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when there is a question of success,
looks into his work for a reply."

—Ralph Waldo Emerson

In Memory of

MARVIN LAWRENCE "BUDDY" HUDSON

1933 – 2021

VOTING RIGHTS AND THE CLOAK OF ADMINISTRATIVE INCOMPETENCE

BEN MERRIMAN & JEFFREY NATHANIEL PARKER†

I. INTRODUCTION

Despite the existence of strong constitutional and statutory protections of the right to vote, participating in elections remains difficult for many Americans. Turnout in major American elections is consistently low in comparison to other democracies and varies widely across states and localities.[1] This Article draws upon a large body of social scientific research to describe what practices make voting difficult and how these practices withstand legal scrutiny. It argues that practices of election administration, rather than formal provisions of law, are currently the source of the most significant practical barriers to participation in American democracy. State and local election officials often successfully defend such administrative barriers, or deflect scrutiny of them, by "playing dumb"—claiming that official conduct that has deleterious effects on some group's ability to vote arises from mistakes, incompetence, or organizational incapacity rather than an intention to make voting difficult.[2] These professions are often effective ways of disclaiming responsibility. Inadequate material support for election administration, the organizational complexity of election

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[1] MELANIE JEAN SPRINGER, HOW THE STATES SHAPED THE NATION: AMERICAN ELECTORAL INSTITUTIONS AND VOTER TURNOUT, 1920-2000 16–17 (2014).

[2] *See infra* Part IV, Section A "Playing Dumb" (discussing feigning lack of knowledge in response to social confrontation).

administration, and major differences between social scientific and legal approaches to creating knowledge have the combined effect of making federal legal remedies a relatively ineffective response to some common administratively imposed burdens on the right to vote.[3] Further, the ramified legal effects of *Crawford* and *Shelby County* have created a voting rights regime defined by judicial credulity: officials readily disclaim bad motives because courts subject their accounts to remarkably little scrutiny.[4]

Judicial credulity directs legal attention away from the practical complexity of elections. Many of the reasons why Americans find it difficult or impossible to vote flow from combinations of state and local administrative practices.[5] Registering to vote and casting a ballot are relatively cumbersome forms of routine public interaction with government, and in contrast to technological changes that have simplified individuals' interactions with many other parts of American government, most Americans who participate in elections still register to vote and cast a ballot in person.[6] The time cost of voting is hardly insuperable for the typical American voter, as the extraordinary turnout in the 2020 general election showed.[7] However, it is non-trivial. What appear to be modest average burdens on voting entail substantial burdens for a subset of voters. There are significant geographic and racial disparities in how these practical burdens are distributed: they fall disproportionately upon groups that have historically suffered from discrimination and remain concentrated in states and localities with histories of discriminatory voting policies.[8]

It is certainly possible, and probably very common, for voters to encounter barriers to participation despite the good faith efforts of administrators. Election administration is, at all levels of

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[3] *See* SPRINGER, *supra* note 1, at 167–68.

[4] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008); Shelby Cnty. v. Holder, 570 U.S. 529 (2013). *See generally* Dale E. Ho, *Voting Rights Litigation after* Shelby County*: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U J. LEGIS. & PUB. POL'Y 675, 676 (2014) (discussing the ramifications of the *Shelby County* decision).

[5] *See* SPRINGER, *supra* note 1, at 20–21.

[6] *See id.* at 21–22.

[7] Jacob Fabina, *Despite Pandemic Challenges, 2020 Election Had Largest Increase in Voting Between Presidential Elections on Record*, U.S. CENSUS BUREAU (Apr. 29, 2021), https://www.census.gov/library/stories/2021/04/record-high-turnout-in-2020-general-election.html.

[8] SPRINGER, *supra* note 1, at 24–25, 145.

government, a low budgetary priority.[9] At the state and local levels, the officials charged with administering elections ordinarily hold an exceedingly broad portfolio of official responsibilities, which they must discharge with the aid of very modest staffs.[10] The costs of administering elections are devolved to local governments with limited resources and capacity.[11] These resource shortages are a serious policy problem that courts cannot be expected to resolve.

However, federal law provides few good bases for distinguishing honest shortcomings from bad action. This Article shows that the contours of federal voting rights law allow election officials to avoid legal ascriptions of impermissible motives by presenting themselves as incompetent and that such self-presentations could not succeed without a formally credulous audience. Such officials, who are often directly elected, also face few political sanctions for such self-presentations. If the alternative is a conclusion—whether in public or in court—that a policy or policy implementation was, for instance, designed to "target African Americans with almost surgical precision," it is politically and legally preferable to claim to be an inept surgeon.[12] This vocabulary of incompetence may include professions of ignorance of facts, ignorance of the (potentially dubious) motives of other government actors, ignorance of how information was produced, or organizational incapacity.[13] Such professions work, in part, because they align with particular features of legal doctrine, but they also work because they are in many cases plausibly true.

Official performances of incompetence and inattention have a long history, some far more malevolent than the matters examined here. Perhaps the most dramatic of these come in the cases of lynching and other instances of mob violence when officers of the law "lost" individuals in their custody.[14] Mob efforts to take the

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[9] PRESIDENTIAL COMM'N ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS 10 (Jan. 2014).

[10] THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 150 (2019 ed.).

[11] PRESIDENTIAL COMM'N ON ELECTION ADMIN., *supra* note 9, at 10.

[12] N.C. State Conf. NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).

[13] *See generally infra* Part IV, Section A "Playing Dumb" *and* Barbara Kellman, *When Should a Leader Apologize—and When Not?*, HARV. BUS. REV. (Apr. 2006), https://hbr.org/2006/04/when-should-a-leader-apologize-and-when-not (discussing failure of political actors to take responsibility for their actions).

[14] *See* Christopher Waldrep, *National Policing, Lynching, and Constitutional Change*, 74 J. S. HIST. 589, 616, 618 (2008).

law into their own hands did not always succeed: officials could, and in many cases did, successfully intervene.[15] At other times, they actively "colluded with mobs"[16] or passively turned a blind eye.[17] To consider an example more closely connected to voting rights, racially exclusionary white primaries were sustained by the official pretext that political parties were private clubs not properly subject to state scrutiny.[18]

Our examples, drawn from administrative practices challenged in federal courts, are by definition relatively extreme—the idea that burdens on voting so plausibly flow from public organizational failings certainly precludes any legal challenge of most burdens as the potential result of willful maladministration.[19] So defined, this problem does not admit of obvious legal solutions. The framework of voter registration and voter roll maintenance defined in the National Voter Registration Act ("NVRA") and Help America Vote Act ("HAVA"), though a source of serious problems, is by now largely settled.[20] The protections afforded by surviving sections of the Voting Rights Act ("VRA") are beset by important conceptual difficulties.[21] Disparities in the ease of voting arise from causally complex processes, which often operate across public organizations and levels of government.[22] Statistics are often the most apt means of describing these patterns, but the federal judiciary has been highly resistant to the use of complex social statistics in voting-related cases and, in many instances, lacks well-defined standards or concepts for using statistics thoughtfully.[23] The Supreme Court's

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[15] *See, e.g.*, Ryan Hagen et al., *The Influence of Political Dynamics on Southern Lynch Mob Formation and Lethality*, 92 SOC. FORCES 757, 757–58 (2013); E. M. Beck et al., *Contested Terrain: The State versus Threatened Lynch Mob Violence*, 121 AM. J. SOCIO. 1856, 1860 (2016).

[16] Kinga Makovi et al., *The Course of Law: State Intervention in Southern Lynch Mob Violence 1882-1930*, 3 SOCIO. SCI. 860, 869 (2016).

[17] James W. Clarke, *Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South*, 28 BRIT. J. POL. SCI. 269, 270 (1998).

[18] SPRINGER, *supra* note 1, at 155–56.

[19] *See* PRESIDENTIAL COMM'N ON ELECTION ADMIN., *supra* note 9, at 9.

[20] *See* SPRINGER, *supra* note 1, at 167.

[21] Voting Rights Act of 1965, Pub. L. No. 107-252, 79 Stat. 437 (1965); Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (2002); U.S. ELECTION ASSISTANCE COMM'N, ELECTION ADMINISTRATION AND VOTING SURVEY: 2018 COMPREHENSIVE REPORT 42–43 (2019).

[22] *See* Robert S. Montjoy, *The Public Administration of Elections*, 68 PUB. ADMIN. REV. 788, 793–94 (2008).

[23] *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

rulings in recent partisan gerrymandering cases offer the powerful suggestion that further development of statistical evidence is unlikely to alter legal analysis.[24] In earlier cases, most notably *Crawford v. Marion County Election Board* (discussed *infra*), the Court effectively foreclosed potential consideration of what has since become a well-developed and compelling body of evidence about contemporary practices that make electoral participation harder.[25]

The limits on the legal use of social statistics do not simply arise from fine points of doctrine. Judicial understandings of cause often differ markedly from the logic of causal inference that undergirds social statistical research; in commending statistical evidence to judges' attention, the social sciences have perhaps not put their best foot forward.[26] One of the guiding principles of sociological research to come from the last century is the Thomas Theorem, which states parsimoniously that "if men define situations as real, they are real in their consequences."[27] A legal analog of this might be "if judges do not define situations as real, they cannot be real in their consequences." No matter how sophisticated the statistical techniques become, if judges are hesitant to grant them epistemological priority, then they will never be as useful as we might like at effecting actual change. Even supposing the judiciary looked more favorably upon the forms of social scientific evidence it has resisted up to this point, scarcity of government- or researcher-produced data would still make it difficult to describe many kinds of disparities well enough to make them amenable to legal remedy.

We conclude that other forms of social scientific evidence, and other aspects of existing law, might provide promising ways of promoting unburdened exercise of the right to vote. Forms of qualitative social science grounded in interviewing, direct observation, and interpretation often rely on underlying views of cases, causes, and evidence that approximate judicial reasoning much more closely than standard forms of statistical analysis. Administrative burdens on the right to vote might also be constructively reconceived in other legal terms. Given that administratively imposed

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[24] *See* Gill v. Whitford, 138 S. Ct. 1916 (2018).

[25] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

[26] *See* discussion *infra* Part III, Section A, Subsection ii, "The Supreme Court has Broadly Avoided Statistics or Statistically-Supported Explanations."

[27] WILLIAM ISAAC THOMAS & DOROTHY SWAINE THOMAS, THE CHILD IN AMERICA (1928).

burdens on the right to vote flow from state and local practices and are closely associated with materially inadequate government support for the task, state legal guarantees of fair and adequate support for the administration of democracy could be quite effective. The majority of state constitutions contain language that could be invoked to this end, and similar legal guarantees have long played an important role in addressing disparities in public education.[28] In addition, American administrative law has well-developed conceptions of reasonable conduct, and administrative scholarship and practice is increasingly oriented toward greater public transparency and participation in administrative decision-making.[29] A confrontation with the overall inefficiency and opacity of election administration might also be a powerful means of addressing disparities.

II. ADMINISTRATIVE PRACTICES BURDEN THE RIGHT TO VOTE

Rights do not enforce themselves. The practical experience of government protections, including rights or entitlements defined by statute or judicial interpretation, is mediated by the work of administrators. Sympathetic administrators have played a major role in making rights real.[30] Conversely, frontline administrative behavior and designed features of public programs can impose a range of burdens on individual members of the public, which may markedly limit the practical benefit of government for the individual and diminish trust in government.[31] A growing social scientific literature, reviewed in detail below, catalogues the extraordinary effect of administrative burdens in the everyday experience of government in the United States.

The administration of elections and the democratic process exemplifies this pattern. Compared to many other forms of routine public interaction with government, participating in elections is

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[28] EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 67–68 (2013).

[29] *See generally* Glen Stazewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 886 (2011) ("Such transparency is needed to provide citizens and other public officials with an opportunity to discuss, evaluate, and criticize those decisions, 'as well as potentially to seek legal or political reform.'").

[30] CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 218 (2010).

[31] Megan Doughty & Karen J. Baehler, *"Hostages to Compliance": Towards a Reasonableness Test for Administrative Burden*, 3 PERSP. ON PUB. MGMT. & GOVERNANCE 273, 286 (2020).

relatively complex and time consuming.[32] The degree of burden placed on voters, and voters' capacity to surmount these burdens, varies widely across places and populations.[33] A great deal of recent social scientific and legal work on voting rights examines practical limitations on the right to vote and the value of a vote. Much of this work has focused on major judicial rulings or controversial statutory provisions such as voter identification requirements.[34] Such work focuses "less on understanding and improving the relationship between the administrative process and citizen participation in elections and more on the statutory and constitutional language designed to structure this dynamic."[35] This section argues that the most significant contemporary obstacles to voting are closely associated with the relatively neglected work of administrators: ineffective administration, shortages of public organizational capacity, and poor communication and responsiveness make voting more difficult for many Americans, especially in communities and polities where confidence in government is already low.[36]

Although academic interest in voting and elections issues has grown markedly over the past decade, there are several important features of contemporary election administration that are still imperfectly understood. For example, neither scholars nor government officials possess very detailed information about the experience of voting in most local places in the United States. It is not always clear how individual and communal perceptions of government and its motives shape the subjective understanding and experience of how elections are administered.

A. The Importance and Ambiguity of Administrative Burden

Administrative burdens are the learning, compliance, or psychological costs that are imposed on individuals in their

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[32] *See generally* Robert S. Montjoy, *The Public Administration of Elections*, 68 PUB. ADMIN. REV. 788, 793–94 (2008).

[33] *See* John Kuk et al., *A Disproportionate Burden: Strict Voter Identification Laws and Minority Turnout*, 8 POLS. GRPS. & IDENTITIES 1, 7 (2020).

[34] *Id.* at 2.

[35] Jennifer L. Selin, *The Best Laid Plans: How Administrative Burden Complicates Voting Rights Restoration Law and Policy*, 84 MO. L. REV. 999, 1004 (2019).

[36] Shannon Portillo et al., *The Disenfranchisement of Voters of Color: Redux*, 23 PUB. INTEGRITY 111, 112 (2021).

interactions with government.[37] The direct effect of administratively burdensome implementations of policy is to limit the ability of individuals to make practical claims on government.[38] A broader, indirect effect may be to limit administratively burdened individuals' future efforts to engage with or make claims upon government and to lower confidence in government.[39] Herd and Moynihan examine administrative burdens in several areas of policy in the United States: means-tested social welfare programs, age-based programs like Medicare and Social Security, voting policy, access to reproductive health services, and federal income tax filing.[40] The public's use of such services and benefits may be limited, in the first place, by a lack of knowledge of program availability or eligibility, or by difficulty in obtaining information. For many of the best-studied instances of burden, such as barriers to enrollment in state-administered programs like Medicaid and Supplemental Nutrition Assistance Program ("SNAP"), a great obstacle is bureaucratic complexity, such as that arising from documentation and paperwork requirements.[41] The cognitive cost of navigating these aspects of participation in public programs has the strongest adverse effect on precisely the members of the population most in need of the assistance the programs offer.[42] Establishing or maintaining eligibility may also require submitting to extensive, highly intrusive examination of one's personal affairs, a process that may feel pointedly inquisitorial and calculated to produce reasons to deny the claims of eligible beneficiaries.[43]

Administrative burdens bear upon the core public question of the distribution of resources and protections, but it is often difficult to mount effective political challenges to administratively burdensome practices. The decision-making processes that produce

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[37] PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 22–23 (2018).

[38] *Id.* at 37.

[39] *Id.* at 3.

[40] *Id.* at 6–7.

[41] *Id.* at 24.

[42] Julian Christensen et al., *Human Capital and Administrative Burden: The Role of Cognitive Resources in Citizen-State Interactions*, 80 PUB. ADMIN. REV. 127, 131 (2019).

[43] Spencer Headworth, *Getting to Know You: Welfare Fraud Investigation and the Appropriation of Social Ties*, 84 AM. SOCIO. REV. 171, 172 (2019); Cayce Hughes, *From the Long Arm of the State to Eyes on the Street: How Poor African American Mothers Navigate Surveillance in the Social Safety Net*, 48 J. CONTEMP. ETHNOGRAPHY 339, 340, 353 (2019).

burdens are frequently obscure, and it is often not possible to show that a burdensome outcome was intended.[44] Administrative decision-making processes are also difficult to influence by conventionally political tactics: administrative design and implementation processes strongly favor organized interests over individuals and technical expertise over expressly political claims-making.[45]

Some administrative burdens appear calculated to make it more difficult for members of the public to make claims on government,[46] leading to the characterization of administratively burdensome design as "policymaking by other means."[47] However, it is not always reasonable to tie a burdensome policy implementation to a deliberate motive. Burdens may arise from poor or incorrect decisions that were made with good intentions. Contemporary policymakers are often embedded within organizational structures that are ineffective at digesting policy information that could support effective administrative design and implementation.[48] At the state level, policymakers may also face acute shortages of policy information or resources. Although the U.S. Congress has thousands of expert staff members, many state legislatures lack institutional policy staffing and have little or no dedicated staffing for individual legislators.[49] State agencies have relatively greater policy capacity, but this is often very modest when viewing the scope of the task before them.[50] This lack of policy capacity is a significant reason why delegation of authority to the states frequently does not have the salutary, democratic effects that theories of American federalism

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[44] Jacob S. Hacker, *Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243, 245 (2004).

[45] RACHEL AUGUSTINE POTTER, BENDING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY 47 (2019); Susan Webb Yackee, *Participant Voice in the Bureaucratic Policymaking Process*, 25 J. PUB. ADMIN. RSCH. & THEORY 427, 431 (2014).

[46] Carolyn J. Heinrich, *Presidential Address: "A Thousand Petty Fortresses": Administrative Burden in U.S. Immigration Policies and its Consequences*, 37 J. POL'Y ANALYSIS & MGMT. 211, 216 (2018).

[47] HERD & MOYNIHAN, *supra* note 37, at 8.

[48] FRANK F. BAUMGARTNER & BRYAN D. JONES, THE POLITICS OF INFORMATION: PROBLEM DEFINITION AND THE COURSE OF PUBLIC POLICY IN AMERICA 39 (2015).

[49] MATT GROSSMAN, RED STATE BLUES: HOW THE CONSERVATIVE REVOLUTION STALLED IN THE STATES 55 (2019); THE COUNCIL OF STATE GOV'TS, *supra* note 10, at 81.

[50] *See generally* Neal D. Woods & Michael Baranowski, *Legislative Professionalism and Influence on State Agencies: The Effects of Resources and Careerism*, 31 LEGIS. STUD. Q. 585, 586 (2006) (arguing that greater legislative resources increase influence on administrative agencies, but scarce use of resources decreases legislative influence).

anticipate.[51] Many contemporary policy issues, particularly matters like election administration where a great deal of authority reposes at the state or local level, involve a high degree of technical uncertainty and jurisdictional fragmentation.[52] Problems of this class have been a prominent focus of policy research for decades, but technical complexity and dispersed or overlapping patterns of authority remain enormous obstacles to effective policy design.[53]

In addition, governments characteristically shift administrative work onto other actors, including individual members of the public, when their own capacity is limited.[54] Administrative choices that shift work onto individuals may be an unavoidable organizational response to resource constraints externally imposed by political actors—a very common problem for public organizations given that the imposition of fiscal constraints is a defining tactic of modern American politics and that both major political parties tend to characterize government as wasteful and inefficient.[55] Burdens may also reflect structural shortages of public resources that neither political nor administrative actors can readily correct. Genuine scarcity of public resources is very common at the state and local level, where governments must finance their operations under a variety of legal constraints that do not occur at the national level.[56] Finally, programs that are reasonably functional under ordinary circumstances may also become severely burdensome under unusual ones. For instance, job losses associated with the novel coronavirus pandemic overwhelmed state-administered unemployment insurance programs, and many newly unemployed people either found it impossible to register a claim or could do so only by extraordinary time

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[51] Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 111 (2018).

[52] KATHLEEN HALE & MITCHELL BROWN, HOW WE VOTE: INNOVATION IN AMERICAN ELECTIONS 168 (2020).

[53] ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 25–26 (2015); MATTHEW WOOD, HYPER-ACTIVE GOVERNANCE: HOW GOVERNMENTS MANAGE THE POLITICS OF EXPERTISE 14 (2019).

[54] Cass Sunstein, *Sludge and Ordeals*, 68 DUKE L.J. 1843, 1860–62 (2019) (arguing that adequate bureaucratic capacity is associated with low programmatic burden).

[55] MONICA PRASAD, STARVING THE BEAST: RONALD REAGAN AND THE TAX CUT REVOLUTION 15 (2018); AMY E. LERMAN, GOOD ENOUGH FOR GOVERNMENT WORK: THE PUBLIC REPUTATION CRISIS IN AMERICA (AND WHAT WE CAN DO TO FIX IT) 20 (2019).

[56] Daniel R. Alvord, *The Triumph of Deficits: Supply-Side Economics, Institutional Constraints and the Political Articulation of Fiscal Crisis*, 61 SOCIO. Q. 206, 212 (2020).

investments.[57] Administrative burdens, in short, are always political in the sense that they have distributive consequences that follow from government decisions, but they are not always baldly political or calculatedly partisan. Burdens may arise from financial, personnel, informational, and legal constraints that public organizations cannot reasonably control or counteract. This ambiguity about the causes and motives of burdens is a defining feature of the role of administrative burdens in elections and voting.

B. Administrative Burdens on the Right to Vote Remain Common

In the case of election administration, administrative burdens may be understood as politics by other means—burdens constrain the opportunity to participate in the democratic process. Since the emergence of mass parties in the nineteenth century, tension has existed between the broadened legal recognition of the right to vote and the patterns of administration that practically limit the exercise of that right.[58] Until the latter part of the twentieth century, these burdens could be very heavy and were widespread.[59] Formal voter registration requirements were first adopted in northeastern and midwestern states with large, urbanized immigrant populations; when introduced, these registration requirements frequently applied only to voters in cities and disfavored urban voters in intention and effect.[60] Voter registration spread widely and was also used to a highly restrictive effect in the South.[61] Between 1950 and 1972, there were twenty-five states where poll taxes or literacy tests were in formal use.[62] Sixteen were non-southern states,

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[57] *See* Robert Clifford & Marybeth J. Mattingly, *Unemployment Insurance Is Failing Workers During COVID-19. Here's How to Strengthen It*, BROOKINGS (Apr. 9, 2020), https://www.brookings.edu/research/unemployment-insurance-is-failing-workers-during-covid-19-heres-how-to-strengthen-it.

[58] *See* Theodore J. Lowi et al., *American Government: An Introduction*, W.W. NORTON & COMPANY, INC., https://wwnorton.com/college/polisci/american-government12/core/ch/12/outline.aspx.

[59] *Id.*

[60] ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES, 65 (2009).

[61] SPRINGER, *supra* note 1, at 67–68, 79.

[62] *Id.* at 57.

typically states with large immigrant populations: as in the South, these restrictive laws were largely directed at minority groups.[63]

This is to speak only of official actions of government; studied government inaction was another feature of disenfranchisement. Many governments ignored or suborned extralegal violence and intimidation.[64] As noted above, states also hindered electoral participation by the pretense that political parties were private organizations whose conduct was not properly subject to government regulation.[65] This view of political parties was very common through the early twentieth century.[66] In states with historically strong party organizations, this legacy demonstrably affects basic features of elections up to the present day.[67] States' treatment of parties as private, autonomous organizations was also the legal foundation of the racially exclusionary white primary system in the South.[68]

By present standards, routine features of elections administration through the mid-twentieth century could be extraordinarily burdensome. Springer reproduces the voter registration form in use in Mississippi in the 1960s, which neatly demonstrates how policy design choices may impose a range of burdens on individuals.[69] The form included twenty-one items, which registrants were required to complete in their own handwriting, in the presence of the registrar, "without assistance or suggestion of any person or memorandum."[70] The form requested a range of factual details that a registrant might not know or readily remember—including how long they had resided in their current precinct, addresses and dates of prior residence, and whether some other person of the same name was registered in the jurisdiction.[71] In addition, registrants were obliged to copy a section of the Mississippi State Constitution of the registrar's choosing, then provide a written "reasonable

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[63] *Id.* at 56.

[64] Jay Goodliffe et al., *The Enduring Effects of State Party Tradition on the Voting Experience*, 19 ELECTION L. J. 45, 46–47 (2020).

[65] *Id.*

[66] FRANK GOODNOW, POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT 92 (Routledge, 1st ed. 2017).

[67] Goodliffe et al., *supra* note 64, at 47.

[68] *See* SPRINGER *supra* note 1, at 156.

[69] *Id.* at 173–75.

[70] *Id.*

[71] *Id.* at 173.

interpretation" of the section's meaning.[72] This constitutional gloss was to be followed by a written "statement setting forth your understanding of the duties and obligations of citizenship under a constitutional form of government."[73] A law professor or political theorist might well struggle to answer such questions, and it is no great marvel that voter turnout in the state at mid-century hovered around 10% in non-Presidential elections.[74]

By comparison, the registration form defined by the National Voter Registration Act of 1993 is simplicity itself.[75] However, although participating in elections today is undoubtedly simpler than it was in many previous places and times, registering, remaining registered, and casting a ballot remains difficult for many. The burden imposed on some voters is, in part, an effect of the relatively archaic character of elections administration generally. Voting, though not onerous for the typical voter, is nonetheless a relatively cumbersome form of routine interaction with government.[76] In the 2018 general election cycle, around 54% of voters registered at a motor vehicles office or in-person at a local election office.[77] More than 55% of all voters cast their ballot in person at a polling place on Election Day, which involves at least some time cost to travel and navigate the procedures of the polling place, in addition to time waiting in line in many cases.[78] Voting absentee frequently involves meeting additional requirements, and even in states where elections are conducted wholly by mail voting, participation commonly involves a time cost.[79] Although voters may return a mail-in ballot through the postal service, the great majority travel to an official site to return their ballot in person.

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[72] *Id.* at 174.

[73] *Id.*

[74] *Id.* at 37.

[75] *See* National Voter Registration Act, 52 U.S.C. §§ 20501–20511; *see also* U.S. ELECTION ASSISTANCE COMM'N, REGISTER TO VOTE IN YOUR STATE BY USING THIS POSTCARD FORM AND GUIDE 1 (2021).

[76] *See Why Are Millions of Citizens Not Registered to Vote?*, PEW (June 21, 2017), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/06/why-are-millions-of-citizens-not-registered-to-vote.

[77] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 18 tbl.2.

[78] *Id.* at 7.

[79] *See Absentee and Early Voting*, USAGOV, https://www.usa.gov/absentee-voting (last visited Oct. 6, 2021).

There may also be substantial and unevenly allocated costs to acquiring needed information about voting. One reason for this is limited online availability of official information about voting.[80] A great deal of the public's regular interaction with government, and acquisition of governmental information, happens electronically.[81] But the majority of state elections websites do not provide information about rules for primary elections or information about official activity, security concerns, or observation of elections—key integrity concerns that figure prominently in online information offered in other democratic polities.[82] As of 2018, six state elections agencies had no Twitter account, and nine had no Facebook page; only thirteen total states maintained social media presences specific to the particular elections cycle.[83] In Garnett's study of online provision of voting information, five state election offices never responded to emails posing common, simple questions about voting, and nine other emails waited more than a week for a response.[84] This experiment did not seek to gauge differences in the speed or quality of responses depending upon the identity of the person requesting information. Other experimental studies, however, have found that partisan officials were differentially responsive to questions depending upon the party affiliation of voters.[85] Nationwide, election officials were less likely on average to respond to queries from Latino aliases than queries from non-Latino white aliases and on average provided less complete and less accurate information when they did respond.[86] Even the most basic fact—whether one has a current, valid registration—is not always easily obtained.[87]

There is a range of important modern federal protections of the right to vote. The Twenty-fourth Amendment prohibits directly

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[80] Holly Ann Garnett, *Behind the Screens: E-Government in American State Election Administration*, 19 ELECTION L. J. 402, 410 (2020).

[81] *Id.* at 403.

[82] *Id.* at 410–11.

[83] *Id.* at 411.

[84] *Id.* at 412.

[85] Ethan Porter & Jon C. Rogowski, *Partisanship, Bureaucratic Responsiveness, and Election Administration: Evidence from a Field Experiment*, 28 J. PUB. ADMIN. RSCH. & THEORY 602, 611 (2018).

[86] Ariel R. White et al., *What Do I Need to Vote? Bureaucratic Discretion and Discrimination by Local Election Officials*, 109 AM. POL. SCI. REV. 129, 140 (2015).

[87] *See id.* at 131 n.11.

imposed financial costs on voting.[88] Large portions of the VRA remain in effect after *Shelby County v. Holder*, and the NVRA and HAVA establish a wide range of requirements, all of which serve to define basic safeguards and guarantees of access.[89] Nonetheless, there may be significant time and cognitive costs to register to vote, remain registered, and actually cast a ballot.[90] State governments may make a range of policy and administrative choices that may affect the ease and fairness of each of these phases of the process.

Federal law establishes clear minimum standards about the availability of voter registration.[91] The implementation of positively burdensome registration policies, such as the much-contested documentary proof of citizenship requirement at issue in *Arizona v. Inter Tribal Council of Arizona* and implemented in Kansas, has therefore been rare.[92] However, states may make a range of choices that make registering relatively easier or more convenient than the federal baseline, and the variety and convenience of means of registering varies significantly across states.[93] It may be added that much could be done to make it easier for voters to obtain information about their current registration status: in 2018, some 7.5 million registrations—about 10% of total registrations—were duplicate submissions by voters whose registration status was already up-to-date.[94]

Between the 2016 and 2018 federal election cycles, thirteen states developed some model of automatic voter registration, most commonly an "opt in" model that modestly streamlined registration in settings like DMVs; Alaska deployed an "opt out" model by which government records were used to register voters unless they expressly stated their desire not to be registered.[95] In 2018, thirty-eight states permitted online voter registration, typically employing

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[88] U.S. CONST. amend. XXIV, § 1.

[89] Vincent Marinaccio, *Protecting Voters' Rights: The Aftermath of* Shelby v. Holder, 35 WHITTIER L. REV. 531, 548–49 (2014); U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 42–43.

[90] *See generally* VOTE.ORG, https://www.vote.org (last visited Sep. 29, 2021) (illustrating the various voting deadlines, dates, and rules for each state).

[91] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 41–42.

[92] Arizona v. Inter Tribal Council of Arizona, 570 U.S. 1, 6–7 (2013); Fish v. Kobach, 840 F.3d 710, 715 (10th Cir. 2016).

[93] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 45–47.

[94] *Id.* at 74–75 tbl.2c.

[95] *Id.* at 47.

systems that require possession of a driver's license.[96] Just under half of the states permit some form of same-day registration; fifteen permit registration and voting on Election Day.[97] States have widely varying rules about voter registration drives, in which party or advocacy organizations provide assistance in registering.[98] Where state policy is relatively permissive, drives may be a major source of new registrants: in 2018, there were four states where more than 10% of new registrations came from drives, as well as many states with stringent rules where there were none at all.[99] The administrative methods for restoring voting rights to former offenders may significantly affect ease of registration among this population. Such rights restorations are most commonly carried out automatically, but one-third of states require former offenders to initiate restoration of voting rights, either by furnishing documentation or navigating a formal administrative process.[100] Such processes may pose especially significant obstacles to former offenders.[101]

The ease of remaining registered may also vary significantly across states and localities. The enactment of HAVA obliged states to develop centrally maintained, electronic voter rolls and modified provisions of the NVRA by permitting maintenance to remove duplicate or incorrect registrations.[102] States have widely varying procedures about how and when they engage in routine voter roll maintenance.[103] The quantity and variety of information obtained to maintain voter rolls, and the manner in which this information is used, may in some cases prompt erroneous scrutiny or

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[96] *Id.* at 122 fig.3.

[97] *Id.* at 123 fig.4.

[98] DIANA KASDAN, BRENNAN CTR. FOR JUST., STATE RESTRICTIONS ON VOTER REGISTRATION DRIVES 2 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/State%20Restrictions%20on%20Voter%20Registration%20Drives.pdf.

[99] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 69–70 tbl.2b.

[100] *Id.* at 125.

[101] AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 125, 216 (Univ. Chi. Press 2014).

[102] *See* National Voter Registration Act, 52 U.S.C. §§ 20501–20511; *see also* Help America Vote Act, 52 U.S.C. §§ 20901–21145; *see also* U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 43 (explaining implications of the two laws).

[103] *See* NAT'L ASSN. OF SECRETARIES OF STATE, MAINTENANCE OF STATE VOTER REGISTRATION LISTS: A REVIEW OF RELEVANT POLICIES AND PROCEDURES (2017).

cancellation of valid registrations.[104] An existing registration is properly removed if the voter has moved outside of the relevant jurisdiction, has died, no longer wishes to be registered, has been convicted of a disqualifying criminal offense, or has been found to be mentally incompetent.[105] A registration should also be removed if the registration was improper in the first place—for instance, if a person who did not satisfy eligibility requirements was erroneously registered.[106]

The most significant feature of voter roll maintenance is the registration confirmation postcard framework defined by the NVRA; voters may respond to these cards to indicate that they have moved or no longer wish to be registered, and non-response, coupled with non-voting in the two prior federal elections, may be grounds for removing a registration.[107] The registration confirmation method leaves much to be desired. Nearly two decades after the enactment of HAVA, bloated voter rolls remain common: in Washington, D.C., Alaska, and Kentucky, registered voters were more numerous than the citizen voting age population, and many other states had rolls nearly as large as the total eligible population.[108] Registration confirmation mailings offer only modest help. Nationally, 61.9% of registration confirmation notices sent in the United States were of unknown status—in effect, more than 13 million mailings were not returned to elections officials for reasons not known.[109] An additional 16.4% of such notices were returned as undeliverable, and in nine states, more than a quarter of such notices were undeliverable.[110] The briefs, oral arguments, and opinions in *Husted v. A Philip Randolph Institute*, a recent Supreme Court case on the use of confirmation mailings in voter roll maintenance, abundantly demonstrated the ambiguity of the NVRA's statutory language, as well as the dearth of factual information about what happens to the great mass of unreturned mailings.[111] It is plain that non-

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[104] Christopher Coble, *How Do You Know If Your Voter Registration Has Been Cancelled?*, FINDLAW (Aug. 7, 2019, 3:00 PM), https://www.findlaw.com/legalblogs/law-and-life/how-do-you-know-if-your-voter-registration-has-been-cancelled.

[105] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 52.

[106] *See* JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD 4 (2007).

[107] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 52.

[108] *Id.* at 48 fig.4.

[109] *Id.* at 51–52.

[110] *Id.* at 51, 78–79 tbl.3a.

[111] Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833, 1838–39 (2018).

response is a weakly informative piece of information. Yet non-response to registration confirmations is by far the most common trigger for a registered voter's removal from the rolls.[112] Removal of registrations on this basis will often result in the deletion of a large number of valid registrations, which are, for a variety of reasons, likely to be concentrated in communities with lower average incomes and higher concentrations of registered voters belonging to racial and ethnic minority groups.[113]

States may also make use of a wide range of other records to maintain current voter rolls. All states have electronic linkages between voter rolls and other sources of information; the most common links are to motor vehicles departments, sources of death information, and sources of information about disqualifying criminal convictions.[114] States, to more widely varying degrees, also maintain linkages to other sources of information. Most states have also participated in either the now-suspended Interstate Voter Registration Crosscheck Program ("Crosscheck") or the Electronic Registration Information Center ("ERIC"), two interstate record-sharing programs.[115] Aside from differences in how much information state governments acquire for purposes of maintaining voter rolls, there are differences in how they use this information. For instance, Virginia and North Carolina, two states with similar electoral administrative structures and histories, made strikingly different use of lists of potentially obsolete registrations produced by Crosscheck: owing to data quality concerns, Virginia largely discarded these matches, while North Carolina treated them as strong evidence that registrations were obsolete or even that tens of thousands of North Carolinians had engaged in illegal double voting.[116] Voter roll maintenance practices, depending upon their timing, the administrative classification of potentially obsolescent records, and voter registration rules, may ultimately make it difficult for erroneously removed voters to cast a ballot.

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[112] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 53.

[113] MYRNA PEREZ, BRENNAN CTR. FOR JUST., VOTER PURGES 10–12 (2008).

[114] *See* U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 120–21, 137–38 tbl.2.

[115] *See e.g.*, Off. Sec. of State, *Interstate Crosscheck Program Grows*, CANVASSING KAN. 1 (Dec. 2013), https://www.kssos.org/forms/communication/canvassing_kansas/dec13.pdf; *Who We Are*, ELECTRONIC REG. INFO. CTR., https://ericstates.org/who-we-are (last visited Oct. 4, 2021).

[116] BEN MERRIMAN, CONSERVATIVE INNOVATORS 113–14 (2019).

Federal protections are arguably weakest regarding the ease of casting a ballot. Meaningful federal policy, of course, exists. The minority language provisions of the Voting Rights Act provide significant access to ballots in a voter's preferred language.[117] Over 350,000 uniformed military personnel and overseas civilian voters participated in the 2018 election through absentee and mail voting methods defined by the Uniformed and Overseas Citizens Absentee Voting Act.[118] And provisional balloting safeguards developed after the enactment of HAVA enable participation for voters of challenged or uncertain registration status. In 2018, nearly 870,000 provisional ballots were eventually verified and counted in full.[119] However, the ease of voting, and the time ultimately spent casting a ballot, is, to a great degree, a matter of state and local policy and administration. States define rules for voting absentee or early in-person.[120] The number and location of polling places are defined by some combination of state and local decisions.[121] The recruitment of poll workers is a task left mainly to local officials and, in many states, so is the financing and acquisition of voting equipment. Long travel or wait times have been a persistent problem against which federal law offers few direct protections. One potential legal approach—looking upon heavy time burdens as analogous to poll taxes—was effectively ruled out by *Crawford v. Marion County Election Board*, where the Supreme Court declined to assess the potential effects of Indiana's voting identification law according to the legal standard applicable to poll taxes.[122] The line of reasoning in that case would certainly tend to make it harder to mount compelling legal objections to election administrative practices that impose functional time costs on voters where there is no directly imposed monetary cost.

Wait times above six hours were reported in some localities in the 2004 general election, which prompted the new technique of preemptive litigation to anticipate and avert similar wait times in 2008; the success of such litigation has been hindered by unclear

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[117] *See* U.S. COMM'N ON C.R., A CITIZEN'S GUIDE TO UNDERSTANDING THE VOTING RIGHTS ACT 15 (Clearinghouse 1984).

[118] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 15.

[119] *Id.* at 16, 34 tbl.3.

[120] *See id.* at 1–3.

[121] *See id.* at 1, 2, 7.

[122] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 188–89 (2008).

legal standards, and imperfect alignment of legal arguments with what is administratively feasible.[123] Long wait times have persisted as a problem. In the 2012 general election, some five million voters waited more than an hour to cast their ballot, and another five million voters waited between half an hour and an hour.[124] In the 2020 federal election cycle, there were prominent reports of lines of many hours in length to vote in primary elections in cities such as Atlanta, Georgia, and Louisville, Kentucky, and in October, there were reports of similar lines to vote early in-person in localities in Ohio, Georgia, and Texas.[125]

The time cost of voting is allocated very unevenly. In the majority of states, the average wait time to vote in the 2012 general election was less than ten minutes, but average wait times approached forty minutes in Florida.[126] Wait times are also distributed unevenly across localities. Long wait times are far more common in majority-minority areas: "zip codes with greater than 75 percent nonwhite populations waited more than twice as long as zip codes with less than 25 percent nonwhite populations."[127] Minority voters are six times more likely than white voters to wait at least an hour to vote.[128] Although data that could persuasively demonstrate it are unavailable, the end of pre-clearance after *Shelby County v. Holder* has conceivably compounded racial disparities in wait times.[129] The most thorough available analysis found that 1688 polling places have been closed in jurisdictions formerly covered by Section 5 of the VRA, a figure that does not include closures in Virginia or some localities in Texas.[130]

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[123] *See* Justin Levitt, *Long Lines at the Courthouse: Pre-Election Litigation of Election Day Burdens*, 9 ELECTION L. J. 19–20, 36, 39 (2010).

[124] PRESIDENTIAL COMM'N ON ELECTION ADMIN., *supra* note 9, at 13.

[125] *See* BRENNAN CTR. FOR JUST., VOTER SUPPRESSION IN 2020 10–11 (2021); Dan Sewell & Julie Carr Smyth, *Lines Long as Early Voting Begins Amid Pandemic Precautions*, AP NEWS (Oct. 6, 2020), https://apnews.com/article/virus-outbreak-election-2020-joe-biden-donald-trump-cincinnati-c66ee83816849c72f144df10ea890f19.

[126] Charles Stewart III, *Waiting to Vote in 2012*, 28 J. L. & POL. 439, 452 (2013).

[127] Robert M. Stein et al., *Waiting to Vote in the 2016 Presidential Election: Evidence from a Multi-County Study*, 73 POL. RSCH. Q. 439, 441 (2019).

[128] Stephen Pettigrew, *The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials*, 132 POL. SCI. Q. 527, 527 (2017).

[129] Donald L. Davison & Michael Krassa, *Times Taxes and Voting Queues: The Voting Rights Act after* Shelby County, Alabama v. Holder *(2013)*, 20 NAT. POL. SCI. REV. 20, 20 (2019).

[130] THE LEADERSHIP CONF. EDUC. FUND, DEMOCRACY DIVERTED: POLLING PLACE CLOSURES AND THE RIGHT TO VOTE 12, 53 (2019).

Long wait times to vote in person may arise, in part, from statutory provisions: states that provide limited opportunities for absentee or early in-person voting will, of necessity, see more voting occurring in person on Election Day. Voter identification laws have a modest but demonstrated effect on wait times.[131] And the number and proximity of polling places will follow partly from legal provisions. However, long wait times are perhaps the largest functional burden on voting that arises from administrative decisions and practices: wait times to vote in person are very much a result of election administrative capacity. Adequate staffing of polling places is the most significant organizational determinant of shorter wait times.[132] Staffing is also one of the most obvious deficiencies in American elections administration: in 2018, staffing levels were unchanged from 2014 while voter turnout increased nearly 45%.[133] Simple staffing considerations were one of most prominent concerns in the run-up to the 2020 general election. Turnout was expected to be extremely high, but the novel coronavirus pandemic promised to increase the complexity of routine work at the polls while also deterring the participation of many experienced workers—in 2018, 58% of poll workers were over the age of sixty.[134]

Long waits also arise from the relative scarcity of polling places and the capacity of polling places to handle voters, both matters shaped largely by the decisions of local election officials. Around half of the observable racial difference in wait times to vote in the United States arises from "differences within an election administrator's jurisdiction"—that is, from local choices about allocation of resources and opportunities.[135] Long wait times may also be a sign of technical and organizational breakdowns or insufficiencies.[136] Robust local organizational and technical capacity can be a serious protection against delays and problems, even where financial resources are not especially abundant.[137] Unusually thorough observation finds that experienced poll workers facilitate more

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[131] Stein et al., *supra* note 127, at 439, 442.

[132] *Id.* at 446.

[133] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 5, 9.

[134] *Id.* at 10.

[135] Pettigrew, *supra* note 128, at 535.

[136] Stewart, *supra* note 126, at 444.

[137] Martha Kropf et al., *Making Every Vote Count: The Important Role of Managerial Capacity in Achieving Better Election Administration Outcomes*, 80 PUB. ADMIN. REV. 733, 737–38 (2020).

efficient and accurate polling place operation.[138] However, achieving such staffing conditions has been a major challenge: in 2018, only about 15% of local jurisdictions reported finding it somewhat or very easy to recruit poll workers.[139]

C. Perceptions of Government Magnify the Effects of Electoral Administrative Burdens

Objectively speaking, the cognitive and time costs of voting vary widely across places and voter populations. The subjective experience of those costs, and how this experience affects behavior, also varies. Election administrative practices unavoidably send potent messages about whose democratic participation is welcomed. Individual and communal perceptions of how elections are administered are also shaped by existing beliefs about and experience of government.

Voter identification laws, which require voters to present one of a specified set of identifying documents to cast a ballot in person, are the most visible and best studied of the class of current policies and practices that may limit electoral participation in the United States. It is by no means clear that they are most widely or intensely burdensome of such policies, but because the body of social research on the policy is very well developed, voter identification requirements are a useful case for describing the social dynamics of such policies.[140] Studies of the direct effects of voter identification laws suggest that there are relatively few people who try and fail to vote because they genuinely lack the requisite documentation.[141] Although these effects are modest, they are plainly disparate across groups—the robust literature on the subject invariably finds a more pronounced effect on minority voters and older voters, and policies with an exact name match provision are

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[138] Barry C. Burden et al., *What Happens at the Polling Place: Using Administrative Data to Look Inside Elections*, 77 PUB. ADMIN. REV. 354, 362 (2017).

[139] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at 9.

[140] *See generally Research on Voter ID,* BRENNAN CTR. FOR JUST. (Apr. 11, 2017), https://www.brennancenter.org/our-work/research-reports/research-voter-id (providing a list of research on voter ID laws).

[141] *See* Nate Dobbs, *The Pitfalls of the Kansas SAFE Act Voter Identification Provision and the Resulting Negative Impact on Provisional Voters*, 83 UMKC L. REV. 427, 440–41 (2015); M.V. Hood III & Charles S. Bullock III, *Much Ado about Nothing? An Empirical Assessment of the Georgia Voter Identification Statute*, 12 ST. POL. & POL'Y. Q. 394, 396 (2012); Charles Stewart III, *Voter ID: Who Has Them? Who Shows Them?*, 66 OKLA. L. REV. 21, 22 (2013).

disproportionately likely to affect women.[142] Such policies also have measurable but modest effects on wait times to vote at polling places with large concentrations of minority voters and may create scope for discriminatory patterns of discretionary application at the street level.[143] This risk is heightened by the extremely modest training requirements for most poll workers.[144]

However, the participatory effects of voter identification laws are entangled with individual and communal perceptions of the intentions of such policies. Thus, such measures may prompt increases in turnout when effective communication makes the heightened requirements salient to voters who might be adversely affected.[145] Conversely, the number of people who possess appropriate identification but who do not vote because they are confused about the requirements of voter identification laws can be quite large.[146] In one study, the number of qualified nonvoters who stayed away from the polls on the mistaken belief that they lacked required documentation was markedly larger than the number of people who genuinely lacked the required documents.[147]

Studies of this kind suggest that administrative choices about policy communication can have a larger effect on voter behavior than formal provisions of a policy and that effective outreach can attenuate the potentially adverse effects of changes. Experimental studies of vote-by-mail also suggest that government responsiveness to the public is by far the most effective means of securing productive changes in voters' behavior.[148] This is consistent with a much

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[142] Kelly S. McConville et al., *Accumulating Evidence of the Impact of Voter ID Laws: Student Engagement in the Political Process*, 5 STAT. & PUB. POL'Y. 1, 6 (2017).

[143] Deuel Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests*, 45 COLUM. HUM. RTS. L. REV. 362, 426, 428–29 (2014); Stein et al., *supra* note 127, at 441.

[144] *See* U.S. ELECTION ASSISTANCE COMM'N, COMPENDIUM OF STATE POLL WORKER REQUIREMENTS (4th ed. 2020).

[145] Chelsea L.M. Bright & Michael S. Lynch, *Kansas Voter ID Laws: Advertising and its Effects on Turnout*, 70 POL. RSCH. Q. 340, 344–45 (2017); Jack Citrin et al., *The Effects of Voter ID Notification on Voter Turnout: Results from a Large-Scale Field Experiment*, 13 ELECTION L. J. 228, 235 (2014); Daniel J. Hopkins et al., *Voting But for the Law: Evidence from Virginia on Photo Identification Requirements*, 14 J. EMPIRICAL LEGAL STUD. 79, 82 (2017).

[146] Michael G. DeCrescenzo & Kenneth R. Mayer, *Voter Identification and Nonvoting in Wisconsin—Evidence from the 2016 Election*, 18 ELECTION L. J. 342, 345, 348, 352–53 (2019).

[147] BILL HOBBY ET AL., THE TEXAS VOTER ID LAW AND THE 2014 ELECTION: A STUDY OF TEXAS'S 23RD CONG. DIST. (2015).

[148] Andrew Menger & Robert M. Stein, *Enlisting the Public in Facilitating Election Administration: A Field Experiment*, 78 PUB. ADMIN. REV. 892, 896 (2018).

larger administrative literature on government responsiveness. Voting, because it is a voluntary practice tightly connected to a sense of membership in the political community, might be much more sensitive to communication and information provisions than many other matters of policy.

Many voters' anticipation that such policies will make it difficult or impossible to vote is likely, to some degree, a reflection of the circumstances of the adoption and stated purposes of these policies. In *Crawford v. Marion County Election Board*, the Supreme Court recognized that electoral integrity and fraud prevention were compelling, lawful rationales for Indiana's enactment of a voter identification law, even absent any demonstrated problem with fraudulent voting.[149] In that case, the Court also declined to consider the legislature's party-line vote to enact the policy as suggestive evidence that suppressing voter participation was an unstated purpose for the policy.[150] The pattern in Indiana has recurred in other states that have adopted similar measures: such policies are characteristically adopted along party-line votes in states under Republican control where elections are competitive and the population of minority voters is large.[151] There are striking partisan and racial differences in how the purpose and function of such policies are perceived.[152] In view of the circumstances of their enactment, many voters understand such policies to possess unstated exclusionary motives and anticipate the effects of those policies accordingly.

In addition, voting behavior is connected to individual and community experience of government more broadly. Adverse experiences of government readily create distrust and aversion. Experimental work broadly shows that existing distrust in government actively shapes how individuals interpret subsequent government

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[149] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190 (2008).

