jan. 2, 2017), https://www.stitcher.com/podcast/misconduct-a-true-crime-podcast.

4 Conviction (Fox Searchlight Pictures 2010); Thin Blue Line (Miramax Films 1988); The Hurricane (Beacon Pictures 1999).

5 *Rectify* (SundanceTV Apr. 22, 2013); *Making a Murderer* (Netflix Dec. 18, 2015).

6 A version of this article was presented as part of the 2018 Innocence Network Conference in Memphis, Tennessee on March 23–24, 2018.

7 *See* Robert J. Norris, Exonerated: A History of the Innocence

During an evening of the 2018 Conference, dozens of exonerees were introduced and welcomed, while a slideshow of photographs of the wrongly convicted was displayed. That moving tribute compels me to start this article with an apology. My empirical study of wrongful conviction compensation, described in Section I of this Article, turns people into categories, tags, codes, numbers, and statistical units, a necessary but dehumanizing contrast to the Conference's celebration of real people, and their suffering, humanity, and freedom.

The stories told at the Conference of the exonerated do not end in a DNA laboratory or when the prison cell opens. Understandably, compensation for wrongful conviction has attracted less public attention than the efforts to free the innocent and to prevent wrongful convictions. But it is hardly invisible. The press frequently reports on lawsuits seeking relief, verdicts and settlements in wrongful conviction compensation cases,[8] and unsuccessful efforts to compensate victims of wrongful convictions.[9]

MOVEMENT (2017).

8 *See. e.g.*, Pam Kragen, *Carlsbad Man Exonerated After Nearly 39 Years in Prison Receives $21 Million Settlement*, SAN DIEGO UNION-TRIB. (Feb. 25, 2019, 6:05 PM), https://www.sandiegouniontribune.com/communities/north-county/sd-no-coley-settlement-20190225-story.html; Eric Heisig, *Three East Cleveland Men Each Awarded $5 Million for Wrongful Murder Convictions*, CLEVELAND COM. (Nov. 15, 2018), https://www.cleveland.com/court-justice/2018/11/three-east-cleveland-men-each-awarded-5-million-for-wrongful-murder-convictions.html; George Hunter, *Lawsuit: Evidence Fake in '92 Murder; After 25 Years In Prison, Man Goes After City, Pair Of Detectives*, THE DETROIT NEWS, July 13, 2018, at A1; Ian Duncan, *Baltimore Poised To Pay $9M To Man Who Spent 20 Years In Prison On Wrongful Murder Conviction*, BALT. SUN (Apr. 30, 2018, 3:45 PM), https://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-wrongful-conviction-settlement-20180430-story.html; Logan Bogert, *Gov. Northam OKs Paying "Norfolk Four" $3.5M For Wrongful Rape, Murder Convictions*, THE VIRGINIAN-PILOT (Apr. 2, 2018), https://pilotonline.com/news/government/politics/virginia/article_94afa7b8-36d6-11e8-a34e-b3006a8c7d94.html; Melissa Etehad, *L.A. County To Pay $15 Million To Man Wrongfully Convicted Of Murder*, L.A. TIMES (Nov. 21, 2017, 7:00 PM), https://www.latimes.com/local/california/la-me-ln-frank-oconnell-settlement-20171121-story.html.

9 *See, e.g.*, Sam Friedman, *Judge Dismisses Fairbanks Four's Lawsuit Against City In Hartman Killing*, FAIRBANKS DAILY NEWS-MINER (Oct. 23, 2018), http://www.newsminer.com/fairbanks_four/judge-dismisses-fairbanks-four-s-lawsuit-against-city-in-hartman/article_7edd1bd0-d728-11e8-998b-8fd1e1a28b55.html; *Kansas man wrongfully imprisoned for 23 years receives no compensation from state*, CBS NEWS: CBS THIS MORNING (Mar. 3, 2018, 1:36 PM), https://www.cbsnews.com/news/kansas-man-wrongfully-imprisoned-

Few would disagree that wrongful conviction is one of the most grievous harms a member of society can suffer and that those who are wrongfully convicted deserve to be compensated for those injuries.[10] Yet, large numbers of exonerees do not seek compensation and, as explained in Section II, many file unsuccessful claims or lawsuits for compensation. An empirical study of wrongful conviction compensation can teach us valuable lessons about whether, how, and why our remedial aspiration falls short and how we can improve our country's civil justice response to criminal justice failure.

The first part of that study was described in my 2017 article, "An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted."[11] There, I examined how the first 1,900 persons convicted in state courts listed in the National Registry of Exonerations fared under the patchwork of state compensation statutes that exist in this country.[12] Based on that empirical study, I proposed reforms that would improve these statutes' distributive fairness in ways sensitive to state budgetary concerns.[13]

Using the research methodology described in Section I, this Article expands that study in several ways. First, the state compensation data published in 2017 is updated, as new cases have been filed and prior claims decided. One hundred more exonerees were added to the database, now consisting of the first 2,000 individuals exonerated following state court convictions recorded in the Registry, and data for those exonerees was updated to September 16, 2018.

Second, this Article looks beyond the percentages of exonerees filing for and winning or losing those claims that I addressed in 2017. Using data gathered by the Registry and provided

23-years-no-compensation-from-state/; Reshad Hudson, *Man Who Spent 30 Years On Death Row Has Not Received Compensation Following Wrongful Conviction*, RocketCityNow.com (Jun. 14, 2018, 6:43 AM), https://www.rocketcitynow.com/news/local-news/man-who-spent-30-years-on-death-row-has-not-received-compensation-following-wrongful-conviction/1239276752: Geraldine Sealey, *Not Every Exonerated Man Gets Repaid*, ABC News (Aug. 8, 2017), https://abcnews.go.com/US/story?id=90978&page=1.

10 *See* Erik Encarnacion, *Backpay for Exonerees*, 29 Yale J.L. & Human. 245 (2017).

11 Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted*, 82 Mo. L. Rev. 369 (2017).

12 *Id.* Hereafter, the National Registry of Exonerations is referred to as the "Registry." Nat'l Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/about.aspx.

13 Gutman, *supra* note 11, at 421–37.

by states, we explore another meaningful measure of the fairness of these statutes: the proportion of years lost in prison for which state compensation was awarded. In popular imagination, the exonerated are viewed as spending decades in prison; the reality is different. Significant numbers of those listed on the Registry were incarcerated for no or relatively little time. It is important to ask, then, what proportion of that lost time was subject to a compensatory award.

As described in detail in Section III, as of the time of this writing, the state statutory compensation data shows the following:

- Just under 53% of exonerees convicted in states with compensation statutes filed for compensation.
- Of those filers, 73.5% prevailed on their claims, 17.6% lost, and the remaining 8.9% of claims are pending.
- Since 1989, states have paid $545 million in wrongful conviction compensation pursuant to state statutes, an average of less than $20 million annually.
- The average annual amount paid to prevailing exonerees is just over $70,000 per year, an amount that would be considerably lower were it not for Connecticut, the District of Columbia, and New York, which had or still have statutes which do not cap damages.[14]
- Nearly half of the years lost by exonerees convicted in states with compensation statutes were uncompensated.

Third, this Article examines federal civil rights and state tort cases arising from wrongful conviction. It analyzes, also by state, whether the same set of 2,000 exonerees filed such cases and, if so, the results of them. With respect to the 1,802 of those exonerees who were incarcerated, that data reveals the following:

- Almost 45% of the exonerees (808 in total) filed federal civil rights and/or state tort lawsuits[15] arising out of their wrongful conviction.

14 Only Maryland, New York, and West Virginia have statutes that are entirely uncapped. M.D. CODE ANN., STATE FIN. & PROC. § 10-501 (West 2019); N.Y. COURT OF CLAIMS ACT § 8-b (McKinney 2019); W. VA. CODE ANN. § 14-2-13a (West 2019). If the exoneree files a judicial claim for damages rather than petitions the District administratively, the damages are uncapped. D.C. CODE ANN. §§ 2-421(1), 2-423 (West 2019).

15 For convenience, these will be referred to as "civil compensation" suits.

- Of those filers, 448, or 55%, received some monetary recovery; 217 (or 27%) were unsuccessful. The remaining 143 lawsuits are pending.
- Since 1989, those wrongly convicted who were incarcerated recovered over $1.7 billion from governments or state actors (or their insurers) as a result of verdicts or settlements in civil compensation suits.
- The average amount awarded for each year of imprisonment was just under $305,000.
- Exonerees were compensated in civil compensation suits for only 32% of the total years lost.

Fourth, this Article combines state statutory compensation and civil compensation filings for those incarcerated and draws the following conclusions regarding the overall compensatory landscape:

- Of the 1,802 incarcerated exonerees, 62% (1,210) sought some form of compensation.
- Of those who sought compensation, 70% (846) received it.
- In sum, 42% of the 1,802 incarcerated exonerees studied received compensation.
- Over $2.2 billion has been paid by states and municipalities in wrongful conviction compensation to those exonerees.
- Just under 60% of all years lost were compensated through state statutory or civil compensation recoveries.

Fifth, having sketched the big picture, our study asks a more fundamental question: what particular factors or characteristics appeared to be associated with higher rates of filing for and receiving state statutory and civil compensation and with higher amounts of compensation received per year of incarceration in civil compensation cases? Fortunately, many of those characteristics are recorded by the Registry. The ones we tested are detailed in Section I.D and include race and gender, whether the exoneree was aided post-conviction by a conviction integrity unit or an innocence organization, whether the exoneree pled guilty, was sentenced to death or exonerated by DNA evidence, the causes of the wrongful conviction, the crime for which they were wrongly convicted, the state and region of the country of conviction and the number of years lost to wrongful imprisonment. This Article sets forth the results of regression analyses of the data

to reveal the sometimes expected and sometimes surprising truths behind the factors that drive wrongful conviction compensation.

As a threshold matter, one might expect that the likelihood of filing a state statutory compensation claim or a civil compensation lawsuit would turn, at least in part, on the likelihood of prevailing and the range of expected awards. The data shows that to be true—to a point. The percentage of exonerees wrongly convicted in states with a no-fault compensation statute was higher than the percentage of exonerees filing more costly and difficult federal civil rights cases requiring proof of unconstitutional government misconduct, and the likelihood of prevailing on a state compensation claim was higher than on civil compensation claims. The duration of the wrongful incarceration was positively associated with rates of filing.

At the same time, because most state statutes have annual or total compensatory caps, or both, the expected outcome in successful state statutory compensation cases is generally more certain and, as it turns out, much lower than that in civil compensation cases. And, somewhat counterintuitively, there seems no particular correlation between the rates of filing state compensation cases and the generosity of the state's statute.

We supposed that there could be a correlation between gender and race and the likelihood of filing and prevailing on state statutory compensation and civil compensation claims and the average annual amount received in successful civil compensation cases. Within the 2,000-person database, there were far higher numbers of exonerated men than women and larger numbers of exonerated African-Americans than other racial groups. The average number of years lost to wrongful conviction was higher for African-Americans than whites, and double for males than females.

We found that males consistently filed and won claims at higher rates than women and received higher average civil compensation awards, but the regression analyses show that gender does not explain those differences. Interestingly, African-Americans filed and won state and civil compensation claims at higher rates than whites, but received lower civil compensation awards per year of incarceration. But, the regression analyses also showed that these differences were not associated with race, except that we found a positive association between being Hispanic and higher annual civil compensation awards compared to whites and African-Americans. In a criminal justice system marred by racial disparity, there is perhaps some comfort to be taken that race appears not to affect the rates

of filing and prevailing in cases seeking compensation for wrongful conviction and the results of those efforts.

We did, however, find a consistent and clear statistical association between two particular factors and the likelihood of filing and prevailing on state and civil compensation claims. Those exonerees who were assisted in their efforts to obtain post-conviction relief and exonerations by innocence organizations and those exonerated as a result of DNA analysis were substantially more likely to file and win state statutory compensation and civil compensation cases than those unaffiliated with innocence organizations or those exonerated by evidence other than DNA. In addition, as one might expect from the legal requirement in civil rights cases that unconstitutional government conduct cause the wrongful conviction, we found an association between cases involving official misconduct and higher rates of filing and winning civil rights cases.

Geography plays an extremely important and troubling role in understanding wrongful conviction compensation. The rates of filing and prevailing in both state statutory compensation and civil compensation cases vary widely by state. Similarly, there are substantial differences by state in the average annual amounts received per year of incarceration in both state statutory compensation and civil compensation. The result is significant state-by-state differences in the amount that a year of lost freedom is valued.

Dividing the map into regions (South, West, Midwest, and Northeast) and politically (blue states voting for Clinton and red states voting for Trump in 2016) reveals statistical associations between those geographic realities and the compensation factors studied. Very generally, states in the South and West and red states are associated with lower rates of filing, lower rates of winning and of lower civil compensatory outcomes. In a very real and unsettling way, the likelihood and extent of compensation turns on geographic fortuity—the state of wrongful conviction.

Finally, we offer another way of considering the fairness of this compensatory system. Rather than looking at comparative generosity by state, the focus instead is to consider the extent to which substantial numbers seek either form of compensation, the extent to which substantial numbers of claimants are awarded some compensation and the extent to which a substantial percentage of years lost to wrongful conviction is compensated.

In this way, the fairness of the system is viewed from the perspective of what we call compensatory coverage—the notion that

it is better for a system to compensate a greater percentage of injured persons, and within that group, the most seriously harmed, than to compensate a smaller group more generously. Because make-whole compensation in cases of wrongful conviction is impossible, an award reflects society's acknowledgement of the harm and its moral obligation to provide at least some measure of compensation. When one looks at those elements of fairness, there is a good argument to be made that the best state to be exonerated in is Mississippi.

I. The Data Set and Data Gathering

A. The National Registry of Exonerations

The data set for this analysis is the 2,000 people listed on the National Registry of Exonerations[16] as of September 16, 2018, who were wrongly convicted in a state or territorial court[17] between January 1, 1989 and May 3, 2017.[18] It is generally premature to evaluate compensation to those later exonerated.[19] The compensation data used in this Article is accurate as of October 1, 2018.

The Registry, created in 2012, is a joint research project of the University of California at Irvine Newkirk Center for Science and Society, the University of Michigan Law School, and the Michigan State University College of Law.[20] Registry staff study, analyze, and report on the causes and trends of wrongful convictions. Widely quoted and cited, the Registry is regarded as the country's most authoritative source of data on the subject.[21]

16 NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Aug 8, 2018).

17 The 2,000 includes 16 persons exonerated in the District of Columbia, 6 in Puerto Rico and 1 in Guam. For convenience, we refer to these collectively as state court convictions.

18 The database used here excludes those 109 persons who were wrongly convicted in a federal or military court. NAT'L REGISTRY OF EXONERATIONS, MILESTONE: EXONERATED DEFENDANTS SPENT 20,000 YEARS IN PRISON 3 n.5, http://www.law.umich.edu/special/exoneration/Documents/NRE.20000.Years.Report.pdf.

19 After September 16, 2018, a small number of people exonerated prior to May 3, 2017, were added to the Registry. By necessity, they are excluded from the database.

20 NAT'L REGISTRY OF EXONERATIONS, *supra* note 16.

21 Jessica Pishko, *No County for Innocent Men*, D MAGAZINE (May 15, 2018, 11:30 AM) https://www.dmagazine.com/frontburner/2018/05/dallas-county-exonerations-innocent-conviction-integrity-unit/ (describing the Registry's data as the "gold standard."). *See* Radley Balko, *Report: Wrongful convictions have*

The Registry employs a definition of exoneration which requires that an individual be officially declared innocent by an authorized government official or agency or be relieved of the consequences of a conviction by pardon, acquittal or dismissal of charges on the basis, at least in part, of newly discovered evidence of innocence:

> Exoneration—A person has been exonerated if he or she was convicted of a crime and . . . was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action. The official action may be: (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence; (ii) an acquittal of all charges factually related to the crime for which the person was originally convicted; or (iii) a dismissal of all charges related to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal. The pardon, acquittal, or dismissal must have been the result, at least in part, of evidence of innocence that either (i) was not presented at the trial at which the person was convicted; or (ii) if the person pled guilty, was not known to the defendant and the defense attorney, and to the court, at the time the plea

stolen over 20,000 years from innocent defendants, Wash. Post (Sept. 10, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/09/10/report-wrongful-convictions-have-stolen-at-least-20000-years-from-innocent-defendants/; Niraj Chokshi, *Black People More Likely to Be Wrongfully Convicted of Murder, Study Shows*, N.Y. Times (Mar. 7, 2017), https://www.nytimes.cim/2017/03/07/us/Wrongful-convictions-race-exoneration.html; David G. Savage, *Registry tallies over 2,000 wrongful convictions since 1989*, L.A. Times (May 20, 2012), https://www.latimes.com/World/la-xpm-2012-may-20-la-na-dna-revolution-20120521-story.htm. The Registry was cited in Justice Breyer's dissent from the denial of certiorari in *Jordan v. Mississippi*, 138 S. Ct. 2567, 2571 (2018) (Breyer, J., dissenting), and in his dissent in *Glossip v. Gross*, 135 S. Ct. 2726, 2757 (2015) (Breyer, J., dissenting). It has been cited in well over 200 law review articles. *See also In The News*, Nat'l Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/inthenews.aspx.

> was entered. The evidence of innocence need not be an explicit basis for the official action that exonerated the person. A person who otherwise qualifies has not been exonerated if there is unexplained physical evidence of that person's guilt.[22]

In short, except for those cases in which one has been declared factually innocent by a government official or agency with authority to do so, such as through an award of a pardon on express grounds of innocence or the grant of a certificate of innocence, without some new evidence of innocence, there is no exoneration. The post-conviction disclosure of unlawfully withheld *Brady* material, the recantation of trial testimony, or new DNA analysis of forensic evidence may be new evidence of innocence not presented at trial. An acquittal following a reversal or vacatur of a conviction on procedural grounds, in contrast, may not serve as the basis of an exoneration if no new evidence of innocence was presented at retrial.[23]

The Registry does not include those cleared of an offense, but who participated in "a lesser crime that involved the same conduct."[24] It excludes any case in which a defendant pled guilty to any charge that is factually related to the original vacated conviction.[25] The Registry also excludes "mass" or "group" exonerations, which are typically cases of large-scale police perjury or corruption which, when uncovered, result in non-individualized vacaturs of convictions

22 *Glossary*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (last visited March 14, 2019).

23 Obviously, those who fail to satisfy the Registry's definition of exoneration are not precluded from seeking compensation. An unintended byproduct of researching claims or lawsuits filed by those on the Registry was finding both successful and unsuccessful efforts to obtain compensation by others not listed. When found, I alerted the Registry. Its subsequent review resulted in some additional cases being added to the Registry; others did not satisfy its criteria. There are some people who have obtained state statutory compensation or civil compensation who are not in the Registry because they do not satisfy its criteria, but those people are not included in this analysis.

24 SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989–2012 REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS, 1989–2012 REPORT, NAT'L REGISTRY OF EXONERATIONS 7 (2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

25 *Id.*

of the apparent victims of such misconduct.[26]

The Registry acknowledges that it has not listed all exonerations because it does not learn about all of them.[27] It largely relies on public and media reporting, information from potential exonerees or their attorneys, and reports from the Innocence Project and local innocence network members.[28] The extent to which exonerations are uncovered in particular states depends on the length and depth of reporting by sources in those states. Many other exonerations likely result from the work of prosecutor's offices rather than professional exonerators and are less likely to be publicized.[29]

Moreover, exonerations of serious crimes, like murder and rape, and the subsequent release of those who served many years in prison are more likely to be reported by the press or to the Registry than less dramatic cases involving lesser crimes and less time of unjust imprisonment.[30] Even so, as innocence programs have grown and publicized their work, and as the press increasingly covers wrongful conviction stories, the "capture rate" of exonerations has likely increased over time. The database used for this study is that of the Registry, even though the Registry's recorded exonerations are a subset of all exonerations and not a representative sample of them.[31]

26 The Registry has uncovered fifteen group exonerations involving at least 1,840 people, the vast majority of whom were framed for drug offenses. Samuel R. Gross et al., Race and Wrongful Convictions in the United States 20–26 (Mar. 7, 2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf.

27 Gross & Shaffer, *supra* note 24, at 91–101.

28 *See* Samuel Gross, Conviction Integrity Units, Innocence Organizations and the Time It Takes the Registry to List Exonerations (Sept. 11, 2017), http://www.law.umich.edu/special/exoneration/Documents/Conviction%20Integrity%20Units,%20Innocence%20Organizations%20and.pdf (attributing the growing number of cases the Registry learns about promptly to innocence organization and conviction integrity unit publicity).

29 *Id.* at 2. *See* Samuel Gross, *What We Think, What We Know and What We Think We Know About False Convictions*, 14 Ohio St. J. Crim. L. 753, 758-63 (2017) (explaining why it is impossible to uncover all wrongful convictions and why many are not publicized).

30 *See* Gross, *supra* note 29, at 762–67 (the numbers of known exonerations increase as the severity of the crime and sentence does).

31 Gross & Shaffer, *supra* note 24, at 96–101 (the exonerations the Registry finds out about are the ones with the most press publicity; "Judging from the few exonerations we happened to learn about despite their near-invisibility, there are many others that we have missed.").

B. Methods of Compensation

There are two principal ways the wrongly convicted may be compensated, which, in eight states, are at least partially mutually exclusive.[32] First, an exoneree can seek compensation pursuant to a state statute, which exists in thirty-three states and the District of Columbia.[33] These statutes do not require the plaintiff or claimant to demonstrate that their wrongful conviction was the result of government misconduct; they are no-fault statutes.[34] However, they generally require the plaintiff or claimant to show factual innocence.[35] How that may be done and the burden of proof required to demonstrate innocence varies widely among the states.

Following post-conviction relief, some of these statutes require a civil suit to be filed in a state trial court,[36] while others call on

32 In eight states, receipt of state compensation requires a waiver of other claims arising from wrongful conviction against states, state instrumentalities, and state employees. CONN. GEN. STAT. § 54-102uu(g) (2019); FLA. STAT. § 961.06 (2019); HAW. REV. STAT. § 661B-7 (2018); IOWA CODE § 669.8 (2018); MO. REV. STAT. § 650.058 (2018); TEX. CIV. PRAC. & REM. CODE ANN. § 103.153(b) (West 2017); VA. CODE ANN. § 8.01-195.12(B) (2018); WASH. REV. CODE § 4.100.080 (2019). In Colorado and Michigan, a recipient of state compensation must reimburse the state if there is a subsequent civil compensation award. COLO. REV. STAT. § 13-3-114 (6) (2019); MICH. COMP. LAWS § 691.1755 (13) (2018). In Minnesota, the converse is true—a subsequent civil compensation award is to be offset by the amount received from the state pursuant to the state compensation statute. MINN. STAT. § 611.365 Subd. 5 (2019). No state statute bars the award of state compensation if there is an initial civil compensation award.

33 *Compensation Statutes: A National Overview*, INNOCENCE PROJECT (2007), https://www.innocenceproject.org/wp-content/uploads/2017/09/Adeles_Compensation-Chart_Version-2017.pdf. The most recent state to have adopted a compensation statute is Kansas, which passed a statute in May 2018. H.B. 2579, Kan. State Leg., 2017-2018 Sess. (Kan. 2018), http://www.kslegislature.org/li_2018/b2017_18/measures/hb2579/. Because it is so recent, I have not included Kansas exonerees in my analysis of state compensation claims.

34 Gutman, *supra* note 11, at 370.

35 *See id.* at 371.

36 Colorado, Hawaii, Iowa, Louisiana, Maine, Massachusetts, Mississippi, Missouri, New Jersey, Ohio, Vermont, Washington, and West Virginia. The District of Columbia has a procedure whereby a petitioner may seek compensation from a state trial court or from an administrative agency. D.C. CODE § 2-421 (2017). Florida has a hybrid system in which a petition for status as a wrongfully incarcerated person is filed with the original sentencing court, but certain claims are heard by an administrative law judge, subject to court review. FLA. STAT. § 961.03 (2017).

claimants to file claims with a state court of claims or claims board.[37] Other states require a filing with a state administrative entity.[38] In yet others, particular forms of post-conviction relief, sometimes issued in a civil proceeding, such as an award of a certificate of innocence or a finding of being a wrongfully convicted person, yield an essentially automatic compensatory award made by a court or administrative body without an explicit requirement to bring a separate civil or administrative action in which factual innocence must be proven again.[39] In a small number of states, awards by such entities are subject to legislative review and/or an affirmative legislative grant of compensation.[40]

Second, the wrongly convicted may file federal civil rights cases pursuant to 42 U.S.C. § 1983 against counties, other municipalities, and state actors such as prosecutors, police officers, and/or state experts or others alleged to have engaged in forms of unconstitutional misconduct that caused the wrongful conviction.[41] In addition, or alternatively, some exonerees have filed state common law tort claims on theories such as false arrest, false imprisonment, or malicious prosecution.[42] I have separately recorded and coded claims for state statutory compensation and for suits under civil rights or tort theories.

37 Connecticut, Michigan, Nebraska, Tennessee, and Wisconsin.

38 Alabama (Division of Risk Management), Maryland (Board of Public Works), Montana (Department of Corrections), North Carolina (Industrial Commission), Oklahoma (Office of Management and Enterprise Services, Risk Management Division), Texas (Comptroller).

39 California, Illinois, and Utah. In Minnesota, once a court declares the petitioner eligible for compensation, the person then files a claim for compensation with the state Supreme Court. Minn. Stat. Ann. § 611.363 (West 2017); Back v. State, 902 N.W.2d 23, 26–27 (Minn. 2017) (describing statutory scheme).

40 Alabama, California, Connecticut, Illinois, Minnesota, and Utah. A relatively small number of exonerees in a state without state compensation statutes received compensation through private legislative bills or through state tort claims procedures. Virginia has a compensation statute, but the mechanism by which compensation is award is purely legislative. Va. Code Ann. § 8.01-195.10, 11 (2010). The database records known unsuccessful legislative efforts to receive compensation in Virginia and elsewhere as denials.

41 A small number of exonerees filed Federal Tort Claims Act cases against the United States or *Bivens* cases against officials arising from federal involvement in the wrongful conviction.

42 A fair number of malpractice cases, some successful, were filed by exonerees against their attorneys. Although some of those were filed against state or county public defenders' offices or attorneys, those malpractice claims were excluded from this study because most did not involve a government entity.

A few people have been compensated in other ways. I identified one exoneree who received compensation (and one who did not) through a general state tort claims process in Arkansas, a state that does not have a compensation statute. A few people have received compensation through a legislative process in states that did not have relevant statutes at the time of compensation—five in Georgia and one in Kansas (which now has a statute).[43] In other states, legislatures compensated exonerees by private bill before the state enacted a state compensation statute. In such cases, the legislative awards were included with statutory awards.

C. Research Methodology

Data reflecting the claims made under state compensation statutes and the results of those claims are relatively accessible. Some states post online decisions made by administrative bodies or courts of claims that resolve claims for state wrongful conviction compensation or the amounts paid to particular exonerees.[44] Other states responded to informal or formal public records requests for such information.[45] In some states, such as Alabama, California, Massachusetts, Mississippi, Nebraska, Oklahoma, and Texas, academic researchers and investigative journalists have published articles on state compensation.[46] In addition, one can track bill histories in states, such as Alabama, California, Illinois, and Virginia, which require legislative action to pay compensation claims (or decide not to do so). Over time, there also has been increased press reporting of the award or denial of state compensation claims. All told, while I may have missed some older claims, I believe that the data set is substantially complete and accurate.

Determining whether a federal civil rights or state tort

43 I have noted those eight claims in brackets in Spreadsheet 1, but did not add them in the totals. I included them in overall Spreadsheet 2. As a result, you will see a minor difference in between Spreadsheet 1, *infra*, Column P and Spreadsheet 2, *infra*, Column D.

44 These include California, Louisiana, Michigan, North Carolina, Ohio, and Wisconsin. Among those, a small number of states may not post the results of cases going back to 1989. California's online records dates from 2005 and, while efforts were made to obtain older records, it is possible that some claims were missed.

45 Connecticut, Florida, Illinois, Iowa, Maryland, Minnesota, Mississippi, Missouri, Montana, New Jersey, New York, Oklahoma, Tennessee, Texas, Washington, and West Virginia.

46 *See* Gutman, *supra* note 11, at 388 n.122.

claim was filed was more challenging because that effort required an exoneree-by-exoneree approach rather than a state-by-state study. The Registry, the Innocence Project, Witness to Innocence,[47] and media reporting provided substantial amounts of information about whether such a lawsuit had been filed and the results of it. Some records of settlements and verdicts were found on LEXIS. Some settlements were located by reviewing county or city council meeting action documents in cases requiring settlement approval. I filed dozens of Freedom of Information Act and other public records requests and contacted many of the attorneys litigating these cases.

These efforts uncovered most, but not all, settlements. Some states, like Louisiana, and certain counties have particularly restrictive laws and policies regarding the release of confidential settlement agreements. In others, the relevant municipality did not have the agreement because a private firm, under contract with the insurer, represented it. In a number of cases, there was evidence of an agreement, but it had been destroyed by the municipality or plaintiff's counsel in accordance with record retention practices, generally making older settlements harder to get than newer ones. When possible, inquiries were made of counsel, but many attorneys have left practice, did not keep a file, or stated that they could not discuss the matter. Despite that, only 22 settlements were undisclosed and, of those, six were associated with exonerees incarcerated for two years or less.

Finding filed cases was one thing, but concluding that the exoneree had not filed a lawsuit is a less certain enterprise. There is no question that the substantial majority of exonerees who filed non-statutory claims brought federal civil rights claims under 42 U.S.C. § 1983 rather than state tort claims, although many filed Section 1983 claims and supplemental state claims together. Virtually all of the civil rights claims were filed in federal court, or were removed to federal court.

As a result, PACER, LEXIS, and Bloomberg searches within the federal judicial district encompassing the county of conviction permitted reasonable conclusions that federal cases were unfiled. When possible, state and county online docket searches were made to determine whether a relevant case had been filed in state court. At the same time, online searches of this kind have inherent limitations. PACER dockets frequently do not extend prior to 1999. State court

47 Witness to Innocence, https://www.witnesstoinnocence.org/.

docket searches are sometimes spottier. Some dockets do not extend as far back as 1989. A few states and counties lack free online search options and demand high fees for searches. In cases of uncertain filing, Google searches for press reporting were performed.

Moreover, online searches are highly name sensitive. If an exoneree changed their name, if different spellings were used, if the name was unusually common, or if the lawsuit were brought by an estate executor or other fiduciary, a case might be missed. It is entirely possible that some cases were in fact filed by exonerees but were coded as "unfiled."

D. The Coding

I adopted a fairly simple coding method for each exoneree. For exonerees wrongly convicted in a state which has a compensation statute, I recorded whether the individual filed a state compensation claim under the state statute.[48] If not, I identified the case as falling within one of three categories: (1) the exoneree was not incarcerated,[49] (2) the individual might yet file a claim as the applicable statute of limitations had yet to run (labelled "premature"), or (3) the exoneree did not file a claim.

For those who did file a claim, three results were possible: (1) the claim was dismissed or denied, (2) the claim was granted, or (3) the claim remained pending for judicial or administrative determination.[50] If the claim was granted, I recorded the amount awarded.[51] On occasion, conflicting or uncertain data regarding the

48 As noted, a few exonerees received compensation by states without a state compensation statute, typically through a general state claims statute or by private legislative bill. I excluded those awards from my study of state statutory compensation, but included them in evaluating total compensation.

49 I labeled them as "0 timers." Generally, state statutes do not permit "0 timers" to recover compensation. There is, however, one exoneree in Texas who served no time and was compensated for the time listed on the state's sex offender registry. There is also one exoneree in Illinois who served no time, but received a certificate of innocence and, thus, an entitlement to some non-monetary assistance. For consistency, I excluded those awards from the calculations.

50 For purposes of this study, I did not distinguish among involuntary dismissals or denials, such as those decided on the merits, those dismissed on procedural grounds and those dismissed voluntarily for strategic or other reasons. It was sometimes, but not always, possible to discern the basis or reason for the denial or dismissal.

51 Texas exonerees receive monthly annuity amounts in addition to a lump sum award. The Texas data includes annuity payments received until February 1,

amount of the award required a measure of judgment. My typical approach was to err on the side of the more generous award in cases of uncertainty and, when clearly stated in the award, to deduct the amount awarded as attorney's fees or costs. The resulting amounts, to the extent possible, track the money received by exonerees, rather than amount paid by states, but it is likely that many of the other awards recorded included attorney's fees. They were not deducted because there was no clear statement of the amount.[52]

Naturally, over time, the number of premature and pending claims will decline and the number of unfiled and decided claims will increase. The numbers that are compiled in Spreadsheet 1 are therefore a snapshot, but one with the substantial majority of codings being determinate rather than subject to future decision.

The coding for federal civil rights or torts cases was nearly identical. Each of the 2,000 cases were coded, including those of exonerees who were not incarcerated after wrongful conviction. Of the 2,000 exonerees, 198 served no prison time. Of those not incarcerated after wrongful conviction, only 35 filed federal civil rights and/or state tort cases and 17 were successful. They recovered about $6.5 million. To reduce the size and complexity of Spreadsheet 2, I have excluded data about non-incarcerated exonerees from it. They are, however, accounted for in the statistical analysis that follows.

If there was no evidence that a federal civil rights or state tort claim was filed, one of two codes was used: that the case was "unfiled" because I could conclude with some certainty that the statute of limitations had run on any claim arising from an order vacating or reversing a criminal conviction, or that the case was "premature" because the applicable statute of limitations had not

2018.

52 I have obtained some anecdotal information regarding particular state statutory awards that were not fully paid. There are a number of reasons that this might occur. In a small number of states, Alabama being an example, the legislature has the authority to appropriate payments over time and budgetary issues may prevent or delay certain out-year payments. In other cases, also typically involving installment payments, payments may be discontinued when particular eligibility requirements are no longer met, such as if the exoneree dies or is convicted of a subsequent crime. Nonetheless, it was not possible to track whether full payments were made to each exoneree awarded state statutory compensation. Thus, the entire amount was recorded as the award. As a result, it is more accurate to say that the database lists compensatory awards, rather than compensatory receipts. This may slightly overstate the amount of compensation actually paid.

yet expired.

If a case had been filed, it was coded in one of three ways: (1) dismissal or verdict for defendant, (2) settlement or verdict for plaintiff, or (3) pending. On occasion, judgment was required to determine whether the civil compensation claim arose from a wrongful conviction. In a small number of cases, almost exclusively those brought by people who served very little or no time, the case focused on physical injuries suffered during the course of the arrest.[53] I excluded such cases, although in a few of them, damages were claimed (and awarded) for the arrest through wrongful conviction. In case of doubt, and without a means for apportioning a judgment or settlement between injuries suffered during arrest and injuries arising from wrongful conviction, I erred on the side of recording the entire judgment amount.[54]

Dismissals were coded as a denial regardless of whether the dismissal was the result of a judicial determination of the claim on the merits, a verdict for the defendant or defendants at trial, or a dismissal of the civil case on procedural grounds. A voluntary dismissal was a signal that there might have been a settlement and that possibility was researched, but when no evidence of a settlement was uncovered (often following a conversation with counsel), the voluntary dismissal was coded as a denial. When federal claims were dismissed and supplemental state claims dismissed without prejudice or remanded to state court, efforts were made to determine whether there were further state court proceedings and, if so, to record the results of them.

Many cases involved some mixed result. Not surprisingly, with significant frequency, courts dismiss certain claims but not others, and/or dismiss claims against certain defendants but not others. I coded a single case status as follows:

- If there was a judgment for the plaintiff or the defendant, and the result was on appeal but still undecided, the case

53 *See, e.g.*, Brandon Lewis, *Other Arizona Cases*, NAT'L REGISTRY OF EXONERATIONS (Jun. 25, 2014), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4450.

54 Again, I heard anecdotally of a small number of cases in which there was evidence that a judgment, sometimes a default judgment, was entered against a state actor, but that the judgment was not paid, often as a result of the failure or refusal of the relevant municipal entity to indemnify the state employee. Nevertheless, I recorded the full amount of the award or judgment given difficulties in accurately determining which were fully paid.

was coded as "pending."

- If there was a dismissal of some claims or some defendants, but the litigation continues, the case was coded as "pending" not a "denial."
- If there was a dismissal of some claims and/or some defendants, but the litigation concluded with a partial settlement for the plaintiff, the case was coded as an award for the plaintiff, not a "denial."
- If there was a settlement on some claims or a settlement with some defendants, but the litigation continues, the case was coded as an award for the plaintiff, rather than "pending," and the settlement amount to date was recorded, but with a note to continue to follow the case.
- A small number of cases, particularly in New York, were settled before filing. Nonetheless, I coded those cases as filed with an award to the plaintiff.[55]
- Some federal civil rights cases are brought by multiple defendants wrongly convicted in the same incident. When a verdict or settlement was reached in favor of the plaintiffs, it was sometimes possible to learn the per-plaintiff amounts and those were recorded. In other cases, that distribution is confidential and I divided the total award equally by the number of plaintiffs.

