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FROM THE EDITOR-IN-CHIEF

Dear Readers,

It is with great pride that we present the second issue of the third volume of the *Criminal Law Practitioner.* This edition features both student and practitioner pieces to cover a variety of key topics. The *Criminal Law Practitioner* is the American University Washington College of Law's only student-run publication dedicated to addressing key criminal law issues that are helpful to practicing attorneys, judges, legislators, and law students.

This edition would not have been made possible without the hard work of our junior staffers and our executive board. I would like to take this time to congratulate all of our staffers who are graduating this semester. Your work for the *Practitioner* has been invaluable. Additionally, I would like to welcome the incoming board. Next year, Megan Doyle will be joining us as Executive Editor; Peter Brostowin and Joseph Collins III will be joining us as Managing and Deputy Managing Editor; Cheline Schroeder and William Warmke will be joining us as Articles and Deputy Articles Editor; Braxton Marcela and Emily Wolfford will be joining us as Publication and Deputy Publications Editors; and Aaron Garavaglia and Samantha Dos Santos will be joining us as Blog and Deputy Blog Editors. I have no doubt that the new executive staff will work hard to continue the great work that their predecessors have done for the *Criminal Law Practitioner*.

Finally, I would like to thank you: the readers. Providing you with quality articles that address important topics and controversies within the criminal law field is why we exist. If you are interested in reading more of our work, check out our blog at our new website: crimlawpractitioner.com.

The staff of the *Criminal Law Practitioner* hope that you enjoy this issue.

Sincerely,

Kieley Sutton
Editor-In-Chief

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What's in the Box?

Re-conceptualizing Computers as Containers, Metadata as Contents of That Container, and Applying Fourth Amendment Protections

Christopher Michels

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Introduction

In 1967, the United States Supreme Court handed down its watershed decision in *Katz v. United States*,[1] establishing the principle that the Fourth Amendment[2] protects people from government searches without a warrant in places where a person has "exhibited an actual (subjective) expectation of privacy," and that expectation is "reasonable."[3] That same year, researchers at the Advanced Research Projects Agency met with representatives of the Department of Defense to discuss possible computer protocols that could be used to share data over long-distance using computers.[4] Little did the Justices in *Katz* know, these computer protocols would soon revolutionize society's concept of privacy as they developed into what is today recognized as the Internet.[5]

Every day, nearly three billion people throughout the world connect to the Internet to share and collect data.[6] In 2013, over 74% of people in the United States used the Internet in their household.[7] In addition, by 2014, 64% of adults in the United States had a smartphone[8] capable of accessing the Internet.[9] Explaining the importance of using the Internet has become a lesson in the obvious. While much of the use of the Internet is innocuous, the Internet is also commonly used for several insidious purposes, namely, for furthering crimes.[10] The Government has an interest in monitoring these nefarious acts and, if needed, using information gathered from this monitoring to obtain an arrest warrant or to use as evidence in a criminal trial.[11]

Unique Fourth Amendment implications are raised when the Government wants to monitor what persons do on the Internet because the Internet is not a tangible place that can be observed using traditional police tactics, but is instead a system of shared data that exists in a complex system of servers, routers, and client computers.[12] One of the key functions of the Internet has been its ability to remember what the user has previously done.[13] Through the use of "cookies" web browsers save the sites their user visits: Gmail saves a record of the e-mails users send,[14] Facebook records when a person

1 *See generally* Katz v. United States, 389 U.S. 347 (1967).

2 U.S. Const. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

3 *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

4 Barry M. Leiner, et. al., *Brief History of the Internet*, Internet Society, http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet.

5 *Id.*

6 *The World in 2014: Facts: ICT Facts and Figures*, Int'l Telecomm. Union (May 5, 2014), http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2014-e.pdf.

7 Thom File & Camille Ryan, *Computer and Internet Use in the United States: 2013*, U.S. Census Bureau (Nov. 2014), http://www.census.gov/content/dam/Census/library/publications/2014/acs/acs-28.pdf.

8 *Smartphone*, Oxford Dictionaries, http://www.oxforddictionaries.com/us/definition/american_english/smartphone (last visited Apr. 10, 2016) (defining smartphones as "a mobile phone that performs many of the functions of a computer, typically having a touchscreen interface, Internet access, and an operating system capable of running downloaded applications.").

9 *Mobile Technology Fact Sheet*, Pew Res. Ctr., http://www.pewInternet.org/fact-sheets/mobile-technology-fact-sheet/ (last visited Apr. 10, 2016).

10 *See* Internet Crime Complaint Ctr, FBI 2013, *2013 Internet Crime Report*, Fed. Bureau of Investigation 14-16 (2014) http://www.ic3.gov/media/annualreport/2013_IC3Report.pdf.

11 *See* Michael O'Dwyer, *The Next-Generation Tech Helping the Police Fight Crime*, Forbes (July 21, 2014), http://www.forbes.com/sites/ptc/2014/07/21/the-next-generation-tech-helping-the-police-fight-crime/ (discussing the use of computer technology in police work).

12 *See infra* Section I.C.

13 *See infra* notes 119-122 and accompanying text.