[150] *Id.* at 203–204.

[151] *See* Keith G. Bentele & Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. ON POL. 1088, 1089 (2013); Daniel R. Biggers & Michael J. Hanmer, *Who Makes Voting Convenient? Explaining the Adoption of Early and No-Excuse Absentee Voting in the American States*, 15 ST. POL. & POL'Y. Q. 192, 198 (2015); Michael C. Herron & Daniel A. Smith, *Race, Party, and the Consequences of Restricting Early Voting in Florida in the 2012 General Election*, 67 POL. RSCH. Q. 646, 660 (2014).

[152] *See e.g.*, Shaun Bowler & Todd Donovan, *A Partisan Model of Electoral Reform: Voter Identification Laws and Confidence in State Elections*, 16 ST. POL. & POL'Y. Q. 340, 343–45 (2016); David C. Wilson & Paul R. Brewer, *The Foundations of Public Opinion on Voter ID Laws: Political Predispositions, Racial Resentment, and Information Effects*, 77 PUB. OP. Q. 962, 967 (2013).

behavior.[153] This effect is intensified by the public's necessarily limited understanding of the inner workings of government. Public administrative research finds that "external audience members view public agencies as being more unified than they actually are," which is to say that an unfavorable experience with one official will tend to shape views of an agency, and an unfavorable experience of one part of government may readily shape broader attitudes.[154]

Adverse experiences, such as unwelcome encounters with government, enduringly and negatively affect individuals' views of government's legitimacy and goodwill, an effect that may extend from the individual to the community level.[155] Such experiences also have specific, persistent effects on political participation, a pattern driven by directly diminished trust in government,[156] as well as a more complex pattern of "negative interpretive policy feedback" that spurs disengagement.[157] These effects are particularly apparent, for instance, in the infrequency with which former offenders seek restoration of their voting rights in states where this process does not occur automatically.[158] Delays and adverse incidents at the polling place, which are markedly more prevalent in localities with large minority populations, may have substantial and lasting effects on confidence in the democratic process.[159]

It is difficult to say more about the subjective response to policy because factual knowledge of election administration remains remarkably underdeveloped. Major proposals for reform regularly begin by urging improved measurement.[160] As one recent

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[153] LERMAN, *supra* note 55, at 132–33.

[154] Daniel P. Carpenter & George A. Krause, *Reputation and Public Administration*, 72 PUB. ADMIN. REV. 26, 29 (2012).

[155] *See* CHARLES R. EPP ET AL., PULLED OVER 1, 140–42 (2014); *see also* Daniel S. Nagin & Cody W. Telep, *Procedural Justice and Legal Compliance*, 13 ANN. REV. L. & SOC. SCI. 5 (2017).

[156] Brandon R. Davis, *Testing Mechanisms: Carceral Contact and Political Participation*, 101 SOC. SCI. Q. 909, 921 (2020).

[157] Brandon R. Davis, *Feeling Politics: Carceral Contact, Well-Being, and Participation*, 49 POL'Y. STUD. J. 591, 595 (2021).

[158] Selin, *supra* note 35, at 1002, 1017.

[159] Bridgett A. King, *Waiting to Vote: The Effect of Administrative Irregularities at Polling Locations and Voter Confidence*, 41 POL'Y. STUD. 1000, 1003, 1017 (2020).

[160] *See* HEATHER GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT 68 (2009); HALE & BROWN, *supra* note 52.

study put it, "what isn't counted can't be managed."[161] Yet there remain large gaps in factual knowledge about the working of elections, especially regarding local administration or the practical experience of the individual voter. Ongoing projects like the Survey of Performance of American Elections ("SPAE") and the Cooperative Congressional Election Studies ("CCES") provide excellent, valuable descriptions of national and state patterns, but these aggregate views may obscure remarkable variations across populations and jurisdictions.[162] More detailed observational or experimental studies, such as those discussed in this section, likewise offer valuable insight but furnish direct accounts of voting in only a small set of jurisdictions. There exists only one major study of the backgrounds, attitudes, and work of state secretaries of state—generally states' chief election officials.[163] The enactment of HAVA has prompted the development of a modest literature about local election officials.[164] However, developing systematic knowledge in this area is difficult, owing to both the great number of local officials, as well as wide (and as-yet incompletely cataloged) interstate variation in how local election authority is defined and exercised.[165]

Social scientific research often relies on governmentally produced information, and there is simply a remarkable number of important election administrative matters about which governments do not ordinarily collect data. The Election Administration and Voting Survey ("EAVS"), the results of which have been discussed extensively in this section, offers a detailed view of part of the process but thereby also illustrates things not known.[166] To mention matters relevant to this discussion, EAVS reports on localities' relative ease in finding poll workers but not how this is done or what barriers make recruiting a difficult task in most local jurisdictions.[167] EAVS

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[161] JOHN C. FORTIER ET AL., BIPARTISAN POL'Y CTR., IMPROVING THE VOTER EXPERIENCE: REDUCING POLLING PLACE WAIT TIMES BY MEASURING LINES AND MANAGING POLLING PLACE RESOURCES 29 (2018).

[162] Stewart, *supra* note 126, at 451.

[163] JOCELYN BENSON, STATE SECRETARIES OF STATE: GUARDIANS OF THE DEMOCRATIC PROCESS (2010).

[164] Donald P. Moynihan & Carol L. Silva, *The Administrators of Democracy: A Research Note on Local Election Officials*, 68 PUB. ADMIN. REV. 816 (2008).

[165] KATHLEEN HALE ET AL., ADMINISTERING ELECTIONS 24 (2015).

[166] *See generally* U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21, at i–iii (stating generally the results of voter turnout, registration, and poll location statistics).

[167] *Id.* at ii.

reports nearly a third of rejected mail ballots are rejected for "other" reasons but not what these might be.[168] The survey documents a wave of polling place closures in the South but not the reasons—sound or unsound—for these closures. Adequate financial capacity is a necessary condition for effective election administration. Yet, every state has its own model for allocating the costs of elections and only four states systematically collect data on costs.[169] Until the 2020 general election, the great majority of American voters had cast a ballot in-person on Election Day, but only five states collect detailed information about the operation of polling places.[170] Although the Bipartisan Policy Center has developed effective, simple ways to collect data on wait times to vote, it does not appear that any jurisdiction has made the collection of such data a permanent requirement.[171] Under present circumstances, many jurisdictions could not reasonably be expected to undertake more thorough data collection: election administration is chronically underfunded and is almost invariably near the bottom of state and local budgetary priorities.[172]

In reviewing existing social scientific work, this section has shown that voting is a relatively time-consuming and confusing process for many Americans, that the burdens of voting are distributed unevenly, and that it is the administration of elections, rather than the content of statutory law, that is often the proximate cause of these burdens.[173] Although the evidence for these general propositions is strong, academic and governmental knowledge of the administration of elections in any particular local case tends to be scant. In consequence, it is often difficult to say, in any specific instance, whether disparities in voting exist or whether these disparities are substantial. Similarly, it is hard to discern whether local disparities flow from state or national decisions, and whether they arise in the course of good faith efforts to run elections or from maladministration. The complexity of the task, coupled with specific legal

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[168] *Id.* at 14 tbl.1.

[169] NAT'L CONF. OF STATE LEGISLATURES, THE PRICE OF DEMOCRACY: SPLITTING THE BILL FOR ELECTIONS 5 (2018).

[170] *See* Burden et al., *supra* note 138, at 362–63.

[171] FORTIER ET AL., *supra* note 161, at 16–17.

[172] *See* PRESIDENTIAL COMM'N ON ELECTION ADMIN., *supra* note 9, at 42–44; Jacob Rush, *Hacking the Right to Vote*, 105 VA. L. REV. ONLINE 67, 69, 71 (2019).

[173] *See* Wendy Weiser et al., *Congress Must Pass the 'For the People Act'*, BRENNAN CTR. FOR JUST., at 1, 7–8 (2021).

doctrines and a broad judicial aversion to statistical information, creates broad scope for bad (or simply inept) action to avoid or withstand legal scrutiny.

III. The Federal Judiciary Does Not Offer Strong Protections Against Administrative Burdens on the Right to Vote

The preceding section showed that administrative burdens limit the exercise of the right to vote. In contrast to historical restrictions that purposefully made voting impossible or dangerous, contemporary practices make voting inconvenient, confusing, and uncertain. This section describes broad patterns of judicial reasoning that make it difficult to use the courts to seek effective protection against such burdens. The probabilistic, causally complex operation of administrative burden is not readily intelligible to federal courts that have been highly resistant to statistics and that have a narrow—and at times credulous—view about the legal pertinence of political officials' intentions.[174] The discussion offered here is not the sort of detailed account of judicial reasoning common in legal scholarship. Its aim is not to say whether judges reached correct conclusions about any particular controversy or point of law but to describe the federal judiciary's general pattern of reasoning.

A. The Judiciary is Unreceptive to the Forms of Social Scientific Evidence that Substantiate the Existence of Serious Disparities

The factual account offered up to this point has relied heavily on social research, much of which is statistical in character. That account, though compelling in its own terms, has had modest influence on judicial reasoning; the federal judiciary has been reticent in its use of statistics in voting and elections cases. From a strictly legal point of view, modern cases about districting and apportionment—which arose from the Supreme Court's own recognition of the justiciability of these matters—are somewhat distinct from individual voting rights matters more firmly founded upon the statutory

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[174] *See e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2334–36, 2338 (2021) (holding that increasingly restrictive voter requirements were lawful in light of the considerable factors involved in protecting voting within a state).

schemes of the VRA, NVRA, and HAVA.[175] However, judicial attitudes about statistical evidence are similar in these two neighboring areas of law. Cases of both sorts will be discussed here to illustrate the aversion to social research and statistical evidence. We hasten to note that this aversion, to a considerable degree, arises from basic features of the judicial worldview, rather than the policy preferences or ideological leanings of judges.

i. Common Forms of Social Statistical Reasoning Give Strong Accounts of General Patterns, but Weak Accounts in any Specific Instance

It is perhaps useful, at the outset of this discussion, to describe the reasoning that undergirds common quantitative forms of social science, noting how these differ from judicial thinking about cause. One important approach employs an experimental logic to isolate a causal process. For instance, researchers White, Nathan, and Faller, discussed above, sent thousands of emails to local election administrators.[176] These emails posed common, simple questions about voting; some emails were sent from aliases with Latino-sounding surnames, and identical emails were sent from aliases with other surnames.[177] The name of the person ostensibly sending the query was one of two variables in the study, making it logically simple to gauge whether names patterned official responses.[178] They found, on average, that officials were less likely to respond to emails from Latino aliases and on average provided less thorough information when they did respond; these disparities disappeared in localities covered by preclearance or minority language provisions of the VRA.[179] This research approach persuasively establishes that ethnic bias shapes officials' responsiveness to voters. However, its design does not give any indications about which local officials are more or less likely to respond to such emails—and, of course, a legal case or controversy would concern the conduct of specific officials. Nor does a study of this sort elucidate what officials thought when

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[175] Rucho v. Common Cause, 139 S. Ct. 2484, 2499–500 (2019) (holding that partisan gerrymandering is a political question outside the scope of review by the Supreme Court).

[176] White et al., *supra* note 86, at 132–33.

[177] *Id.* at 133.

[178] *Id.*

[179] *Id.* at 142, 144–46.

deciding not to respond; it is a form of causal explanation that need not delve into motivational or cognitive accounts of cause. Experiments of this sort are not the most common means of studying matters like elections, but for many social scientists, experiments are the simplest and most convincing means of demonstrating the existence of a causal pattern, and many studies employing other designs seek to approximate the sort of clean measurement offered in a study like this one.

The more common research approach makes inferences by describing statistical relationships between variable measures that would be unlikely to arise by chance, supposing the two measurements were genuinely unrelated. Improbability may be relatively compelling in itself. The suggestion that there is a genuine, meaningful relationship between two measurements becomes more compelling when the pattern persists after introducing other measures that might shape the outcome of interest and when the pattern is consistent with existing social scientific accounts.

For instance, Springer describes how measures like property requirements and poll taxes affected turnout in Southern elections.[180] She shows that voter turnout in the early and mid-twentieth century was lower in elections held in states that employed these requirements, and that the statistical association was much larger than would be likely to arise randomly—that is, if such policies did not genuinely affect turnout.[181] This statistical pattern of lower turnout in states with property requirements and poll taxes persists after incorporating into the analysis other factors likely to shape turnout: the demography of the state, rules about polling place hours, which officials appeared on the ballot in a given election, and so on.[182] Her conclusion that such measures genuinely limited electoral participation is also consistent with existing social scientific accounts: one may readily understand how requirements of this kind would make it harder for an otherwise eligible voter to participate, and a large body of historical research suggests that these kinds of policies were intended to limit turnout. Combined, such evidence powerfully suggests that property requirements and poll taxes limited electoral participation, though Springer's analysis of course offers no specific

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[180] SPRINGER, *supra* note 1, at 58, 63.

[181] *Id.* at 31–37 tbls.3.1–3.4, 3.9–3.10.

[182] *Id.*

evidence that any individual potential voter was deterred for this reason.

ii. The Supreme Court has Broadly Avoided Statistics or Statistically-Supported Explanations

The avoidance of statistics is latent in one of the boldest legal doctrines in modern voting and elections law—one person, one vote. In his dissent in *Baker v. Carr*, Justice Frankfurter warned that holding legislative districting cases to be justiciable would draw the judiciary into the "mathematical quagmire."[183] There immediately followed considerable speculation about how the courts might find predictable criteria for settling such questions of fairness in districting schemes.[184] That justiciability could be established by straightforward reference to principles of equal protection did not in itself imply a neat means of ruling upon the fairness of any particular districting scheme. The doctrine of one person, one vote emerging from *Wesberry v. Sanders* and related cases was, politically speaking, boldly progressive.[185] It was also a stark simplification of the practical problems. It leapt past a range of intermediate approaches to the question of fair apportionment—approaches that also would have obliged courts to consider a wide range of criteria, many of which would, as Justice Frankfurter warned, certainly have been statistical in character. The elaboration of one person, one vote transformed what was understood at the time as an exceedingly complex question into a simple one resolved by applying the basic criterion of population equality. This seemingly intuitive criterion in fact creates ambiguities about what is being protected—equal value of a vote or equal access to representation, which would seem to require different approaches to districting. Social scientific evidence shows that the practical differences between these two notions of equality can be very sizable.[186] Justice Thomas's concurrence in *Evenwel v. Abbott* offers a lucid statement of the conceptual tension, though we

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[183] Baker v. Carr, 369 U.S. 186, 268 (1962) (Frankfurter, J., dissenting).

[184] Jerold Israel, *On Charting a Course through the Mathematical Quagmire: The Future of* Baker v. Carr, 61 MICH. L. REV. 107, 107–108 (1962).

[185] Wesberry v. Sanders, 376 U.S. 1, 18 (1964).

[186] Sarah Cowan, *Periodic Discordance between Vote Equality and Representational Equality in the United States*, 2 SOCIO. SCI. 442, 442–43 (2015).

hardly agree that this ambiguity is an argument against the basic principle.[187]

Recent Supreme Court cases about voter registration and partisan gerrymandering have also demonstrated a relatively plain judicial aversion to extensive engagement with social science. First, the Court has pursued lines of thinking that have precluded the consideration of potentially useful social science. As noted above, in *Crawford v. Marion County Election Board*, the Court broadly rejected the claim that partisan patterns in enactment of Indiana's voter identification law offered judicially compelling indications about the motives or likely effects of the law.[188] This finding has prompted the Court not to consider what has become, in the following dozen years, a voluminous social scientific literature on how contemporary voter registration practices may make it harder to vote, or the factors that reliably predict when and where restrictive policies are enacted, and who supports them. That *Crawford* involved a facial challenge to Indiana's law has probably been consequential for the arc of cases on voter registration policies. Because the case was heard before there were well-developed accounts of the effects of policies like voter identification laws, the Justices gave remarkably little consideration to the role of race as a factor predicting the enactment of such policies, or as a predictor of who will be adversely affected by them.[189]

In oral arguments in *Husted v. A Philip Randolph Institute*, Justice Breyer pursued a line of factual questioning concerning what happens to NVRA registration confirmation mailings that are not returned, seeking for "any place in this record that I can look for some numbers or surveys."[190] Given that the vast majority of such mailings are not returned, and the state of Ohio treated non-response coupled with non-voting as grounds for removing a registration, this would seem to be an exceedingly pertinent factual question. However, the rest of the Justices turned away from such questions, instead exploring Aristotelean questions of cause by reference to a baseball metaphor.

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[187] Evenwel v. Abbott, 136 S. Ct. 1120, 1136 (2016) (Thomas, J., concurring).

[188] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008).

[189] MERRIMAN, *supra* note 116, at 93–95.

[190] Transcript of Oral Arguments at 66, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (No. 16-980).

The Court has also evinced a broad unwillingness to rely upon statistics as a key means of resolving questions. In *Cooper v. Harris*, social scientist Stephen Ansolabehere submitted an analysis suggesting that the alterations to a Congressional district boundary in North Carolina were informed primarily by race rather than voters' partisan leanings.[191] In this case, the Justices' views of the statistics did not directly shape the legal outcome, but their views demonstrate important intellectual differences between social scientific and legal thinking. Ansolabehere's analysis relied on two important factual patterns: first, black North Carolinians were extremely likely to vote for Barack Obama, and this support was patterned by race as well as underlying partisan preferences.[192] Second, Ansolabehere showed that the alterations to the district map were vastly more likely to affect black Democratic supporters than white Democratic supporters.[193] From a probabilistic point of view, it was extraordinarily unlikely that this pattern would arise by chance if a mapmaker redrew district lines merely to disfavor Democratic supporters, with no attention to race. Consistent with existing doctrine in the area, the majority opinion characterized this analysis as a credible but "circumstantial" form of evidence.[194] Justice Alito's dissent included pointed criticism of Ansolabehere's analysis.[195] Alito effectively rejected the notion that such analysis could be persuasive if there were any circumstances under which a pattern of this sort could arise without an underlying racial motive—and pointed to local racial residential segregation as evidence that the mapmaker could have acted without a racial motive.[196]

The Court long held the justiciability of partisan gerrymandering claims as an open question, partly in anticipation of a larger corpus of social scientific research that might simplify the analysis of the problem. Ultimately, researchers developed a social scientifically compelling account that the Court was unwilling to embrace. In *Gill v. Whitford*, the Court rejected a probabilistically-derived claim of standing, though it also acknowledged that it would be difficult for any particular voter to demonstrate an injury in fact arising

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[191] Cooper v. Harris, 137 S. Ct. 1455, 1477 (2017).

[192] *Id.* at 1493.

[193] *Id.* at 1495.

[194] *Id.* at 1462.

[195] *Id.* at 1503 (Alito, J., dissenting).

[196] *Id.*

from a legislative map that was unfair in its overall design.[197] That is, although it is recognized that the harmful consequences of partisan gerrymandering flow from the overall apportionment scheme, the Court could not see a way to allow a challenge to the overall scheme, focusing instead on a more traditional analysis of the districts in which particular petitioners resided.

The case was remanded; the opinion of the Court suggested that the petitioners develop a more or less novel associational argument, in effect preferring a complex, untested legal argument to a straightforward statistical argument.[198] In turning aside *Gill* on standing considerations, the Court also rejected a readily applicable numerical standard for an unfair partisan gerrymander.[199] The standard was derived from a study of all U.S. state legislative elections since 1970.[200] That analysis sought to predict persistent representational gaps using data from the first election employing a new map.[201] It found that a map yielding a disparity of more than 8% between a party's popular vote share and the proportion of legislative seats won would, more than 95% of the time, disfavor that same party in every subsequent election employing the map.[202] That standard could have addressed two important concerns arising in partisan gerrymandering cases: it would subject only a small proportion of legislative maps to scrutiny and suggest that a map could be judged acceptable without requiring proportional representation. That the statistical bright line offered in this case would admit of ready application hardly makes it ideal. Such a standard would effectively authorize modest but substantial partisan disadvantages and would raise some difficult subsidiary analytical questions. For instance, the respondents correctly observed that many of the maps with the most severe partisan efficiency gaps were drawn by courts, indicating that the linkage between partisan intent and partisan advantage is not always straightforward.[203] Likewise, respondents observed that some efficiency gaps arise from geographic patterns of

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[197] Gill v. Whitford, 138 S. Ct. 1916, 1933 (2018).

[198] *Id.* at 1938.

[199] *Id.* at 1933.

[200] *Id.* at 1932.

[201] *Id.*

[202] *Id.*

[203] *Id.*

party support; it could be difficult to draw a map that mitigated this effect while also satisfying traditional districting criteria.

In *Rucho v. Common Cause*, a case whose facts conformed more closely than *Gill* to the standard legal analyses of intent, burden, and causation, the Court finally found partisan gerrymandering to be non-justiciable.[204] Tellingly, the *Rucho* Court shied away from answering questions that are "matters of degree," even when the degree is quite extreme.[205] As Justice Kagan's dissent noted, the mapmakers in North Carolina showed extraordinary sophistication: one expert simulating maps that met basic districting criteria produced thousands of maps, none of which were as skewed as the one actually developed by the state.[206] It may be added that in the present era, where categorical exclusions from the right to vote are impermissible, circumscriptions of the right to vote and the value of a vote are by definition matters of degree. The unwillingness to embrace quantitative evidence that can finely describe such degrees has yielded legal protections that are ill-suited to address current problems. Partisan gerrymandering illustrates this particularly strikingly because the intentions of mapmakers are professed openly, the representational consequences are clear, and the Justices broadly agree that the phenomenon is harmful to democracy.[207]

B. Judicial Reasoning Aligns Poorly with the Nature of Election Administration

Regarding partisan gerrymandering, a reticence to act upon statistical bases has culminated in a flat rejection of well-developed social scientific evidence that was created with the clear aim of supplying the Court with a ready means of settling a persistent problem. The judiciary analyzes causal processes with a strong emphasis on demonstrable intent.[208] In some cases, it can offer remedy without a showing of specific official intent (or use of a prohibited device) by noting the existence of a disparity affecting a protected group and linking that disparity to a historical or ongoing process.[209] These forms of reasoning, however, do not offer very incisive

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[204] Rucho v. Common Cause, 139 S. Ct. 2484, 2508–09 (2019).

[205] *Id.* at 2505.

[206] *Id.* at 2520.

[207] *Id.* at 2507, 2509.

[208] *Id.* at 2489.

[209] League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 402 (2006).

analyses of electoral administrative conduct and suffer from conceptual under-definition.

Federal voting rights law distinguishes permissible and impermissible motives, in large part, by reference to the group disfavored by an electoral practice. It is licit to draw district boundaries to disfavor one's rival political party but not to draw district boundaries that erode the voting power of a racial minority group. Criticism of this reasoning often focuses on the extreme difficulty of the analytical task that results from it: disentangling race and party support is nearly impossible in many states.

But this is not the oddest consequence of such reasoning. This thinking produces sharply divergent views, in different cases, about the competence and foresight of roughly the same constellation of government officials. In partisan gerrymandering cases, where the intention to aid one's party is licit, officials acknowledge the motive and pursue it with extraordinary aptitude.[210] In cases about, for example, racial gerrymanders or voter identification laws, legislators disclaim any invidious discriminatory intention, even though the likely effects of such laws are, by now, very well established.[211] Yet, the people are the same: a legislative majority that enacts voter identification laws with professed ignorance of the racial disparities produced by such laws is the same legislative majority that collaborates with mapmakers to produce sophisticated partisan gerrymanders. The state secretaries of state, who are typically charged to fairly administer America's democracy, are, nearly without exception, partisans; in most states, they belong to the political party that firmly controls a state's government.[212] The great majority of state secretaries of state who serve as chief election officers have also previously held state political offices, most often in state legislatures.[213] Virtually all secretaries of state remain closely connected to the routine political life of the state by virtue of official duties involving routine interaction with the legislature and key elected executive officials.[214] Whatever one believes about the objective skill of such officials, it is hard to credit that it varies depending upon

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[210] *Rucho*, 139 S. Ct. at 2488.

[211] *League of United Latin Am. Citizens*, 548 U.S. at 477.

[212] *Secretary of State Office Comparison*, BALLOTPEDIA, (Oct. 2021), https://ballotpedia.org/Secretary_of_State_office_comparison.

[213] *Id.*

[214] THE COUNCIL OF STATE GOV'TS, *supra* note 10, at 152.

one's framing of an issue as a partisan matter or a racial or ethnic matter.

It is, in any event, difficult to pursue vigorous legal scrutiny of the intentions of elections administrators. *Crawford v. Marion County Election Board* acknowledged the prevention of fraud and the protection of both the objective and perceived credibility of the electoral process as generally valid motives.[215] This has since become a ubiquitous rationale for policies likely to make it more difficult for some Americans to vote. Additionally, there is little deliberative record underlying many consequential administrative decisions. State and local elections administration does not ordinarily yield detailed records produced by the work of legislatures nor do decisions such as the allocation of voting equipment to polling places—or the decision to close polling places—rely upon practices like informal rulemaking that produce a robust deliberative record.[216] In short, the judiciary is relatively credulous of official explanations for policies and practices that make voting harder, readily accepts a stock explanation for such conduct, and must frequently conduct its analysis without the benefit of a well-developed official record that it could meaningfully scrutinize.

The solution to this problem is not necessarily to embrace forms of social scientific reasoning that describe causal processes without strong reference to intentions—in fact, the appellate judiciary has long done this with unsatisfactory results. Section 2 of the Voting Rights Act provides protections against policies that have disparate impacts on voting.[217] Demonstrating the existence of a racial disparity in the effects of a policy is not adequate to establish a violation of the law—as Ho says, it must be demonstrated that the result is more than a "statistical accident."[218] Stephanopoulos notes that the prevailing judicial approach to vote denial is a two-part test that links a demonstrated disparity to an account of the historical or ongoing social process that produces the disparity.[219] This analytic approach differs from other prominent disparate impact

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[215] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

[216] *See* CHRISTOPHER FAMIGHETTI ET AL., BRENNAN CTR. FOR JUST., ELECTION DAY LONG LINES: RESOURCE ALLOCATION (2014), https://www.brennancenter.org/sites/default/files/publications/ElectionDayLongLines-ResourceAllocation.pdf.

[217] Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

[218] Ho, *supra* note 4, at 680.

[219] Nicholas Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L. J. 1566, 1570 (2019).

provisions in federal law, and Stephanopoulos proposes aligning thinking in voting rights with other approaches to disparate impact: "courts should scrutinize the interests that allegedly *justify* these electoral disparities; how compelling they are, the degree to which they are advanced by challenged practices, and whether they could be furthered by other means."[220] Facially, this appears to be a proposal to impose a more difficult standard on claims about voting disparity; the existing approach considers that a situation lacks a remedy if its effects arise from a general social process, rather than the work and thinking of government officials. However, the two-part test reflects the more general posture of judicial credulity about officials' accounts of their intentions, and its underlying logic is in fact very similar to forms of social scientific thinking that the courts have generally avoided. In view of the drift of judicial thinking about matters like partisan gerrymandering, more litigation and better data on elections practice would perhaps lead to the conclusion that the test is legally unworkable.

In a recent ruling, the Supreme Court at once adopted this familiar test, and applied it so narrowly that its value in challenging unfair practices now stands as an open question. In *Brnovich v. Democratic National Committee*, a case that dealt with vote denial claims under Section 2, the Court embraced the familiar test, rejecting alternative approaches, including that suggested by Stephanopoulos.[221] Yet, the opinion used all the forms of reasoning discussed above to narrow what would constitute vote denial. The majority opinion gives little weight to the easily predictable disparities produced by Arizona's categorical prohibition on the counting of ballots cast out of precinct, and it reaffirms fraud prevention as a broadly permissible legislative motive absent any actual occurrence of fraud.[222] Both large disparities in ballot rejection rates and the high overall rates of ballot rejection are dismissed by characterizing odds ratios as a misleading form of cross-group comparison.[223] The plain failure of a public organization to carry out its legal mandate is characterized as a peripheral consideration.[224]

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[220] *Id.* at 1570–71.

[221] Brnovich v. Democratic Nat'l Committee, 141 S. Ct. 2321, 2341 (2021).

[222] *Id.* at 2340.

[223] *Id.* at 2345.

[224] *Id.* at 2348.

In sum, the judiciary has been broadly unwilling to embrace social statistical forms of reasoning in handling cases about voting rights and electoral practices. Although we find such statistical reasoning persuasive, we do not regard judges' reticence to be crudely ideological or anti-intellectual—basic features of law and the judicial task involve forms of thinking quite different from that of quantitative social science. Yet, the relevant judicial categories also overlook matters we consider important. Below, we describe how elections administrators use presentations of incompetence to avoid legal scrutiny.

IV. Performances of Administrative Incompetence Shield Officials' Conduct from Effective Legal Scrutiny

The preceding section described important differences between common social scientific and legal accounts of causes, how this difference figures in the judiciary's relatively limited use of well-developed research findings about difficulties in voting, and the official conduct that contributes to such difficulties. Doctrine has evolved in ways that limit effective judicial scrutiny of the motivation and rationality of official action. Legal distinctions about suspect categories lead courts to deploy widely varying assumptions about the competence of a stable set of political actors: they are competent in favoring their party's interests but harm the interests of minority groups only incidentally and unwittingly. The statistical improbability that certain of these patterns arise incidentally is, in itself, not legally compelling. Where policies affecting the individual right to vote are concerned, a broadly proclaimed goal of promoting electoral integrity is readily accepted as a permissible motive, and judicial analysis of disparate impacts of electoral practices, in contrast to both other analyses of disparate impact and other issues related to elections and voting, is relatively inattentive to officials' motives and justifications.

We have suggested that administrative practices about voter registration, voter roll maintenance, and voting opportunities impose the largest practical burdens on the right to vote. These matters do not figure as prominently in legal scholarship or litigation as they could, but here we consider what happens when claims about administrative practice or policy implementation in these areas are contested in court. That is, in view of the kinds of evidence

and accounts that courts consider persuasive, how do officials seek to defend actions that may hinder the right to vote? We argue that officials' defenses of their conduct frequently rely on a vocabulary of incompetence. They present themselves as being, in various ways, ignorant of or incapable of meaningfully acting upon important facts and thereby seek to disavow impermissible motives for their conduct—a result could not be intended by one who did not know about the conditions that created it. For elected officials such as state secretaries of state or county clerks, these public professions of ignorance and error are remarkable—it is extremely rare for elected officials to take personal responsibility for mistakes, in part because the political costs of such acknowledgments may be very high.[225] Yet, the potential political costs are, evidently, lower than the potential hazard of being found legally responsible for restricting voting rights. This approach is often successful, in part because there is a wide penumbra of credulity at the margin of the relevant legal standards, particularly after *Shelby*—the suspension of preclearance under Section 5 of the VRA is, in essence, the end of a regime of official skepticism about election administration in covered jurisdictions.[226] These self-representations may also succeed because they are at least plausibly grounded in objective reality. In view of pervasive, persistent shortages of information, materiel, and staffing in elections administration, good faith errors are undoubtedly possible.

A. Playing Dumb

Characterizing the self as a social creation is a sociological commonplace dating back at least to the beginning of the twentieth century.[227] The idea that a functioning society, and all its attendant institutions, requires a functional order of social interaction is propounded most clearly in Erving Goffman's work on interaction

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[225] Allan McConnell, *What is Policy Failure? A Primer to Help Navigate the Maze*, 30 PUB. POL'Y. & ADMIN. 221, 238 (2015).

[226] Ho, *supra* note 4, at 687.

[227] *See generally* CHARLES HORTON COOLEY, HUMAN NATURE AND THE SOCIAL ORDER (1902); GEORGE HERBERT MEAD, MIND, SELF, AND SOCIETY FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST (1967) (illustrating that discussion of sociological commonplace is found in twentieth century literature).

ritual and social presentation of self.[228] Goffman emphasizes interaction rituals as a sort of lubricant that allows social life to keep moving rather than coming to a standstill at every moment of awkwardness or disconnect.[229] Goffman's theory is dramaturgical: he is interested in how our staged behaviors manifest themselves in everyday interaction—his explanation of "tactful blindness," for example, is useful for explaining how a family gets through a Thanksgiving dinner with each person's feelings unscathed by means of everyone pretending they did not hear an uncle's racist remark or notice a mother's drinking problem.[230] "Social life is an uncluttered, orderly thing because the person voluntarily stays away from the places and topics and times where he is not wanted and where he might be disparaged for going," Goffman concludes.[231] In discussing social life as performance, he notes that

> in their capacity as performers, individuals will be concerned with maintaining the impression that they are living up to the many standards by which they and their products are judged . . . . But, *qua* performers, individuals are concerned not with the moral issue of realizing these standards, but with the amoral issue of engineering a convincing impression that these standards are being realized.[232]

The fundamental question is not whether one is what one claims to be, but whether one can convince other people of it. We are helped along in this regard by other people, as "the audience contributes in a significant way to the maintenance of a show by exercising tact or protective practices on behalf of the performers."[233] For Goffman, social life moves along because of both *obligations* and *expectations*, with obligations "establishing how [an individual] is morally constrained to conduct himself" and expectations

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[228] *See generally* ERVING GOFFMAN, INTERACTION RITUAL (1967); ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 251 (1959) (highlighting the powerful role of self-presentation in communicating in social interactions).

[229] *See generally* INTERACTION RITUAL, *supra* note 228 (explaining that people develop social skills and learn to react appropriately to certain social cues through interaction rituals).

[230] Erving Goffman, *On Face-to Face*, *in* INTERACTION RITUAL 5, 12, 18 (1967).

[231] *Id.* at 43.

[232] THE PRESENTATION OF SELF IN EVERYDAY LIFE, *supra* note 228, at 251.

[233] *Id.* at 234.

"establishing how others are morally bound to act in regard to him."[234]

Goffman's account is therefore concerned with how we portray competence in the performance of our roles. Yet, situations may also call for a self-presentation of incompetence.[235] McLuhan describes how individuals may don "the cloak of incompetence" in order to "deliberately disregard, disguise, downplay, or diminish their personal abilities in social interaction for strategic and moral purposes."[236] One technique is particularly important here: "playing dumb," which McLuhan describes as "pretending not to understand the other, feigning ignorance of some subject, or downplaying personal abilities."[237]

This particular strategic performance of incompetence or ignorance is recognizable enough in everyday life that "playing dumb" is a common term: we play dumb when revealing knowledge of certain information might result in social sanctions or discomfort and are told not to play dumb when denials of knowledge strain credulity. As with any other social performance, the audience must do its part to sustain this self-presentation by shows of credulity. As Goffman, says,

> When a person treats face-work not as something he need be prepared to perform, but rather as something that others can be counted on to perform or to accept, then an encounter or an undertaking becomes less a scene of mutual considerateness than an arena in which a contest or match is held.[238]

This need for a credulous audience speaks to the notion that there is something fundamentally *social* about this process. Wakeham, in an article about the phenomenon of "bullshit"—his term, not ours—argues that it is a problem of social epistemology, contending that "bullshit is the product of social action, and bullshitting is a decidedly social activity. Explaining bullshit requires

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[234] INTERACTION RITUAL, *supra* note 228, at 49 (emphasis in original).

[235] Arthur McLuhan et al., *The Cloak of Incompetence: A Neglected Concept in the Sociology of Everyday Life*, 45 AM. SOCIO. 361, 364 (2014).

[236] Arthur McLuhan, *Adopting a Cloak of Incompetence: Impression Management Techniques for Feigning Lesser Selves*, 38 SOCIO. THEORY 122, 122 (2020).

[237] *Id.* at 127.

[238] INTERACTION RITUAL, *supra* note 228, at 24.

framing the problem not just in reference to the epistemic conditions faced at the individual level but also in reference to the social production of knowledge."[239] A significant part of what makes bullshit likely to be accepted is vagueness of standards of evidence. As Wakeham says,

> Whether the would-be bullshitter intends to be deceptive (like a liar) or sincerely believes and promotes some form of nonsense is less important than the fact that he or she is able to get away with it (to varying degrees) largely because of the lack of clarity and agreement over the relevant epistemic standards.[240]

A lack of epistemic clarity can be intensified when "bullshit" is appositely framed. Goffman, for instance, discusses rituals of deference, "that component of activity which functions as a symbolic means by which appreciation is regularly conveyed *to* a recipient *of* this recipient, or of something of which this recipient is taken as a symbol, extension, or agent."[241] Within the confines of these rituals, actors are actually given substantial leeway: "in scrupulously observing the proper forms [an actor] may find that he is free to insinuate all kinds of disregard by carefully modifying intonation, pronunciation, pacing and so forth."[242] This situation is a useful working description of the courtroom.

B. A Vocabulary of Non-Competence

Goffman's account of social life conceives of reality in the terms of what is intersubjectively treated as true, rather than what is objectively the case. This view is well-suited to describe the operation of courts. His thinking arises from the pragmatist tradition that also gave rise to legal realism, the view of law resting on the maxim that "the law" is nothing but "what the courts will do in fact."[243] A banal realism pervades American legal thought and practice, and

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[239] Joshua Wakeham, *Bullshit as a Problem of Social Epistemology*, 35 SOCIO. THEORY 15, 18 (2017).

[240] *Id.* at 26.

[241] Erving Goffman, *The Nature of Deference and Demeanor*, *in* INTERACTION RITUAL 47, 56 (1967).

[242] *Id.* at 58.

[243] Oliver Wendell Holmes, Jr., *The Path of Law*, 110 HARV. L. REV. 991, 994 (1997).

courts are meant to produce a reality much like that Goffman describes.[244] The purpose of adversarial proceedings is to establish legal rather than objective truth, and the production of legal truth is achieved by the application of a range of concepts and standards that seek to gauge what is approximately true, with the understanding that different questions call for different standards—non-arbitrary, reasonable, clear and compelling, and so forth. Claims and self-representations in legal contexts, at least from actors with an understanding of how law works, should therefore be understood in those terms: legal success arises from producing legally effective accounts of one's actions. Representing oneself as ignorant of facts, the motives of others, or lacking the organizational ability to do one's work may be an effective accounting.

i. Disavowing Responsibility for or Knowledge of Others' Actions

Election officials may try to disclaim responsibility for administrative problems by professing ignorance about the conduct or motives of other actors. In legal settings, this may involve a claim to be applying, rather than making, law. For example, Ohio Secretary of State Jon Husted claimed to be immune from a lawsuit challenging his enforcement of "an illegal state law saying initiative petition circulators must be Ohio residents."[245] Husted was found not to have qualified immunity.[246] When the ruling came down, "Husted's office questioned [the] ruling denying him qualified immunity, saying his role in the executive branch is to carry out a law, not interpret it," with a spokesman saying, "When the General Assembly issues a new law, we go on the assumption that the law is constitutional. I don't believe the voters elected Secretary Husted to decide which laws he's going to uphold and which laws to ignore."[247] The executive director of the 1851 Center for Constitutional Law, the plaintiff in the lawsuit, said, "We would like to end

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[244] Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1813 (1990).

[245] Darrel Rowland, *Judge Finds Husted Liable for Enforcing Unconstitutional Law*, COLUMBUS DISPATCH (Mar. 16, 2015), https://www.dispatch.com/article/20150316/NEWS/303169731.

[246] *Id.*

[247] *Id.*

the 'I don't make the law; I just enforce it' mentality that many public officials use to escape liability for the harm they cause."[248]

Such claims, in a legal venue, are analogous to the common rhetorical practice of ascribing responsibility to some other government actor. We will confine ourselves to two examples. In 2018, Ford County Clerk Debbie Cox moved Dodge City, Kansas's sole voting location beyond the city limits to a site only accessible by car.[249] Dodge is a majority-minority community anchored by the meatpacking industry, whose relatively poor and busy workers might lack the time or transportation to visit an extra-municipal polling place.[250] When a complaint was first sent to Cox, she forwarded the complaint by email to another state official, along with her own commentary: "LOL."[251] As concerns about Dodge City became more prominent, "Secretary of State Kris Kobach's office said in an emailed statement it has no control over the decisions of most Kansas counties"—a factually correct claim largely beside the point.[252] Similarly, after long lines to vote in Georgia's 2020 primary elections received national recognition, Georgia Secretary of State Brad Raffensperger "accused the liberal-leaning Fulton County, which includes most of Atlanta, of botching the election" and specifically placed "the blame on the workers from individual counties for not knowing how to work the machines."[253] Such a claim may have some basis in fact but is hardly a compelling response from an official responsible for administering elections in a state with a very long history of similar problems.

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[248] *Id.*

[249] Roxana Hegeman, *New Voters Get Notices Listing Wrong Dodge City Polling Site*, AP NEWS (Oct. 25, 2018), https://apnews.com/e1b4e441d4a448b98f129fcde0556a98.

[250] *Id.*

[251] Aris Folley, *Kansas Election Official Wrote 'LOL' in Response to ACLU Request for Second Polling Site*, HILL (Nov. 2, 2018) https://thehill.com/blogs/blog-briefing-room/news/414534-election-official-said-lol-in-response-to-aclu-request-to-open.

[252] Hegeman, *supra* note 249.

[253] *Black Areas Plagued by Voting Problems in Georgia, Activist Says*, WTOP (July 2020), https://wtop.com/national/2020/07/black-areas-plagued-by-voting-problems-in-georgia-activist-says. Secretary Raffensperger, of course, faced strong criticism from co-partisans for his later defense of the conduct of Georgia's general and runoff elections, and was wholly unwilling to take any steps to question, alter, or discard the results—a significant illustration that the administrative conduct described here is generally legally permissible, and carried out within traditional understandings of the rule of law. Amy Gardner, *Ga. Secretary of State Says Fellow Republicans are Pressuring Him to Find Ways to Exclude Ballots*, WASH. POST (Nov. 16, 2020), https://www.washingtonpost.com/politics/brad-raffensperger-georgia-vote/2020/11/16/6b6cb2f4-283e-11eb-8fa2-06e7cbb145c0_story.html.

ii. Ignorance of Facts or Their Production

Election officials may claim to have been ignorant of facts that, if known, would have strongly suggested that some action was likely to produce a serious problem or disparity. The discussion above has pointed to voter roll maintenance as a matter badly hindered by incomplete and inadequate information; the NVRA's maintenance framework has effectively institutionalized action grounded in non-knowledge. When voter roll maintenance shades into voter purging, officials commonly profess not to have known about the conditions that produce this result.

For example, in 2004, Glenda Hood, who succeeded Katherine Harris as Secretary of State of Florida, was forced to abandon a plan to use a "felon purge" list "after it became known that the flawed list would target [B]lacks but not Hispanics, who are more likely in Florida to vote Republican."[254] The list also contained the names of thousands of people, most of them Black, who should not have been on the list at all.[255] Hood claimed this was unintentional, and even ordered an audit of the database.[256]

In West Virginia, Secretary of State Andrew "Mac" Warner reported in 2018 in a communication titled "Voter List Maintenance is the Foundation for Election Security" that approximately 100,000 names were removed from voting rolls over the course of nineteen months.[257] This constituted "about one in 12 registered voters," as the Brennan Center for Justice points out.[258] The Brennan Center also reports a disparity between the point of view of election administrators on this purge and the experience of voters:

> In contrast, the county officials we spoke with reported that for the most part, the list maintenance process went smoothly. Most officials said they were unaware of any

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[254] Bob Herbert, *A Chill in Florida*, N.Y. TIMES (Aug. 23, 2004), https://www.nytimes.com/2004/08/23/opinion/a-chill-in-florida.html.

[255] *Id.*

[256] Lucy Morgan, *Hood Wants Investigation of Felon Database*, TAMPA BAY TIMES (July 16, 2004), https://www.tampabay.com/archive/2004/07/16/hood-wants-investigation-of-felon-database.

[257] Press Release, Mac Warner, W. Va. Sec'y of St., Voter List Maintenance is the Foundation of Election Security (Sept. 14, 2018), https://sos.wv.gov/news/Pages/09-14-2018-B.aspx.

[258] Jonathan Brater, *West Virginia's Large-Scale Purge Raises Concerns among Voters*, BRENNAN CTR. FOR JUST. (Oct. 30, 2018), https://www.brennancenter.org/our-work/analysis-opinion/west-virginias-large-scale-purge-raises-concerns-among-voters.

> individuals who had been removed wrongly. However, some of these officials were from counties in which we also spoke to voters who were purged. County officials did acknowledge that mistakes do happen.[259]

Voter roll maintenance does not simply rely on weak information such as non-response to a confirmation mailing—it relies upon information supplied by federal, state, and local entities, as well as records furnished by other states. Above, we noted that North Carolina made aggressive, uncritical use of ostensible record matches created by the Crosscheck program. Here, we consider recent voter roll maintenance issues in Texas. In 2019, Texas Secretary of State David Whitley directed county administrators to investigate the registration status of some 95,000 registered voters whose names appeared on a list of non-citizens produced by the Texas Department of Public Safety—in effect contending that the state had failed to detect well over 100,000 instances of felonious registration and voting by non-citizens.[260] In fact, the list was outdated and inaccurate: it cataloged a range of erroneous name matches, or information of individuals who registered to vote after naturalizing.[261] Steve McCraw, head of the Department of Public Safety, said "his department had included that citizenship flag in the data it sent to the secretary of state, chalking up the error to 'confusion in how the data was interpreted' by 'lower-level people acting in good faith.'"[262] Such was also the position of Secretary Whitley, who professed not to have been aware of the means or timing of the production of this list.

This issue is not specific to Texas. Other states have used "lawful presence lists" based on driver's license and other state ID applications, as well as juror questionnaires, to determine

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[259] *Id.*

[260] Liam Stack, *Texas Secretary of State Questions Citizenship Status of 95,000 Voters*, N.Y. TIMES, Jan. 26, 2019, at A16.

[261] Liam Stack, *Texas Ends Review That Questioned Citizenship of Almost 100,000 Voters*, N.Y. TIMES (Apr. 26, 2019), https://www.nytimes.com/2019/04/26/us/texas-voting.html.

[262] Alexa Ura, *Gov. Greg Abbott Blames DPS for Voter Roll Snafu. But the Story Behind the Citizenship Review is Complicated*, TEXAS TRIB. (Mar. 5, 2019, 8:00 PM), https://www.texastribune.org/2019/03/04/voting-rights-fight-texas-gov-greg-abbott-picks-side-david-whitley.

citizenship status.[263] Such records are a weak basis for subjecting registrations to scrutiny. In Texas, "driver's licenses don't have to be renewed for several years. In between renewals, Texans aren't required to notify DPS about changes in citizenship status. That means many of the people on the list could have become citizens and registered to vote without DPS knowing."[264] The same investigation noted that this has had consequences in other states, including "in 2012, [where] Florida officials drew up a list of about 180,000 possible noncitizens . . . . It was later culled to about 2,600 names, but even then that data was found to include errors . . . [and] ultimately, only about 85 voters were nixed from the rolls."[265] Careful handling of such records will greatly limit the number of questioned registrations:

> Around the same time, officials in Colorado started with a list of 11,805 individuals on the voter rolls who they said were noncitizens when they got their driver's licenses . . . [but] in the end, state officials said they had found about 141 noncitizens on the rolls — 35 of whom had a voting history — but that those still needed to be verified by local election officials.266

iii. Organizational Incapacity

Finally, officials may claim disparities flowing from administrative actions are not willful, but the result of organizational incapacity. Perhaps the most important instance, poll closures, can be discussed briefly. Budgetary constraints are routinely cited as a reason for elimination of polling places, an argument often conjoined to claims about high costs of making polling places compliant with the Americans with Disabilities Act.[267] For example, in Maricopa County, Arizona, participants in the 2016 primary "faced voting

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[263] Alexa Ura, *"Someone Did Not Do Their Due Diligence": How an Attempt to Review Texas' Voter Rolls Turned into a Debacle*, TEX. TRIB. (Feb. 1, 2019, 10:00 AM), https://www.texastribune.org/2019 /02/01/texas-citizenship-voter-roll-review-how-it-turned-boondoggle.

[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] Andy Sullivan, *Southern U.S. States Have Closed 1,200 Polling Places in Recent Years: Rights Group*, REUTERS (Sept. 10, 2019, 2:12 AM), https://www.reuters.com/article/us-usa-election-locations-idUSKCN1VV09J.

delays of up to five hours. After state officials cut county budgets, Maricopa reduced its number of polling places by 70 percent—from 200 to 60—meaning one polling place was available for every 21,000 voters."[268]

Accounts about incapacity are also found in discussions of voter roll maintenance. In 2012, it was reported that "in a state of four million people and two million registered voters, Louisiana lists a staggering 190,848 registered voters on the state's inactive voter list."[269] Despite this, "some parishes have used budgetary constraints to justify not publishing inactive voter lists."[270] In the recent voter roll maintenance in West Virginia noted above, election officials attributed the high purge rates in some counties to lack of resources.[271] On the subject of:

> seven counties where between 26 percent and 33 percent of Democratic registrations were purged . . . [which] also saw between 21 percent and 26 percent of Republican registrations purged, [. . .] [general counsel in the Secretary of State's Office Donald] Kersey and Brittany Westfall, director of the Secretary of State's Elections Division, said those percentages likely represent challenges faced by county clerk's offices with small staffs to quickly address backlogs of inactive registrations.[272]

In *Fish v. Kobach*, this account also extended to voter registration practices.[273] At issue in the case was Kansas's implementation of a documentary proof of citizenship requirement to register to

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[268] Adam Harris, *The Voting Disaster Ahead*, ATLANTIC (June 30, 2020, 7:50 PM), https://www.theatlantic.com/politics/archive/2020/06/voter-suppression-novembers-looming-election-crisis/613408.