In addition, I recorded for each exoneree four categories of data maintained by the Registry. First, the Registry records the race and gender of the exoneree.[56] We will call these Bio Factors. Second, because I hypothesized that they might be relevant to compensation, I noted the presence or absence of three of several of the characteristics that the Registry calls "Tags"[57]:

55 Obviously, prefiling settlements are hard to find unless there is some publicity about them.

56 When reviewing case documents and researching potential exonerations, the Registry attempts to determine the race of the exoneree. Racial classifications are often difficult and, here, particularly so in properly classifying whether an exoneree is Hispanic. Despite potential inaccuracies, we have adhered here to the Registry's racial categorizations.

57 The Registry has a defined set of characteristics that it calls "Tags." The Registry's "Tags" are listed on its website and defined there as well. Nat'l Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Apr. 7, 2019).

- Whether the exoneree was helped by a prosecutor's office's conviction integrity unit (CIU);
- Whether the exoneree pled guilty to the crime for which they were wrongly convicted;
- Whether the exoneree had the assistance of an innocence organization during their effort to obtain post-conviction relief (IO).[58]

In addition, I recorded two additional potentially relevant characteristics noted by the Registry:

- Whether DNA analysis was central in securing the exoneration and, thus, recorded on the Innocence Project's website;[59]
- Whether the exoneree was sentenced to death.[60]

Third, the Registry records and we noted the worst crime for which each exoneree was wrongly convicted. The Registry places these crimes in one of six "crime" categories: murder, sexual assault, drugs, child sexual abuse, robbery, and other. Fourth, we used the Registry's identification of "Contributing Factor Codes." The study of each exoneree's case led the Registry to determine whether any of the following factors (some exonerees had more than one) contributed to the wrongful conviction:

- Whether the exoneree made a false confession;
- Whether there was a mistaken witness identification;
- Whether false or misleading forensic evidence was

58 The Registry's 2017 Report notes that for the last several years, most exonerations were produced by "professional exonerators," attorneys working in CIUs and those associated with IOs, often in tandem. NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2017 1, http://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf. As noted, this reality will skew the complexion of the database as states with active IOs and state counties with active CIUs record more exonerations than states with fewer or no IOs and CIUs.

59 The Innocence Project has documented 365 exonerations through DNA analysis. *DNA Exonerations in the United States*, INNOCENCE PROJECT https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Apr. 12, 2019).

60 A DNA exoneration or a death sentence are recorded as "Tags" in the Registry. For convenience, they are added among our five "Tags" as a shorthand recognizing that that term is not true to the Registry's list.

employed;
- Whether witnesses perjured themselves or made false allegations;
- Whether there was official misconduct;
- Whether there was an inadequate legal defense.

The Registry is mindful that some of these factors are easier to discern than others. False confessions are almost always mentioned in a report about the case, but because case reviews may not surface other causes not explicitly raised in efforts to obtain post-conviction relief, other hidden causes may be missed. This is particularly true of inadequate legal defense, the frequency of which cannot be accurately quantified.[61] For that reason, the tables below exclude this particular contributing factor.

In addition, since the Registry records the state of wrongful conviction, we coded "Geo Factors" by dividing the states geographically in terms used by the Census Bureau: South, West, Northeast, and Midwest,[62] and also noted each state as "red" (voting for Trump in 2016) or "blue" (voting for Clinton in 2016).[63]

Finally, the Registry records "years lost" for each exoneree. Years lost is generally the period of wrongful incarceration calculated from the day of conviction to the day of release.[64] Pre-trial

61 *See* Gross, *supra* note 29, at 773.

62 The Census Bureau groups all states into either the South, the West, the Northeast, and the Midwest. The South contains Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, West Virginia, Alabama, Kentucky, Mississippi, Tennessee, Arkansas, Louisiana, Oklahoma, and Texas. The West contains Arizona, Colorado, Idaho, New Mexico, Montana, Utah, Nevada, Wyoming, Alaska, California, Hawaii, Oregon, and Washington. The Northeast contains Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, New Jersey, New York, and Pennsylvania. Finally, the Midwest contains Indiana, Illinois, Michigan, Ohio, Wisconsin, Iowa, Nebraska, Kansas, North Dakota, Minnesota, South Dakota, and Missouri. *Census Regions and Divisions of the United States*, United States Census Bureau, https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf. Exonerees from Guam and Puerto Rico are excluded from these geographic categories.

63 Because Puerto Rico and Guam are absent from the Electoral College, the seven exonerees from those territories are excluded from the "red"/"blue" analysis.

64 *Longest Incarcerations*, Nat'l Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/longestincarceration.aspx (last visited Apr. 12, 2019). For a small number of exonerees who remain incarcerated after exoneration on other crimes, the "years lost" ends on the date of exoneration.

incarceration and post-release parole, probation, or time on a state sexual offender registry is not counted.[65]

II. Why Do the Wrongly Convicted Lose Compensation Claims?

The focus of this empirical research has been to determine how frequently the wrongly convicted are compensated, to catalog the amounts received through settlement or adjudication and to assess whether any particular factors explain the frequency and extent of compensation. It is worth first flipping the question to ask why—perhaps counter to one's intuition—some exonerees seek compensation but fail. The data shows that 146 state compensation claims have been denied and that 217 incarcerated exonerees have lost their civil compensation cases.

As noted, there are two paths to compensation—no-fault state statutes and civil rights or tort claims. The potential roadblocks between filing and compensation are very different in each. It is beyond the scope of this article to catalog and analyze the cause of failure in each case, but a general background can offer some insight into why some are unsuccessful, why some might not be filed in the first place and why some civil compensation cases settle for modest amounts.

A. Why Do Claimants Lose State Statutory Claims?

In my 2017 article, I canvassed the enormous variation among state statutes, both in terms of determining eligibility and in

65 Because this Article's analysis accounts for "years lost," it is important to understand whether the Registry's conviction to exoneration calculation matches that of the state when it awards state statutory compensation. Whether the state must calculate the exact amount of time a successful state statutory compensation claimant served in prison depends on the metric the state uses for deriving a calculation award. In many states, a precise calculation is not made and the Registry's "years lost" figure was used. A number of states explicitly or implicitly include pre-conviction incarceration time as part of their compensation calculus and thus could have a larger time lost period than the Registry. Other states may use the same metric as the Registry, but arrive at a different number. When the state's compensation award rested on a precise calculation and it differed from the Registry's, I used the state's calculation. In short, the Registry's lost years amount was used unless the record showed a carefully calculated alternative amount. This resulted in small adjustments for exonerees with state awards in Alabama, California, District of Columbia, Florida, Maryland, Missouri, North Carolina, Ohio, and Texas.

awarding compensation.[66] Newer compensation statutes and recent amendments to existing statutes tend to include fewer disqualifying provisions and are more generous.[67] The most recent statute adopted, by Kansas, follows that trend and has been called a model statute.[68]

In Kansas, claimants file suit in state trial court and must prove, by a preponderance of the evidence, four elements: that (1) they were convicted of a felony and imprisoned, (2) the conviction was reversed or vacated and either the charges were dismissed or the claimant was retried and found not guilty, (3) that the claimant did not commit the crimes for which they were charged, and (4) that they did not cause or bring about their conviction, such as by suborning perjury or fabricating evidence.[69] A guilty plea or false confession does not preclude a showing of the last element.[70]

If these elements are satisfied (and the court is expressly afforded discretion to consider the difficulties of proof caused by the passage of time, death or unavailability of witnesses and destruction of evidence[71]), then the court must award $65,000 for each year of incarceration and not less than $25,000 per year of post-release parole, supervision or registration as a sex offender.[72]

Describing the Kansas statute, as comparatively progressive as it is, offers insight into why at least some of the 17.5% of applicants

66 Gutman, *supra* note 11, at 385–97.

67 There are exceptions to that general trend. As noted, *id.* at 382–84, Connecticut and the District of Columbia which had two of the most progressive statutes recently amended them in ways that make them less generous and more restrictive, but nevertheless remain among the best statutes.

68 Innocence Staff, *Governor Signs Gold-Standard Wrongful Conviction Compensation Law in Kansas*, Innocence Project (May 15, 2018). https://www.innocenceproject.org/governor-signs-wrongful-conviction-compensation-law-kansas/.

69 Kan. Stat. Ann. § 60-5004(c)(1) (2019). The Nebraska Supreme Court has described elements (2) and (3) as requiring a showing of legal innocence and factual innocence, respectively. Hess v. State, 843 N.W.2d 648, 653 (Neb. 2014).

70 Kan. Stat. Ann. § 60-5004(c)(1)(D) (2019).

71 *Id.* § 60-5004(c)(2).

72 *Id.* § 60-5004((e)(1). In addition, the court must award attorney's fees and may award non-monetary relief, including counseling, housing assistance and personal financial literacy assistance. *Id.* § 60-5004(e)(4)(A)–(B). The claimant is also entitled to tuition assistance and state health care benefits. *Id.* § 60-5004(e)(4)(C)–(D). The state is to be reimbursed from money received in any earlier or later civil rights or tort claim arising from their wrongful conviction. *Id.* at § 60-5004(f). If the court concludes that the claimant qualifies for compensation, a certificate of innocence is issued. *Id.* § 60-5004(g).

for state statutory compensation lose their cases. Given that these are no-fault statutes which do not require proof of misconduct, the number of unsuccessful claims may seem surprising. Part of the answer lies with the basis upon which one may be listed in the National Registry of Exonerations.

Simply because one has met the Registry's definition of an "exoneree" does not mean that one automatically satisfies state statutory requirements that they demonstrate factual innocence. Recall that one qualifies for the Registry on one of two grounds: if one has been declared factually innocent *or* has been relieved of all the consequences of the criminal conviction by pardon, acquittal or dismissal of charges[73] and the pardon, acquittal, or dismissal was the result, at least in part, of new evidence of innocence. With respect to the latter ground, a demonstration of factual innocence is not required.[74]

A showing of factual innocence is a non-issue for those seeking compensation who were earlier declared innocent by a court or pardoning authority. Without such a pre-existing declaration, the vast majority of state statutes that are specific on this point require applicants for compensation to show by either clear and convincing evidence[75] or a preponderance of the evidence[76] not only that the charges against them were reversed, vacated, or dismissed, but also that they were factually innocent of them. In Kansas and many other

73 This is similar to the Kansas element (2) described above.

74 The Registry's definition is, thus, similar to that of West Virginia, which permits compensation if the claimant's judgment of conviction has been reversed or vacated, and the accusatory instrument dismissed, or if a new trial is ordered, he or she was found not guilty or ultimately not retried. W. VA. CODE § 14-2-13(a)(c)(2)(C) (2019). Factual innocence, or even new post-trial evidence of innocence, is not required. In Minnesota, one is eligible for compensation if the conviction is vacated or reversed on grounds "consistent with innocence" or if a new trial were ordered "consistent with innocence and the charges were dismissed or the claimant was found not guilty. MINN. STAT. § 590.11, subd. 1 (2017); *see also* ALA. CODE § 29-2-157 (2019). Connecticut's statute appears to depart most liberally from the Registry's definition by permitting compensation to persons whose convictions have been vacated or reversed because of cited acts or omissions that constitute malfeasance or other serious misconduct without requiring a showing of innocence. CONN. GEN. STAT. § 54-102uu(a)(2)(B) (2019). In such states, then, it is possible that state compensation can be paid to persons not on the Registry.

75 Colorado, District of Columbia, Iowa, Louisiana, Maine, Massachusetts, Michigan, Nebraska, New Jersey, New York, Oklahoma, Utah, Vermont, Washington, Wisconsin.

76 California (by case law), Hawaii, Illinois, Mississippi.

states, an acquittal after retrial is alone not enough to show that.

Almost half of those who lost state compensation claims had sought relief in just two states: California and New York. The substantial majority of those California denials issued at the time of this writing[77] rested in whole or in part on the claimant's failure to show factual innocence.[78] Of the available New York Court of Claims opinions denying claims, a fair number also faltered on the innocence prong.[79] A significant number of denials in other states also followed a determination that the petitioner failed to prove factual innocence; such was the case, for example, in every denial in Louisiana and Wisconsin. In short, a substantial number of people satisfy the Registry's exoneration definition but are denied compensation because they are found not to have met the state's statutory requirement of factual innocence.

Some other state compensation denials can be attributed to quirks in state law or the interpretation of them. In Michigan, for example, the statute provides that wrongful conviction compensation claims may be filed in the state's Court of Claims within eighteen months of the enactment of the statute.[80] The Court of Claims, however, has in several cases applied a six-month notice deadline generally applicable to Court of Claims filings, resulting in several dismissals.[81] In Ohio, the state Supreme Court interpreted a somewhat idiosyncratic provision requiring a person seeking to be designated as a "wrongfully imprisoned individual" to show an error in procedure resulting in release to have occurred after sentencing

77 Cal. Victim Comp. Bd., *Proposed Decisions*, https://victims.ca.gov/board/pc4900.aspx (as of Aug 8, 2018). The Board has posted a small number of new decisions on its website since I completed this study.

78 As applied, the California Victim Compensation Board enforces the innocence requirement rigorously, or, some would argue, overzealously. *See* Justin Brooks & Alexander Simpson, *Find the Cost of Freedom: The State of Wrongful Conviction Compensation Statutes Across the Country and the Strange Legal Odyssey of Timothy Atkins*, 49 San Diego L. Rev. 627, 644 (2012).

79 Like some other states, both California and New York deny compensation to those found to have caused or contributed to their convictions and several denials were based on that rationale.

80 Mich. Comp. Laws § 691.1757.7 (2019).

81 Rusha v. Dep't of Corr., 859 N.W.2d 735 (Mich. Ct. App. 2014) (interpreting the six-month notice requirement); Summary Disposition, Sadowski v. State of Michigan, No. 18-00051-MZ (Mich. Ct. Cl. Jul. 30, 2018); *see* Ken Kolker, *'Miscarriage of justice': State fights wrongful conviction payments*, WOOD-TV (May 16, 2018, 6:13 PM), https://www.woodtv.com/news/target-8/-miscarriage-of-justice-state-fights-wrongful-conviction-payments/1183315375.

or during or after imprisonment, rather than before or during trial.[82] The claims of several of the heirs of the "Wilmington 10" in North Carolina were denied because the eventual exoneree died before exoneration.[83]

All that said, many denials were based on procedure, rather than substance. Wrongful conviction compensation claims are not immune from dismissal for pleading errors, statute of limitations problems, and other avoidable procedural mistakes. Some run into a post-filing statutory bar, such as the claimant's death or subsequent criminal conviction. In addition, some dismissals were voluntary and rested on grounds that compensation advocates would not regard as worrisome. For instance, there are cases that appeared to have been dismissed as a part of a global settlement of parallel civil rights claims.

B. Why Do Civil Rights Plaintiffs Lose?

The vast majority of cases filed outside the context of state statutory compensation are brought under federal civil rights theories. Obviously, both procedurally and doctrinally, federal civil rights cases arising from wrongful conviction are far more complex and uncertain than claims under no-fault state wrongful conviction compensation statutes.[84] These cases typically involve multiple legal theories against multiple defendants, including municipalities, prosecutors, police officers, forensic experts, and defense attorneys.[85]

82 Mansaray v. State, 6 N.E.3d 35, 37 (Ohio 2014). *See* Editorial, *Do right, Ohio, by those wrongfully convicted*, AKRON BEACON J. (May 16, 2018), https://www.ohio.com/akron/editorial/editorials/beacon-journal-ohio-com-editorial-board-do-right-ohio-by-those-wrongfully-convicted. This glitch has been corrected. OHIO REV. CODE ANN. § 2743.48(A)(5) (West 2019).

83 Estate of Jacobs v. State, 775 S.E.2d 873, 874–75 (N.C. Ct. App. 2015).

84 *See* Encarnacion, *supra* note 10, at 248; Gutman, *supra* note 11, at 372 n.11. Indeed, this Article shows that a significantly higher percentage of those seeking state statutory compensation were successful than those filing federal civil rights or torts claims.

85 The substantial majority of these cases are filed against state municipalities and employees. Some, however, advance claims against the United States or federal employees because of their alleged involvement in the wrongful conviction. *See* Bunch v. United States, 880 F.3d 938 (7th Cir. 2018) (describing Federal Tort Claims Act case against United States arising from claim that federal forensic chemist was alleged to have fabricated evidence); Engel v. Buchan, 710 F.3d 698 (7th Cir. 2013) (concerning a *Bivens* claim against FBI agent alleged to have fabricated evidence and violated *Brady*); Limone v. United States, 579 F.3d 79 (1st Cir. 2009) (discussing FTCA claims against the United States for suppressing evidence undermining key prosecution

Commonly, these claims are narrowed as motions to dismiss and motions for summary judgment result in rulings dismissing some (or all) of the claims and parties. Doctrinally, these cases involve the complicated intersection of civil claims for damages arising from unconstitutional acts or omissions during a criminal prosecution.[86] From a coding perspective, when a civil rights case is coded as a denial, it means that the case failed in its entirety. Conversely, when it is coded as one in which there was a recovery, either at trial or, more commonly, in settlement, that does not exclude the likelihood that some claims and/or parties were dismissed voluntarily or by court order prior to the resolution of the litigation. In short, coding of plaintiff recoveries in civil rights cases lacks nuance; it fails to reflect the dismissals of some claims and/or parties that preceded the recovery.

It is outside the purview of this article to comprehensively survey each of the civil rights theories raised in these cases, the many defenses to them, or to catalog why some succeed and others fail. But, it is helpful to generally understand the typical theories and the defenses to them. That understanding offers insight into why many exonerees do not file them, why a significant number fail and why, in some cases, arguable weakness in these claims results in relatively modest settlements.

As lawyers think through whether and how to frame federal civil rights theories for exonerated clients, their point of departure is the innocence of their clients. The strategic focus then is to determine why their clients were wrongly found guilty. In some cases, guilt was established by plea and may, for example, have been the product of a coerced confession or the withholding of exculpatory evidence. In others, a finding of guilt followed a trial and lawyers may trace the source of important evidence presented to the jury to police fabrication, suggestive identification procedures, or other forms of police misconduct. In yet other cases, exculpatory or impeachment evidence known to the government was concealed from the defense.

To be sure, not every wrongful conviction is the result of unconstitutional misconduct.[87] In a number of sexual assault

witness).

86 Brandon Garrett, *Innocence, Harmless Error and Wrongful Conviction Law*, 2005 Wis. L. Rev. 35, 38 (2005).

87 Innocence Project, Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation 12 (2009) ("In most cases, there is no intentional

cases, for example, the only evidence against the defendant was an erroneous cross-racial witness identification by the victim and flawed forensic evaluation of hair samples. Without evidence that the error was the result of unconstitutionally suggestive police identification procedures, or that the forensic analysis was intentionally fabricated or mischaracterized at trial, there is no basis for a federal civil rights claim.[88] It also goes without saying that a wrongful conviction may have been the result of unconstitutional acts or omissions, but as years pass evidence is lost and proving it may become increasingly challenging.

It is very difficult, and perhaps impossible, to know whether those exonerees who did not file a compensation claim did not do so because a competent lawyer, reviewing the record, found no existing evidence of unconstitutional or tortious misconduct causing the conviction and thus no basis to bring such a suit.[89] The non-filing may, alternatively, be the result of any number of other reasons: lack of access to an attorney, an erroneous conclusion by counsel that no viable claim existed, a reluctance of the exoneree to litigate, post-exoneration criminal activity resulting in incarceration and attendant difficulties in bringing suit,[90] statute of limitations problems, post-exoneration death and a disinclination of the estate to pursue a claim, or a short wrongful incarceration suggesting, at best, a modest recovery.

misconduct that caused the wrongful conviction, or at least, none that can be proven.").

88 Official misconduct was not found to be a contributing factor to the wrongful conviction in nearly half of the exonerations listed in the National Registry. *See Exonerations in the United States Map*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last updated Mar. 22, 2019). To see the number of state exonerees whose wrongful convictions were due in part to official misconduct, click the "non-federal" toggle and then the "present" button next to official misconduct on the right side of the page.

89 In contrast, in those states in which receipt of state statutory compensation requires the waiver of all other claims against any prospective defendant arising from the wrongful conviction, the reason for non-filing is obvious.

90 While the popular impression of an exoneration features an innocent person leaving prison for good, there are, in fact, a substantial number of cases in which an exoneree remains incarcerated as a result of an unchallenged conviction on other crimes or, sadly, is imprisoned as a result of post-exoneration crimes. Neither necessarily precludes a compensation claim arising from the wrongful conviction, but continued incarceration may make finding counsel more difficult and may reduce both the chances of prevailing and the monetary value of the case.

Generally, federal Section 1983 civil rights claims are premised on the twin notions that certain acts or omissions of government actors, rising to the level of the violation of constitutional norms, deprived the exonerated plaintiff of a fair criminal trial,[91] and that this official misconduct was the cause of the wrongful conviction and subsequent damages.[92] So understood, these types of claims spawn obvious potential defenses on the merits: that the record lacks plausible evidence of misconduct, that the alleged misconduct, if it occurred, did not rise to the level of a due process violation or that it was not the factual or legal cause of the conviction because other facts, evidence or witnesses, untainted by misconduct, explain why the conviction occurred.[93]

Professor Brandon Garrett has categorized several types of constitutional violations that have been claimed to cause a wrongful conviction. In practice, however, there are often not sharp boundaries between them. How they are articulated in court decisions depends on how lawyers frame them. There is also some blur in how they are defended; for instance, there is frequently overlap between defenses on the merits and immunity defenses.

First, wrongly convicted plaintiffs have claimed that the government's violations of *Brady v. Maryland*,[94] which held that principles of due process require that favorable and material evidence

91 Garrett, *supra* note 86, at 54–55.

92 Framing the issue at this level of generality ignores the complex and largely unresolved questions regarding the nature and definition of the required causal connection between the wrongful act or omission and the wrongful conviction. *See* Teressa Ravenell, *Cause and Conviction: The Role of Causation in § 1983 Wrongful Conviction Claims*, 81 Temp. L. Rev. 689 (2008). Professor Ravenell's article describes and anticipates part of the causation question later decided in *Drumgold v. Callahan*, 707 F.2d 28, 48–54 (1st Cir. 2013). There, the First Circuit overturned a jury award in a Section 1983 claim based on a *Brady* violation. It held that the district judge erred in issuing a jury instruction permitting the jury to find liability if the suppression of evidence was a "substantial factor" or concurrent cause of the wrongful conviction. *Id.* at 53–54. Instead, the Court held that the district judge should have given the jury a "but for" factual causation instruction, a more difficult standard for the plaintiff to meet.

93 Of course, other defenses are made in many of these cases. A fairly common one is the statute of limitations. As a threshold matter, *Heck v. Humphrey*, 512 U.S. 477 (1994) requires the civil rights plaintiff to prove that his or her criminal conviction or sentence has been set aside. *See also* Poventud v. City of New York, 750 F.3d 121 (2d Cir. 2014).

94 373 U.S. 83 (1963).

known to prosecutors or police be furnished to criminal defendants,[95] caused their wrongful conviction.[96] Generally, to prevail on a *Brady* claim in this context, "a plaintiff must show that (1) the evidence was favorable to him; (2) the officer concealed the evidence[97]; and (3) the concealment prejudiced him."[98]

Favorable evidence may be exculpatory, such as evidence suggesting the criminal involvement of a third party, or impeachment evidence, such as evidence of the unreliability of a prosecution witness.[99] Evidence is material when there is "any reasonable likelihood" it could have "affected the judgment of the jury."[100] The plaintiff does not need to show it is more likely than not that they could have been acquitted at trial had the suppressed evidence been disclosed. Instead, they must show that failure to disclose the evidence is sufficient to "undermine confidence" in the verdict.[101]

As a matter of practice, *Brady* claims are often added to lawsuits challenging specific forms of police misconduct, such as overly suggestive witness identification techniques or fabrications of inculpatory evidence.[102] The *Brady* claim is that these acts

95 *See* Strickler v. Greene, 527 U.S. 263, 280–81 (1999) (quoting Kyles v. Whitley, 514 U.S. 419, 438 (1995)).

96 Garrett, *supra* note 86, at 70; *Drumgold*, 707 F.3d at 38. The Circuits are split on whether and to what extent there is a Brady right to exculpatory evidence prior to a guilty plea. Alvarez v. City of Brownsville, 904 F.3d 382, 392–93 (5th Cir. 2018) (collecting cases from the circuits).

97 Generally, there is no *Brady* claim for suppression of evidence if the evidence is known to the defendant. *See* Avery v. City of Milwaukee, 847 F.3d at 443, 443–44.

98 Gill v. City of Milwaukee, 850 F.3d 335, 343 (7th Cir. 2017) (citation omitted); *see* Poventud, 750 F.3d at 133; *see also* Mills v. Barnard, 869 F.3d 473, 485–86 (6th Cir. 2017).

99 United States v. Bagley, 473 U.S. 667, 676 (1985).

100 Wearry v. Cain, 136 S. Ct. 1002, 1006 (2016) (internal quotations omitted) (quoting Giglio v. United States, 405 U.S. 150, 154 (1972)).

101 Smith v. Cain, 565 U.S. 73, 75 (2012); Owens v. Balt. City State's Att'ys Office, 767 F.3d 379, 397 (4th Cir. 2014).

102 *See* Gates v. District of Columbia, 66 F. Supp. 3d 1, 23 (D.D.C. 2014) (if the police fabricated a confession to a snitch and failed to disclose it to prosecutors, they would have violated Brady); *Avery*, 847 F.3d at 443 (police violate *Brady* when they withhold the coercive techniques employed to threaten witnesses); *see* Gregory v. City of Louisville, 444 F.3d 725, 744 (6th Cir. 2006) (separating claims of fabrication from *Brady* claim as to forensic scientist); *see also Mills*, 869 F.3d at 473. *But see* Saunders-El v. Rohde, 778 F.3d 556, 562 (7th Cir. 2015) (*Brady* does not require police to create exculpatory evidence by requiring them to disclose fabrication of evidence to the prosecutor); Ajamu v. City of Cleveland, 2017 U.S. Dist. LEXIS 123362, at *12–13 (finding *Avery*

of misconduct, known to the police, were not disclosed to the prosecutor. It is not possible to bring civil *Brady* claims against prosecutors because the Supreme Court, in a line of cases since *Imbler v. Pachtman*, has held that absolute immunity shields them against claims challenging conduct "within the scope of his duties in initiating and pursuing a criminal prosecution."[103]

Absolute immunity does not apply when the prosecutor is sued for investigative or administrative acts.[104] However, that exception has been held inapplicable to claims that managing prosecutors failed to train and supervise prosecutors on their *Brady* obligations and failed to establish an information database recording impeachment material on jailhouse informants.[105]

In addition to proving a violation of *Brady*, the plaintiff must demonstrate by a preponderance of the evidence a causal connection between it and the conviction. Common law tort principles generally inform the causation inquiry.[106] In this context, materiality and

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and *Saunders-El* difficult to reconcile).

103 Imbler v. Pachtman, 424 U.S. 409, 410 (1976). *See* Kalina v. Fletcher, 522 U.S. 118 (1997) (holding prosecutor absolutely immune from claims that affidavit supporting application for arrest warrant contained false statements); Buckley v. Fitzsimmons, 509 U.S. 259, 277 (1993) (holding prosecutor absolutely immune from claims arising from statements made to press); Burns v. Reed, 500 U.S. 478 (1991) (holding prosecutor absolutely immune from claims arising from application for search warrant and presentation of evidence before grand jury). *See* Karen McDonald Henning, *The Failed Legacy of Absolute Immunity Under Imbler: Providing a Compromise Approach to Claims of Prosecutorial Misconduct*, 48 Gonz. L. Rev. 219 (2012) (arguing for modification of doctrine); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. Rev. 53 (2005) (same).

104 The courts are split on whether absolute or qualified immunity, or neither, may apply to claims that the prosecutor knowingly used fabricated evidence at trial. Buckley v. Fitzsimmons, 20 F.3d 789, 797 (7th Cir. 1994); Michaels v. New Jersey, 222 F.3d 118, 123 (3d Cir. 2000) (absolute immunity applies); Zahrey v Coffey, 221 F.3d 342, 354 (2d Cir. 2000) (qualified immunity applies); Fields v. Wharrie, 740 F.3d 1107, 1114 (7th Cir. 2014) (holding that a prosecutor did not have absolute or qualified immunity where he fabricated evidence).

105 Van de Kamp v. Goldstein, 555 U.S. 335 (2009); *see* Martin A. Schwartz, *The Supreme Court's Unfortunate Narrowing of the Section 1983 Remedy for Brady Violations*, 37 The Champion 58, 59–61 (May 2013). In *Connick v. Thompson*, 563 U.S. 51 (2001), the Supreme Court held that a municipality may be liable for damages under Section 1983 only when it is deliberately indifferent to actual or constructive knowledge that its prosecutors have been inadequately trained on their *Brady* obligations.

106 Drumgold v. Callahan, 707 F.3d 28, 48 (1st Cir. 2013).

causation are closely connected. Materiality requires a showing of a reasonable probability that the plaintiff would not have been convicted but for the withholding of evidence. Causation requires the plaintiff to make the same "but for" showing by a preponderance of the evidence, a heightened burden of proof.[107]

Some Circuits apply a more stringent standard for plaintiffs to meet in making *Brady*-based civil rights claims. In the Fourth Circuit, the plaintiff must show, among other factors, that the officer's failure to disclose *Brady* material to the prosecutor was in bad faith.[108] In the Eighth Circuit, plaintiffs must show that the officer both knew of the exculpatory value of the evidence and suppressed it in bad faith with the intention of depriving the defendant of a fair trial.[109] In the Eleventh Circuit, plaintiffs must show that the *Brady* violation was more than the product of negligence.[110]

Noting inter-Circuit differences in just this one area of the law underscores a broader, and obvious reality. While it is impossible to quantify, differences in the legal standards, and how they are applied from district to district and circuit to circuit, surely have an important but indeterminate role in the empirical data. The state of the law in a particular district or circuit, when not uniform across the country, naturally influences whether potential civil rights plaintiffs bring particular claims, which they bring, and how successful they are.

Whether a plaintiff's *Brady* claim can survive a motion for summary judgment depends largely on the facts. The standards articulated above suggest reasons why a plaintiff may fail to prevail on such claims. The court may conclude, for example, that the suppressed evidence was immaterial,[111] that it was cumulative of

107 *Id.* at 48–54 (reversing verdict based on jury instruction that erroneously incorporated notions of both but for and concurrent causation).

108 Owens v. Balt. City State's Attys. Office, 767 F.3d 379, 396–97 (4th Cir. 2014) (reversing dismissal of such claims).

109 Briscoe v. Cty. of St. Louis, 690 F.3d 1004, 1013 (8th Cir. 2012) (granting motion for summary judgment on *Brady* claim); Villasana v. Wilhoit, 368 F.3d 976, 979–81 (8th Cir. 2004) (same).

110 Porter v. White, 483 F.3d 1294, 1305–08 (11th Cir. 2007). The Ninth Circuit requires the officer to have failed to disclose *Brady* material to prosecutors with deliberate indifference or reckless disregard of the defendant's rights. Tennison v. City & Cty. of San Francisco, 570 F.3d 1078, 1089 (9th Cir. 2009) (finding standard satisfied).

111 *See* Lefever v. Ferguson, 645 F. App'x. 438, 443–44 (6th Cir. 2016) (holding forensic scientist's lie about graduation date, combined with other matters, was not material as nondisclosure did not undermine confidence in the trial).

known evidence,[112] that its nature did not permit a reasonable jury to draw a causal connection to the wrongful conviction,[113] or that it failed to meet the enhanced standards in the Fourth, Eighth, or Eleventh Circuits.[114]

Unlike prosecutors, police officers are subject to civil *Brady* claims,[115] but such a claim may fail on qualified immunity grounds. The doctrine of qualified immunity was crafted to "balance[] two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[116] Qualified immunity shields the government actor from liability when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[117] Overcoming a qualified immunity defense is, therefore, a tall order; as the Supreme Court has said, immunity protects "all but the plainly incompetent or those who knowingly violate the law."[118]

Determining the applicability of qualified immunity involves a two-part analysis. Officials are entitled to qualified immunity unless they violated a federal statutory or constitutional right and the unlawfulness of their conduct was "clearly established at the time."[119] "Clearly established" means that, at the time that the government

112 Hernandez v. Terrones, 397 F. App'x. 954, 970–74 (5th Cir. 2010); *Lefever*, 645 F. App'x. 438.

113 Johnson v. Mahoney, 424 F.3d 83, 91 (1st Cir. 2005).

114 *See Porter*, 483 F.3d at 1305.

115 *See* Strickler v. Greene, 527 U.S. 263, at 280–81 (1999); Whitlock v. Brueggemann, 682 F.3d 567, 587–88 (7th Cir. 2012); Johnson v. Dossey, 515 F.3d 778, 781 (7th Cir. 2008); Steidl v. Fermon, 494 F.3d 623, 627–32 (7th Cir. 2007); Porter v. White, 483 F.3d 1294, 1304 (11th Cir. 2007); Gibson v. Superintendent of N.J. Dep't of Law & Pub. Safety, 411 F.3d 427, 442–43 (3d Cir. 2005) ("Several courts have recognized that police officers and other state actors may be liable under § 1983 for failure to disclose exculpatory material to the prosecutor."), *cert. denied*, 547 U.S. 1035 (2006); Villasana v. Wilhoit, 368 F.3d 976, 978 (8th Cir. 2004), *cert. denied*, 543 U.S. 1183 (2005); Newsome v. McCabe, 256 F.3d 747, 752 (7th Cir. 2001); Schwartz, *supra* note 105, at 61.

116 Pearson v. Callahan, 555 U.S. 223, 231 (2009).

117 White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam) (quoting Mullenix v. Luna, 136 S. Ct. 305, 308 (2015)).

118 *Mullenix*, 136 S. Ct. at 308 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

119 District of Columbia v. Wesby, 138 S. Ct. 577, 589–90 (2018) (quoting Reichle v. Howards, 566 U.S. 658, 664 (2012)).

official acted, or chose not to act, the law was "'sufficiently clear' that every 'reasonable official would understand that what he is doing'" is unlawful.[120] The law at issue must, therefore, be clear enough to be defined at a high degree of specificity and that it admits to only one reasonable interpretation within the circumstances faced by the official.

Thus, in the context of *Brady*, the qualified immunity question turns on whether the protection was violated, an issue that may well have been resolved during post-conviction proceedings, and whether the obligation to disclose the evidence was "clearly established" at the time. Naturally, that will depend on the particular nature of the alleged suppression of evidence and when it occurred. Varying factual scenarios have led to different results.[121]

Second, plaintiffs have alleged that their due process rights to a fair trial were violated when the police used unduly suggestive witness identification techniques that resulted in witnesses wrongly identifying the plaintiff as the perpetrator of a crime.[122] The Supreme Court has held that due process concerns may be implicated when particular identification procedures are both suggestive and unnecessary.[123] Even when that threshold is met, however, automatic exclusion does not follow.

Instead, courts will assess whether improper procedures created a "substantial likelihood of misidentification."[124] Where the

120 Ashcroft v. Al-Kidd, 563 U.S. 731, 741 (2012) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

121 Mellen v. Winn, 900 F.3d 1085 (9th Cir. 2018) (reversing dismissal of *Brady* claims); Drumgold v. Callahan, 707 F.3d 28, 43–45 (1st Cir. 2013) (rejecting defense); *compare* Haley v. City of Boston, 657 F.3d 39, 46–49 (1st Cir. 2011) (accepting defense in part because in 1972 it was not clearly established that *Brady* applied to officers) *with* Owens v. Balt. City State's Attorney's Office, 767 F.3d 379, 399–401 (4th Cir. 2014) (rejecting defense); Carrillo v. Cty. of L.A., 798 F.3d 1210 (9th Cir. 2015) (affirming rejection of qualified immunity defense); Tennison v. City & Cty. of San Francisco, 570 F.3d 1078, 1093–95 (9th Cir. 2009) (same).

122 Garrett, *supra* note 86, at 78–87. To some degree, this claim may overlap with *Brady*. The plaintiff may allege that the police failed to disclose to prosecutors that they employed suggestive techniques. *Cf. Carrillo*, 798 F.3d at 1228 (denying qualified immunity).

123 Perry v. New Hampshire, 565 U.S. 228, 238–39 (2012) (citing Neil v. Biggers, 409 U.S. 188, 198 (1972) and Manson v. Brathwaite, 432 U.S. 98, 107 (1977)).

124 *Biggers*, 409 U.S. at 201. In *Good v. Curtis*, 601 F.3d 393, 399 (5th Cir. 2010), *cert denied*, 562 U.S. 840 (2010), however, the Fifth Circuit held that the "substantial likelihood of misidentification" prong is no bearing on the analysis because the wrongly convicted are, by their nature, misidentified.