[269] Erica Woebse, *Geaux Vote (or Don't): Exploring the Excessive Number of Louisiana Voters on State's Inactive Voter List*, WM. & MARY ELECTION L. SOC'Y. (Oct. 10, 2012), http://electls.blogs.wm.edu /2012/10/10/geaux-vote-or-dont-exploring-the-excessive-number-of-louisiana-voters-on-the-states-inactive-voter-list.

[270] *Id.*

[271] Phil Kabler, *More WV Democrats than Republicans Have Been Purged from Voter Rolls. Is that Unexpected?*, CHARLESTON GAZETTE-MAIL (Jan. 18, 2020), https://www.wvgazettemail.com/news/politics/more-wv-democrats-than-republicans-have-been-purged-from-voter-rolls-is-that-unexpected/article_53b54044-1b99-5d3a-a192-926f9950e0cb.html.

[272] *Id.*

[273] Fish v. Kobach, 309 F. Supp. 3d 1048, 1104 (D. Kan. 2018).

vote in state elections.[274] New registrants who could not immediately supply proof of U.S. citizenship were placed on a list of "suspended" voter registrations; this list was maintained (and cleared) by administrators in the Office of the Kansas Secretary of State.[275] This suspended list grew rapidly in size and produced lengthy delays in processing clearances from the suspension list. At trial, Secretary Kobach sought to defend the legality of the documentary proof of citizenship policy, in part, by acknowledging administrative failings in its implementation.[276]

Judge Julie Robinson's opinion in the case enumerated an extraordinarily wide range of reasons for rejecting the documentary proof of citizenship policy in both its conception and implementation. But the case provides occasion to note how modest the organizational capacity of state-level secretaries of state is relative to the scope of their tasks. In Kansas, the Office of the Secretary of State "administers more than 1,000 laws" respecting elections, lobbying, trademarks, corporations, notaries, legislative operations, state administration, and so forth, but the office has the equivalent of thirty-six staff members.[277] It is hard to imagine how an organization of this scope was to find the additional capacity to manually assess and clear tens of thousands of suspended voter registrations.

Practices of the kind described here routinely produce disparate effects across racial and ethnic groups and do so by mechanisms that are readily understood.[278] Elections officials who oversee polling place closures, enforce legally questionable restrictions on registration activity, or engage in voter roll maintenance practices that remove valid registrants frequently profess that both the results and the intervening causal steps were unexpected and unintended.[279] Although this section has focused on (unusual) instances where such claims failed to serve as complete legal defenses of actions, they served in these instances as a successful means of

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[274] *Id.* at 1053.

[275] *Id.* at 1067.

[276] *Id.* at 1113.

[277] LAURA KELLY, OFF. OF THE GOVERNOR, THE GOVERNOR'S BUDGET REPORT, VOLUME 2, AGENCY DETAIL, FISCAL YEAR 2020 162–163 (2020).

[278] *See, e.g.*, Theodore Johnson, *The New Voter Suppression*, BRENNAN CTR. FOR JUST. (Jan. 16, 2018), https://www.brennancenter.org/our-work/research-reports/new-voter-suppression.

[279] Antony Page & Michael Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1, 3–4 (2010).

disclaiming malign intent. We believe that these self-representations are broadly effective: they are common among elections administrators who face criticism, but similar professions of personal failure are extraordinarily rare in American public life. The relatively modest administrative record produced to support choices of this kind also affords little basis to rebut the officials' self-representations. We claim no privileged knowledge of the motives or states of mind of elections officials. But we conclude by observing that there are few other governmental domains where sincere, persistent avowals in individual or organizational incompetence would be tolerable.

V. Demanding Competence

We have argued that the inadequacies of election administration have constituted the largest practical barrier to the right to vote in the United States over the past generation. The wave of state legislation in 2021 is unlikely to change this pattern—it is the legislation's administration that will define the practical effect of such laws. As we have defined it, administrative burdens on the right to vote are the result of three interrelated problems: administrative inadequacy, discrimination, and misalignment between the social scientific evidence for these problems and the legal standards for defining and remedying them. The baseline quality of election administration in the United States is relatively low: official information is modest in scope, the conduct of elections relies upon the work of a highly dispersed set of public organizations and an aging infrastructure, and voting is, in comparison to other kinds of common interaction with government, relatively inconvenient. It is instructive that one of the great achievements in the modern history of voting rights was to raise voter registration practices to the administrative standard set by motor vehicles agencies—offices that serve as a popular archetype of inefficient, unpleasant bureaucracy.

Many of these problems are conceivably outside of the control of elections administrators. We are inclined to believe that state and local elections administrators broadly desire to run fair and inclusive elections, and many problems individual voters encounter truly are traceable to scarcity of public resources, rather than any personal failing or animus on administrators' part. Yet, it is clear that general problems in administering elections coexist alongside clear disparities that closely follow persistent social and geographic

patterns of inequality and discrimination. That participating in elections is so often confusing and laborious makes it more difficult, in any particular instance, to show that barriers may be the product of bad intentions rather than structural problems.

A generally improved standard of election administration would be the most expedient means of stripping the protective cloak of incompetence from invidiously discriminatory conduct. Avoidable barriers to voting are also objectionable in a representative democracy, irrespective of any cross-group disparity they might produce. In this section, we suggest three potential ways of addressing these matters. All the suggestions rest outside the conventional parameters of voting rights law: we laud the vigorous and thoughtful efforts of voting rights advocates but note that larger patterns of legal and political change are closing off once-promising avenues of argument.

A. Call Attention to Social Research that Aligns with Judges' Habits of Mind

Social statistics are the basis of a large, distinguished research tradition for good reason. They afford a means of producing approximate (but sound) descriptions of large patterns from modest observations. Ubiquitous computing has also transformed statistics into a labor efficient means of describing social reality. Used thoughtfully, many statistical methods can identify a particular causal link amid the profuse, messy processes that characterize social reality.

However, many of the qualities that make social statistics a strong basis for describing social reality also limit their application in judicial settings. Conventional techniques such as statistical regression produce knowledge by describing the overall pattern or structure that may be observed across a wide range of "cases" (that is, particular observations); a regression, for instance, yields a simplified description of the patterned variation of social reality, rather than a complete account of any particular case included in the statistical analysis.[280] Although there are a wide range of beliefs about the nature of causation that inform statistical research, much of this work endeavors to *isolate* a given cause, rather than to give a

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[280] ANDREW ABBOTT, TIME MATTERS 38–40 (2001).

detailed, processual account of the operation of that cause.[281] This is a contrast to judicial production of knowledge, which treats a particular case in fine detail, and often conceives of causes in terms of subjective motivations and states, amid the unfolding of processes. Thus, conventional social statistical findings, however rigorously produced and compelling in their own terms, will almost never be taken by judges as dispositive answers to legal questions.

Not coincidentally, this pattern strongly resembles divisions between research traditions within the social sciences. At the turn of the twentieth century, there were very strong intellectual and institutional connections between law and social science.[282] Divisions within the social sciences arose from historical processes similar to those that drew professionalized social science farther from law.[283] Statistical accounts have developed in parallel with another prominent research approach, characteristically reliant upon direct observation, interviews, or documents as primary sources of information, and which transmute such information into arguments—including causal explanations—by structured practices of interpretation. In disciplines like sociology, such "qualitative" research figures prominently in studies of contemporary forms of inequality, especially inequality arising from the everyday manifestations of racism at the individual and community level.

Qualitative techniques also figure prominently in work on topics where there the number of observable cases is limited, but the cases are of high interest. There have been few successful political revolutions in modern history, but the causes of the French and Russian Revolutions are of undoubted interest.[284] Or, to mention a matter of more direct relevance for the American judiciary: understanding the circumstances of Reconstruction has been critical for making sense of contemporaneous legal provisions such as the Fourteenth Amendment, whose expansive interpretation has altered law and government practice in ways that are almost impossible to overstate.[285] Social historian Eric Foner's account of Reconstruction has therefore been one of the most-cited pieces of non-

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[281] *Id.* at 54–59.

[282] *See* Eric Lybeck, *Ajurisdiction*, 48 THEORY & SOC'Y. 167, 175–76 (2019).

[283] ANDREW ABBOTT, CHAOS OF DISCIPLINES 32 (2001).

[284] THEDA SKOCPOL, STATES AND SOCIAL REVOLUTIONS 37, 39 (1979).

[285] Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585 (2012).

legal research in the modern history of the Supreme Court—though, in Foner's own view, the Court has never yet fully acknowledged the importance of modern accounts of Reconstruction.[286]

These distinct methods, and their underlying modes of reasoning, have been a source of major disciplinary conflict in the social sciences.[287] There exist pointed critiques of the simplifying mathematical assumptions of statistics and the tendency of these assumptions to shape how researchers conceive of social reality; there are similarly pointed critiques of the subjective character of evidence production in qualitative research and the limitations on the ability to make general knowledge claims from such work.[288] Influential works have argued that studies of single cases may be designed in a way that conforms to the common assumptions of statistical inference, though we are persuaded by responses that characterize this as an awkward fit that undermines the truly compelling explanatory features of case-based qualitative studies.[289] In some social sciences, one approach or the other predominates—the great majority of work in political science and public policy, for instance, relies on statistical forms of evidence, while contemporary anthropology is overwhelmingly qualitative. Our own fields of sociology and public administration have sought a pluralist approach that acknowledges the value of different methods in making sense of a given topic—and, in many cases, the value of combining quite distinct techniques in the context of a particular study.[290]

Efforts within the social sciences to constructively combine different forms of data and explanation offer a potential model for presentation of social scientific evidence in support of rights claims. There are profound intellectual similarities between judicial and qualitative social scientific work.[291] The elaboration of more

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[286] *Id.* at 1599.

[287] ABBOTT, *supra* note 283.

[288] ABBOTT, *supra* note 280.

[289] GARY KING ET AL., DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 106 (1994); Mario Small, "*How Many Cases Do I Need?*" *On Science and the Logic of Case Selection in Field-Based Research*, 10 ETHNOGRAPHY 1, 18 (2009).

[290] Michèle Lamont & Ann Swidler, *Methodological Pluralism and the Possibilities and Limits of Interviewing*, 37 QUALITATIVE SOCIO. 153, 154–55 (2014); Mario Small, *How to Conduct a Mixed Methods Study: Recent Trends in a Rapidly Growing Literature*, 37 ANN. REV. SOCIO. 57, 58 (2011).

[291] Boyce Robert Owens & Laura Ford, *Judicial Social Theorizing and Its Relation to Sociology*, 42 QUALITATIVE SOCIO. 229, 230 (2019).

sophisticated statistical accounts of voting issues, even if carefully tailored to judicial reasoning, would appear to have modest prospects of future success. At this point, it is useful to consider that a key distinction in social science research between the logic of inquiry associated with statistical research and the logic of inquiry associated with qualitative research is that, while the former focuses on describing empirical cases in ways that are statistically generalizable to a larger population, the virtue of the latter is its ability to identify mechanisms in cases that drive social processes, regardless of whether the cases under examination admit of generalizable claims-making. Emphasizing such a logic is potentially strategically beneficial to actors attempting to convince judges who have been hesitant to rely on statistics in making their decisions, because the qualitative approach to identifying mechanisms within empirical cases roughly aligns with existing legal logics of legal realism.[292] We do not suggest that statistical evidence has no place in legal arguments, but rather that joining such work to social scientific accounts that provide strong narrative, motivational, or processual accounts of experience and behavior could be a promising way forward, particularly regarding subjective aspects of voters' experiences. Judges and lawyers are trained to think in ways consonant with a qualitative case-based social science approach, so emphasizing such evidence within a courtroom could potentially pay dividends.

B. Positive Guarantees Under State Law

The inadequacy of material support for election administration arises in part because there is no level of government that bears a clear responsibility for financing elections. The fiscal federalism of elections is very complex, and as has been noted above, there is much still unknown about the cost of conducting elections. The gap between strong legal protections of the right to vote and the weak and uneven institutional basis for exercising it is in many ways analogous to public education. Since the 1950s, the federal courts have emphatically rejected segregated schools as inherently unequal.[293] Yet, federal courts have recognized no positive right to a public education. Nor does the federal government assume much responsibility for financing public education: nearly all funding for public

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[292] Holmes, *supra* note 243, at 8, 11.

[293] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

K-12 education comes from state and local governments.[294] The legal pursuit of educational equity has thus advanced much farther at the state level, where it has often been possible to enact and enforce positive guarantees of fair and adequate support for public education in state constitutions.[295]

Given that elections are a matter where states have the largest role, both constitutionally and practically, similar legal guarantees for fairly and adequately administered elections might be pursued at the state level. Although the U.S. Constitution does not explicitly grant the right to vote, every state constitution, except Arizona's, expressly recognizes a right to vote; in addition, there are twenty-six states whose constitutions expressly guarantee "free," "free and open," or "free and equal" elections.[296] Such language may be interpreted more broadly than federal law, and the practical meaning of these guarantees may be further explored or revisited in states where doctrine is already well-developed. We note that elections clauses were central to two important recent decisions. In *League of Women Voters v. Commonwealth*, Pennsylvania's elections clause was invoked in a successful challenge to the state's congressional districting plan.[297] In *Common Cause v. Lewis*, North Carolina's elections clause was successfully invoked to challenge a statewide districting scheme.[298] This approach couples law and practical responsibility more closely. It is also a proposition that might be broadly agreeable to voters, who often show a stronger appetite for elections reforms than political leadership. By direct democratic means, voters in many states have opted for the creation of independent redistricting commissions and reform of felon disenfranchisement laws.

C. Elections as Administration

Election officials embody a duality. They are charged to safeguard the fairness and integrity of the democratic process, and in a large democracy like the United States, the greater part of this task

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[294] Daniel Alvord & Emily Rauscher, *Minority Support: School District Demographics and Support for Funding Election Measures*, 57 URB. AFF. REV. 643, 644 (2021).

[295] See ZACKIN, *supra* note 28.

[296] Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 144–49 (2014).

[297] League of Women Voters v. Commonwealth, 178 A.3d 737, 741 (Pa. 2018).

[298] *See* Common Cause v. Lewis, 834 S.E.2d 425 (N.C. 2019).

is neutrally technical in character, the sort of work often entrusted to a senior civil servant who has advanced on the basis of merit. Yet, the most important state and local election officials are political figures—often directly elected and, at the state level, invariably partisan. As sitting secretaries of state themselves conceive the role, a good official must meet both standards: the role demands the skill and impartiality of a senior administrator, but also democratic accountability to the electorate.[299]

In practice, it is often possible to fall short of both standards: the typical voter cannot be expected to be well informed about the record of a state secretary of state or county clerk, and elected officials' decisions are often subject to lower legal standards of scrutiny than administrators who must act in accordance with legislative authorization of their work. Judges, solely through stylistic choices, could play a role in holding officials to the dual standard. In cases arising from two of the examples discussed in the previous section, *LULAC v. Whitley* and *Fish v. Kobach*, the district judges issued scathing rulings.[300] In *LULAC*, Judge Biery frankly declared that the Secretary of State had "created this mess."[301] In *Fish v. Kobach*, Judge Robinson also entered a contempt of court finding that obliged Secretary Kobach to take continuing legal education courses.[302] The tenor of these opinions secured significant media attention in both cases, effectively bringing what judges deemed to be the administrative failings of political officials into public view in a way that a routine application of the NVRA would not. Opinion style matters for law, and rebuke can be a powerful stylistic choice.[303]

Judicial review of administrative conduct commonly takes two forms. To assess the decisions arising from settings like administrative adjudications or rulemakings, the courts have elaborated a robust framework that is particularly attentive to the inputs and

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[299] BENSON, *supra* note 163.

[300] Tex. League of United Latin Am. Citizens v. Whitley, No. SA-19-CA-074-FB 1, 4 (W.D. Tex. Feb. 27, 2019) (order denying defendant motion to dismiss); Fish v. Kobach, 189 F. Supp. 3d 1107, 1118–19 (D. Kan. 2016).

[301] *Tex. League of United Latin Am. Citizens*, No. SA-19-CA-074-FB, at 4.

[302] *Fish*, 189 F. Supp. 3d, at 1119.

[303] Pamela Hobbs, *Judges' Use of Humor as a Social Corrective*, 39 J. PRAGMATICS 50, 52–53 (2007); Robert J. Hume, *The Impact of Judicial Opinion Language on the Transmission of Federal Circuit Court Precedents*, 43 L. & SOC'Y. REV. 127, 146 (2009).

procedures.[304] In assessing less formal administrative decisions, such as the frontline work of officials who interact directly with the public, the standard is lower—in many cases, the question is whether the decision followed reasonably from the trained intuition of the official.[305] More might be done, through both legal and political means, to bring election administration into closer conformity with such basic standards.

A wide range of important administrative choices about elections—what sources of records to employ in voter roll maintenance, where to site polling places, and so forth—are regularly made out of public view, with little supporting rationale. There are two compelling grounds for making the administration of democracy a more transparent process. First, a more transparent (and, perhaps, participatory) process would be consistent with basic democratic values and would also accord with the professional ethical orientation of modern American administration, which strongly favors equity and participation.[306] Second, the soundness of the thinking behind officials' choices cannot readily be tested in court if officials are not obliged to document these reasons or are free to offer them post facto.[307]

A promising model for pursuing administrative procedural regularity is Virginia's House Bill 1890, enacted by the General Assembly in its 2021 Special Session.[308] The bill subjects a wide range of "covered practices" to review before final adoption.[309] The language of covered practices, and the mechanism of review by the state attorney general, both resemble the requirements of Section 5 of the VRA.[310] However, the law also provides for review of a covered practice through ordinary public notice and comment mechanisms, which are in wide use and about which there is a mature

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[304] DAVID ROSENBLOOM, ADMINISTRATIVE LAW FOR PUBLIC MANAGERS (2d ed. 2015); JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 489–90 (6th ed. 2018).

[305] DAVID ROSENBLOOM ET AL., PUBLIC ADMINISTRATION AND LAW (3d ed. 2010).

[306] KENNETH J. MEIER & LAURENCE J. O'TOOLE, JR., BUREAUCRACY IN A DEMOCRATIC STATE 40 (2006); AM. SOC'Y. FOR PUB. ADMIN., CODE OF ETHICS (2020).

[307] Gregg G. Van Ryzin et al., *Latent Transparency and Trust in Government: Unexpected Findings from Two Survey Experiments*, 37 GOV'T INFO. Q., 1, 8 (2020); K. Sabeel Rahmaan, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 167, 168 (2018).

[308] H.B. 1890, 2021 Gen. Assemb., Spec. Sess. (VA 2021).

[309] H.B. 1890.

[310] Voting Rights Act of 1965, Pub. L. No. 97-205, §10304, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

body of law. House Bill 1890 also includes provisions that address common barriers to individuals seeking to make use of administrative legal protections by providing for recovery of court costs and explicitly defining a simple standing requirement.[311]

In other settings, organizations regularly protect themselves against claims about discrimination by the use of mandatory training. Such training, for instance, is a foundation of employers' protection against employment discrimination claims. There exist compelling arguments for the practical limitations of this approach.[312] Yet even this modest baseline is often absent in elections administration. There are fifteen states that have no mandatory training for local elections officials—states without mandatory training include notably populous states like California, New York, and Pennsylvania, as well as states like Alabama, Florida, Louisiana, and Texas that have been at the center of past and present concerns about voter suppression.[313] Many other states permit local officials to waive training requirements when faced with shortages of poll workers.[314] There is both a strong administrative argument for training and professionalism, and potentially wide administrative legal grounds for contesting the choices of untrained administrators.[315]

We are hardly the first to suggest that administration may be an effective starting point for defending voting rights. Zipkin, for instance, provides a thoughtful overview of administrative legal concepts that could be of use in electoral settings.[316] However, our account has suggested that there is a great deal of new work to be done. Legally, confronting administratively produced barriers might require new argumentative approaches and strategies and could require turning efforts away from symbolically potent and historically significant legal provisions. In view of the intergovernmental character of election administration, and the range of important choices made at the county level (or below), confronting electoral

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[311] Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821 (2008); *see* Ben Merriman, *Public Management's Problems are Legal Problems: How Law Contributes to Inequity in Contemporary Governance*, 4 PERSP. ON PUB. MGMT. & GOVERNANCE 213 (2021).

[312] LAUREN EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS (2016).

[313] NAT'L CONF. OF STATE LEGISLATURES, *supra* note 169, at 35.

[314] U.S. ELECTION ASSISTANCE COMM'N, *supra* note 21.

[315] HALE ET AL., *supra* note 165, at 46.

[316] Saul Zipkin, *Administering Election Law*, 95 MARQ. L. REV. 641, 669–70 (2012).

administrative burden would also involve a widely distributed effort. Moreover, the empirical basis for such a full legal confrontation with electoral administrative burden is wanting in two respects. First, factual knowledge about the local financing and organization of elections, and voters' experience of elections at the community level, is seriously underdeveloped, in part because social science is so reliant on governmentally produced information, and the systematic underfinancing of elections limits public organizational capacity to collect useful information. Second, the social scientific account of elections in the United States has been built from kinds of evidence and inference that courts have resisted; qualitative research of a kind infrequently commended to the judiciary's attention might be compelling. But employing the findings of emerging, methodologically mixed literatures, such as the rapidly growing literature of administrative burden, would require closer, sustained intellectual relationships between the social sciences and law. This article is our modest effort, as social scientists, to open a conversation with the legal scholars and practitioners who have been at the center of ongoing efforts to protect the right to vote.

PUTTING THE "VA" IN VTCS: HOW FACILITATING VA ACCESS CAN MAKE VETERANS TREATMENT COURTS MORE EFFECTIVE

RYAN FOLEY & JAMIE ROWEN†

ABSTRACT

This Article argues for better integration between Veterans Treatment Courts ("VTCs") and the Department of Veterans Affairs ("VA") by increasing court staff's training and knowledge about VA benefits. VA healthcare, housing, education, and monetary benefits can provide the stability and hope that many VTC participants need to successfully complete their court-mandated rehabilitation. We posit that VTC teams should include members who are knowledgeable about all VA services. Integration with the Veterans Health Administration ("VHA"), which can provide free or low-cost mental healthcare and substance use disorder care,[1] should be among the most important priorities for VTCs, with the goal of reducing recidivism for addiction-related offenses. Additionally, VTCs with staff trained to refer veterans to the appropriate Veterans Benefits Administration ("VBA") programs[2] would help participants plagued by

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[1] *See* SIDATH VIRANGA PANANGALA & JARED S. SUSSMAN, CONG. RSCH. SERV., R42747, HEALTH CARE FOR VETERANS: ANSWERS TO FREQUENTLY ASKED QUESTIONS 6, 31 (2020).

[2] *See* Maureen McCarthy, *VA Mental Health Care Found Superior to Care in the Private Sector*, U.S. DEP'T VETERANS AFF. (Apr. 15, 2016), https://www.blogs.va.gov/VAntage/27029/vv-

homelessness, lack of education, and other social disadvantages begin to build promising futures. We provide detailed information about the range of services available through the VA and call for greater integration of these two disparate but increasingly interdependent organizations—the VA and VTCs—so those who need VA benefits most do not suffer from inadequate access to the benefits they have earned.

I. INTRODUCTION

After listening to an introduction from the Veterans Treatment Court team about what to expect in the program, the first question from the newest court participant was, "What will happen to my housing?" He explained that, after months of bouncing between different shelters, he recently obtained a VA "sponsored" housing voucher and finally moved into his own apartment. Despite serious criminal charges pending against him and just having heard the long list of expectations from the court, including mandatory mental health treatment and drug testing, his biggest concern was that he would find himself homeless again. In a room full of advocates who just promised that they would be there to help him along the way, the silence in response to his question was deafening. After an awkward pause, the judge assured him that his new case manager would look into it with him.

This was not the first, and certainly not the last, veteran who has asked this same question.[3] Why did no one know the answer, and how can this lack of knowledge, which has a significant impact on veterans' well-being and success in treatment court,[4] be prevented? Scholars and practitioners have called attention to the unique benefits that these VTCs have provided since 2004, when a district court in Anchorage, Alaska, developed a specialized track for veterans in treatment court, and following the rapid spread of

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mental-health-care-found-superior-care-private-sector (illustrating that referrals to mental health programs profoundly benefit veterans).

[3] *See* Jack Tsai et al., *A National Study of Veterans Treatment Court Participants: Who Benefits and Who Recidivates*, 45 ADMIN. POL'Y MENTAL HEALTH 236, 239 (2018). In this study of 7931 VTC participants, the authors found that most participants in VTCs "exited the program in the same situation they entered." *Id.* at 240. For example, over 60% of those participants who did not have housing when they entered the program did not have housing when they left the program. *Id.* at 241.

[4] Robert M. Bossarte et al., *Housing Instability and Mental Distress Among U.S. Veterans*, 103 AM. J. PUB. HEALTH 213, 215 (2013).

Veteran's Treatment Courts[5] after Buffalo created one in 2008.[6] Modeled after adult drug treatment courts, VTCs are designed to provide additional support to former service members with substance use and/or mental health disorders who are either facing criminal charges (in pre-plea courts) or probation (in post-disposition courts).[7]

Despite growing interest in the efficacy of VTCs, there is surprisingly little attention paid to the role of the main institution that provides treatment for the VTC participants—the Department of Veterans Affairs.[8] This institutional relationship is increasingly recognized by Congress, which recently allocated significant funding for the creation of Veterans Justice Officers ("VJOs") to staff VTCs around the country.[9] In January 2020, Congress passed a bill to create a Veterans Treatment Court Program within the Department of Justice with the goal of developing "best practices" for VTCs nationwide.[10] Along with the Veterans Suicide Prevention Task Force, which has investigated the benefits of VTCs in suicide prevention since the Task Force's creation in 2019, this bill underscores the significant local, state, and national investment into VTCs.[11]

However, in order to develop "best practices," policymakers and advocates need a better understanding of how these courts operate—specifically how they provide access to the treatment that the participants need. Veterans are a particularly high-risk group for both substance use and criminal offending.[12] Veterans with substance use disorders are more likely to have criminal histories, with

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[5] VTCs are a general term for a treatment court that only allows qualifying veterans with substance use and/or mental health disorders and offers criminal justice benefits (either reduced or dismissed charges if pre-plea, or probation if post-disposition) for those who comply with court ordered psychological treatment. Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. CRIM. & CIV. CONFINEMENT 357, 363, 369 (2009). These courts have different definitions of a veteran, but they generally require that the participant enlisted in military service. *See id.* at 364.

[6] *Id.*

[7] AM. U., VETERANS TREATMENT COURTS: 2015 SURVEY RESULTS 11, 13 (2016).

[8] *See* Andrea K. Finlay et al., *Logic Model of the Department of Veterans Affairs' Role in Veterans Treatment Courts*, 2 DRUG CT. REV. 45, 49–50 (2019).

[9] Veterans Treatment Court Improvement Act, H.R. 2147, 115th Cong. § 2(a) (2018); *see also* Julie M. Baldwin & Erika J. Brooke, *Pausing in the Wake of Rapid Adoption: A Call to Critically Examine the Veterans Treatment Court Concept*, 58 J. OFFENDER REHAB. 1, 1–29 (2019).

[10] Veterans Treatment Court Coordination Act, H.R. 886, 116th Cong. § 2(a) (2020).

[11] Exec. Order No. 13,861, 3 C.F.R. § 8585 (2019).

[12] Nicole R. Schultz et al., *Criminal Typology of Veterans Substance Abuse Treatment*, 54 J. SUBSTANCE ABUSE TREATMENT 56, 56 (2015).

charges that include both nonviolent and violent offenses, than civilians with substance use disorders.[13] Studies show an average of eight arrests among justice-involved veterans, and about 70% of veterans in jails and prisons have been incarcerated before.[14] Further, the limited studies of VTC outcomes show mixed results. The most comprehensive study of VTCs across the country showed a 14% reincarceration rate within eleven months of program completion, which is significantly less than the recidivism rates for those involved in drug treatment courts.[15] In one study, the author found that graduates of the Alaska Veterans Court had lower recidivism rates compared with the overall recidivism rate in Alaska, but there were clear racial disparities in who completed the program.[16] By contrast, another study found that participants in a large, urban VTC were significantly less likely to be rearrested during the three-year follow-up period compared with a control group of probationers who were eligible for the VTC but opted out.[17]

Most VTC scholarship to date focuses on the role of criminal justice personnel such as the prosecutor, probation officer, defense attorney, or judge.[18] There has also been increased attention to the role of mentors, as VTCs often tout veteran-peer mentorship as a crucial factor contributing to their success.[19] However, the personnel who connect the VTCs with the VA often play the most critical role in VTCs.[20] Here, where the treatment provider is an enormous

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[13] Daniel M. Blonigen et al., *Criminal Recidivism Among Justice-Involved Veterans Following Substance Use Disorder Residential Treatment*, 106 ADDICTIVE BEHAVIORS 1, 2 (2020).

[14] *Id.*

[15] Tsai et al., *supra* note 3, at 239; Ojmarrh Mitchell, *Assessing the Effectiveness of Drug Courts on Recidivism: A Meta-Analytic Review of Traditional and Non-Traditional Drug Courts*, 40 J. CRIM. JUST. 60, 62 (2012).

[16] *See* Jack W. Smith, *The Anchorage, Alaska Veterans Court and Recidivism: July 6, 2004 – December 31, 2010*, 29 ALASKA L. REV. 93, 103, 107 (2010).

[17] Richard D. Hartley & Julie Marie Baldwin, *Waging War on Recidivism Among Justice-Involved Veterans: An Impact Evaluation of a Large Urban Veterans Treatment Court*, 30 CRIM. JUST. POL'Y REV. 62, 71–72 (2019).

[18] *See* ANNE S. DOUDS & EILEEN M. AHLIN, THE VETERANS TREATMENT COURT MOVEMENT STRIVING TO SERVE THOSE WHO SERVED 75 (2019); *see, e.g.*, Lisa M. Shannon et al., *Examining Implementation and Preliminary Performance Indicators of Veterans Treatment Courts: The Kentucky Experience*, 63 EVAL. PROGRAM & PLANNING 54, 57–58 (2017); *see also* Russell, *supra* note 5, at 365–67.

[19] Caroline I. Jalain & Elizabeth L. Grossi, *Take a Load off Fanny: Peer Mentors in Veterans Treatment Court*, 31 CRIM. JUST. POL'Y REV. 1165, 1169–70 (2020); Anne S. Douds & Don Hummer, *When a Veterans' Treatment Court Fails: Lessons Learned from a Qualitative Evaluation*, 14 VICTIMS & OFFENDERS 322, 323 (2019).

[20] *See* Smith, *supra* note 16, at 101.

bureaucracy with rigid rules about what services it offers, who can access them, and when and how they can be accessed, the court cannot effectively order treatment, or reasonably punish those for not accessing treatment, if the court does not understand how access to VA treatment actually works.[21]

To address these scholarly and practical concerns, this Article provides insights into the relationship between VTCs and the VA and offers ways to improve it. We focus on the opportunities and the limits of current practices that integrate VA services into VTCs and posit that VTC teams must include members knowledgeable about all VA services, not only those that initially appear most relevant to the court. Integration with the Veterans Health Administration, which can provide free or low-cost mental healthcare and substance use disorder care,[22] should be among the most important priorities for VTCs with the goal of reducing recidivism for addiction-related offenses. Additionally, VTCs with staff trained to navigate Veterans Benefits Administration programs would help participants plagued by homelessness, lack of education, and other social disadvantages begin to build promising futures.[23] Finally, we offer additional insights on improving relationships between VTCs and the VA, so that those who could benefit from VA benefits the most do not suffer from inadequate access to the benefits they have earned.

II. DEVELOPING A SPECIALTY COURT FOR VETERANS

VTCs are part of a larger body of specialized courts designed to help individuals in the criminal justice system who are suffering from substance use and mental health disorders.[24] The idea behind treatment courts is that criminal offenders with substance use disorders in drug courts, or mental health disorders in mental health courts, should work to address their addiction or underlying mental health issues rather than be simply punished with jail time.[25] Participants give up certain due process rights and gain access to a host

[21] *See, e.g.*, Finlay et al., *supra* note 8, at 52 (illustrating that VTC sentencing does not always line-up or comply with VA guidelines).

[22] *See* PANANGALA & SUSSMAN, *supra* note 1, at 6.

[23] *See* Finlay et al., *supra* note 8, at 52.

[24] Russell, *supra* note 5, at 357.

[25] Bruce J. Winick & David B. Wexler, *Drug Treatment Court: Therapeutic Jurisprudence Applied*, 18 TOURO L. REV. 479, 481 (2002); BRUCE J. WINICK, PROBLEM SOLVING COURTS: SOCIAL SCIENCE AND LEGAL PERSPECTIVES 211–12 (Richard L. Wiener & Eve M. Brank eds., 2013).

of social services designed to keep them on track.[26] Upon graduation, they usually receive some type of criminal justice benefit.[27] For pre-plea courts, offenders may receive dismissed or reduced charges.[28] For post-disposition courts, they may receive less time on probation or probation rather than a jail sentence.[29] VTCs are primarily modeled after drug treatment courts, though they also draw on practices from mental health courts.[30] The main difference is that some type of military service is required to access the VTC.[31] Furthermore, unlike the two other courts, VTCs have access to additional social services resources in the form of local, state, and federal programs for veterans.[32]

Although VTCs are created by courts and are not formally associated with the VA, the local VA medical center's ability to provide treatment is an important factor in the creation of VTCs as well as in their operations.[33] In Anchorage, where the first VTC was created, court personnel immediately contacted the local VA medical center to help set up the court.[34] According to a founding judge, "[t]he VA and Municipal Prosecutor both conditioned their agreement to participate in the Veterans Court on having the right to refuse to allow otherwise eligible individuals entry into the Veterans Court due to their current offense, criminal history, or history with the VA."[35] In other words, the local VA helped dictate who would be eligible for this court, linking eligibility for the VTC to eligibility

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[26] Martin Reisig, *The Difficult Role of the Defense Lawyer in a Post-Adjudication Drug Treatment Court: Accommodating Therapeutic Jurisprudence and Due Process*, 38 CRIM. L. BULL. 216, 218 (2002).

[27] *See id.* at 216.

[28] *See* RYAN S. KING & JILL PASQUARELLA, THE SENT'G PROJECT, DRUG COURTS: A REVIEW OF THE EVIDENCE 3 (2009), https://www.sentencingproject.org/wp-content/uploads/2016/01/Drug-Courts-A-Review-of-the-Evidence.pdf.

[29] *See id.*

[30] Russell, *supra* note 5, at 364–65.

[31] *E.g.*, *Veteran's Court Eligibility Criteria*, KITSAP COUNTY, https://www.kitsapgov.com/pros/Pages/Veteran'sCourtEligibility.aspx (last visited Oct. 17, 2021).

[32] Carole House et al., *State Veteran Benefit Finder*, CTR. FOR NEW AM. SEC. (Nov. 11, 2019), https://www.cnas.org/publications/reports/state-veteran-benefit-finder.

[33] Eric D. Button, The Diffusion of Veterans Treatment Courts: An Examination of Political, Social, and Economic Determinants at the County Level 2, 37 (Dec. 1, 2017) (unpublished M.A. thesis, University of Arkansas) (on file with ScholarWorks, University of Arkansas).

[34] Smith, *supra* note 16, at 97.

[35] *Id.*

for VA services.[36] This made sense since the creation of a VTC was predicated on the availability of treatment services for participants.[37] Ensuring availability of treatment through the VA meant that the court's founders were not asking other service providers to take on a new population or mandating that participants engage with services they cannot access or that do not exist.[38] VTCs are more likely to emerge in states where there are a significant number of veterans and corresponding veterans services, such as a local VA medical center.[39] In 2017, nearly a third of these unique courts required VA eligibility.[40] Participant outcomes are frequently measured in relation to the participant's ability to get VA services.[41] In other words, VTCs may not be formally affiliated with the VA, but they are highly interdependent.

Despite heavy reliance on VAs to provide treatment in VTCs, personnel in these courts frequently lack knowledge about VA benefits that are essential to the treatment plan.[42] The military service-related eligibility requirements for diversion to VTCs vary across the country and even within the same state.[43] These requirements often are dictated by state laws and funding restrictions, but all courts consider individuals' service component, length of service, and character of discharge.[44] Depending on the specificity of the eligibility requirements (or lack thereof), determining whether an individual is, in fact, eligible for VTC diversion based on their military service history can be complicated.[45] This becomes only more

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[36] *Id.* at 96.

[37] *Id.*

[38] *See id.* at 98, 100.

[39] Interestingly, the number of veterans actually decreases the likelihood of a VTC in certain counties but, at the state level, the higher the veteran population, the more likely a VTC exists. Button, *supra* note 33, at 37, 41.

[40] BESSIE FLATLEY ET AL., U.S. DEP'T OF VETERANS AFF., VETERANS COURT INVENTORY 2016 UPDATE: CHARACTERISTICS OF AND VA INVOLVEMENT IN VETERANS TREATMENT COURTS AND OTHER VETERAN-FOCUSED COURT PROGRAMS FROM THE VETERANS JUSTICE OUTREACH SPECIALIST PERSPECTIVE 3 (2017).

[41] For example, Tsai et al.'s analysis of VTC outcomes focuses on how VTCs improve access to housing, which the VA assists with through its host of benefits. Tsai et al., *supra* note 3, at 237, 242.

[42] Smith, *supra* note 16, at 101 (noting that veteran-defendants are rarely matched with a probation officer who can direct them to VA resources).

[43] Christine Timko et al., *A Longitudinal Examination of Veterans Treatment Courts' Characteristics and Eligibility Criteria*, 17 JUST. RSCH. & POL'Y 123, 125–26 (2016).

[44] *Id.*

[45] *Id.*

complicated when courts must determine if an individual is, in fact, eligible for relevant VA services, as each VA benefit and program has its own eligibility requirements.[46] A VTC team can only effectively determine whether an individual is a good candidate for participation if a VTC team member can correctly assess whether that individual's circumstances meet all requirements for participation.[47] While these evaluations may include a typical drug court evaluation, such as a risk and need assessment or whether those accused or found guilty of felonies or offenses classified as violent are allowed in the court, there may also be a question of access to VA services.[48] After all, a treatment court should not accept someone to whom it cannot provide treatment. Accurate eligibility determinations are far from a guarantee when some VTCs have minimal to no VA training or interaction.[49]

VTCs' difficulty in making accurate eligibility determinations becomes even more apparent the less relevant the VA benefit seems to the core mission of the court—providing substance use and mental health treatment.[50] A veteran may have access to VA-sponsored housing vouchers, for example, but not have access to VA healthcare because of his or her discharge status, length of service, or branch (e.g., National Guard or Reserves versus active duty Air Force, Navy, Marines, or Army).[51]

There are multiple reasons for VTCs' lack of VA knowledge, including the basic fact that the VA was not designed to work with criminal justice institutions.[52] The VA, as initially envisioned, was

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[46] 38 U.S.C. § 1710.

[47] *See* Smith, *supra* note 16, at 99–100.

[48] N.Y. ST. DEP'T OF HEALTH, DEVELOPING A TRAINING CURRICULUM ON THE NEEDS OF VETERANS IN THE CRIMINAL JUSTICE SYSTEM USING RESULTS FROM AN EVALUATION OF THE BUFFALO VETERANS TREATMENT COURT 1, 3 (2011), https://nyshealthfoundation.org/wp-content/uploads/2017/11/developing-training-curriculum-buffalo-veterans-treatment-court-november-2011.pdf [hereinafter DEVELOPING A TRAINING CURRICULUM].

[49] OFF. OF THE EXEC. SEC'Y OF VA., VIRGINIA VETERANS TREATMENT COURT STATEWIDE STRATEGIC PLAN 5–6 (2019).

[50] DEVELOPING A TRAINING CURRICULUM, *supra* note 48, at 1.

[51] UMAR MOULTA-ALI & SIDATH VIRANGA PANANGALA, CONG. RSCH. SERV., R43928, VETERANS' BENEFITS: THE IMPACT OF MILITARY DISCHARGES ON BASIC ELIGIBILITY 12–13 (2015).

[52] *See VA History: History – Department of Veterans Affairs (VA)*, U.S. DEP'T VETERANS AFF., https://www.va.gov/HISTORY/VA_History/Overview.asp (last updated May 27, 2021) (explaining the original intention and capacity of the VA).

meant to provide hospice care to the aging veteran population.[53] Having expanded far beyond its original mission, today the VA is the largest integrated healthcare system in the United States[54] and the nation's second-largest federal employer—second only to the Department of Defense.[55] The VA also administers benefits and services for service-connected disabilities (and in some cases non-service-connected disabilities), rehabilitation, employment, education, housing, and life insurance to veterans, their families, and their survivors, as well as handling burials and memorials for eligible service members.[56]

Recent scholarship has called for a better understanding of the central role that the VA plays in many VTCs, emphasizing that the VA needs to be understood as a separate entity with its own rules and regulations.[57] The VA continues to adapt to meet the growing needs of the veteran population, and has now evolved to provide support for justice-involved veterans ("JIVs"), those former service members who find themselves arrested or in jail.[58] VTCs and VAs, through their mutually beneficial work, can address shortcomings in both the VA and the criminal justice system. However, for progress to continue, additional focus must be placed on increasing both the level and the consistency of expertise in VTCs.

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[53] *Id.* "Following the Civil War, many state Veterans homes were established. Since domiciliary care was available at all state Veterans homes, incidental medical and hospital treatment was provided for all injuries and diseases whether or not of service origin." *Id.*

[54] *About VHA*, U.S. DEP'T VETERANS AFF., https://www.va.gov/health/aboutvha.asp (last updated Apr. 23, 2021).

[55] *Id.*; *see also Federal Agencies List*, OFFICE PERS. MGMT., https://www.opm.gov/about-us/open-government/Data/Apps/Agencies (last visited Sept. 27, 2021).

[56] *I Am a Veteran*, U.S. DEP'T VETERANS AFF., https://www.va.gov/opa/persona/index.asp (last updated Mar. 11, 2021).

[57] Finlay et al., *supra* note 8, at 54–55.

[58] 38 U.S.C. § 2022; Jessica H. Blue-Howells et al., *The U.S. Department of Veterans Affairs Veterans Justice Programs and the Sequential Intercept Model: Case Examples in National Dissemination of Intervention for Justice-Involved Veterans*, 10 PSYCH. SERVS. 48, 48 (2013); Finlay et al., *supra* note 8, at 47 ("Over 90 percent of veterans in VTCs, eligible for VA care, receive some VA treatment services while under court supervision – most commonly mental health or substance use disorder treatment."); Andrea K. Finlay, Address at Veterans Court Conference on Mental Health and Substance Use Disorder Diagnoses and Treatment Use Among Veterans in Veterans Treatment Courts - Identification of Treatment Needs and Interventions (June 1, 2018) (notes on file with author).

III. THE VJOS AND VTCS

Over the past two decades, the VA has been engaged in efforts to aid JIVs, the term for veterans who are under some form of criminal justice supervision (e.g., probation or parole) or detention.[59] By 2007, the VA recognized the significant link between incarceration and homelessness: a four-fold increase in risk of homelessness for veterans with a history of incarceration.[60] As part of its effort to combat veteran homelessness, the VA created a new program called Healthcare for Reentry.[61] This program focused on aiding veterans in prisons or jails who were transitioning back into the community.[62] Providers trained in counseling and social work developed individualized reentry programs with a focus on housing, mental health and substance use treatment, and other psychosocial needs.[63] The Veterans Justice Outreach program, which currently operates as the VA's official liaison program for VTCs, emerged from this effort and focuses not only on reentry but also on diversion and other programs to keep veterans out of detention.[64]

While VJOs are now understood to be central members of the VTC team, this was not always the case.[65] As the VJO program was being created, an advisory board of treatment court judges worked with the VA to develop the relationship between this new position and the growing number of VTCs.[66] Though there were only a handful of VTCs when the VJO program began, they immediately developed trainings and programming to ensure that VJOs

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[59] Andrea K. Finlay et al., *A Scoping Review of Military Veterans Involved in the Criminal Justice System and Their Health and Healthcare*, 7 HEALTH & JUST., 1, 2 (2019).

[60] Laurel A. Copeland et al., *Clinical and Demographic Factors Associated with Homelessness and Incarceration Among VA Patients with Bipolar Disorder*, 99 AM. J. PUB. HEALTH 871, 874 (2009).

[61] *Health Care for Re-entry Veterans Services and Resources*, U.S. DEP'T VETERANS AFF., https://www.va.gov/homeless/reentry.asp (last updated Nov. 15, 2021).

[62] *Id.*

[63] U.S. DEP'T OF VETERANS AFFAIRS, VETERANS TREATMENT COURTS AND OTHER VETERAN-FOCUSED COURTS SERVED BY VA VETERANS JUSTICE OUTREACH SPECIALISTS (2021), https://www.va.gov/HOMELESS/docs/VJO/Veterans-Treatment-Court-Inventory-Update-Fact-Sheet-Jan-2021.pdf.

[64] *Veterans Justice Outreach Program*, U.S. DEP'T VETERANS AFF., https://www.va.gov/homeless/vjo.asp (last updated Oct. 5, 2021).

[65] *See Veterans Justice Advocates*, VETERANS JUST. PROJECT, https://www.vetjuspro.com/8e (last visited Oct. 6, 2021).

[66] Interview with Jack O'Connor, Buffalo Veterans Treatment Court Volunteer Coordinator (May 2020) (on file with author).

served as effective liaisons between VTCs and the VA.[67] Judge Russell in Buffalo, New York, along with the head of the Buffalo court's mentor program, started working closely with the VJO office to educate them on VTCs.[68] The Buffalo model, built from existing drug courts, became the standard for training other communities to create VTCs.[69] Soon, the National Association of Drug Court Professionals ("NADCP") began a program dedicated to helping courts set up VTCs, and drew on this model that emphasized peer mentors, sobriety, and an understanding of military culture.[70]

The creation of the VJO bolstered the newly burgeoning VTC movement, and the relationship between this VA office and these new courts continues to deepen.[71] Funding enabled more positions for these specialists, who are increasingly associated with VTCs.[72] By fall 2019, there were 364 funded VJOs across the country, each working within VTCs and/or criminal justice settings to ensure that qualifying veterans can access services.[73] The VA reports that VJOs now work in 601 VTCs.[74] VJOs do more than just help VTCs; they also work in jails to identify veterans and ensure that they connect with VA services.[75] For example, VJOs can assist incarcerated veterans who receive disability benefits to apportion all or part of those benefits to their spouse or children, rather than lose the benefit entirely.[76] In many jurisdictions, it is now standard practice for jails to screen for military service, to ensure VJOs can initiate contact and help the veteran or his or her family gain access to VA-administered benefits.[77]

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[67] *See* Anne S. Douds et al., *Varieties of Veterans' Courts: A Statewide Assessment of Veterans' Treatment Court Components*, 28 CRIM. JUST. POL'Y REV. 740, 742 (2017).

[68] Interview with Jack O'Connor, *supra* note 66; *see also* Robert T. Russell, *Veteran Treatment Courts*, 31 TOURO L. REV. 385, 392–93 (2015).

[69] Russell, *supra* note 68, at 399–400.

[70] *See About Us*, JUST. FOR VETS, https://justiceforvets.org/about (last visited Oct. 6, 2021).

[71] Finlay et al., *supra* note 8, at 52; DOUDS & AHLIN, *supra* note 18, at 74–75.

[72] Finlay et al., *supra* note 8, at 47.

[73] Interview with Sean Clark, VJO National Coordinator (September 2019) (on file with author).

[74] U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 63.

[75] U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-393, VETERANS JUSTICE OUTREACH PROGRAM: VA COULD IMPROVE MANAGEMENT BY ESTABLISHING PERFORMANCE MEASURES AND FULLY ASSESSING RISKS 11 (2016).

[76] 38 C.F.R § 3.665 (2020).

[77] Sean Clark & Matthew Harris, Address at the Stepping Up Initiative, Stepping Up 101: A Primer for Veterans Justice Outreach Specialists (June 2019).

One of the more important services that VJOs working in correctional facilities offer is to identify veterans, and connect qualifying veterans with a VTC, if available, and provide information to encourage their participation.[78] While it may seem to be a given that a qualifying veteran would want the services, the calculation is not so simple. Low-level offenders may not see the benefit of submitting to the demanding requirements of a treatment court, preferring to take their chances in a regular criminal justice process that leaves them free from supervision sooner or with fewer demands.[79] Further, they may be wrongly concerned that their criminal justice involvement may compromise their VA benefits.[80] VJOs can provide information about the kinds of services available should the qualifying veteran decide to join the VTC.[81]

This inter-institutional arrangement is not without complication. VJOs have to be invited into the court—they are not automatically able to join a VTC working group—and early courts did not always recognize the need for a dedicated staff member who worked for the VA.[82] Over time, and with national trainings as part of the NADCP emphasizing the role of the VJO in VTCs, their presence has become standard practice.[83] Still, VJOs may be unclear as to what their role in a VTC is or should be given that the original emphasis was on locating veterans and helping them with reentry, not acting as a care provider in a court setting.[84] Courts also may be unclear of exactly what role a VJO should play on the VTC team. While the VJO has the potential to be a link to countless VA services, in many VTCs, VJO participation is often limited to facilitating VA appointments and verifying VA treatment compliance.[85]

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[78] KIERRA ZOELLICK, JUST. PROGRAMS OFF., THE ROLE OF VETERANS JUSTICE OUTREACH SPECIALISTS IN VETERANS TREATMENT COURTS 2 (Dec. 2016), https://www.american.edu/spa/jpo/upload/aunewsvjofinal.pdf.

[79] Stacey-Rae Simcox & Morgan MacIsaac-Bykowski, *Veteran Treatment Court Coordination Act of 2019: Support for Justice Involved Veterans to Improve Health and Wellness Outcomes*, A.B.A. HEALTH ESOURCE (Nov. 4, 2020), https://www.americanbar.org/groups/health_law/publications/aba_health_esource/2020-2021/november-2020/vet-tre.

[80] Duke Chen, *Benefits Available to Veterans After Incarceration*, OFF. OF LEGIS. RSCH, https://www.cga.ct.gov/2016/rpt/2016-R-0028.htm (last visited Oct. 8, 2021).

[81] U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 63.

[82] Russell, *supra* note 68, at 393.

[83] *See* SEAN CLARK, U.S. DEP'T OF VETERANS AFFAIRS, VA SERVICES FOR VETERANS INVOLVED IN THE JUSTICE SYSTEM: THE VETERANS JUSTICE OUTREACH (VJO) INITIATIVE (2009).

[84] *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 75, at 1 (2016).

[85] *See id.*

As the VJO program has grown, it has become evident that VJOs are playing different roles in different places.[86] Moreover, given their specialization in criminal justice-related issues, not all VJOs understand the diverse services offered by the VA.[87] This is unsurprising given the complexity of many VA programs. Further, since many VJOs do much more than work with a VTC, VTCs with just one VJO, who also may be working in the jails and prisons, or with JIVs in non-VTC criminal proceedings, may be short-staffed.[88] Assigning VJOs multiple duties as they attempt to assist veterans, many of whom are suffering from mental health and substance abuse issues,[89] requires that they navigate a complex, slow-moving bureaucracy.[90] The position is stretched thin, negatively impacting the veterans being served.[91] Non-VA affiliated case managers, who typically help participants gain access to state and other social services programs, are not always a solution.[92] Unless these individuals have worked in the VA, or utilized the programs themselves, they will have little to no knowledge of what VA programs are even available.[93] This knowledge gap will ultimately affect court processes, as there are no other stopgaps for a judge to learn what is actually possible.[94]

Before providing more detailed suggestions for better integrating the VJO into the VTC, in the following section we outline a number of services and benefits available through the VA, with

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[86] For example, at the 2021 Annual Meeting of National Association for Drug Court Professionals, the Director of the VJO program reiterated that VJOs are playing a variety of roles in courts and that there is confusion as to what they are supposed to do. Katharine Stewart, VJO Program Director, Address on Collaborative Case Management in a VTC at NADCP 2021 Annual Conference (Aug. 15, 2021). She clarified that VJOs are available to synthesize what is going on at the VA, identifying the top needs, not going into the details, and helping with information about evidence-based treatment. *Id.*

[87] *VA Portland Health Care System*, U.S. DEP'T VETERANS AFF., https://www.portland.va.gov/services/Veterans_Justice_Outreach_VJO_Program.asp (last visited Nov. 22, 2021).

[88] ZOELLICK, *supra* note 78, at 3.

[89] Russell, *supra* note 5, at 357.

[90] *See Why Is VA So Slow? What Can You Do About It?*, VETERANS BENEFIT GROUP GOODMAN DONNELLY, https://veteransbenefitgroup.com/why-is-va-so-slow-what-can-you-do-about-it (last visited Oct. 9, 2021).

[91] ZOELLICK, *supra* note 78, at 2–3.

[92] *See* Kerry Murphy Healey, *Case Management in the Criminal Justice System*, NAT'L RSCH. ACTION 1, 1 (1999).

[93] *Why Is VA So Slow? What Can You Do About It?*, *supra* note 90.

[94] DOUDS & AHLIN, *supra* note 18, at 75.

detailed information about how they might serve VTC participants. This information is useful not only for those working as VJOs, but for all VTC team members to better understand the basics about what services are available, what services are not available, and for whom they are available. This latter part—who gets benefits—is one of the more complicated aspects of the VA and, by extension, an important and understudied part of VTCs. It is crucial for VTCs to understand that it is not the case that participants are either eligible for everything or eligible for nothing.[95] Rather, each VA benefit or program has its own set of eligibility criteria, and exceptions abound.[96] The misconception that VA benefits are "all or nothing," which often dissuades veterans themselves from visiting the VA or applying for benefits,[97] should be extinguished by VTCs if they are to help the veterans they wish to connect with services.

IV. UNDERSTANDING HOW VA BENEFITS CAN SUPPORT VTC PARTICIPANTS

Given the important role of social capital and material resources in treatment court success,[98] VTCs that can maximize VA healthcare, housing, disability, rehabilitation, employment, and education for their participants should be more likely to see improvements in metrics of recidivism and continued treatment. This is particularly salient for veterans given the well-documented relationship between housing and employment on treatment court outcomes and the myriad of benefits that a veteran can receive.[99]

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[95] *See generally* U.S. DEP'T OF VETERANS AFFAIRS, FEDERAL BENEFITS FOR VETERANS, DEPENDENTS AND SURVIVORS (2019); Alex Horton, *VA Unlawfully Turned Away Vulnerable Veterans for Decades, Study Says, With 400,000 More at Risk*, WASH. POST (Mar. 5, 2020), https://www.washingtonpost.com/national-security/2020/03/05/veterans-va-bad-paper-study.

[96] *VA Benefits for Service Members*, U.S. DEP'T VETERANS AFF., https://www.va.gov/service-member-benefits (last visited Oct. 9, 2021).

[97] Megan Hammons, *VA Disability Compensation vs. Pension*, VETERANAID.ORG (June 14, 2017), https://www.veteranaid.org/blog/va-disability-compensation-vs-pension.

[98] *See* Sarah L. Belgrad, Predictors of Graduation and Termination from Veteran Treatment Court (Aug. 17, 2017) (unpublished Ph.D. dissertation, Chicago School of Professional Psychology – Los Angeles) (ProQuest); *see also* John R. Gallagher et al., *Predicting Termination from Drug Court and Comparing Recidivism Patterns: Treating Substance Use Disorders in Criminal Justice Settings*, 33 ALCOHOLISM TREATMENT Q. 28, 28–43 (2015).

[99] *See generally* John R. Gallagher, *Drug Court Graduation Rates: Implications for Policy Advocacy and Future Research*, 31 ALCOHOLISM TREATMENT Q. 241 (2013); Janice D. McCall et al., *Veterans Treatment Court Research: Participant Characteristics, Outcomes, and Gaps in the Literature*, 57 J. OFFENDER REHAB. 384 (2018); John R. Gallagher et al., *Improving Graduation Rates in*

Many individuals assume the U.S. Department of Veterans Affairs is solely a health care provider for military veterans.[100] While this was one of the primary intentions in its creation and continues to be one of the essential services it handles, the agency provides a wide array of social services and benefits to the veteran population.[101] Split into three partner administrations, the Veterans Health Administration, the Veterans Benefits Administration, and the National Cemetery Administration,[102] the VA is tasked with implementing and running essential programs covering the vast needs of the veteran community.[103] For VTCs, the VHA, which runs the 171 medical centers and 340 outpatient clinics across the country,[104] is the essential partner for successful operation.[105] For the majority of VTC participants, the VHA will be the medical provider for mental health and substance abuse outpatient services.[106] The VA's placement of the VJO within the VHA is a clear indication that the VA understands that importance.[107] However, VTCs that ignore or underappreciate the value of the VBA and the supportive role it can play for veterans are making a significant error.

A. Who Is a "Veteran" for VA Purposes?

Before diving into the myriad of benefits in the VA system, it is important to first note that not all individuals who served in the military are eligible for all benefits.[108] The VA defines a veteran as "a person who served in the active military, naval, or air service and who was discharged or released therefrom under conditions other

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Drug Court: A Qualitative Study of Participants' Lived Experiences, 17 CRIMINOLOGY & CRIM. JUST. 468 (2017).

[100] David J. Shulkin, *Why VA Health Care is Different*, 33 FED. PRAC. 9, 9 (May 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6369034.

[101] *VA History: History – Department of Veterans Affairs (VA)*, *supra* note 52; *About VA*, U.S. DEP'T VETERANS AFF., https://www.va.gov/about_va (last visited Oct. 9, 2021).

[102] *How The VA Is Structured (and Why It Matters to You)*, U.S. DEP'T VETERANS AFF. (Dec. 8, 2010), https://blogs.va.gov/VAntage/812/how-va-is-structured-and-why-it-matters-to-you.

[103] *About VA*, *supra* note 101.

[104] Veterans Health Administration, ALLGOV, http://www.allgov.com/departments/department-of-veterans-affairs/veterans-health-administration?agencyid=7146 (last visited Oct. 17, 2021).

[105] Finlay et al., *supra* note 8, at 48.

[106] *See id.*

[107] U.S. DEP'T OF VETERANS AFFAIRS, VHA DIRECTIVE 1162.06(1): VETERANS JUSTICE PROGRAMS (VJP) 3–4 (2020).

[108] *See* 38 U.S.C. § 101(2), (13)–(15).

than dishonorable."[109] Much like how VTC eligibility requirements consider the classification of a veteran's military service and the conditions under which they left active duty, so too does the VA when considering eligibility for benefits.[110] It would be impossible to include all relevant information related to each factor, but this Article will touch on the two most crucial to benefits: service component and discharge status. Though this Article only focuses on these two components, we encourage that a more in-depth analysis be conducted whenever an initial investigation suggests a veteran as ineligible for benefits.

When looking at the VA's definition of a veteran, the first key phrase is "served in the active military."[111] Active military service includes "(A) active duty; (B) any period of active duty for training during which [a person is] disabled or die[s] from a disease or injury incurred or aggravated in the line of duty; and (C) any period of inactive duty training" in specific limited circumstances.[112] Essentially, this means that to qualify, an individual must have served in the military in a full-time capacity or have been injured or killed during select periods of full-time training.[113] Service members in any of the six branches of the Armed Forces—Army, Navy, Marine Corps, Air Force, Coast Guard, and, now, Space Force—would meet the active service requirement.[114] Individuals who served in the Reserves, Air or Army National Guard, military academies, and certain offices in the Public Health Service, National Oceanic and Atmosphere Administration, and Environmental Science Services would only qualify in certain circumstances.[115] Individuals in that second category would likely need to have been called up to full-time active duty for federal purposes to meet the active service requirement—most individuals in this category with a qualifying period of service will have served in an overseas deployment.[116] This means that VTCs with flexibility to admit participants who served in a service component other than the six branches of the Armed Forces may not be

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[109] *Id.* § 101(2).

[110] *Id.*

[111] *See id.*

[112] *Id.* § 101(24).

[113] *Id.*

[114] *Id.* § 101(10); 10 U.S.C. § 9081(a).

[115] *See* 38 U.S.C. § 101(2), (10), (21)(A)–(D), (24)(A).

[116] *Id.* § 101(21).

considered a veteran by the VA, and thus may be ineligible for any services or benefits.

The second key phrase in the VA's definition of a veteran is a discharge that is "other than dishonorable."[117] A military discharge is given when a service member is released from active duty.[118] Individuals will be assigned a discharge status dependent on the reason for separation that falls into one of two categories: administrative[119] or punitive.[120] Administrative separations occur when the command seeks to involuntarily separate a service member through a non-judicial process.[121] Administrative discharges include: "uncharacterized," which is given to individuals who separate prior to completing 180 days of military service and does not attempt to characterize service as good or bad; "honorable," which is given to those who met or exceeded the conduct and performance standards of the military; "general, under honorable conditions," which is given when an individual's performance was satisfactory, but fell short in terms of military duty and conduct; and "other than honorable," which is given when the individual's service involved a serious departure from the conduct and performance expected.[122]

Punitive discharges are awarded by a sentence of a court-martial.[123] A "bad conduct" discharge is issued for lesser offenses, while a "dishonorable" discharge is typically reserved for serious offenses such as murder, desertion, rape, and the like.[124] For purposes of VA services and benefits, a "dishonorable" discharge serves as a complete bar.[125] Pursuant to the statutory definition, a former service member with a "dishonorable" discharge status is not a

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[117] *Id.* § 101(2).

[118] *Id.* § 101(18).

[119] 32 C.F.R. § 724.108 (2020).

[120] *Id.* § 724.111.

[121] *See* VETERANS LEGAL CLINIC, HARV. L. SCH. ET AL., TURNED AWAY: HOW VA UNLAWFULLY DENIES HEALTH CARE TO VETERANS WITH BAD PAPER DISCHARGES 3 (2020), https://www.legalservicescenter.org/wp-content/uploads/Turn-Away-Report.pdf.

[122] U.S. DEP'T. OF LABOR, VETS USERRA FACT SHEET #3: FREQUENTLY ASKED QUESTIONS – SEPARATIONS FROM UNIFORMED SERVICE, CHARACTERIZATIONS OF SERVICE, AND EFFECTS ON RIGHTS AND BENEFITS UNDER USERRA 5–8, https://www.dol.gov/sites/dolgov/files/VETS/files/USERRA-Fact-Sheet-3-Separations.pdf.

[123] *See* VETERANS LEGAL CLINIC, *supra* note 121, at 3.

[124] 38 C.F.R. § 3.12(d)(2)–(3) (2020); U.S. DEP'T. OF LABOR, *supra* note 122, at 4.

[125] *Applying for Benefits and Your Character of Discharge*, U.S. DEP'T VETERANS AFF., https://www.benefits.va.gov/benefits/character_of_discharge.asp (last updated Dec. 10, 2020).

"veteran."[126] On the other end, an "honorable" discharge is the only discharge status that meets the discharge eligibility requirement for all benefits.[127] While "general, under honorable conditions" discharge will allow for most benefits, it bars the individual from some education benefits.[128] And "other than honorable" and "bad conduct" discharges require a VA "character of service determination" to determine whether statutory or regulatory bars prohibit VA from providing services and benefits.[129] Reports have found that the Department of Defense ("DOD") does not grant discharge status in an equitable manner, with factors like race, sexual orientation, and disability having significant impacts; one such study found that between 2006 and 2015, Black service members had a 61% higher chance of facing a general or special court martial than their White peers.[130]

Post-discharge, service members can attempt to upgrade their discharge status or secure a favorable character of service determination from the VA.[131] A discharge upgrade is a process in which an individual petitions the DOD for a change in his or her character of service based on arguments of equity or propriety.[132] It is a challenging process with low success rates.[133] However, cases where individuals were discharged under "Don't Ask, Don't Tell,"[134] or where the discharge was related to mental health conditions, including post-traumatic stress disorder ("PTSD"), traumatic brain injury ("TBI"), or sexual assault or harassment (including military sexual trauma), are now to be considered more liberally.[135] A successful discharge upgrade can result in amended military records that

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[126] 38 U.S.C. § 101(2).

[127] *Applying for Benefits and Your Character of Discharge*, *supra* note 125.

[128] MOULTA-ALI & PANANGALA, *supra* note 51, at 7.

[129] *Id.* at 1, 6; *see also* 38 C.F.R. § 3.12 (2020).

[130] *See* VETERANS LEGAL CLINIC, *supra* note 121, at 5–6.

[131] *Id.* at 2, 8.

[132] 32 C.F.R. § 70.8(a)(3)(i)–(ii), (a)(4)(iii) (2020).

[133] *See* VETERANS FOR AMERICA, THE AMERICAN VETERANS AND SERVICEMEMBERS SURVIVAL GUIDE 324 (2008).

[134] *Don't Ask, Don't Tell*, ARMY REV. BOARDS AGENCY, U.S. ARMY, https://arba.army.pentagon.mil/dadt.html (last visited Oct. 16, 2021); *Don't Ask, Don't Tell (DADT)*, COUNCIL OF REVIEW BOARDS, U.S. NAVY, https://www.secnav.navy.mil/mra/CORB/pages/ndrb/dadt.aspx (last visited Oct. 16, 2021).

[135] *DOD Memoranda Guiding Discharge Review Boards on PTSD, TBI, and MST*, Section on *Discharge Upgrades & Military Record Changes*, STATESIDE LEGAL (Nov. 2020), https://statesidelegal.org/dod-memoranda-guiding-discharge-review-boards-ptsd-tbi-and-mst.

reflect the new discharge status and will provide all the benefits of that higher status.[136] A separate process done with the VA, a character of discharge determination, does not change the discharge status that an individual was given by the military.[137] However, it can impact what benefits the VA will provide.[138] Individuals with "other than honorable" or certain "bad conduct" discharges can ask the VA to review or re-review their military service to determine if it will be considered "honorable for VA purposes."[139] This process involves proving to the VA that service was "honest, faithful, and meritorious" other than minor discipline issues or proving to the VA that the individual was "insane" at the time of the misconduct resulting in discharge.[140] A favorable result will allow an individual to access all VA benefits other than some education benefits.[141]

Both discharge upgrades and character of discharge determinations are complicated processes with low success rates, which often require the intervention of an attorney for a favorable result.[142] Success in these processes is often the difference between a veteran having no access to the VA or being able to use many, or all, of the VA's programs and services.[143] Discharge status factors into the VTC eligibility process for every single participant.[144] Regardless of whether a VTC can accept veterans with "bad paper"[145] or can only accept veterans with "honorable" and "general" discharges, VTCs should be pointing all veterans with a less-than-honorable discharge in the direction of resources that can help increase their benefit eligibility. They should also be cognizant of the grey zones created by every discharge between "honorable" and "dishonorable." For example, an "other than honorable" veteran with a favorable character of service determination can use the VA for healthcare, including VTC mandated mental health and substance

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[136] VETERANS FOR AMERICA, *supra* note 133, at 343.

[137] *Military Discharge Status and What it Means for Your Entitlement to VA Benefits*, CHISHOLM CHISHOLM & KILPATRICK LTD (Apr. 24, 2017), https://cck-law.com/blog/military-discharge-status-and-what-it-means-for-your-entitlement-to-va-benefits.

[138] *See* 38 C.F.R. § 3.12(e) (2020).

[139] *Military Discharge Status and What it Means for Your Entitlement to VA Benefits*, *supra* note 137.

[140] 38 C.F.R. § 3.12(d)(4) (2020).

[141] MOULTA-ALI & PANANGALA, *supra* note 51, at 7.

[142] *See* VETERANS FOR AMERICA, *supra* note 133, at 343.

[143] *Id.* at 323.

[144] *See* MOULTA-ALI & PANANGALA, *supra* note 51, at 7.

[145] Timko et al., *supra* note 43, at 123.

abuse counseling.[146] Even with an *unfavorable* character of service determination, veterans with other than honorable discharges or certain bad conduct discharges can receive VA healthcare to treat service-connected medical conditions, which can include mental health services.[147] Thus, VTCs must check more than just discharge status if VHA-eligibility is a VTC eligibility component, and VTCs must ensure that policies to restrict certain discharge statuses are not built based solely on the assumption that VHA-eligibility would not exist.[148]

Recent research reveals the wide variation between VA services available to bad paper veterans across the country is largely caused by a systemic misunderstanding of the law within the VA.[149] Denial of benefits may be illegal,[150] but more concretely, the VA's failure to correctly implement its own eligibility requirements results in thousands of the most vulnerable veterans being kept from accessing earned benefits every year.[151] One report on the VA reveals that, "[s]ince 1980, more than 575,000 service members have received an Other Than Honorable, Bad Conduct, or Dishonorable discharge"—sometimes called a "bad paper" discharge—"representing about 7% of those with characterized discharges."[152] Eighty-one percent of these are "Other Than Honorable" discharges, which means that there was no court process to determine the discharge characterization.[153] Likewise, "more than 600,000 servicemembers since 1980 have received General discharge characterizations," which can also affect access to some VA services.[154]

Although these categories appear clear, their interpretation and application have contributed to gross inequalities among service members.[155] From 2009 through 2015, 22,000 service members

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[146] ELIGIBILITY FOR BENEFITS CHART, MARINE CORPS AIR STATION IWAKUNI, https://www.mcasiwakuni.marines.mil/Portals/112/Docs/sja/discharge%20list.pdf (last visited Oct. 16, 2021).

[147] 38 C.F.R. § 3.360(a)–(b) (2020); *see also* 38 U.S.C. § 1720I(a)–(b) (authorizing mental health care for all veterans with other-than-honorable discharges who served in a combat theater or were sexually assaulted, physically assaulted, or sexually harassed).

[148] U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 95.

[149] Horton, *supra* note 95.

[150] *See* VETERANS LEGAL CLINIC, *supra* note 121, at 10–11.

[151] *Id.* at 13.

[152] *Id.* at 7

[153] *Id.* at 7–8.

[154] *Id.* at 8.

[155] *See id.*

with PTSD and TBI received so-called "bad paper" discharges that limited their access to services.[156] Over 100,000 LGBTQ+ individuals left the military with "bad paper" discharges between 1994 and 2011, and racial disparities and arbitrary discharge characterizations are well documented.[157] One military commander's interpretation of mitigating circumstances, a prior service history, or their sympathy may affect these characterizations.

If these miscarriages of justice happen at the DOD and VA, where front desk staff are trained to understand eligibility issues, VTCs are even more likely to experience these issues.[158] VTCs turning away those who are eligible leave veterans again experiencing someone turning their back on them.[159] Bad paper discharges that fall into the grey zone of eligibility are only becoming more and more common.[160] Data shows that bad paper discharges have steadily increased since WWII, with more veterans from the Global War on Terrorism (or "GWOT," comprised of Operation Enduring Freedom in Afghanistan, Operation Iraqi Freedom in Iraq, and other related operations) receiving bad paper discharges at four times the rate of WWII veterans and more than double the rate of Vietnam era veterans.[161]

VTCs must make it a priority to understand VA eligibility, specifically the complexities of the system that renders some veterans eligible for some benefits but not others, as well as ways to increase VA access. This will ensure they will be successful at finding potential participants in the most need and connecting those same veterans with the numerous programs across the VHA and VBA.

B. Health Care

VTCs are predicated around the idea that treatment for an underlying mental health or substance use disorder will reduce recidivism.[162] And while disability benefits and housing vouchers are

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[156] *Id.* at 5.

[157] *Id.* at 5–6.

[158] *See id.* at 5.

[159] *See* Steve Walsh, *VA Struggles to Reach Other-Than-Honorable-Discharge Vets in Need of Help*, NPR (Oct. 18, 2018, 5:02 AM), https://www.npr.org/2018/10/18/657789457/va-struggles-to-reach-other-than-honorable-discharge-vets-in-need-of-help.

[160] *See* Ali R. Tayyeb & Jennifer Greenburg, *"Bad Papers": The Invisible and Increasing Costs of War for Excluded Veterans*, COSTS OF WAR 1, 1 (2017).

[161] *Id.* at 1, 5.

[162] Timko et al., *supra* note 43, at 131.

frequently important in creating the stability needed for future success, the first step in a VTC is establishing a treatment plan with the participant.[163] Unlike participants who must rely on community resources to meet the requirements of drug courts and mental health courts, VA eligible participants in VTCs are typically eligible for free or reduced medical care by virtue of their veteran status and their income level.[164] Veterans that meet the VA's active service requirement and have an "honorable" or "general" discharge or have an "other than honorable" or "bad conduct" discharge with a favorable character of service determination meet the first step of eligibility.[165] Veterans with an "other than honorable" discharge or "bad conduct" discharge with an *unfavorable* character of service determination may still receive treatment for service-connected medical conditions in some cases.[166]

Next, for healthcare, the VA requires that if the individual served after September 7, 1980, they must have served twenty-four continuous months or the full period of their active duty, unless they were discharged for a disability related to their active-duty service or were discharged for a hardship.[167] Those who served prior to September 7, 1980, do not have a length of service requirement.[168] Finally, to determine how much a veteran may be responsible for paying toward care, the VA created several priority groups, which consider military service history, service-connected disability rating, income level, Medicaid eligibility, and other VA benefits eligibility.[169]

VTCs should work to connect qualifying veterans who may not be accessing their healthcare benefits to VA services. A 2017 VA study found that the total VHA enrollee population was 8.3 million veterans, significantly less than the estimated total veteran

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[163] KATHLEEN MOORE ET AL., SAMHSA, EVALUATION OF THE VETERANS TREATMENT COURT (VTC) PROGRAM 4 (2020).

[164] *See Basic Eligibility for VA Health Care*, U.S. DEP'T VETERANS AFF., https://www.va.gov/healthbenefits/resources/publications/hbco/hbco_basic_eligibility.asp (Apr. 23, 2019) (describing VA eligibility).

[165] Timko et al., *supra* note 43, at 125–26.

[166] *Id.* at 4; *see also* 38 C.F.R. § 3.360(a) (2020); 38 U.S.C. § 1720I (authorizing mental health care for all veterans with other-than-honorable discharges who served in a combat theater or were sexually assaulted, physically assaulted, or sexually harassed).

[167] *Eligibility for VA Healthcare*, U.S. DEP'T VETERANS AFF., https://www.va.gov/healthcare/eligibility (last updated Sept. 17, 2020).

[168] *Id.*

[169] 38 C.F.R. § 17.36(b) (2020).

population of 18.3 million.[170] Current estimates suggest that less than 49% of veterans use the VA for their regular healthcare needs.[171] As such, VTCs should not expect veteran participants to be enrolled at the VA or even know if they are eligible for services. It is also important that they be aware that attempting to enroll in VA healthcare for the first time may trigger the character of discharge determination process for "other than honorable" or "bad conduct" veterans when they are not in any position to present or gather evidence for their case. Analysis done through the priority group enrollment and patient surveys has found that the veterans most likely to utilize VHA healthcare are those with annual incomes below $35,000, as well as those who consider themselves to be in poor health.[172] Low-income veterans and veterans with service-connected disabilities are the most likely to receive their medical care for free from the VA,[173] which is a tremendous benefit to those in need.

For VTCs, the VA is an excellent partner for participants' outpatient care needs. The VA provides mental health outpatient treatment that has been found to be superior to the private sector's based on initial diagnoses, medication intervention, and long-term treatment.[174] The VA also tends to offer substantial substance abuse programs with both group and individualized therapy at VA medical centers and smaller specialized facilities.[175] In 2017, the VA expanded emergency mental health care, offering certain veterans with "other than honorable" discharges the ability to receive care for up to ninety days including inpatient, residential, or outpatient care.[176] Although, the launch of the program has experienced

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[170] GRACE HUANG ET AL., WESTAT, 2017 SURVEY OF VETERAN ENROLLEES' HEALTH AND USE OF HEALTH CARE DATA FINDINGS REPORT 10 (2018).

[171] *See* National Center for Veterans Analysis and Statistics, *VA Utilization profile FY 2017*, U.S. DEP'T VETERANS AFF. 1, 3 (2020), https://www.va.gov/vetdata/docs/Quickfacts/VA_Utilization_Profile_2017.pdf. In 2017, 9.8 million veterans, 49% of all veterans, used VHA services. *Id.*

[172] *See* HUANG ET AL., *supra* note 170, at 113.

[173] *Id.* at 1.

[174] *VA Mental Health Care Found Superior to Care in the Private Sector*, U.S. DEP'T VETERANS AFF. (Apr. 15, 2016), https://blogs.va.gov/VAntage/27029/va-mental-health-care-found-superior-care-private-sector.

[175] *VA Mental Health Services*, U.S. DEP'T VETERANS AFF., https://www.va.gov/health-care/health-needs-conditions/mental-health (last updated Feb. 12, 2021).

[176] *VA Secretary Formalizes Expansion of Emergency Mental Health Care to Former Service Members with Other-Than-Honorable Discharges*, U.S. DEP'T VETERANS AFF. (June 27, 2017, 11:48 AM), https://www.va.gov/opa/pressrel/pressrelease.cfm?id=2923; U.S. DEP'T OF VETERANS

significant issues,[177] VTCs should be aware of this program while searching for longer-term care options for non-VHA eligible veterans. Lastly, community-based Vet Centers provide readjustment counseling to all veterans who served in periods of armed hostilities from the Vietnam era through the present, except those with a fully "dishonorable" discharge.[178]

One important challenge for VTCs is participants' ability to access inpatient, as opposed to outpatient, treatment.[179] Participants often require intensive substance use treatment, and those who continue to use while enrolled in the VTC may be required to enter an inpatient program.[180] Unfortunately, the VHA is limited in terms of inpatient program access.[181] Even though the majority of VA medical centers have inpatient substance abuse programs and inpatient mental health programs, including programs for PTSD, the waiting lists for these programs tend to be significant.[182] VTCs, whether through their VJOs or VA contact, should consistently monitor bed availability in these programs when determining participant eligibility. The VA MISSION Act,[183] a 2018 law, has created more funding for veterans to receive care in their communities in private health care settings, while the 2021 National Defense Authorization Act ("NDAA") has set aside funding to assist homeless, women, and veterans with expanded mental health issues.[184] These important laws and future efforts may provide additional avenues for veterans to receive inpatient treatment. The VTC team should be familiar with these updates. Further, the VTC team should connect with non-VA health care providers that offer programs to

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AFFAIRS, EXPANDING ACCESS FOR EMERGENT MENTAL HEALTH CARE FOR FORMER SERVICE MEMBERS, https://www.co.monterey.ca.us/home/showdocument?id=38564.

[177] U.S. DEP'T OF VETERANS AFFAIRS OFF. OF INSPECTOR GEN., DEFICIENCIES IN THE ADMINISTRATION OF EMERGENT MENTAL HEALTH SERVICES AT COATESVILLE VA MEDICAL CENTER 2 (2020).

[178] 38 C.F.R. § 17.2000(c) (2020).

[179] *See* Ronald D. Hester, *Lack of Access to Mental Health Services Contributing to the High Suicide Rates Among Veterans*, 11 INT'L J. OF MENTAL HEALTH SYS. 47 (2017).

[180] *See* FOURTH JUDICIAL CIRCUIT, PROBLEM-SOLVING COURTS OF CLAY COUNTY, FLORIDA: VETERANS TREATMENT COURT PARTICIPANT HANDBOOK 13 (2017).

[181] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-35, VETERANS HEALTH CARE 7 (2019).

[182] *Id.* at 18.

[183] VA Mission Act of 2018, Pub. L. No. 115-182, 132 Stat. 1393 (2018).

[184] Veterans Health Care and Benefits Improvement Act of 2020, Pub. L. No. 116-315, 134 Stat. 4932 (2020).

veterans and fill the gaps where ineligibility or long waits would impact court participation or success.

In summary, VTCs should not assume that discharge status is the only determining factor for VHA eligibility, and they must collaborate with team members who are knowledgeable about how eligibility works. When unclear, VTCs need to consult knowledgeable VSOs or attorneys to see if a character of discharge determination has taken place. VTCs, through the VJO or other VHA representatives, must develop relationships with the mental health, substance abuse, and inpatient VA programs, as well as discuss the availability of emergency mental health care, Vet Centers, and non-VA facilities for ineligible veterans. Further, courts must closely monitor changes in the law that increase potential private health care access for sub-populations of the veteran community, which are frequently overrepresented in VTCs.

C. Housing

With a large percentage of participants entering VTCs housing insecure,[185] it would seem a logical extension for VTCs to place emphasis on establishing housing stability at the start of the program. How can a VTC participant focus on treatment if they are worried about where they will sleep that night? Studies show that many participants who were unsheltered obtained housing at program exit,[186] yet a significant number of veterans still leave their lengthy VTC programs without housing.[187] This is a result of differing priorities between VA and VTCs and a lack of knowledge of VA housing programs within VTC teams.[188]

In 2012, the VA adopted as national policy a "Housing First" approach for its homeless programs.[189] Housing First is a "low-barrier, supportive housing model" that "provides individuals who are experiencing homelessness . . . with permanent housing as quickly as possible and [with] supportive services as needed."[190] The model

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[185] Tsai et al., *supra* note 3, at 239.

[186] *Id.*

[187] *Id.* at 241.

[188] *Id.* at 242–43.

[189] ANN ELIZABETH MONTGOMERY ET AL., U.S. DEP'T OF VETERANS AFFAIRS, HOUSING FIRST IMPLEMENTATION BRIEF (2014), https://www.va.gov/homeless/nchav/docs/Housing-First-Implementation-brief.pdf.

[190] *Id.* (citing Sam J. Tsemberis, *Housing First: The Pathways Model to End Homelessness for People with Mental Illness and Addiction Manual*, 5 EUR. J. HOMELESSNESS 235 (Jan. 2011)).

provides housing "without prerequisites for abstinence, psychiatric stability, or completion of treatment programs."[191] The approach is guided by the belief that "people need basic necessities like food and a place to live before attending to anything less critical, such as getting a job, budgeting properly, or attending to substance use issues."[192]

The VA supports three major housing programs focused on low-income and disabled veterans: VA's Homeless Providers Grant and Per Diem Program ("GPD"), VA's Supportive Services for Veterans Families Program ("SSVF"), and U.S. Department of Housing and Urban Development-VA Supportive Housing Program ("HUD-VASH").[193] Each program targets different sub-populations of homeless veterans to tackle their different barriers.[194] The VA also offers home loans, which can help service members or their survivors become homeowners.[195]

Knowledge of these different programs can aid VTC participants who are most vulnerable and most likely to struggle in or after a VTC program. GPD awards grants to community-based agencies that provide transitional housing and supportive services to homeless veterans.[196] GPD is often used as a first step in housing for many veterans, providing more freedom and flexibility than shelters while offering differing levels of social and medical services depending on the needs of the individual.[197] GPD-Low Demand is aimed at chronically homeless veterans who were unsuccessful in traditional housing programs, frequently due to their inability to meet

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[191] *Id.* (citing Sam Tsemberis, Leyla Gulcur & Maria Nakae, *Housing First, Consumer Choice, and Harm Reduction for Homeless Individuals with a Dual Diagnosis*, 94 AM. J. PUB. HEALTH 651–56 (Apr. 2004)).

[192] *Fact Sheet: Housing First*, NAT. ALL. TO END HOMELESSNESS (Apr. 2016), https://endhomelessness.org/wp-content/uploads/2016/04/housing-first-fact-sheet.pdf.

[193] *Housing Assistance for Veterans*, U.S. DEP'T VETERANS AFF., https://www.va.gov/homeless/housing.asp (last updated Feb. 19, 2019).

[194] *Id.*

[195] *VA Home Loans*, U.S. DEP'T VETERAN AFF., https://www.benefits.va.gov/homeloans (last updated July 28, 2021).

[196] U.S. DEP'T OF VETERANS AFFAIRS, FACT SHEET: VA PROGRAMS FOR HOMELESS VETERANS 5 (2018).

[197] *GPD Program: Seizing the Moment to End Veteran Homelessness*, U.S. VETS, https://usvets.org/gpd-program-seizing-the-moment-to-end-veteran-homelessness/#:~:text=GPD%20transitional%20housing%20would%20operate%20within%20this%20comprehensive,get%20into%20permanent%20housing%20as%20quickly%20as%20possible (last visited Oct. 9, 2021).

treatment participation and sobriety requirements.[198] GPD-Hospital to Hospital is set up to provide clinical follow-up care to homeless veterans following inpatient or emergency stays and to prevent them from being discharged to the streets, an emergency shelter, or extending their inpatient stay.[199] GPD-Clinical Treatment is arranged with an emphasis on case management and treatment services incorporated with temporary housing, providing a less intensive alternative to inpatient treatment programs.[200] GPD-Bridge Housing is for short-term stays where veterans have been offered and accepted permanent housing, but the accepted housing is not yet available.[201] For GPD eligibility, veterans only need one day of active duty service and a discharge status other than dishonorable or bad conduct from a general court-martial (as opposed to a bad conduct discharge issued in a special court-martial).[202]

SSVF is a VA grant program that awards non-profit organizations funding to assist very low-income veterans and their families residing in, or transitioning to, permanent housing.[203] SSVF organizations are able to provide a range of supportive services to eligible veterans designed to promote housing stability, including case management and temporary financial assistance.[204] The SSVF program is not intended to provide long-term support for participants but rather is targeted at identifying veterans who are at risk of homelessness and keeping them housed or rapidly re-housing veterans who are currently homeless.[205] SSVF is often used as the link to getting veterans from shelter or GPD into permanent housing, while also connecting veterans and families with the other non-VA resources available in their area.[206] Like GPD, for SSVF eligibility,

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[198] *Grant and Per Diem - Low Demand (GPD-LD)*, U.S. DEP'T VETERANS AFF., https://www.va.gov/HOMELESS/nchav/gpd-ta/GPD-LD.asp (Aug. 13, 2019).

[199] *Grant and Per Diem - Hospital-to-Housing (H2H)*, U.S. DEP'T VETERANS AFF., https://www.va.gov/HOMELESS/nchav/gpd-ta/H2H.asp (Feb. 22, 2021).

[200] U.S. DEP'T OF VETERANS AFFAIRS, VA GRANT & PER DIEM PROGRAM: GRANT RECIPIENT GUIDE, 19 (2020).

[201] Letter from Deputy Secretary Sloan D. Gibson to Grantees of VA Homeless Providers Grant and Per Diem (GPD) Program (Mar. 1, 2016), https://files.hudexchange.info/resources/documents/Deputy-Secretary-of-Veterans-Affairs-Letter-to-GPD-Grantees.pdf.

[202] VA GRANT & PER DIEM PROGRAM: GRANT RECIPIENT GUIDE, *supra* note 200, at 10–11.

[203] U.S. DEP'T OF VETERANS AFFAIRS, DEPARTMENT OF VETERANS AFFAIRS SUPPORTIVE SERVICES FOR VETERAN FAMILIES (SSVF) PROGRAM 1 (2021).

[204] *Id.* at 1, 6.

[205] *Id.* at 197–98, 200.

[206] *Id.* at 48, 51.

veterans only need one day of active duty service and a discharge status other than dishonorable or bad conduct from a general court-martial.[207]

HUD-VASH is a uniquely beneficial program to help veterans most at risk of housing insecurity.[208] It is a VHA-run program that combines HUD housing vouchers with VA supportive services to help homeless veterans find and sustain permanent housing.[209] HUD provides specific rental assistance vouchers to veterans who are eligible for VA health care services.[210] Recipients must connect with VA case managers who will assist them in accessing health care, mental health treatment, and substance use counseling to help their recovery and to maintain housing in the community.[211] As of 2019, there were 90,749 veterans with active HUD-VASH vouchers.[212] Prior to 2021, veterans with an "other than honorable" or "bad conduct" discharge were ineligible for this program, even if they had a favorable character of service determination.[213] However, the 2021 NDAA has expanded the program to include "other than honorable" veterans, and efforts continue to further expand the definition to match those used by GPD and SSVF.[214] And while HUD-VASH vouchers have limitations, especially in areas with high cost of living,[215] they have had a massive impact on lowering the number of homeless veterans across the country.[216]

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[207] *Id.* at 24.

[208] FACT SHEET: VA PROGRAMS FOR HOMELESS VETERANS, *supra* note 196, at 6.

[209] *U.S. Department of Housing and Urban Development-VA Supportive Housing (HUD-VASH) Program*, U.S. DEP'T VETERANS AFF., https://www.va.gov/homeless/hud-vash.asp (Mar. 30, 2021).

[210] *Id.*

[211] FACT SHEET: VA PROGRAMS FOR HOMELESS VETERANS, *supra* note 196, at 6.

[212] *VA Programs for Homeless Veterans*, U.S. DEP'T VETERANS AFF., https://www.va.gov/homeless/for_homeless_veterans.asp (last updated Feb. 18, 2021).

[213] *Expanding Eligibility for HUD-VASH*, NAT'L ALL. TO END HOMELESSNESS, https://endhomelessness.org/wp-content/uploads/2019/07/HUD-VASH-2019-v2-FINAL.pdf (last visited Oct. 16, 2021).

[214] *See id.*

[215] *See* Leo Shane III, *Thousands of Housing Vouchers for Veterans Went Unused Last Year, Hurting Efforts to End Homelessness*, MIL. TIMES (Jan. 14, 2020), https://www.militarytimes.com/news/pentagon-congress/2020/01/14/thousands-of-housing-vouchers-for-veterans-went-unused-last-year-hurting-efforts-to-end-homelessness.

[216] Steve Berg, *Positive Changes in FY2021 Spending: HUD-VASH Eligibility Expands*, NAT'L ALL. TO END HOMELESSNESS (Feb. 9, 2021), https://endhomelessness.org/positive-changes-in-fy2021-spending-hud-vash-eligibility-expands.

VA home loans may also provide an advantageous way for veterans to secure permanent housing for VTC participants.[217] VA home loans are provided by private lenders, but the VA guarantees a portion of the loan, which enables the lender to provide more favorable terms.[218] Major benefits come with VA home loans including no down payment, no private mortgage insurance, more flexible credit requirements, limits to closing costs, and greater forgiveness of past foreclosure or bankruptcy.[219] Eligibility for VA home loans matches the requirements for VHA healthcare discussed in the previous section.[220] Unlike HUD-VASH, this VA administered program is handled by the VBA, rather than the VHA.[221]

In summary, the VA has four different housing programs that VTCs should consider. Two of the programs, GPD and SSVF, are funded by the VA, but are handled by non-profit organizations in the community.[222] These programs have less restrictive eligibility requirements, which can be extremely beneficial to veterans with "other than honorable" or "bad conduct" discharges or those who served for a very short period of time.[223] The VHA is responsible for the HUD-VASH program, which can connect homeless veterans with long-term housing vouchers and has seen a recent expansion in eligibility requirements.[224] And the VBA oversees the VA Home Loans program, which can provide favorable terms for eligible veteran homebuyers.[225] VTCs need contacts for each different option, which requires knowledge of local community agencies and an understanding of the needs of participants entering the program for referral purposes.

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[217] *VA Home Loans*, *supra* note 195.

[218] *Id.*

[219] Chris Birk, *6 Unbeatable Benefits of VA Loans*, MILITARY.COM, https://www.military.com/money/va-loans/6-unbeatable-benefits-of-va-loans.html (last visited Oct. 16, 2021).

[220] 38 U.S.C. § 3702(c).

[221] *About VBA*, U.S. DEP'T VETERANS AFF., https://www.benefits.va.gov/BENEFITS/about.asp (last updated Jan. 22, 2021).

[222] VA Homeless Providers Grant and Per Diem Program, 78 Fed. Reg. 12,600–01 (Feb 25, 2013); *see also* U.S. DEP'T OF VETERANS AFFAIRS, SUPPORTIVE SERVICES FOR VETERAN FAMILIES (SSVF) PROGRAM GUIDE 1 (2018).

[223] SUPPORTIVE SERVICES FOR VETERAN FAMILIES (SSVF) PROGRAM GUIDE, *supra* note 222, at 22, 173.

[224] *U.S. Department of Housing and Urban Development-VA Supportive Housing (HUD-VASH) Program*, *supra* note 209.

[225] *About VBA*, *supra* note 221.

D. Disability

VTCs have a unique opportunity to connect participants to VA disability benefits, but it requires them to understand the benefits available and to come up with ways to involve accredited representatives[226] in the court. The most comprehensive study of VTC participants to date reveals that, at VTC admission, 38% of participants were receiving VA disability benefits, a number that increased to 50% by program exit.[227] While VTC participants may already be connected to the VA, VTCs can help individuals who have yet to access their benefits.

Obtaining VA disability benefits can be a long process. However, when participants are mandated to keep contact with the court and to receive treatment for their disability, they can improve their VA disability claims, specifically by increasing the amount of medical evidence they have, which will be beneficial to proving the existence or severity of their claimed disability.[228] Monthly income from disability benefits can help participants find or maintain stability, especially early in the VTC process when court obligations can make employment challenging, and after graduation when the level of support decreases.[229]

The percentage of VTC participants already receiving VA disability benefits may appear high. However, as a subset of the veteran population where all participants have severe mental health or substance abuse issues, it is likely significantly lower than it should be. VTCs serve as a hybrid of mental health and drug courts, as VTCs condition entry on either or both a substance use and mental health disorder diagnosis.[230] While most courts do not require the qualifying condition to be related to military service, in some cases, the qualifying condition either started in or was aggravated by

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[226] The VA accredits attorneys, agents, and Veteran Service Organization ("VSO") representatives to help qualifying veterans apply for claims, ensuring the accredited individual has "good moral character" and is "fit" to represent veterans in claims. *See VA Veterans Benefits Administration, Accredited Representatives*, U.S. DEP'T VETERANS AFF., https://www.benefits.va.gov/vso/ (last updated Nov. 9, 2021).

[227] Tsai et al., *supra* note 3, at 239.

[228] *See How to File a VA Disability Claim*, U.S. DEP'T VETERANS AFF., https://www.va.gov/disability/how-to-file-claim (last updated Oct. 1, 2021).

[229] *See VA Disability Compensation*, U.S. DEP'T VETERANS AFF., https://www.va.gov/disability (last updated Sept. 17, 2021).

[230] *Veterans Courts*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/topics/alternative-dockets/problem-solving-courts/veterans-court/resource-guide (last visited Oct. 16, 2021).

military service.[231] For example, of the 38% receiving benefits at admission, 46.5% reported compensation for a service-connected psychiatric condition.[232] As such, the expectation would be for a significant number of participants to enter with a mental health condition leading to receipt of disability benefits.

Further, while the data captures the percentage receiving benefits, it does not clarify whether the VA disability benefit received is for service-connected or non-service-connected disabilities (the latter of which is only available for totally disabled and very low-income veterans) or if the benefits amount accurately reflects the severity of the disability.[233] Even though VTCs may not view connection to disability benefits as part of their core missions, increasing benefits assists with housing and can provide a consistent source of income while participants attempt to meet the rigorous treatment and court requirements. For this reason, it is critical that a VTC team member be familiar with the VBA.

The VA has two major disability benefits programs, both overseen by the VBA.[234] The first benefits program is VA Service-Connected Disability Compensation ("Compensation"), a tax-free monetary benefit paid to veterans with disabilities that are the result of a disease or injury incurred or aggravated during active military service.[235] Compensation requires a veteran to show that it is at least as likely as not that a current physical or mental health condition resulting in disability was incurred in, aggravated by, or caused by service.[236] The VA considers five criteria when making a decision about the link between a disability and its origin: (1) direct service connection,[237] (2) aggravation,[238] (3) presumptive service connection,[239] (4) secondary service connection,[240] and (5) consequence

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[231] *See Eligibility for VA Disability Benefits*, U.S. DEP'T VETERANS AFFAIRS, https://www.va.gov/disability/eligibility (last updated Aug. 13, 2021).

[232] Tsai et al., *supra* note 3, at 240.

[233] *Id.* at 239–40.

[234] *About VBA*, *supra* note 221.

[235] *Compensation*, U.S. DEP'T VETERANS AFF., https://www.benefits.va.gov/compensation (last updated Feb. 13, 2019).

[236] *See* 38 C.F.R. § 3.303(a) (2020).

[237] *Id.* § 3.304(a).

[238] *Id.* § 3.306(a).

[239] *Id.* § 3.307(a); *see also id.* § 3.309(a).

[240] *Id.* § 3.310(a).

of VA health care.[241] If granted, the VA then rates each individual disability in increments of 10%, from 0% to 100%, and veterans with multiple rated conditions receive an overall "combined" rating (using a method distinct from simple addition).[242] Monthly compensation increases with a veteran's combined rating and number of dependents, with a single veteran rated at 100% receiving $3,146 per month in benefits.[243]

The second benefits program is VA Non-Service-Connected Disability Pension ("Pension"), a tax-free benefits program payable to very low-income, disabled, or elderly veterans.[244] In addition to requiring that recipients meet the VA's definition of a veteran, Pension has several other qualifiers.[245] First is a net worth limitation, which considers both assets and annual income.[246] Next, the veteran must have at least ninety days of active duty, including one day during a wartime period, or if the active duty occurred after September 7, 1980, at least twenty-four months of service or a full period called up, along with one day during a wartime period.[247] Last, the veteran must be sixty-five or older with limited or no income, totally and permanently disabled, a patient in a nursing home receiving skilled nursing care, or a recipient of SSI or SSDI.[248] A single veteran with Pension will receive up to $1,160 per month, however the amount can increase depending on additional care needs and out of pocket medical expenses.[249]

A VJO should be familiar with the basics of each program in order to help the veterans they work with determine which benefits or programs might be appropriate, regardless of whether they are working with incarcerated veterans, VTCs, or other JIVs. However,

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[241] 38 U.S.C. § 1151(a).

[242] *About VA Disability Ratings*, U.S. DEP'T. VETERANS AFF., https://www.va.gov/disability/about-disability-ratings (last updated Dec. 10, 2020).

[243] *2021 Veterans Disability Compensation Rates*, U.S. DEP'T. VETERANS AFF., https://www.va.gov/disability/compensation-rates/veteran-rates (last updated July 15, 2021).

[244] *Eligibility For Veterans Pension*, U.S. DEP'T. VETERANS AFF., https://www.va.gov/pension/eligibility (last updated Sept. 29, 2021).

[245] *Id.*

[246] *2021 VA Pension Rates for Veterans*, U.S. DEP'T VETERANS AFF., https://www.va.gov/pension/veterans-pension-rates (last updated July 15, 2021).

[247] 38 C.F.R. § 3.3(2)–(3) (2020); *Eligibility For Veterans Pension*, *supra* note 244.

[248] *Eligibility For Veterans Pension*, *supra* note 244.

[249] *See 2021 VA Pension Rates for Veterans*, *supra* note 246.

VJOs are limited in their ability to provide assistance with the actual application or with appeals of denials.[250]

Given the complexity of the benefit programs and the lengthy process to receive a decision, VTCs should look elsewhere for assistance in helping veterans, particularly veterans with mental health conditions and housing insecurity, succeed in their initial applications and appeals. Veteran Service Organizations ("VSOs"), along with state, county, and local veteran service representatives, are trained to help veterans understand and apply for these VA benefits for no cost.[251] There are also legal service providers, law school clinics, and other non-profit organizations that have attorneys available to provide pro bono assistance with disability claims.[252] There are also attorneys and agents that are accredited who charge fees to veterans to assist with their claims.[253] Since VJOs cannot assist directly with the claims process, they need to be aware of who in their community can. VTC teams should also consider how they can bring accredited representatives into the court to work directly with participants.