"indicators of [a witness'] ability to make an accurate identification" are "outweighed by the corrupting effect" of law enforcement suggestion, the identification should be suppressed.[125] Thus, courts will determine, based on a totality of the circumstances, whether a suggestive and unnecessary identification procedure was nevertheless reliable,[126] or, instead, made the trial unfair.[127] Again, whether the plaintiff bringing such a claim can surmount a motion for summary judgment will depend on how the court frames the question and the evidence developed through discovery.[128]

Third, plaintiffs have alleged that their due process rights were violated when police coerced their confessions. Of the 2,308 state wrongful conviction cases in the Registry of Exonerations recorded as of the spring of 2019, 292 involved false confessions. Exoneration makes clear that the confession was false, but a civil rights plaintiff must show that the confession was a result of unconstitutional coercion.[129] The Supreme Court has held that principles of due process and the Fifth Amendment privilege[130] against self-incrimination require a confession to be voluntary before it may be admitted into evidence.[131] The Court's focus has been on due process and it has held that the question of voluntariness depends on "whether a defendant's will was overborne," requiring an evaluation of the totality of circumstances, including "both the characteristics of the accused and the details of the interrogation."[132]

125 *Perry*, 565 U.S. at 229 (quoting *Braithwaite*, 432 U.S. at 114).

126 Lee v. Foster, 750 F.3d 687, 691 (7th Cir. 2014). Whether the identification was potentially reliable in the criminal context should have no bearing in a civil rights case based on the innocence of the plaintiff. Innocence should take reliability out of the civil liability equation. Garrett, *supra* note 86, at 88.

127 Alexander v. City of South Bend, 433 F.3d 550, 555 (7th Cir. 2006).

128 *Id.* at 552 (granting summary judgment); Hicks v. City of New York, 232 F. Supp. 3d 480, 494 (S.D.N.Y. 2017) (granting motion to dismiss), *aff'd in part, vacated in part*, 719 F. App'x 61 (2d Cir. 2018) (affirming the dismissal on the basis of *Brady* but vacating the dismissal of defendant's malicious prosecution claims). Hicks v. Marchman, 719 F. App'x. 61 (2d Cir. 2018) (granting motion to dismiss); Hampton v. City of Chicago, No. 12-cv-5150, 2017 WL 2985743 at *23–24 (N.D. Ill. July 13, 2017).

129 Garrett, *supra* note 86, at 90.

130 Tinney v. Richland Cty., 678 F. App'x. 362, 365 (6th Cir. 2017) (affirming dismissal of self-incrimination claim on qualified immunity grounds when it was unclear whether a violation of the right against self-incrimination can occur without a trial).

131 Dickerson v. United States, 530 U.S. 428, 433 (2000).

132 *Id.* at 433–34 (quoting Schenkcloth v. Bustamonte, 412 U.S. 218, 226 (1973)); *see* Halsey v. Pfeiffer, 750 F.3d 273, 304 (3d Cir. 2014).

This totality of the circumstances test is an uncertain one because "the line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly . . . where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused."[133] Not surprisingly, then, the success of such a claim depends largely on the facts.[134]

Fourth, plaintiffs have argued that, in violation of principles of due process, prosecutors,[135] police or, less commonly, forensic scientists testifying for the state, fabricated evidence which led to their wrongful conviction. The language describing the required causal connection between the fabrication and the conviction is not entirely consistent, but is reasonably forgiving.[136]

Uncovering evidence of fabrication, often decades after the misconduct, is challenging. But, when it is found, fabrication can form the basis of a powerful claim and render qualified immunity defenses difficult. Fabrication violates clearly established constitutional rights: "[w]e emphatically reject the notion that due process of law permits the police to frame suspects."[137] The unconstitutionality of fabrication is typically found to have been well-established prior to

133 *Halsey*, 750 F.3d at 304 (quoting Haynes v. Washington, 373 U.S. 503, 515 (1963)).

134 *Id.* at 306–09 (reversing summary judgment for defendants); Livers v. Schenck, 700 F.3d 340, 352–54 (8th Cir. 2012) (affirming denial of qualified immunity); *Tinney*, 678 F. App'x. at 367 (affirming judgment against plaintiff alleging that police knowledge of his mental illness when obtaining a confession shocked the conscience). The Seventh Circuit has held that coercive interrogation of witnesses or inducing them to lie is not a violation of the defendant's due process rights because their testimony may be true; the violation, if any, is one resting on *Brady*—the failure to disclose the tactics used to obtain the testimony. *See* Avery v. City of Milwaukee, 847 F.3d 433, 439 (7th Cir. 2017).

135 In *Fields v. Wharrie*, 740 F.3d 1107 (7th Cir. 2014), the Seventh Circuit affirmed the denial of absolute immunity to a prosecutor alleged to have fabricated evidence as an investigator prior to indictment.

136 *Halsey*, 750 F.3d at 294 n.19 ("reasonably likely"); Mills v. Barnard, 869 F.3d 473, 484 (6th Cir. 2017) ("a reasonable likelihood that the false evidence could have affected the judgment of the jury") (citation omitted); *Avery*, 847 F.3d at 439 (convictions "premised" on fabricated evidence always violate Due Process). In *Massey v. Ojanlit*, 759 F.3d 343, 354–56 (4th Cir. 2014), the Fourth Circuit employed a "but for" standard of causation and, affirming the dismissal by the trial court, held that it was not met.

137 *Halsey*, 750 F.3d at 293; *see* Whitlock v. Brueggerman, 682 F.3d 567, 580–87 (7th Cir. 2012) (denying qualified immunity defense).

the fabrication at issue in these cases.[138]

It is appropriate at this point to make another simple but important observation. Civil rights law in the area of wrongful conviction changes over time; claims that were not viable in 1990 may be more viable today, or vice versa. For example, a number of cases were dismissed in the Seventh Circuit when courts held that police fabrication of evidence does not violate a defendant's federal civil rights, but that is no longer the law of the circuit.[139] In contrast, *Connick v. Thompson* made future *Monell* claims much more difficult in the *Brady* context.[140] Just as the law is not the same from circuit to circuit, it changes over time and necessarily influences which cases are brought and which are successful.

Fifth, plaintiffs have brought what are traditionally tort claims for malicious prosecution as Section 1983 claims arising under the Fourth Amendment. Generally, the elements of such a claim are (1) "that a criminal prosecution was initiated against the plaintiff and that the defendant 'ma[d]e, influence[d], or participate[d] in the decision to prosecute'", (2) "that there was a lack of probable cause for the criminal prosecution", (3) "that, 'as a consequence of a legal proceeding,' the plaintiff suffered a 'deprivation of liberty' . . . apart from the initial seizure", and (4) that "the criminal proceeding must have been resolved in the plaintiff's favor."[141] On the merits, the difficulty in some of these cases is in satisfying the lack of probable cause prong.[142]

Last, in addition to suing individuals, wrongfully convicted

138 *Mills*, 869 F.3d at 486–87. The Seventh Circuit has held, for example, that, since 1988, it has been well-established in that Circuit that police fabrication of evidence which is later used to convict a defendant is unconstitutional. *Whitlock*, 682 F.3d at 580.

139 *See* Saunders-El v. Rohde, 778 F.3d 556, 560 (7th Cir. 2015).

140 Connick v. Thompson, 563 U.S. 51 (2011).

141 *Mills*, 869 F.3d at 479–80 (quoting Sykes v. Anderson, 625 F.3d 294 (6th Cir. 2010)) (reversing dismissal of such claims); *cf.* Black v. Montgomery Cty., 835 F.3d 358, 364 (3d Cir. 2016) (adding requirement that the "defendant acted maliciously for a purpose other than bringing the plaintiff to justice"); *see* Montoya v. Vigil, 898 F.3d 1056, 1066–68 (10th Cir. 2018) (holding that the termination of criminal proceedings in plaintiff's favor was not satisfied when vacatur of conviction was the result of compromise unrelated to innocence).

142 *See* Tinney v. Richland Cty., 678 F. App'x. 362 (6th Cir. 2017) (noting that an indictment satisfies probable cause, court affirms summary judgment on grounds that officers had absolute immunity from claims of false testimony at grand jury); Massey v. Ojanlit, 759 F.3d 343, 357 (grand jury had probable cause to indict notwithstanding officer's false statements).

civil rights plaintiffs frequently sue municipalities or other local governments. Typically called "*Monell*" claims after *Monell v. New York City Dept. of Social Services*,[143] these claims are not subject to qualified or absolute immunity defenses.[144] However, local governments are not vicariously liable for the misconduct of their employees.[145] Instead, the municipality itself must cause the deprivation of the plaintiff's constitutional rights.[146]

To show that, the plaintiff must identify an action or custom rising to the level of official municipal policy that caused or was the "moving force"[147] behind their injury.[148] The Supreme Court has held that an official municipal policy "includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law."[149] Moreover, the plaintiff "must show that the policy was implemented with 'deliberate indifference' to the 'known or obvious consequences' that constitutional violations would result."[150]

These alleged policies or customs can, in effect, be affirmative or negative[151] in nature. For example, in the *Brady* context, plaintiffs may contend that the prosecutor's office had a policy or custom of failing to disclose *Brady* material, that the office had a practice of failing to train employees on their *Brady* obligations or that it failed to supervise them in efforts to comply with them.[152] In any case,

143 Monell v. N.Y.C. Dep't of Soc. Servs., 436 U.S. 658 (1978).

144 Owen v. City of Independence, 445 U.S. 622, 657, (1980).

145 *Connick*, 563 U.S. at 60 (1991) (citing *Monell*, 436 U.S. at 691).

146 *Monell*, 436 U.S. at 692.

147 City of Canton v. Harris, 489 U.S. 378, 388–89 (1989).

148 *Monell*, 436 U.S. at 691.

149 Connick v. Thompson, 563 U.S. 51, 60–61. Sometimes, this requires a determination of whether the government actor is acting on behalf of the municipality or the state, a decision that is based on state law. McMillian v. Monroe County, 520 U.S. 781, 797 (1997). If the actor is making policy for the state, rather than for a municipality, the actor is not susceptible to suit under Section 1983.

150 Alvarez v. City of Brownsville, 904 F.3d 382, 390 (5th Cir. 2018) (en banc) (finding no deliberate indifference); *see also* Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 407 (1997).

151 Lisker v. City of Los Angeles, No. CV09-09374, 2013 U.S. Dist. LEXIS 48184 (C.D. Cal. 2013), *aff'd* 780 F.3d 1237 (9th Cir. 2015) (denying motion for summary judgment on Monell claims that LAPD had a policy of failing to respond to citizen police complaints and disciplining police, thereby enabling officers to fabricate evidence against the plaintiff).

152 *See, e.g.*, Bryson v. City of Oklahoma City, 627 F.3d 784 (10th Cir. 2010)

these claims are often very difficult to win. The plaintiff must show not only that unconstitutional misconduct caused their wrongful conviction, but that the misconduct was part of a broader custom or policy which, presumably, resulted in other wrongful convictions as well.

Some *Monell* claims rest not on affirmative and unconstitutional policies, but on the municipalities' failure to train or supervise officers on proper ones. The Court has, however, described as "tenuous" claims that a failure to train amounts to an official policy or custom.[153] To make that showing, the plaintiff must demonstrate that municipal decision makers either knew or should have known that training was inadequate but were "deliberately indifferent" to the effect that inadequacy might have on the constitutional rights of citizens.[154] Deliberate indifference can generally only be shown when the government policymaker is aware or should be aware of a pattern of similar violations caused by the failure to train or supervise.[155] If the plaintiff can surmount that formidable burden, he or she must, of course, also prove that the wrongful conviction would not have occurred had the municipality properly trained or supervised its employees.

III. What Is The Data and What Does It Tell Us?

Having explained our research methodology and the bases upon which claimants or plaintiffs may not win wrongful conviction compensation claims, we have a context for better understanding

(affirming summary judgment for municipality on claim that it failed to train forensic scientist); Alexander v. City of South Bend, 433 F.3d 550, 557 (7th Cir. 2006) (granting defendant's motion for summary judgment on *Monell* claim regarding policy of suggestive identifications); Reasonover v. St. Louis, 447 F.3d 569, 584 (8th Cir. 2006) (granting defendants' motion for summary judgment on *Monell* claim alleging failure to train on *Brady* obligations); Bailey v. City of New York, 79 F. Supp. 3d 424, 443, 454 (E.D.N.Y. 2015) (denying motion for summary judgment on *Monell* claim involving failure to train on *Brady* obligations).

153 *Thompson*, 563 U.S. at 61.

154 City of Canton v. Harris, 489 U.S. 378, 390 (1989). *See also Bd. of the Cty. Comm'rs*, 520 U.S. at 410 ("'deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.")

155 *Compare Thompson*, 563 U.S. at 61, 63 (rejecting a single *Brady* violation as establishing deliberate indifference) *with City of Canton*, 489 U.S. at 391 (hypothesizing a scenario in which deliberate indifference can be inferred after a single incident).

the data. Any exoneree, whether incarcerated or not, can file a federal civil rights or state tort claim. Of the 2,000 potential civil compensation filers in the database, 1,802 were incarcerated and 198 were not imprisoned.[156] All are reflected in the first two data columns in Tables 1 and 2. In contrast, only those wrongly convicted in states with compensation statutes and subsequently incarcerated may file for state statutory compensation. The third and fourth columns in Tables 1 and 2 reflect that, of the 1,802 incarcerated exonerees, 1,572 were convicted in states that now have compensation statutes (except Kansas) and 230 were convicted in states without them (including Kansas).

Table 1 lists the numbers and percentages of total exonerees, total incarcerated exonerees, and incarcerated exonerees convicted in states with and without compensation statutes by race and gender.[157]

156 The wrongfully convicted who are not sentenced to prison are a somewhat surprising percentage of those on the Registry. *Cf.* Samuel R. Gross, *Contributions: Errors in Misdemeanor Adjudications*, 98 B.U. L. REV. 999 (2018) (discussing exonerations of those convicted of misdemeanors). Because of its size and the possibility that readers might be less concerned about them, compared to those wrongly imprisoned, we have tried in several tables to separate this subgroup out from the full cohort of 2000.

157 The percentages have remained quite constant according to the most recent data from the National Registry. *Exonerations in the United States Map*, *supra* note 88.

Table 1 (Exonerees by Race and Gender)

Bio Factors	Total Exonerees		Incarcerated Exonerees		Incarcerated Exonerees in States with Compensation Statutes		Incarcerated Exonerees in States without Compensation Statues	
Race	Count	(%)	Count	(%)	Count	(%)	Count	(%)
Asian	16	0.80	13	0.72	11	0.70	2	0.87
Black	952	47.60	893	49.56	805	51.21	88	38.26
Caucasian	771	38.55	678	37.62	561	35.69	117	50.87
Hispanic	240	12.00	200	11.10	182	11.58	18	7.83
Native American	12	0.60	10	0.55	6	0.38	4	1.74
Other	9	0.45	8	0.44	7	0.45	1	0.43
Total	2000	100	1802	100	1572	100	230	100
Gender	Count	(%)	Count	(%)	Count	(%)	Count	(%)
Female	186	9.30	134	7.44	116	7.38	18	7.83
Male	1814	90.70	1668	92.56	1456	92.62	212	92.17
Total	2000	100	1802	100	1572	100	230	100

The overwhelming majority of exonerees in our database are male, and African-Americans make up the largest racial group of exonerees. In contrast, among the population of exonerees convicted in states *without* compensation statutes, there are more whites than blacks.[158] The absence of compensation statutes in seventeen states thus affects more whites than blacks.

Table 2 sets forth the numbers and percentages of exonerees and incarcerated exonerees by the "Tags," "Contributing Factors," "Worst Crimes," and "Geo Factors" described above.

158 The Registry has studied race in wrongful convictions. *See* Gross et al., *supra* note 26.

Table 2 (Exonerees by Other Characteristics)

	Total Exonerees		Incarcerated Exonerees		Incarcerated Exonerees in States with Compensation Statutes		Incarcerated Exonerees in States without Compensation Statues	
Tags	Count	(%)	Count	(%)	Count	(%)	Count	(%)
CIU	240	12	160	8.88	158	10.05	2	0.87
No CIU	1760	88	1642	91.12	1414	89.95	228	99.13
GP	424	21.2	307	17.04	290	18.45	17	7.39
No GP	1576	78.8	1495	82.96	1282	81.55	213	92.61
IOA	400	20	395	21.92	345	21.95	50	21.74
No IOA	1600	80	1407	78.08	1227	78.05	180	78.26
DNA Ex.	346	17.3	345	19.15	303	19.27	42	18.26
No DNA Ex.	1654	82.7	1457	80.85	1269	80.73	188	81.74
DP	117	5.85	117	6.49	96	6.11	21	9.13
No DP	1883	94.15	1685	93.51	1476	93.89	209	90.87
Contributing Factors	Count	(%)	Count	(%)	Count	(%)	Count	(%)
FC	248	12.4	239	13.26	211	13.42	28	12.17
No FC	1752	87.6	1563	86.74	1361	86.58	202	87.83
MWID	611	30.55	596	33.07	527	33.52	69	30
No MWID	1389	69.45	1206	66.93	1045	66.48	161	70
F/MF	493	24.65	445	24.69	386	24.55	59	25.65
No F/MF	1507	75.35	1357	75.31	1186	75.45	171	74.35
P/FA	1109	55.45	1040	57.71	898	57.12	142	61.74
No P/FA	891	44.55	762	42.29	674	42.88	88	38.26
OM	931	46.55	872	48.39	773	49.17	99	43.04
No OM	1069	53.45	930	51.61	799	50.83	131	56.96

Worst Crime	Count	(%)	Count	(%)	Count	(%)	Count	(%)
Murder	799	39.95	795	44.12	674	42.88	121	52.61
Sexual Assault	301	15.05	291	16.15	255	16.22	36	15.65
Drugs	218	10.9	130	7.21	123	7.82	7	3.04
Child Sexual Assault	240	12	228	12.65	201	12.79	27	11.74
Robbery	105	5.25	104	5.77	93	5.92	11	4.78
Other	337	16.85	254	14.1	226	14.38	28	12.17
Geo Factors	Count	(%)	Count	(%)	Count	(%)	Count	(%)
South	744	37.2	638	35.41	582	37.02	56	24.35
West	330	16.5	296	16.43	239	15.2	57	24.78
Northeast	413	20.65	386	21.42	322	20.48	64	27.83
Midwest	506	25.3	475	26.36	429	27.29	46	20
Red State (2016)	1071	53.55	941	52.22	752	47.84	189	82.17
Blue State (2016)	922	46.1	854	47.39	820	52.16	34	14.78

Chart Abbreviations	
	Definition
CIU	Conviction Integrity Unit
GP	Guilty Plea
IO	Innocence Organization Aid
Ex.	Exoneration
DP	Death Penalty
FC	False Confession
MWID	Mistaken Witness Identification
F/MF	False/Misleading Forensics
P/FA	Perjury/False Allegation
OM	Official Misconduct

When considering the association between these characteristics and compensatory outcomes, it is important to bear in mind the frequency of the characteristics in the database. Tables 1 and 2 provide that background. We will soon see, for example, that exonerees who were assisted in their efforts to obtain post-conviction relief by innocence organizations and those exonerated by DNA evidence are generally more likely to seek and receive state statutory compensation and civil compensation. Yet, Table 2 shows that innocence organizations aided only about 20% of the exonerees in our database and DNA was responsible for the exonerations of only 17.3% of them.

Of the contributing factors, more than half of the exonerations featured perjury or false allegations while less than half involved official misconduct. Murder, at 40%, was the most frequent crime for which the exonerated were wrongly convicted. The most wrongful convictions occurred in the South (37.2%), by a wide margin, and the least occurred in the West (16.5%); they were fairly equally divided between blue and red states.

With some exceptions, the frequency of the characteristics studied among the exonerees in the full database generally mirror the frequency of those features among those exonerated in states without compensation statutes. One exception is for those sentenced to death. While less than 6% (117) of all exonerees were sentenced to death, 9% of those wrongfully convicted in states without statutes received the death penalty. Another is that the absence of compensation statues in certain states disproportionately impacted persons convicted of murder: about 40% of the exonerees in the database were wrongly convicted of murder, but over half of those exonerated in states without statutes were convicted of murder. The opposite is true for those wrongly convicted of drug offenses; about 11% of all exonerees were wrongly convicted of drug offenses, but drug offense exonerees accounted for only 3% of those wrongly convicted in states without compensation statutes. The absence of those statutes then more severely impacts those with more time lost; the average number of years lost in state murder cases in fall 2018 was 13.3 years and only one year in drug cases.[159]

The percentages of exonerees from states without compensation statutes was balanced among geographic regions. The South, Northeast, and Midwest each have one state without

159 *Exonerations in the United States Map*, *supra* note 88.

a compensation statute with substantial numbers of exonerees (Georgia, Pennsylvania, and Indiana), while the West has a larger number of lower-volume states without compensation statutes. And, for those unable to escape red/blue politics, of all exonerees (except Puerto Rico and Guam, which are not represented in the electoral college) convicted in states without a compensation statute, nearly 82% were convicted in states carried by Trump in 2016, indicating that states without statutes may, on balance, be more politically conservative than those that do.

When looking at this data and that which follows, we should be mindful of one significant quirk in the database. The majority of wrongful convictions in drug cases arose from a single county—Harris County (Houston), Texas. In 2014, the conviction integrity unit (CIU) in Harris County started uncovering significant numbers of guilty pleas in drug possession cases in which the confiscated evidence was not, in fact, a controlled substance.[160] There are 145 such cases in the database of 2,000. This large cluster of drug cases from a single state has several common characteristics: incarcerations of one year or less (with two exceptions), CIU involvement, guilty pleas, and almost no state compensation filings (just one unsuccessful one). This cluster undoubtedly skews the picture. That said, we have decided not to exclude them from the database; they and others like them in other counties and other states are listed in the Registry. We were reluctant to begin excluding arguably non-representative clusters from the database for want of a rational and consistent methodology for doing so. At the same time, those drawing conclusions from this data should understand and appropriately account for the presence of these cases.

As noted, the Registry records the number of years each exoneree was wrongly imprisoned. Table 3 below lists the average number of years lost for each racial group, for both genders, and for the four geographic regions. The average number of years lost for non-federal exonerees in the fall of 2018 was 9.2 years.[161] The data show that the average number of years lost is substantially higher for blacks than for whites, Asians and Hispanics and more than twice as high for men than for women. Whites averaged more years lost than Hispanics. Those wrongly convicted in the Northeast and Midwest

160 Nat'l Registry of Exonerations, Exonerations in 2015 9–11 (Feb. 3, 2016), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf.

161 *Exonerations in the United States Map*, *supra* note 88.

experienced the longest average years lost, amounts larger than the national average.

Table 3 (Mean Years Lost by Race, Gender, and Region)[162, 163]

Race	Number	Mean	Standard Deviation	P Value
Asian	16	6.63	7.37	
Black	952	10.36	8.73	
Caucasian	771	7.41	7.42	
Hispanic	240	6.78	6.83	<0.0001
Native American	12	10.23	6.62	
Other	9	6.62	6.24	
Gender				
Female	186	4.38	5.91	<0.0001
Male	1814	9.20	8.21	
Geo Factor				
South	744	8.34	8.78	
West	330	7.59	7.25	0.0011
Northeast	413	9.61	7.74	
Midwest	506	9.35	7.93	

A. The State Statutory Compensation Data

We turn next to data regarding claims made (or not made) pursuant to state wrongful conviction compensation statutes and the results of those claims. What can the data tell us about the characteristics of those more likely to file and receive statutory

162 The standard deviation measures the amount of variation within a set of data. A low standard deviation indicates that most the numbers are near the mean. A high standard deviation means that the numbers are more spread out. If, for example, the mean of a set of data were 10 and the standard deviation were 4, 68% of the observations would lie between 6 and 14 and 95% would be between 2 and 18.

163 The P value from analysis of variance (ANOVA) tests whether there are differences between groups. The null hypothesis of ANOVA is that all groups have the same mean. If the P value is less than or equal to 0.05, we reject the null hypothesis and conclude that not all group means are equal. Such is the case here.

compensation and any trends observed in filing?

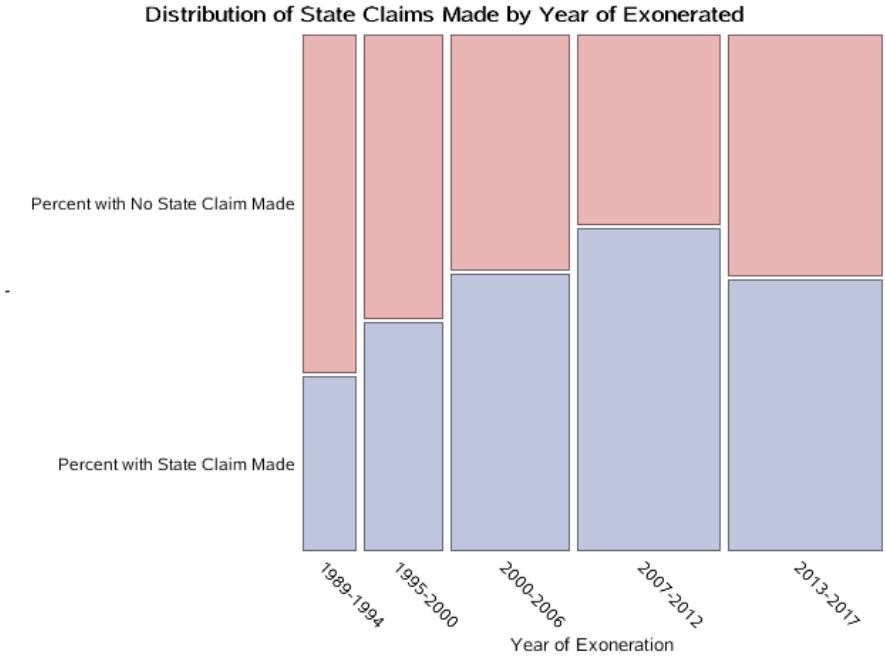
In my earlier work, I hypothesized about why exonerated incarcerees in states with compensation statutes do not file for compensation.[164] One was that many states adopted statutes during the 1989–2018 period, and that some of those exonerated prior to enactment of the statute do not seek compensation because, while most statutes allowed such retroactive filings, the exoneree is unaware of their opportunity to so. Another is that some exonerees whose wrongful incarceration was brief do not file because the potential gains outweigh the costs associated with the effort. Objective data permits us to test these hypotheses.

First, using a Cochran-Armitage trend test,[165] we wanted to see if there was a relationship between the probability of filing for state compensation and the year of exoneration (which is recorded by the Registry). As expected, that relationship exists, as shown in Figure 1. The width of the band in each figure represents the size of the population within the band.

164 Gutman, *supra* note 11, at 395–97. An unfortunate reality of wrongful conviction is the number of exonerees who commit crimes after exoneration. A number of exonerees are also not released after exoneration because they continue to serve sentences for crimes actually committed. We have not determined the numbers of these cases or whether the time between exoneration and re-conviction permitted a claim or suit to be filed. Future research is needed to better assess how frequently subsequent convictions or continued incarceration explains non-filing, but the anecdotal evidence I have seen of this phenomenon is considerable.

165 The Cochran-Armitage trend test is a test of linear trend in the proportions of the response of interest from a binary response across R ordered categories. For example, we want to test the null hypothesis that the proportions of compensation filings or awards were the same over several time bands versus the alternative hypothesis that those proportions of awards increased across the calendar time bands.

Figure 1 (State Claims Made by Year of Exoneration)



Generally,[166] Figure 1 shows that the proportion of incarcerated exonerees seeking state statutory compensation has increased over time. One possible explanation for this is that because the number of state statutes has increased since 1989, more people are potentially eligible and apply.[167]

However, virtually all states that have adopted statutes since 1989 either expressly permit retroactive compensation by allowing pre-adoption exonerees to seek compensation or are silent on retroactivity, but have been implemented as though it exists.[168] Even so, it stands to reason that a long period of time between exoneration and state statutory adoption will reduce the number of claimants as a result of death, subsequent disqualifying criminal activity, lack

166 The proportion decreased during the most recent period (2013–2017), perhaps because a number of recent exonerees have not yet sought compensation.

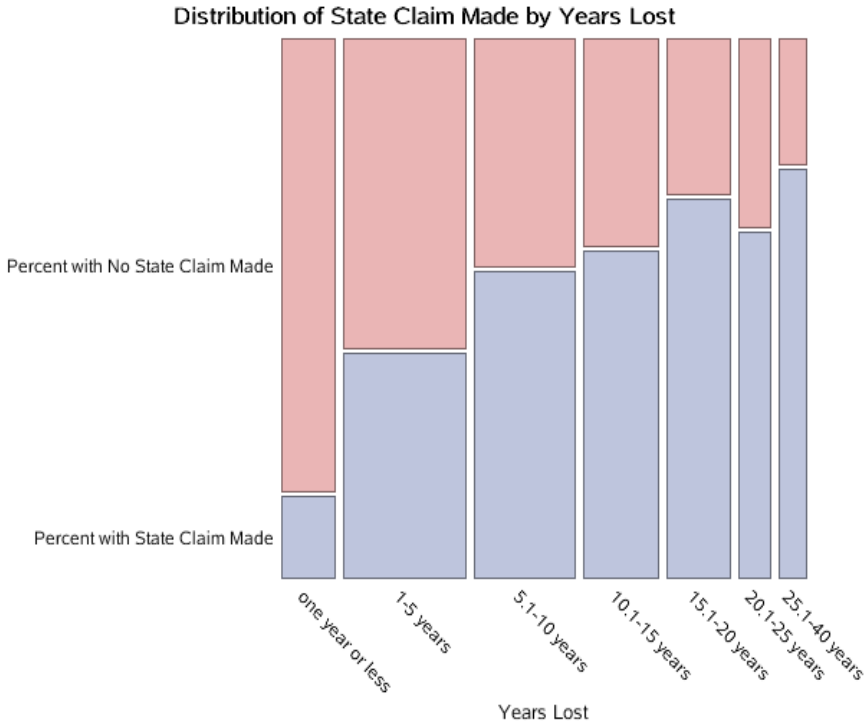
167 Robert J. Norris, *Exoneree Compensation: Current Policies and Future Outlook*, *in* WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE 289, 294–95 (Marvin Zalman & Julia Carrano eds., 2014).

168 Iowa and Minnesota do not expressly bar retroactive claims, but none have been made.

of knowledge of the new statute, or a desire not to revisit their wrongful conviction in a potentially adversarial claim. Thus, it is not surprising that the trend of more filings is generally upward.

Second, Figure 2 shows a strong positive relationship between years lost and the likelihood of filing. This accords with one's intuition that as the number of years lost grows, the exoneree has a greater the need for financial and other support and the prospect of a higher potential award from filing.[169] Conversely, there are fewer filings of those with relatively brief wrongful incarcerations.

Figure 2 (State Claims Made by Years Lost)



Spreadsheet 1 below updates the table appended to my previous article.[170] As my research continued, I learned about the results of previously premature or pending claims, uncovered previously unknown claims and the results therefrom, concluded that certain previously premature claims should be recoded as

169 Gutman, *supra* note 11, at 396–97.
170 *See id.* at 439–40.

unfiled due to the expiration of the applicable statute of limitations and corrected a few errors. Most significantly, a substantial number of additional awards were made in New York, and I obtained updated information about annual annuity payments paid to Texas exonerees. Together, they accounted for the majority of the additional payments made.

Otherwise, the state statutory compensation landscape is relatively unchanged. Only one state, Kansas, has enacted a new statute.[171] Claims have been filed and decided in Michigan, the last state to adopt a statute prior to Kansas. Florida amended its compensation statute to relieve, in part, a prohibition on compensation to persons previously convicted of a felony. Florida exonerees are now eligible if they have one prior non-violent felony, but that relaxation is not retroactive.[172] Maryland exonerees no longer require a governor's pardon to qualify for compensation.[173] Massachusetts made some positive reforms to its statute, including raising the compensation cap from $500,000 to $1 million.[174]

Yet, the data remains concerning. Of 1,572 incarcerated exonerees wrongly convicted in states with a compensation statute, only 828 have filed compensation claims, or about 53% of exonerees in those states. [Columns I and J]. That number will rise, but not dramatically because there exist only 76 premature claims – exonerees who might still file for state statutory compensation prior to running of the statute of limitations.[175] [Column F] About 42.5% did not file and the applicable statutes of limitation make it too late to do so.[176] [Column H].

Of the 828 filings, 609, or about 73.5%, were granted, 148 (almost 18%) were denied and 73 (9%) remain pending. [Columns L, M, N]. The total amount paid by states now exceeds $545 million since 1989, or an average of $18.8 million per year. [Column P]. Compensated exonerees received an average of $69,000 per year of

171 KAN. STAT. ANN. § 60-5004 (West 2019).

172 FLA. STAT. ANN. § 961.04 (West 2019).

173 MD. STAT. ANN. § 10-501(b)(2) (West 2019).

174 *Compare* MASS. ANN. LAWS ch. 258D, § 5 (West 2019), *with* MASS. ANN. LAWS ch. 258D, § 5 (West 2017) (amended 2018).

175 Thirty-one of those premature claims are in Texas and, of those, the vast majority are associated with exonerees who were wrongly convicted of drug possession in Harris County, served relatively little time in prison and are unlikely to file claims.

176 The remaining 5% of exonerees are coded "premature."

incarceration.[177] [Column Q]. Those numbers would be significantly lower were it not for New York. New York's statute is uncapped; the average amount paid per year of incarceration is over $148,000. New York was the state of conviction of 14% of incarcerated exonerees, but over 38% of all state statutory compensation paid in the nation was awarded by New York.

Overall, only 38.7% of exonerees convicted in states with a compensation statute received compensation. Again, that number will rise as pending claims are decided and premature claims are filed and, later, decided. But, even if all premature claims were filed and all of those and all pending claims were awarded for the claimant, the maximum percentage of exonerees in states with statutes who could receive state compensation would be 48%. If one looks at the nation as a whole, rather than only states with compensation statutes, the numbers drop. Only 46% of all exonerees filed state compensation claims and only one-third received compensation. That decrease is fairly small because, although 17 states lack a compensation statute, those are states of conviction of only one-eighth of incarcerated exonerees.

As noted, a compelling explanation for at least some non-filing is that a significant number of exonerees served relatively little time in prison. Of those 1,572 incarcerated, 177 served one year or less. Given the relatively strict compensatory caps and absence of attorney's fees in most states, many who served comparatively little time might not have filed because it was simply not affordable or worth the effort.

The data, reflected in Figure 2, supports that hypothesis. Generally, the longer the exoneree was imprisoned, the more likely they were to file a state compensation claim. There is also evidence of a correlation between length of wrongful incarceration and likelihood of receipt of state compensation. Using the Registry's "years lost" data, it is possible to add the number of years of incarceration experienced by those who received a state compensation award. The

177 Professor Encarnacion argues that, when the state incarcerates a person, it employs that person's body to deter others from committing crimes. As he puts it, "the state in effect conscripts that person into criminal deterrence services." *See* Encarnacion, *supra* note 10, at 261. When the state does that wrongly, Professor Encarnacion views the wages earned by a person employed in an analogous occupation as being a reasonable metric for compensation. He views a correctional officer as the closest analogy and observes that the average hourly wage of such employees, multiplied by 24 hours/day, 365 days/year comes to about $180,000 per year. *See id.* at 268.

results are telling. Although only 38.7% of exonerees in states with statutes received compensation, they accounted for over 50% of the years lost. [Columns O, T].

It is hardly a point of pride to conclude that almost half of all time served in prison by exonerees convicted in states with statutes was uncompensated, as was 55% of time served by all exonerees. But it does show, in general, that exonerees who were unjustly incarcerated for longer periods were relatively more likely to be awarded compensation.

The experience in Texas illustrates both points. Texas has one of the more generous compensation statutes in the country and the most exonerees, but of 231 incarcerated Texans in our 2,000-person database, 83 were wrongly incarcerated for one year or less. As noted, most of those wrongful convictions arose from arrests for possession of harmless substances. It is very likely that, because of the volume of exonerees with short incarcerations, Texas has a below-average filing rate of 43% and only 38% of Texas exonerees received an award. But, of those who filed, nearly 88% received an award and those awards covered nearly two-thirds of the years lost by all Texas exonerees.