E. Education and Employment

One important way to combat addiction and reduce recidivism is to increase access to education and work opportunities.[254] VA education and employment benefits may feel less urgent for older VTC participants and those struggling with homelessness but may be most important in the long run for younger participants hoping to build a stable future. The most recent data shows the mean age of VTC participants is 43.7 years old, putting them at working age.[255] While younger veterans made up a smaller number

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[250] *See Justice Involved Veterans and Treatment Court*, U.S. DEP'T VETERANS AFF., https://www.va.gov/HEALTHEQUITY/Justice_Involved_Veterans_and_Treatment_Court.asp (last updated Apr. 16, 2021).

[251] *Accredited Representatives*, U.S. DEP'T VETERANS AFF., https://www.benefits.va.gov/vso (last updated Feb. 5, 2021).

[252] *Legal Help for Veterans*, U.S. DEP'T VETERANS AFF., https://www.va.gov/OGC/LegalServices.asp (last updated May 5, 2021).

[253] *Accredited Representatives*, *supra* note 251.

[254] *See, e.g.*, Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AM. SOCIO. REV. 529, 542–43 (2000); James S. Vacca, *Educated Prisoners Are Less Likely to Return to Prison*, 55 J. CORR. EDUC. 297, 297–98 (2004); Christy A. Visher et al., *Ex-Offender Employment Programs and Recidivism: A Meta-Analysis*, 1 J. EXPERIMENTAL CRIMINOLOGY 295, 295, 311 (2005).

[255] Tsai et al., *supra* note 3, at 240.

of participants than originally anticipated in the creation of these courts, the declining overall veteran population suggests VTCs should expect a future increase in the number of Gulf War era and Post-9/11 veterans, who comprise about one-third of VTC participants in recent years.[256] And while some may have total and permanent disabilities, many VTC participants will need to secure or maintain employment while also dealing with the mental health and substance abuse issues that brought them to the court, and depending on the court, potentially a criminal charge or conviction too.

The three largest VA programs providing critical education and workforce training are the various iterations of the GI Bill, the Veteran Readiness and Employment program ("VR&E," formerly known as VocRehab), and Compensated Work Therapy ("CWT").[257]

The GI Bill is an education benefit provided by the VA that helps qualifying veterans cover all or some of the costs of school or training.[258] Many service members cite education benefits as the principal reason for joining the military.[259] To be eligible for VA education benefits through the Post-9/11 GI Bill, a veteran must have served for ninety days, whether continuous or interrupted after September 10, 2001, and received an "honorable" discharge.[260] To be eligible for VA education benefits through the older Montgomery GI Bill, a veteran must have served two years on active duty and have received an "honorable" discharge.[261] The GI Bill is the only benefit that individuals with a "general" discharge are not

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[256] *Id.*

[257] *See About GI Bill Benefits*, U.S. DEP'T VETERANS AFF., https://www.va.gov/education/about-gi-bill-benefits (last updated Dec. 30, 2020); *Veteran Readiness and Employment (Chapter 31)*, U.S. DEP'T VETERANS AFF., https://www.va.gov/careers-employment/vocational-rehabilitation (May 18, 2021); *Information for Veterans - Compensated Work Therapy*, U.S. DEP'T VETERANS AFF., https://www.va.gov/HEALTH/cwt/veterans.asp (last updated Oct. 13, 2021).

[258] *About GI Bill Benefits*, *supra* note 257.

[259] Meghann Myers, *Studies Tackle Who Joins the Military and Why, but Their Findings Aren't What Many Assume*, MIL. TIMES (Apr. 27, 2020), https://www.militarytimes.com/news/your-military/2020/04/27/studies-tackle-who-joins-the-military-and-why-but-their-findings-arent-what-many-assume.

[260] *Post-9/11 GI Bill (Chapter 33)*, U.S. DEP'T VETERANS AFF., https://www.va.gov/education/about-gi-bill-benefits/post-9-11 (last updated Oct. 7, 2021).

[261] *Montgomery GI Bill Active Duty (MGIB-AD)*, U.S. DEP'T VETERANS AFF., https://www.va.gov/education/about-gi-bill-benefits/montgomery-active-duty (last updated Oct. 18, 2021).

eligible for.[262] Only a discharge upgrade, not a favorable character of discharge determination, will make an ineligible veteran subsequently eligible for GI Bill benefits.[263] The GI Bill can pay full tuition for public colleges or universities and a percentage of private or foreign universities, and can also provide a monthly housing allowance.[264]

Veteran Readiness and Employment is a VHA program designed to assist veterans with service-connected disabilities obtain suitable employment or independent living.[265] Veterans meet with rehabilitation counselors who discuss and determine employment handicaps and assess veterans' skills, abilities, and interests.[266] Veterans are then placed on one of five different tracks: (1) re-employment, (2) rapid access to employment, (3) self-employment, (4) employment through long-term services, or (5) independent living, depending on the level of need.[267] In addition to case management and employment services, VR&E can help pay for veterans' vocational or educational training as well as housing assistance.[268] While VR&E requires VHA eligibility and a service-connected disability, it does not require an "honorable" discharge, expanding educational opportunities for veterans who may be ineligible for the GI Bill.[269] It also closely monitors the successes and failures of participants, so veterans who are unsuccessful with the program have increased

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[262] *Applying for Benefits and Your Character of Discharge*, U.S. DEP'T VETERANS AFF., https://www.benefits.va.gov/benefits/character_of_discharge.asp (last updated Dec. 10, 2020).

[263] *What Type of Discharge is Required to Qualify for the Post-9/11 GI Bill?*, U.S. DEP'T VETERANS AFF., https://gibill.custhelp.va.gov/app/answers/detail/a_id/942/kw/general%20discharge (last updated Nov. 6, 2018).

[264] Jim Absher, *Post-9/11 GI Bill Rates*, MILITARY.COM (May 18, 2021), https://www.military.com/education/gi-bill/gi-bill-tuition-rates.html.

[265] *Veteran Readiness and Employment (Chapter 31)*, *supra* note 257.

[266] *VR&E Rapid Access to Employment Track*, U.S. DEP'T VETERANS AFF., https://www.va.gov/careers-employment/vocational-rehabilitation/programs/rapid-access-to-employment (last updated June 8, 2021).

[267] *See id.*

[268] *Federal Benefits for Veterans Dependents and Survivors Chapter 3 Vocational Rehabilitation and Employment*, U.S. DEP'T VETERANS AFF., https://www.va.gov/opa/publications/benefits_book/benefits_chap03.asp (last updated Apr. 21, 2015).

[269] *See Eligibility of Veteran Readiness and Employment*, U.S. DEP'T VETERANS AFF., https://www.va.gov/careers-employment/vocational-rehabilitation/eligibility (last updated Sept. 30, 2021).

likelihood of being able to obtain increases in VA Disability Benefits or Social Security Disability Benefits.[270]

CWT is a VHA clinical vocational rehabilitation program that is offered at every VA medical center.[271] CWT frequently partners with VR&E to expand work opportunities for veterans.[272] The goal of the program is to provide support to veterans who have mental or physical limitations that have created barriers to employment to secure and maintain community-based competitive employment.[273] To be eligible for CWT, an individual must be VHA eligible and have a disability, but that disability does not need to be service-connected, making it the least restrictive of the employment and education programs.[274] Much like VR&E, a veteran must meet with a counselor who provides a vocational assessment to determine if the program is appropriate and, if it is, develop an employment plan.[275] Depending on their level of need, veterans may be placed in transitional work, supported employment, community-based employment services, vocational assistance, supported self-employment, or supported education.[276]

In summary, the VA has anticipated the struggles of veterans to pay for education and find employment, particularly those veterans with disabilities. VTCs can potentially utilize the different services and benefits to help their participants overcome the issues that led them to the court as well as the challenges of a new criminal record. These programs can also potentially provide housing allowances to veterans struggling with insecurity. The emphasis a VTC places in these benefits largely will depend on the demographic makeup of the participants in that court, but VTCs should at least have contacts and resources for the advantage of interested veterans. This is especially true given the importance of education and other community resources to lower recidivism rates within treatment courts.[277]

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[270] *SSA and VA Disability Benefits: Tips for Veterans*, SAMHSA (Dec. 25, 2015), https://www.va.gov/HOMELESS/ssvf/docs/SSA_and_VA_Disability_Benefits_122415.pdf .

[271] *Information for Veterans - Compensated Work Therapy*, *supra* note 257.

[272] *See id.*

[273] *Id.*

[274] *Id.*

[275] *Id.*

[276] *Id.*

[277] Gallagher et al., *supra* note 99, at 470.

V. TOWARDS BETTER INTEGRATION OF VTCS AND VAS

Like all treatment courts, the success of a Veteran Treatment Court will likely be judged on outcomes such as the recidivism rates of its participants, whether they have better housing or employment after participation, as well as whether they are able to stay sober and even stay alive.[278] Because of this, VTCs must evaluate all the factors that will impact a veteran participant, not just while they are in the court but also once they graduate. While strengthening compliance with treatment and building a strong mentorship team are important, ensuring access to basic needs beyond the confines of the VTC program is just as, if not more, important. VTCs should incorporate the wide array of benefits the VA can provide. The VA must recognize its essential support role in these courts and the potential value of VTCs as a pathway to help hard-to-reach veterans. Early studies have already found that VTC participants use a much higher percentage of VA services than non-VTC participants and likely need them beyond their participation in court-mandated treatment.[279] Based on the needs presented by participants on VTC entry and exit, as well as recidivism rates,[280] veterans need more support.

VTCs provide a unique circumstance where a struggling veteran can be linked with life-changing resources, but that can only happen if the VA recognizes the importance of its presence within the courts and VTCs start thinking outside the box of who else must be part of the team. Here, we outline several suggestions for improving the working relationship between VAs and VTCs and how to strengthen elements that already exist.

As a preliminary matter, we acknowledge the important work that all VJOs are doing in VTCs as well as criminal justice institutions. In previous sections, we explored the creation and growth of the VJO program, an innovative idea to address the needs of the JIV population. And while the program was initially met with hesitancy, with the growth of VTCs across the country, the VJO program is now viewed as a critical component to the courts, and lawmakers have designated funds to expand the program.[281] More

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[278] *See* Tsai et al., *supra* note 3, at 237.

[279] Finlay et al., *supra* note 8, at 52.

[280] *See* Tsai et al., *supra* note 3, at 237.

[281] Austin Igleheart, *Congress Passes Bill to Expand Veterans Justice Outreach Program and Incentivize New Veterans Treatment Courts*, NACO (Aug. 28, 2018),

VJOs is a positive for VTCs, but to truly maximize the impact for VTC participants, it is time to reconsider their role and opportunities to better utilize their unique position as a liaison with the VA.

First, we suggest the creation of specialized VJO positions. The expectation that VJOs should be providing prison outreach and assistance to non-VTC JIVs, while also working as a liaison to VTCs, which can range from dozens to hundreds of clients, is simply unrealistic. It would make sense for the VJO position to first be specified as either a VTC liaison, with considerations given to the size of the area VTC, or a prison outreach and traditional criminal court liaison. The positions should then take into account geographic zones, specifically in terms of VA and non-VA veteran programs that exist within the area. With this change, VJOs could have an opportunity to make a more meaningful difference for the JIVs they assist, as the sub-populations they serve would have similar issues, and they would be expected to manage fewer partner relationships. The VA has shown a commitment to this program,[282] but the next step for growth is specialization and focused impact.

VJOs, especially ones with greater focus on the VTC participants, should also not be the only VA representative in VTCs. All VTCs should have expertise on VHA benefits, VBA benefits, and non-VA community benefits. The VJO can fill the role for VHA benefits, but as the role is currently conceived, they do not have the training or bandwidth to serve as VBA benefits experts, too.[283] The VA should consider different options to have representatives from the VBA be a regular, if not constant, presence in VTCs. Ideally, a VBA representative would attend the VTC hearings like a VJO in order to address issues and consider ways to connect participants to additional VA resources that may be more cost-effective. However, a VBA representative should not be thought of as the same as a VJO, who may be called upon frequently in VTC hearings for updates on treatment progress or scheduling future appointments.[284] By contrast, access to VBA programs is not necessary for basic VTC

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https://www.naco.org/blog/congress-passes-bill-expand-veterans-justice-outreach-program-and-incentivize-new-veterans.

[282] *Incarcerated Veterans*, U.S. DEP'T VETERANS AFF., https://benefits.va.gov/PERSONA/veteran-incarcerated.asp (last updated Aug. 4, 2020).

[283] U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-564, VETERANS JUSTICE OUTREACH PROGRAM: FURTHER ACTIONS TO IDENTIFY AND ADDRESS BARRIERS TO PARTICIPATION WOULD PROMOTE ACCESS TO SERVICES (Sept. 14, 2021), https://www.gao.gov/products/gao-21-564.

[284] *See* U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 63.

participation compliance.[285] As an alternative, a VBA representative could be made available to answer questions and provide guidance at key points in the VTC process. By ensuring that courts have someone that participants can speak to upon admission, mid-way through the program, and before graduation, the VA could provide regular evaluation of a participant's circumstances and the VBA benefits that may be appropriate. Making the VBA representative a structured position, and potentially requiring VTC participants to contact the VBA representative for benefits assessments, would connect participants with needed benefits without placing that extra burden on current VJOs.

In designing and implementing its programs, the VA has acknowledged that it is not always best positioned to serve hard-to-reach veterans directly.[286] The GPD and SSVF programs demonstrate VA's realization that to combat veteran homelessness, the VA would need the help of non-profit community organizations who better understood the barriers and challenges facing a particular area's veteran population. In a similar way, VTCs could draw on outside experts who can help veteran participants navigate problems beyond the scope of the VA representatives and court case managers. One place they could start are civil legal service organizations and law school clinics that focus on veterans' services. Both can offer a wealth of knowledge, including a thorough understanding of benefits and resources at the federal, state, and local levels as well as the ability to solve issues that require legal intervention.[287] In some cases, VHA and VBA programs may resolve some issues easily, but more often it will take work from both VA and outside advocates to get issues fixed. There is a natural fit for civil legal attorneys and law school clinics to take on this outside expert role.

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[285] *See What Is A Veterans Treatment Court*, JUST. FOR VETS, https://justiceforvets.org/what-is-a-veterans-treatment-court (last visited Oct. 17, 2021).

[286] *See* OFF. OF MENTAL HEALTH & SUICIDE PREVENTION, U.S. DEP'T OF VETERANS AFFAIRS, NATIONAL STRATEGY FOR PREVENTING VETERAN SUICIDE 2018–2028 9 (2018).

[287] While VTCs were designed with the understanding of the role that mental health and substance abuse play in criminal activity, the role of social disadvantages and poverty should not be overlooked. Tsai et al., *supra* note 3, at 5. And it cannot be understated that civil legal services are an extremely effective poverty fighting tool. Steve Gottlieb, *To Fight Poverty, We Must Have Civil Legal Aid*, WELLS FARGO STORIES (Mar. 22, 2021), https://stories.wf.com/to-fight-poverty-we-must-have-civil-legal-aid. A Legal Services Corporation study found that although "71% of households with veterans or other military personnel experienced a civil legal problem in the past year," "only 20% of low-income Americans seek professional legal help." LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017).

The challenges involve accessing, inviting, and funding support. VTCs need to determine what organizations or clinics best fit their individual model and initiate the relationship. These courts are innovative in their approach to criminal justice, but they still need to overcome the frame of mind that civil legal needs are not a part of criminal justice rehabilitation. The population VTCs are serving will overlap with the population civil legal organizations are serving, and the sooner both civil and criminal sides of a veteran participant's problem can be identified, the sooner it can be resolved. Obviously, these organizations or clinics need additional resources to be effective partners to VTCs. This is where the VA needs to become creative and utilize recent legislation like the Veterans Health Care and Benefits Improvement Act of 2020,[288] which requires the VA to provide legal services to homeless veterans and to fund wrap-around civil legal services to VTC participants.[289]

A successful VTC team is one that has the expertise to address the needs of the veteran participant from the moment they enter the court to long after they graduate. And while the current approach of a singular overstretched VJO is absolutely better than no intervention, it is not nearly where it could be, and should be, to fulfill the mission of these courts. To get closer, the VA needs to reaffirm its commitment to the VJO program through expansion and specialization as well as guarantee the involvement of VBA representatives. Courts also need to fill the gap for outside expertise by engaging with legal service organizations and law school clinics in recognition of the remaining needs of veteran participants. This will take funding as well as experimentation to get right, but VTCs have the attention and support to take risks for the veterans they serve.

VI. CONCLUSION

The possibilities to improve VTCs are numerous, and a truly successful court will likely need a combination of the above suggestions, including specialized VJOs, involvement of VBA representatives, and community partnerships with local legal service organizations. To accomplish this, funding must be increased. The reality is that some courts will continue to operate without a VJO, or will have

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[288] Veterans Health Care and Benefits Improvement Act of 2020, Pub. L. No. 116-315, 134 Stat. 4932 (2020).

[289] *Id.* § 4202.

a VJO stretched between multiple roles, and it will be on court personnel to be aware of policies to determine which benefits the veteran participant can access and recognize what community partners can be brought in to help them. This is especially true if the participant might be eligible for VA benefits but is not accessing them.

On top of growing funding for VTCs through allocations to adult drug courts, Congress recently passed the Veterans Treatment Court Improvement Act.[290] This act will provide an additional $20 million for VTCs (its proponents wanted $5 billion)[291] in order to make available grants, technical assistance, and information on best practices for running a VTC.[292] This increased number of VTCs will no doubt put strain on local VAs to make sure that there is adequate personnel to work in the court and connect veterans to local VA services. This challenge will be more acute where courts are not near VA clinics.

As the more than 500 current VTCs push forward,[293] we should be continuing to push the bar on what success actually looks like. We see justification of the rapid creation of VTCs around the idea that our military veterans are worthy of additional support.[294] If that is the case, these courts should also help connect veterans with the social services available to ensure they are in a position to thrive going forward.

In sum, efforts to improve veteran well-being will not be possible without recognition of the important role the VA plays in VTCs, and resources to better integrate VTCs and VAs. Just as military culture is used to build comradery and help with compliance, the earned benefits of military service, including healthcare, housing, and disability, should be fought for so the participants can be made whole. Courts should look for ways to build bridges to the VHA and VBA, and the VA should want to have VJOs and other liaisons in these courts to help vulnerable veterans in need of support. A veteran should not be in fear of leaving the court homeless, unemployed, or unable to support themselves. These unfortunate

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[290] 34 U.S.C. § 10651(a).

[291] Harm Venhuizen, *Congress Approves Bill Giving Federal Support to Veterans Treatment Courts*, MIL. TIMES (July 21, 2020), https://www.militarytimes.com/news/your-military/2020/07/21/congress-approves-bill-giving-federal-support-to-veterans-treatment-courts.

[292] *Id.*

[293] Douds & Hummer, *supra* note 19, at 322.

[294] Jamie Rowen, *Worthy of Justice: A Veterans Treatment Court in Practice*, 42 L. & POL'Y 78, 90 (2020); Baldwin & Brooke, *supra* note 9, at 1–29.

consequences will continue to happen if VTCs do not build in their expertise and knowledge of the processes and procedures to connect veterans to available benefits. More knowledgeable VJOs will help, creative partnerships with the VBA will help, and relationships with local legal service organizations will help. While each VTC may look different, and as a result will need a different combination of these modifications, they are the keys to creating a transformative court for our veteran community. In supporting such reforms, the VA and VTCs as a whole will send a message of what these courts are here to do: help veterans.

EXPLOITING PRISONERS: PRECEDENT, TECHNOLOGY, AND THE PROMISE OF ACCESS TO JUSICE

ASHLEY KRENELKA CHASE†

ABSTRACT

This article examines the legal evolution of access to information for incarcerated litigants and the role that access to the internet, libraries, and "ownership" of the law plays in providing access to the courts under decades of precedent. It then discusses the Supreme Court's jurisprudence regarding the way technology has changed American behavior, including access to the internet, and how that significant shift in behavior is impacting incarcerated litigants. It concludes by offering a hopeful—and significantly fairer—approach to providing inmates access to the courts and, therefore, true access to justice, without exploiting them in the process.

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INTRODUCTION

Fred, an inmate at a correctional institution in Florida, is entering the prison law library. Fred's family pays a monthly fee to ensure Fred has access to technology for both research and recreational technology use, and today is the day he is allowed to access the law library's computers. There, he will have an opportunity to research issues related to his private attorney's representation, whose services Fred believes were ineffective. He knows a little about the law—he's heard of Strickland v. Washington*—but he has less than a month to file his Motion for Post-Conviction Relief based on the bad advice he received from hired counsel during plea negotiations with the State. The prison law librarian informs Fred that, according to his account balance and the library's policies, he has 15 minutes to research. Fred clicks the icon to access the law library's online legal research*

> *platform. The internet churns slowly while Fred waits and watches his allotted research time tick by. Finally, and with three minutes remaining, Fred runs a cursory search: plea agreement. The internet starts churning again. Fred's research time is up.*

If you are only given fifteen minutes to research and, in that time, you are not given access to anything, have you truly performed legal research? Have you received access to the resources that are supposed to provide you with constitutionally required access to the courts, according to longstanding precedent? And does anyone care?

From defunding private prisons to defunding the police, criminal justice in the United States is standing on a precipice, poised for significant change that will inexorably alter the lives of those navigating the system.[1] What remains to be seen, of course, is whether that significant change will be to the benefit or detriment of those navigating the criminal justice system. Much of the attention has been focused on issues like police reform, ensuring that our country's detention centers are safe, and addressing prisoners' mental health crises. Yet, there is another issue standing squarely in the way of access to justice for America's convicted: access to information and, by extension, access to the courts.[2] In fact, the current unequal access to information in the United States and the way in

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[1] Where criminal justice reform is being discussed in the United States, those discussions have centered largely around things like the George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/house-bill/7120/all-actions (addressing a wide range of policies and issues relating to law enforcement accountability and police practices, and enhancing existing enforcement mechanisms to remedy violations by law enforcement). Furthermore, Oregon Measure 110 reduces penalties for mere possession of controlled substances. *See* Drug Addiction Treatment and Recovery Act, 2021 Or. Laws Ch. 591; *see also* Benzinga, *Oregon Becomes First U.S. State to Decriminalize Drug Possession*, CFO (Nov. 4, 2020), https://www.cfo.com/legal/2020/11/oregon-becomes-first-u-s-state-to-decriminalize-drug-possession. To decrease incarceration levels, President Biden has also ordered the Justice Department to end funding of private prisons. *See* Aamer Madhani, *Biden Orders Justice Dept. to End Use of Private Prisons*, AP NEWS (Jan. 26, 2021), https://apnews.com/article/joe-biden-race-and-ethnicity-prisons-coronavirus-pandemic-c8c246f00695f37ef2afb1dd3a5f115e; *see also* Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities, Exec. Order No. 14006, 86 Fed. Reg. 7483 (Jan. 26, 2021).

[2] JOHN HOWARD ASS'N, PRISONER ACCESS TO THE COURT AND ADEQUATE LAW LIBRARY: NINE RECOMMENDATIONS FOR SYSTEM IMPROVEMENT 4 (2019), https://static1.squarespace.com/static/5beab48285ede1f7e8102102/t/5db0b54c32a93274d095ff33/1571861839356/JHA+Special+Report+Access+to+Court+and+Adequate+Law+Library+2019.pdf.

which equal access to information can be changed on a dime threatens American society as a whole and criminal defendants in particular.[3] The unavailability of a neutral and open internet threatens equality and human welfare.[4] Nowhere is this threat more apparent than looking at the impact a lack of net neutrality could have on access to justice in the United States criminal justice system.[5] A truly neutral internet—one in which access cannot be blocked, slowed down, or censored—requires formal regulation by the federal government.[6]

The internet is central to the information-finding behaviors of a majority of Americans, and access to information is a central tenet of access to the courts (and access to justice).[7] But, for millions of Americans, meaningful access to the internet is not guaranteed; they turn to other sources—namely, libraries—to gather information.[8] Individuals navigating the criminal justice system who need access to information to weed their way through the system are chief among those who turn to external sources and seek help in accessing information.[9] But the volatility of net neutrality means

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[3] Former FCC Chairman, Tom Wheeler, defends the proposed rules allowing for Internet "fast lanes," as the rules will still allow for an "open pathway" that is "sufficiently robust." Sam Gustin, *FCC Chairman Tom Wheeler Pledges Open Internet in Face of Criticism*, TIME (Apr. 30, 2014, 9:43 AM), https://time.com/82409/wheeler-net-neutrality. Tim Wu, a Columbia University law professor who coined the term "net neutrality," described the proposed rules as a "net-discrimination rule" that would "threaten to make the Internet just like everything else in American society: unequal in a way that deeply threatens our long-term prosperity." Megan O'Neil, *Worried by FCC Plan, Net-Neutrality Advocates at Colleges Gauge Next Steps*, CHRON. OF HIGHER EDUC. (May 1, 2014), http://chronicle.com/article/Worried-by-FCC-Plan/146293.

[4] *See* Klint Finley, *Why Net Neutrality Matters Even in the Age of Oligopoly*, WIRED (June 22, 2017, 3:52 PM), https://www.wired.com/story/why-net-neutrality-matters-even-in-the-age-of-oligopoly.

[5] Ashley Krenelka Chase, *Neutralizing Access to Justice: Criminal Defendants' Access to Justice in a Net Neutrality Information World*, 84 MO. L. REV. 323, 343 (2019).

[6] *See generally* Babette E.L. Boliek, *Wireless Net Neutrality Regulation and the Problem with Pricing: An Empirical, Cautionary Tale*, 16 MICH. TELECOMM. & TECH. L. REV. 1, 7–8 (2009) (analyzing "the relative consumer benefits of [prior] state rate regulation and federal entry regulation" on the mobile telecommunications industry).

[7] *See* Bounds v. Smith, 430 U.S. 817 (1977), *overruled in part by* Lewis v. Casey, 518 U.S. 343 (1996); *see also* Lewis v. Casey, 518 U.S. 343 (1996).

[8] Lauren Kirchner, *Millions of Americans Depend on Libraries for Internet. Now They're Closed*, MARKUP (June 25, 2020, 10:00 AM), https://themarkup.org/coronavirus/2020/06/25/millions-of-americans-depend-on-libraries-for-internet-now-theyre-closed.

[9] *See generally* Adam Wisnieski, *Access Denied: The Digital Crisis in Prisons*, CRIME REP. (Aug. 6, 2018), https://thecrimereport.org/2018/08/06/access-denied-the-digital-crisis-in-prisons.

that access to information is not guaranteed.[10] Lack of access to a truly neutral internet severely limits the litigating capacity of criminal litigants, who are in turn exploited in order to have access to basic legal information that could provide them the ability to meaningfully attack their sentences.[11]

Part I of this Article examines the precedent that courts currently rely on in the United States when determining incarcerated litigants' access to the courts via their access to information. Next, it considers how those cases fail to examine the current realities of legal research and access to information. Part II discusses the significant issues that stand in the way of meaningful access to electronic resources—namely, a lack of regulated net neutrality and the inability of prison law libraries to provide equal and meaningful access to legal information due to the move to electronic resources. It also discusses a recent Supreme Court opinion detailing "ownership" of the law in the United States and the application of that standard to incarcerated litigants. Part III describes the Supreme Court Justices' current views on the application of precedent in light of constitutional issues and how the current precedent related to access to the courts via access to information should be overturned based on other precedent, which clearly states that rapidly changing technology has changed everything about the way Americans behave socially and economically. This new precedent, this Article argues, should apply to access to the courts and access to information, and it should require the Supreme Court to revisit its own limiting precedent about access to information. Finally, this Article examines the changes to legal research technology; how prisoners' gap in technological knowledge is coupled with the fallibility of access to information given the United States' current lack of net neutrality regulations;[12] the continuing exploitation of prisoners by private companies operating in prisons; and the need to reframe the narrative and use different precedent—namely, *South Dakota v. Wayfair*—to ensure that those navigating the criminal justice system have meaningful access to legal information.

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[10] *See generally* Jeffrey Cook et al., *Net Neutrality Repeal Sparks Praise and Disappointment: 'We Cannot Let This Happen'*, ABC NEWS (Dec. 14, 2017, 6:04 PM), https://abcnews.go.com/US/net-neutrality-repeal-sparks-praise-disappointment-happen/story?id=51798263.

[11] *See* Chase, *supra* note 5, at 344–45.

[12] *See* Chase, *supra* note 5 (providing a detailed description of net neutrality and access to justice).

I. THE PRECEDENT: *BOUNDS*, *CASEY*, AND THE FAILURE OF THE UNITED STATES SUPREME COURT

There is a significant need for far-reaching American criminal justice reform, a topic that has been discussed by popular media and non-profits and that has been prioritized by past and present Presidents of the United States with varying degrees of urgency and success.[13] The exploitation of prisoners—everything from outrageous commissary charges to unpaid work—is less of a priority for many who dare to address reforms.[14] The Biden administration and bipartisan legislators are attempting to remedy Trump-era rollbacks of access to justice initiatives, highlighting the need for equal access to legal resources to truly provide justice for all.[15]

The less public and less newsworthy side of criminal justice reform and access to justice lies within the walls of prison law libraries, where it is incredibly difficult for prisoners—especially indigent prisoners—to gain meaningful access to the courts.[16] An examination of prisoners' experience with legal research and technology in prison, particularly in light of decades-old precedent related to inmates' access to legal information, coupled with a massive digital divide for those in prison, illustrates the damage inflicted on these vulnerable populations.[17]

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[13] *Compare* Barack Obama, *The President's Role in Advancing Criminal Justice*, 130 HARV. L. REV. 811 (2017) (detailing former President Barack Obama's tenure and impact on criminal justice reform in the United States), *with* Malia Brink, *The Next Four Years: What Biden Should Prioritize on Policing and Criminal Justice Reform*, A.B.A. (Mar. 3, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-next-four-years/policing-and-criminal-justice-reform (analyzing President Biden's campaign promises regarding criminal justice reform and suggesting actions he could take to implement his promises).

[14] Jeanne Hirschberger, *'Imprisonment is Expensive' – Breaking Down the Costs and Impacts Globally*, PENAL REFORM INT'L BLOG (July 24, 2020), https://www.penalreform.org/blog/imprisonment-is-expensive-breaking-down-the-costs-and; Bernadette Rabuy & Peter Wagner, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html.

[15] Press Release, Congressman Jerry Nadler, Bipartisan Lawmakers Introduce Legislation to Restore DOJ's Office for Access to Justice (July 16, 2021), https://nadler.house.gov/news/documentsingle.aspx?DocumentID=394691; *see also* Memorandum on Restoring the Dep't of Justice's Access-to-Justice Function and Reinvigorating the White House Legal Aid Interagency Roundtable, 86 Fed. Reg. 27793 (May 21, 2021).

[16] *See* Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299 (2006).

[17] *Id.*

A. The Intersection of Access to Justice and Libraries

The body of cases discussing access to information as an avenue to access the court system is not large, and two cases remain the polestars for discussing criminal defendants' access to information, the courts, and justice: *Bounds v. Smith*[18] and *Lewis v. Casey*.[19] Both *Bounds* and *Casey* discuss access to the American court system and the impact that libraries—specifically prison libraries—have on that access. While the opinions in both cases hinge on prisoners' ability to access legal information, neither case contemplates the significant shift in the cost and availability of legal resources, and subsequent cases continue to fail to acknowledge the new reality of legal research: meaningful access to the internet is essential to accessing legal resources.[20]

i. *Bounds*

Bounds v. Smith was the first Supreme Court case to address whether a failure to provide legal research facilities in prisons is akin to barring inmates' access to the courts in violation of their First and Fourteenth Amendment rights.[21] In making a determination that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law,"[22] the Supreme Court evaluated whether the need for legal research in new cases versus petitions for discretionary review had any impact on prisoners' ability to access the courts.[23] The Supreme Court established that it is "beyond doubt that prisoners have a constitutional right of access to the courts," regardless of the type of action being pursued by the prisoner.[24]

The Supreme Court went on to say that "access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with

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[18] 430 U.S. 817 (1977), *overruled in part by* Lewis v. Casey, 518 U.S. 343 (1996).

[19] 518 U.S. 343 (1996).

[20] Chase, *supra* note 5, at 359.

[21] *Bounds*, 430 U.S. at 817–18.

[22] *Id.* at 828.

[23] *Id.* at 827–28.

[24] *Id.* at 821–22.

adequate law libraries or adequate assistance from persons trained in the law."[25] In making its determination, the Court noted that an attorney would be deemed incompetent and ineffective if he filed an initial pleading without performing research and that research tasks are no less important for an incarcerated litigant representing himself pro se when navigating the criminal justice system.[26] The Supreme Court stated that economic factors may be considered when determining the methods used to provide the required access to prison law libraries or assistance from those trained in the law.[27] The decision in *Bounds* opened a door for thousands of cases in federal and state courts discussing the constitutional right to access the courts via use of legal information, but after the decision in *Lewis v. Casey* nearly twenty years later, the holding of *Bounds* became much more limited.[28]

ii. *Casey*

After *Bounds*, the Supreme Court noted in *Lewis v. Casey* that access to legal information is vital to prisoners, who frequently must represent themselves pro se.[29] The Supreme Court went on to limit the holding in *Bounds* by emphasizing that what was actually guaranteed was the right of access to the courts—not libraries.[30] In making that determination, the Court stated that incarcerated litigants cannot simply launch a theoretical argument that the prison's law library is inadequate to satisfy a broad claim of denial of access to the courts.[31] The Supreme Court found that prisoners are entitled only to "minimal access" to legal information and established strict standing requirements for prisoners suing about obstacles they encounter in the process of accessing legal information.[32]

In explaining its decision, the Supreme Court stated that "[t]o demand the conferral of . . . sophisticated legal capabilities

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[25] *Id.* at 828.

[26] *Id.* at 825–26.

[27] *Id.* at 825.

[28] Lewis v. Casey, 518 U.S. 343, 355 (1996) (limiting the holding of Bounds v. Smith, 430 U.S. 817 (1977) by determining that inmates are only allowed the litigation tools needed "in order to attack their sentences directly or collaterally").

[29] *Id.*

[30] *Id.* at 350.

[31] *Id.* at 356–57.

[32] *Id.* at 351–53.

upon a mostly uneducated . . . population is effectively to demand permanent provision of counsel, which [the Supreme Court] d[id] not believe the Constitution require[d]."[33] In *Casey*, rather than giving meaning to the right of access to the courts through access to information, the majority used a problem caused largely by the socioeconomic inequity of incarcerated individuals who would be impacted by their decision to justify denying court access.[34] In *Casey*, the Supreme Court rejected the caution issued in *Bounds* that "[t]he cost of protecting a constitutional right cannot justify its total denial."[35] The *Casey* decision further stated that:

> *Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need to attack their sentences, directly or collaterally, and to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.[36]

iii. Recent Decisions Regarding Access to Information/Courts

In the twenty-five years since *Casey* was decided, several cases challenging the precedent have made their way to the federal circuits, only to find the arguments of the incarcerated litigants dashed and dismissed.[37] Throughout the 1990s, litigants like

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[33] *Id.* at 354.

[34] *Id.*

[35] Bounds v. Smith, 430 U.S. 817, 825 (1977).

[36] *Casey*, 518 U.S. at 355.

[37] *See* McDonald v. Steward, 132 F.3d 225, 231 (5th Cir. 1998); Farver v. Vilches, 155 F.3d 978, 979–80 (8th Cir. 1998); Simmons v. United States, 974 F.3d 791, 797 (6th Cir. 2020).

Degrate,[38] Klinger,[39] and Jones[40] brought federal civil rights actions under 42 U.S.C. § 1983, alleging that deprivation of access to a law library—and therefore access to legal materials—violated their right of meaningful access to the courts. In each of these cases, not only did the circuit courts state that the inmates had as much access to law libraries as they needed but the courts also noted that, while these incarcerated litigants could have had *more* access to legal materials in the prison libraries, additional access would not have impacted the outcome of their cases and, as such, the lack of access did not violate their constitutional rights.[41]

There is no shortage of commentary discussing what prisoners should and should not be able to do, how they should behave, or what can be done to improve their lives during incarceration, while also ensuring they are appropriately punished.[42] The line between what convicted (and not-yet convicted) criminal litigants should and should not be able to do while in prison has been explored in many contexts.[43] In *Creative Prison Lawyering*, Feierman argued that, "[i]n the context of cuts in funding for educational programs for prisoners, *Casey* contribute[d] to the deepening gap between those with access to legal knowledge and those entirely dependent on others, further silencing prisoners who might otherwise attempt to participate in public discourse through litigation."[44]

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[38] Degrate v. Godwin, 84 F.3d 768, 769 (5th Cir. 1996) (holding that because the appellant refused assistance from court-appointed counsel, he had no right to access the law library for preparing his pro se defense).

[39] Klinger v. Dep't of Corr., 107 F.3d 609 (8th Cir. 1997) (holding that the prisoners did not establish they were denied meaningful access to the courts even though they did demonstrate a complete and systemic denial of access to the law library; thus, because they could not show that any actual injury arose from a failure to access the library, the court held that no constitutional rights were violated).

[40] Jones v. Greninger, 188 F.3d 322 (5th Cir. 1999) (limiting prisoners to five hours a week of time in a law library does not violate their constitutional right of access to the courts).

[41] *Degrate*, 84 F.3d at 769; *Klinger*, 107 F.3d at 617; *Jones*, 188 F.3d at 325.

[42] *See, e.g.*, Abdallah Fayyad, *Prisoners Should be Allowed to Vote While Serving*, BOS. GLOBE (July 23, 2020, 12:00 AM), https://www.bostonglobe.com/2020/07/23/opinion/yes-they-should-be-allowed-vote-while-serving (discussing whether inmates should or should not be allowed to vote); Bryan Nguyen, *Prisons: Reform or Punishment?*, MEDIUM (Mar. 27, 2017), https://medium.com/fhsaplang/prisons-reform-or-punishment-2ce135a108c7 (discussing prisoner reform versus prisoner punishment).

[43] *See* Jessica Feierman, *Creative Prison Lawyering: From Silence to Democracy*, 11 GEO. J. POVERTY L. & POL'Y 249, 252 (2004).

[44] *Id.* at 269 (discussing barriers to prisoners' speech and lack of access to the courts, as well as models for prison lawyering that empower prisoners to overcome issues with access to

This argument is particularly striking when considering the impact net neutrality and exploitation of prisoners through access to resources has on those in the criminal justice system. Internet deregulation, a lack of net neutrality, and the desire to profit on prisoners' need for access to legal information will not only impact the way incarcerated litigants use computers and the Internet to access legal information but it will also deepen the gap between self-represented litigants—who require access to legal information in libraries—and those who have been assigned public defenders or can afford to hire private attorneys.[45] Defendants who can afford private attorneys are unlikely to notice a change, other than slightly higher attorneys' fees,[46] and litigants with public defenders may find themselves being represented by attorneys who are less inclined to perform legal research to strengthen their cases because it will simply become too burdensome to do so.[47] But self-represented criminal litigants have the worst fate of all, as they may be left unable to access legal information online due to lack of time to access information, lack of computer skills needed to navigate online systems, slow internet access due to tiering or network throttling, and the prohibitive costs or lack of availability of meaningful resources due to the continued exploitation of prisoners.[48] In a world without a neutral internet or protections for incarcerated individuals, legal resources remain out of reach for criminal defendants.

II. THE PARAMETERS: NET NEUTRALITY, ACCESS TO JUSTICE, AND THE CURRENT FRAMEWORKS FOR INFORMATION ACCESS AND OWNERSHIP

Access to the internet is not a given. Millions of Americans do not have meaningful access to the internet and, for those that

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the courts, win legal victories, and enforce their rights in order to pursue long-term change for this underserved population and the prison communities in which they live).

[45] *See* Chase, *supra* note 5, at 343.

[46] *See* discussion *infra* Part III.B.1.b.

[47] *See* Chase, *supra* note 5, at 363–64.

[48] While there are many free legal research resources available today, such as Google Scholar and the Cornell Legal Information Institute, most are incomplete or lack the breadth of information that can be retrieved through traditional, paid legal research platforms. *See* Johnathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries*, 101 GEO. L. J. 1171, 1212, 1215 (2013).

do, the speed of that access is not guaranteed.[49] Net neutrality—the idea that access to information on the internet should be equal, accessible, and meaningful—has been kicked around in the public lexicon for years.[50] Similarly, access to justice and the barriers that stand between individuals and the court system in the United States are now a more widely-discussed issue, particularly in the legal field.[51] The intersection of these issues is, however, relatively new,[52] and the impact of a non-neutral internet on those navigating the criminal justice system is particularly problematic, as a lack of access to information at meaningful speeds is essentially a barrier to access to the criminal justice system itself.[53] The fallibility of access to legal materials, both due to issues related to internet access and issues with access to justice for those in the criminal justice system, demands that the Supreme Court revisit precedent and reevaluate whether access to the courts can truly be achieved when legal materials are not equally and meaningfully accessible to those navigating the system.

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[49] Tyler Sonnemaker, *The Number of Americans without Reliable Internet May Be Way Higher Than the Government's Estimate – and That Could Cause Major Problems in 2020*, BUS. INSIDER (Mar. 12, 2020, 3:00 PM), https://www.businessinsider.com/americans-lack-of-internet-access-likely-underestimated-by-government-2020-3 (detailing the ways in which the coronavirus accelerated the need for meaningful internet access for people around the United States); Sean Hollister, *In 2021, We Need to Fix America's Internet*, VERGE (Dec. 17, 2020, 8:15 AM), https://www.theverge.com/22177154/us-internet-speed-maps-competition-availability-fcc (discussing the differences between internet in the United States and Europe, including the difference in price and the availability of high speed access [which is not as readily available in the United States as it is throughout Europe]).

[50] Marguerite Reardon, *Net Neutrality: How We Got from There to Here*, CNET TECH (Feb. 24, 2015, 4:00 AM), https://www.cnet.com/tech/services-and-software/net-neutrality-from-there-to-here (providing a brief history of net neutrality in the United States); *A History of Net Neutrality in the United States*, MOZILLA FOUND., https://foundation.mozilla.org/en/campaigns/net-neutrality-timeline (last visited Oct. 14, 2021) (providing a history of internet access and net neutrality in the United States).

[51] Joe Kennedy & Rohan Pavuluri, *We Need a New Civil Right*, CNN OPINIONS (Aug. 8, 2021, 8:24 PM), https://www.cnn.com/2021/08/08/opinions/access-to-justice-gap-civil-rights-kennedy-pavuluri/index.html (arguing that access to information is a fundamental right); Maggie Jo Buchanan et al., *'Justice for All' Requires Access to Justice*, CTR. FOR AM. PROGRESS (Apr. 8, 2021, 9:00 AM), https://www.americanprogress.org/issues/courts/news/2021/04/08/497950/justice-requires-access-justice (discussing the Biden administration's call for racial equity and the revival of an Office for Access to Justice).

[52] *See* Chase, *supra* note 5, at 361.

[53] *Id.* at 362–63.

A. Net Neutrality's Role in Access to Information

Net neutrality has no simple definition and is often referred to as everything from absolute nondiscrimination[54] to limited discrimination without tiering based on quality of service.[55] In the United States, net neutrality has been discussed on the floor of Congress and at the Federal Communications Commission ("FCC"), as well as in federal courts.[56] Most recently, issues of internet access came to light as people around the globe faced the COVID-19 pandemic and found themselves working, attending school, and living completely in their homes.[57] Initially, a series of orders adopted by the FCC in the 1970s were all that was available to deal with telecommunications in the United States.[58]

Subsequently, the FCC was granted power to regulate interstate and international communications by radio, television, satellite, wire, and cable in all fifty states, the District of Columbia, and the U.S. territories.[59] The Communications Act of 1934 ("the 1934 Act") allows the FCC to regulate under two broad areas: Title I governs telecommunications services under the Commerce Clause, while Title II applies more stringent regulations to broadcast services, including radio and television.[60] Thirty-two years later,

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[54] *See* Tim Wu, *Network Neutrality, Broadband Discrimination,* 2 J. TELECOMM. & HIGH TECH. L. 141, 165 (2003) (discussing the concept of net neutrality as related to telecommunications policy and innovation).

[55] *See id.* at 154.

[56] Tony Romm & Brian Fung, *Net Neutrality Bill Sails through the House but Faces an Uncertain Political Future,* WASH. POST (Apr. 10, 2019), https://www.washingtonpost.com/technology/2019/04/10/net-neutrality-bill-sails-through-house-faces-an-uncertain-political-future; David Shepardson, *U.S. FCC Votes to Maintain 2017 Repeal of Net Neutrality Rules,* REUTERS (Oct. 27, 2020), https://www.reuters.com/article/us-usa-internet/u-s-fcc-votes-to-maintain-2017-repeal-of-net-neutrality-rules-idUSKBN27C2EO.

[57] Klint Finley, *The Covid-19 Pandemic Shows the Virtues of Net Neutrality*, WIRED (May 4, 2020, 8:00 AM), https://www.wired.com/story/covid-19-pandemic-shows-virtues-net-neutrality (discussing how a lack of net neutrality regulations in the United States was highlighted during the pandemic, when a crush of internet traffic slowed speeds as people tried to work and attend school from home); Chad Marlow, *Why Net Neutrality Can't Wait*, ACLU (July 9, 2021), https://www.aclu.org/news/free-speech/why-net-neutrality-cant-wait (calling on the Biden administration to prioritize naming an FCC Chair and formally revitalize net neutrality).

[58] JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 188 (2013).

[59] 47 U.S.C. § 151.

[60] Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151–646).

Congress passed the Telecommunications Act of 1996 ("the 1996 Act") in which it defined two classes of services, including "information services."[61] "Information services" offer the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing[] but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[62] Second, it defined "telecommunications services," which offer "telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[63]

In 2002, using the updated definitions from the 1996 Act, the FCC determined that provision of broadband internet and cable television services should be subjected to the less strict Title I standards of the 1934 Act.[64] In 2005, the United States Supreme Court upheld this ruling in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.[65] Later in 2005, the FCC extended the same *Brand X* regulatory relief to telephone company internet access services—for example, digital subscriber line ("DSL") services—in what became known as the Advanced Services Order.[66] The Advanced Services Order put telephone company internet access services under the ambit of telecommunications services subject to regulation under Title I.[67] The justification for doing so was simple, according to the FCC—telephone company internet services were purely transmission technologies.[68]

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[61] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended at 47 U.S.C. §§ 151–646).

[62] 47 U.S.C. § 153(24).

[63] *Id.* § 153(53).

[64] *In re* Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities, 17 FCC Rcd. 4798 (2002), *aff'd in part, vacated in part by* Brand X Internet Services v. FCC, 345 F.3d 1120 (9th Cir. 2003), *and rev'd and remanded sub nom*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Serv., 545 U.S. 967 (2005).

[65] 545 U.S. 967, 1002–03 (2005) (determining that the FCC was lawful and acted within its discretion in not defining cable broadband providers as "telecommunications services" under Chevron v. Nat. Res. Def. Council, 467 U.S. 837 (1984)).

[66] *See In re* Appropriate Framework for Broadband Access to the Internet, 20 FCC Rcd. 14,986 (2005).

[67] *See id.* at 14,987–88.

[68] *See id.*

By classifying both telephone internet access service and cable modem service as telecommunications services under Title I (instead of broadcast services under Title II), the FCC was allowed to apply less stringent regulations to both.[69] This classification also permitted the FCC to maintain its regulatory authority over these services under ancillary jurisdiction granted by Title I.[70] After the ruling in *Brand X* and the publication of the Advanced Services Order, the FCC adopted four principles "to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers . . . . [*Thus,*] *to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*[:]

- . . . [C]onsumers are entitled to access the lawful internet content of their choice.
- . . . [C]onsumers are entitled to run applications and services of their choice (subject to the needs of law enforcement).
- . . . [C]onsumers are entitled to connect their choice of legal devices that do not harm the network.
- . . .[C]onsumers are entitled to competition among network providers, application and service providers, and content providers.[71]

While this statement of principles did not have the force of law,[72] it showed that the FCC, through the authority granted to it by Congress, considered itself a major stakeholder in the debate over net neutrality.

In 2010, the FCC published the Open Internet Order,[73] which contained three basic goals for the maintenance of net neutrality.[74] The first goal, transparency, indicated that internet service providers ("ISPs") should disclose to their users any and all relevant information about the policies that govern their networks.[75]

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[69] *See id.*

[70] *Id.* (alterations in original).

[71] *Id.*

[72] *Net Neutrality Overview,* 86 CONG. DIG. 39, 39–40 (2007).

[73] *In re* Preserving the Open Internet Broadband Industry Practices, 25 FCC Rcd. 17,905 (2010), *vacated and remanded by* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

[74] *Id.* at 17,906.