Previously, I observed that certain structural features of past or existing state compensation statutes also depress filing rates in certain states, such as those requiring a gubernatorial pardon, those restricting eligibility only to those exonerated as a result of DNA testing and those barring exonerees who had, before their wrongful conviction been convicted of a felony.[178] These unwarranted restrictions invariably reduced the filing rates in Florida, Missouri, Montana, Maryland, and Tennessee.[179]

Another possible explanation for non-filing could be the modest compensation offered by some states. My previous article examined at some length the caps on most state statutes and demonstrated how these caps are far below per-year jury awards in federal civil rights cases and judicial awards in states without caps.[180]

178 Gutman, *supra* note 11, at 395–96.

179 *Id.*

180 *Id.* at 397–408. Since the publication of my 2017 article, there have been three jury verdicts for plaintiffs. In the Jacques Rivera case, a federal jury awarded $17.175 million to a man wrongly imprisoned for 21.3 years. Sam Charles, *Jury Gives $17M To Man Falsely Imprisoned In Case Tied To Tainted Cop*, CHI. SUN-TIMES (June 29, 2018), https://chicago.suntimes.com/news/jury-gives-17m-to-man-falsely-imprisoned-for-murder-in-case-tied-to-tainted-cop/. In the Jamal Trulove case, a San Francisco jury awarded $10 million to a wrongly

A state legislative judgment assigning a value of a year of lost liberty offers an objective basis for assessing comparative generosity. The "grade sheet" in Chart 1 tries to do that. Uncapped statutes or those that incorporate some measure of compensatory flexibility are, in my view, more just that those with restrictive annual caps, overall caps, or both. Using that compensatory metric alone,[181] the following grade sheet ranks the state statutes and notes the percentage of incarcerated filers:

Chart 1 (State Statute Generosity)[182]

Grade	State
A	District of Columbia [50%], Maryland [22%], Minnesota [54%], New York [77%], West Virginia [60%]
A-	Colorado [33%], Connecticut [83%], Texas [43%]
B+	Alabama [35%], Hawaii [50%]
B	Ohio [76%], New Jersey [53%]
B-	California [39%], Michigan [51%], Virginia [63%], Washington [40%]
C+	Florida [15%], Tennessee [17%], North Carolina [52%], Utah [36%]
C	Massachusetts [70%], Mississippi [82%], Nebraska [78%]
C-	Maine [0%], Louisiana [71%]
D+	Iowa [29%], Oklahoma [24%]
D	Missouri [20%], Illinois [69%]
D-	New Hampshire [0%], Wisconsin [38%]
F	Montana [0%]

convicted man who was incarcerated for 5.1 years, or nearly $2 million per year. Bob Egellko, *S.F. Man Awarded $10 Million After Jury Finds Police Framed Him For Murder*, S.F. Chron., Apr. 6, 2018, at A1. A jury awarded $5 million each for three Cleveland men each wrongly imprisoned for 19.2 years. Heisig, *supra* note 8.

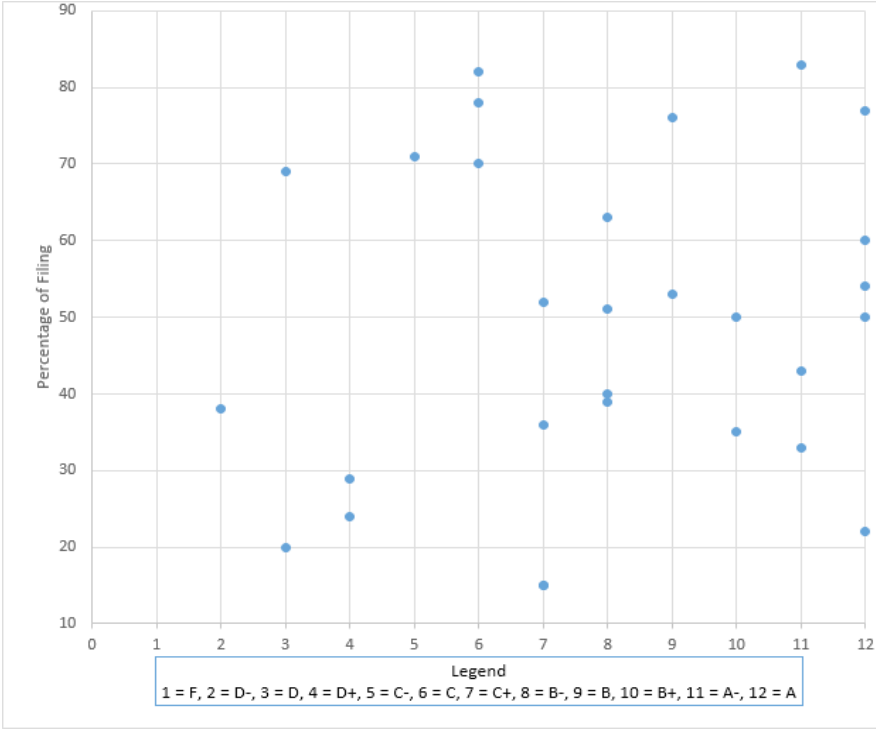
181 I exclude consideration of other compensatory mechanisms, such as social and medical services, a waiver of income tax, award of attorney's fee, and refund of costs and penalties associated with the criminal conviction. Also excluded was Vermont, with only one exoneree.

182 Massachusetts amended its statute in 2018 to raise its damages cap from $500,000 to $1 million. *Compare* Mass. Ann. Laws ch. 258D, § 5(A) (West 2019) *with* Mass. Ann. Laws ch. 258D, § 5(A) (West 2017). Because the database pre-dates that legislative change, Massachusetts' "grade" reflects its old statute, not the new one.

One might expect some sort of correlation between filing rates and generosity. To be sure, that correlation holds in some states. Filing rates are relatively high in New York, West Virginia, and Connecticut and low in Missouri and Montana. But, relative parsimony does not appear to have much explanatory power as shown in the scatterplot below. The filing rates in Illinois and Louisiana, for example, are well above average and just below average in Wisconsin.[183] Yet, those states rank very low in comparative generosity. At the same time, the filing rate is relatively low in several more (potentially) generous states, such as Maryland, Minnesota, Alabama, Texas, New Jersey, and Washington.

183 Wisconsin pays no more than $5,000 per year of wrongful incarceration, up to a total maximum of $25,000. WIS. STAT. ANN. § 775.05(4) (West 2018). Recent attempts to compensate Wisconsin exonerees up to $50,000 per year with a maximum cap of $1,000,000 and to include social services appears to lack support in the Wisconsin state senate. *See* Laurel White, *Wrongful Conviction Compensation Bill Likely Dead This Session*, WISCONSIN PUBLIC RADIO (Feb. 8, 2018, 4:00 PM), https://www.wpr.org/wrongful-conviction-compensation-bill-likely-dead-session (House sponsor declares bill dead in February 2018); *but see* Brooke Hollingsworth, *Bill looks to change compensation law for wrongfully convicted individuals*, THE BADGER HERALD (Mar. 6, 2018), https://badgerherald.com/news/2018/03/06/bill-looks-to-change-compensation-law-for-wrongfully-convicted-individuals/ (State Senator expresses optimism for passage of 2017 Senate Bill 456 introduced October 18, 2017).

Figure 3 (State Compensation Filing by Generosity Grade)



Having now offered a somewhat impressionistic view of what factors might affect state compensation filing rates, co-author Lingxiao Sun ran a logistic regression model[184] and computed the

184 Regression analysis is a statistical tool to determine the relationship between variables. The factor or variable that we are studying or predicting is the dependent variable. Here, those would be the likelihood of seeking and receiving state and civil compensation. What factors impact that likelihood? The factors which we hypothesize might impact the dependent variable are called independent variables. The independent variables for which we have data include whether, for example, the exoneree is male or female, of a particular race or geographic area, and so on. If we were simply looking at the relationship between two variables, like gender and LSAT score, a chi square test between only two variables would be appropriate. If we were looking at the effect of multiple variables jointly on the outcome, and the response variable is a continuous variable (like amounts of money or years) a simple linear model would be appropriate. Here, however, we are looking at the effect of multiple prognostic variables jointly on the outcome – our dependent variables. When there are multiple independent variables and the outcome is a binary event, like filing/no filing or receiving/not receiving, logistic regression is the appropriate analysis to perform.

marginal effects of each explanatory or prognostic variable—the "Bio Codes," the Tags," the "Worst Crime," the "Contributing Factors," and the "Geo Factors"—on the probability of filing for state compensation and the probability of prevailing on filed claims. Here, we do not presume to attribute causation between the independent variables and the dependent variable in each model. Instead, we use this approach as a convenient way to summarize association between the variables while holding other independent variables constant. Prior to presenting the results of the logistic models, Table 4 sets forth the basic percentages—the first column being the percentages of those with the listed characteristic seeking state compensation and the second being the percentages of those with each characteristic receiving state compensation:

Table 4 (Percentage of Exonerees with Each Characteristic Filing for State Compensation and Receiving State Compensation)

185, 186

Characteristic	State Compensation Filed	P Value	State Compensation Received	P Value
CIU	89/158=56.33%	0.3316	75/81=92.59%	0.004
No CIU	739/1414=52.26%		534/674=79.23%	
GP	106/290=36.55%	<.0001	83/99=83.84%	0.3907
No GP	722/1282=56.32%		526/656=80.18%	
IOA	249/345=72.17%	<.0001	212/229=92.58%	<.0001
No IOA	579/1227=47.19%		397/526=75.48%	
DNA Ex.	251/303=82.84%	<.0001	233/242=96.28%	<.0001
No DNA Ex.	577/1269=45.47%		376/513=73.29%	
DP	47/96=48.96%	0.452	34/45=75.56%	0.3711
No D.P.	781/1476=52.91%		575/710=80.99%	
FC	133/211=63.03%	0.0012	103/124=83.06%	0.4588
No FC	695/1361=51.07%		506/631=80.19%	
MWID	354/527=67.17%	<.0001	282/329=85.71%	0.002
No MWID	474/1045=45.36%		327/426=76.76%	
F/MF	206/386=53.37%	0.7525	158/186=84.95%	0.0884

185 As noted below, the simple percentages show wide variations in some of the characteristics. That gives a hint, but not a statistical showing, of an association between the likelihood of filing for or receiving state compensation and the characteristic. The p value of a chi square test between only two variables (like gender and likelihood of filing) provides that showing. As explained below, we start with a hypothesis that there is no association between the characteristic and likelihood of filing. The p value is the probability of observing a random association in the data. In general, a p value less than 0.05 is considered unlikely and data thus provides evidence supporting the alternative hypothesis—that the factor under study is indeed associated with the outcome, that is, increasing or decreasing the chance of the outcome event. The p value in Tables 5, 6, 8 and 9 is the result of a different statistical analysis—one that accounts for all factors examined rather than simply the one in Tables 4 and 7.

186 In this Table and Table 7, note that the numerator of the fraction in column 1—claims filed—is not the same as the denominator of the fraction in column 3—claims decided. That is because the latter denominator excludes pending cases.

Characteristic	State Compensation Filed	P Value	State Compensation Received	P Value
No F/MF	622/1186=52.45%		451/569=79.26%	
P/FA.	460/898=51.22%	0.1848	335/423=79.20%	0.2496
No P/FA	368/674=54.60%		274/332=82.53%	
OM	405/773=52.39%	0.8278	302/378=79.89%	0.5926
No OM	423/799=52.94%		307/377=81.43%	
Male	786/1456=53.98%	0.0002	580/715=81.12%	0.1792
Female	42/116=36.21%		29/40=72.50%	
Murder	372/674=55.19%	<.0001	281/336=83.63%	<.0001
Sexual Assault	175/255=68.63%		150/165=90.91%	
Drugs	24/123=19.51%		14/22=63.64%	
Child Sexual Abuse	93/201=46.27%		64/85=75.29%	
Robbery	52/93=55.91%		37/50=74.00%	
Other Crime	112/226=49.56%		63/97=64.95%	
Black	476/805=59.13%	<.0001	376/438=85.84%	<.0001
Caucasian	247/561=44.03%		153/220=69.55%	
Hispanic	93/182=51.10%		73/88=82.95%	
Other	12/24=50.00%		7/9=77.78%	
South	253/582=43.47%	<.0001	213/246=86.59%	<.0001
West	90/239=37.66%		48/79=60.76%	
Northeast	238/322=73.91%		162/212=76.42%	
Midwest	247/429=57.58%		186/218=85.32%	
Red State (2016)	329/752=43.75%	<.0001	249/298=83.56%	0.1039
Blue State (2016)	499/820=60.85%		360/457=78.77%	

The simple percentages and associated p values support some findings that are not terribly surprising: the percentages of state compensation filing by exonerees who did not plead guilty,[187]

187 Seven states—California, Colorado, District of Columbia, New Jersey, Ohio, Oklahoma, and Virginia—entirely or partly bar compensation to those who

who were exonerated by DNA evidence, and who were supported in their exoneration efforts by an innocence organization were much higher than those with the opposite characteristics. Predictably, the filing rate of those wrongly convicted of drug crimes was quite low; that can be explained by the generally much lower sentences for such crimes and thus fewer years lost.

Other results were less expected. The percentage of filers whose wrongful conviction was at least partly attributable to a false confession or mistaken witness identification was much higher than for those who did not falsely confess or did not have mistaken witness ID issues in their criminal cases. African-Americans had much higher filing rates than whites. Filing rates in states with compensation statutes were highest in the Northeast, twice as high as in the West. And filing rates were higher in blue states with statutes than red states with statutes.

With respect to results of state compensation claims, because state statutes are no-fault statutes, one would not expect particular characteristics to be associated with a higher likelihood of success except for exoneration by DNA, which is virtually unassailable proof of factual innocence. Not surprisingly, then, DNA exonerees were much more likely to prevail than non-DNA exonerees (96% prevailed compared to 73%). This may account for the high percentage of prevailing in sexual assault cases. As might be expected, a greater percentage of those assisted in their exoneration by an innocence organization prevailed than those who were not.

Interestingly, African-Americans and Hispanics had much higher rates of prevailing on state compensation claims—about 86% and 83%, respectively—than whites. Those in the South, which had a relatively low rate of filing, had the highest rate of success regionally. Although filing rates were lower in red states, exonerees in those states prevailed at a greater rate than those wrongly convicted claimants in blue states.

The percentages, while interesting, have an obvious limitation. They cannot offer insight into the extent to which characteristics other than the ones examined contribute to the results found. We

plead guilty to a crime that they did not commit. California is an example of a partial bar—prohibiting compensation to those who plead guilty to protect another. Cal. Penal Code § 4903(c) (West 2019). Ohio, in contrast, has an outright bar. Ohio Rev. Code § 2743.48(A)(2) (West 2019). But these states seem unlikely alone to account for the wide variance in filing between those who pled guilty and those who did not.

cannot assume, for example, that gender alone is responsible for the differences between males and females. Other factors might partially drive the results observed. For example, virtually no females are exonerated as a result of DNA analysis; thus, the lower percentages of females filing for state compensation may partially be the result of that factor.

A regression model permits us to determine whether particular characteristics are associated in a statistically significant way with the likelihood of filing for or receiving state or civil compensation while accounting for the effects of the other characteristics in the model. We have four tables summarizing the results. Tables 5 and 6 deal with filing for and receiving state compensation (respectively). Tables 8 and 9 cover the filing for and receiving of civil compensation (respectively).

Table 5 (Logistic Regression Analyzing State Filing for Compensation)

Characteristic	P Value	Odds Ratio	95% Confidence Interval	
CIU	0.0201	1.765	1.093	2.848
GP	0.0889	0.739	0.521	1.047
IOA	0.0059	1.559	1.137	2.139
DP	0.9283	1.023	0.619	1.691
DNA Ex.	<.0001	4.28	2.811	6.517
FC	0.4237	1.168	0.798	1.71
MWID	0.0746	1.347	0.971	1.87
F/MF	0.513	1.106	0.818	1.495
P/FA	0.7715	1.047	0.77	1.422
OM	0.0271	0.74	0.567	0.967
Sexual Assault	0.3126	0.902	0.593	1.37
Drugs	0.0118	0.571	0.307	1.063
Child Sexual Abuse	0.4103	1.23	0.833	1.815
Robbery	0.1254	1.499	0.878	2.557
Other Crimes	0.0039	1.639	1.128	2.382
Asian	0.5411	1.31	0.341	5.031
Caucasian	0.3762	0.721	0.551	0.943

Characteristic	P Value	Odds Ratio	95% Confidence Interval	
Hispanic	0.9423	0.887	0.607	1.297
Native American	0.3026	1.989	0.345	3.486
Other	0.196	0.33	0.055	1.98
Female	0.8555	1.044	0.659	1.652
Midwest	0.0519	1.654	1.216	2.25
Northeast	<.0001	2.89	1.876	4.451
West	<.0001	0.678	0.437	1.052
Blue State (2016)	0.0024	1.664	1.197	2.313
Years Lost	<.0001	1.056	1.037	1.076

How do we read Tables 5, 6, 8, and 9? Let's look at the DNA exoneration line in Table 5. The logistic regression model asks and answers the following question: compared to those whose exoneration did not result from DNA analysis, were those exonerated by DNA more likely to file for state statutory compensation, while holding all other characteristics fixed? Where there are binary parameters—such as conviction integrity unit involvement or not, or official misconduct or not—the characteristic listed is presented relative to its opposite. Where there are multiple parameters, like race, crime, and region, the characteristic listed is compared to the one that is left out. For example, each of the worst crimes are compared to murder, the races are compared to African-Americans and the regions are compared to the South.

We start with a null hypothesis: that there is no statistical association between the characteristic, like exoneration by DNA, the variable we are testing, and the likelihood of an exoneree filing for state statutory compensation. The null hypothesis is that the characteristic and variable tested are entirely independent of each other. In Table 4, we saw a pretty large difference between DNA and non-DNA exonerees and the percentage of filings for state compensation, so we may not believe our null hypothesis. On the other hand, perhaps a good part of that percentage difference is better explained by some other variable, like the fact that only males are DNA exonerees.

Using a chi-square test, we can test the validity of that null hypothesis. The test compares the observed data against the null

hypothesis. We consider characteristics with a p value of less than or equal to .05 to be statistically significant, and we shade those in the tables. In these cases, we reject the null hypothesis and conclude that there is a correlation between the characteristic and the variable examined. That association is positive when the odds ratio is greater than one and negative when it is less than one. Not surprisingly, DNA exoneration reveals a very low p value, indicating a strong association between being a DNA exoneree and filing for state compensation, all other factors held constant. And, that association is positive—the odds ratio is greater than one.

We can also see a positive association between exoneration through the intervention of a conviction integrity unit and assistance of an innocence organization, so-called professional exonerators, and filing for state compensation. As predicted, there is a negative correlation between filing and wrongful conviction for drug crimes compared to murder. Compared to the South, there is a positive correlation with filing and wrongful conviction in states with a statute in the Northeast and a negative correlation in the West. There is a positive association between likelihood of filing and a wrongful conviction in a blue state with a compensation statute compared to a red state. There is also an association between years lost and filing. For every additional year of incarceration, the odds of filing increase by almost 6%.

Equally as important are the characteristics shown to have no association with the likelihood of filing. Table 5 shows no association between gender and race and the likelihood of state filing. Thus, the percentage differences seen in Table 4 with respect to the likelihood of filing and gender and race are better attributed to other factors. Table 5 shows no association between any of the "Contributing Factors" and the likelihood of filing for state compensation.

What can we say about the strength of the statistically significant association between a characteristic and an examined variable? That's where the odds ratio comes in. Returning to Table 5 and DNA exoneration, we see an odds ratio of over four. That means that the odds of a DNA exoneree filing for compensation are four times that of a non-DNA exoneree.[188] We can say that there is

188 Perhaps an example would help. Odds are the probability of success divided by the probability of failure (or, here, the probability of filing/not filing or receiving/not receiving). Assume non-DNA exonerees have a probability of filing of .5 and a probability of non-filing of .5. Assume further that the probability of DNA exonerees filing is .8 and the non-filing probability is 0.2.

a strong association between DNA exoneration and filing for state compensation, compared to those who are not DNA exonerees.[189]

The following table summarizes the results of a similar regression analysis for the receipt of state compensation. What characteristics are associated with higher likelihoods of receiving state compensation?

Table 6 (Logistic Regression Analyzing State Receipt of Compensation)

Characteristic	P Value	Odds Ratio	95% Confidence Interval	
CIU	0.0469	2.549	1.013	6.415
GP	0.0326	2.161	1.066	4.379
IOA	0.0013	2.791	1.494	5.214
DP	0.0989	0.484	0.204	1.146
DNA Ex.	<.0001	6.773	2.885	15.904
FC	0.1257	0.591	0.301	1.159
MWID	0.6859	1.125	0.636	1.991
F/MF	0.6109	0.866	0.499	1.505
P/FA	0.9521	1.017	0.581	1.781
OM	0.9503	0.985	0.603	1.607
Sexual Assault	0.9909	0.639	0.292	1.399
Drugs	0.2464	0.377	0.124	1.153
Child Sexual Abuse	0.7638	0.693	0.342	1.407
Robbery	0.7144	0.722	0.305	1.705

In that case, the odds ratio is 4: .8/.2 ÷ .5/.5. The most accurate way of describing the result is that DNA exonerees are much more likely to file than non-DNA exonerees, while accounting for the effect of all other characteristics in the model. It is less accurate to say that DNA exonerees are four times more likely to file than non-DNA exonerees.

189 Notice, too, that the tables include a 95% confidence interval. A 95% confidence interval means if we take many similar samples from the given population, 95% of the computed confidence intervals would contain the true odds ratio. Put a little more simply, but not quite as accurately, we have 95% confidence, with respect to DNA exonerees, that the true odds ratio is in the interval of 2.811 to 6.517.

Characteristic	P Value	Odds Ratio	95% Confidence Interval	
Other Crimes	0.5555	0.551	0.293	1.036
Asian	0.9655	1.012	0.096	1.928
Caucasian	0.9503	0.504	0.318	0.798
Hispanic	0.9688	1.174	0.592	2.326
Native American	0.9585	0.733	0.062	1.404
Other	0.9617	>999.999	<0.001	>999.999
Female	0.8654	1.074	0.469	2.462
Midwest	0.6041	0.936	0.497	1.763
Northeast	0.3429	0.451	0.203	1.005
West	0.0003	0.22	0.091	0.534
Blue State (2016)	0.269	1.469	0.743	2.903
Years Lost	0.1792	1.024	0.989	1.059

This analysis shows that involvement of a conviction integrity unit, assistance of an innocence organization, and DNA exoneration were positively associated with receiving state compensation. So was a guilty plea for reasons that are difficult to discern. DNA showed the strongest association—the odds of prevailing in a state compensation claim were almost seven times higher for DNA exonerees than non-DNA exonerees. The "worst crime" and "Contributing Factor" characteristics are not associated with higher or lower likelihoods of prevailing. Nor is gender, race, blue/red state, or years lost associated with a greater or lesser likelihood of receiving compensation. With respect to geography, the odds of receiving state compensation in the West are about one-quarter of the odds of receiving compensation in the South.

Having examined the statistical relationships between various characteristics and the likelihood of seeking and receiving state compensation, let's return to the data in Spreadsheet 1 and its state-by-state comparison of percentages of filings and awards. Understanding that premature and pending claims may change these numbers in the future, a scan through Columns H (the percentage of incarcerated non-filers), Column J (the percentage of incarcerated

filers), Column L (the percentage of filed claims awarded), Column O (the percentage of incarcerated exonerees compensated), and Column T (the percentage of lost time compensated) reveals considerable variation among the states. Obviously, the higher the percentages, the better.

Putting aside the generosity of the statutes, these percentages offer another way to evaluate fairness: to look not only at the percentages of exonerees filing and receiving awards (as I had in my prior article), but also the percentages of years lost compensated. For example, take State A with ten exonerees. Assume that nine exonerees file for compensation and eight receive awards. That state looks very good. Ninety percent file, 89% of filers are compensated, and 80% of all exonerees receive awards.

How would we feel, though, about State A if each of the eight exonerees awarded compensation served only one year in prison as a result of a wrongful conviction and the two who were not compensated (say one did not apply and one was denied) each spent twenty years in prison? We might feel less positively about State A, which seems to do an excellent job compensating those who might be regarded as less harmed and a terrible job compensating those incarcerated far longer. Indeed, we might feel much better about State A if only the two long-serving exonerees sought compensation and received it, and the eight serving only one year did not even apply.

In this sense, states with compensation statutes, however they are graded on my generosity chart, should strive to have what I will call "breadth of coverage": (1) high percentages of exonerees who file for state compensation, (2) high percentages of awarded claims, (3) high percentages of exonerees with awards,[190] and (4) high percentages of lost years compensated.[191] The presence of these characteristics would suggest a statute that is sufficiently generous to incentivize filing, a statute with low barriers to compensation, an implementation of the statute that favors awards and a system that makes awards to long-serving exonerees. To evaluate comparative "breadth of coverage," I analyzed the corresponding Columns J, L, O, and T in Spreadsheet 1 and excluded four states with three

190 This third characteristic is not independent of 1 and 2, but a function of them.

191 The "breadth of coverage" analysis excludes two very important features of a just state compensation program—the speed at which claims are decided following post-conviction relief and the speed by which successful claims are paid.

exonerees or fewer.[192]

To be sure, this is an imperfect comparative exercise. First, to rank order the states, I weighted each of the four factors equally. One could reorder the rankings by reweighting the factors. Second, states with relatively high numbers of exonerees not filing due to short terms of wrongful imprisonment (such as Texas), relatively high numbers of premature claims (such as Texas and Wisconsin), and relatively high numbers of pending claims (such as Michigan and New York) are disadvantaged. A more definitive analysis would wait for the statute of limitations to run and for all claims to be decided. Yet, the number of exonerees with definitive results (either not filing or filing claims that have been decided) is large enough to draw some lessons.

One of them is that of the twenty-nine states examined, only six states were above the national average with respect to each of these four characteristics: Illinois, Louisiana, Minnesota, Mississippi, Nebraska, and Virginia. Only two of these states (Minnesota and Virginia) got a grade as high as a B- in generosity, with the remainder earning a C or less. Ironically, the states with the best "breadth of coverage" are among the least generous.

Chart 2 is a grade sheet reflecting comparative "breadth of coverage" when weighing each characteristic equally. Two states tied for first: Mississippi and Nebraska. For reasons that are not easy to explain, Mississippi and Nebraska share very high rates of filing, rates of award, and lost years compensated. They, of course, both benefit from having comparatively few exonerees, but so do many other states with less breadth of coverage. Nebraska, in particular, may benefit in this analysis by an odd quirk: of its nine exonerees, six (the "Beatrice 6") were wrongly convicted together of the same crime. It is reasonable to expect that, in multi-exoneree cases of this sort, each file (if any of them do) and that the results are the same.

192 Hawaii, Maine, New Hampshire, and Vermont.

Chart 2 (Breadth of State Statutory Compensation Coverage)

Grade	State
A+	Mississippi, Nebraska
A	Illinois, Louisiana, Connecticut
A-	Virginia, New York
B+	Massachusetts, Ohio, West Virginia, Utah, Minnesota, Texas, North Carolina
B	New Jersey, Oklahoma
B-	Wisconsin
C+	Tennessee, District of Columbia, Missouri
C	Washington, Florida
C-	California
D+	Alabama, Colorado, Maryland
D	Michigan
D-	Iowa
F	Montana

As someone who has done a fair amount of grading, I can say with confidence that creating this grading curve was not difficult. This is not a narrow bell curve; the spread among states is wide, substantial, and troubling. Of course, in seventeen states, there is no statute at all, but for the rest, the reality is that the chances of seeking and receiving state statutory compensation turn substantially on fortuity—one's state of wrongful conviction.

As discussed, some of it can be explained by unnecessary disqualifying statutory provisions, interpretations of those provisions that disadvantage claimants and extreme ungenerosity. Some of it may be due simply to numbers—perhaps it is unreasonable to expect states with large numbers of exonerees to have high filing, receipt, and years lost coverage rates simply due to size, although Illinois does. States with smaller numbers of exonerees and multiple co-defendant cases (like Nebraska) may post better percentage numbers due to their smaller size.

Whether the state statute requires the claimant to file in a trial court, a court of claims, directly with the legislature or an administrative entity seems not to have any explanatory power. Nor

does the date of the enactment of the statute offer a compelling explanation for the breadth of coverage outcome. Ultimately, some of the variations may be due to intangible custom and local culture. States with strong innocence programs, experienced and skilled attorneys in this area of practice, and a widespread public recognition and understanding of accessible state compensation programs may perform comparatively better.

The data show another concerning aspect of inter-state variation. Column Q of Spreadsheet 1 shows the average annual amount of compensation provided per state to prevailing claimants. Because most state statutes contain annual or overall caps or both, one might expect some narrowing in the variation among the states. But, that is not reflected in Column Q. The average annual award, for example, in Wisconsin is just over $3,000 per year of wrongful imprisonment while it is over *$375,000* per year in the District of Columbia.

The reason is obvious: D.C. had and partially still has an uncapped statute, while Wisconsin imposes a $5,000 per year cap, up to $25,000. But, the point is that there is no conceivable justification for a system in which the value of a lost year of liberty is 119 times greater in one state than another. Fair-minded people can debate whether breadth of coverage or generosity, or some combination of the two, better reflect shared principles of fairness in an environment of finite resources. Yet even if that debate is resolved differently in different states, it is essential to dramatically narrow the wide variations in average annual compensation reflected in Column Q.

Of course, that is easy to say and impossible to do, at least systematically since, of course, each state sets its compensatory parameters and process. But, it does offer an additional argument for advocates supporting new state laws in states without them and reforms to existing statutes. When considering whether alternative legislative proposals are fair and just, states should consider the degree to which the competing options treat exonerees fairly compared to other states. Kansas' 2018 statute does so. House Bill 4838, introduced in February 2018 in the South Carolina House of Representatives, which would have awarded up to $15,000 per year of wrongful imprisonment with a cap of $50,000, did not.[193]

193 H. 4838, 2018 Gen. Assemb., 122d Sess. (S.C. 2018), § 24-13-2340(B)(1), https://www.scstatehouse.gov/sess122_2017-2018/bills/4838.htm. *See also* Chelsea Evans, *Constitutional Law: A Dime for Your Time: A Case for Compensating the Wrongfully Convicted in South Carolina*, 68 S.C. L. REV. 539, 566 (2017)

B. Federal Civil Rights and Tort Litigation

As explained, eight states, most notably Texas, bar exonerees from seeking damages arising from wrongful conviction if the lawsuits were awarded state statutory compensation. For those not precluded, exonerees may file a federal civil rights suit and/or state tort suit in addition to or instead of state compensation. Earlier, I briefly reviewed the bases of some claims of this sort and the typical defenses to them. Because the plaintiff must prove unconstitutional misconduct or tortious negligence, often decades after the events, no one would suggest that these are simple cases. To the contrary, the difficulty and potential expense of such cases is a reason many give for expanding and strengthening no-fault state compensation statutes.[194]

Our study of state statutory compensation required us to look at a subset of our 2,000-person database—those wrongfully convicted in states with compensation statutes—and added a layer of complexity because these statutes were adopted over time. Civil rights and torts litigation involves no similar wrinkles—they can be filed by any person listed in the Registry not precluded from doing so under state law. Even so, the difficulty of these cases, their expense, and the need to demonstrate unconstitutional misconduct or negligence supports a hypothesis that filing and prevailing rates should be modest.[195] The empirical reality is more complicated. Let's review the nationwide numbers, which are also broken down by state in Spreadsheet 2.

1. Filing of Claims

Of the 2,000 exonerees, 198 served no prison time. [Columns B and C]. To keep Spreadsheet 2 manageable, the remaining columns deal only with the remaining 1,802 incarcerated exonerees. Of those, 808, or 45%, filed civil compensation claims. [Columns H, I].[196] This number is likely to rise because 74 exonerees have "premature" claims that may yet be filed. [Column F].

Column G shows the numbers of cases filed in each state.

(advocating for a state compensation statute in South Carolina).

194 *See* Gutman, *supra* note 11, at 372 n.11 (citing articles making this point).

195 Prevailing means that the civil compensation suit resulted in some recovery for the plaintiff. In the substantial majority of such cases, compensation was paid following a settlement rather than following trial.

196 Of the 1,802 incarcerated exonerees, approximately 138 were barred from filing such lawsuits because they had accepted state compensation. Excluding this group, the effective filing rate was, perhaps surprisingly, almost 50%.

The largest number of cases were filed by those wrongly convicted in Illinois (146), followed by New York (136). Column H indicates the percentage of incarcerated filers in each state. Excluding states with four or fewer exonerees, the data show a substantial variation among the states. The proportion of exonerated filers is highest in Illinois (over 80%). Part of that might be explained by a relatively ungenerous state statute and a concentration of civil rights attorneys with expertise in these cases centered in the Chicago area.

In contrast, excluding the small states and states that bar civil compensation suits following receipt of state statutory awards, the proportion of exonerated filers for civil compensation was less than 20% in Alabama, Georgia, Maryland, Minnesota, New Mexico, Virginia and Wisconsin. One might expect the likelihood of civil rights and torts litigation to be higher in states without state compensation statutes or with particularly ungenerous ones. That turns out not be the case. Georgia, for example, is the state with the second largest number of exonerees without a statute and, yet, a low civil compensation filing rate.[197] Wisconsin has a particularly poor state statute and a low civil compensation filing rate, although it also has an unusually long statute of limitations for Section 1983 claims and some claims may yet be filed.

As with state statutory compensation, we tested whether there was a relationship between the likelihood of filing civil compensation and the year of exoneration and amount of time lost. We found, as shown in Figure 4, that there is no growth in seeking civil compensation over time. That finding is at odds with our intuition that increasing percentages of these cases are filed over time as large settlements and verdicts are publicized and more attorneys develop expertise in litigating these cases. That conclusion, though, should be tempered by the reality that the statute of limitations, which differs from state to state, has not yet run for relatively recent exonerees.

As we found with state statutory compensation, there is an obvious association between seeking civil compensation seeking and years lost. Figure 5 accords with one's intuition that the likelihood of filing rises with the length of the unjust incarceration.

197 However, the state with the most exonerees but without a state compensation statute, Pennsylvania, has a civil compensation filing rate of over 50%.

Figure 4 (Civil Compensation Claims by Year of Extension)

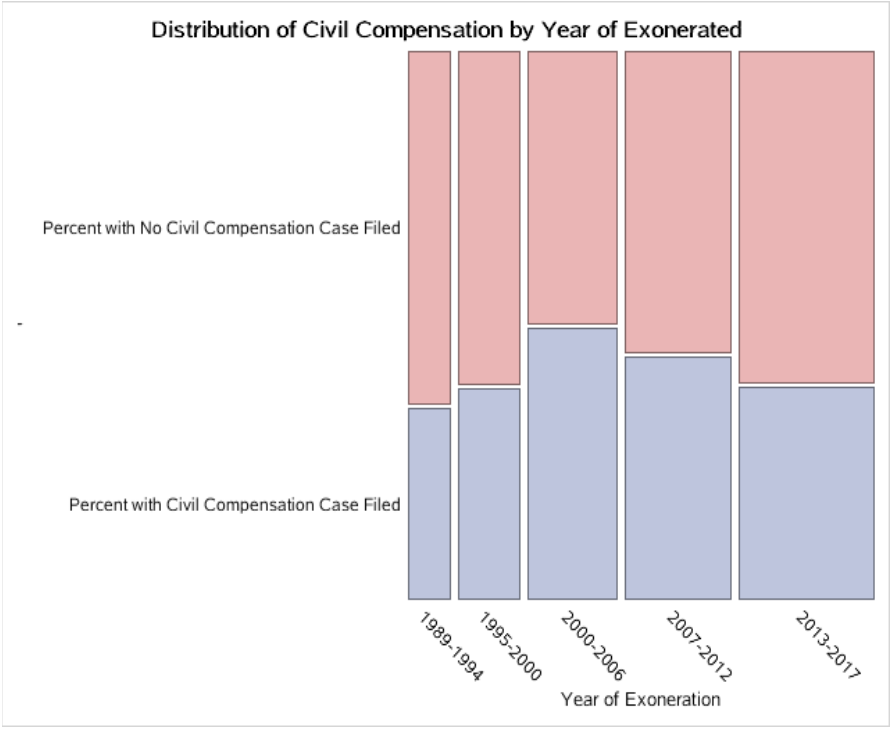


Figure 5 (Civil Compensation Claims by Years Lost)

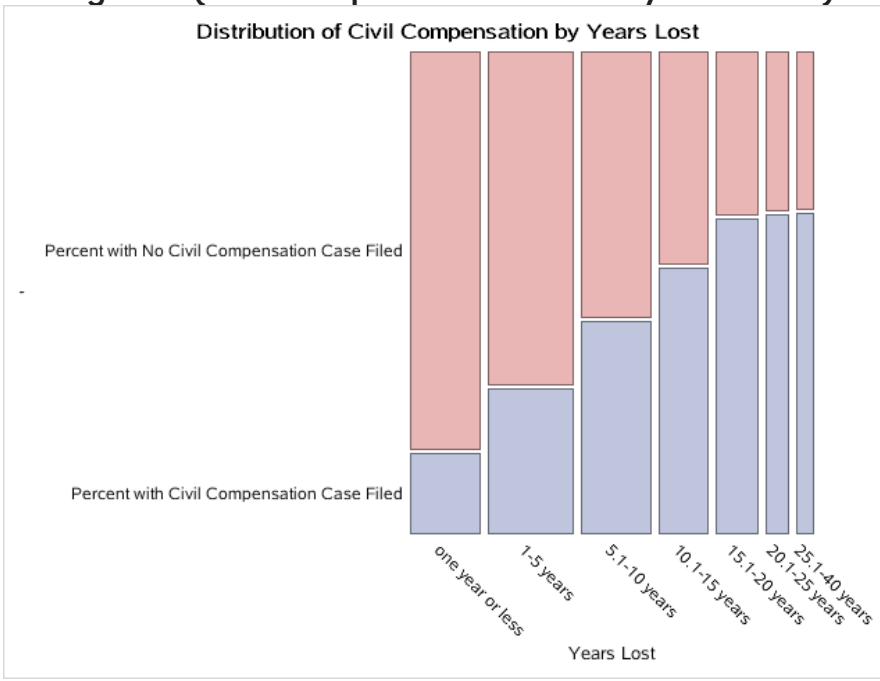


Table 7 sets forth the percentages of civil compensation filings and recoveries by each characteristic examined.[198]

Table 7 (Percentage of Exonerees with Each Characteristic Filing for and Receiving Civil Compensation)

Characteristic	Civil Case Compensation Filed	P Value	Civil Case Compensation Received	P Value
CIU	66/240=27.50%	<.0001	31/42=73.81%	0.3204
No CIU	779/1760=44.26%		434/654=66.36%	
GP	112/424=26.42%	<.0001	73/93=78.49%	0.0101
No GP	733/1576=46.51%		392/603=65.01%	
IOA	253/400=63.25%	<.0001	137/180=76.11%	0.0021

198 The totals of the denominators in the "civil case compensation received" column within each characteristic do not add up to the numerators in the "civil compensation case filed" column because the former excludes pending cases.