[75] *Id.*

Second, the FCC listed the goal of "no blocking."[76] Simply put, this goal requested that ISPs not block any content that can legally be put online. Finally, the FCC requested that ISPs not act in a "commercially unreasonable manner to harm the Internet, including favoring traffic from an affiliated entity."[77] The third goal is the one, which, arguably, most threatens daily use of the internet for non-commercial end users like attorneys, libraries, advocacy groups, and other individuals.[78]

It took four years but, in 2014, the D.C. Circuit struck down the FCC's Open Internet Order, rendering it almost entirely ineffective.[79] The court noted that it was well within the scope of broadband internet providers' technical abilities to "distinguish between and discriminate against certain types of [i]nternet traffic" and that these providers' "position in the market gives them the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers."[80] This decision, as well as the backlash that resulted, was broadly covered by the media in the United States and abroad, leading President Obama to call for the FCC to quickly pass formal regulations that would require an open and neutral internet.[81] FCC Chairman Tom Wheeler was quick to point out that the President's request was exactly what everyone else was requesting: "an open [i]nternet that doesn't affect your business."[82] A frustrated Wheeler went on to say that what the FCC needed to do was

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[76] *Id.*

[77] Tom Wheeler, *Setting the Record Straight on the FCC's Open Internet Rules*, FCC (Apr. 24, 2014, 11:15 AM), https://www.fcc.gov/news-events/blog/2014/04/24/setting-record-straight-fccs-open-internet-rules (explaining the process of drafting the Open Internet rules and the notice and comment period related to that rulemaking process).

[78] Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,745 (Apr. 13, 2015).

[79] Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014).

[80] *Id.* at 646. Edge providers are, in essence, what make the Internet functional for the general public; they "provide content, applications, or services" on the internet and "provide[] . . . device[s] used for accessing any content, application, or service over the [i]nternet." David Post, *Does the FCC Really Not Get It about the Internet?*, WASH. POST (Oct. 31, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/31/does-the-fcc-really-not-get-it-about-the-internet.

[81] *See* Brian Fung & Nancy Scola, *Obama's Call for an Open Internet Puts Him at Odds with Regulators*, WASH. POST (Nov. 11, 2014, 4:27 PM), http://www.washingtonpost.com/blogs/the-switch/wp/2014/11/11/the-fcc-weighs-breaking-with-obama-over-the-future-of-the-internet (describing the political difficulties in formal regulation of a neutral internet under President Obama).

[82] *Id.*

balance those interests, to "figure out . . . how to split the baby" between an open internet and one that does not impact businesses.[83]

In 2015, the FCC took an official, hardline stance in response to *Verizon v. FCC* by publishing a new set of open internet protections.[84] These "bright line rules," outlined by the FCC on its website, included:

> - **No Blocking:** broadband providers may not block access to legal content, applications, services, or non-harmful devices.
> - **No Throttling:** broadband providers may not impair or degrade lawful [i]nternet traffic on the basis of content, applications, services, or non-harmful devices.
> - **No Paid Prioritization:** broadband providers may not favor some lawful [i]nternet traffic over other lawful traffic in exchange for consideration [of any kind] – in other words, no "fast lanes." This rule also bans ISPs from prioritizing content and services of their affiliates.[85]

While the FCC seemed to have a clear vision for regulating the Internet, others began questioning these rules and demanding changes to Internet regulation.[86]

The FCC's clear and consistent desire to protect both consumers and edge users continued and, on April 13, 2015, it published its final rule: Protecting and Promoting the Open Internet ("PPOI").[87] In publishing this final rule, the FCC noted the immense power wielded by ISPs and their ability to do harm to any internet traffic they determined they did not like.[88] The FCC stated further that a "ban on throttling [was] necessary . . . to avoid gamesmanship designed to avoid the no-blocking rule by, for example,

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[83] *Id.*

[84] *See* Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,745 (Apr. 13, 2015).

[85] FCC, FACT SHEET: CHAIRMAN WHEELER PROPOSES NEW RULES FOR PROTECTING THE OPEN INTERNET 2 (2015), https://www.fcc.gov/document/chairman-wheeler-proposes-new-rules-protecting-open-internet.

[86] *See* Y. Peter Kang, *CenturyLink Sues FCC Over Net Neutrality*, LAW360 (Apr. 17, 2015, 6:01 PM), https://www.law360.com/articles/644864/centurylink-sues-fcc-over-net-neutrality.

[87] Protecting and Promoting the Open Internet, 80 Fed. Reg. at 19,745.

[88] *See id.*

rendering an application effectively, but not technically, unusable. [The PPOI] prohibit[ed] the degrading of [i]nternet traffic based on source, destination, or content."[89] In publishing the PPOI, the FCC won the hearts of net neutrality and infuriated ISPs.[90]

A mere four days after the PPOI was published in the Federal Register, a slew of new lawsuits were filed in the D.C. Circuit.[91] These cases, later consolidated, came to be known as *United States Telecom Ass'n v. FCC* and sought to rehash many of the same details discussed by the court in *Verizon* within the context of the PPOI.[92] Arguments in favor of the ISPs were largely economical, while briefs filed in favor of the respondents expressed a clear concern for free speech and ensuring that ISPs cannot "disadvantag[e] non-profit or public interest entities" through paid prioritization schemes.[93] On May 1, 2017, the D.C. Circuit denied the petitions and upheld the FCC's 2015 Open Internet Order and refused to involve itself in the then-ongoing debate over the PPOI,[94] confirming that the rules were lawful and within the FCC's statutory authority.

With a change in administration came a change to the FCC, and shortly after his 2016 victory, President Donald Trump appointed Chairman Ajit Pai to head the FCC.[95] Months into his tenure as Chair, Pai announced that the FCC would move forward with deregulating the internet and encourage ISPs to voluntarily adhere to net neutrality principles.[96] By reenacting a light touch framework for net neutrality, the FCC abdicated authority over ISPs and cleared the way for them to engage in behavior that would bar

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[89] *Id.* at 19,740.

[90] *See* Kang, *supra* note 86.

[91] *See, e.g.*, Petition for Review at 1, CenturyLink v. FCC, No. 15-1099 (D.C. Cir. Apr. 17, 2015).

[92] United States Telecom Ass'n v. FCC, 855 F.3d 381 (D.C. Cir. 2017).

[93] Amicus Brief for Am. Library Ass'n, Ass'n of Coll. & Research Libraries et al. in Support of Respondents at 3–4, 10, United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2015) (No. 15-1063), https://docs.fcc.gov/public/attachments/DOC-335408A1.pdf; *see also* Brief of Amici Curiae Elec. Frontier Found., ACLU et al. in Support of the Respondents, United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2015) (No. 15-1063), https://docs.fcc.gov/public/attachments/DOC-335407A1.pdf; Brief Amici Curiae of Comput. & Commc'ns Indus. Ass'n & Mozilla in Support of Respondents, United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2015) (No. 15-1063), https://docs.fcc.gov/public/attachments/DOC-335411A1.pdf.

[94] *See United States Telecom Ass'n*, 855 F.3d at 382.

[95] *See* Chase, *supra* note 5, at 338 n.89.

[96] *Id.* at 338 nn.90–93.

individual users from meaningful, open access to the internet.[97] Throughout his tenure at the FCC, Chairman Pai focused on the economic arguments for internet deregulation, stating:

> Money that could have expanded networks was now being siphoned off to pay lawyers and consultants to make sense of the new rules. Resources were spent developing plans to minimize the risk of enforcement actions. Some [members of the American Cable Association] even started setting money aside for litigation reserves. We're talking about time, money, and lawyers that your companies can't easily afford. On top of that, [members of the American Cable Association] faced the possibility of after-the-fact rate regulation that could reduce returns on investments and prevent you from raising further capital.[98]

Many others, including Congress, attempted to respond to Pai's assertions that internet deregulation would economically harm ISPs.[99] Surprising no one, every Trump-era congressional effort to formally adopt net neutrality legislation died either in committee or on the floor of Congress.[100]

Despite media attention related to net neutrality, the conversation around the potential harm of a deregulated internet seemed to focus on traditional consumers; very little attention was paid to access to justice and the role a neutral internet plays in providing legal information to millions of people in the justice gap.[101] Exceptions to the silence included Avvo and the American Association of Law Libraries, both of which highlighted the essential nature of net neutrality and the need for a neutral internet "to

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[97] *Id.* at 339 nn.94–95.

[98] FCC, REMARKS OF FCC CHAIRMAN AJIT PAI AT THE AMERICAN CABLE ASSOCIATION ANNUAL SUMMIT 3 (Mar. 21, 2018), https://docs.fcc.gov/public/attachments/DOC-349825A1.pdf.

[99] *See* Chase, *supra* note 5, at 333–34 nn.60-63 (describing how rolling back net neutrality affected consumers).

[100] *Id.* at 333 n.64.

[101] *See* Jason Tashea, *In the Battle for Net Neutrality, the A2J Community is Notably Quiet*, A.B.A. J. L. SCRIBBLER (Oct. 22, 2018, 6:00 AM), https://www.abajournal.com/lawscribbler/article/in_the_battle_for_net_neutrality_the_legal_community_is_notably_quiet (describing the U.S. Department of Justice's net neutrality lawsuit against California and the marked silence from legal aid providers, attorneys, and lawmakers about the impact net neutrality has on access to justice).

provide users with equitable access to up-to-date legal information," including users who may not be able to "pay the fees for preferred access. These users are . . . self-represented litigants" including, of course, criminal litigants.[102] In 2018, no one was sure how ISPs would exercise their freedom to block and throttle internet access, but issues with connectivity and equitable internet speeds quickly came into focus. With the election of President Biden in 2020 came a glimmer of hope for net neutrality to be regulated once again.[103] Ashley Boyd, vice president for advocacy and engagement at Mozilla, stated that the United States needs to focus again on net neutrality "and get it secured because of how fundamental it is."[104] The COVID-19 pandemic that continued to grip the United States after the inauguration highlighted the necessity of the internet for Americans who were still attending school, work, and play online.[105] The FCC, while without formal leadership or a strategic plan to ensure a neutral internet, has publicly prioritized broadband internet access, providing a glimmer of hope for a return to net neutrality. Unfortunately, the glimmer has yet to turn into a shining ray of hope. The FCC is politically deadlocked, and Congress is under immense pressure to deal with other pressing national issues arising; one hopes that advocates for net neutrality, including President Biden, will press the issue and sort the FCC's deadlock in the near future.[106]

B. The Role of Libraries in Providing Access to Information and Access to the Courts

Bounds and *Casey* discuss the need for those in the criminal justice system to have access to prison libraries,[107] but, in facilities where prisoners' access to legal information is treated less like a constitutional right and more like a money-making opportunity, that need is quickly drowned out by exploitation of this vulnerable

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[102] *Id.*

[103] *See* Tony Romm, *Pressure Builds on Biden, Democrats to Revive Net Neutrality Rules*, WASH. POST (Jan. 27, 2021), https://www.washingtonpost.com/technology/2021/01/27/net-neutrality-biden-fcc (describing optimism among democrats in reviving net neutrality after 2020 election).

[104] *Id.*

[105] *Id.*

[106] *Id.*; *see also* Promoting Competition in the American Economy, 86 Fed. Reg. 36,987 (July 9, 2021).

[107] Bounds v. Smith, 430 U.S. 817 (1977); *see also* Lewis v. Casey, 518 U.S. 343 (1996).

population.[108] In the fight for prisoners' true access to justice, the potential gap in access to information created by a lack of net neutrality is sure to be the most far-reaching. Most libraries with legal collections have moved away from print materials for cost-saving purposes; the cost of legal materials for libraries has increased by an average of 9.86% every year since 2009, while library budgets have largely remained flat or declined.[109]

Prison libraries—the primary focus of *Bounds* and *Casey*—do not ensure access to online resources, but a non-neutral internet all but ensures they will never be able to do so at any time.[110] The data surrounding prison libraries and acquisitions is deceptive.[111] "In institutions with limited prisoner access to libraries, prisoners with high literacy levels cannot advocate for themselves as well as they would have before, and prisoners with lower literacy levels cannot obtain as much help from jailhouse lawyers."[112] As far back as 2009, a lack of meaningful internet access was identified as a challenge to all kinds of prison programming.[113] Because "most convicts are poor and social deprivation is a primary correlate of criminal behavior, [should] it follow that the poor in prison should be connected to the internet?"[114] While access to the internet has changed for some prisoners, the access they are being granted today is not to legal materials, but to email, books, or other applications deemed

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[108] *See* Larry E. Sullivan, *The Least of Our Brethren: Library Services to Prisoners*, AM. LIB. 56, 58 (2000) ("This country, at least, [has] already turned away from the attempt to provide anything of substance for convicts."); *see also* Abel, *supra* note 48, at 1213–14 (discussing how in the transition to online prison library resources it is "dollars and cents" not meaningful prisoner access that drives decision making).

[109] *See* Narda Tafuri, *Prices of U.S. and Foreign Published Materials*, 62 LIBR. & BOOK TRADE ALMANAC 347, 352 (2017), https://alair.ala.org/bitstream/handle/11213/8099/LMPI%20Article%202017.pdf?sequence+1&isAllowed=y (averaging years 2010–17 on Table 2).

[110] *See generally* Chase, *supra* note 5, at 347–48 (discussing how internet deregulation may deepen the gap between those that rely on legal libraries and those who have assistance of counsel).

[111] *See id.* at 358.

[112] Jessica Feierman, *Creative Prison Lawyering: From Silence to Democracy*, 11 GEO. J. POVERTY L. & POL'Y 249, 268 (2004) (citing John Matosky, *Illiterate Inmates and the Right of Meaningful Access to the Courts*, 7 B.U. PUB. INT. L. J. 295, 307 (1998)).

[113] Carl Nink et al., *Expanding Distance Learning Access in Prisons: A Growing Need*, 71 CORRECTIONS TODAY 40, 42 (2009) (discussing methods for providing inmates without formal education access to distance learning opportunities using technology and other methods).

[114] Sullivan, *supra* note 108, at 58 (discussing possible approaches of providing internet access to prisoners in the digital age).

acceptable by both those running the prisons and the for-profit companies providing them with access.[115]

Access to the internet for performing legal research has never been perceived as a positive step towards providing inmates access to the courts via access to information, as guaranteed in *Bounds*.[116] Certainly, it is not a stretch to think limiting prisoner access to legal materials will continue as budget cuts to the Government Publishing Office and libraries around the country continue.[117] Nor is it a stretch to think that in order to access relevant legal information to proactively argue their cases, inmates would be better served by having access to the internet for the purposes of accessing legal information.

Thirty-nine states' departments of corrections—along with over a thousand jails—have access to Lexis for incarcerated litigants.[118] In other states, access to legal research in prisons is achieved through Westlaw, Conway Greene, or books, exclusively (though that number is small).[119] Nine states' prison libraries have begun providing inmates access to the Internet for the purposes of gathering legal information.[120] Nearly one million incarcerated litigants use Lexis for computer-assisted legal research.[121] Lexis claims

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[115] *See* Stephen Raher & Andrea Fenster, *A Tale of Two Technologies: Why "Digital" Doesn't Always Mean "Better" for Prison Law Libraries*, PRISON POL'Y INITIATIVE (Oct. 28, 2020), https://www.prisonpolicy.org/blog/2020/10/28/digital-law-libraries (comparing two different digital law library rollouts in prisons in Oregon and South Dakota); *see also* Stephen Raher, *The Wireless Prison: How Colorado's Tablet Computer Program Misses Opportunities and Monetizes the Poor*, PRISON POL'Y INITIATIVE (July 6, 2017), https://www.prisonpolicy.org/blog/2017/07/06/tablets (discussing limited and exploitive functionality of tablets being made available to prisoners in Colorado).

[116] *See generally* Abel, *supra* note 48, at 1211–14 (discussing the implications of computerization on the Law Library Doctrine).

[117] *See* Samantha Michaels, *Books Have the Power to Rehabilitate. But Prisons Are Blocking Access to Them*, MOTHER JONES (Feb. 2020), https://www.motherjones.com/crime-justice/2019/11/prison-libraries-book-bans-california-sacramento-reading-rehabilitation (discussing budget issues compounded by unsympathetic decision makers affecting access to prison library services).

[118] *See* Transcript of Deposition of Anders Ganten at 9, Brakeall v. Kaemingk, 18-CV-04056-LLP (D.S.D. Nov. 21, 2018), https://www.prisonpolicy.org/scans/lawlibraries/Ganten_Deposition_BrakeallvKaemingk.pdf (In his deposition, Ganten, the senior director of governmental corrections with LexisNexis, states that Lexis is "the market leader" in prison legal information services.).

[119] *See e.g.*, Wisnieski, *supra* note 9.

[120] This information was generated utilizing a series of documents and interviews, all of which are on file with the author and available upon request.

[121] *Id.*

to provide the same level of access to incarcerated litigants that they offer to law firms, but with less current access to secondary sources and external links disabled.[122]

Simply put, law library collections are moving online because of massive shifts in the industry that do not take criminal litigants' needs into account, and their access to justice hangs in the balance.[123]

C. Georgia v. Public.Resource.Org[124]

In the years between *Casey* and today, the Supreme Court addressed another issue related to access to information in *Georgia v. Public.Resource.Org*.[125] In determining that the state of Georgia violated the Copyright Act by copyrighting—and preventing access to—annotations that are published with Georgia's Official Code, the Supreme Court made it clear that "*no one can own the law*."[126] The Supreme Court offered a hypothetical citizen who would be affected by limited access to the fully annotated version of Georgia's Official Code:

> Imagine a Georgia citizen interested in learning his legal rights and duties. If he reads the economy-class version of the Georgia Code available online, he will see laws . . . criminalizing broad categories of consensual sexual conduct[] and exempting certain key evidence in criminal trials from standard evidentiary limitations—with no hint that important aspects of those laws have been held unconstitutional by the Georgia Supreme Court. Meanwhile, first-class readers with access to the annotations will be assured that these laws are, in crucial respects, unenforceable relics that the legislature has not bothered to narrow or repeal.[127]

This hypothetical citizen illustrates the reasoning behind the Court's decision: Copyrighting the Georgia Official Code stood

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[122] *Id.*

[123] *See generally* Chase, *supra* note 6, at 358–61.

[124] 140 S. Ct. 1498 (2020).

[125] *Id.*

[126] *Id.* at 1506–09 (emphasis added).

[127] *Id.* at 1512 (emphasis added) (internal citations omitted).

in the way of this citizen's access to information, which was unacceptable because no one owns the law. But this hypothetical citizen can, with a few small changes, also be used to illustrate the flaws in maintaining Bounds and Casey as precedent for prisoners' access to information, the courts, and justice:

> Imagine a Georgia [prisoner] interested in learning his legal rights and duties. If he reads the economy-class version of the Georgia Code available online [in the prison library], he will see laws . . . criminalizing broad categories of consensual sexual conduct[] and exempting certain key evidence in criminal trials from standard evidentiary limitations—with no hint that important aspects of those laws have been held unconstitutional by the Georgia Supreme Court. Meanwhile, [individuals who are not incarcerated] with access to the annotations will be assured that these laws are, in crucial respects, unenforceable relics that the legislature has not bothered to narrow or repeal.[128]

Denying the incarcerated criminal litigant access to the legal information he needs to adequately attack his case because it is behind a copyright and paywall would clearly violate the Copyright Act.[129] But impairing that same incarcerated criminal litigant's capacity to litigate his own case because access to current legal information is easily available online, and meaningful access to the internet in correctional facilities has not been deemed a meaningful approach to closing the justice gap, is "perfectly constitutional."[130]

The contrast between these two scenarios could not be more stark: In *Georgia v. Public.Resource.Org*, the Court was willing to cast precedent aside because the citizen at issue was not incarcerated and had access to the internet;[131] under *Lewis v. Casey*, a lack of access to information due to a lack of meaningful access to the internet by someone with an only cursory understanding of online

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[128] *Id.* (emphasis added) (internal citations omitted).

[129] *Id.*

[130] Lewis v. Casey, 518 U.S. 343, 355 (1996).

[131] *See* Georgia v. Public.Resource.Org, 140 S. Ct 1498, 1519–20 (2020) (Thomas, J. dissenting) (discussing the idea that many jurisdictions had relied on precedent to reach a conclusion contrary to that of the majority holding that annotations are copyrightable).

research to begin with—and the impairment of that criminal litigant's ability to argue his case—is perfectly constitutional.[132] Without guaranteed access to online information for criminal litigants coupled with digital literacy training, it does not *matter* who owns the law; prisoners will not have meaningful access to legal materials until the Supreme Court recognizes the fallibility of internet access due to a lack of net neutrality, and casts aside *Bounds* and *Casey* because the mere existence of internet access requires them to do so. Without guaranteed access to information, prisoners are being exploited, and their constitutional right of access to the courts is being violated.[133]

Despite the promise of the opinion in *Georgia v. Public.Resource.Org,* it is unlikely that courts will rely on anything other than *Bounds* and *Casey* when determining whether those navigating the criminal justice system have access to courts and, it follows, access to justice. Although no one can own the law, and because there are no guarantees that any Americans will have meaningful and equitable access to the internet because of regulated net neutrality (and, if net neutrality does again become a reality, its fallibility is easily demonstrated),[134] there are two options for moving forward: legislated net neutrality, which has failed time and again,[135] or a Supreme Court decision that acknowledges a lack of ownership of the law *and* the significant technological and sociological changes since *Bounds* and *Casey* were decided (in the 1970s and 1990s, respectively). In what can only be described as good news for those who fall in both the justice gap and the digital divide—namely, prisoners—the Supreme Court has declared that the proliferation of the

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[132] *Lewis*, 518 U.S. at 346–47, 355–57.

[133] *See* Chase, *supra* note 5, at 358–61 (discussing net neutrality issues and the state of online information in the context of prison libraries); *see also* Benjamin R. Dryden, *Technological Leaps and Bounds: Pro Se Prisoner Litigation in the Internet Age*, 10 U. PA. J. CONST. L. 819 (2008) (discussing the proposition that denying prisoners' access to the internet is a violation of fundamental connotational rights).

[134] *See generally Public.Resource.Org*, 140 S. Ct at 1521–22 (Thomas, J. dissenting) (discussing how the ruling will be difficult to administer and may push the cost of financing premium legal research services to those who can least afford to pay for it, such as individuals using electronic research services in the prison setting); Chase, *supra* note 6, at 340–43 (discussing the perilous present and uncertain future of internet deregulation and its implications for the world of electronic prison legal research).

[135] *See* Chase, *supra* note 5, at 343.

internet changes the game and requires a closer look at damaging precedent like *Bounds* and *Casey*.[136]

III. THE POTENTIAL: USING *SOUTH DAKOTA V. WAYFAIR* TO PROVIDE ACCESS TO JUSTICE IN THE CRIMINAL JUSTICE SYSTEM

Stare decisis, the idea that courts should stand by their previous decisions, is the basis for precedent in the United States.[137] Justice Breyer stated that overruling precedent always requires special justification beyond an argument that the Court simply got something wrong.[138] And, often, the Court's adherence to the principles of stare decisis is good; precedent makes courts more predictable.[139]

The Justices and their individual views on stare decisis are not, however, predictable.[140] Chief Justice Roberts and Justice Alito were quite outspoken about the importance of precedent and, in fact, both testified to the fundamental nature of stare decisis during their confirmation hearings.[141] After those hearings, however, their actions spoke "louder than their words to Congress," as both repeatedly abandoned stare decisis, even when fellow justices accused them of ignoring earlier decisions.[142] This alleged adherence to the principle of stare decisis while throwing it out the window when it suits individual justices is damaging to that predictability. Luckily, the world is not predictable, so a flexible view on stare decisis and a less rigid reliance on precedent is a good thing when the Court is faced with new issues.

Fortunately, the remainder of Supreme Court justices have adopted a flexible approach (though with varying degrees of

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[136] *See generally* David P. Fidler, *The Supreme Court Adapts Constitutional Law to Address Technological Change*, COUNCIL ON FOREIGN REL. (July 11, 2018, 11:05 AM), https://www.cfr.org/blog/supreme-court-adapts-constitutional-law-address-technological-change.

[137] Ramos v. Louisiana, 140 S. Ct. 1390, 1408 (2020) (Sotomayor, J., concurring).

[138] Franchise Tax Board v. Hyatt, 139 S. Ct. 1485, 1504–05 (2019) (Breyer, J., dissenting).

[139] *See* Geoffrey R. Stone, *Stone on Roberts, Alito, and Stare Decisis*, U. CHI. NEWS (Oct. 23, 2007), https://www.law.uchicago.edu/news/stone-roberts-alito-and-stare-decisis.

[140] *Id.*

[141] *Id.*

[142] *Id.*

conviction).[143] Justice Gorsuch authored an opinion in which he stated that there are precedential Supreme Court opinions that warrant the Court's deep respect, but the principle of stare decisis is not supposed to be an avenue for the Court to "methodically ignor[e] what everyone knows to be true."[144] In another case, Justice Gorsuch used his dissent to state that where "far-reaching systemic and structural changes make an 'earlier error all the more egregious and harmful,' stare decisis can lose its force."[145]

Justice Sotomayor also took aim at the issues with precedent, stating that "[w]hile overruling precedent must be rare, this Court should not shy away from correcting its errors where the right to avoid imprisonment pursuant to unconstitutional procedures hangs in the balance."[146] In noting that the majority opinion in a criminal case was irreconcilable with not one, but two strands of precedent, Justice Sotomayor noted:

> This case . . . threatens no broad upheaval of private economic rights. Particularly when compared to the interests of private parties who have structured their affairs in reliance on our decisions, the States' interests here in avoiding a modest number of retrials—emphasized at such length by the dissent—are much less weighty.[147]

In another opinion, Justice Kagan has noted that "[t]o reverse a decision, we demand a 'special justification,' over and above the belief 'that the precedent was wrongly decided.'"[148] Justice Kavanagh is in agreement, stating that special justifications for overruling a decision exist when a decision is "egregiously wrong, it has significant negative consequences, and overruling it would not unduly upset reliance interests."[149] Justice Thomas, too, has stated that when deciding whether or not to overturn precedent, the Court must look to "the quality of the decision's reasoning; its consistency

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[143] *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1404–05 (2020).

[144] *Id.* at 1405.

[145] Gamble v. United States, 139 S. Ct. 1960, 2008 (2019) (Gorsuch, J., dissenting).

[146] *Ramos*, 140 S. Ct. at 1410 (Sotomayor, J., concurring).

[147] *Id.* at 1409 (Sotomayor, J., concurring).

[148] Allen v. Cooper, 140 S. Ct. 994, 1003 (2020).

[149] *Ramos*, 140 S. Ct. at 1420 (Kavanaugh, J., concurring).

with related decisions; legal developments since the decision; and reliance on the decision."[150]

Justice Barrett's views of stare decisis and the impact strict adherence to precedent has on due process are, perhaps, the most directly related to the need to overturn *Bounds* and *Casey*.[151] Nearly two decades prior to her Supreme Court appointment, Justice Barrett detailed her view "that the preclusive effect of precedent raises due process concerns, and, on occasion, slides into unconstitutionality."[152] She noted that courts and commentators have "debated whether the force of a precedent should vary with its subject matter—whether it should be particularly weak in constitutional cases."[153] Stare decisis has a very real power to deprive litigants of hearings on the merits of their claims and, as Justice Barrett notes, where "liberty . . . is at stake—the Constitution guarantees litigants due process of law."[154] Incarcerated criminal litigants seeking to litigate the constitutionality of their access to the courts via access to legal information are likely to read *Bounds* and *Casey* and feel a sense of hopelessness; those cases clearly state that requiring access to legal information is akin to "permanent provision of counsel," which the Supreme Court has determined is not required by the Constitution.[155] The caution originally issued in *Bounds*, that "[t]he cost of protecting a constitutional right cannot justify its total denial,"[156] is even more salient today, when criminal litigants are virtually, if not actually, foreclosed from accessing legal information because of the electronic nature of the materials and the potential for lack of meaningful (if any) access because the United States has not found the time to prioritize a regulated neutral internet.

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[150] Franchise Tax Bd. v. Hyatt, 1398 S. Ct. 1485, 1499 (2019).

[151] *See generally* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011 (2003).

[152] *Id.* at 1012.

[153] *Id.* at 1029; *see also* Agostini v. Felton, 521 U.S. 203, 235 (1997).

[154] Barrett, *supra* note 151, at 1026.

[155] Lewis v. Casey, 518 U.S. 343, 354 (1996).

[156] Bounds v. Smith, 430 U.S. 817, 825 (1977).

A. Technology Changes Everything—Why Bounds *and* Casey *No Longer Guarantee the Constitutional Right of Access to the Courts*

Justice Barrett's argument that "stare decisis should be weaker in constitutional cases, because constitutional amendment—the only way around a constitutional decision if it is not overruled—can be accomplished only with great difficulty" is particularly important when discussing criminal litigants' constitutional right of access to the courts via access to information, as laid out in *Bounds*.[157] The Supreme Court certainly found it within its power to significantly limit the parameters of precedent when it used *Casey* to limit the application of *Bounds*, and in so doing it used paternalistic, racist, and classist assumptions that prisoners cannot understand legal information, so prison law libraries should not be obligated to provide it. Contemporary cases—cases completely unrelated to access to justice or criminal litigants—which, without the significant impact of technology likely would have followed precedent, give hope to criminal litigants who believe the changes in technology ought to give the Court pertinent reason to overturn *Casey*. In essence, the Supreme Court finally found a way to make one thing clear: the internet changes everything.

i. *Direct Marketing v. Brohl*[158]

The Supreme Court's first opportunity to use technology and equity to shift the tides of precedent came in 2015, with the decision in *Direct Marketing v. Brohl*.[159] In *Direct Marketing*, the Court evaluated whether the Tax Injunction Act barred federal court jurisdiction over a suit brought by non-tax payers seeking to enjoin certain requirements of a Colorado state tax law.[160] In determining the outcome of the case, the Court did not need to touch on the significant technological changes that occurred between *Bellas Hess*, *Quill*, and *Direct Marketing*; the Court simply relied on a more structural and text-based approach to finding that the requested relief would not "enjoin, suspend, or restrain the assessment, levy, or

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[157] Barrett, *supra* note 151, at 1029 n.71.

[158] 575 U.S. 1 (2015).

[159] *Id.*

[160] *Id.* at 4.

collection of any tax" and, as such, a federal district court could hear the case.[161]

In his concurring opinion, where he stated his "unqualified join and assent" for the majority opinion of the Court, Justice Kennedy took the time to carefully and specifically lay out why the reliance on stare decisis in cases where significant technological changes have impacted the core tenets of the case was an issue.[162] In his concurrence, Kennedy took the bold step of calling out a previous decision as not only wrong, but "inflicting extreme harm and unfairness" upon one of the parties in the case (and, in turn, the states themselves).[163]

ii. *South Dakota v. Wayfair, Inc.*[164]

In 2018, the United States Supreme Court directly addressed the "Internet revolution" in an opinion that, on its face, had nothing to do with the internet and had everything to do with commerce.[165] In *Wayfair*, the state of South Dakota taxed out-of-state sellers of "tangible personal property" with no physical presence in the state at the same rate that they taxed those sellers who do have a physical presence.[166] The law, passed by the legislature in opposition to Supreme Court precedent, was put in place because internet sales were increasingly affecting sales tax collections in the state.[167] That precedent, which stated that the dormant Commerce Clause prohibits states from taxing sellers without a physical presence in the state, was found to be incorrect and narrowly overturned by the Supreme Court.[168]

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[161] *Id.* at 7.

[162] *Id.* at 16–17 (Kennedy, J., concurring).

[163] *Id.* at 17. Notably, Kennedy takes the time to note that he, himself, relied solely on stare decisis when making his decision and did not consider a reevaluation based on other factors, namely the "dramatic technological and social changes that had taken place in the increasingly interconnected economy." *Id.* at 17.

[164] 138 S. Ct. 2080 (2018).

[165] *Id.* at 2084.

[166] *Id.* at 2092–93.

[167] *Id.* at 2088.

[168] *Id.*; *See generally* Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967) (holding that mail order resellers like the appellant were not required to collect sales tax unless the seller or reseller had some physical contact with the state); Quill Corp. v. North Dakota, 504 U.S. 298 (1992) (evaluating *Bellas Hess* to determine whether North Dakota's imposition of sales taxes upon Quill's merchandise violated the Due Process Clause or Commerce Clause. The Court noted that, while subsequent cases allowed for more flexibility

In deciding *Wayfair*, the Supreme Court not only directly discussed the changes in technology since the precedential cases were decided,[169] but explicitly stated that "[t]he Internet's prevalence and power have changed the dynamics of the national economy"[170] such that a "substantial nexus" to a state is the logical next step from physical presence, which the Court found to be outdated.[171] In coming to that conclusion, the Court stated that, previously, the

> Court did not have before it the . . . realities of the internet marketplace. In 1992, less than 2 percent of Americans had internet access . . . When it decided *Quill*, the Court could not have envisioned a world in which the world's largest retailer would be a remote seller.[172]

Notably, the Court highlighted that, in the year prior to its opinion, "e-commerce grew at four times the rate of traditional retail, and it shows no sign of any slower pace."[173] In fact, when the Supreme Court overturned the significant precedent discussed in *Quill* and *Bellas Hess*, they noted that it is important to focus on rules that are appropriate to the twenty-first century, not the nineteenth, and that the Commerce Clause was not written to "permit the Judiciary to create market distortions."[174] While the Supreme Court in *Wayfair* was fixated on the economic impact of following precedent—and those arguing for an unregulated internet make similar economic arguments—there are significant equity distortions that arise if the Supreme Court does not use the logic it used in deciding *Wayfair* to revisit *Bounds* and *Casey*. Just as "[t]he Internet's prevalence and power . . . changed the dynamics of the national

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than was initially allowable under *Bellas Hess*, the precedent should not be thrown out entirely. The Court held that there was no breach of the Due Process Clause because Quill had sufficient contact with the state of North Dakota and benefitted from the State's revenue, but the imposition of taxes *did* interfere with interstate commerce.).

[169] *Bellas Hess*, 386 U.S. 753 and *Quill*, 504 U.S. 298 were decided in the 1960s and 1990s, respectively.

[170] *Wayfair*, 138 S. Ct. at 2097.

[171] *Id.* at 2095.

[172] *Id.* at 2097 (internal citations omitted).

[173] *Id.*

[174] *Id.* at 2094.

economy" at the time of *Wayfair* so, too, has it changed access to legal information for attorneys and litigants alike.[175]

It is clear that the parameters of the decisions in *Bounds* and *Casey* are nothing like the decisions in *Wayfair* and *Direct Marketing*.[176] Similarly, the Supreme Court would likely refuse to hear a case about access to information and the constitutional right of access to the Courts if a litigant based his or her petition on *Wayfair* and *Direct Marketing*.[177] But the time has come for the Court to rethink *Bounds* and *Casey* and consider the recent societal and technological changes that impact access to the courts. After all, "individuals are the ones who stand to gain or lose the most when judges decide whether stare decisis matters."[178]

B. "Fairness dictates quite the opposite result."[179]

As mentioned above:

> Bounds does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.[180]

When the Supreme Court reversed itself in *South Dakota v. Wayfair*, the message was clear: the internet changed everything.[181] Given the significant changes in technology since *Bounds* and *Casey*

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[175] *Id.* at 2097.

[176] One envisions a reader singing "one of these things is not like the other." *Sesame Street* (Public Broadcasting Service 1969).

[177] *See generally Wayfair*, 138 S. Ct. at 2100; Direct Marketing Ass'n v. Brohl, 575 U.S. 1, 7 (2015) (noting that under the Tax Injunction Act, states have a right to collect, levy, and assess taxes via state law).

[178] Jesse D.H. Snyder, *Stare Decisis is for Pirates*, 73 OKLA. L. REV. 245, 247 (2021).

[179] *Wayfair*, 138 S. Ct. at 2096.

[180] Lewis v. Casey, 518 U.S. 343, 355 (1996).

[181] *Wayfair*, 138 S. Ct. at 2097 (noting that e-commerce grew at four times the rate of traditional retail in the year prior to the decision).

were decided, a similar reversal is warranted and fairness, truly, dictates a reversal of the damaging precedent that inmates could attack their sentences *without* meaningful access to legal resources.[182] The tools needed by prisoners "to attack their sentences, directly or collaterally" have moved online. [183] The "impairment of any *other* litigating capacity" the Court in *Casey* deemed "incidental (and perfectly constitutional)" has extended beyond what was imagined by the litigants in either *Bounds* or *Casey*, when they requested more robust law libraries in their correctional institutions.[184]

The Supreme Court needs to revisit *Bounds* and *Casey* not only because of the shift in access points for legal information but also to address the digital crisis in prisons and the fallibility of internet access to ensure that the importance of a neutral internet, free of tiering, throttling, and blocking, are made central to the argument that criminal litigants—especially those in prison—require a neutral internet to access necessary legal information and the courts. The way litigants, and citizens in general, access information has changed significantly since 1996, but the way prisoners access legal information has largely remained the same.[185] Where some change has been effectuated, prisoners are still being exploited and subject to outrageous fees associated with hard-to-use platforms, on the one hand, or completely inaccessible materials, on the other.[186] For criminal justice to be truly reformed, the Supreme Court must revisit *Bounds* and *Casey* with an understanding of the changes in technology, fallibility of access to online resources, and the further exploitation of prisoners if their constitutional rights to access legal information are not upheld under the internet-age standards set forth in *South Dakota v. Wayfair*.

i. Changes in Technology

a. Generally

It is impossible to deny that technology has changed since 1977, when *Bounds* was decided, or even 1996, when the Supreme

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[182] *Casey*, 518 U.S. at 355.

[183] *Id.*

[184] *Id.*

[185] *Id.* at 356–57.

[186] *See* Abel, *supra* note 48, at 1209–10.

Court issued its opinion in *Casey*.[187] In 1996, use of the internet had only begun to pick up speed; a startling twenty million American adults had access to the "Jurassic Web,"[188] which is the same number of people who subscribe to satellite radio today.[189] Only 22% of the United States' general public report going online from work, school, or home.[190] In 1995, only 21% of Americans had used the internet, but in 1996, that number increased to 73%.[191] In 1995, only 12% of people reported using the internet in the week prior to the survey;[192] in 1996, that number increased to 51%.[193] Only 77% of people who used the internet sent or received an email "at least once every few weeks."[194]

By contrast, in 2020, the FCC estimated that twenty-one million Americans (the same number that had access in 1996) were without access to high-speed internet.[195] In 2021, 93% of American adults report having used the internet.[196] And 77% of U.S. adults report having access to the internet at home.[197] The COVID-19

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[187] Bounds v. Smith, 430 U.S. 817, 825 (1977).

[188] Farhad Manjoo, *Jurassic Web: The Internet of 1996 is Almost Unrecognizable Compared with What We Have Today*, SLATE TECH. (Feb. 24, 2009, 5:33 PM), https://slate.com/technology/2009/02/the-unrecognizable-internet-of-1996.html (detailing the difference in the internet of 1996 and 2009).

[189] *Id.*

[190] *News Attracts Most Internet Users: Online Use*, PEW RSCH. CTR. (Dec. 16, 1996), https://www.pewresearch.org/politics/1996/12/16/online-use (finding slow but steady growth of people accessing the internet).

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.* This study was conducted to determine how many Americans were using the internet in 1996; it found that users during this time period primarily accessed the internet to view news sources. *Id.* It is important to remember, of course, that the number of people in the United States with *access* to the internet in 1996 may have been higher than the number of people actually *using* the internet in 1996. The same can be said today—while people may have access to the internet in 2021, it does not mean they are *using* the internet.

[195] Linda Poon, *There Are Far More Americans Without Broadband Access than Previously Thought*, BLOOMBERG CITYLAB (Feb. 19, 2020, 3:09 PM), https://www.bloomberg.com/news/articles/2020-02-19/where-the-u-s-underestimates-the-digital-divide (discussing the FCC's underestimations of people with access to the internet due to the high numbers of individuals in rural areas who are unable to get appropriate funding or resources to access the internet).

[196] *Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband.

[197] *Id.* (displaying charts and data about how Americans' internet use has changed over time).

pandemic that gripped the United States in early 2020 highlighted the necessity of the internet for Americans who were forced to attend school, work, and play online.[198] The FCC, while without formal leadership or a strategic plan to ensure a neutral internet, has publicly prioritized broadband internet access.[199] It launched a program entitled the "Emergency Broadband Benefit," which seeks to address the affordability of internet access for those Americans who cannot otherwise afford it.[200] In addition, the Commission has developed an "Emergency Connectivity Fund" to provide funding for schools and libraries to cover the "reasonable costs of laptop and tablet computers; Wi-Fi hotspots; modems; routers; and broadband connectivity purchases for off-campus use by students, school staff, and library patrons in need during the COVID-19 pandemic."[201]

The "digital divide" is so much more than providing access to the internet for children who need to do homework in the middle of a deadly pandemic, and efforts like these "are just the starting blocks of digital inclusion efforts," according to Amina Fazlullah, director of equity policy at Common Sense Media.[202] Digital equity requires not only internet access, but "IT support, digital literacy skills and technology training, accessible language availability for tech resources, [and] other forms of support."[203]

The differences between the internet access of 1996 and today are striking, but this discussion is largely centered around the changes to access of things like email, news websites, educational materials, or dancing baby videos.[204] None of these changes discuss the significant ways in which legal materials—and access to legal materials—have changed since *Bounds* and *Casey* were decided. While the change to email is obvious and the learning curve is not

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[198] *Homework Gap and Connectivity Divide*, FCC, https://www.fcc.gov/about-fcc/fcc-initiatives/homework-gap-and-connectivity-divide (last visited Oct. 16, 2021) (discussing the gap in internet access for students trying to navigate online school during the pandemic and the emergency broadband benefits put in place to assist them).

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] Natasha Piñon, *What Is the Digital Divide?*, MASHABLE (Mar. 9, 2021), https://mashable.com/article/what-is-the-digital-divide (discussing and defining the digital divide in America in light of the COVID-19 pandemic).

[203] *Id.*

[204] *See Dancing Baby*, WIKIPEDIA, https://en.wikipedia.org/wiki/Dancing_baby (last edited July 7, 2021) (just kidding, no one wants a dancing baby video now).

difficult, the learning curve in legal research is potentially insurmountable, particularly for those individuals, like criminal litigants, who lie at the intersection of the digital divide and the justice gap.

b. Legal Research

In April 1996, the American Bar Association ("ABA") Journal published an article titled "Internet: Who Needs It?"[205] The mere publication of an article by that title is unthinkable today, but in 1996—the year *Casey* was decided by the U.S. Supreme Court—law firms and attorneys were just beginning to grapple with how to truly utilize and embrace technology in their day-to-day lives. In fact, discussions around technology in 1996 centered mostly around computers, word processors, laser printers, and the use of CD-ROM based legal research systems.[206] Where access to the internet was discussed, modem speeds were recommended to be 14.4 kilobits per second or greater.[207] In 1997, scholars like Robin Widdison, Richard Susskind, and Lord Woolf were thinking about the legal profession, access to justice, and the future of the profession in light of rapidly advancing technology.[208] Widdison predicted that, between 1997 and today, "legal practice will change out of all recognition."[209] While law practice today is certainly as recognizable as it was in 1997, technological advances have made some parts of law

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[205] David Beckman & David Hirsch, *Internet: Who Needs It,* 82 A.B.A. J. 93 (1996) (arguing that everyone in a firm should have access to the internet, though the authors acknowledge that the cost of unlimited internet access may be high. Thus, they conclude that firms should put policies in place to ensure staff members cannot access "'hate' sites" or otherwise become distracted by easy access to the internet).

[206] *See* Steven G. Tyler, *Art of Technology in Today's Law Practice*, 29 MD. B.J. 11 (1996).

[207] *See* Jon Newberry, *Status Checks Plus Details on the March ABA Techshow*, 82 A.B.A. J. 68 (1996) (discussing how today's web access speeds are recommended to be between 3-8 megabits per second for "low-end users" and at least 25 megabits per second for higher-need internet users); *see also* Kristin Shaw & Onjeinika Brooks, *What Is a Good Internet Speed?*, U.S. NEWS (Dec. 14, 2020, 1:00 PM), https://www.usnews.com/360-reviews/internet-providers/what-is-a-good-internet-speed (illustrating the differences between "low-end" users in the 1990s and today, including that the "low-end" user of internet today can expect speeds at least 200 times faster than law firm users needed in 1996. This is a staggering difference in speeds and the ability to access materials from complex websites, like those in use by legal research providers.).

[208] *See* RICHARD SUSSKIND, THE FUTURE OF LAW (Oxford University Press 1996); Robin Widdison, *Electronic Law Practice: An Exercise in Legal Futurology,* 60 MOD. L. REV. 143 (1997); LORD WOOLF MR, ACCESS TO JUSTICE (London HMSO 1996).

[209] Widdison, *supra* note 209, at 143.

practice—most notably legal research—most accessible to those with proficiency using both computers and the internet.[210]

Between 1986 and 1996, a large-scale survey of the nation's 500 largest law firms was conducted to consider computer use of these firms' attorneys.[211] Results from this survey, coupled with results from the ABA Legal Technology Survey Report, provide a fascinating look at the shift in attorney research habits over the last three decades.[212] In 1992, four years prior to the opinion in *Casey*, 70% of attorneys reported having "workstations"[213] at their desks, but only 5% of attorneys reported having the internet available for legal research purposes.[214] By 1995, 88% of attorneys reported having a workstation located at their desk, and 77% of attorneys reported having access to the internet to perform legal research.[215]

In 2020, only 0.4% of attorneys reported *not* working primarily on a computer.[216] And while the latest data from the ABA doesn't

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[210] *See* Transcript of Deposition of Anders Ganten, *supra* note 118, at 6–7.

[211] Rosemary Shiels, *Technology Update: Attorneys' Use of Computers in the Nation's 500 Largest Law Firms*, 46 AM. U. L. REV. 537 (1996). Notably, when Shiels details how attorneys at these large law firms are using the internet to access legal information, she takes the time to describe Lexis, Westlaw, CompuServe, and Dow Jones. *Id.* Today, researchers would be hard-pressed to find an attorney who is not aware of at least two, if not all, of these pieces of technology. Shiels also notes that "the LEXIS-NEXIS databases currently contain more than 11,000 sources and provide over 953 million documents online." *Id.* at 538 n.1 (quoting *LEXIS-NEXIS Background*, LEXIS-NEXIS, http://www.lexis-nexis.com/Incc/about/background.html). Today, the Lexis suite contains dozens of products, from a legal research platform to analytics and data analysis products, to hosted litigation solutions. *Id.* at 537–39. Similarly, Shiels states that Westlaw contained over 9000 databases, and was introduced in 1975 as the only computer-assisted legal research service offering synopses, headnotes, and key numbers. *See West Publishing History*, WEST PUBLISHING, http://www.westlaw.com/htbin/htimage/about.conf?47,240 (on file with the author). Today, Thomson Reuters, the parent company of Westlaw, touts over 1500 products meant to streamline services for not only legal professionals, but corporate, tax, and accounting professionals, as well. *Products Page*, THOMSON REUTERS, https://www.thomsonreuters.com/en/products-services.html (last visited Oct. 23, 2021).

[212] Shiels, *supra* note 211, at 538.

[213] *Id.* at 539 (citing Greg R. Notess, *Telnet, the Forgotten Internet Tool*, ON THE NETS (July 17, 1996)).

[214] *Id.* at 538.

[215] *Id.* at 538–39.

[216] A.B.A., 2020 LEGAL TECHNOLOGY SURVEY REPORT, VOLUME III: LAW OFFICE TECHNOLOGY 12 (2020). In this survey, 48.9% of attorneys report using a desktop primarily for work; 38.6% report primarily using a docked laptop computer with one or more additional accessories; 8.8% report using a laptop on its own; 1.9% report using an all-in-one computer; 0.5% report using a tablet; and 0.9% of attorneys report using another form of technological device as their primary work station. *Id.*

detail how often attorneys access the internet to perform their work on any given day, 97.3% of attorneys report using the internet to "read information on news and current events relevant to [their] job[s]."[217] As attorneys have begun using the internet for research almost exclusively, publishers have shifted their legal content online.[218] LexisNexis, for instance, is ceasing to print Shepard's, and the United States Government Publishing Office routinely threatens to cease print publication of materials like the Federal Register.[219] The shift in attorneys' access to legal materials, from print to digital, is hardly problematic; after all, attorneys have resources available to help with training, including CLEs, vendor representatives, and law school courses that have trained them to research online. Incarcerated litigants' access to resources could not be more different.

ii. Criminal Litigants' Interactions with, and Access to, Technology

While the information about legal research practices of attorneys helps frame the significant shift in access to legal information, it is not at all illustrative of how these changes impact incarcerated criminal litigants. The digital crisis in prisons is real, and in cases where prisoners are given limited or no time with computers, there is no opportunity for incarcerated litigants to learn basic computer skills, let alone legal research.[220] Couple that with painfully slow internet speeds (due to throttling and tiering, which are a direct result of a lack of regulated net neutrality) and any time incarcerated litigants are permitted to spend performing digital research can be ground to a screeching halt.[221] Where prisoners are given access to technology, whether to perform research or simply to do things like listen to music or read for pleasure, they are constantly being exploited by for-profit companies who control their every

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[217] A.B.A., 2020 LEGAL TECHNOLOGY SURVEY REPORT, VOLUME I: ONLINE RESEARCH 52 (2020).

[218] *See* Transcript of Deposition of Anders Ganten, *supra* note 118, at 7.

[219] *Id.* at 6.

[220] *See* Wisnieski, *supra* note 9 (detailing the inability of prisoners to have meaningful access to electronic resources in prison and the lack of training in technology skills for those who do have access to electronic services).

[221] *See id.*

method of access.[222] In the words of Jane Newman, a previous director of LexisNexis's prison sales department, "it's not [Lexis's] problem that the prisoner – that the inmate is computer illiterate. [Lexis is] providing what the state is requiring, and it's up to the inmate to learn the system."[223] We should all be uncomfortable adopting Ms. Newman's cavalier attitude towards the constitutional rights of incarcerated litigants; to ensure true access to justice for criminal litigants, each of these three issues must be addressed.

a. Gap in Knowledge for Those Incarcerated

Those in the corrections field are quick to speak about the ways in which technology has helped and hindered their work.[224] Pointing to the industry's struggles to handle the technology itself, the National Institute of Corrections has compiled a list of resources discussing trends in corrections technology.[225] What these resources fail to address, however, is the massive digital moat surrounding those who live their lives behind bars. In 2016, the idea of a "digital moat" surrounding prisons was introduced to illustrate how technologically isolated incarcerated litigants are from those who are not in prison.[226] Unincarcerated people know how valuable internet access is, but most, if not all, states ban prisoners from "direct, unsupervised access to the internet" with some states going so far as to enact legislation to prevent them from doing so.[227] Internet access, alone, is a significant issue, but the ability to use *any* technology is a significant issue for incarcerated litigants.

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[222] *See* Abel, *supra* note 48, at 1176–78.

[223] *See* Transcript of Deposition of Anders Ganten, *supra* note 118, at 42; *see* Abel, *supra* note 48, at 1176–78 (detailing the rise of prison law libraries as a means for controlling inmate behavior in order to better understand how prison law libraries can plan for the future).

[224] *See generally Technology in Corrections*, NAT'L INST. OF CORR., https://www.nicic.gov/projects/technology-corrections (last visited Oct. 16, 2021) (landing page for resources related to technology in corrections, ranging from telehealth to drones, body cameras to biometrics).

[225] *Id.*

[226] Dan Tynan, *Online Behind Bars: If Internet Access Is a Human Right, Should Prisoners Have It?*, GUARDIAN (Oct. 3, 2016, 6:00 AM), https://www.theguardian.com/us-news/2016/oct/03/prison-internet-access-tablets-edovo-jpay.

[227] Stephen Raher, *You've Got Mail: The Promise of Cyber Communication in Prisons and the Need for Regulation*, PRISON POL'Y INITIATIVE (Jan. 21, 2016), https://www.prisonpolicy.org/messaging/report.html.

Educational attainment and household income are significant indicators of a person's likelihood to be offline. Some 14% of adults with a high school education or less do not use the internet, but that share falls as the level of educational attainment increases.[228] Adults living in households earning less than $30,000 a year are far more likely than those whose annual household income is $75,000 or more to report not using the internet (14% versus 1%).[229] And while the gap in a person's ability to use technology can easily be tied to their age, educational attainment, and socioeconomic status so, too, can it be tied to the amount of time they have spent involved in the criminal justice system and their lack of interaction with the "outside world."[230]Despite the digital moat and significant learning curve for prisoners seeking to use technology, prison officials are not keen to increase the technological skills of inmates.[231]

> [I]f prisons gave unfettered internet access to inmates . . . they wouldn't know how to secure it properly. Then all you need is one inmate to send an improper email or Facebook message to a victim. When that story makes the front pages, the prisons will use that data point to make sure no one ever gets connected again.[232]

But some prisons are trying to bridge the gap to assist criminal litigants while they are in prison, as well as decrease recidivism when they are released.[233] Inmates at prisons in North Dakota, South Carolina, New Mexico, Indiana, Maine, Alabama, Texas, and Oklahoma offer inmates some access to the internet via tablets.[234]

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[228] Sara Atske & Andrew Perrin, *7% of Americans Don't Use the Internet. Who Are They?*, PEW RSCH. CTR. (Apr. 2, 2021), https://www.pewresearch.org/fact-tank/2021/04/02/7-of-americans-dont-use-the-internet-who-are-they (describing the types of people who generally do not use the internet, including their educational attainment and socioeconomic status).

[229] *Id.*

[230] *See* Raher, *supra* note 227.

[231] *See* Abel, *supra* note 48, at 1213–14.

[232] Tynan, *supra* note 226 (quoting Brian Hill, CEO of Edovo) (discussing the campaigns to give prisoners more access to technology and the internet while incarcerated).

[233] *See* Alaa Elassar, *Inmates at Oklahoma Prisons Begin Receiving Computer Tablets*, CNN (June 13, 2021, 5:01 AM), https://www.cnn.com/2021/06/13/us/oklahoma-prison-inmates-computer-tablets/index.html; *see also* Raher & Fenster, *supra* note 115.

[234] *See* Steve Karimi, *Tablets for Inmates: Prisons in a Number of States Allow Those Behind Bars to Have Electronic Devices*, KARIMI L. BLOG (Oct 11, 2017),

But access to the internet on these tablets is neither unlimited nor does it guarantee access to legal information.[235] In fact, much of the access provided is explicitly not for access to legal materials, instead providing inmates access to music, entertainment, employment opportunities, and non-legal educational resources.[236]

And while limited access to online resources to aid in a decrease of recidivism is a good and noble cause, access to non-legal information is distinctly problematic for those who are trying to attack their sentences or their treatment while incarcerated.[237] The fallibility of access to technology—any technology—in prison is significant, due both to net neutrality concerns and the culture surrounding prisons and the way incarcerated litigants are treated in the United States.[238]

b. Fallibility of Access

Fallibility of internet access is an issue for all Americans, but the problems associated with internet access are particularly acute for those behind bars.[239] Because inmates' access to computers for any purpose is so limited—sometimes only minutes a day for those using the prison library or law library—it is susceptible to other limitations, as well.[240] If the prison goes on lockdown due to an internal incident, there is a blackout, or a pandemic rages within the prison's walls, access to the limited computers inmates are allowed to use can be cut off at a moment's notice, for indefinite periods of time.[241]

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https://www.karimilawoffice.com/tablets-for-inmates-prisons-in-a-number-of-states-allow-those-behind-bars-to-have-electronic-devices; *see also* Wanda Bertram & Mack Finkel, *More States Are Signing Harmful "Free Prison Tablet" Contracts*, PRISON POL'Y INITIATIVE (Mar. 7, 2019), https://www.prisonpolicy.org/blog/2019/03/07/free-tablets.

[235] *See* Bertram & Finkel, *supra* note 234.

[236] *See id.*; Elassar, *supra* note 233.

[237] *See* Abel, *supra* note 48, at 1187–89.

[238] *See generally id.*; *see also* Mirko Bagaric et al., *The Hardship that Is Internet Deprivation and What It Means for Sentencing: Development of the Internet Sanction and Connectivity for Prisoners*, 51 AKRON L. REV. 261, 282–85 (2017).

[239] *See* Abel, *supra* note 48, at 1214.

[240] *See* Tynan, *supra* note 226.

[241] Dale Chappell, *Are Prison Law Libraries Adequate?*, PRISON LEGAL NEWS (Apr. 1, 2020), https://www.prisonlegalnews.org/news/2020/apr/1/are-prison-law-libraries-adequate (detailing the resources available in prison law libraries and their adequacy to meet the needs of incarcerated litigants); *see also* Raher & Fenster, *supra* note 115 (discussing cost

Prison culture, generally, does not allow for much freedom for inmates to act or express themselves, sometimes for good reason. But states like South Carolina have made online expression an offense that can lead to years in solitary confinement.[242] It follows that in states where inmate internet access for legal materials is allowed, whether through the law library or through individual inmates' tablets, misuse of that valuable resource being viewed via a computer could also be leveraged as a sword just as easily, cutting off inmates' constitutional right of access to the courts under *Bounds* and *Casey*.[243]

In addition, internet speeds in prisons are problematic.[244] Modernizing prisons is not a priority, and discussions around improving prison facilities are largely driven by the ever-growing prison population and inmates' health and safety concerns, and not their need for more wireless or electrical infrastructure to support computers and wireless internet.[245] Instead of taking steps to improve infrastructure to potentially help America's mass incarceration problem[246] and provide more access to information via robust computer and wireless systems, America's prisons have chosen a path of further exploitation of inmates, this time through access to educational, technological, and research resources.

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cutting measures that led prison law libraries to license electronic resources and the pitfalls of relying on electronic materials).

[242] Dave Maass, *Hundreds of South Carolina Inmates Sent to Solitary Confinement Over Facebook*, ELEC. FRONTIER FOUND. (Feb. 12, 2015), https://www.eff.org/deeplinks/2015/02/hundreds-south-carolina-inmates-sent-solitary-confinement-over-facebook (describing instances where incarcerated individuals in South Carolina were sent to solitary confinement because of Facebook posts created by friends and family).

[243] *See* Chappell, *supra* note 241.

[244] *See* Transcript of Deposition of Anders Ganten, *supra* note 118, at 48.

[245] CHRIS MAI ET AL., VERA INST. FOR JUST., BROKEN GROUND: WHY AMERICA KEEPS BUILDING MORE JAILS AND WHAT IT CAN DO INSTEAD, (Nov. 2019), https://www.vera.org/downloads/publications/broken-ground-jail-construction.pdf.

[246] Eva Fedderly, *Can New Prison Design Help America's Mass Incarceration Problem?*, ARCHITECTURAL DIG. (Apr. 1, 2021), https://www.architecturaldigest.com/story/can-new-prison-design-help-americas-mass-incarceration-problem (discussing, through an architectural lens, how more humane prisons and jails can be used to reduce recidivism and rehabilitate incarcerated people).

c. Exploitation of Prisoners

Technology is slowly eking its way into the U.S. prison system but at an extremely high cost.[247] Between 2014 and 2016, major corporations including American Prison Data Systems, Edobo, and JPay began to distribute basic tablet computers to thousands of inmates.[248] These tablets, while basic, provide incarcerated individuals with educational and entertainment content which, they argue, can help reduce recidivism and improve behavior.[249] Some prisons, like those in Colorado, have implemented tablet programs that foreshadow "a potential new paradigm in corrections, shifting numerous communications, educational, and recreational functions to a for-profit contractor; and making incarcerated people and their families pay for services that are commonly funded by the state."[250]

It is no surprise that there is a high cost associated with this access, and the service received by the inmates would not be found acceptable by anyone who is not behind bars.[251] Companies like JPay have been accused of monetizing human contact and giving kickbacks to the U.S. government for financially exploiting the vulnerable prison population.[252]

Using technology to exploit prisoners is not new.[253] The use of Voice Over Internet Protocol ("VoIP") phone systems in prisons is pervasive, and the use of those phones is outrageously expensive.[254] The phone companies "bait prisons and jails into charging high phone rates in exchange for a share of the revenue," which sometimes results in phone calls from correctional institutions costing an average of a dollar per minute, or more.[255] And, as is nearly always the case in correctional institutions, there are costs

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[247] *See* Elassar, *supra* note 233; *see also* Tynan, *supra* note 226.

[248] Tynan, *supra* note 226.

[249] *Id.*

[250] Raher & Fenster, *supra* note 115 (discussing the exploitation of prisoners in Colorado via the tablet computer program).

[251] Tynan, *supra* note 226.

[252] *Id.*

[253] Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, PRISON POL'Y INITIATIVE (Feb. 2019), https://www.prisonpolicy.org/phones/state_of_phone_justice.html#consolidation (discussing the high cost of phone calls for people in America's prisons and jails).

[254] *Id.*

[255] *Id.*

associated with setting up the accounts that allow inmates to make phone calls at all.[256] The fees to open, fund, have, and close prison phone accounts account for almost 40% of what families spend on calls to their loved ones in prison.[257]

The FCC took care to cap the cost on out-of-state phone calls from prisons and jails, as well as capping fees that phone providers were charging to *further* exploit prisoners.[258] But, much like with net neutrality, these caps are subject to administrative whims,[259] and previous exploitation of prisoners via price-gouging could become a reality, again, at any point in time.

Prison telecommunications systems also present a promise for incarcerated litigants to communicate with friends and family via the internet.[260] This evolution has been slow, as demonstrated throughout this Article; providing prisoners with access to the internet has never been popular.[261] And the electronic communication options available to prisoners is not what the average person considers to be e-mail access: many providers offer one-way systems ("free-world" users can send messages but prisoners must respond by traditional mail); cost for each email sent or received; the use of proprietary software to access messages; character limits; and data retention policies.[262] And as with phone calls, there are a myriad of other fees associated with having access to a service that those on "the outside" consider basic.[263] Convenience fees are charged for setup (advance deposit required at setup, of course); there is a fee

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[256] *Id.*

[257] *Id.*; *see also* Drew Kukorowski et al., *Please Deposit All of Your Money: Kickbacks, Rates, and Hidden Fees in the Jail Phone Industry*, PRISON POL'Y INITIATIVE (May 8, 2013), https://www.prisonpolicy.org/phones/pleasedeposit.html#costoffees (detailing the hidden costs and fees associated with phone calls for those in prisons and jails in the United States).

[258] *Id.*; *see also Consumer Guide: Telephone Service for Incarcerated Individuals*, FCC, https://www.fcc.gov/sites/default/files/inmate_telephone_service.pdf (last reviewed Oct. 27, 2020) (discussing the rate caps for interstate calls from prisons and jails, as well as additional service charges that are allowable).

[259] *See generally* Andrea Fenster, *What Families Can Expect to Be Charged Under the New FCC Rules*, PRISON POL'Y INITIATIVE (June 10, 2021), https://www.prisonpolicy.org/blog/2021/06/10/new_fcc_rules (discussing the impact of the new FCC rules on administrative decisions to charge prisoners for calls).

[260] Tynan, *supra* note 226.

[261] Raher, *supra* note 227 (discussing types of communications available to inmates and the costs associated with each type of communication).

[262] *Id.*

[263] *Id.*

to deposit your money (and the fee increases as the deposit increases); and the fees are typically not mentioned in the service contracts.[264] The cost to communicate with an incarcerated loved one is extremely high.

Similarly, the cost for prisoners who do have access to legal information via online providers is high.[265] Michigan has a $1.3 million contract with LexisNexis, and South Dakota has a $54,000 annual contract with LexisNexis to provide access to legal information in the state prisons.[266] As a part of the contract with the state, LexisNexis recommends internet speeds and operating systems that are optimal for running their legal research platforms.[267] While the recommendations for browsers such as Internet Explorer, Edge, or Chrome are not surprising, the recommended speed that LexisNexis recommends is five megabytes per second (5 mbs), which is five times slower than internet access deemed "good for doing the basics with a little streaming."[268] If internet speeds of twenty-five megabyte per second is recommended for the average person to search the internet for things like a local takeout menu, how is one-fifth of that speed acceptable for incarcerated litigants to research their constitutional rights? Companies like LexisNexis, Westlaw, JPay, and Edobo are charging prisons—and by extension, prisoners—for access to technology that may as well not be accessible, at all.

IV. CONCLUSION

The way attorneys, judges, and litigants think about access to justice and access to courts has, justifiably, changed since the 1990s. For the majority of that group, their information-seeking and

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[264] *Id.*

[265] *See* Bertram & Finkel, *supra* note 234 (detailing the costs associated with prisoners using tablets to gain access to the internet); *see also* Elassar, *supra* note 233.

[266] *See* Notice of Contract, *Electronic Law Library for the Michigan Department of Corrections*, DEP'T OF TECH., MGMT., & BUDGET (May 4, 2020), https://www.michigan.gov/documents/dtmb/200000000691_688822_7.pdf (detailing the high costs and limitations put on contracting with legal research providers in contracts between the State of Michigan Department of Technology, Management, and Budget and RELX Inc).

[267] *Id.*

[268] *Id.*; *see also* John Dilley, *How Much Should I Be Paying for High-Speed Internet?*, HIGHSPEEDINTERNET.COM (June 18, 2021), https://www.highspeedinternet.com/resources/how-much-should-i-be-paying-for-high-speed-internet-resource.

research behaviors have changed dramatically as well. While the evolution of access to information has changed with the advent of the internet, the Supreme Court has been excruciatingly slow to change the ways in which prisoners are guaranteed access to the Courts.

But while the Supreme Court recognizes that the advent of the internet has changed the economic landscape of this country, and it reversed decades of precedent in determining the outcome of *Wayfair*, there has been no such desire to discuss—or even acknowledge—how the internet has changed the lives of millions of incarcerated Americans. Perhaps it is because their fundamental rights are not quite as important as the rights of states or corporations? Or because there is a profound discomfort in recognizing that internet access at meaningful speeds is a way to help those behind bars, both in terms of litigating their cases and helping them wade through the digital moat? Or perhaps big corporations simply have not found a way to further exploit prisoners by charging them exorbitant fees for the latest technology?

Bounds and *Casey* cannot stand as the foundational precedent upon which courts rely when determining whether prisoners have access to the courts. At a minimum, the arguments in *Wayfair* and *Georgia v. Public.Resource.Org* must be leveraged for the benefit of America's incarcerated litigants, many of whom do not have meaningful access to the internet for the purposes of performing legal research. The internet has changed everything, including legal research, and it is not enough to give an inmate like Fred fifteen minutes in front of a computer with internet speeds so slow that he cannot perform a search. We cannot deepen the digital moat and expect those who are unfamiliar with the internet to understand how to perform legal research online. We cannot provide and revoke prisoners' access to legal materials on a whim. We cannot allow further exploitation of our vulnerable inmate population so legal research providers, internet service providers, and other for-profit companies can make more money from inmates' constitutional rights. And so, the rallying cry continues: We must ensure meaningful access to legal information and the courts for incarcerated litigants; we must ensure access to justice.

ABUSE AT THE HANDS OF EDUCATORS: ANALYZING THE USE OF SECLUSION AND RESTRAINTS IN K-12 PUBLIC SCHOOLS ACROSS AMERICA

SALEM D. KIRKMAN†

I. INTRODUCTION

Imagine being forced into a cold, confined room with no windows and no other means of escape. Now imagine being physically restrained and forced into that same room not knowing when you will be released. This is the unfortunate reality for thousands of students with disabilities in K-12 public schools across America.[1] Students with disabilities are disproportionately affected by these practices known as seclusion and restraint.[2] Seclusion refers to "involuntarily confining a student alone in a room or area from which he or she cannot physically leave."[3] During the 2017–2018 school year, 27,538 public school students were reported to have been secluded, and 77% of these students had disabilities.[4] Restraint is described as "restricting the student's ability to move."[5] During the 2017–2018 school year, 70,833 public school students were reported to have been physically restrained, and an alarming

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[1] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-418T, FEDERAL DATA AND RESOURCES ON RESTRAINT AND SECLUSION 4 (2019).

[2] *Id.* at 1.

[3] *Id.*

[4] U.S. DEP'T OF EDUC., 2017-18 CIVIL RIGHTS DATA COLLECTION, THE USE OF RESTRAINT AND SECLUSION ON CHILDREN WITH DISABILITIES IN K-12 SCHOOL 7 at 5 (2020).

[5] U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-418T, *supra* note 1, at 1.

80% of these students had disabilities.[6] While some students are restrained and secluded for a few minutes, others are confined for hours at a time, depending on their behavior.[7] Despite these startling statistics, there is no federal law addressing the use of seclusion and restraints in public schools.[8] Therefore, it is up to the states to decide how seclusion and restraints are to be used in public schools, which has resulted in a lack of uniform standards.[9] As instances of improper seclusion and restraint on students with disabilities continue to surface,[10] there is an urgent need for uniform and comprehensive federal legislation limiting the use of seclusion and restraints in K-12 public schools.

This Comment examines current state laws and recent cases and analyzes potential provisions that legislation should include to provide uniformity and better protect one of the nation's most vulnerable populations. Section II provides an overview of the legislative history addressing the use of seclusion and restraints in public schools and explores where federal guidelines currently stand. Section III examines recent cases and instances of seclusion and restraint, analyzes the state laws governing them, and proposes modifications to these state laws to prevent future instances of use. Finally, Section IV advocates for federal legislation and examines the need for federal funding and enforcement mechanisms to

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[6] This data is collected from a survey of almost all public schools in America. U.S. DEP'T OF EDUC., *supra* note 4, at 1. Thus, there is potential for this number to be higher based on various school reporting methods. *Id.* at 6.

[7] Jennifer Smith Richards et al., *The Quiet Rooms*, PROPUBLICA ILL. (Nov. 19, 2019), https://features.propublica.org/illinois-seclusion-rooms/school-students-put-in-isolated-timeouts.

[8] Jenny Abamu, *How Some Schools Restrain or Seclude Students: A Look at a Controversial Practice*, NPR (June 15, 2019, 6:01 AM), https://www.npr.org/2019/06/15/729955321/how-some-schools-restrain-or-seclude-students-a-look-at-a-controversial-practice.

[9] JESSICA BUTLER, HOW SAFE IS THE SCHOOLHOUSE? AN ANALYSIS OF STATE SECLUSION AND RESTRAINT LAWS AND POLICIES 16–17 (2009), https://www.autcom.org/pdf/HowSafeSchoolhouse.pdf.

[10] *See, e.g.*, C. S. Hagen, *Mother's Lawsuit Claims Fargo Public Schools Improperly Restrained, Secluded Autistic Son*, DULUTH NEWS TRIB. (Dec. 11, 2020, 9 AM), https://www.duluthnewstribune.com/news/education/6797650-Mothers-lawsuit-claims-Fargo-Public-Schools-improperly-restrained-secluded-autistic-son; Karen Hensel, *Light Oversight on School Time-Out Rooms Worries Parents, Advocates*, NBC BOS. (Feb. 8, 2019, 4:02 PM), https://www.nbcboston.com/news/local/light-oversight-on-school-time-out-rooms-worries-parents-advocates/2313; Mary Tyler March, *Parents Sue Fairfax Schools Over Alleged Student Seclusion, Discrimination*, NPR (Oct. 9, 2019), https://www.npr.org/local/305/2019/10/09/768593229/parents-sue-fairfax-schools-over-alleged-student-seclusion-discrimination.

ultimately provide greater protection for students with disabilities across America.

II. LEGISLATIVE HISTORY AND FEDERAL GUIDELINES ON SECLUSION AND RESTRAINT IN K-12 PUBLIC SCHOOLS

One of the first pieces of federal legislation addressing the treatment of students with disabilities in public schools was the 1975 Education for All Handicapped Children Act.[11] Today, the Education for All Handicapped Children Act is known as the Individuals with Disabilities Education Act, and it was created to ensure that individuals with disabilities receive a free public education.[12] The act also requires students with disabilities to receive an "individual education program" or "IEP" that identifies the services required to meet students' educational needs.[13] The Individuals with Disabilities Education Act also provides various guidelines regarding the education and treatment of students with disabilities and states that the IEP Team—composed of students' parents, at least one special education teacher,[14] and other school staff—must "consider the use of positive behavioral interventions and supports, and other strategies" when students engage in disruptive behavior.[15] However, the Act is silent as to whether practices such as the use of restraints and seclusion fall within "positive behavioral interventions and supports."[16] Therefore, without any federal guidance on the use of restraints and seclusion, school administrators have been free to use these practices as they see fit.[17]

A 2009 report by the U.S. Government Accountability Office ("Accountability Office") renewed public interest in the use of restraints and seclusion on students with disabilities.[18] The report

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[11] *About IDEA*, IDEA, https://sites.ed.gov/idea/about-idea/#IDEA-History (last visited Feb. 21, 2021).

[12] *Id.*

[13] NANCY LEE JONES & JODY FEDER, CONG. RSCH. SERV., RL40522, THE USE OF SECLUSION AND RESTRAINT IN PUBLIC SCHOOLS: THE LEGAL ISSUES 6 (2010).

[14] 20 U.S.C. § 1414(d)(1)(B).

[15] 20 U.S.C. § 1414(d)(3)(B)(i).

[16] *Id.*

[17] BUTLER, *supra* note 9.

[18] U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-719T, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS (2009).

detailed various instances of death and abuse due to the improper use of seclusion and restraints in schools across America.[19] The Accountability Office not only shed light on a lack of policies and trainings,[20] but it also detailed numerous inconsistencies in state laws.[21] In cases examined by the Accountability Office, restraints and seclusion were used on students with disabilities "as disciplinary measures, even when [students'] behavior did not appear to be physically aggressive."[22] Although the report did not analyze whether the practices used by the school staff violated state laws, these findings suggest that students with disabilities may have been unnecessarily secluded or restrained.[23]

Following the publication of the Accountability Office's report, the Keeping All Students Safe Act was introduced in December of 2009.[24] Since its initial introduction, a similar version of the Keeping All Students Safe Act has been introduced in recent years, yet the passage of federal legislation addressing restraint and seclusion has been unsuccessful.[25] The proposed Act would prohibit school personnel from restraining or secluding all students except when faced with "an imminent danger of physical injury to the student, school personnel, or others."[26] The Act also proposed required trainings and certifications along with procedures for notifying parents and guardians of students following the use of seclusion and/or restraint.[27] Additionally, not only did the proposed Act provide requirements for schools and school personnel

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[19] *Id.*

[20] *See id.* at 9.

[21] *See id.* at 3–4.

[22] *Id.* at 8.

[23] *Id.*

[24] *H.R.4247 - 111th Congress (2009-2010): Keeping All Students Safe Act*, CONGRESS.GOV, https://www.congress.gov/bill/111th-congress/house-bill/4247 (last visited Feb. 21, 2021).

[25] *See, e.g.*, *H.R.1381 - 112th Congress (2011-2012): Keeping All Students Safe Act*, CONGRESS.GOV, https://www.congress.gov/bill/112th-congress/house-bill/1381 (last visited Feb. 21, 2021); *H.R.1893 - 113th Congress (2013-2014): Keeping All Students Safe Act*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/house-bill/1893 (last visited Feb. 21, 2021); *H.R. 927 - 114th Congress (2015-2016): Keeping All Students Safe Act*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/927 (last visited Feb. 21, 2021); *H.R.7124 - 115th Congress (2017-2018): Keeping All Students Safe Act*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/7124 (last visited Feb. 21, 2021).

[26] Keeping All Students Safe Act of 2009, H.R. 4247, 111th Cong. §§ 3(1), (2), (4) (2010).

[27] *Id.* §§ 3(5)(A), (B), 5(a)(5)(A).

but it also recognized "a substantial disparity" among the states regarding "the protection and oversight of the rights of children and school personnel to a safe learning environment."[28] The Keeping All Students Safe Act never became law due to disagreements concerning whether seclusion should be banned entirely or allowed only as a "last resort."[29] In over a decade since this Act was first introduced, the discrepancies in restraint and seclusion practices and regulations continue to persist among the states.[30]

Most recently in January 2019, former U.S. Secretary of Education Betsy DeVos announced the U.S. Department of Education's initiative to address current, and prevent future, improper uses of seclusion and restraints.[31] The initiative stated that the Office for Civil Rights and the Office of Special Education and Rehabilitative Services would oversee the initiative and its goal of protecting students with disabilities.[32] The initiative included three aspects: compliance reviews, data quality reviews, and technical assistance to schools.[33] In January 2020, the Office for Civil Rights and the Office of Special Education and Rehabilitative Services released a webinar that provides technical assistance for school personnel working with students with disabilities.[34] While the future success of this initiative is still unknown, the end goal is that improper uses of seclusion and restraint will be identified, addressed, and remedied.[35]

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[28] *Id.* § 2(5).

[29] *See* BUTLER, *supra* note 9, at 56.

[30] *Id.* at x.

[31] *U.S. Department of Education Announces Initiative to Address the Inappropriate Use of Restraint and Seclusion to Protect Children with Disabilities, Ensure Compliance with Federal Laws*, U.S. DEP'T EDUC. (Jan. 17, 2019), https://sites.ed.gov/idea/u-s-department-of-education-announces-initiative-to-address-the-inappropriate-use-of-restraint-and-seclusion-to-protect-children-with-disabilities-ensure-compliance-with-federal-laws.

[32] *Id.*

[33] U.S. DEP'T OF EDUC., *supra* note 4, at 3.

[34] *News Room*, U.S. DEP'T EDUC. (Jan. 10, 2020), https://www2.ed.gov/about/offices/list/ocr/newsroom.html.

[35] *Id.*

III. Recent Cases and Instances of Seclusion and Restraint Involving Students with Disabilities and Analysis of State Laws

A. North Dakota: Barnum v. Board of Education of City of Fargo

In *Barnum v. Board of Education of City of Fargo*, an eight-year-old student with autism was allegedly secluded and restrained during the 2018–2019 school year.[36] The plaintiff's son was diagnosed with PTSD as a result of the seclusion and restraints.[37] The lawsuit, in part, alleges that Fargo Public Schools did not "consistently maintain complete and current records of [the student's] in-school behaviors."[38] This case highlights the need for additional procedures addressing how students' behaviors and instances of seclusion and restraint are recorded and reported.[39]

The student in the *Barnum* case attended Fargo Public Schools in Fargo, North Dakota.[40] North Dakota law limits the use of seclusion and physical restraint to emergency situations and requires the public school administrator to be notified of its use.[41] North Dakota law allows such seclusion and physical restraint to continue if deemed necessary by the school administrator provided that the student is monitored every thirty minutes.[42] One concern with the North Dakota law is that it requires the school administrator to be notified of any instances of seclusion and/or physical restraint but does not require parents or other guardians of the student to be notified.[43] Another concern is that the North Dakota law does not contain any provision related to mandatory documentation of students' behaviors and instances where physical restraint and/or seclusion are used.[44] The lack of any documentation requirement was a key factor in the *Barnum* case because the plaintiff

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[36] Hagen, *supra* note 10; Complaint at 1, Barnum v. Bd. of Educ. of City of Fargo, 3:21CV00119 (D. N.D. filed June 1, 2021).

[37] Hagen, *supra* note 10.

[38] *Id.*

[39] *See id.*

[40] *Id.*

[41] N.D. Cent. Code §§ 25-01.2-09, 25-01.2-10 (2021).

[42] *Id.* § 25-01.2-10.

[43] *Id.*

[44] *See id.*

alleged that the school did not properly maintain records of her son's behaviors, which made it impossible to determine whether the use of seclusion and physical restraint was even warranted.[45]

At the very least, North Dakota law should be modified to require schools to document and report student behavior leading up to the use of physical restraints and/or seclusion and the frequency and duration of these practices. When compliance officers have thorough and accurate records of students' behavior and actions taken by school staff, they can better ensure that all instances of restraint and seclusion are proper.[46] Additionally, North Dakota law should be modified to require prompt notification to parents or guardians of students once their behavior escalates to the level of an emergency situation. When parents and guardians are notified as soon as a student's behavior escalates, there is less time for potential abuse and misuse of restraints and seclusion.[47]

B. California: Kerri K. & Jacob K. v. State of California

On January 1, 2019, a California law limiting the use of seclusion and restraint to "emergency" situations went into effect.[48] Just five months after this law became effective, the plaintiffs in *Kerri K. & Jacob K. v. State of California*[49] filed a lawsuit alleging that students with disabilities were harmed through the illegal use of restraints and seclusion while attending a special education public school in California.[50] The plaintiffs also alleged that school officials frequently restrained and secluded students in "non-emergency situations," in violation of California law.[51] Not only does the

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[45] *See generally* Hagen, *supra* note 10.

[46] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-551R, K-12 EDUCATION: EDUCATION SHOULD TAKE IMMEDIATE ACTION TO ADDRESS INACCURACIES IN FEDERAL RESTRAINT AND SECLUSION DATA (2019).

[47] Debbie Truong, *Parents Sue Fairfax Schools, Allege Improper Seclusion and Restraint of Students with Disabilities*, WASH. POST (Oct. 8, 2019, 6:54 PM), https://www.washingtonpost.com/local/education/parents-sue-fairfax-schools-allege-improper-seclusion-and-restraint-of-students-with-disabilities/2019/10/08/066166dc-e9f8-11e9-85c0-85a098e47b37story.html.

[48] Assemb. B. 2657, 2018 Assemb., Reg. Sess. § 1(49005)(a) (Cal. 2018).

[49] Kerri K. v. State, CIVMSC19-00972 (Cal. Super. Ct. May 13, 2019).

[50] Diana Lambert, *Lawsuit Challenges Use of Restraint, Seclusion in California Special Education School*, EDSOURCE (May 20, 2019), https://edsource.org/2019/lawsuit-challenges-use-of-restraint-seclusion-in-california-special-education-school/612690.

[51] *Id.*

complaint allege that students were improperly subjected to these harmful practices, but it also states that the school neither documented nor told parents and guardians about many instances of seclusion and restraint within the reporting period required under California law.[52]

California law states that restraint and seclusion "should only be used as a safety measure of last resort" and not as "punishment or discipline or for staff convenience."[53] However, a parent of two students in the lawsuit stated that the school viewed the students as "children with poor behavior" and used restraint and seclusion as a way to "break [the students] into submission."[54]

According to the California Education Code, schools are required to notify parents and guardians of students within "one school day" of any use of seclusion or restraint.[55] However, there is no enforcement mechanism or repercussions to ensure that schools follow this requirement.[56] Thus, California law should be modified to incorporate accountability measures such as termination or unpaid suspension for school staff who do not report the use of restraint and seclusion to parents and guardians by the next school day. Although California has fairly robust protections for public school students with disabilities, these protections are only effective when those administering them are held accountable for their actions.[57]

C. Virginia: Q.T. v. Fairfax County School Board

In *Q.T. v. Fairfax County School Board*, one plaintiff's son was secluded more than seven hundred times over the course of seven years, yet the plaintiff was not notified of these instances within the twenty-four hour timeframe as prescribed by Virginia law.[58] Moreover, during the 2015–2016 school year, the Fairfax school system

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[52] *Id.*

[53] CAL. EDUC. CODE § 49005 (Deering 2021).

[54] Lambert, *supra* note 50.

[55] CAL. EDUC. CODE § 56521.1(e) (Deering 2021).

[56] *Id.* (explaining the procedures for reporting, but not requiring any discipline for failure to report); *see also* BUTLER, *supra* note 9, at 6 (discussing how not all restraint laws are enforced).

[57] BUTLER, *supra* note 9, at 11.

[58] Order, Q.T. v. Fairfax Cty. Sch. Bd., No. 1:19-cv-01285, slip op. at 4, 6 (E.D. Va. July 14, 2020), ECF No. 33.

reported no incidents involving seclusion or restraints despite a report identifying numerous unreported incidents involving these practices.[59] Not only is underreporting an issue but a lack of proper training is also an alleged contributing factor to the mistreatment of students with disabilities and behavioral problems.[60] The lawsuit alleges that the school staff lacked both "training and guidance" and were forced to "assume knowledge and responsibilities for responding to children with disabilities that they profoundly lack[ed]."[61] As a result, one plaintiff's son was allegedly "physically restrained in the classroom and then placed in a six-by-six foot padded room with a magnetically locked door" for reasons "that did not pose an imminent threat to himself or others."[62]

Virginia law must be modified to incorporate enforcement mechanisms and accountability measures. In 2015, section 22.1-279.1:1 of the Virginia Code was enacted and required the Virginia Board of Education to "adopt regulations on the use of seclusion and restraint in public elementary and secondary schools" that adhere to the U.S. Department of Education's guidelines and principles.[63] However, while regulations have been proposed, none have been adopted.[64] One proposed regulation, section 20-750-60 of the Virginia Administrative Code, would require schools to "make reasonable effort[s]" to notify parents of any incident involving the use of seclusion and restraint immediately following the incident.[65] Additionally, if enacted, the proposed regulation would require schools to craft and implement policies and procedures relating to positive behavioral interventions, notification and documentation requirements, and appropriate trainings.[66]

If enacted, Virginia's proposed regulations have the potential to prevent the misuse of seclusion and restraint practices noted

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[59] Truong, *supra* note 47.

[60] *Id.*

[61] Complaint at 4, Q.T. v. Fairfax Cty. Sch. Bd., No. 1:19-cv-01285 (E.D. Va. Oct. 8, 2019), ECF No. 1.

[62] *Id.* at 33, 34.

[63] VA. CODE ANN. § 22.1-279.1:1 (2020).

[64] SAMANTHA H. HOLLINS, FIRST REVIEW OF PROPOSED REGULATIONS GOVERNING THE USE OF SECLUSION AND RESTRAINT IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS IN VIRGINIA A–B (2019).

[65] 8 VA. ADMIN. CODE § 20-750-60(A)(2) (2021).

[66] 8 VA. ADMIN. CODE § 20-750-70(A)(1)-(5) (2021).

in the *Q.T. v. Fairfax County School Board* case.[67] Prompt parental notification potentially could have prevented the hundreds of instances of seclusion experienced by one plaintiff's son.[68] In addition, this case highlights the need for thorough trainings and guidance not only in the use of restraints and seclusion, but also in alternative approaches, such as positive behavioral interventions.[69] Although restraints and seclusion are supposed to be limited to instances when a student's behavior "places the student or others at risk of harm or injury,"[70] the complaint alleged that one plaintiff's son was restrained and secluded even when the student was not at risk of harming himself or others.[71] Thus, positive behavioral interventions likely would have been a preferred alternative to the harsh practices described in the complaint.[72]

D. Illinois: The "Quiet Rooms" Investigation

In November 2019, ProPublica Illinois published the findings of an investigation which detailed more than twenty thousand incidents of seclusion in Illinois public schools over a one and one-half year time period.[73] When these instances of seclusion occurred, state law permitted Illinois public school staff to seclude students when students acted in a way that created "a safety threat to themselves or others."[74] However, the investigation revealed that in over one-third of the incidents, school staff failed to document any valid reason for secluding the students in these "Quiet Rooms."[75] Despite their name, these rooms were far from quiet as the students locked inside the rooms begged, screamed, and violently thrusted their bodies against the walls in an attempt to escape.[76] Students like Jace

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[67] Truong, *supra* note 47.

[68] *Id.*

[69] Complaint, *supra* note 61, at 3, 6–7.

[70] VA. DEP'T. OF EDUC., GUIDELINES FOR THE DEVELOPMENT OF POLICIES AND PROCEDURES FOR MANAGING STUDENT BEHAVIORS IN EMERGENCY SITUATIONS IN VIRGINIA PUBLIC SCHOOLS FOCUSING ON PHYSICAL RESTRAINT AND SECLUSION 5 (2009), https://www.doe.virginia.gov/support/student_conduct/guidelines_managing_behaviors_emergency.pdf.

[71] Complaint, *supra* note 61, at 34.

[72] *Id.* at 3, 6–7, 34; VA. DEP'T. OF EDUC., *supra* note 70.

[73] Richards et al., *supra* note 7.

[74] *Id.*

[75] *Id.*

[76] *Id.*

Gill, a nine-year-old with autism, were regularly secluded inside the "Quiet Rooms."[77] During these seclusions, Jace would often urinate and defecate on himself as a result of the fear, uncertainty, and confusion he experienced.[78] Despite school staff assuring Jace's family that he would not be placed inside the "Quiet Rooms" alone, he was forced and left in a "5-foot-square space made of plywood and cinder block" over twenty times throughout the 2017–2018 school year.[79] Similarly, a seven-year-old student named Isaiah was repeatedly forced into his school's "timeout room" where he would frequently "bang his head against the concrete and plywood walls."[80]Although the school Isaiah attended kept records of Isaiah's behavior in these "Quiet Rooms," Isaiah's mother neither knew of this recordkeeping nor was notified of Isaiah's behavior while in the seclusion room.[81] Thus, Isaiah's mother never knew that Isaiah complained of headaches and "ringing in his ears" nor did she know that school nurses completed a concussion form after Isaiah began exhibiting concussion-like symptoms.[82] It was only when Isaiah returned home from school with carpet burn on his face that his mother discovered he had been placed "in a prone restraint on a carpeted floor"—a position that can restrict a student's ability to breathe and ultimately cause asphyxiation.[83] While Isaiah's behavior and the use of seclusion were documented in school records, the Illinois State Board of Education did not monitor the use of seclusion or restraints and did not require any reporting on the use of such practices.[84] Due to the lack of monitoring and reporting requirements, students like Jace and Isaiah continued to experience frequent and often unsupervised seclusion while parents and

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[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] Jennifer Smith Richards et al., *Schools Aren't Supposed to Forcibly Restrain Children as Punishment. In Illinois, It Happened Repeatedly.*, PROPUBLICA (Dec. 20, 2019, 5:00 AM), https://www.propublica.org/article/illinois-school-restraints.

[84] Jodi S. Cohen et al., *Readers Choked Back Tears. Some Struggled to Keep Reading. We Understand.*, PROPUBLICA (Nov. 22, 2019, 4:00 AM), https://www.propublica.org/article/illinois-school-seclusions-reader-responses.

guardians were left in the dark, unaware of the horrific acts that occurred in the "Quiet Rooms."[85]

Following ProPublica Illinois' publication of the findings of their investigation, the Illinois State Board of Education announced an "immediate ban" on the use of "isolated seclusion" and issued emergency rules to address the investigation's gruesome discoveries.[86] The governor of Illinois, J.B. Pritzker, acknowledged the "appalling" nature of "[i]solated seclusion"[87] and announced emergency rules banning the use of locked seclusion rooms and requiring that an adult trained in "de-escalation, restorative practices, and behavior management practices" stay with all secluded students.[88] The emergency rules also limited the use of physical restraints to instances where such restraints were necessary to maintain "a safe environment for learning" and "preserve the safety of students and others."[89] Additionally, all staff engaged in physically restraining students were required to be trained in "de-escalation of problematic behavior, relationship-building, and the use of alternatives to restraint."[90] Lastly, the emergency rules required all schools, including public and special education schools, to report all instances of seclusion and physical restraint to the State Superintendent within two days of the incident and to the parents of students within one day of the incident.[91] This last requirement serves as a resounding response to the lack of knowledge experienced by Isaiah's mother and numerous other families who were unaware that their children were repeatedly being restrained and secluded in isolated, locked rooms while attending school.[92]

In January 2021, Illinois lawmakers attempted to pass a bill that would have banned schools from secluding students in locked rooms and physically restraining students in a facedown manner.[93]

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[85] Richards et al., *supra* note 7.

[86] Cohen et al., *supra* note 84.

[87] *Id.*

[88] 43 Ill. Reg. 14315, 14321 (Dec. 6, 2019).

[89] *Id.* at14314.

[90] *Id.* at 14321.

[91] *Id.* at 14320–21.

[92] Richards et al., *supra* note 7.

[93] Jennifer Smith Richards & Jodi S. Cohen, *Bill Banning Locked Seclusion and Face-Down Restraints in Illinois School Stalls*, DAILY HERALD (Jan. 14, 2021, 12:49 PM), https://www.dailyherald.com/news/20210114/bill-banning-locked-seclusion-and-face-down-restraints-in-illinois-schools-stalls.

Unfortunately, the bill failed to pass, leaving thousands of Illinois students at risk of continued harm at the hands of their school staff.[94] Although the bill stalled in the Illinois House of Representatives, many of its provisions can serve as a model to protect current and future students with disabilities.[95] In addition to altogether banning the use of "locked seclusion rooms and prone, or facedown, physical restraints," the proposed bill also limited the use of unlocked seclusion and non-facedown restraints to instances where students pose an "imminent danger of serious physical harm."[96] This provision, if enacted earlier, likely would have alleviated the suffering and repeated instances of restraint and seclusion experienced by Jace and Isaiah.[97] The requirement that students be subjected to restraints and seclusion only when posing an "imminent danger of serious physical harm" could have prevented both Jace and Isaiah from experiencing any form of seclusion, as both students were secluded for minor behavioral issues.[98] Additionally, the bill, if passed, would have required schools to not only notify parents and guardians of instances of seclusion and/or restraint,[99] but also to offer to meet with these parents and guardians.[100] As is evident in Isaiah's case, it is critical for parents to have the opportunity to speak with school staff following a student's seclusion and/or restraint to ensure the continued safety and proper treatment of students with disabilities.[101] One final provision incorporated in the emergency rules and proposed in the bill was mandatory training

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[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *See* Richards et al., *supra* note 7 (explaining that Jace was locked in rooms over two dozen times, and Isaiah would repeatedly bang his head against the walls when in the quiet room, to the point where employees "asked him to use a pillow 'if he wishes to bang his head'"); Richards et al., *supra* note 83 (noting that Isaiah was pulled out of school "after he came home with a mark on his face from being restrained facedown on carpet").

[98] Richards et al., *supra* note 7 (noting that "[t]he incident began that morning when Jace ripped up a math worksheet and went into the hallway, trying to leave school" and that Isaiah was secluded once after pushing a chair and desk and "distracting other students").

[99] S.B. 2315, 101st Gen. Assemb., Reg. Sess. (Ill. 2019)

[100] Kendra Yoch & Dana Fattore Crumley, *Proposed State and Federal Legislation Would Further Reduce Physical Restraint and Time Out in Schools*, SPECIAL EDUC. L. INSIGHTS (Dec. 1, 2020), https://www.specialedlawinsights.com/2020/12/proposed-state-and-federal-legislation-would-further-reduce-physical-restraint-and-time-out-in-schools.

[101] *Id.*

on "positive behavioral interventions" and "restorative practices."[102] These trainings, which would have been funded by an Illinois State Board of Education grant program, could have prevented various instances of seclusion and restraint by taking a proactive approach to de-escalating student behavior.[103] Thus, as a result of the "Quiet Rooms" investigation exposing thousands of improper instances of seclusion and restraint, practical solutions were developed that can serve as a guide for future legislation.[104]

E. North Carolina: Wake County Lawsuit

In January 2020, the Wake County school system settled a lawsuit with the family of a Raleigh high school student with disabilities.[105] The lawsuit alleged that many students were subjected to improper seclusion throughout the 2018–2019 school year.[106] According to the lawsuit, the school administration was notified of the teacher's improper treatment of students, yet the teacher continued to teach students with disabilities.[107] When the parents of one student noticed bruises on their son, they contacted both the school administration and school district.[108] Despite proof of the teacher's improper seclusion of students in the school's storage room, the teacher currently continues to work for a nearby school district in Durham, North Carolina.[109]

The Wake County lawsuit highlights the need for cameras in special education classrooms and the need for greater enforcement mechanisms and accountability measures.[110] Having cameras in classrooms may deter teachers from mistreating students with disabilities and may also capture any instances of seclusion and restraint. In North Carolina, school staff may seclude students when

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[102] *Id.*

[103] *Id.*

[104] Richards et al., *supra* note 7; *see also* Yoch & Crumley, *supra* note 100.

[105] T. Keung Hui, *Family Says a Student Was Illegally Restrained and Secluded. Wake Will Pay $450,000.*, NEWS & OBSERVER (Jan. 15, 2020, 2:22 PM), https://www.newsobserver.com/news/local/education/article239076598.html.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] The parents of one student who was subjected to improper seclusion advocated for the use of cameras in special education classrooms. *Id.*

"a student's behavior poses a threat of imminent physical harm to self or others."[111] However, school staff may not seclude students "solely as a disciplinary consequence," which is what the teacher is accused of doing in this case.[112] Perhaps most concerning is the fact that the teacher in this case is still allowed to teach in North Carolina's public school systems.[113] Future legislation must contain provisions that better protect current and future public school students. After thorough investigation, if the school administration or school district concludes that a staff member improperly secluded or restrained a student, the staff member must be suspended and required to complete detailed trainings on the use of seclusion and restraints before returning to the classroom.

IV. Proposed Federal Legislation: The Need for Federal Funding and Enforcement Mechanisms

As the cases and incidents above illustrate, there is an urgent need for mandated trainings, improved enforcement mechanisms, and stronger accountability measures in America's public school systems. Although strengthening state laws on the use of seclusion and restraints is a step in the right direction, to create safer and more streamlined practices across America's public school systems, federal legislation must be crafted and enacted. First, federal legislation must include federal funding so all teachers and administrators can participate in necessary trainings, including trainings on crisis intervention, de-escalation techniques, and mindfulness practices.[114] Second, federal legislation must establish and implement enforcement mechanisms that will hold school systems and schools accountable for their actions.

A. Federal Funding for Trainings on Crisis Intervention, De-escalation Techniques, and Mindfulness

While current state and future federal legislation can mandate certain trainings for school staff, without adequate funding, it

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[111] N.C. Gen. Stat. § 115C-391.1(e)(1)(d) (2020).

[112] *Id.* § 115C-391.1(e)(3); *see* Hui, *supra* note 105.

[113] Hui, *supra* note 105.

[114] Michael Couvillon et al., *A Review of Crisis Intervention Training Programs for Schools*, 42 Teaching Exceptional Child. 6, 8 (2010).

is unlikely that schools will have sufficient resources to pay for mandatory trainings.[115] Thus, federal legislation must provide federal funding to assist in the establishment, maintenance, and implementation of all mandatory trainings. One avenue the federal government can take is the Taxing and Spending Clause found in Article I, Section 8, Clause 1 of the Constitution of the United States.[116] Using its power to tax and spend, the federal government can incentivize states and public school systems to require workshops and trainings pertaining to the proper use of seclusion and restraints.[117] Through the use of spending programs, the federal government can compel states to adopt restraint and seclusion trainings and workshops before providing states with supplemental funding.[118] Although K-12 education funding comes primarily through the states,[119] potential spending programs will encourage states to comply with federal laws aimed at better protecting students with disabilities.[120] The Supreme Court has held that all spending programs must be for the "general welfare of the United States" and cannot violate other constitutional provisions.[121] Additionally, all conditions on the receipt of federal funding must be "unambiguously" expressed to the states and must be related to "the federal interest in particular national projects or programs."[122]

Federal funding can be used to support trainings and workshops for public school staff working with students with disabilities.[123] Taking a proactive and preventative approach to behavioral

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[115] Cory Turner, *America's School Funding Crisis: Budget Costs, Rising Costs and No Help In Sight*, NPR (Oct. 23, 2020, 7:00 AM), https://www.npr.org/sections/coronavirus-live-updates/2020/10/23/926815076/americas-school-funding-crisis-budget-cuts-rising-costs-and-no-help-in-sight.

[116] U.S. CONST. art. I, § 8, cl. 1.

[117] *Id.*

[118] *See 10 Facts about K-12 Education Funding*, U.S. DEP'T EDUC., https://www2.ed.gov/about/overview/fed/10facts/index.html (last modified Sept. 19, 2014).