Characteristic	Civil Case Compensation Filed	P Value	Civil Case Compensation Received	P Value
No IOA	592/1600=37.00%		328/516=63.57%	
DNA Ex.	194/346=56.07%	<.0001	139/177=78.53%	0.0001
No DNA Ex.	651/1654=39.36%		326/519=74.57%	
DP	66/117=56.41%	0.0014	34/56=60.71%	0.3124
No DP	779/1883=41.37%		431/640=67.34%	
FC	164/248=66.13%	<.0001	103/130=79.23%	0.0009
No FC	681/1752=38.87%		362/566=63.96%	
MWID	276/611=45.17%	0.0793	147/230=63.91%	0.2541
No MWID	569/1389=40.96%		318/466=68.24%	
F/MF	207/493=41.99%	0.892	117/178=65.73%	0.7228
No F/MF	638/1507=42.34%		348/518=67.18%	
P/FA	585/1109=52.75%	<.0001	335/480=69.79%	0.0128
No P/FA	260/891=29.18%		130/216=60.19%	
OM	574/931=61.65%	<.0001	326/462=70.56%	0.0031
No OM	271/1069=25.35%		139/234=59.40%	
Male	786/1814=43.33%	0.0023	436/646=67.49%	0.1697
Female	59/186=31.72%		29/50=58.00%	
Murder	476/799=59.57%	<.0001	268/381=70.34%	0.1364
Sexual Assault	118/301=39.20%		68/101=67.33%	
Drugs	31/218=14.22%		14/22=63.64%	
Child Sexual Abuse	75/240=31.25%		42/70=60.00%	
Robbery	30/105=28.57%		12/25=48.00%	
Other Crime	115/337=34.12%		61/97=62.89%	
Black	446/952=46.85%	0.0003	249/359=69.36%	0.23
Caucasian	286/771=37.09%		151/242=62.40%	
Hispanic	102/240=42.50%		59/88=67.05%	
Other	11/37=29.73%		6/7=85.71%	
South	182/744=24.46%	<.0001	83/152=54.61%	<.0001

Character-istic	Civil Case Compensation Filed	P Value	Civil Case Compensation Received	P Value
West	151/330=45.76%		80/132=60.61%	
Northeast	226/413=54.72%		149/188=79.26%	
Midwest	282/506=55.73%		151/220=68.64	
Red State (2016)	332/1071=31.00%	<.0001	151/270=55.93%	<.0001
Blue State (2016)	509/922=55.21%		312/422=73.93%	

Let's look first at the rates of filing and the associated p values in Columns 1 and 2. Those whose exonerations resulted from the intervention of a conviction integrity unit were much less likely to file for civil compensation than those not so assisted. One would suspect that participation of a CIU and the imprimatur of that assistance would make those helped more likely to file. As previously noted, however, a large number of these cases are the drug cases from Harris County, Texas. So far, only one of those exonerees has filed a civil rights claim (unsuccessfully), presumably because the lengths of their incarcerations were very short. That undoubtedly led to the rather low rate of CIU filers.

Those who falsely confessed, were sentenced to death, or who were wrongly convicted based at least in part on perjured or false testimony were much more likely to file than those who did not. Those who pled guilty were much less likely to file than those who did not, perhaps because of a view that a guilty plea undermines a civil rights case. African-American and Hispanic exonerees were more likely to seek civil compensation than white exonerees. Females filed at a lower rate than men. Those who were wrongly convicted of murder filed more frequently than those wrongly convicted of other crimes; drugs were the least frequent.

Not surprisingly, those whose exonerations were aided by an innocence organization were much more likely to file civil compensation cases than those who were not. As one might expect, DNA exonerees were more likely to file than those exonerated for other reasons. Given the requirement that misconduct be found to prevail in civil rights and torts cases, one would expect that those wrongly convicted at least in part because of government misconduct would be more likely to file than those who were not. The data shows

that to be true. Geographically, filing rates were much lower in the South than in other regions of the country and much lower in red states than blue states.

Again, the usual caution is in order. Simple percentage comparisons do not mean that the differences can be attributed only to that characteristic. Other characteristics examined (or not examined) may explain some of those differences. Thus, as we did with state statutory compensation, a logistic regression was run to determine which characteristics were associated with the likelihood of filing for civil compensation, all other characteristics held constant. Again, those with p values less than .05 showed an association. Table 8 sets forth the results:

Table 8 (Logistic Regression Analyzing Civil Compensation Filing)

Characteristic	P Value	Odds Ratio	95% Confidence Interval	
CIU	0.3487	0.803	0.508	1.271
GP	0.7465	0.946	0.678	1.321
IOA	0.0011	1.641	1.218	2.211
DP	0.6866	1.105	0.68	1.795
DNA Ex.	<.0001	2.102	1.446	3.055
FC	0.0105	1.601	1.116	2.296
MWID	0.066	1.347	0.981	1.85
F/MF	0.0131	1.419	1.076	1.872
P/FA	<.0001	1.791	1.349	2.377
OM	<.0001	3.153	2.477	4.013
Sexual Assault	0.0834	0.517	0.354	0.755
Drugs	0.7222	0.739	0.424	1.289
Child Sexual Abuse	0.0496	0.504	0.348	0.729
Robbery	0.7103	0.63	0.373	1.064
Other Crimes	0.1452	0.827	0.59	1.16
Asian	0.704	0.784	0.22	2.793
Caucasian	0.3474	0.803	0.622	1.035
Hispanic	0.1342	0.956	0.668	1.368

Characteristic	P Value	Odds Ratio	95% Confidence Interval	
Native American	0.54	0.428	0.105	1.747
Other	0.3093	0.242	0.027	2.16
Female	0.801	0.95	0.635	1.419
Midwest	<.0001	3.478	2.569	4.709
Northeast	0.0373	2.792	1.948	4.002
West	0.2365	2.567	1.749	3.767
Blue State (2016)	0.0001	1.726	1.31	2.276
Years Lost	<.0001	1.06	1.042	1.078

Is there a statistical association between the characteristics and the likelihood of filing a civil compensation case? Here again, interestingly, there is no statistical correlation between race or gender and the likelihood of filing. Nor was there a correlation between any of the worst crimes for which the exoneree was wrongly convicted and the likelihood of filing, except for child sex abuse. Those wrongly convicted of that crime were substantially less likely to file a suit for civil compensation.

As with state statutory compensation, the participation of an innocence organization and DNA exoneration were again positively associated with the likelihood of filing a civil compensation suit. The odds of filing a civil compensation case were over twice that in DNA exoneration cases than other cases. The involvement of a conviction integrity unit was not associated with the likelihood of filing a civil case.

With respect to the "Contributing Factors," the existence of a false confession, perjury or false allegations, false or misleading forensic evidence, and official misconduct were factors associated with an increased likelihood of filing. The strongest association was to be expected—those exonerees who were wrongly convicted at least in part as a result of official misconduct. The odds of filing were over three times greater with official misconduct than without. Assuming that the Registry accurately codes cases with official misconduct, this suggests that civil rights lawyers may do a pretty good job in case selection.

Exonerees wrongly convicted in the Midwest and Northeast were much more likely to file for civil compensation than those in

the South. There was a positive association between being convicted in a blue state and filing for civil compensation. The odds of filing in blue states were 1.7 times greater than in red states. And, for every year lost, the odds of filing for civil compensation increased by 6%.

2. Results of Filing

Let's turn next to the results of civil compensation litigation. Much of the literature repeats the narrative that litigating federal civil compensation or state tort cases is difficult, time-consuming and expensive. While true, difficult is not synonymous with unsuccessful. Surprising to us was the finding that, of the 808 cases filed by incarcerated exonerees, 55%, or 448 cases, resulted in a plaintiff's verdict or settlement. [Columns I, J]. That number is likely to rise because there remain 143 pending lawsuits. [Column L]. Recall, by comparison, that the rate of prevailing in state compensation cases is 73.5%.

That reasonably high rate of prevailing does not mean, of course, that they were all multi-million dollar verdicts. Eighty-nine verdicts were less than $500,000. The average award for prevailing formerly incarcerated plaintiffs was over $3.8 million. A high rate of prevailing and recovery of high awards is, again, arguably an indication that skilled attorneys quite accurately screen cases with significant monetary value. Of the cases filed, 217, or 27%, were dismissed or resulted in no recovery for the plaintiff. [Column M].

Wrongful conviction imposes enormous costs on society, not the least of which is the harm to the wrongly convicted and their families and continued opportunities for the real culprits to commit crimes. The total amount awarded to prevailing plaintiffs was over $1.7 billion at the time of this writing. [Column N].[199] This sum should be considered in proper context. It reflects a nationwide total spanning nearly thirty years.

In that connection, geographic variation is enormously significant. Over 53% of all civil compensation was awarded to formerly incarcerated exonerees in just two states—Illinois and New York—which together accounted for only 22% of the 1,802

199 I was unable to find settlement figures in 22 cases. [Column O]. I coded those cases as ones in which the plaintiffs prevailed, but could not record the amount. That will depress the total amount awarded somewhat. However, the total number of years lost associated with these 22 cases was 117.2 years. Many of these cases involved relatively short terms of wrongful imprisonment and, likely, fairly modest settlements.

exonerees in the database. Although a number of exonerations in those states resulted from the discovery of patterns of repeated misconduct by a small number of police officers,[200] it is unlikely that this alone accounts for this finding. The nature of the jury pools (or perceived jury pools) in metropolitan Chicago and New York, negotiations that account for the history of prior settlements, and the substantial experience and expertise of specialized law firms practicing in those areas are undoubtedly contributing factors to explain the compensatory dominance of these two states.

The national average recovery per year of incarceration is almost $305,000. [Column R]. The volume of awards in Illinois and New York, which both compensate at higher than the national average ($426,741 and $341,200, respectively) raise the national average. There are some states with yet higher averages—Colorado, Kansas, Kentucky, Maryland, Missouri, and Wyoming—but those can be explained by small numbers of unusually high awards to exonerees in states with few of them. Here again, the variation among states is striking. The average annual award is lowest in Georgia, less than $15,000 per year. Georgia also lacks a state compensation statute, giving it the unhappy distinction of being one of the states in which exonerees would least likely be compensated.

The average annual figure offers an important point of comparison to state compensation statutes. Every statute which imposes a cap or limit on annual or total recovery is set at a rate substantially less than $305,000. Many hover around the $50,000 per year standard set by amendments to the federal compensation statute.[201] To the extent that $305,000 per year of wrongful

200 A number of Chicago-area wrongful convictions are attributed to three officers (Jon Burge, Reynaldo Guevara, and Ronald Watts). Don Babwin, *New wrongful convictions could pressure Chicago's finances*, STARTRIBUNE (June 3, 2018, 11:40 AM), http://www.startribune.com/new-wrongful-convictions-could-pressure-chicago-s-finances/484420981/. Over a dozen Brooklyn wrongful convictions are tied to Louis Scarcella. *See* Chelsia Rose Marcius and James Fanell, *Dirty Detective Louis Scarcella insists, "I've done nothing wrong," despite sending 13 wrongfully convicted people to jail*, N.Y. DAILY NEWS (May 20, 2018), https://www.nydailynews.com/new-york/law-punish-detective-louis-scarcella-dirty-tactics-article-1.4000501.

201 28 U.S.C. § 2513(e) (2012) (statute also provides for $100,000 per year for those sentenced to death); *see also* MICH. COMP LAWS ANN. § 691.1755(2)(a) (West 2019) ($50,000 per year of incarceration); WASH. REV. CODE ANN. § 4.100.060(5)(a) (West 2019) ($50,000 per year; $100,000 per year if sentenced to death); N.J. STAT. ANN. § 52:4C-5 (West 2019) (two times prior income or $50,000 per year, whichever is higher); CAL. PENAL CODE § 4904

imprisonment has, over time and over hundreds of cases, become a just or fair average compensatory metric, it is clear now, if it was not before, that the $50,000 federal standard and any state standard based on it are not only arbitrary but arbitrarily low.

This data may put lawyers representing clients in particular states to a difficult choice. Take, for example, the relatively recent Texas statute and more recent Connecticut amendments to its state compensation statute. Both are substantially more generous than the national average. Texas' administrative claim process is also relatively prompt. In both states, though, accepting state money requires a waiver of one's right to file a federal civil rights or state law tort claim. For lawyers with clients in need of financial support and with uncertain prospects of winning a civil rights claim, opting for the relatively generous no-fault state statute is the conservative and entirely defensible choice, even if it means foregoing a potentially larger recovery (and attorney's fees) from a civil rights case. That certainly has been the choice for the substantial majority of Texas exonerees, but the choice would be more difficult in states with less generous and/or less efficient state compensation schemes.

In states without preclusion provisions, the calculus may be different. The data suggests that attorneys should seriously consider pursuing viable civil rights and torts suits after successfully resolving state claims, even in states which require the repayment of state money if civil compensation is later awarded. The average annual recovery is likely to be higher than that in a capped state, but the potential for achieving it must, of course, be weighed by considering the strength of the case.

Finally, civil rights or torts recoveries were awarded to exonerees whose number of years lost was 32.1% of the total time lost by all exonerees in the database. [Columns P and Q]. Recall that state statutory compensation programs compensated more broadly—providing money to exonerees with just over 50% of the total years lost in states with statutes.

(West 2019) ($140 per day of incarceration = $51,110 per year); Miss. Code Ann. § 11-44-7 (West 2019) ($50,000 per year; $500,000 cap); N.C. Gen. Stat. Ann. § 148-84 (West 2019) ($50,000 per year; $750,000 cap); Fla. Stat. Ann. § 961.06 (West 2019) ($50,000 per year; $2 million overall cap). Interestingly, Table 10 shows that the average annual recoveries in death and non-death penalty cases are not significantly different and Table 11 shows that the regression analysis shows no statistical association between the amount and a death/non-death sentence.

Looking at the second column of Table 7 gives a simple snapshot regarding characteristics that appear to be associated with the likelihood of prevailing in civil compensation claims. Those who pled guilty, experienced a false confession, and were wrongly convicted in part due to perjury or false allegations had a higher rate of prevailing than those with the opposite characteristics.

Unsurprisingly, the percentage of prevailing claimants who were wrongly convicted at least in part as a result of official misconduct was higher than those without official misconduct in their criminal cases. What is surprising, however, is that nearly 60% of civil compensation cases tagged by the Registry as those not involving official misconduct nevertheless resulted in an award for the plaintiff. Since the vast majority of those awards were the result of a settlement rather than verdict and since, generally, civil compensation cases require proof of official misconduct, the high percentage is difficult to explain. It may suggest inaccuracy in the Registry's coding, differences between the Registry's conception of official misconduct and that required in these cases, or a desire by some defense counsel to minimize litigation risks by settlement.

There was some greater likelihood of success of plaintiffs who were earlier aided by innocence organizations and those who were not. DNA exonerees had, as expected, a higher rate of prevailing than non-DNA exonerees, but the difference was quite small. The prevailing rates for African-Americans, whites, and Hispanics were roughly the same. The likelihood of prevailing was higher in the Northeast than in other parts of the county and, thus, not surprisingly, the percentage of exonerees successfully filing for civil compensation in blue states was significantly higher than in red states.

The logistic regression analysis helps narrow the number of characteristics associated with higher rates of prevailing by holding all other variables constant. Table 9 displays the results:

Table 9 (Logistic Regression Analyzing Receipt of Civil Compensation)

Characteristic	P Value	Odds Ratio	95% Confidence Interval	
CIU	0.7043	0.854	0.379	1.926
GP	0.0125	2.135	1.177	3.87
IOA	0.0077	1.883	1.182	2.999
DP	0.3269	0.714	0.365	1.399
DNA Ex.	0.0002	3	1.691	5.325
FC	0.3842	1.269	0.742	2.173
MWID	0.3701	0.799	0.489	1.305
F/MF	0.9175	0.977	0.631	1.513
P/FA	0.2234	1.34	0.837	2.146
OM	0.005	1.81	1.196	2.74
Sexual Assault	0.7347	0.713	0.375	1.359
Drugs	0.8116	0.871	0.308	2.461
Child Sexual Abuse	0.567	0.672	0.356	1.271
Robbery	0.6361	0.652	0.252	1.687
Other Crimes	0.7009	0.861	0.484	1.532
Asian	0.9479	1.986	0.205	3.767
Caucasian	0.9361	1.065	0.696	1.631
Hispanic	0.9318	0.847	0.473	1.514
Native American	0.9713	>999.999	<0.001	>999.999
Other	0.9596	>999.999	<0.001	>999.999
Female	0.3223	0.71	0.361	1.399
Midwest	0.8299	1.389	0.844	2.285
Northeast	0.0001	2.64	1.425	4.889
West	0.0386	0.891	0.456	1.742
Blue State (2016)	0.0015	2.141	1.338	3.425
Years Lost	0.544	1.009	0.981	1.037

As has become familiar, the regression analysis shows that receiving assistance from an innocence organization and having been exonerated by DNA are positively associated with the likelihood of

prevailing on civil compensation claims. The odds of receiving civil compensation are three times greater for DNA exonerees than non-DNA exonerees. Interestingly, but difficult to explain, is that pleading guilty to a crime one did not commit is positively associated with the likelihood of prevailing on a civil compensation claim, as it was with state statutory compensation claims.

When the Registry determines that official misconduct has contributed to the wrongful conviction, the exoneree is more likely to prevail than those whose cases did not involve official misconduct. The odds of prevailing are 1.8 times greater for those victimized by official misconduct than those not. Those wrongly convicted in the Northeast are more likely to prevail than in the South. The odds of prevailing on a civil compensation case are 2.1 times greater in a blue state than in a red state.

Again, there was no statistical association between gender or race and the likelihood of prevailing in civil compensation. Nor was there an association between the crime for which the exoneree was wrongly convicted or the years lost and the likelihood of prevailing on a civil compensation claim.

3. Average Annual Civil Compensation

Finally, we tried to determine whether there was any correlation between the characteristics we examined and the amounts prevailing civil compensation plaintiffs received per year of incarceration. One important caveat is in order. This recovery metric—award divided by years lost—is the only practical and objective measurement available for analysis. But, framing it in this way implies that damages end on the day of release from incarceration. In reality, many exonerees suffer from ongoing medical conditions contracted in prison, continued psychological harm, reduced life expectancy, and ongoing lost wages.[202] Unless it is specifically set forth in a court judgment, as it was *Odom v. District of Columbia*[203] and *Tribble v. District of Columbia*,[204] it is impossible to determine whether an award by verdict or settlement accounts for post-release harms.

202 David Cloud, *On Life Support: Public Health in the Age of Mass Incarceration*, VERA INST. JUST. (Nov. 2014), https://www.vera.org/publications/on-life-support-public-health-in-the-age-of-mass-incarceration.

203 Odom v. District of Columbia, No. 2013 CA 3239, 2015 D.C. Super. LEXIS 2, at *3 (D.C. Super. Ct. Feb. 27, 2015).

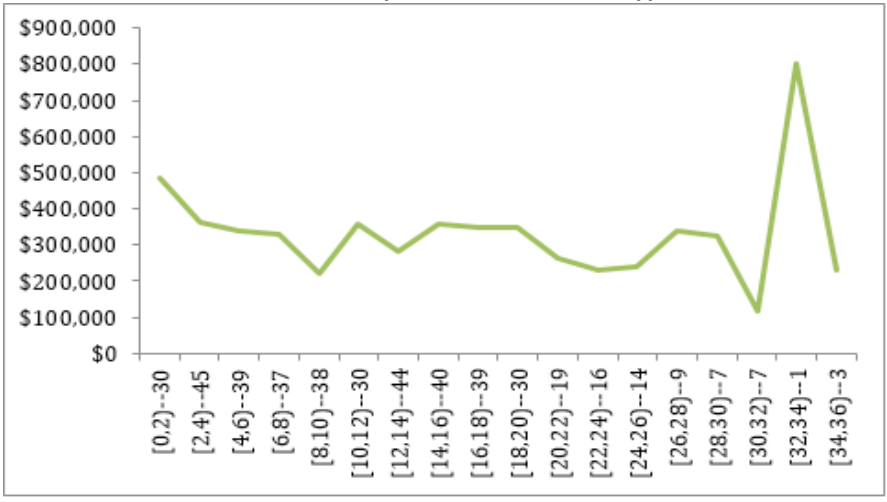
204 Tribble v. District of Columbia, No. 2013 CA 3237, 2016 D.C. Super. LEXIS 4, at *81 (D.C. Super. Ct. Feb. 26, 2016). These cases were discussed at length in Gutman, *supra* note 11, at 376–79, 380–82.

If they do, the metric we use here by necessity—average annual amounts per year of incarceration—are effectively overstated.

First, we tried to determine whether there was a relationship between years lost and average annual recoveries. In theory, exonerees should receive the same average amount of civil compensation per year of wrongful imprisonment regardless of the length of the term. In practice, lawyers in these cases understand that the metric for compensation depends on many other variables, such as the extent and severity of the official misconduct, the exoneree's life story, the degree of harm experienced in prison and following release, lost wage calculations and dozens of other factors. And, of course, settlements reflect a compromise that accounts for ranges of predicted damages and likelihoods of prevailing on many issues.

We found, as shown in Figure 6, somewhat surprisingly, that the average annual award generally slopes downward over time.[205] It is uncertain how much to read into that other than it may conform to an uncomfortable and often unstated intuition that those in prison adapt to their lack of freedom, learn measures of self-protection and, thus, experience less physical and psychological harm over time.

Figure 6 (Amount of Civil Award Per Year Lost by Group of Year Lost (Two-Year Bands))



Second, we turned our attention to the average annual

205 There is one large exception in the 32–34 range involving a particularly large recovery for a single individual.

compensation awards obtained by exonerees with each of the characteristics we studied. The objective was to determine whether there was a correlation between particular characteristics and the amount of recovery. Table 10 lists the average annual amounts received in civil compensation litigation by prevailing plaintiffs by characteristic.

Table 10 (Average Annual Amounts of Civil Compensation by Characteristic)

	Amount Total	Years Lost Total	Amount Per Year
All Exonerees	$1,717,529,707	5612	$306,046
Females	$49,325,133	187.8	$262,647
Males	$1,668,204,574	5424.2	$307,549
Caucasians	$519,591,416	1616.3	$321,470
Blacks	$976,647,133	3397.5	$287,461
Hispanics	$215,361,264	544.9	$395,231
Other	$5,929,894	53.3	$163,873
CIU	$195,245,000	537	$363,585
No CIU	$1,522,284,707	5075	$299,958
GP	$218,995,460	651.8	$335,986
No GP	$1,498,534,248	4960.2	$302,112
IOA	$714,339,000	2119.3	$337,064
No IOA	$1,003,190,707	3492.7	$287,225
DNA Ex.	$686,194,113	1973.3	$347,739
No DNA Ex.	$1,031,335,594	3638.7	$283,435
DP	$178,244,083	519.9	$342,843
No DP	$1,539,285,624	5092.1	$302,289
FC	$486,765,083	1377	$353,497
No FC	$1,230,764,624	4235	$290,617
MWID	$508,637,173	1846	$275,535
No MWID	$1,208,892,535	3766	$321,002
F/MF	$461,627,045	1636.7	$282,047
No F/MF	$1,255,902,662	3975.3	$315,927
P/FA	$1,360,799,467	4114.6	$330,725

	Amount Total	Years Lost Total	Amount Per Year
No P/FA	$356,730,241	1497.4	$238,233
OM	$1,251,265,923	4028.6	$310,596
No OM	$466,263,785	1583.4	$294,470
Murder	$1,309,410,126	3935.1	$332,751
Sexual Assault	$235,749,280	890.8	$264,649
Drugs	$2,842,501	28.2	$100,798
Child Sexual Abuse	$72,121,000	392.6	$183,701
Robbery	$16,737,000	76.3	$219,358
Other Crimes	$80,669,800	289	$279,134
Midwest	$658,976,031	1737.8	$379,201
Northeast	$647,797,045	1962.1	$330,155
South	$218,971,265	1087	$201,446
West	$191,785,367	816	$235,031
Blue State (2016)	$1,313,828,649	3770.6	$348,440
Red State (2016)	$403,701,058	1832.3	$220,325

Table 10 reveals a number of interesting and sobering findings. Especially noteworthy is the substantial variation of average annual awards between men and women, particularly given the much longer average lost years for men than women. Interestingly, the average annual awards for whites were $34,000 more than for blacks, but the average annual award for Hispanics was nearly $74,000 more than for whites.

Although, in theory, the crime for which the exoneree was wrongly convicted should have no bearing on the annual civil compensation, the data shows that those convicted of murder received the largest average annual awards—over three times those convicted of drug offenses. Perhaps there is a gender aspect to this. According to the Registry, the worst crime of wrongful conviction was murder for 40% of men, but only for 29% of women. Sexual assault was almost non-existent for women, while it was the worst crime for 15% of men. Twenty-four percent of females were wrongly convicted of drug crimes while only 10% of men were. Child sexual

abuse was the worst crime for about 17% of women, but only 11% of men.[206]

Those aided by a conviction integrity unit or an innocence organization, and those exonerated by DNA or sentenced to death received significantly more annually than those without those characteristics. There were also significant variations geographically. Average annual awards were highest in the Midwest and Northeast and dramatically lower in the South and West. Thus, it is not surprising that the average annual civil compensation award in blue states was more than 50% higher than in red states.

Again, causation cannot be inferred from these simple percentages. The data in Table 11 do not permit a conclusion, for example, that women receive less per year than men because of their gender. Other characteristics may explain that observation. Thus, we ran a linear regression analysis which examined each characteristic against its opposite or others in the same category (crime, region, race), holding other characteristics fixed. The results are set forth in Table 11.

Table 11 (Linear Model[207] Result of Average Annual Amount of Civil Compensation)[208]

Characteristic	Estimates	P Value
Conviction Integrity Unit	$23,7610	0.8021
Guilty Plea	-$25,356	0.7141
Innocence Organization Aid	$58,820	0.2823
Death Penalty	-$61,150	0.5029
DNA Exoneration	$110,797	0.0895
False Confession	$52,635	0.4006
Mistaken Witness Identification	-$44,212	0.4984
False/Misleading Forensics	-$73,152	0.2268

206 NAT'L REGISTRY OF EXONERATIONS, *supra* note 57.

207 Here, we want to explain the relationship between the average annual amount of civil compensation and all the characteristics. Because the response variable—amount of compensation—is a continuous variable, we used a linear model instead of logistic model.

208 Estimates of a linear regression model show the impact of the corresponding characteristics on the response variable. More specifically, estimates represent the difference in the predicted value of outcome (average annual amount of civil compensation here) for each one unit change in the corresponding characteristic while all other characteristics in the model remain constant.

Characteristic	Estimates	P Value
Perjury/False Accusation	-$4,006	0.9527
Official Misconduct	$81,637	0.169
Sexual Assault	-$19,292	0.814
Drugs	-$387,865	0.0213
Child Sexual Abuse	-$187,477	0.0443
Robbery	-$179,398	0.2399
Other Crimes	-$186,713	0.0269
Asian	-$26,891	0.923
Caucasian	$302	0.9958
Hispanic	$182,327	0.017
Other	-$117,397	0.8074
Female	-$81,427	0.4567
Midwest	$172,451	0.0215
Northeast	$37,170	0.6668
West	-$3,644	0.9706
Blue State (2016)	$76,279	0.2356
Years Lost	-$14,226	<.0001

In Table 10, fairly wide differences in annual average civil compensation awards are observed within the studied characteristics. The final question addressed was whether the characteristic can explain the difference—that, for example, the average annual compensation award for blacks is lower than whites because of that racial difference, or whether that difference is explained by other characteristics.

As it turns out, relatively few variables we tracked are statistically associated with average annual civil compensatory outcomes. The wrongful conviction of drug, child sexual abuse and "other" crimes is associated with substantially lower awards. Interestingly, those wrongly convicted and prevailing in civil compensation claims in the Midwest are associated with average annual compensation awards of over $172,000 per year more than those in the South, all other factors being fixed. For every year lost, the annual award drops by over $14,000 per year. For reasons hard to explain, Hispanics were associated with over $182,000 per year more compensation compared to African-Americans.

As interesting is the lack of correlation between all other factors and civil compensatory outcome. There is no correlation between being white or black and compensatory outcome. There is no association between average awards and gender, conviction in red or blue states, any of the tags, or any of the wrongful conviction factors. The percentage differences we saw in Table 10 are simply not explained by any particular characteristic we studied.

4. The Overall Landscape and Conclusions

In the end, we should view the compensatory landscape from the perspective of those exonerees who attended the Innocence Network conference. Their narratives often begin with the truism that no amount of money can compensate them for their lost liberty and profound suffering. Given that reality, there should be a route to compensation guided by several principles, of which two are absent from this analysis. First, compensation and non-compensatory social services should be provided quickly after exoneration. Second, the amount of compensation should be large enough to permit the exoneree to be sufficiently compensated and to incentivize improvements in policy and procedure to reduce the incidence of future wrongful convictions without being so large as to deter states and municipalities from cooperating in the effort to surface wrongful convictions and from settling meritorious cases seeking compensation.

The remaining principles have been a focus of our study. There should be a breadth of coverage—a compensatory framework that results in high rates of filing claims or suits and awarding compensation while targeting those higher rates to exonerees with the most time lost. Compensatory generosity and breadth of coverage should not be widely variant among states; how an exoneree fares in their quest for compensation should not depend on geographic circumstance.

Spreadsheet 2 offers some insight into the full compensatory picture, including breadth of coverage and inter-state variability. Combining together state statutory claims and federal civil rights and state tort lawsuits, 1,210 of 1,802 formerly incarcerated exonerees, or 67% sought at least one remedy. [Columns S, T]. Column V shows that 628, or 35%, obtained one form of relief or the other while 218 obtained both state and civil compensation [Column W]. Thus, 846 of 1,802 or 42.3% received some compensation. [Columns V, W, X]. This covered just under 60% of the lost time, indicating, as we

showed, higher rates of filing and prevailing by those with more years lost. [Column Z]. Put differently, over 40% of the years lost to exonerees in our database were uncompensated.

In September 2018, the Registry noted the passage of a tragic benchmark. At that point, the years lost to both state and federal exonerees crossed 20,000, the equivalent of the full lifetimes of 250 people. Our study concludes that those experiencing some 8,000 of those years of wrongful incarceration received no compensation from the state or any governmental entity or actor. The study also shows that these absences of compensation are not evenly spread throughout the United States. The state of wrongful conviction is a very important explanatory variable.

The percentages by state of 1) exonerees seeking compensation, 2) exonerees receiving some form of compensation, and 3) years lost for which some compensation was paid varies widely.[209] With respect to all exonerees in the database, both incarcerated and not, out of states with more than four exonerees, West Virginia, Ohio, and Mississippi had the highest percentages of exonerees seeking compensation; New Mexico, Montana, and Rhode Island were by far the lowest, with roughly a fifth of the filing rates of the highest states. West Virginia, Nebraska, and Mississippi had the highest percentages of claimants obtaining an award, but Alaska, New Mexico, and South Carolina had none. The exonerees in five states received compensation for over 80% of the years lost in those states: Mississippi, Nebraska, Virginia, Massachusetts, and Illinois. In contrast, twelve states with more than four exonerees compensated less than 30% of the years lost.[210]

Weighting each of these three factors equally, we conclude with a state-by-state grade sheet on breadth of coverage, counting both state statutory and civil compensation, excluding the ten states and territories with less than five exonerees.

209 In Spreadsheet 2, the percentages are shown in Columns T, X, and Z. The discussion in the text that follows, however, reflects the percentages associated with all 2,000 exonerees, rather than those incarcerated.

210 Alabama, Alaska, Arizona, Arkansas, Indiana, Kentucky, Nevada, New Mexico, Oregon, Puerto Rico, South Carolina, and Tennessee

Chart 3 (Overall Breadth of Coverage)

Grade	State
A+	Mississippi, West Virginia
A	Illinois, Nebraska
A-	Massachusetts, Virginia, New York, Ohio, Louisiana, Connecticut
B+	North Carolina
B	Washington, Oklahoma, California, District of Columbia
B-	Utah, New Jersey
C+	Minnesota, Michigan, Kansas, Missouri, Iowa, Nevada, Texas
C	Colorado, Wisconsin, Indiana, Kentucky, Puerto Rico
C-	Pennsylvania, Tennessee, Maryland, Florida, Georgia
D+	Alabama, Montana
D	Arkansas, Oregon, Rhode Island, Alaska
D-	Arizona, South Carolina
F	New Mexico

Mississippi is hardly the most generous state, but generosity is not the only feature of a compensatory system that may define its fairness. Breadth of coverage—the prospect of at least some compensation encompassing as many years lost to wrongful incarceration as is possible—serves as a competing measure of fairness. If we adopt that perspective, we can answer the question we started with: why it is that Mississippi is the best state in which to be exonerated.