[119] *Id.*

[120] *See* CLARE MCCANN, NEW AMERICA, FEDERAL FUNDING FOR STUDENTS WITH DISABILITIES: THE EVOLUTION OF FEDERAL SPECIAL EDUCATION FINANCE IN THE UNITED STATES (2014), https://files.eric.ed.gov/fulltext/ED556326.pdf (explaining that while federal funding for special needs has been a priority for Congress over the past few decades, the funding model is outdated and needs an overhaul to match current need levels).

[121] South Dakota v. Dole, 483 U.S. 203, 207, 208 (1987).

[122] *Id.* at 207.

[123] *See* MCCANN, *supra* note 120.

concerns can alleviate the need for staff to seclude and restrain students.[124] In the event that a student's behavior escalates, staff should be trained in crisis intervention and de-escalation techniques.[125] One study explored the effects of staff training that addressed "prevention strategies for avoiding intensive behavioral incidents" as well as strategies aimed at de-escalating student behaviors.[126] The study's findings indicate that an emphasis on "prevention, evidence-based behavior support, monitoring, and personnel training" helped reduce instances of "behavioral crisis" and helped promote the safety of both students and staff.[127] Mindfulness trainings are another way to help reduce the use of restraints and seclusion on public school students.[128] Studies have found a correlation between increased mindfulness and a reduction in the use of physical restraints on individuals with intellectual disabilities as well as a reduction of "hostile" behavior towards individuals with disabilities.[129] Therefore, federal funding must be used for mindfulness trainings and trainings on alternative measures such as de-escalation techniques and crisis intervention strategies. Federally-funded trainings will not only educate school staff, but they will also serve as a preventative measure in order to avoid behaviors that often lead to the use of restraints and seclusion in public schools across America.

B. Keeping Schools Accountable Through the Use of Enforcement Mechanisms

In addition to federal funding, enforcement mechanisms must be established in order to hold schools and staff accountable for their interactions with students with disabilities. Federal funding will ensure that schools will have sufficient resources for trainings and workshops, but without any enforcement mechanisms, schools

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[124] Couvillon, *supra* note 114.

[125] *See* MCCANN, *supra* note 120.

[126] Barbara Trader et al., *Promoting Inclusion Through Evidence-Based Alternatives to Restraint and Seclusion*, 42 RSCH. & PRAC. FOR PERSONS WITH SEVERE DISABILITIES 75, 80 (2017).

[127] *Id.* at 84.

[128] Nirbhay N. Singh et al., *Mindful Staff Can Reduce the Use of Physical Restraints When Providing Care to Individuals with Intellectual Disabilities*, 22 J. OF APPLIED RSCH. IN INTELL. DISABILITIES 194, 194 (2009).

[129] *Id. See* A. Willems, et al., *Towards a Framework in Interaction Training for Staff Working with Clients with Intellectual Disabilities and Challenging Behavior*, 60 J. OF INTELL. DISABILITIES RSCH. 134, 144–45 (2016).

will not be held accountable for following the practices established in such trainings.[130]

One proposed enforcement mechanism is the mandatory installation of cameras in classrooms with students with disabilities.[131] As discussed in the Wake County lawsuit,[132] cameras serve as a possible deterrent for staff who may mistreat students with disabilities. Furthermore, with cameras capturing the interactions between students and staff, repeated instances of mistreatment, such as in the *Q.T. v. Fairfax County School Board* case, may be avoided.[133] In 2015, Texas became the first state to require cameras in classrooms with students with disabilities if parents and guardians of these students requested them.[134] Although opponents of the use of cameras in classrooms voice privacy concerns, having cameras in special needs classrooms can deter staff misconduct and serve as a voice for voiceless and vulnerable students.[135] Moreover, these cameras would not be placed in areas where students and school staff have "a reasonable expectation of privacy," such as restrooms, but instead would be placed in areas such as classrooms and seclusions rooms.[136] Additionally, because the footage captured by these cameras would be considered an "education record," it would need to be made available to parents and guardians.[137] Although cameras may not resolve all of the concerns surrounding seclusion and restraints, at the very least, cameras hopefully will deter potential mistreatment of students by capturing both student and staff behavior in the classroom.

Another enforcement mechanism is the implementation of meetings between school staff and the parents and guardians of

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[130] PATRICK OBER, WHO IS HELD ACCOUNTABLE? AN ANALYSIS OF STATE RESTRAINT AND SECLUSION LAWS (2018).

[131] *See* Hui, *supra* note 105.

[132] *Id.*

[133] Truong, *supra* note 47.

[134] *Will Classroom Cameras Protect Students with Special Needs?*, PBS NEWSHOUR (Apr. 4, 2017, 7:20 PM), https://www.pbs.org/newshour/show/will-classroom-cameras-protect-students-special-needs.

[135] *Id.* Amy M. Steketee, *The Legal Implications of Surveillance Cameras*, 48 DIST. ADMIN. 55, 55–56 (2012).

[136] Steketee, *supra* note 135, at 56.

[137] The Family Educational Rights and Privacy Act requires public schools to make education records, which include footage captured on cameras, accessible to parents of students. *See id.*

students following incidents involving seclusion and/or restraints.[138] Teachers and staff should also be disciplined for failure to follow this protocol. Future federal legislation should mandate schools and school districts to schedule meetings with students' parents and guardians following the use of seclusion and/or restraints and to document such meetings. If parents have not been notified of the use of seclusion and/or restraints on their children but have reason to believe seclusion and/or restraints were used, the parents can request a meeting with school staff. In this way, parents will be kept abreast of any incident posing risks to their children and will have the opportunity to discuss their children's behavior leading up to the use of potentially harmful practices.

In California, for example, following the use of "emergency interventions," school administrators are required to document the incident and schedule a team meeting to discuss the incident.[139] However, in the event that school administrators fail to notify parents or schedule such meetings, disciplinary measures should be in place. Upon the first failure to adhere to these policies, school staff should receive a warning and for each subsequent failure, school staff should be suspended and their noncompliance should be documented on their employment record. As in the Wake County lawsuit, the teacher accused of mistreating a student with disabilities was allowed to continue teaching even after reports of incidents surfaced.[140] If staff noncompliance is documented and staff are suspended following noncompliance, future incidents resembling the Wake County case hopefully will be avoided.

V. CONCLUSION AND NEXT STEPS

Across America, students with disabilities will continue to be improperly secluded and restrained if more uniform and protective legislation is not enacted.[141] Many students with disabilities cannot

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[138] *See* Daniel Stewart, *How Do the States Regulate Restraint and Seclusion in Public Schools - A Survey of the Strengths and Weaknesses in State Laws*, 34 HAMLINE L. REV. 531, 561 (2011).

[139] CAL. EDUC. CODE § 56521.1(a), (g), (h) (Deering 2021).

[140] Hui, *supra* note 105.

[141] *See* Hannah Rappleye & Liz Brown, *Thirteen-Year-Old Activist with Autism Wants to Close Seclusion Rooms at Schools*, NBC NEWS (Nov. 23, 2018, 6:00 AM), https://www.nbcnews.com/news/education/thirteen-year-old-activist-autism-wants-close-seclusion-rooms-schools-n935356.

advocate for themselves,[142] so legislators must pass legislation that not only limits the use of seclusion and restraints in K-12 public schools, but also implements enforcement mechanisms and alternative practices for staff working with students with disabilities. The piecemeal approach currently taken by states has led to disparate practices and treatment of students with disabilities.[143] In light of recent efforts by states to pass and implement new laws,[144] all students, and particularly those with disabilities, should look forward to attending school and should not fear potential mistreatment at the hands of their own teachers. Students with disabilities are one of the nation's most vulnerable groups of individuals, and future federal legislation has the potential to protect and defend these individuals. Indeed, federal legislation has the potential to create a learning environment where students with disabilities are valued, respected, and welcomed with open arms—a far cry from the current abuse experienced by students at the hands of educators.

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[142] *See id.*

[143] *Id.*

[144] *See, e.g.*, Assemb. B. 2657, 2018 Assemb., Reg. Sess. § 1(49005) (Cal. 2018); 35 Va. Reg. Regs. 1617 (Feb. 18, 2019); Richards & Cohen, *supra* note 93.

SECOND-IN-TIME *BRADY* CLAIMS: PROSECUTORIAL MISCONDUCT AND THE AEDPA

EMILY E. WASHBURN†

I. INTRODUCTION

In elementary school, American students are taught the basic principles of the country's system of democracy, including the fundamental rights and freedoms guaranteed by the United States Constitution.[1] Though elementary students do not yet have the capacity to understand the nuances of our constitutional rights, elementary schools often emphasize certain enumerated rights, like freedom of speech, as well as foundational concepts of the American system, like "innocent until proven guilty."[2] We are told that the system is fair and just, but what happens when it is not?

Brandon Bernard was only eighteen years old when he was convicted of murder and sentenced to death, making him "one of the youngest people ever sentenced to death in federal court."[3] In June 1999, Bernard helped carry out a plan to commit a carjacking and robbery with four other teenagers, all members of the same gang; this plan ultimately resulted in the deaths of Todd and Stacie Bagley.[4] Although Bernard's involvement was minimal, he was

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[1] *See* Lori T. Meier et al., *We the People: Elementary Pre-Service Teachers and Constitutional Readability*, 24 SRATE J. 47, 47–48 (2014), https://files.eric.ed.gov/fulltext/EJ1057203.pdf.

[2] *See We the Civics Kids Lesson 3: The Bill of Rights*, NAT'L CONST. CTR., https://constitutioncenter.org/learn/educational-resources/lesson-plans/we-the-civics-kids-lesson-3-the-bill-of-rights (last visited June 27, 2021).

[3] Petition for Clemency Seeking Commutation of Death Sentence at 2, *In re* Brandon Bernard, OFF. OF THE PRESIDENT AND U.S. PARDON ATT'Y (Nov. 10, 2020).

[4] *Id.*

sentenced to death on one of three capital charges he faced.[5] The prosecution theorized that Bernard was one of the most dangerous members of the gang and posed an ongoing risk to the safety of others.[6]

In 2017, one of Bernard's accomplices, Tony Sparks, was granted a resentencing hearing.[7] At this hearing, it was revealed that the prosecution had withheld material evidence in violation of *Brady v. Maryland*,[8] and that Bernard had played a substantially lesser role in the robbery and carjacking than the prosecution's theory suggested.[9] Bernard argued that he was never given this evidence and that he could have used it to undermine the prosecution's theory of his involvement in the crime.[10] As a result, Bernard filed a second-in-time habeas petition pursuant to 28 U.S.C. § 2255 moving for relief from judgment.[11] However, the Fifth Circuit applied a "perverse and illogical rule"[12] that conflicted with the analysis set forth in Supreme Court precedent and, as a result, Bernard was denied due process of the law.[13] He was subsequently executed before his claims were fully considered on the merits.[14]

This Note discusses the unjust execution of Brandon Bernard by the federal government of the United States and argues that *Brady* violations should fall into a categorical exception from the bar against "second or successive" petitions, like the Supreme Court

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[5] *Id.* at 3. Bernard faced four counts, three of which were death penalty eligible. *Id.* at 10. The jury found Bernard guilty on all counts; however, for three of the four, he was sentenced to life imprisonment. *Id.* Bernard was only sentenced to death for the murder of Stacie Bagley. *Id.* at 13–14.

[6] *Id.* at 3–4.

[7] Sparks v. United States, W-11-CV-123, 2018 U.S. Dist. LEXIS 46485 (W.D. Tex. Mar. 19, 2018), *aff'd*, 941 F.3d 748 (5th Cir. 2019).

[8] 373 U.S. 83, 87 (1963).

[9] Bernard v. United States, 141 S. Ct. 504, 505 (2020) (Sotomayor, J., dissenting).

[10] Petition for Clemency Seeking Commutation of Death Sentence, *supra* note 3, at 4.

[11] United States v. Bernard, 820 F. App'x 309, 310 (5th Cir. 2020).

[12] *Bernard*, 141 S. Ct. at 505–07 (Sotomayor, J., dissenting) (stating the Fifth Circuit required Bernard to adhere to the rule for successive petitions and produce "newly discovered evidence . . . sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense").

[13] *Id.*

[14] *Brandon Bernard Executed in Trump's Final Days*, BBC NEWS (Dec. 11, 2020), https://www.bbc.com/news/world-us-canada-55261224.

recognized for *Ford*[15] claims in *Panetti v. Quarterman*.[16] Part II introduces and summarizes the "Great Writ" of habeas corpus, a fundamental right recognized in the United States Constitution, and the limitation that the Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes on that right.[17] Part III completes an in-depth analysis into Brandon Bernard's case and subsequent habeas petitions. Finally, Part IV argues that second-in-time habeas petitions alleging *Brady* violations should not be subject to the AEDPA's gatekeeping provisions set forth in 28 U.S.C. § 2244(b)(2),[18] but instead should follow the analysis set forth by the Supreme Court in *Panetti* in order to execute the full and fair administration of justice.[19]

II. HABEAS CORPUS AND THE AEDPA

A. The Creation and Evolution of Habeas Corpus

Habeas corpus, the "remedy used to bring a confined person before a court to ensure that the person's detention is not illegal," is a foundational concept of American jurisprudence.[20] The Framers of the U.S. Constitution recognized this concept to be so central to the idea of personal liberty that they enumerated the right to habeas corpus in the "Suspension Clause" of the Constitution.[21] As a result, habeas corpus is, and continues to be, "an important instrument to safeguard individual freedom against arbitrary executive power."[22]

Under the administration of President George Washington, the Judiciary Act of 1789 was signed into law, which authorized

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[15] Ford v. Wainwright, 477 U.S. 399 (1986).

[16] 551 U.S. 930, 934 (2007) (holding that *Ford*-based claims of incompetency to be executed were not barred by the AEDPA's prohibition against "second or successive" petitions).

[17] Nathan Nasrallah, *The Wall that AEDPA Built: Revisiting the Suspension Clause Challenge to the Antiterrorism and Effective Death Penalty Act*, 66 CASE W. RSRV. L. REV. 1147, 1148–51 (2016).

[18] 28 U.S.C. § 2244(b)(2).

[19] *See Panetti*, 551 U.S. 930.

[20] *The History of Habeas Corpus in America*, 2255 MOTION, https://2255motion.com/history-habeas-corpus-america (last visited Feb. 25, 2021).

[21] *Id.* The Suspension Clause states "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

[22] *What You Should Know About Habeas Corpus*, AM. C.L. UNION, https://www.aclu.org/other/what-you-should-know-about-habeas-corpus (last visited Feb. 25, 2020).

federal courts to issue a writ of habeas corpus for the first time.[23] It was not until decades later that this right of federal habeas corpus was extended to state prisoners through the Habeas Corpus Act of 1867, an amendment of the Judiciary Act of 1789.[24] In 1948, Congress enacted 28 U.S.C. § 2255.[25] Section 2255 allows federal prisoners to request that a court vacate, correct, or set aside a federal sentence on the grounds that it "was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack."[26] Essentially, this statute provided the necessary mechanism for federal prisoners to invoke habeas corpus challenges to their sentences.[27]

Initially, Congress did not impose a statute of limitations on motions filed under § 2255, as the statute's mechanism was most similar to the historical precedent of federal habeas corpus law.[28] The limits imposed on habeas review prior to 1996 included "limits on successive federal challenges to state custody, . . . a strict procedural default bar on claims and evidence not properly preserved in state court proceedings, and . . . [confining] habeas appeals to substantial federal questions."[29] However, that all changed with the passage of the AEDPA in April 1996.[30]

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[23] Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789); *see also Judiciary Act of 1789: Primary Documents in American History*, THE LIBR. OF CONG., https://www.loc.gov/rr/program/bib/ourdocs/judiciary.html (last visited Feb. 25, 2021); *The History of Habeas Corpus in America*, *supra* note 20.

[24] This provision amending the Judiciary Act is as follows: "[t]he several courts of the United States . . . shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (1867).

[25] *The History of Habeas Corpus in America*, *supra* note 20.

[26] 28 U.S.C. § 2255(a).

[27] *The History of Habeas Corpus in America*, *supra* note 20.

[28] Benjamin R. Orye III, *The Failure of Words: Habeas Corpus Reform, the Antiterrorism and Effective Death Penalty Act, and When a Judgment of Conviction Becomes Final for the Purposes of 28 U.S.C. 2255(1)*, 44 WM. & MARY L. REV. 441 (2002).

[29] James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK L. REV. 411, 416 (2001).

[30] *Id.*

B. The AEDPA's Limitations to Habeas Corpus Challenges

In January 1995, the "Gingrich Congress"[31] followed through with one of its election platform promises by introducing the "Effective Death Penalty Act" to Congress.[32] The bill was later combined with an Antiterrorism Act proposed by the Clinton administration in response to the bombing of the front of the Murrah Federal Building in Oklahoma City by Timothy McVeigh in April 1995, which resulted in the death of 168 people.[33] Although the bill faced strong opposition initially in both the Senate and the House, it ultimately passed with the support of President Clinton.[34] Thus, the enactment of the AEDPA was the result of a combination of three events: "Timothy McVeigh's twisted patriotism and disdain for 'collateral damage,' the Gingrich Revolution in its heyday, and the Clinton Presidency at the furthest point of its most rightward triangulation."[35]

The AEDPA incorporated many changes that severely restrict a prisoner's ability to bring a habeas corpus challenge.[36] Proponents of the AEDPA argued that prisoners were abusing their right to federal habeas corpus, which flooded the courts with frivolous petitions and prolonged the administration of punishment.[37] Thus, these restrictions were passed to achieve Congress's goal of "finality, federalism, and comity."[38] Most notable among these changes is § 2244(b)(2)(B) of the Act, which created a much higher standard for filing second or successive federal petitions:

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[31] *Id.* at 412. In the 1994 midterm elections, Newt Gingrich published his "Contract with America," which contained proposals for conservative bills. Lesley Kennedy, *The 1994 Midterms: When Newt Gingrich Helped Republicans Win Big*, HISTORY (Oct. 9, 2018), https://www.history.com/news/midterm-elections-1994-republican-revolution-gingrich-contract-with-america. This "Contract" contributed to the Republicans gaining control of both the House and the Senate for the first time in forty years. *Id.* Thus, the "Gingrich Congress" is a term coined to recognize this shift to Republican congressional control. *Id.*

[32] Liebman, *supra* note 29, at 412.

[33] *Id.*

[34] *Id.* at 413.

[35] *Id.*

[36] *Id.* at 416.

[37] Nasrallah, *supra* note 17, at 1151–52.

[38] *Id.* at 1151.

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[39]

These two narrow requirements in § 2244(b)(2)(B)(i) and (ii) have been described as creating "a nearly insurmountable bar against second or successive applications for habeas relief."[40] However, even though the AEDPA introduced this new, rigorous standard for "second or successive" habeas petitions, there is no definition included in the Act as to what constitutes a "second or successive" habeas petition.[41] Thus, courts are free to create their own definitions of this phrase, which has led to extremely different interpretations and applications across circuits.[42] Additionally, only a few months after the Act was enacted, the Supreme Court failed to provide a clear interpretation or definition of the AEDPA's "second or successive" language in *Felker v. Turpin*, where it "rejected a facial challenge to the constitutionality of AEDPA's restrictions on successive habeas petitions."[43] Consequently, circuit courts have applied different interpretations of the "second or successive" language that yield significantly diverging results.[44] Some circuits incorporate the abuse of writ standard that existed prior to the enactment of the AEDPA into the definition of "second or successive," interpreting the phrase as a term of art.[45] Yet other circuits

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[39] 28 U.S.C. § 2244(b)(2)(B).

[40] John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffman and King*, 96 CORNELL L. REV. 435, 442 (2011).

[41] Mark T. Pavkov, *Does "Second" Mean Second: Examining the Split Among the Circuit Courts of Appeals in Interpreting AEDPA's Second or Successive Limitations on Habeas Corpus Petitions*, 57 CASE W. RSRV. L. REV. 1007, 1008 (2007).

[42] *Id.* at 1009.

[43] *Id.* (referencing Felker v. Turpin, 518 U.S. 651 (1996)).

[44] *Id.*

[45] *Id.*

only interpret the phrase's meaning to include the plain meaning of the terms "second or successive."[46]

C. The AEDPA's "Second or Successive" Language's Application to Brady *and* Napue *Claims in Various Circuits*

In *Brady v. Maryland*, the Supreme Court held that due process is violated when the government withholds "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[47] Prior to *Brady*, the Supreme Court had established in *Napue v. Illinois* that the government may not knowingly use false evidence or testimony to obtain a conviction.[48] In certain instances, violations of the rules set forth in *Brady* and *Napue* are not discovered until years later, often after prisoners have already filed their first habeas petition under § 2255.[49] As a result, multiple circuits have been forced to address the issue of whether a second-in-time *Brady* claim is subject to the AEDPA's strict rules applying to "second or successive" petitions set forth in § 2244(b)(2)(B).[50]

The Fifth Circuit, like other circuits,[51] has held that a prisoner's habeas corpus "application is not second or successive simply

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[46] *Id.*

[47] 373 U.S. 83, 87 (1963). In *Brady*, the defendant was found guilty of first-degree murder and sentenced to death along with his accomplice. *Id.* at 84. In his initial trial, Brady admitted to participating in the crime, but claimed that his accomplice was the one who actually murdered the victim; Brady's counsel conceded that he was guilty of first-degree murder, asking that the jury spare him from a death sentence. *Id.* Before the trial, Brady's counsel requested the statements the prosecution had from Brady's accomplice; the prosecution complied with the request for the most part but did not give Brady's counsel a statement in which Brady's accomplice confessed to the murder. *Id.* It was not discovered until after Brady had been tried, convicted, sentenced, and his sentence was affirmed that the prosecution had withheld this key information. *Id.*

[48] Napue v. Illinois, 360 U.S. 264, 269 (1959). In *Napue*, the prosecution failed to correct false testimony that was given at trial by one its key witnesses. *Id.* at 265. This led to the conviction of the defendant for murder. *Id.* at 266.

[49] *See, e.g.*, Scott v. United States, 890 F.3d 1239, 1245–46 (11th Cir. 2018).

[50] *Id.* at 1245; *see also* Petition for Rehearing En Banc, United States v. Bernard, (5th Cir. Oct. 23, 2020) (No. 19-70021).

[51] The Fifth Circuit follows the majority of jurisdictions here (the First, Second, Third, Eighth, Ninth, and Tenth Circuits) by interpreting the phrase "second or successive" to be a term of art that incorporates the pre-AEDPA abuse of writ standards. *See* Pavkov, *supra* note 41, at 1021–22. The Eleventh Circuit also follows the majority interpretation in some panel decisions. *Id.*

because it follows an earlier federal petition."[52] This conclusion is based upon the language in 28 U.S.C. § 2244, which sheds light on the purpose of the AEDPA—"to preclude prisoners from repeatedly attacking the validity of their convictions and sentences."[53]

These circuits then turn to the language of § 2244(b)(2)(B), which states that a federal review may be granted to a prisoner's claim if "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" or the newly discovered evidence would establish that "no reasonable fact finder would have found the applicant guilty of the underlying offense."[54]

Herein lies the problem. The Fifth Circuit has wrongly interpreted the language of § 2244(b)(2)(B)(i) to mean that claims based on a factual predicate not previously discovered, but that existed at the time, are successive.[55] Essentially, the Fifth Circuit's rule states that "if the purported defect existed, or the claim was ripe, at the time of the prior petition, the later petition is likely to be held successive even if the legal basis for the attack was not."[56] The result of this rule is that second-in-time *Brady* and *Napue* claims, although undiscovered, are barred under the Fifth Circuit's interpretation of the AEDPA's "second or successive" language.[57] The reasoning for this result is that even though the claims were not discovered until after the prisoner filed his first habeas corpus application, they were technically available and not preserved at the time of the first application.[58]

III. A CASE STUDY: BRANDON BERNARD

A. Facts and Procedural History

On June 21, 1999, Brandon Bernard, then eighteen years old, helped four of his fellow teenage gang members, Christopher Vialva, Christopher Lewis, Terry Brown, and Tony Sparks, carry out

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[52] *In re* Cain, 137 F.3d 234, 235 (5th Cir. 1998).

[53] *Id.*

[54] 28 U.S.C. § 2244(b)(2)(B).

[55] Garcia v. Quarterman, 573 F.3d 214, 222 (5th Cir. 2009). The Fifth Circuit strays from the majority view in its interpretation here by following the "plain wording of § 2244(b)." *See* Pavkov, *supra* note 41, at 1022.

[56] *Garcia*, 573 F.3d at 222.

[57] *Id.*

[58] *Id.*

a carjacking and robbery, which ultimately resulted in the murders of Todd and Stacie Bagley.[59] Vialva, Lewis, and Sparks met on June 20, 1999, to plan a robbery, where they decided they would ask someone for a ride, then steal the person's personal effects and money and force the victim into the trunk of the car.[60] The next day, they approached Bernard and Brown, two fellow gang members, to help them carry out their plan.[61]

The group initially only had one gun but decided that they needed a second to execute the crime, so Bernard provided one of his own.[62] The group then drove around town to various parking lots at local convenience stores in order to locate a victim.[63] They saw Todd Bagley using a pay phone outside of a convenience store, so Lewis and Sparks approached him to ask for a ride, to which Todd agreed.[64] Vialva joined Lewis and Sparks, climbing into the backseat of the Bagleys' car; after a few minutes of driving, Vialva and Sparks pulled out their guns and directed Todd to pull over.[65] At this point, Vialva, Sparks, and Lewis robbed the Bagleys and forced them into the trunk of the car.[66] Bernard and Brown were not present for the carjacking or the robbery.[67]

Although the initial plan was just to rob the victim, after locking the Bagleys in the trunk for several hours, Vialva alerted the other men that he had to kill the Bagleys since they had seen his face.[68] Upon Vialva's instructions, Brown and Bernard doused the interior of the car with lighter fluid, then Vialva shot both of the Bagleys.[69] Bernard set the car on fire, and the group ran down a hill to their getaway car.[70] They were caught soon after while trying to push the car out of a muddy ditch.[71]

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[59] United States v. Bernard, 299 F.3d 467, 471–73 (5th Cir. 2002).

[60] *Id.* at 471.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 471–72.

[65] *Id.* at 472.

[66] *Id.*

[67] *Id.* at 472 n.2.

[68] *Id.*

[69] *Id.* at 472–73.

[70] *Id.* at 473.

[71] *Id.*

Both Vialva and Bernard were indicted on four counts: carjacking, conspiracy to commit murder, the murder of Todd Bagley, and the murder of Stacie Bagley.[72] The prosecution gave notice that it would seek the death penalty for both Vialva and Bernard.[73] The three other individuals who participated in the crime were all minors at the time and, thus, were not eligible for capital sentences.[74]

During the sentencing phase, the prosecution's case for the death penalty against Bernard was based in part "on the theory that he was 'likely to commit criminal acts of violence in the future.'"[75] The prosecution "repeatedly invoked [Bernard's] gang affiliations" and "emphasiz[ed] that all members of his gang were supposedly 'equal.'"[76]

As a result, the jury found Vialva and Bernard guilty on all counts on June 1, 2000.[77] On June 8, 2000, the jury recommended a sentence of death for Vialva on Counts One, Three, and Four but recommended a sentence of death against Bernard only on Count Four.[78] The district court gave Vialva a life sentence for Count Two, but death on the other three counts.[79] The court gave Bernard a life

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[72] *Id.* The full explanation of the counts are as follows: "carjacking and aiding and abetting the same in violation of 18 U.S.C. §§ 2, 2119 ('Count One'); conspiracy to commit murder in violation of 18 U.S.C. §§ 1111, 1117 ('Count Two'); the murder of Todd Bagley, within the special maritime and territorial jurisdiction of the United States, and aiding and abetting the same in violation of 18 U.S.C. §§ 2, 1111 ('Count Three'); and the murder of Stacie L. Bagley, within the special maritime and territorial jurisdiction of the United States, and aiding and abetting the same in violation of 18 U.S.C. §§ 2, 1111 ('Count Four')." *Id.*

[73] *Id.*

[74] Petition for Clemency Seeking Commutation of Death Sentence, *supra* note 3, at 10. Christopher Lewis was fifteen years old at the time of the crime. *Id.* He testified for the prosecution and was sentenced to only twenty years in prison for his active participation in the abduction, robbery, and kidnapping of the Bagleys. *Id.* at 14. Terry Brown, seventeen years old at the time of the crime, testified for the prosecution and received twenty years in prison. *Id.* Brown, like Bernard, was not present during the carjacking but helped to douse the car in lighter fluid. *Id.* Both Lewis and Brown have completed their sentences. *Id.* Tony Sparks, sixteen years old at the time of the crime, actively participated in all aspects of the crime, like Lewis. *Id.* at 15. He was originally given a life sentence that was later reduced to thirty-five years. *Id.*

[75] Bernard v. United States, 141 S. Ct. 504, 504 (2020) (Sotomayor, J., dissenting) (quoting Electronic Case Filing in No. 2:20–cv–00616, Doc. 3 (SD Ind., Nov. 24, 2020) (App. Vol. I), p. 46 (ECF)).

[76] *Id.* at 504.

[77] United States v. Bernard, 299 F.3d 467, 473 (5th Cir. 2002).

[78] *Id.*

[79] *Id.*

sentence for Counts One, Two, and Three, but death on Count Four.[80]

Bernard appealed his conviction and sentence, which were both affirmed.[81] Bernard then filed his first 28 U.S.C. § 2255 habeas petition.[82] In his first habeas petition, Bernard alleged ineffective assistance of counsel, a *Brady* claim,[83] cumulative error, and a Fifth Amendment claim.[84] Later, Bernard moved for relief from judgment under Federal Rule of Civil Procedure 60(b)(6), requesting to reopen his initial § 2255 habeas petition on the basis that Judge Walter Smith, the judge for Bernard's trial and first habeas proceeding, "was unfit to conduct proceedings because of 'impairments'" and errors that he made in the previous proceedings he oversaw.[85] The district court held that the motion was a "second or successive" petition under § 2255 and, thus, the court dismissed it for lack of jurisdiction.[86] The court of appeals then denied the certificate of appealability.[87]

B. Bernard's Most Recent Habeas Petition

In a resentencing proceeding for one of Bernard's accomplices, Tony Sparks,[88] Sergeant Sandra Hunt testified as a witness for the prosecution.[89] Sergeant Hunt was the former head of the

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[80] *Id.*

[81] *Bernard*, 299 F.3d at 473, *cert. denied*, 539 U.S. 928 (2003).

[82] United States v. Bernard, 762 F.3d 467, 470 (5th Cir. 2014).

[83] *Id.* at 480. The *Brady* claim in this habeas petition included assertions that the government failed to turn over information about Brown's criminal history, mental health, and drug use that could have been used to impeach him at Bernard's original trial. *Id.* at 481.

[84] *Id.* at 482.

[85] United States v. Vialva, 904 F.3d 356, 358 (5th Cir. 2018).

[86] *Id.*

[87] *Id.*

[88] *See* Sparks v. United States, W-11-CV-123, 2018 U.S. Dist. LEXIS 46485 (W.D. Tex. Mar. 19, 2018). Sparks was originally sentenced to life in prison without the possibility of parole in April 2000. *Id.* at *1. However, he filed an Unopposed Successive Motion to Vacate, Set Aside, or Correct Sentence after the Supreme Court's decision in *Miller v. Alabama*, which held that that the Eighth Amendment's prohibition on cruel and unusual punishment is violated by imposing mandatory life imprisonment without the possibility of parole for those under eighteen at the time of their crimes. *Id.* at *1 n.1; *see* Miller v. Alabama, 567 U.S. 460 (2012). The U.S. District Court for the Western District of Texas granted Spark's motion and held a resentencing hearing for him in accordance with the *Miller* decision. *Sparks*, 2018 U.S. Dist. LEXIS 46485, at *1 n.1.

[89] Bernard v. United States, 141 S. Ct. 504, 504 (2020) (Sotomayor, J., dissenting) (quoting Electronic Case Filing in No. 2:20–cv–00616, Doc. 3 (SD Ind., Nov. 24, 2020) (App. Vol. I), p. 46 (ECF)); *see also Sparks*, 2018 U.S. Dist. LEXIS 46485.

gang unit for the Killeen Police Department in Killeen, Texas, during the time of the murders.[90] In her testimony, she stated that she went over the gang's structure with the prosecution before Bernard's trial and informed them that it was composed of a "thirteen-tier hierarchy with Bernard at the very bottom."[91] In addition, she provided a diagram denoting the gang's structure that she had developed with a government informant.[92] The prosecution failed to disclose "Sergeant Hunt's opinion that [Bernard] was on the periphery of the gang [and] the existence of the diagram illustrating his subordinate role."[93]

After learning of Sergeant Hunt's testimony in *Sparks*,[94] Bernard moved for relief from judgment pursuant to § 2255 and, in the alternative, Rule 60(b).[95] In this motion, Bernard alleges "for the first time that the government (1) failed to disclose favorable evidence in violation of *Brady* . . . and (2) presented false testimony at trial in violation of *Napue*."[96] Bernard argued that with Sergeant Hunt's testimony, he would have been able to "undermine[] the prosecution's case that he was an equal participant in gang activity and posed the same risk of future dangerousness as other gang members."[97] The district court held that Bernard's motion was successive but, pursuant to § 1631, transferred it to the Fifth Circuit Court of Appeals.[98]

The Fifth Circuit Court of Appeals applied its dangerous and wrongful interpretation of the language of § 2244(b)(2)(B)(i) in this case, stating that "if a prisoner's later-in-time petition raises a new claim based on evidence that the prisoner alleges was undiscoverable at the time of his earlier petition, the petition is successive."[99] Consequently, the court held that Bernard's motion fell into this category of claims and, thus, was successive.[100] The Fifth

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[90] *Bernard*, 141 S. Ct. at 504 (Sotomayor, J., dissenting) (quoting Electronic Case Filing in No. 2:20–cv–00616, Doc. 3 (SD Ind., Nov. 24, 2020) (App. Vol. I), p. 46 (ECF)).

[91] *Id.* at 505.

[92] *Id.*

[93] *Id.*

[94] *See Sparks*, 2018 U.S. Dist. LEXIS 46485.

[95] United States v. Bernard, 820 F. App'x 309, 310 (5th Cir. 2020).

[96] *Id.*

[97] *Bernard*, 141 S. Ct. at 505 (Sotomayor, J., dissenting).

[98] *Bernard*, 820 F. App'x at 310.

[99] *Id.*

[100] *Id.* at 3.

Circuit's decision to deny this motion without giving proper consideration to Bernard's *Brady* and *Napue* claims on the merits adheres to extremely dangerous precedent that the Fifth Circuit continues to uphold.[101]

IV. SECOND-IN-TIME *BRADY* VIOLATIONS SHOULD NOT BE SUBJECT TO THE HIGHER STANDARD ENFORCED BY CIRCUIT COURTS' INTERPRETATIONS OF THE AEDPA'S "SECOND OR SUCCESSIVE" HABEAS APPLICATIONS

A. Panetti v. Quarterman*: A Prior Supreme Court Exception to§ 2244(b)(2)'s Bar on "Second or Successive" Habeas Petitions*

In his motion for relief, Bernard argued that *Panetti v. Quarterman*[102] required the Fifth Circuit Court of Appeals to conclude that his motion fell into a narrow exception where second-in-time claims are deemed non-successive.[103]

In *Panetti*, a prisoner was convicted of capital murder and sentenced to death.[104] The prisoner filed a second-in-time federal habeas petition that alleged a *Ford* claim,[105] challenging his mental competency to be executed.[106] The government argued that because the prisoner failed to raise a *Ford*-based claim in his first § 2254 petition, [107] the district court lacked jurisdiction.[108] The Supreme Court in *Panetti* laid out three considerations that guided its analysis and led to its conclusion: "(1) the implications for habeas practice of adopting a literal interpretation of 'second or successive[;]' (2) the purposes of the AEDPA; and (3) the Court's prior

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[101] *Id.* at 4.

[102] *See* Panetti v. Quarterman, 551 U.S. 930 (2007).

[103] *Bernard*, 820 F. App'x at 310.

[104] *Panetti*, 551 U.S. at 930.

[105] Ford v. Wainwright, 477 U.S. 399, 399 (1986). In *Ford*, the Supreme Court held that the Eighth Amendment to the U.S. Constitution prohibits the government from carrying out the death penalty upon insane prisoners; thus, the petitioner is entitled to an evidentiary hearing on the question of mental competency to determine whether his sentence should be carried out. *Id.*

[106] *Panetti*, 551 U.S. at 930.

[107] 28 U.S.C. § 2254 is the statute available for writ of habeas corpus for state prisoners. 28 U.S.C. § 2254.

[108] *Panetti*, 551 U.S. at 931.

decisions in the context of the pre-AEDPA abuse-of-writ doctrine."[109]

As to the first consideration, the State argued that a federal court can review a prisoner's *Ford* claim when it becomes ripe but only if the prisoner preserved the claim by including it in his initial habeas petition.[110] This approach, as the Court noted, is flawed because it requires defense attorneys "to file unripe (and in many cases, meritless) *Ford* claims in each and every Section 2254 application."[111] Thus, the Court stated that when analyzing the AEDPA's phrase "second or successive," the court must consider the implications of habeas practice when construing the extent of § 2254.[112] Ultimately, the Court concluded "that Congress did not intend the provisions of the AEDPA addressing 'second or successive' habeas petitions to govern a filing in the unusual posture presented here: a Section 2254 application raising a *Ford* based incompetency claim filed as soon as that claim is ripe."[113]

Next, the Court stated that its conclusion was further evidenced by the AEDPA's enumerated purposes of "further[ing] the principles of comity, finality, and federalism."[114] The Court specified that Congress's purposes when enacting the AEDPA and the practical effects of judicial holdings regarding these claims should inform its interpretation of AEDPA provisions, especially in instances where petitioners would potentially "forever los[e] their opportunity for any federal review of their unexhausted claims."[115]

Finally, the Court analyzed whether the petitioner's actions constituted an abuse of the writ.[116] The Court noted that there are exceptions to second-in-time habeas petitions that are barred by the terms of § 2244 and, in instances such as this, the Court is "hesitant to construe a statute . . . in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to benefit no party."[117] Thus, the Court held that the

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[109] Petition for Writ of Certiorari at 9, Anthony Donato v. United States, No. 18-7792 (2nd Cir. Feb. 1, 2019).

[110] *Panetti*, 551 U.S. at 943.

[111] *Id.*

[112] *Id.* at 945.

[113] *Id.*

[114] *Id.* (quoting Miller-El v. Cockrell, 537 U.S. 322, 337 (2003)).

[115] *Id.* at 945–46 (quoting Rhines v. Weber, 544 U.S. 269, 275 (2005)).

[116] *Id.* at 947.

[117] *Id.*

statutory bar set forth in § 2244(b)(2) against "second or successive" habeas applications "does not apply to a *Ford* claim brought in an application filed when the claim is first ripe."[118]

B. Fifth Circuit's Wrongful Application of Panetti *to Bernard's Case*

Similar to *Panetti*, Bernard's motion inherently hinges on a court's interpretation of the gatekeeping provisions of the AEDPA, specifically in § 2244(b)(2).[119] The Fifth Circuit ultimately concluded that the factual predicate for Bernard's *Brady* claim existed even before he filed his first habeas petition, so his second-in-time petition was successive.[120] Thus, the Fifth Circuit determined that the discoverability of the facts was determinative of whether Bernard met the requirement for filing a successive petition under § 2244(b)(2).[121] Because § 2244(b)(2) establishes such a high evidentiary standard, the court held that it did not have jurisdiction and held that it was an unauthorized successive habeas petition.[122]

The Fifth Circuit also attempted to distinguish *Panetti* from Bernard's *Brady* claims through its interpretation of the "ripeness" doctrine.[123] The Supreme Court establishes a twofold inquiry for questions regarding the ripeness doctrine where courts are required "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[124] In its opinion, the Fifth Circuit reasoned that the Supreme Court's holding in *Panetti*—that the second-in-time petition was not successive—was based on the fact that the *Ford* claim (or factual predicate) could not have existed at the time the first petition was filed and, thus, was not ripe.[125] In contrast, the Fifth Circuit held that the factual predicate in Bernard's case, his *Brady* claims, existed before Bernard filed his first habeas petition.[126] Thus, the Fifth Circuit held that Bernard's *Brady* claims were ripe at the time he filed

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[118] *Id.*

[119] United States v. Bernard, 829 F. App'x 309 (5th Cir.), *cert. denied*, 141 S. Ct. 504 (2020).

[120] *Id.* at 311.

[121] *Id.*; *see also* Blackman v. Davis, 909 F.3d 772, 778–79 (5th Cir. 2018).

[122] *Bernard*, 829 F. App'x at 311; *see also* Blackman, 909 F.3d at 780.

[123] *Bernard*, 829 F. App'x 310–11.

[124] Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977).

[125] *Bernard*, 829 F. App'x 310–11.

[126] *Id.* at 311.

his first habeas petition and, since he failed to preserve the claims by including them in his first petition, § 2244(b)(2) barred the successive habeas petition.[127]

Although the Supreme Court denied Bernard's subsequent application for a stay of execution and petition for a writ of certiorari, Justice Sotomayor wrote a dissent in which she analyzed the Fifth Circuit's ruling.[128] Essentially, Justice Sotomayor argued that the Court's analysis in *Panetti* applied to Bernard's case because it was not Congress's intention nor does it align with the goals of the AEDPA "to subject *Brady* claims to the heightened standard of Section 2244(b)(2)."[129] If the Court were to do so, it would adversely affect habeas practice and infringe on the constitutional rights of prisoners.

C. The Supreme Court's Reasoning in Panetti *Should Apply to Second-in-Time Habeas Petitions that Allege* Brady *Violations*

The standard that must be met for a *Brady* violation is a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," or, more simply, a "reasonable probability of a different result."[130] However, the Fifth Circuit's rule requires that the withheld evidence must "establish by clear and convincing evidence that . . . no reasonable factfinder would have found the applicant guilty of the underlying offense," or else the *Brady* claim is barred by the circuit's interpretation of the AEDPA's "second or successive" language.[131]

By instituting and upholding this rule, the Fifth Circuit directly contradicts the analysis set forth by Supreme Court precedent established in *Panetti*. It does not contemplate the three considerations set forth in *Panetti*.[132]

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[127] *Id.*

[128] Bernard v. United States, 141 S. Ct. 504 (2020) (Sotomayor, J., dissenting).

[129] *Id.* at 506–07.

[130] Kyles v. Whitley, 514 U.S. 419, 434–35 (1995).

[131] 28 U.S.C. § 2244(b)(2)(B)(ii).

[132] *See Bernard*, 141 S. Ct. at 506 (Sotomayor, J., dissenting).

i. Application of the First *Panetti* Factor to Bernard's Case

If the Fifth Circuit were to apply the first consideration set forth in *Panetti*[133] to the *Brady* claims in Bernard's case, it would quickly become evident that barring second-in-time *Brady* motions under § 2244(b)(2) "would 'produce troublesome results,' 'create procedural anomalies,' and 'close [the] door[] to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent.'"[134] It is unmistakable that Congress, in enacting the AEDPA, did not wish to prevent prisoners from filing *Brady* claims that could potentially reduce their sentences or save their lives.[135] Such a goal would directly conflict with the principles of habeas corpus and due process preserved in the U.S. Constitution. But for the *Brady* violations by the prosecution in Bernard's case, he would have had the chance to reduce his sentence to a life sentence, rather than being executed.[136]

ii. Application of the Second *Panetti* Factor to Bernard's Case

Continuing the application of the *Panetti* factors to the *Brady* claims in Bernard's case, the second consideration[137] also strongly contradicts the Fifth Circuit's rule.[138] As in *Panetti*, the AEDPA's concern for finality would not be implicated with *Brady* claims because federal courts would only be required to resolve claims at the time

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[133] *See id.* at 506–507. The first consideration is the effect of adopting a literal interpretation of 'second or successive" on habeas practice. Petition for Writ of Certiorari, *supra* note 109, at 9.

[134] Panetti v. Quarterman, 551 U.S. 930, 946 (2007) (quoting Castro v. United States, 540 U.S. 375, 380 (2003)).

[135] *See Bernard*, 141 S. Ct. at 507.

[136] Petition for Clemency Seeking Commutation of Death Sentence, *supra* note 3, at 3–4. *See also Jurors and Appellate Prosecutor Say Teen Offender Brandon Bernard Should Not be Executed*, DEATH PENALTY INFO. CTR. (Dec. 8, 2020), https://deathpenaltyinfo.org/news/jurors-and-trial-prosecutor-say-teen-offender-brandon-bernard-should-not-be-executed. Five of the original trial jurors in Bernard's case stepped forward before his execution stating that they support commuting his sentence as a result of the new evidence that diminishes Bernard's role in the crimes which had been suppressed by the prosecution. *Id.*

[137] The second consideration includes an evaluation of the purposes the AEDPA was enacted to serve. *See Panetti*, 551 U.S. at 945–46; *see also Bernard*, 141 S. Ct. at 506–507 (Sotomayor, J., dissenting).

[138] *See generally* United States v. Bernard, 820 F. App'x 309 (5th Cir. 2020).

of first filing when they come to light.[139] Further, *Brady* violations require a preliminary showing that there is a "reasonable probability of a different result" before it is allowed to proceed.[140]

iii. Application of the Third *Panetti* Factor to Bernard's Case

Finally, although *Brady* violations are technically "ripe" before the first habeas petition is filed, a second-in-time habeas petition that alleges previously undiscovered *Brady* violations does not constitute an abuse of the writ.[141] This is similar to *Panetti* in that if the reasoning of the Fifth Circuit were to apply, which would require the defense to preserve a claim that is factually unsupported at the time of filing the first habeas petition, then it would create a flood of "claims to be raised as a mere formality, to the benefit of no party" nor the judicial system as a whole.[142] Instead, it would undermine the principles of comity, finality, and federalism which are foundational to the AEDPA.[143]

Not only does the Fifth Circuit's rule conflict with Supreme Court precedent[144] but this interpretation is also extremely dangerous, especially in the context of capital cases like Bernard's. This rule allows prosecutors to avoid accountability and their duty to administer justice by concealing their violations, at least until after a prisoner's first habeas petition has been resolved.[145] As Judge Wynn stated in his concurrence in *Long v. Hooks*, "to subject *Brady* claims to the heightened standard of Section 2244(b)(2) is to reward investigators or prosecutors who engage in the unconstitutional suppression of evidence with a 'win.'"[146] Consequently, the Fifth Circuit rule allows a prisoner to be stripped of his right to a fair trial[147] and his right to challenge his conviction through the writ of habeas corpus as well.[148] This was the case for Bernard—his *Brady* claim was

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[139] *Panetti*, 551 U.S. at 946.

[140] *Bernard*, 141 S. Ct. at 506.

[141] *Id.*

[142] *Panetti*, 551 U.S. at 947.

[143] *See id.*

[144] *See id.*

[145] *See generally* United States v. Bernard, 820 F. App'x 309 (5th Cir. 2020).

[146] 972 F.3d 442, 486 (4th Cir. 2020) (Wynn, J., concurring).

[147] U.S. CONST. amend. V.

[148] U.S. CONST. art. I, § 9.

dismissed before it was able to be heard on its merits, and he was subsequently executed.[149]

V. CONCLUSION

The impact of a rule like the one utilized by the Fifth Circuit is that it undermines the concept of justice itself, which is foundational to American society. It allows prosecutorial misconduct to become the basis for convicting and sentencing individuals, depriving them of "life, liberty, or property, without due process of law."[150] Furthermore, this rule and others like it corrode the trust and faith of citizens in the American system of justice. If the judicial system's purpose is not to enforce the constraints of the U.S. Constitution and protect citizens' individual rights enumerated within it, our democracy fails.

Brady violations are distinguishable by nature from other second-in-time habeas claims because they are undiscoverable, even with diligence on the part of the defense attorney, unless the prosecution discloses them.[151] In order to further the AEDPA's purpose of finality as well as the constitutional guarantees for procedural fairness, courts need to recognize an exception to the § 2244(b)(2) bar on "second or successive" habeas petitions, as the Supreme Court did in *Panetti*.[152] As it is well known, "procedural fairness is necessary to the perceived legitimacy of the law."[153]

Brandon Bernard's right to life was taken from him without due process of the law. Although there is no guarantee that Bernard's death sentence would have been overturned if his second-in-time habeas petition had been examined under the correct analysis, he would have at least had the chance to be heard fully on the merits of his claim—the chance that his life could have been spared. Habeas corpus is a right that is crucial to safeguard individuals against arbitrary executive power, as stated at the beginning of this Note.[154] Brandon Bernard was explicitly denied that right in the

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[149] *See* United States v. Bernard, 820 F. App'x 309, 311 (5th Cir. 2020).

[150] U.S. CONST. amend. V.

[151] *See generally* Brady v. Maryland, 373 U.S. 83 (1963).

[152] Panetti v. Quarterman, 551 U.S. 930 (2007).

[153] KEVIN BURKE & STEVE LEBEN, PROCEDURAL FAIRNESS: A KEY INGREDIENT IN PUBLIC SATISFACTION, 44 CT. REV. 4, 7 (2008) (citing Tom. R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006)).

[154] *What You Should Know About Habeas Corpus*, *supra* note 22.

most dire, life-or-death situation because the Fifth Circuit refused to follow the analysis set forth in *Panetti* by the Supreme Court.[155] The denial of this right goes against the very foundational concepts of American democracy that we are taught in elementary school.

[155] *See* United States v. Bernard, 820 F. App'x 309, 310 (5th Cir. 2020).