Spreadsheet 1

	A	B	C	D	E	F	G	H	I
1	State/Territory	Compensation Statute?/ Year	# of Exonerees	# of Incarcerated Exonerees (F+G+I)	# of Exonerees Serving 0 Time (C-D)	# of Premature State Claims	# of Unfiled State Claims (excl. premature)	% of Incarcerated Non-Filers (G/D)	# of Claims Filed (K+M+N)
2	Alabama	YES (2001)	26	23	3	0	15	65.22%	8
3	Alaska	NO	8	6	2				
4	Arizona	NO	19	18	1				
5	Arkansas	NO	7	5	2				[2]
6	California	YES (1913)	180	165	15	2	98	59.39%	65
7	Colorado	YES (2013)	7	6	1	0	4	66.67%	2
8	Connecticut	YES (2008)	20	18	2	0	3	16.67%	15
9	Delaware	NO	2	2	0				
10	District of Columbia	YES (1981)	16	16	0	0	8	50.00%	8
11	Florida	YES (2008)	64	54	10	1	45	83.33%	8
12	Georgia	NO	31	30	1				[6]
13	Guam	NO	1	1	0				
14	Hawaii	YES (2016)	3	2	1	0	1	50.00%	1
15	Idaho	NO	3	2	1				
16	Illinois	YES (2008)	195	182	13	2	54	29.67%	126
17	Indiana	NO	34	34	0				
18	Iowa	YES (1997)	14	14	0	2	8	57.14%	4
19	Kansas	YES (2018)	8	6	2				[1]
20	Kentucky	NO	12	12	0				
21	Louisiana	YES (2005)	49	48	1	4	10	20.83%	34
22	Maine	YES (1993)	3	1	2	1	0	0.00%	0
23	Maryland	YES (1999)	24	23	1	0	18	78.26%	5
24	Massachusetts	YES (2004)	57	54	3	1	15	27.78%	38
25	Michigan	YES (2017)	75	65	10	0	32	49.23%	33
26	Minnesota	YES (2014)	14	13	1	0	6	46.15%	7
27	Mississippi	YES (2009)	17	17	0	1	2	11.76%	14
28	Missouri	YES (2006)	41	40	1	0	32	80.00%	8
29	Montana	YES (2003)	10	9	1	1	8	88.89%	0
30	Nebraska	YES (2009)	9	9	0	0	2	22.22%	7
31	Nevada	NO	10	10	0				
32	New Hampshire	YES (1977)	1	1	0	0	1	100.00%	0
33	New Jersey	YES (1997)	33	30	3	1	13	43.33%	16
34	New Mexico	NO	6	6	0				
35	New York	YES (1984)	231	217	14	8	41	18.89%	168
36	North Carolina	YES (1947)	59	58	1	7	21	36.21%	30
37	North Dakota	NO	4	3	1				
38	Ohio	YES (1989)	59	58	1	0	14	24.14%	44
39	Oklahoma	YES (1978)	34	34	0	0	26	76.47%	8
40	Oregon	NO	17	11	6				
41	Pennsylvania	NO	61	59	2				
42	Puerto Rico	NO	6	6	0				
43	Rhode Island	NO	6	5	1				
44	South Carolina	NO	7	7	0				
45	South Dakota	NO	4	3	1				
46	Tennessee	YES (1984)	20	20	0	0	17	85.00%	3
47	Texas	YES (1985)	317	231	86	31	101	43.72%	99
48	Utah	YES (2008)	16	14	2	2	7	50.00%	5
49	Vermont	YES (2007)	1	1	0	0	0	0.00%	1
50	Virginia	YES (2004)	49	48	1	1	17	35.42%	30
51	Washington	YES (2013)	47	43	4	2	24	55.81%	17
52	West Virginia	YES (1987)	10	10	0	0	4	40.00%	6
53	Wisconsin	YES (1913)	49	48	1	9	21	43.75%	18
54	Wyoming	NO	4	4	0				
55	TOTAL		2000	1802	198			49.83%	
56	TOTAL IN STATES WITH STATUTES		1750	1572	178	76	668	42.49%	828
57	TOTAL IN STATES W/O STATUTES		250	230	20				
58	% IN STATES WITH STATUTES		87.50%	87.24%	89.90%	4.83%			

J	K	L	M	N	O	P	Q	R	S	T
% of Incarcerated Exonerees Filing Claims [I/D]	# of State Claims Awarded	% of Filed Claims Awarded [K/I]	# of State Claims Denied	# of State Claims Pending	% of Incarcerated Exonerees Paid [K/D]	Total $ Paid to Exonerees	Amount Paid Per Year Lost to Paid Exonerees [P/R]	Total Years Lost	Total Years Lost of Paid Exonerees	Percentage of Lost Years Compensated [S/R]
34.78%	4	50.00%	3	1	17.39%	$2,320,141.26	$ 62,369.39	177.9	37.2	20.91%
								70.4		
								137.1		
	[1]		[1]			[$200000]		28.6	[4.9]	
39.39%	31	47.69%	27	7	18.79%	$ 16,503,080.00	$ 41,811.71	1502.2	394.7	26.27%
33.33%	1	50.00%	0	1	16.67%	$ 1,200,000.00	$ 75,949.37	74.2	15.8	21.29%
83.33%	11	73.33%	2	2	61.11%	$ 40,082,000.00	$ 302,505.66	203.2	132.5	65.21%
								5.8		0.00%
50.00%	4	50.00%	4	0	25.00%	$ 38,214,027.00	$ 376,864.17	283.3	101.4	35.79%
14.81%	7	87.50%	1	0	12.96%	$ 8,876,901.24	$ 56,111.89	588.5	158.2	26.88%
	[6]					[$4800000]		273.4	[116.3]	
								1		
50.00%	0	0.00%	0	1	0.00%	$0	$0	28.4	0	0.00%
								37.2		
69.23%	118	93.65%	5	3	64.84%	$ 18,945,076.56	$ 12,679.93	2110.2	1494.1	70.80%
								292.5		
28.57%	1	25.00%	3	0	7.14%	$197,812.00	$ 50,721.03	79.0	3.9	4.94%
	[1]					[$350000]		49.3	[5.7]	
								94.3		
70.83%	30	88.24%	3	1	62.50%	$7,874,519.62	$ 16,299.98	737.4	483.1	65.51%
0.00%	0	0.00%	0	0	0.00%	$0.00	$0	3.4	0	0.00%
21.74%	3	60.00%	1	1	13.04%	$ 2,605,000.00	$ 46,936.94	261.9	55.5	21.19%
70.37%	27	71.05%	6	5	50.00%	$10,595,000.00	$ 37,839.29	530.5	280	52.78%
50.77%	5	15.15%	7	21	7.69%	$3,407,268.38	$ 42,966.81	566.5	79.3	14.00%
53.85%	6	85.71%	1	0	46.15%	$ 1,965,369.19	$ 130,156.90	28.2	15.1	53.55%
82.35%	13	92.86%	0	1	76.47%	$ 4,962,333.00	$ 26,837.93	209.9	184.9	88.09%
20.00%	8	100.00%	0	0	20.00%	$ 1,923,900.00	$ 17,521.86	445.9	109.8	24.62%
0.00%	0	0.00%	0	0	0.00%	$0	$0	86.1	0	0.00%
77.78%	7	100.00%	0	0	77.78%	$ 2,630,000.00	$ 30,724.30	102.4	85.6	83.59%
								119.8		
0.00%	0	0.00%	0	0	0.00%	$0.00	$0	3.4	0	0.00%
53.33%	11	68.75%	1	4	36.67%	$ 2,470,139.02	$ 23,020.87	305.5	107.3	35.12%
								36.3		
77.42%	112	66.67%	41	15	51.61%	$209,042,337.63	$ 148,288.53	2233.1	1409.7	63.13%
51.72%	25	83.33%	4	1	43.10%	$ 10,915,274.60	$ 27,549.91	740.4	396.2	53.51%
								11.5		
75.86%	28	63.64%	11	5	48.28%	$ 25,564,362.08	$ 69,638.69	694.6	367.1	52.85%
23.53%	8	100.00%	0	0	23.53%	$ 1,285,000.00	$ 9,809.16	311.4	131.0	42.07%
								66.5		
								646.2		
								82.9		
								27.8		
								70.1		
								15.1		
15.00%	3	100.00%	0	0	15.00%	$ 1,583,036.36	$ 28,730.24	209.9	55.1	26.25%
42.86%	87	87.88%	12	0	37.66%	$ 106,579,281.30	$ 97,261.62	1,687.6	1095.8	64.93%
35.71%	5	100.00%	0	0	35.71%	$ 943,933.00	$ 16,246.70	84.9	58.1	68.43%
100.00%	1	100.00%	0	0	100.00%	$ 1,550,000.00	$ 90,643.27	17.1	17.1	100.00%
62.50%	24	80.00%	5	1	50.00%	$13,951,136.00	$ 46,894.57	424.4	297.5	70.10%
39.53%	11	64.71%	4	2	25.58%	$ 2,796,659.70	$ 62,846.29	231.1	44.5	19.26%
60.00%	5	83.33%	0	1	50.00%	$ 6,050,000.00	$ 129,550.32	101.8	46.7	45.87%
37.50%	13	72.22%	5	0	27.08%	$ 370,416.76	$ 3,163.25	334.8	117.1	34.98%
								30.3		
45.95%					33.80%			17,495.2		44.44%
52.67%	609	73.55%	146	73	38.74%	$ 545,404,004.70	$ 70,154.74	15,395.7	7,774.3	50.50%
								2,096		
			17.63%	8.82%				88.00%		

Spreadsheet 2

State/Territory	# of Total Exonerees	# of Incarcerated Exonerees	Total $ Paid in State Compensation	Total Years Lost	# of Premature Civil Claims of Incarcerated Exonerees	# of Incarcerated Filing Rights Claims	% of Incarcerated Civil Filers (G/C)	# of Civil Awards to Incarcerated Exonerees	% of Incarcerated Plaintiffs With Civil Awards (I/G)	% of Incarcerated Exonerees With Civil Awards (I/C)	# of Pending Claims of Incarcerated Exonerees	# of Civil Claims of Incarcerated Exonerees Denied	Total Civil Awards Paid to Incarcerated Exonerees
Alabama	26	23	$ 2,320,141.26	177.9	0	4	17.39%	1	25.00%	4.35%	0	3	undisclosed
Alaska	8	6	$0.00	70.4	0	4	66.67%	0	0.00%	0.00%	4	0	$0
Arizona	19	18	$0.00	137.1	1	4	22.22%	2	50.00%	11.11%	1	1	$4,550,000
Arkansas	7	5	$200,000.00	28.6	0	2	40.00%	0	0.00%	0.00%	0	2	$0
California	180	165	$ 16,503,080.00	1502.2	4	95	57.58%	48	50.53%	29.09%	8	39	$141,071,966.80
Colorado	7	6	$ 1,200,000.00	74.2	0	3	50.00%	1	33.33%	16.67%	2	0	$10,000,000
Connecticut	20	18	$ 40,082,000.00	203.2	1	7	38.89%	3	42.86%	16.67%	2	2	$10,750,000
Delaware	2	2	$0	5.8	0	2	100.00%	0	0.00%	0.00%	2	0	$0
District of Columbia	16	16	$ 38,214,027.00	283.3	1	6	37.50%	3	50.00%	18.75%	0	3	$18,540,000
Florida	64	54	$ 8,876,901.24	588.5	5	11	20.37%	9	81.82%	16.67%	0	2	$12,975,000
Georgia	31	30	$4,800,000.00	273.4	4	5	16.67%	1	20.00%	3.33%	1	3	$250,000
Guam	1	1	$0	1	0	0	0.00%	0	0.00%	0.00%	0	0	$0
Hawaii	3	2	$0	28.4	0	1	50.00%	1	100.00%	50.00%	0	0	$7,500,00
Idaho	3	2	$0	37.2	0	2	100.00%	1	50.00%	50.00%	0	1	$900,000
Illinois	195	182	$18,945,075.56	2110.2	1	146	80.22%	87	59.59%	47.80%	36	23	$461,221,997.65
Indiana	34	34	$0	292.5	0	22	64.71%	8	36.36%	23.53%	8	6	$14,090,000
Iowa	14	14	$197,812.00	79.0	0	4	28.57%	2	50.00%	14.29%	1	1	$18,200,000
Kansas	8	6	$350,000.00	49.3	0	2	33.33%	1	50.00%	16.67%	1	0	$7,500,000
Kentucky	12	12	$0	94.3	1	7	58.33%	3	42.86%	25.00%	2	2	$20,600,000
Louisiana	49	48	$7,874,519.62	737.4	1	27	56.25%	11	40.74%	22.92%	5	11	$10,092,000
Maine	3	1	$0	3.4	1	0	0.00%	0	0.00%	0.00%	0	0	$0
Maryland	24	23	$ 2,605,000.00	261.9	1	4	17.39%	2	50.00%	8.70%	0	2	$24,000,000
Massachusetts	57	54	$10,595,000.00	530.5	5	25	46.30%	21	84.00%	38.89%	2	2	$141,354,000
Michigan	75	65	$3,407,268.38	566.5	7	32	49.23%	17	53.13%	26.15%	5	10	$32,445,000
Minnesota	14	13	$ 1,965,369.19	28.2	1	1	7.69%	0	0.00%	0.00%	0	1	$0
Mississippi	17	17	$ 4,962,333.00	209.9	0	8	47.06%	4	50.00%	23.53%	1	3	$16,695,000
Missouri	41	40	$ 1,923,900.00	445.9	0	19	47.50%	7	36.84%	17.50%	3	9	$51,915,000
Montana	10	9	$0	86.1	1	2	22.22%	2	100.00%	22.22%	0	0	$3,530,000
Nebraska	9	9	$ 2,630,000.00	102.4	0	6	66.67%	6	100.00%	66.67%	0	0	$28,080,000
Nevada	10	10	$0	119.8	0	7	70.00%	4	57.14%	40.00%	2	1	$6,800,000
New Hampshire	1	1	$0.00	3.4	0	0	0.00%	0	0.00%	0.00%	0	0	$0
New Jersey	33	30	$2,470,139.02	305.5	1	15	50.00%	6	40.00%	20.00%	5	4	$13,470,540.85
New Mexico	6	6	$0	36.3	0	1	16.67%	0	0.00%	0.00%	0	1	$0
New York	231	217	$209,042,337.63	2233.1	4	136	62.67%	100	73.53%	46.08%	23	13	$452,090,609.66
North Carolina	59	58	$10,915,274.60	740.4	3	28	48.28%	16	57.14%	27.59%	9	3	$51,016,000
North Dakota	4	3	$0	11.5	0	0	0%	0	0.00%	0.00%	0	0	$0
Ohio	59	58	$ 25,564,362.08	694.6	0	26	44.83%	11	42.31%	18.97%	4	11	$32,370,000
Oklahoma	34	34	$ 1,285,000.00	311.4	0	15	44.12%	8	53.33%	23.53%	2	5	$32,058,364.29
Oregon	17	11	$0	66.5	0	4	36.36%	2	50.00%	18.18%	0	2	$2,000,000
Pennsylvania	61	59	$0	646.2	2	30	50.85%	13	43.33%	22.03%	4	13	$27,871,894
Puerto Rico	6	6	$0	82.9	0	4	66.67%	2	50.00%	33.33%	0	2	undisclosed
Rhode Island	6	5	$0	27.8	1	1	20.00%	1	100.00%	20.00%	0	0	$600,000
South Carolina	7	7	$0	70.1	0	3	42.86%	0	0.00%	0.00%	0	3	$0
South Dakota	4	3	$0	15.1	0	1	33.33%	0	0.00%	0.00%	1	0	$0
Tennessee	20	20	$1,583,036.36	209.9	0	8	40.00%	1	12.50%	5.00%	2	5	$125,000
Texas	317	231	$106,579,281.30	1,687.6	12	30	12.99%	9	30.00%	3.90%	2	19	$20,690,000
Utah	16	14	$ 943,933.00	84.9	1	3	21.43%	1	33.33%	7.14%	1	1	$402,000
Vermont	1	1	$ 1,550,000.00	17.1	0	1	100.00%	0	0.00%	0.00%	0	1	$0
Virginia	49	48	$13,951,136.00	424.4	0	9	18.75%	7	77.78%	14.58%	1	1	$5,350,001
Washington	47	43	$2,795,659.70	231.1	2	18	41.86%	15	88.33%	34.88%	0	3	$20,474,000
West Virginia	10	10	$ 6,050,000.00	101.8	0	7	70.00%	5	71.43%	50.00%	1	1	$6,050,000.00
Wisconsin	49	48	$ 370,416.76	334.8	10	8	16.67%	5	62.50%	10.42%	1	2	$9,670,000
Wyoming	4	4	$0	30.3	0	2	50.00%	1	50.00%	25.00%	1	0	$1,250,000
TOTAL	2000	1802	$ 550,754,004.70	17,495.2	74	808	44.84%	448	55.45%	24.86%	143	217	$1,711,055,774

	O	P	Q	R	S	T	U	V	W	X	Y	Z	AA
1	Number of Undisclosed Civil Payments	Years Lost to Prevailing Civil Plaintiffs	% of Lost Years Compensated by Civil Award (P/E)	Average Civil Award Per Year Lost to Prevailing Incarcerated Exonerees (N/P)	Total Incarcerated Exonerees Filing for State Payment and/or Civil Award	% Incarcerated Filing for State or Civil Compensation (S/C)	Total Incarcerated Not Filing for Any Compensation (including premature) (C-S)	# Incarcerated Exonerees Paid Either State or Civil Award	# Incarcerated Exonerees Paid Both State and Civil Awards	% of Incarcerated Exonerees Compensated ((V+W)/C)	# of Years Lost For Which Compensation Was Paid	% of Years Lost For Which Compensation Was Paid (Y/E)	Total Amount Paid to Incarcerated Exonerees (D+N)
2	1	4.5	2.53%	unknown	10	43.48%	13	5	0	19.23%	41.7	23.44%	$ 2,320,141.26
3	0	0	0.00%	$0.00	4	66.67%	2	0	0	0.00%	0	0.00%	$0
4	0	18.1	13.20%	$251,381.22	4	22.22%	14	2	0	10.53%	18.1	13.20%	$4,550,000.00
5	0	0	0.00%	$0.00	2	40.00%	3	1	0	14.29%	4.9	17.13%	$200,000.00
6	1	568	37.81%	$248,365.96	121	73.33%	44	61	9	38.89%	835.6	55.63%	$ 157,574,946.80
7	0	8.8	11.86%	$1,136,363.64	4	66.67%	2	2	0	28.57%	24.6	33.15%	$ 11,200,000.00
8	0	31.8	15.65%	$338,050.31	15	83.33%	3	10	2	60.00%	151.3	74.46%	$ 50,832,000.00
9	0	0	0.00%	$0.00	2	100.00%	0	0	0	0.00%	0	0.00%	$ -
10	0	78.2	27.60%	$237,084.40	9	56.25%	7	7	0	43.75%	179.6	63.40%	$ 56,754,027.00
11	2	98.2	16.69%	$132,128.31	18	33.33%	36	14	1	23.44%	235.5	40.02%	$ 21,851,901.24
12	0	17.2	6.29%	$14,534.88	9	30.00%	21	5	1	19.35%	116.3	42.54%	$5,050,000.00
13	0	0	0.00%	$0.00	0	0.00%	1	0	0	0.00%	0	0.00%	$ -
14	0	18.6	65.49%	$403.23	1	50.00%	1	1	0	33.33%	18.6	65.49%	$7,500.00
15	0	19.3	51.88%	$46,632.12	2	100.00%	0	1	0	33.33%	19.3	51.88%	$ 900,000.00
16	1	1080.8	51.22%	$426,741.30	159	87.36%	23	77	64	72.31%	1692.1	80.19%	$480,167,074.21
17	0	78	26.67%	$180,641.03	22	64.71%	12	8	0	23.53%	78	26.67%	$ 14,090,000.00
18	0	50.1	63.42%	$363,273.45	7	50.00%	7	3	0	21.43%	54	68.35%	$18,397,812.00
19	0	9.5	19.27%	$789,473.68	3	50.00%	3	2	0	25.00%	15.2	30.83%	$7,850,000.00
20	0	27.4	29.06%	$751,824.82	7	58.33%	5	3	0	25.00%	27.4	29.06%	$ 20,600,000.00
21	3	171.9	23.31%	$58,708.55	42	87.50%	6	21	10	63.27%	484.2	65.66%	$17,966,519.62
22	0	0	0.00%	$0.00	0	0.00%	1	0	0	0.00%	0	0.00%	$0.00
23	0	39.0	14.89%	$615,384.62	8	34.78%	15	5	0	20.83%	94.5	36.08%	$ 26,605,000.00
24	1	331.5	62.49%	$426,407.24	44	81.48%	10	20	14	59.65%	434.3	81.87%	$151,949,000.00
25	0	137.2	24.22%	$236,479.59	53	81.54%	12	22	0	29.33%	216.5	38.22%	$35,852,268.38
26	0	0	0.00%	$0.00	7	53.85%	6	6	0	42.86%	15.1	53.55%	$ 1,965,369.19
27	0	89.9	42.83%	$185,706.34	15	88.24%	2	9	4	76.47%	184.9	88.09%	$ 21,657,333.00
28	1	84.2	18.88%	$616,567.70	25	62.50%	15	15	0	36.59%	194	43.51%	$ 53,838,900.00
29	0	29.2	33.91%	$120,890.41	2	22.22%	7	2	0	20.00%	29.2	33.91%	$3,530,000.00
30	0	72.1	70.41%	$389,459.08	7	77.78%	2	1	6	77.78%	85.6	83.59%	$ 30,710,000.00
31	0	33.2	27.71%	$204,819.28	7	70.00%	3	4	0	40.00%	33.2	27.71%	$ 6,800,000.00
32	0	0	0.00%	$0.00	0	0.00%	1	0	0	0.00%	0	0.00%	$0.00
33	1	70.9	23.21%	$189,993.52	22	73.33%	8	9	4	39.39%	137.3	44.94%	$15,940,679.87
34	0	0	0.00%	$0.00	1	16.67%	5	0	0	0.00%	0	0.00%	$0
35	6	1325	59.33%	$341,200.46	188	86.64%	29	55	77	57.14%	1670.3	74.80%	$661,132,947.29
36	0	269.6	36.41%	$189,228.49	44	75.86%	14	22	10	54.24%	468.0	63.21%	$61,931,274.60
37	0	0	0.00%	$0.00	0	0.00%	3	0	0	0.00%	0	0.00%	$0
38	0	160.1	23.05%	$202,186.13	53	91.38%	5	31	4	59.32%	462.3	66.56%	$ 57,934,362.08
39	0	107.6	34.55%	$297,940.19	17	50.00%	17	14	1	44.12%	223.3	71.71%	$ 33,343,364.29
40	0	15.8	23.76%	$126,582.28	4	36.36%	7	2	0	11.76%	15.8	23.76%	$ 2,000,000.00
41	0	196.5	30.41%	$141,841.70	30	50.85%	29	13	0	21.31%	196.5	30.41%	$ 27,871,894.00
42	2	9.1	10.98%	unknown	4	66.67%	2	2	0	33.33%	9.1	10.98%	unknown
43	0	6.4	23.02%	$93,750.00	1	20.00%	4	1	0	16.67%	6.4	23.02%	$ 600,000.00
44	0	0	0.00%	$0.00	3	42.86%	4	0	0	0.00%	0	0.00%	$0.00
45	0	0	0.00%	$0.00	1	33.33%	2	0	0	0.00%	0	0.00%	$0.00
46	0	0.7	0.33%	$178,571.43	11	55.00%	9	4	0	20.00%	55.8	26.58%	$1,708,036.36
47	2	75.6	4.48%	$273,677.25	116	50.22%	115	93	2	29.97%	1143	67.73%	$127,269,281.30
48	0	2.5	2.94%	$160,800.00	8	57.14%	6	6	0	37.50%	60.6	71.38%	$ 1,345,933.00
49	0	0	0.00%	$0.00	1	100.00%	0	1	0	100.00%	17.1	100.00%	$ 1,550,000.00
50	1	62.1	14.63%	$86,151.38	35	72.92%	13	29	1	61.22%	352.8	83.13%	$19,301,137.00
51	0	100.5	43.49%	$203,721.39	29	67.44%	14	20	3	48.94%	133.5	57.77%	$23,270,659.70
52	0	45.1	44.22%	$134,146.34	10	100.00%	0	6	2	80.00%	69.9	68.66%	$ 12,100,000.00
53	0	65.8	19.65%	$146,960.49	21	43.75%	27	12	3	30.61%	147.2	43.97%	$ 10,040,416.76
54	0	2	6.60%	$625,000.00	2	50.00%	2	1	0	25.00%	2	6.60%	$ 1,250,000.00
55	22	5,612.0	32.08%	$304,892.33	1,210	67.15%	592	628	218	42.30%	10,454.6	59.76%	$2,261,809,778.95

Confirmation Bias and Other Systemic Causes of Wrongful Convictions: A Sentinel Events Perspective*

*By D. Kim Rossmo** and Joycelyn M. Pollock****

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Wrongful convictions are a form of criminal investigative failure. Such failures are sentinel events that signal underlying structural problems within a weak system environment. Similar to transportation or medical accidents, they are often the result of multiple and co-occurring causes. However, unlike the response to an airplane crash, the criminal justice system typically makes little effort to understand what went wrong. These failures tend to be ignored and systemic reviews are rare. As a consequence, important necessary procedural changes and policy improvements may not occur. In this article, we discuss a National Institute of Justice-funded research project that was designed to develop a more comprehensive understanding of how—as opposed to why—such failures occur. We deconstructed 50 wrongful convictions and other criminal investigative failures in order to identify the major causal factors, their characteristics and interrelationships, and the systemic nature of the overall failure. We focus on the central role played by confirmation bias and other thinking errors.

I. Introduction

Wrongful convictions are sentinel events—significant failures that can signal an underlying structural problem.[1] They are frequently the product of compound errors within a weak system environment. Like transportation and medical accidents, they typically have multiple and co-occurring causes; however, unlike an airplane crash, usually little effort is made to understand what went wrong. Such failures are too often ignored, and systemic reviews are rare. Consequently, necessary technical changes and policy improvements may not happen.

Research on wrongful convictions has been done by legal scholars, psychologists, criminologists, and others, each discipline focusing on slightly different issues.[2] The research approach described herein is systems-based, concerned with identifying how

1 U.S. Dep't of Justice, NCJ 247141, Mending Justice: Sentinel Event Reviews 1 (2014).

2 *See, e.g.*, Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong (2011) (analyzing trial records to discuss the practices leading to wrongful convictions including the use of suggestive eyewitness identification procedures, flawed forensic analysis, coercive interrogations, shoddy investigative practices, cognitive bias, and poor lawyering); D. Kim Rossmo, Criminal Investigative Failures (2009) (focusing on law enforcement investigations and cognitive errors in investigators' practices); Jon B. Gould et al., *Predicting Erroneous Convictions*, 99 Iowa L. Rev. 471, 478–79 (2014) (discussing the need for research methodologies other than the case study approach).

a number of causal factors intersect and interact. Previous research on wrongful convictions has discussed the problem of cognitive errors on the part of investigators and prosecutors.[3] Cognitive bias can lead to the identification and prosecution of defendants who are factually innocent. Indeed, the numbers of exonerated continue to grow through DNA evidence and other means.[4]

In Section II, we first explain the National Institute of Justice sentinel event initiative encouraging research on the dynamics of multiple factor interactions underlying "failed" investigations. We then provide a brief description of the nature and scope of wrongful convictions and list the causes identified in the extant literature. Section III outlines the purpose and design of the research project, and Section IV presents our major findings. In Section V, we discuss these findings within the context of what we know about wrongful convictions and focus on the pivotal role of confirmation bias. We present three case studies from our research to illustrate its negative influence. We provide further detail on the inappropriate interference by the prosecutor during the early stages of the police investigation. We describe how prosecutors may be subject to their own cognitive biases and how these contribute to wrongful convictions. We also discuss issues with the current legal definition of probable cause. Finally, we offer recommendations to mitigate the risk of wrongful convictions that arise from this research.

II. Background

A. Sentinel Events Initiative

The sentinel event approach to systematic analysis of error in criminal justice originated with James Doyle, a visiting National Institute of Justice (NIJ) fellow.[5] Doyle has explained

3 *See, e.g.*, Katherine Judson, *Bias, Subjectivity, and Wrongful Conviction*, 50 U. MICH. J.L. REFORM 779 (2017) (examining the ways investigator bias and subjectivity can result in faulty forensic science).

4 The National Registry of Exonerations website listed 2,434 exonerations on May 5, 2019. NAT'L REGISTRY OF EXONERATIONS, www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited May 5, 2019).

5 *See* James M. Doyle, *Learning from Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109 (2010) [hereinafter Doyle, *Learning from Error*]; James M. Doyle, *Learning About Learning from Error*, IDEAS AM. POLICING, May 2012, at 1; James M. Doyle, *Wrongful Convictions and Other Sentinel Events: Learning from Organizational Accidents in the Criminal Justice System*, *in* THE SENTINEL EVENT INITIATIVE: PROCEEDINGS FROM AN EXPERT ROUNDTABLE 2–6 (Nat'l

that "linear" research identifying causal factors (e.g., mistaken eyewitness identifications) has led to prevention efforts that are then implemented and tested (e.g., police procedural changes to reduce eyewitness identification errors).[6] However, Doyle argues that the fields of aviation and medicine, which follow a paradigm of multiple contributing causes, should be applied to the analysis of wrongful convictions.[7] This paradigm assumes several separate mistakes, none on their own sufficient to generate a negative outcome, must come together to create a situation that facilitates the failure.[8] This systematic, multi-causal approach focuses on mistakes of individuals as only one causal element amidst several operational and structural elements, and, therefore, seeks to identify the changes necessary to reduce error rather than to assess blame. For instance, "checklists" and adjustments in aviation and hospital procedures have dramatically reduced negative outcomes originating from oversight and human error.[9] Contrast this with the approach seen in cases of wrongful convictions which often focus on a "rogue" detective or rabid prosecutor who is primarily responsible for the miscarriage of justice.[10] While this tactic can uncover errors, it does little to prevent them. The effort to assign responsibility and blame to a particular person can also produce obfuscation and denial by those who attempt to deflect blame or defend themselves from sanctions.[11]

Inst. of Justice 2013), http://nij.gov/topics/justice-system/Pages/sentinel-event-roundtable.aspx#overview [hereinafter Doyle, 2013 Remarks].

6 *See* Doyle, 2013 Remarks, *supra* note 5.

7 Doyle, *Learning from Error*, *supra* note 5, at 113, 125.

8 Doyle, 2013 Remarks, *supra* note 5; *see, e.g.*, Sidney Dekker, The Field Guide to Understanding Human Error 80 (2006) (explaining human error as an organizational problem); James Reason, Human Error 197 (1990) (discussing the relationship between human error mechanisms and hazardous technologies); Douglas A. Wiegmann & Scott A. Shappell, A Human Error Approach to Aviation Accident Analysis: The Human Factors Analysis and Classification System 45–50, 63, 70 (2003) (analyzing human factors and use of system safety frameworks in understanding and preventing accidents).

9 *See* Atul Gawande, The Checklist Manifesto: How to Get Things Right 114–57 (2009) (describing the effectiveness of flight checklists and the positive results achieved from his experiment utilizing safety checklists during surgical procedures).

10 *See, e.g.*, Frances Robles & Stephanie Clifford, *3 Exonerated in Cases Tied to a Detective*, N.Y. Times, May 6, 2014 at A1 (blaming a "now discredited" detective whose investigative tactics led to multiple wrongful convictions).

11 *See* Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74

A more systemic approach is needed to determine how a detective introduces a false confession in court or a prosecutor withholds exculpatory evidence, either intentionally or unintentionally, without the intervention of other actors in the process.

Doyle proposes that the systems or sentinel event approach, which has seen great success in medicine and transportation, can be adopted to understand wrongful convictions or "near misses" (i.e., narrowly escaped wrongful convictions).[12] The sentinel event approach views accidents and mistakes as more organizational than individual events. The best-known example of the sentinel event approach is the after-action reviews by the National Transportation Safety Board (NTSB).[13] In cases of airplane crashes or close calls, the review team investigates everything from aircraft hardware to weather to pilot decision-making in order to determine what happened.[14] As a result, the aviation industry has experienced significant increases in safety.[15] Medical reviews that emphasize patient safety instead of assessing blame also follow the sentinel event path.[16]

While some have suggested sentinel event analysis cannot be transferred to the wrongful conviction problem because of the greater emphasis on liability and culpability in the justice system,[17] airlines and hospitals are also subject to the risk of negligence, malpractice, or wrongful death lawsuits. Another issue is timing—sentinel event reviews in aviation and medicine typically occur shortly after a negative event.[18] Such immediacy is rarely possible in

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Mo. L. Rev. 999, 1011–14, 1031–34 (2009) (discussing how accountability for a prosecutor's decision's ultimate outcome, for instance a wrongful conviction, can increase bias, but accountability for the decision-making process reduces bias by improving the systematic evaluation of alternatives).

12 *See* Doyle, 2013 Remarks, *supra* note 5, at 3 (suggesting that remedial success in other fields should prompt system-wide analysis of wrongful convictions).

13 Wiegmann & Shappell, *supra* note 8.

14 *Id.* at 1–19.

15 *See id.*

16 *See, e.g.*, Andrew Chang et al., *The JCAHO Patient Safety Event Taxonomy: A Standardized Terminology and Classification Schema for Near Misses and Adverse Events*, 17 Int'l J. for Quality Health Care 95 (2005) (explaining patient safety and adverse event information is needed to develop prevention strategies); Mark Graber et al., *Diagnostic Error in Internal Medicine*, 165 Archive Internal Med. 1493 (2005) (reviewing one hundred cases of diagnostic error to determine the system-related and cognitive components).

17 *Cf.* Doyle, 2013 Remarks, *supra* note 5, at 2, 7 (discussing the utility of sentinel event reviews in strengthening the criminal justice system).

18 *See, e.g.*, *The Investigative Process*, Nat'l Transp. Safety Board, https://www.ntsb.gov/investigations/process/Pages/default.aspx (last visited Mar.

criminal justice; many cases of wrongful conviction emerging today occurred 15 to 20 years ago.[19] Moreover, the uncertainty of innocence is an important difference between the justice system and the fields of aviation (with clear crashes and near misses) and medicine (with obvious deaths and other known negative outcomes).

B. Wrongful Convictions

Determining the extent of the wrongful conviction problem is difficult. Estimates, calculated from different methods, range from 0.03 to 15% of felony convictions.[20] The critical role of DNA in the discovery of wrongful convictions[21] means their detection in crimes other than murder or sexual assault is much less likely, and estimates here are even more problematic.

It should be noted that there is a difference between wrongful

28, 2019).

19 *See* Nat'l Registry of Exonerations, *supra* note 4.

20 *See, e.g.*, C. Ronald Huff et al., Convicted But Innocent: Wrongful Conviction and Public Policy xiv, 55, 61 (1996) (estimating a felony wrongful conviction rate of 0.5% from a perception survey of 229 criminal justice system personnel); John Roman et al., Post-Conviction DNA Testing and Wrongful Conviction 5–6 (2012) (examining biological evidence from 634 sexual assault and homicide cases in Virginia between 1973 and 1987 and determining new DNA testing appeared to eliminate the convicted offenders in 5% of cases; for sexual assault convictions alone, the elimination rate was 8 to 15%); Paul G. Cassell, *Overstating America's Wrongful Conviction Rate? Reassessing the Conventional Wisdom About the Prevalence of Wrongful Convictions*, 60 Ariz. L. Rev. 815, 818 (2018) (using a component-parts methodology with weighted averages to estimate a wrongful conviction risk of 0.031% for violent crimes); Samuel Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death. Proceedings of the National Academy of Sciences*, 111 Proc. Nat'l Acad. Sci. 7230, 7233–34 (2014) (applying survival analysis to death row exoneration data from 1973 through 2004 and conservatively estimating an overall false conviction rate of 4.1% among death sentences); Charles E. Loeffler et al., *Measuring Self-Reported Wrongful Convictions Among Prisoners*, J. Quantitative Criminology 1 (2018) (estimating a 6% wrongful conviction rate in the Pennsylvania prison population from a self-report survey of 2,678 state male prisoners; results varied by conviction type, ranging from 2% for impaired driving to 40% for rape); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. Crim. L. & Criminology 761, 780 (2007) (reviewing wrongful capital rape-murder conviction data and extrapolating a wrongful conviction rate of between 3.3 and 5%); Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 Crim. L. Bull. 221, 230 (2012) (developing a qualitative felony wrongful conviction estimate of 0.5 to 1% by integrating multiple sources).

21 Roman et al., *supra* note 20, at 10.

and erroneous or unsafe convictions. Wrongful convictions are based on actual innocence.[22] Erroneous convictions involve egregious legal errors or misconduct.[23] In these cases, the person may be factually guilty of the crime, but the criminal justice process was subverted to the extent that the conviction fails to meet required legal standards.[24] Throughout the remainder of this discussion, we refer only to wrongful convictions based on actual innocence.

C. Causes of Wrongful Convictions Identified in the Literature

Much effort has been made to understand why wrongful convictions happen[25] and previous research has identified several contributing factors.[26] The most commonly cited causes include eyewitness misidentification, improper forensic science, false confessions, deceitful informants, police and prosecutorial misconduct, and a poor defense.[27] Several scholars have observed that tunnel vision and confirmation bias are also major causes of wrongful convictions.[28] Others have analyzed the effects of race, age, and geographic region.[29] The nature and frequency of causal factors may depend on the type of crime involved—for example, perjury by lying witness and false confessions are more commonly found in murder cases, eyewitness mistakes in rape and robbery cases, and

22 BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

23 Samuel Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM L. & CRIMINOLOGY 523, 525, 542, 544 (2005).

24 *See id.* at 525, 551.

25 *See, e.g.*, Myriam Denov & Katherine Campbell, *Criminal Injustice: Understanding the Causes, Effects, and Responses to Wrongful Conviction in Canada*, 21 J. CONTEMP. CRIM. JUST. 224 (2005) (examining the causes and effects of as well as state responses to wrongful convictions in Canada).

26 Gould et al., *supra* note 2, at 479 (listing the eight major sources identified in previous research as "(1) mistaken eyewitness identification; (2) false incriminating statements or confessions; (3) tunnel vision; (4) perjured informant testimony; (5) forensic error; (6) police error; (7) prosecutorial error; and (8) inadequate defense representation").

27 *The Causes*, INNOCENCE PROJECT, https://www.innocenceproject.org/#causes (last visited Apr. 19, 2019).

28 *See, e.g.*, Keith Findley & Michael Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2 WIS. L. REV. 291 (2006); *see also* Barbara O'Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 PSYCHOL. PUB. POL'Y & L. 315, 316, 328, 331 (2009); D. Kim Rossmo, *Failures in Criminal Investigation*, POLICE CHIEF, Oct. 2009, at 54.

29 Gross et al., *supra* note 23, at 541, 547–51.

fabricated crimes in child sex abuse cases.[30]

Gould and his colleagues compared wrongful convictions to "near misses" (acquittals or dismissals of innocent defendants) and found 10 variables that were significantly related to the former: state death penalty culture (more executions per population); age of defendant (younger); criminal history of defendant; strength of prosecution's case (weaker); intentional misidentification; forensic evidence error; evidence withheld by prosecution; lying by non-eyewitness; strength of defense; and a family witness offered by the defendant.[31]

III. Research Project

A. Purpose of Project

The goal of this project was to deconstruct criminal investigative failures, per the sentinel event initiative, in order to identify their systemic nature. Following the medical analogy, criminal investigative failures are defined as wrongful convictions (misdiagnoses), an unsolved crime that should have been solved (unsuccessful treatment), or an ignored crime (failure to diagnose). These different failure types often share similar etiologies.

Our purpose was to develop a more comprehensive understanding of how—as opposed to why—such failures occur:

> Questions of why and how are logically inseparable, but they lead us in different directions. The question of how invites us to look closely at the sequences of interactions that produced certain outcomes. By contrast, the question of why invites us to go in search of remote and categorical causes . . . .[32]

A sample of wrongful convictions and other types of criminal investigative failure were deconstructed in an effort to identify the major causal factors, their characteristics and interrelationships, and

30 *See* Samuel Gross & Michael Shaffer, *Exonerations in the United States, 1989–2012*, Nat'l Registry of Exonerations 40–41 (June 2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

31 Gould et al., *supra* note 2, at 494, 515.

32 Christopher Clark, The Sleepwalkers: How Europe Went to War in 1914, at xxix (2012).

the systemic nature of the overall failure.[33]

B. Research Design

We first identified 275 criminal investigative failures as potential study cases using various literature searches and databases. Details on crime type, relevant dates, location, investigating agency, exoneration method (if applicable), information sources, and other relevant details were collected. Cases were scored from 0 to 5 on the basis of: (1) information availability; and (2) agreement level that the investigation was a failure. The average of these two scores was used for an overall case score. The top 50 cases were then selected for analysis.

Each case was carefully reviewed and the most important causal factors for the failure identified. Data sources included trial transcripts, government reports, public inquiries, commission investigations, scholarly studies, independent reviews, interviews, and media coverage. Every case was analyzed by two researchers, at least one of whom was an experienced major crime investigator.

The causes were then classified as: (1) personal issues; (2) organizational problems; and (3) situational features. Personal issues were individual-level problems, often involving poor decision-making or flawed judgment (e.g., confirmation bias, misfeasance). Organizational problems were those inherent in the structure, procedures, policies, training, or resources of the police agency or prosecutor's office (e.g., groupthink, poor supervision). Situational factors were environmental features or characteristics of the crime, external to the control of the police or government (e.g., media frenzy, stranger crime). Personal and organizational factors may overlap; if the error was within the control of the individual (i.e., a different detective could have done things properly), then the cause was coded as personal.

Causal factors were further grouped by their proximity to the failure. Primary factors were proximate causes that led directly

33 While the original goal of the study was to examine all types of criminal investigative failure, our final sample was comprised almost entirely of wrongful convictions/arrests (92%). This resulted from our information requirements; while wrongful convictions typically receive considerable media and legal attention, other types of investigative failures tend to be ignored. Impressions from the limited data suggest that all failure types share similar causes, with the exception that unsolved and ignored crimes tend to involve more organizational problems; however, the numbers are too small for any reliable conclusions.

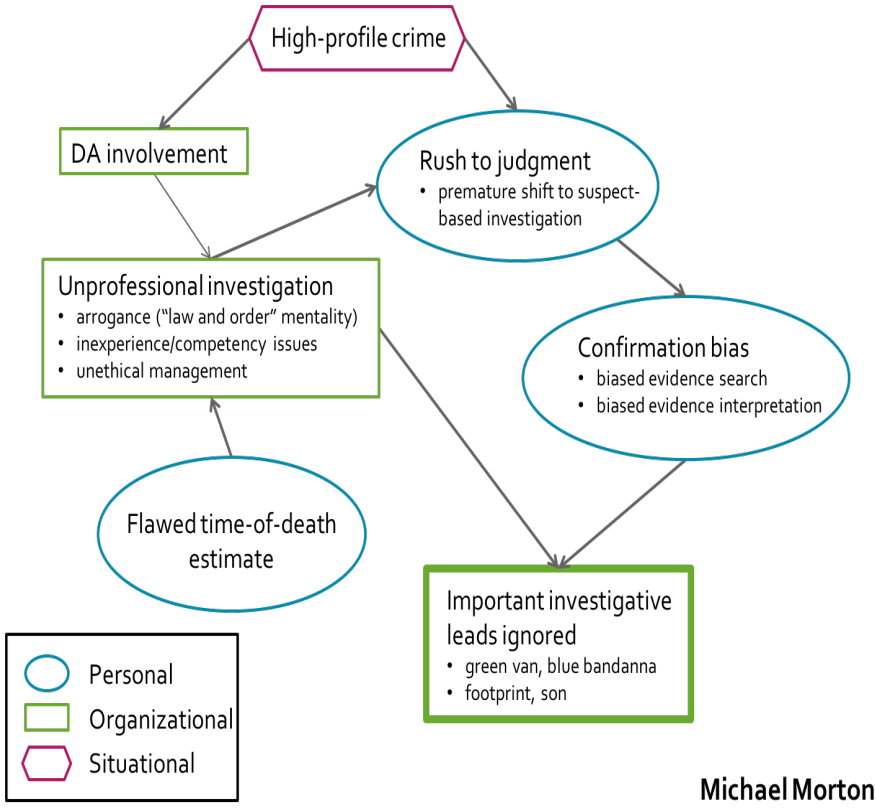
to the failure, while secondary, tertiary, and higher-level factors were contributing causes that produced, influenced, or enabled the primary causal factors.

The next step was to determine how the various causal factors related to each other, what factors facilitated what other factors, and the relative strength of each factor's contribution. We built concept maps and graphically displayed these interactions in causal factor networks in order to reveal and analyze the underlying structure of the case failure.

An example of a concept map, the Michael Morton case, is shown in Figure 1. The nodes in the network represent causal factors and the links influences; the former are shown as blue ovals, green rectangles, or purple hexagons, depending on their classification, and the latter as thick or thin arrows, depending on the direction and strength of their influence. The primary cause of Morton's wrongful conviction was coded as the failure to properly investigate a number of important evidentiary leads. The seven causal factors included:

- The murder was a high-profile crime in suburban community that prided itself on its safety.
- The high-profile nature of the murder resulted in the district attorney's office becoming inappropriately involved in the investigation.
- The sheriff's murder investigation involved inexperienced and incompetent investigators, unethical case management, and an arrogant "law and order" mentality.
- The medical examiner incorrectly estimated the victim's time-of-death, throwing off the timeline of the crime.
- Investigators rushed to judgment regarding Morton's guilt and prematurely shifted from an evidence-based to a suspect-based investigation. The high-profile nature of the crime and the unprofessional investigation contributed to the premature judgment.
- The rush to judgment regarding Morton's guilt led to confirmation bias, resulting in a biased search for and interpretation of evidence. Innocuous events were distorted to support Morton's guilt, while evidence pointing elsewhere was ignored.
- The sheriff's office failed to properly investigate a number of important evidentiary leads.

Figure 1: Concept Map



The concept maps provide a graphic representation of failure causes and their relationships. Network and content analysis tools and methods were then used to help evaluate all the available information. After deconstructing the individual cases, larger systemic patterns were identified by reviewing the failures collectively.

IV. Research Findings

A. Case Characteristics

The characteristics of the 50 study cases were as follows:

- Failure type: 43 wrongful convictions; 3 wrongful

arrests;[34] 2 unsolved crimes; 1 failure to arrest; 1 ignored crime
- Crime type: 45 murders; 5 rapes/sexual assaults
- Location: 42 United States; 5 Canada; 3 Europe
- Mean scores: 4.8 information availability; 4.7 agreement level; 4.6 overall case score.

B. Causal Factors

We identified an average of 7.3 different causes per case (range 5 to 12). For coding purposes, these were grouped into 40 causal factors and 9 causal factor groups based on behavioral similarities. Table 1 shows the most frequent causal factors in rank order. The top 8 (25%) factors accounted for half of the total number of causes. Confirmation bias was present in 74% of all cases, and in 80% of wrongful convictions. Table 2 shows the causal groups in alphabetical order with their associated causal factors. Personal factors were the most common (61%), followed by organizational (21%) and then situational (18%).

Table 1: Causal Factors (≥ 10)

Causal Factor	N
Confirmation bias	37
Tunnel vision	24
High-profile crime/media attention	23
Management/supervision issues	22
Careless/incompetent investigation	20
Improper interrogations	20
Rush to judgment	19
Flawed forensics	15
Problematic witness/informant	14
Evidence analysis/logic failure	12
Interagency conflict/DA interference	10

34 All three wrongful arrest cases involved extended incarceration of the innocent party. Nga Truong, arrested at the age of 16 for the murder of her baby, spent nearly three years in jail before the district attorney dismissed the charges.

Table 2: Causal Factor Groups

Causal Factor Group	N	%	Causal Factor
Cognitive biases	101	28%	Confirmation bias
			Groupthink
			Intuition
			Investigator ego/stubbornness
			Premature shift to suspect-based investigation
			Rush to judgment
			Tunnel vision
Evidence failures	35	10%	Acceptance of unreliable evidence
			Evidence analysis/logic failure
			Evidence collection and analysis failure
			Evidence collection failure
			Physical evidence not analyzed
			Probability errors
External issues	52	14%	Coincidence
			Crime fears
			Difficult crime to investigate
			High-profile crime/media attention
			Outside pressures
			Suspect behavior
Forensics/experts	21	6%	Failure to consult experts
			Flawed forensics
			Improper use of "experts"

Causal Factor Group	N	%	Causal Factor
Misfeasance	18	5%	Misfeasance/corruption
			Procedure/law problems
			Subculture issues
Organizational problems	38	10%	Inattention/apathy
			Interagency conflict/DA interference
			Management/supervision issues
			Resource/budget problems
Other	4	1%	Other
Poor investigation	48	13%	Alibi not evaluated
			Alternative suspects not investigated
			Careless/incompetent investigation
			Demeanor/character evidence
			Knowledge/training issues
			Linkage blindness
Problematic witnesses/confessions	46	13%	Improper interrogations
			Improper suspect identification
			Jailhouse informant
			Problematic witness/ informant
Total	**363**	**100%**	**40**

A causal factor's proximity was measured by its distance from the failure. If a factor was determined to be a direct cause (proximate factor), it was assigned a proximity of 1; if a factor was a contributing cause of the proximate factor, it was assigned a proximity of 2 (and so on). The overall mean proximity, for all factors across all cases, was 2.0. The most frequent proximate causal factors (i.e., proximity = 1) included confirmation bias, careless/incompetent investigation, evidence analysis/logic failure, and improper interrogations.

While causal factors are nodes in the concept maps, the relationships between them are links. There was a total of 383 such connections between the 363 causal factors for the 50 cases (mean = 7.7 links per case). From the perspective of a particular causal factor, a link was either a cause or an effect, depending on whether it led from or to the factor (influence output or input). There were also five mutual cause-effect links (double-headed arrows), indicating a reciprocal relationship between the two factors.

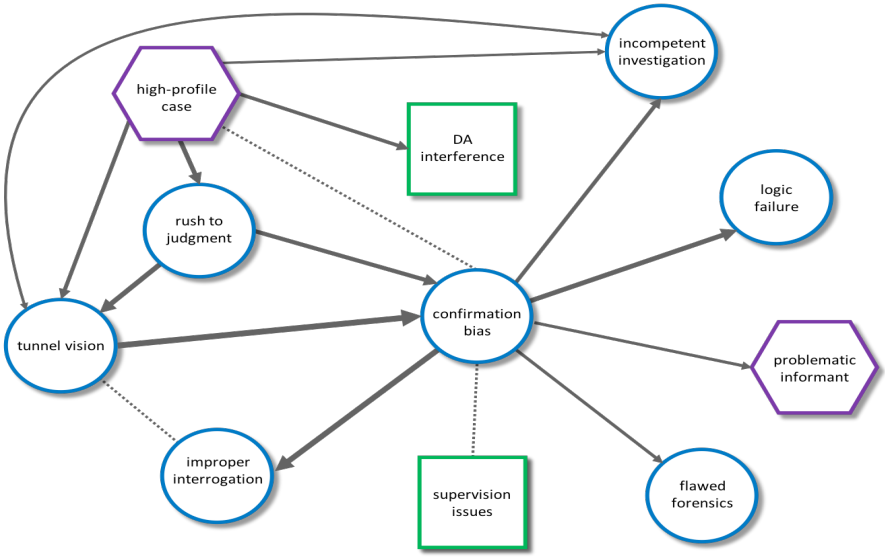
Confirmation bias was the most connected causal factor by a significant margin; it had the highest number of both cause and effect links. Other causal factors with high frequencies of cause links included high-profile crime/media attention, management/supervision issues, tunnel vision, careless/incompetent investigation, and rush to judgment. Causal factors with high frequencies of effect links included tunnel vision, rush to judgment, improper interrogations, evidence analysis/logic failure, and careless/incompetent investigation.

Particular combinations of factors tended to cluster together in the same case. For example, a common causal pattern consisted of a high-profile crime (such as a horrible murder) that led to a rush to judgment (and a premature shift to a suspect-based investigation), resulting in tunnel vision and confirmation bias—ultimately producing an evidence failure. Cluster patterns are likely the result of an underlying process connecting the different factors. In this example, production pressures (well documented in the safety literature[35]), stemming from extensive media coverage of a sensational crime, lead to cognitive biases and then evidence failures.

Figure 2 shows commonly co-occurring causal factors; this image is a summary of the relationships across all cases and does not represent the specific links in a single investigative failure. The width of an arrow indicates how frequently the two connected factors were linked; dotted lines indicate co-occurrence in the same case but not a direct link. As can be clearly seen, confirmation bias plays a central role in this pattern.

35 Safety culture researchers study how managerial and organizational factors influence human performance to help minimize workplace risk. *See, e.g.*, SIDNEY DEKKER, THE FIELD GUIDE TO UNDERSTANDING HUMAN ERROR 164–68, 171 (2006).

Figure 2: Causal Factor Clusters



C. Evidence Failures

A wrongful conviction is fundamentally a failure of evidence.[36] A criminal investigation requires proper evidence collection, evaluation, and analysis. Errors in any of these tasks can lead to flawed decision-making by detectives. We found evidence failures were often the product of a rush to judgment, tunnel vision, confirmation bias, and/or groupthink.

For each case, an assessment was made to determine if any of the following problems occurred during the investigation:

1. Inadequate evidence collection—failure to collect all the relevant evidence necessary to thoroughly investigate the case (e.g., crime scene evidence, neighborhood canvass, witness and suspect interviews);
2. Improper evidence evaluation—failure to assess evidence reliability (the probability an item of evidence, such as a confession, witness statement, or lab analysis, is accurate or true); or
3. Illogical evidence analysis—failure to logically analyze the

36 While some wrongful convictions have been the result of police corruption, most of the official misconduct cases we have encountered (in both our sample and experience) appear to involve a genuine but mistaken—or even reckless—belief on the part of the detective that the suspect was guilty.

evidence (e.g., significance, low reliability implications, connections, patterns).

Evidence collection problems were present in 58%, evidence evaluation problems in 92%, and evidence analysis problems in 78% of the cases. It is possible for a failed investigation to suffer from more than one type of evidence failure. The most common failure combinations were collection/evaluation/analysis (40%) and evaluation/analysis (34%); only 12% of the cases had a single evidence failure mode.

Table 3 shows the causal factors most frequently associated with the various evidence failure modes, arranged roughly in the chronological order in which they occur in an investigation. A comparison of Table 3 to Figure 2 reveals the anatomy of a criminal investigative failure by depicting causal factor relationships and their impact on specific types of evidence failure.

Table 3: Evidence Failure Causal Factors

Evidence Collection	Evidence Evaluation	Evidence Analysis
	High-profile case	
Rush to judgment		
Tunnel vision		
	Confirmation bias	
Incompetent investigation		
		Flawed forensics
		Logic failure
	Improper interrogations	
	Problematic informant	
		Supervision issues

V. Discussion

A. Causes

1. Causality

Our approach was influenced by the root cause analysis (RCA) methods outlined in the safety literature.[37] A root cause is defined as the earliest ("deepest") factor in a causal chain, the removal of which would prevent the failure from occurring—what Allison and Zelikow call the *but for which* test.[38] However, RCA usually assumes a single failure cause and adopts a reductionist view which leads to a linear analysis.[39] This approach is useful for straightforward cause-and-effect relationships, such as machine operations where defects are observable, measurable, and objective; however, social and behavioral influences are not mechanical processes, and RCA is less suitable in human-centered work environments.[40]

Following this definition, most criminal investigative failures do not have a single root cause; rather, they are more commonly the product of a number of intersecting causal factors (or factor patterns). While it might be argued that wrongful convictions are ultimately the result of flawed decision-making, multiple wrong decisions by different parties are necessary—the decision by the police to arrest the wrong person, the decision by the prosecutor to charge the wrong person, the decision by a judge or jury to convict the wrong person.

Certain causal factors were identified as proximate in our study, but this did not mean they were a root cause or that they were even the most important. Proximity was only a measure of temporal causal order. Because of its direct impact on the failure, a proximate cause might be regarded as an essential step, but not as a factor of

37 *See* Paul F. Wilson et al., Root Cause Analysis: A Tool for Total Quality Management 5–17 (1993) (defining RCA and detailing advantages of performing an effective safety analysis utilizing this tool).

38 Graham Allison & Philip Zelikow, Essence of Decision: Explaining the Cuban Missile Crisis 383 (2d ed. 1999).

39 Mohammad Farhad Peerally et al., *The Problem with Root Cause Analysis*, 26 BMJ Quality & Safety 417, 417 (2017).

40 *See* Ivan Pupulidy, *Why Accident Reviews Should Focus on Conditions*, LinkedIn (Mar. 7, 2017), https://www.linkedin.com/pulse/why-accident-reviews-should-focus-conditions-ivan-pupulidy-phd (noting the differences between mechanical systems, where things are measurable and objective, and the subjective nature of information obtained from people).

origin. In this sense, there may not always be a "causal bottom line;" as experimentation is infeasible, it is difficult to identify the specific major factors *but for which* the outcome would not have occurred.

While we used the term "causal factor" in our study, it would have been more precise to refer to "contributing" factor, as any particular factor may or may not have been necessary or sufficient to cause the failure in a given case. Moreover, their role in a future investigation is probabilistic, not deterministic, conditional on other influences and circumstances. Gould, Carrano, Leo, and Hail-Jares caution that much of the research on wrongful convictions has been done by law scholars and journalists using a legal cause-and-effect model,[41] and it can be misleading to think of the related factors identified in this literature as "causing" wrongful convictions. It is perhaps best to think in terms of mapping a fuzzy network of influences rather than one of inevitable causes.[42]

The basic logic of explanation involves the use of particular circumstances and laws ("causes") to answer the question of why an event occurred.[43] Prediction is the converse of explanation. With its antecedents known, an event can be expected and therefore understandable. However, it has been argued that this philosophy of science paradigm does not apply to the philosophy of history[44]—or criminology. While we might be able to identify plausible possibilities, we cannot establish definitive laws of human behavior. Our approach in this study fell between these two positions—deterministic laws were replaced by probabilistic patterns, predictions by risk assessments.

2. Causal Factors

Personal factors were the most frequent cause of wrongful convictions. They comprised 61% of all causes and dominated all three metrics of causal importance—frequency, proximity, and connectedness. They were also key factors in both causal clusters and evidence failures. Specifically, the study showed premature judgment

41 Gould et al., *supra* note 2, at 479.

42 *See* Ivan Pupulidy & Crista Vesel, *The Learning Review: Adding to the Accident Investigation Toolbox*, EUR. COMMISSION JOINT RES. CTR. (Nov. 15, 2017), http://www.safetydifferently.com/wp-content/uploads/2018/08/171024TheLearningReview.pdf (describing the benefits of creating a "network of influences" map as an accident investigation technique).

43 CARL G. HEMPEL, ASPECTS OF SCIENTIFIC EXPLANATION AND OTHER ESSAYS IN THE PHILOSOPHY OF SCIENCE 348–50 (1966).

44 *See, e.g.*, Allison & Zelikow, *supra* note 38, at 11–12.

often led to tunnel vision and confirmation bias. Confirmation bias then produced problems of poor thinking, logic failures, misjudgment of witness reliability, and flawed evidence assessments.

The most frequent organizational problem was lack of proper supervision and management. This void enabled a number of errors, including confirmation bias and incompetent investigations. In certain cases, police management ignored (and perhaps unofficially encouraged) misfeasance and noble cause corruption.

Interagency conflict, most notably between police departments and the district attorney's office, played a role in a number of failures, particularly those involving high-profile crimes with much media attention. Linkage blindness, the failure by police to connect crimes committed by the same offender, was an issue for serial offenses as it prevented the development of a complete picture of the series and undermined potential alibis of innocent suspects.

A high-profile crime followed by excessive media attention was the most common situational factor found in our study. Problematic witnesses or informants who lied to investigators for their own purposes was another frequent situational cause. However, it was sometimes difficult to distinguish instances of legitimate deception from those of police gullibility. Police officers have a responsibility to carefully evaluate evidence reliability, including statements of witnesses. If a detective uncritically accepted the notoriously unreliable claims of a jailhouse informant (due to confirmation bias or perhaps through misfeasance), we coded the action as personal rather than situational.

Confirmation bias held a central role in the systemic causal structure of wrongful convictions. This problem, and the susceptibility of prosecutors to cognitive biases, are discussed in more detail in the following sections.

B. Confirmation Bias

In an ideal world, we would make the best possible decisions after a careful evaluation of all available evidence. Judgment, however, is often impaired by cognitive biases.[45] Within the context of a

45 David Stubbins & Nelson Stubbins, *On the Horns of a Narrative: Judgment, Heuristics, and Biases in Criminal Investigation*, *in* Criminal Investigative Failures, 119, 125–26 (D. Kim Rossmo ed., 2009). The inquiry into cognitive bias extends far beyond criminal justice applications. *See, e.g.*, Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 Science 453 (1981) (describing how decision preferences can shift

criminal investigation, such systematic errors in thinking can result in an unsolved crime or a wrongful conviction;[46] our study found confirmation bias, in particular, held a pivotal position in the causal structure of wrongful convictions. Faulty assumptions, probability errors, and groupthink often played supporting roles. Cognitive bias affects not just investigators, but also prosecutors, defense lawyers, scientists, military leaders, politicians—indeed, everyone.[47]

Cognitive biases operate at a below-conscious level; they are the product of unintentional strategies, not deliberate decisions.[48] Explanatory mechanisms for confirmation bias include both cognitive processes (limited ability to handle complex tasks) and motivated processes (influence of desire on belief, consistency needs).[49] A rush to judgment[50] is often the triggering problem. If investigators

when problems are framed differently); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982) (discussing various decision heuristics employed under conditions of uncertainty and their resulting biases).

46 Itiel Dror & Peter Fraser-Mackenzie, *Cognitive Biases in Human Perception, Judgment, and Decision Making: Bridging Theory and the Real World*, *in* CRIMINAL INVESTIGATIVE FAILURES 56, 59 (D. Kim Rossmo ed., 2009); D. Kim Rossmo, *Criminal Investigative Failures: Avoiding the Pitfalls*, 75 FBI L. ENF'T BULL. 1, 1–2 (2006); D. Kim Rossmo, *Criminal Investigative Failures: Avoiding the Pitfalls (Part Two)*, 75 FBI L. ENF'T BULL. 12 (2006).

47 For more scholarship on cognitive bias as it affects both police and legal professionals see, for example, Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 516–17 (2007) (analyzing the effects of cognitive bias on prosecutors); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1145 (2012) (discussing the role of cognitive bias in the reasonable suspicion/Fourth Amendment context); Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827 (2012) (proposing solutions to mitigate juror bias); Melanie D. Wilson, *Quieting Cognitive Bias with Standards for Witness Communications*, 62 HASTINGS L.J. 1227, 1229 (2011) (discussing effect of cognitive bias on prosecutors and defense attorneys).

48 JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 45, at xii.

49 Margit Oswald & Stefan Grosjean, *Confirmation Bias*, *in* COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGMENT AND MEMORY 81, 90–91 (Rudiger Pohl ed., 2004).

50 Premature judgment is frequently the product of intuition, or what detectives more commonly refer to as "gut instinct." *See* Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality*, 58 AM. PSYCHOLOGIST 697, 697 (2003). Humans employ two types of decision-making—the intuitive and the rational. *Id.* at 698. Intuition is automatic and effortless, fast and powerful, but slowly learned. *Id.* Because of its implicit nature, intuition is difficult to control or modify, can be influenced by emotion, and is often

jump to a conclusion before all the evidence has been collected and analyzed, tunnel vision and confirmation bias may result; evidence discovered later will likely then suffer from a biased evaluation.[51] Public fear, intense media interest, pressure from politicians, organizational stress, personal ego, or a strong desire to arrest a dangerous offender can all lead to premature judgment. Shocking crimes—attacks on children or multiple murders—generate higher pressures[52] and risk driving police from an evidence-based to a suspect-based investigation before they are ready.[53] The evidence-based stage of a criminal investigation involves searching for, gathering, and analyzing evidence in the effort to determine what happened and who might be a viable suspect.[54] The suspect-based stage of a criminal investigation occurs after detectives have decided who the perpetrator is and they shift to the prosecution mode.[55]

Tunnel vision (also called incrementalism) has been identified as a major cause of wrongful convictions.[56] It typically occurs early

error-prone. *Id.* Intuition typically involves the use of heuristics (cognitive shortcuts). *Id.* at 697. *See also* D. Michael Risinger & Jeffrey L. Loop, *Three Card Monte, Monty Hall, Modus Operandi and "Offender Profiling": Some Lessons of Modern Cognitive Science for the Law of Evidence*, 24 Cardozo L. Rev. 193, 197 (2002) (explaining that a particular heuristic does not have to be right most of the time; as long as it promotes survival, it will be passed on through natural selection); Thomas Stewart, *How to Think With Your Gut*, Business 2.0, Nov. 2002, at 98 (explaining that different situations require different types of judgment). Intuition is valuable when it is based on experience and expertise, and if it is used in a stable environment where the learned rules remain consistent. Gary Klein, The Power of Intuition at 5, 23 (2007). When the data are unreliable and incomplete, or when we need to make decisions quickly under chaotic and uncertain conditions, intuitive decision-making is preferable. *Id.* at 189. However, complex and rule-bound tasks, such as major crime investigations or courtroom prosecutions, require careful analysis and sound logic. *See id.* at 67.

51 D. Kim Rossmo, *Case Rethinking: A Protocol for Reviewing Criminal Investigations*, 17 Police Prac. and Res. 214 (2016).

52 O'Brien, *supra* note 28.

53 *See* Rossmo, *supra* note 2, at 58, 61.

54 *See id.* at 59.

55 *See id.*

56 *See, e.g.*, Bruce MacFarlane, Wrongful Convictions: The Effects of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System 29–30 (2010), https://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/policy_research/pdf/Macfarlane_Wrongful-Convictions.pdf; Dianne Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. Rev. 847, 848 (2002); Rossmo, *supra* note 2, at 13–14.

in an investigation and results from a narrow focus on a particular theory; it can be the result of satisficing or the selection of the first identified alternative that appears "good enough."[57] This emphasis results in the unconscious filtering of information and contributes to an inappropriate analysis of evidence:

> An officer may be so convinced of an eyewitness's identification that he ignores other case facts that point away from the suspect's guilt; a forensic scientist may conduct a hair comparison and see such a close match between that of the perpetrator and a suspect that he overlooks fingerprint analysis that isn't as compelling; a prosecutor may be so satisfied with a suspect's confession that he discounts forensic evidence that inculpates others . . . .[58]

The concept of sunk costs has been linked to tunnel vision to explain why belief perseverance occurs even when strong contradictory evidence has emerged. As more resources—money, time, and emotions—are devoted towards a suspect, police and prosecutors become less willing to consider challenges to their conclusions.[59]

Tunnel vision, however, has not been defined in a manner that allows it to be meaningfully researched.[60] It is often used as

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57 *See* FPT HEADS OF PROSECUTIONS COMMITTEE WORKING GROUP, REPORT ON THE PREVENTION OF MISCARRIAGES OF JUSTICE 38 (2004); Findley & Scott, *supra* note 28, at 295. In a report from a commission of inquiry into an infamous wrongful conviction case in Canada, tunnel vision was condemned as "insidious . . . [i]t results in the [police] officer becoming so focussed upon an individual or incident that no other person or incident registers in the officer's thoughts. Thus, tunnel vision can result in the elimination of other suspects who should be investigated." PETER DE C. CORY, THE INQUIRY REGARDING THOMAS SOPHONOW (2001), https://digitalcollection.gov.mb.ca/awweb/pdfopener?smd=1&did=12713&md=1.

58 JON B. GOULD ET AL., PREDICTING ERRONEOUS CONVICTIONS: A SOCIAL SCIENCE APPROACH TO MISCARRIAGES OF JUSTICE 15 (2013). This report's findings are also described in Gould et al., *supra* note 2.

59 Gould et al., *supra* note 2, at 504. For further discussion of tunnel vision and how it affects the entire course of investigation and prosecution, see MacFarlane, *supra* note 56, at 29–56.

60 Brent Snook & Richard Cullen, *Bounded Rationality and Criminal Investigations: Has Tunnel Vision Been Wrongfully Convicted?*, *in* CRIMINAL INVESTIGATIVE FAILURES 73, 73 (D. Kim Rossmo ed., 2009).

a vague umbrella term for certain cognitive biases, including confirmation bias (which is operationally defined and thus easier to identify and study). References to tunnel vision are more commonly found in legal writings, where the term is employed as a metaphor for the reluctance to consider alternatives, than in the psychological literature.

Confirmation bias is a type of selective thinking.[61] Once a hypothesis has been formed, our inclination is to confirm rather than refute it. We tend to look for supporting information, interpret ambiguous information as consistent with our beliefs, and minimize any inconsistent evidence. Types of confirmation bias include: (1) the biased search for evidence; (2) the biased interpretation of information; and (3) a biased memory (selective recall).

Confirmation bias can cause a detective to interpret information in a biased manner—evidence that supports the investigative theory is taken at face value, while contradicting evidence is skeptically scrutinized. Other manifestations of confirmation bias include the failure to search for evidence that might prove a suspect's alibi, not utilizing such evidence if found, and refusing to consider alternative hypotheses.

Confirmation bias often leads to logic failures, which are closely tied to probability errors (e.g., believing something is likely when it is not or vice versa). Beliefs need to be updated upon the discovery of new information. Logically, upon finding exculpatory evidence, police investigators should shift their focus and begin exploring alternative explanations. Unfortunately, there have been several cases where detectives refused to abandon the original suspect, justifying their intransigence through highly convoluted reasoning.[62] Critical thinking requires effort, and an entrenched

61 *E.g.*, O'Brien, *supra* note 28, at 318 (reporting that experienced investigators considered witnesses who exonerated a favored suspect less credible than those who incriminated that suspect). In another study, police trainees considered evidence in a mock homicide case less reliable if it invalidated their initial hypotheses. *Id.*; *see generally* Raymond Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 Rev. Gen. Psychol. 175, 175 (1998); Derek J. Koehler, *Explanation, Imagination, and Confidence in Judgment*, 110 Psychol. Bull. 499, 499 (1991).

62 For example, the discovery that crime scene DNA does not match an arrested person should result in a careful re-examination of the investigative theory. Instead, some investigators have assumed a co-offender was responsible for the DNA. This persistence of belief can be highly resilient, as demonstrated by the Norfolk Four case. Tom Wells & Richard A. Leo, The Wrong Guys: Murder, False Confessions, and the Norfolk Four (2008).

position, even an untenable one, can persist through psychological lethargy and organizational momentum.[63]

The logic of the investigative conclusions can be tested in a case involving confirmation bias by considering what would happen if the order of evidential discovery was altered; the conclusions reached by detectives should not depend on the particular sequence in which the evidence was discovered.[64] But premature judgment can lead to confirmation bias and distorted evidence interpretations. Inculpatory evidence uncovered early in an investigation may be unquestioningly accepted while exculpatory evidence found later is denigrated, irrespective of probative value. For example, in the David Camm wrongful conviction case (discussed below), unreliable bloodstain evidence recovered the day after the murders became critical to the prosecution's case, while later DNA results pointing to the real killer were seen as something to be explained away. If varying the evidential order changes the case conclusion, there is likely a problem with the investigative logic.

Groupthink exacerbates tunnel vision and confirmation bias. Groupthink is the reluctance to think critically and challenge the dominant theory.[65] It occurs in highly cohesive groups under

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When DNA excluded the person investigators initially arrested for the sexual murder of a woman, they pressured him to give up his "accomplice." *See id.* at 54–55. Then, when DNA did not match that second person, they pressured both men to give up a third accomplice. *See id.* at 96. They continued with this strategy, eventually arresting seven different men, four of whom ended up being convicted (in total violation of Occam's razor). *Id.* at ix. While the multiple offenders-scenario is a possibility, it is certainly not a probability—and it becomes much less likely as the numbers increase. The probability of *n* multiple offenders is equal to the probability of the murder being committed by a group of size *n*, multiplied by the probability that all but one of the group members failed to leave behind any DNA evidence, multiplied by the probability that the one person who did leave DNA evidence behind was the last member of the group (i.e., the only one not yet apprehended). The final result of this sequence of probabilities quickly drops into the category of remotely unlikely.

63 Lee Ross and Craig Anderson observed, "it is clear that beliefs can survive potent logical or empirical challenges. They can survive and even be bolstered by evidence that most uncommitted observers would agree logically demands some weakening of such beliefs. They can even survive the total destruction of their original evidential bases." Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 129, 149 (Daniel Kahneman et al. eds., 1982).

64 *See* Rossmo, *supra* note 51, at 212, 217.

65 IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY

pressure to make important decisions. Symptoms include power overestimation and a belief in the group's morality, close-mindedness and rationalization, and uniformity pressures and self-censorship. Groupthink has several negative outcomes; members selectively gather information, do not seek expert opinions, and fail to critically assess their ideas.[66] Consequently, alternatives are not considered and the group does not develop contingency plans. Groupthink can be disastrous in a major crime investigation as it distorts evidence evaluation.

Determining if poor judgment originated from faulty thinking or misfeasance may be difficult in some situations (culpability decision trees[67] can help untangled complex cases). The error to misconduct ratio in police work is simply unknown, and there are likely instances of "negligent logic" or willful blindness on the part of investigators that blur the line.

1. Case Studies

The following wrongful conviction cases from our study sample illustrate the pernicious role of confirmation bias in wrongful convictions.[68]

After the nude body of Angela Correa was found in a park in Peekskill, New York, detectives rushed to judgment and focused on one of her classmates. Jeffrey Deskovic, 15-years-old, became a suspect because of his unusual behavior, including tardiness for school the day after Angela's disappearance. Suffering from tunnel vision, detectives pursued a single-minded course of action designed to get Deskovic to confess. Police did not look for other suspects despite the presence of exculpatory physical evidence. In a classic confirmation bias pattern, detectives changed their theory of the case when the DNA test results came back excluding Deskovic. Instead of re-evaluating the conclusion that he raped and killed Angela, they

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Decisions and Fiascoes 3 (2d ed. 1982).

66 *See* FPT Heads of Prosecutions Committee Working Group, *supra* note 57, at 35–41.

67 Culpability decision trees use a series of structured questions concerning an individual's motives, behavior, and actions to explore why an unsafe event occurred and to help establish the extent of personal culpability. *See* James Reason, Managing the Risks of Organizational Accidents 208–09 (1997).

68 D. Kim Rossmo & Joycelyn Pollock, Case Deconstruction of Criminal Investigative Failures (2018) (unpublished study) (final summary overview submitted to the National Institute of Justice).

decided he did not rape her, but instead killed her in a rage after she had sex with someone else. They failed to try to identify the source of the DNA or run it through CODIS. Rather than examine the evidence objectively, they shaped the evidence to fit their own theory without considering the possibility that they might have the wrong suspect. This resulted in a negligent and flawed investigation. The real offender was identified years later when the district attorney finally agreed to test the seminal fluid recovered from the victim against known sex offenders.

When Bruce Lisker discovered his mother stabbed in her Sherman Oaks, California, home, he frantically called 9-1-1. He was high on methamphetamines and his hands were covered in blood when EMTs arrived. The first detective on the scene knew Bruce from prior interactions and considered him a "punk." Investigators coerced a confession (quickly recanted) from the 17-year-old teenager through the offer of a plea bargain. A rush to judgment followed by tunnel vision led to confirmation bias. Exculpatory evidence was ignored, while the alibi of an alternative and viable suspect was never checked despite inconsistencies in his story. Within days of Lisker's arrival in the county jail, three different inmates reported he had confessed to them. The prosecutor decided to use the evidence of a career criminal with a history of "overhearing" admissions by other inmates, even though the police detective did not believe him. Twenty-six years after Lisker's arrest, a federal judge vacated his conviction, ruling he had been prosecuted with "false evidence."

Judith Johnson was raped and murdered in her home in Barberton, Ohio, and her six-year-old granddaughter, Brooke Sutton, was raped, beaten, and left for dead. Brooke managed to walk to a neighbor's place for help. She told this woman that someone who looked like "Uncle Clarence" had committed the crime. Upon hearing this, police rushed to judgment and Clarence Elkins, Sr., became their one and only suspect. After being interviewed by police detectives and a psychologist, Brooke, despite expressing initial uncertainty, positively identified Elkins as her attacker.

However, there was no physical evidence that connected Elkins to the murder scene, and two pubic hairs found on the murder victim's body failed to match him. Elkins had no significant criminal record and there was nothing in his background to indicate he would rape and kill his mother-in-law or niece. Police did not compare DNA from the crime scene with known sex offenders in the area or attempt to match fingerprints or conduct hair comparisons.

They failed to analyze fingernail scrapings, and they ignored a bloody lampshade at the crime scene because "they had enough evidence." The neighbor that Brooke had asked for help behaved very strangely (she left the blood-covered little girl on her porch for 45 minutes while she cooked breakfast, and she never did call the police); however, this failed to arouse the suspicions of detectives. This is a troubling example of the power of tunnel vision and confirmation bias.

It turned out this neighbor's boyfriend, who had recently absconded from a halfway house, was inside her home. DNA from the crime scene was eventually found to be a match to this man. Despite literally having the real killer next door, police ignored inconsistent physical evidence and exclusively focused on Elkins.

These three cases illustrate the significant damage confirmation bias can wreak on a criminal investigation. In each investigation, the premature focus on a suspect resulted in evidence being distorted or ignored. The result was the convictions and lengthy imprisonments of three innocent men.

C. *Prosecutors*

Prosecutors are subject to the same thinking errors as detectives, including tunnel vision, confirmation bias, belief perseverance, and avoidance of cognitive dissonance.[69] Consider that the prosecutor's role is to prosecute only if there is probable cause to believe in the guilt of the defendant. Indeed, prosecutors are invested in the belief that the defendant is guilty because it is inherent in their professional duty to do so.[70] There is also the argument that

69 *See* Burke, *supra* note 47, at 515–20 (discussing confirmation bias and selective information processing by prosecutors); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 Wm. & Mary L. Rev. 1587, 1590–91, 1613 (2006) (explaining prosecutorial errors and flawed decisions are the result of cognitive processes, specifically information-processing tendencies that depart from perfect rationality). For how research on prosecutorial misconduct has shifted to social science explanations, see the discussion in Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 Notre Dame L. Rev. 51, 97–99 (2016). For examples of how bias affects prosecutors see also Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 Fordham L. Rev. 1453, 1481–83 (2007).

70 *See* Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 How. L.J. 475, 489, 491 (2006) (discussing prosecutor's role vis-à-vis belief system regarding defendants); Sarah Anne Mourer, *Believe It or Not: Mitigating the Negative Effects Personal Belief and Bias Have on the Criminal Justice System*, 43

prosecutors have an even stronger emotional connection to victims than police detectives due to their close relationship during trial preparation. This can lead to an excessive zeal for conviction even when exculpatory evidence exists.[71] While investigators purportedly are trained to objectively evaluate evidence, prosecutors are trained to prepare a case in such a way as to ensure conviction. Once a decision to prosecute has been made, their training prepares them to consider contrary evidence only for the purpose of responding to and attacking such evidence.[72]

The most frequently discussed prosecutorial misconduct involves *Brady* violations, which occur when potentially exculpatory

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HOFSTRA L. REV. 1087, 1089–90, 1113, 1120–21 (2015) (explaining that a prosecutor's ethical code requires a belief in probable cause before prosecuting, which encourages cognitive errors and recommending a higher standard than probable cause before prosecuting). Probable cause is a complex standard that arguably means different things at different decision points; one might argue, for instance, that a police officer's probable cause to arrest is different than a prosecutor's probable cause to pursue prosecution. Cognitive bias is present at each decision point, but arguably is stronger the more invested the criminal justice actors become in the defendant's guilt. For further discussion of probable cause, see Andrew E. Taslitz, *What Is Probable Cause, and Why Should We Care?: The Costs, Benefits, and Meaning of Individualized Suspicion*, 73 LAW & CONTEMP. PROBS. 145 (2010).

71 *See* Randall Grometstein, *Prosecutorial Misconduct and Noble Cause Corruption*, 43 CRIM. L. BULL. 63, 65 (2007); *see also* Daniel Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 46 n.41, 48 (2009).

72 *See* Mourer, *supra* note 70, at 1111 (discussing how prosecutors evaluate evidence differently after they conclude defendant is guilty). Speaking as a former prosecutor, Mark Godsey, describes how prosecutors contribute to wrongful convictions through "cognitive dissonance," "administrative evil," and "dehumanization." MARK GODSEY, BLIND JUSTICE: A FORMER PROSECUTOR EXPOSES THE PSYCHOLOGY AND POLITICS OF WRONGFUL CONVICTIONS (2017). Cognitive dissonance refers to the concept that prosecutors must believe the defendant is guilty and, during and after the trial, will go to ridiculous lengths to argue they correctly targeted the guilty party. *Id.* at 18. Administrative evil refers to the concept that individuals sometimes lose their internal moral compass when they are "doing their job" as part of a larger organization. *Id.* at 34. Acts that are wrong are justified by the fact that everyone in the organization behaves similarly. *Id.* at 37–38. In a prosecutor's office, these acts sometimes skirt the law to shape and shade the evidence to the "story" the prosecutor is presenting to the jury. *See id.* at 48–49. Dehumanization refers to prosecutors' tendency to view criminal suspects as different from themselves, and, indeed, everyone else. *Id.* at 39–42. This can result in celebrating a death penalty or ignoring the toll a guilty verdict takes on the defendant's family. *Id.* at 45.

evidence is not disclosed to the defense.[73] Failure to provide material evidence that might have changed the outcome of the trial can be a *Brady* violation if it stemmed from intentional misconduct or unintentional error.[74] It is the discretion of the prosecutor that initially determines whether the evidence is material and exculpatory.[75] Indeed, the defense of prosecutors when exposed for not sharing evidence is that such evidence was weak, unreliable, and not apt to change the outcome of the trial—the very definition of materiality.[76]

73 This refers to the case of *Brady v. Maryland*, 373 U.S. 83 (1963), in which the Supreme Court ruled that the suppression of exculpatory evidence violated due process when the evidence was material—that is, likely to change the outcome of the proceeding—either to guilt or punishment. The exculpatory evidence in that case was a confession by Brady's accomplice to the murder both were charged with. *Id.* at 86. This statement was withheld from his defense attorney. *Id.* at 84. If such evidence is determined to be material, then both intentional and unintentional failures to disclose are grounds for a reversal. *Id.* at 87. Supreme Court cases have established that the suppression of exculpatory evidence, including evidence that goes to the credibility of witnesses, could be grounds for reversal. *E.g.*, United States v. Bagley, 473 U.S. 667 (1985) (holding that when defense filed motion for prosecutor to disclose any potential impeachment evidence, and prosecutor either inadvertently or deliberately suppressed the fact that two witnesses had been paid for their testimony, it was reversible error if the disclosure failure had a reasonable probability of affecting the outcome of the case); United States v. Agurs, 427 U.S. 97 (1976) (holding that the proper standard of materiality for undisclosed evidence is whether it would have created a reasonable doubt of guilt that did not otherwise exist, and in this case, victim's prior violent crimes were not material); Giglio v. United States, 405 U.S. 150 (1972) (holding that prosecutor should have disclosed that a major witness had been promised immunity in exchange for testimony because it was material evidence going to credibility).

74 *Brady*, 373 U.S. at 87. *See also* Kathleen M. Ridolfi & Maruice Possley, Preventable Error: A Report on Prosecutorial Misconduct in California 1997–2009 36–38 (2010) (discussing *Brady* violations in the context of prosecutorial misconduct).

75 *Brady*, 373 U.S. at 84, 87–88; *see also* Ridolfi & Possley, *supra* note 74, at 36 ("Under *Brady*, it is the prosecution's responsibility to locate and disclose exculpatory information obtained by the police . . . [w]hen prosecutors make the decision as to whether evidence is *Brady* material, their belief that the defendant is guilty can create a distorting prism through which they tend to view the evidence inaccurately as a red herring or irrelevant.").

76 Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. Crim. L. & Criminology 439–40 (2010); *see* Turner v. United States, 137 S. Ct. 1885 (2017) (holding withheld evidence was favorable to the defense but would not have changed the trial outcome); *see also* Bennett L. Gershman, *The Prosecutor's Contribution to Wrongful Convictions*, *in* Examining Wrongful Convictions: Stepping Back, Moving

If appellate judges agree, then there has been no *Brady* violation.[77] *Brady* evidence can include a jailhouse informant receiving a favorable deal in return for testifying, a lab report with information favorable to the defendant, a witness's statement contradicting the prosecutor's theory of the case, or prior disciplinary action against a police officer-witness questioning his or her credibility.[78] If a prosecutor does not take steps to avoid the effects of cognitive bias, then it is easy to see how such bias may taint his or her decision as to whether evidence is exculpatory or not.[79]

Other prosecutorial violations that may contribute to wrongful convictions include coaching witnesses, mentioning inadmissible evidence in closing, eliciting inadmissible evidence from witnesses, badgering witnesses, utilizing perjured testimony, or committing other acts during trial that unfairly sway jurors and violate due process.[80] A common misconception is that law enforcement investigators are entirely in charge from the beginning of the investigation until they hand the case off for prosecution, at which time the prosecutor is solely responsible to see the case through to conviction. Sometimes, however, prosecutors are involved prior to an arrest. In fact, certain jurisdictions assign prosecutors to cases (at least serious cases) as soon as a crime has been identified.[81]

FORWARD 109 (Allison D. Redlich et al. eds., 2014) (discussing how prosecutors are responsible for ensuring only guilty parties are convicted); Jim Petro & Nancy Petro, *The Prosecutor and Wrongful Convictions*, *in* WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE 91–109 (C. Ronald Huff & Martin Killias eds., 2013) (explaining the role and actions of prosecutors in producing wrongful convictions).

77 Some states, such as Texas, have gone further and passed "open file" legislation that requires prosecutors to share all evidence with defense attorneys without a *Brady* motion. Even with a prosecutorial violation, however, a conviction may not be overturned if it is ruled harmless error.

78 *See, e.g.*, Garrett, *supra* note 2, at 110, 122–26 (discussing examples of prosecutorial failure to disclose *Brady* evidence).

79 Because of the difficulty of proving maliciousness on the part of prosecutors, partially because they may have been the victim of cognitive bias and thinking errors discussed herein, there has been discussion of how to change the standard of culpability to one of reasonableness. Sofia Yakren, *Removing the Malice from Federal "Malicious Prosecution": What Cognitive Science Can Teach Lawyers About Reform*, 50 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 359 (2015).

80 *See* Green & Yaroshefsky, *supra* note 69, at 112 n.338. For a discussion of how the belief that prosecutorial misconduct was rare has changed to awareness of pervasive and systemic issues in abuse of prosecutorial discretion, *see id.* at 52–53.

81 For an overview on how some prosecutors are involved in police

Prosecutors can be pressured by police who prematurely identify a suspect and utilize the media to encourage the prosecutor to move forward even if there is weak or contradictory evidence. However, prosecutors themselves are sometimes involved in identifying suspects during early stages and prematurely building cases rather than letting the investigation take its course.[82] Prosecutors may work with law enforcement investigators to develop leads and shape investigations by observing interrogations, offering plea bargains to co-defendants, determining charges, and negotiating with witnesses.

Media frenzy, ambition, ego, and office pressures for convictions can combine with cognitive bias and create the potential for a wrongful conviction.[83] The idea of a "conviction psychology" in a prosecutor's office is the pervasive sense that all defendants are guilty, where racking up convictions is akin to "wins" for a sports team.[84] Only winning prosecutors will be successful in most prosecutors' offices.

In the preliminary stages of an investigation, prosecutors may assist in obtaining search warrants for investigators. The probable cause standard of proof is required for a warrant to issue, so prosecutors are inclined to believe confidential informants or other

investigations see National Research Council, What's Changing in Prosecution, 8, 14–15, 45 (Philip Heymann & Carol Petrie eds., 2001).

82 Brian Reichart, *Symposium Innocence Network Conference: Tunnel Vision: Causes, Effects, and Mitigation Strategies*, 45 Hofstra L. Rev. 451, 451, 455–56 (2016). Reichart also describes one such case where the police targeted a suspect early in the investigation and arrested her in a way designed to bring pressure on the prosecutor. *Id.* at 467.

83 Mourer, *supra* note 70, 1099–101 (discussing personal and organizational pressures to obtain convictions); *see also* Keith A. Findley, *Tunnel Vision*, *in* Conviction of the Innocent: Lessons from Psychological Research 308–13 (Brian L. Cutler ed., 2012) (examining psychological research that helps explain the phenomenon of tunnel vision in criminal cases, and the effects of cognitive distortions such as confirmation and hindsight bias).

84 Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 Am. J. Crim. L. 197, 200–01, 205–06 (1988); *see also* Cyrus R. Vance, Jr., *The Conscience and Culture of a Prosecutor*, 50 Am. Crim. L. Rev. 629, 633–34 (2013) (discussing mentally disabled man's confession to a high-profile brutal murder; despite pressure to obtain conviction, prosecutor continues investigation and eventually exonerates the man, illustrating duty to seek justice, not simply a conviction). *But cf.* Kay L. Levine & Ronald F. Wright, *Prosecutor Risk, Maturation, and Wrongful Conviction Practice*, 42 Law & Soc. Inquiry 648, 648–49 (2017) (discussing "conviction psychology," origins of the phrase, and their findings that senior prosecutors do not necessarily develop such an outlook).

evidence presented to them as support for a warrant. Magistrates are supposed to be neutral, but they are inclined to believe the probable cause affidavits of police officers and there is no defense attorney at this point to inject any adversarial due process.[85] Other decision points vulnerable to prosecutor cognitive bias and a lack of system safeguards include plea-bargaining,[86] the use of informants (especially jailhouse informants),[87] and responding to requests for DNA testing or motions for new trials based on new evidence.[88] Prosecutors may resist DNA testing and otherwise block post-conviction reviews. They invent ridiculous scenarios to support their theory of the case when testing reveals that DNA does not match the person they have prosecuted. For example, the "unindicted co-ejaculator" syndrome is the tendency of prosecutors to reject the possibility that they convicted the wrong person when testing has shown the DNA recovered from a sexual assault victim came from someone other than the convicted person.[89] Prosecutors explain the finding by arguing there must have been a second offender, even when the victim stated there was only one assailant.[90] These irrational denials of prosecutors to DNA evidence that exonerates the wrongfully convicted indicate they are just as likely to be vulnerable to cognitive

85 Mary Nicol Bowman, *Full Disclosure: Cognitive Science, Informants, and Search Warrant Scrutiny*, 47 AKRON L. REV. 431, 436–40 (2014). For a full discussion of how cognitive bias affects search warrants, see generally *id.*

86 *See generally* Alafair Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183 (2007).

87 *See* Mourer, *supra* note 70, 1104 (discussing ethical issues in the use of jailhouse informants); *see generally* ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE (2009) (critiquing the widespread use of informants).

88 *See* GARRETT, *supra* note 2, at 11 (attributing lengthy exoneration times in part to judge and prosecutor opposition to requests for DNA testing); *see also id.* at 12 (referring to the capacity of multiple actors within the legal system to unconsciously discount evidence of innocence).

89 Godsey, *supra* note 72, at 14.

90 *Id.*; *see also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 898–900 (2004) (noting that during the infamous Central Park Jogger case, even after DNA testing confirmed the true rapist's confession, former prosecutors and the New York Police Department criticized the district attorney's office for moving to vacate and set aside the wrongful convictions). For other discussions of how prosecutors maintain beliefs about guilt in the face of contrary evidence, see O'Brien, *supra* note 11, at 1017 n.70, 1039–40; Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134–47 (2004) (discussing the professional incentives as well as the psychological and personal barriers to confronting claims of innocence).

bias as law enforcement investigators.

When prosecutors and investigators work together and quickly decide a suspect is guilty, they focus on constructing a case against this individual. In such situations, the prosecutor is not a separate step in the due process required by the system to prevent errors as he or she fails to act as a check on the investigators' actions. The misconduct of District Attorney Michael Nifong in Durham County, North Carolina, provides an example of what can happen when prosecutors become invested too early in a theory of the case.[91] In this high-profile 2007 incident, a woman hired by members of the Duke University lacrosse team as a stripper alleged that she was raped by members of the team.[92] Nifong made several public statements that the athletes were guilty.[93] At this very early stage, the prosecutor's office was invested in proving the guilt of the players rather than letting the investigation run its course to determine what happened.[94] The case began to fall apart because of the changing story from the victim, no physical evidence, and an ATM video that provided a solid alibi for one of the defendants.[95] Nifong stepped further over the line of ethical prosecution and instructed a lab technician to drop an exculpatory sentence from his report that stated none of the defendants' DNA was found on the victim.[96] The North Carolina state attorney general sent in two outside prosecutors who promptly dropped the charges and Nifong was eventually disbarred.[97] Other factors were at work; Nifong was in a hotly contested election and the case had created a media frenzy that he had to control.[98]

When prosecutors work with detectives during the early stages of a criminal investigation, their zeal to obtain "justice" for the victim may result in them urging detectives to "get a confession," or

91 *See generally* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 Geo. Mason L. Rev. 257 (2008) (discussing the depth and consequences for Nifong's misconduct).

92 *Id.* at 257, 286.

93 *Id.* at 303.

94 *See id.*

95 *Id.* at 286, 288; *see also* Gina Pace, *Duke Defense Cites New ATM Alibi*, CBS News (May 2, 2006, 7:17 AM), https://www.cbsnews.com/news/duke-defense-cites-new-atm-alibi/.

96 Mosteller, *supra* note 91, at 289.

97 *Id.* at 257, 305.

98 *See id.* at 298, 304.

threatening shaky witnesses with prosecution for unrelated charges if they do not testify for the state.[99] Witnesses who are cajoled, coerced, or pressured may create "false memories," which harden over time.[100] When prosecutors are involved in collecting witness statements, they may find themselves, through leading questions, "correcting" any statements of witnesses that might be helpful to the defense, or repeatedly asking questions that challenge statements inconsistent with their theory of the case.[101]

In our research,[102] we saw evidence of how prosecutors can subvert due process. One case we reviewed, while not technically a failed investigation (and therefore not included in our final sample), involved an unjustified prosecution that produced a wrongful conviction. In Charlottesville, Virginia, in 2012, Mark Weiner picked up a young female hitchhiker late at night; her boyfriend had made her walk home by herself in the dark. Weiner drove her to her mother's house. Once there, she texted her boyfriend, writing in a manner that made it appear the messages were being sent by Weiner. The texts taunted the boyfriend, saying the woman had been abducted by Weiner, chloroformed, and was going to be raped. Then, the woman texted that she was being held in an abandoned house. She eventually said she had escaped by jumping out of a second-story window and running home. Her boyfriend and mother telephoned 9-1-1. When police officers interviewed her, she stuck to her story and Weiner was arrested. However, as investigators collected evidence, her version of what happened grew increasingly improbable. According to the timing of the texts, Weiner would have had to incapacitate the woman while driving, only seconds after picking her up. No chloroformed rag was found in his car and no physical evidence was found in the abandoned house. The woman did not exhibit signs of having jumped from a high window or running a mile to her mother's house. One of the texts contained slang atypical for a 52-year-old (Weiner's age). Most importantly, records showed she used her cell

99 Bennett L. Gershman, *Threats and Bullying by Prosecutors*, 46 LOY. U. CHI. L.J. 327, 334–35 (2014) (discussing prosecutors bullying defense and prosecution witnesses); *see also* DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 146–47 (2012) (discusses problems with witness preparation and biased testimony in adversarial proceedings).

100 DANIEL L. SCHACTER, THE SEVEN SINS OF MEMORY: HOW THE MIND FORGETS AND REMEMBERS 115 (2001).

101 *See, e.g.*, GARRETT, *supra* note 2, at 33, 76 (providing examples of the leading and/or "correcting" questions invoked by prosecutors during interviews).

102 All case details and data are from Rossmo & Pollock, *supra* note 68.

phone many times that night, pinging cell towers near her mother's home, not the abandoned house she said she had been held in. Two officers independently arrived at the conclusion that she was lying. Yet the case still proceeded to trial.

The prosecutor interviewed one of these officers shortly before he was to testify; when she learned he had concluded the calls came from the vicinity of the alleged victim's mother's house, she excused him. She also refused to call the other officer to testify once she heard he also had come to the same conclusion. This information was not provided to defense counsel, a clear *Brady* violation.

One of the police officers then called the defense attorney and told him what they had found. When the defense attorney attempted to use this officer's testimony, the prosecutor argued the attorney had not laid the proper foundation and the judge ruled against allowing the admission of the cell phone records or the officer's testimony, despite its clear probative value. Weiner was convicted and sentenced to eight years in prison.

Evidence continued to mount that the woman had lied—she evidently admitted as much to her ex-husband, witnesses said she had been to drug parties in the abandoned house despite her statements to police that she had never been there before, and medical experts swore chloroform does not work in the manner she described. After two and a half years in prison, Weiner's conviction was vacated. The prosecutor only stopped fighting defense motions when the alleged victim was arrested for selling cocaine to two undercover officers. In addition to his loss of freedom, Weiner also lost his job, his home, and his retirement savings—but not because of a failed investigation by law enforcement. The investigators were ready to share evidence that cast doubt on Weiner's guilt. This wrongful conviction came about because of a prosecutor who believed the alleged victim over physical evidence and experienced police investigators and obtained a conviction despite an investigation that proved reasonable doubt.

In several of our reviewed cases, prosecutor actions were identified as important causal factors. In a triple murder case in Indiana, the district attorney's office contributed to a failed investigation and the wrongful conviction of David Camm. The DA and his investigators visited the murder scene, causing some confusion over the division of responsibility with police investigators. The DA also called in a private bloodstain pattern analysis expert instead of using the Indiana State Police expert. The police and prosecutor quickly decided Camm was guilty even though

much of the evidence in the investigation had yet to be collected and analyzed. Confirmation bias set in and critical DNA evidence was not submitted to CODIS. When the DNA and a handprint was eventually found to match a violent convicted felon, the prosecutor asserted this individual did the murders in conjunction with Camm. As we noted in that analysis, the "sunk costs" for the DA's office and the police were high and influenced their inability to admit they had been mistaken in arresting David Camm.

The Michael Morton case also involved inappropriate district attorney involvement that steered the course of the murder investigation. The prosecutor in this case worked closely with inexperienced homicide investigators. The "law and order" mentality of both agencies resulted in a rush to judgment over Morton's guilt. This led to confirmation bias; innocuous events were distorted, important investigative leads were overlooked, and critical evidence was ignored. The prosecutor was also guilty of *Brady* violations. Sources that described the investigation made it clear that the district attorney directed the actions of law enforcement investigators. Further, the DA's office delayed Morton's release for some years by resisting attempts to have the DNA evidence tested.

Juan Rivera was another case where prosecutor interference was identified as a contributing factor to the wrongful conviction. This case involved Lake County State's Attorney Michael Waller who was highly influential in Lake County, a suburb of Chicago. Instead of critically exposing the inconsistencies and problems in Rivera's first confession, he told detectives to go back and get a better one, despite the fact that Rivera was clearly suffering mental distress at this point. This early intervention marks Waller's involvement as part of the investigative failure. The Rivera case is one of five known wrongful prosecutions from Lake County, Illinois. Murder cases against Jerry Hobbs and James Edwards, and rape convictions against Bennie Starks and Angel Gonzalez, were overturned as the result of DNA evidence. Rivera's conviction was eventually vacated when an appellate court decided that no reasonable trier of fact could find him guilty.

In the JonBenét Ramsey case, two causal factors involved the district attorney's office—"conflict between DA and police," and "Ramseys' relationship with DA." There was conflict and rivalry between the DA's office and the police department, which led to poor cooperation and communication. The case was hampered by the prosecutor's relationship with the Ramseys; police investigators

felt the prosecutor was blocking their investigation, especially after the grand jury returned an indictment and the prosecutor still refused to pursue charges.

In the Glenn Tinney case, the "prosecutor's agenda" and "interagency conflict" were identified as causal factors. The elected district attorney had made campaign promises to clear unsolved homicide cases, a political commitment which became more important than proper investigative practices. When an investigator from the prosecutor's office received information about Tinney in connection to an unsolved murder, he and an assistant prosecutor began to build a case without collaborating with police detectives. When Tinney eventually pled guilty, the detectives only learned about it from the newspaper. They challenged the district attorney's office over the validity of Tinney's confession and proved he knew nothing about the crime independently from what he had been told. This paved the way for the court allowing Tinney to withdraw the guilty plea.

Prosecutorial interference was an issue in other cases even when it was not classified as a major causal factor. During the Michael Crowe investigation, the prosecutor seemingly influenced the report of the FBI's Behavioral Analysis Unit profiler to support the police theory of the murder. In the Jonathan Fleming case, the conviction was overturned through the efforts of the Conviction Review Unit, but it was the actions of the original prosecutor that led to the conviction. The prosecutor committed *Brady* violations and pursued a conviction even while in possession of evidence that indicated Fleming could not have been involved.

When three-year-old Riley Fox was sexually assaulted and killed in Wilmington, Illinois, police investigators rushed to judgment and quickly focused on her father, Kevin Fox, as their prime suspect. They never seriously considered the stranger-intruder theory, made no attempt to investigate known sex offenders in the area, ignored the broken lock on the back door of the Fox house, and failed to connect a neighbor's burglary to the murder. When Fox was indicted, the prosecutor, campaigning for re-election, quickly announced he would seek the death penalty. He made false public statements about the victim's previous sexual abuse (there was none), and obtained an indictment before receiving all the physical evidence analysis. The newly elected prosecutor dropped the charges after a review. The true murderer was not discovered until some years later.

In the Dan and Fran Keller case, Travis County prosecutors were involved in the investigation to the point that they directed who the police should target and interrogate. A resulting (false) confession was then used to prosecute the Kellers. Finally, in the wrongful convictions of Michael Hash and Bruce Lisker, jailhouse informants were used to bolster weak cases. Unfortunately, confirmation bias prevented prosecutors from objectively evaluating their notoriously unreliable witnesses.

1. Probable Cause

While the road to a wrongful conviction begins with the police, it must pass through the district attorney's office before the case reaches trial. What the prosecutor sees is very much a function of what the detective investigates. As a consequence, as discussed above, prosecutors are vulnerable to the same cognitive biases as detectives.

A contributing problem is the low bar for probable cause for arrest; "[p]robable cause requires more than bare suspicion, but need not be based on evidence sufficient to support a conviction, nor even a showing that the officer's belief is more likely true than false."[103] The history of this definition is based in court cases that involved warrantless searches and detentions under circumstances in which events were moving quickly and police had to act immediately or risk the loss of evidence or the flight of a suspect.[104] Within this context, the court's definition of probable cause makes sense.

However, this same probable cause definition is used for all arrests, including those with no exigent circumstances. Providing police the legal power to arrest someone who is more likely innocent than guilty is difficult to justify when evidence destruction or escape risks are not concerns. If there is time for a proper investigation, evidence can be collected and evaluated to more accurately determine the strength of any arrest grounds. A probable cause that is not probable is inconsistent with both language and mathematics.

The most certain way to prevent a wrongful conviction is to minimize wrongful arrests of innocent people. It is not safe to assume that a wrongful arrest will be later corrected by the district

103 Hughes v. Meyer, 880 F.2d 967, 970–71 (7th Cir. 1989) (citing Brinegar v. United States, 338 U.S. 160, 175–76 (1949)).

104 *See, e.g.*, Carroll v. United States, 267 U.S. 132 (1925) (upholding the warrantless search of an automobile when there is probable cause and exigent circumstances).

attorney or that a judge or jury will come to the correct finding. Prosecutors may fail to act as an objective check and balance as they can suffer from the same cognitive biases as police investigators. Early mistakes may never be noticed; even if they are, much damage can still occur. The consequences of a wrongful arrest and criminal charge are more serious than for a warrantless search or temporary detention. They can involve loss of liberty for an extended period of time (months or even years if bail is an issue), damage to one's reputation, high costs of legal representation, and the risk of being wrongfully convicted and punished. This danger is all the greater for those accused parties who do not have competent defense counsel.

D. Recommendations

The sentinel events initiative can make a valuable contribution to the prevention of criminal justice failures. By unraveling the subtle psychological, sociological, and organizational influences that enable failures, the model provides an approach for analyzing systemic causation. The sentinel event perspective assumes errors are the product of multiple factors, both organizational and individual, none of which are necessarily sufficient on their own.[105] Human error is only one variable among other operational and structural elements, and a broader understanding of all failure causes and the relationships between them is necessary for effective prevention. The real value of the sentinel event approach lies in the ability to learn from the analysis of a particular failure and apply those lessons to future situations in order to reduce risk.

However, there are some intrinsic differences between criminal justice failures and transportation accidents that limit the generalizability of single-incident reviews. Mechanical breakdowns and machine operation usually involve deterministic relationships; wrongful convictions, on the other hand, are the product of numerous causal factors functioning within networks of probabilistic interactions. There is rarely a root cause, as such, because there is no single origin and only uncertain processes. The factors to blame in a given case may not produce a future failure. Conversely, there is no guarantee that behavior tolerable in one police investigation will not lead to a failure in the future. As we rarely study non-failures, we have little idea how often identical fact patterns do or do not result in problematic outcomes.

105 U.S. Dep't of Justice, *supra* note 1, at 1, 5, 8.

The primary importance of this study is in its analysis of systemic patterns of criminal investigative failures—the identification of the most rampant causal factors and the relationships between them—for a large number of different cases. This information allows us to generally outline dangerous scenarios and problematic police behaviors.

Five main recommendations arise from this research: (1) systemic awareness; (2) risk recipes; (3) evidence procedures; (4) cognitive de-biasing; and (5) organizational monitoring.

1. Systemic Awareness

Identifying the various causes and systemic nature underlying most criminal investigative failures is the first step to understanding and preventing them. The cases examined here involved multiple causal factors (from 5 to 12); the majority were personal in nature, though organizational and situational factors also played roles. "A wrongful conviction is an 'organizational accident.' Many small failures, no one of them independently sufficient to cause the event, combine and cascade, and only then produce a tragedy."[106] The systemic nature of these failures suggests their incidence may be decreased by targeting the most virulent causes or causal clusters. Fixing only one problem may not be sufficient to prevent a failure, particularly if that issue is seen in isolation.

2. Risk Recipes

The systemic causes identified in this study provide a basis for developing "risk recipes"—causal profiles or typologies that can be used to assess the threat of a criminal investigative failure. Doyle has suggested failure causal data could also inform a triage system for prioritizing the investigation of innocence claims.[107] While most factors are not categorical indicators, their existence should be treated as a warning; the more causes present, the greater the risk, particularly if they form a cluster pattern (see Figure 2). Any evidence malfunctions, such as careless reliability assessments, are highly problematic. Risky investigations should be responded to with diligence by detectives, engagement by supervisors, and monitoring

106 James Doyle, *Looking Beyond the 'White Bears' in Criminal Justice*, THE CRIME REP. (June 6, 2017), https://thecrimereport.org/2017/06/06/looking-beyond-the-white-bears-in-criminal-justice/.

107 Posting of James M. Doyle, 1jamesdoyle@gmail.com, to criminal-justice-sentinel-events@googlegroups.com (May 31, 2017) (on file with author).

by police management. They should also be carefully reviewed by prosecutor's offices.

3. Evidence Procedures

Wrongful convictions and other types of criminal investigative failure can be reduced by implementing proper procedures for evidence collection, evaluation, and analysis. A high proportion (88%) of the cases in our study suffered from multiple evidence failure types, the most frequent being biased evidence evaluation (such as not assessing the reliability of a witness).

The major problems underlying evidence failings were a rush to judgment and cognitive bias. Prematurely shifting from an evidence-based investigation to a suspect-based investigation can shut down evidence collection efforts. Confirmation bias distorts the evaluation of evidence reliability, alters probability assessments, and confuses logical evidence analysis. Awareness training and appropriate operational procedures can help mitigate these problems. Effective supervision and engaged management can also play an important role in making sure detectives properly understand the evidence in a criminal investigation.

4. Cognitive De-biasing

"The first principle is that you must not fool yourself—and you are the easiest person to fool."[108]

Flawed decision-making and poor thinking were behind most of the failed investigations we studied. Intuition, rush to judgment, tunnel vision, and groupthink all pose risks to objective and accurate evidence evaluation and analysis, while probability errors and faulty logic led detectives to derive defective conclusions. Confirmation bias was the single most frequent problem in wrongful conviction cases. Biases, because they are implicit, are difficult to control. They function independently of one's intelligence, and awareness of their dangers makes them no easier to avoid.[109] However, research has shown that specialized training may help mitigate their influence.[110]

108 Richard P. Feynman, Commencement Address at California Technical Institute of Technology, Cargo Cult Science: Some Remarks on Science, Pseudoscience, and Learning How to Not Fool Yourself (June 14, 1974).

109 Richards J. Heuer, Jr., Psychology of Intelligence Analysis 122 (1999); Keith Stanovich & Richard F. West, *On the Relative Independence of Thinking Biases and Cognitive Ability*, 94 J. Personality & Soc. Psychol. 672, 686–91 (2008).

110 Carey K. Morewedge et al., *Debiasing Decisions: Improved Decision Making with a*

The development and testing of de-biasing training should be an important focus of future efforts to improve criminal investigations and reduce the frequency of wrongful convictions.

Independent reviews may be the best method to effectively deal with cognitive biases as rethinking a case is difficult for detectives with prior involvement in the investigation.[111] External peer reviewers, for a variety of psychological and organizational reasons, are more apt to notice mistakes and omissions—and much more likely to point them out. In the United Kingdom, after a certain number of months, an unsolved murder is reviewed by a senior investigating officer with no involvement in the case; in high profile or complex cases, the officer is drawn from another police force.[112]

5. Organizational Monitoring

Ineffective supervision and disengaged management were identified as enabling factors in several of the failures in this study. A police agency should have the necessary procedures and regulations in place to make sure basic investigative steps regarding evidence are followed. Supervisors can control risky investigative practices and monitor illogical investigative conclusions, while managers can prevent the development of noble cause corruption. Police leaders should establish professional and independent relationships with district attorney's offices.

Cognitive biases, the most frequent cause of failure in our study, are exceptionally difficult to control; however, investigation supervisors are in a position to independently review cases, while police managers can establish operational procedures for internal devil's advocates and external reviews.[113] The organization provides the best means for controlling personal error.

Police managers also need to understand how difficult it may be for those officers heavily invested in an investigation to be completely objective, particularly about missteps.[114] Better results can be achieved through the use of investigators with no previous connection to the crime, as in the procedure followed by police

Single Training Intervention, 2 POL'Y INSIGHTS FROM BEHAV. AND BRAIN SCI. 129, 129, 131, 134, 136–37 (2015).

111 Rossmo, *supra* note 51, at 225.

112 *See* ASS'N OF CHIEF POLICE OFFICERS (ACPO), MURDER INVESTIGATION MANUAL 84–86 (2006) (recommending review by outside officer between 7 and 28 days after investigation commences).

113 *See* Rossmo, *supra* note 2, at 277, 289–90.

114 Rossmo, *supra* note 51, at 225.

agencies in the United Kingdom.[115]

An appreciation of the role of standard operating practices, routines, and bureaucratic inertia is essential for understanding organizational behavior.[116] Police leaders and managers should carefully review and eliminate problematic practices and routines, both formal and informal, that support dangerous decision-making.

E. Study Limitations

People and organizations are not mechanical systems and efforts to deconstruct their failures are destined to be somewhat subjective;[117] however, every case in this study was reviewed by two researchers, at least one of whom had prior police investigative experience, to increase reliability. We were limited by the availability of information and case documentation, and could only identify the most important known causes. Certain factors may have been missed, while others were likely undercounted (e.g., intuition, detective ego, groupthink, probability errors). All the cases in this study involved either a murder or a rape investigation (mostly the former). While many of the general findings probably apply to police investigations of other crime types, some of the identified causal factors and clusters will likely be different.

VI. Conclusion

Criminal investigative failures can have serious and far-reaching consequences for both individuals and their communities. Unsolved crimes allow criminals to avoid justice and erode the public's faith in their police departments. Wrongful convictions result in the punishment of an innocent person and the escape of the real offender. These failures undermine the deterrence of the law and may bring the entire criminal justice system into disrepute.

The media portrayal of some investigative failures has been oversimplified, leading to an incomplete understanding of how things go wrong and to a loss of subtlety in prevention efforts. Most mistakes have a systemic and multi-factored causal nature. A

115 *See* ACPO, *supra* note 112, at 86 ("In cases involving high profile, complex or sensitive issues affecting the investigation, consideration should be given to appointing a reviewing officer from another force.").

116 *See* Allison & Zelikow, *supra* note 38, at 5–6, 169–70 (discussing the significance of "organization theory" which emphasizes the "distinctive logic, capacities, culture and procedures" of government organizations).

117 Pupulidy, *supra* note 40.

few causes are situational and beyond the control of the criminal justice system. Others are organizational and amenable to effective supervision and engaged management. However, the most common causal factors are personal in type, and arguably within the control of the individual detective.

As discussed above, much previous research has focused on the legal and technical causes of wrongful convictions. A different approach to causality was followed by MacFarlane.[118] He identified four predisposing circumstances, three of which were also found in our study: (1) media pressure to solve a horrific crime; (2) suspect from an unpopular/minority group linked to criminal activity; (3) noble cause corruption; and (4) investigative decision-making based on speculative/incomplete information.[119] He cautions that these circumstances are difficult to manage as they fall below the criminal justice system's "radar screen."[120] This warning supports the use of risk recipes for identifying investigations requiring extra diligence.

Criminal justice failures are challenging, all the more so if they are embedded in a political context. Innovative and effective methodologies are necessary for both problem analysis and solution generation. Detectives must minimize the risk of error by accurately assessing evidence reliability and avoiding premature shifts to suspect-based investigations. Resolving issues of cognitive bias and avoiding logic/analytic mistakes are equally important. While debiasing training, engaged supervision, and external reviews can help, more research is needed to establish realistic and sustainable means of optimizing investigative thinking and reducing the incidence of failure.

118 MacFarlane, *supra* note 56 (studying wrongful convictions as the product of predisposing conditions—i.e., environmental factors—and tunnel vision).

119 *Id.* at 5–6.

120 *Id.* at 5.