14 *Google Terms of Service*, Google, http://www.google.com/intl/en/policies/terms/ (last visited Apr. 10, 2016).

views a picture,[15] Netflix can recommend shows and movies based on what users have previously watched,[16] and the list goes on.[17]

This information is collectively referred to as "metadata" because it is data regarding the data a user accesses on the Internet.[18] While private companies normally store this metadata, the National Security Administration has recently been attempting to store metadata of American Internet users.[19] This storage of computer metadata has drawn criticism from privacy advocates and the public because of the potentials for abuse.[20]

This metadata is already stored en masse by private companies.[21] This storage is not out of a benevolent desire to make using the Internet convenient, but because this data is valuable to advertisers who buy the metadata and use it to make Internet advertisements more targeted to the individual viewing the advertisement.[22] While these advertisements can be distracting, the general consensus among Internet users is that targeted advertisements are an inevitable, and perhaps even necessary, price for the use of the Internet.[23]

The question thus arises as to whether there is a reasonable expectation of privacy for things people do on the Internet. People accept that advertisers may see what they look at on the Internet, but they also do not generally want individuals or the government monitoring their whereabouts on the Internet.[24] This dichotomy strains the traditional *Katz* analysis of a reasonable expectation of privacy.[25] This Note attempts to alleviate that strain by reconceptualizing a computer as a container and metadata as information that is stored in that container.[26]

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15 *Facebook Data Use Policy: Cookies, Pixels and Other Similar Technologies*, Facebook, https://www.facebook.com/about/privacy/cookies (last visited Apr. 10, 2016).

16 *Netflix Privacy Policy*, Nextflix, https://www.netflix.com/PrivacyPolicy (last visited Apr. 10, 2016).

17 See *infra* Part I.C for a discussion on how these technologies work.

18 The term "metadata" is also used to describe data about use of a cellular phone. See *infra* Part I.C.

19 James Ball, *NSA Stores Metadata of Millions of Web Users for up to a Year, Secret Files Show*, Guardian, (Sept. 30, 2013 12:35 PM), http://www.theguardian.com/world/2013/sep/30/nsa-americans-metadata-year-documents. *See also* Jewel v. NSA, No. 08-04373, 2015 U.S. Dist. LEXIS 16200 (C.D. Cal. Feb. 10, 2015) (dismissing a case challenging the constitutionality of the NSA's program).

20 Susan Page, *Poll: Most Americans Now Oppose the NSA Program*, USA Today, (Jan. 20, 2014 3:10 PM), http://www.usatoday.com/story/news/politics/2014/01/20/poll-nsa-surveillance/4638551 (showing polling on an NSA program to store metadata). *See also* Carrie Dann, *Obama: Government Shouldn't Hold Metadata in Bulk*, NBC News, (Mar. 27, 2014, 9:14 AM), http://www.nbcnews.com/storyline/nsa-snooping/obama-government-shouldnt-hold-metadata-bulk-n63651 (arguing against the program); Bruce Schneider, *Let the NSA Keep Hold the Data: Giving it to Private Companies Will Only Make Privacy Intrusion Worse*, Slate, (Feb. 14, 2014, 3:03PM), http://www.slate.com/articles/technology/future_tense/2014/02/nsa_surveillance_metadata_the_government_not_private_companies_should_store.html (supporting the program over the alternatives of private party storage).

21 *See infra* notes 143-148 and accompanying text.

22 Ron Frankel, *Why Metadata Will Define the Future of TV*, Mashable, (Aug. 8, 2011), http://mashable.com/2011/08/08/tv-everywhere-metadata (envisioning the usefulness of metadata for television broadcaster use online); Clint Pumphrey, *How Do Advertisers Show Me Custom Ads,* HowStuffWorks, http://computer.howstuffworks.com/advertiser-custom-ads.htm (discussing how the information is used to make targeted online advertisement); Cotton Delo, *Facebook to Use Web Browsing History for Ad Targeting*, Adage (June 12, 2014), http://adage.com/article/digital/facebook-web-browsing-history-ad-targeting/293656/ (discussing how Facebook in specific will be using more metadata for more targeted advertisements).

23 *See* Olivier Sylvain, *Failing Expectations: Fourth Amendment Doctrine in the Era of Total Surveillance*, 49 Wake Forest L. Rev. 485, 490-91 (2014) (discussing that advertisers will see individual's activities on the Internet).

24 *Id.*

25 *See infra* Section II.D.

26 *See infra* Part IV.

By applying the Fourth Amendment protections for containers, the analysis for metadata affords clear protections to computer metadata from warrantless government searches.[27]

Part I of this Note discusses the background and development of Fourth Amendment protection against warrantless searches as well as the development of the Internet and the use of metadata.[28] Part II describes the current circuit split and outlines the different applications of Fourth Amendment protections to metadata and the Internet.[29] Part III analyzes the split and the shortcomings of current Fourth Amendment applications to metadata.[30] Part IV proposes and discusses a new analytical framework for Fourth Amendment application by suggesting that computers are containers and metadata is the content of that container.[31]

I. Technology and the Fourth Amendment

Before analyzing how the Fourth Amendment protects computers, it is important to look at how Fourth Amendment protection against unreasonable searches has evolved along with technology. First, it is important to examine how the Supreme Court analysis of the Fourth Amendment has evolved with technology.[32] Second, it is important to examine how Fourth Amendment protections extend to unreasonable searches of containers.[33] Finally, a background on how the Internet works is needed to understand current problems with applying the Fourth Amendment to current technologies.[34]

A. Reasonable Expectations of Privacy and Warrantless Searches

The modern application of the Fourth Amendment to warrantless searches began with *Katz v. United States*.[35] In *Katz*, the Supreme Court first acknowledged the Fourth Amendment "protects people and not places."[36] Justice Harlan articulated the two-prong test for when a search is unreasonable: "[F]irst, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[37]

The *Katz* doctrine has received criticism for its lack of any bright-line rule, especially when it is applied to new technology.[38] Further, courts seem to interpret the reasonable expectation of privacy prong of *Katz* as based heavily on property law.[39] What the courts view as "reasonable" is often at odds with what the legislature or most people want to be considered private.[40]

This reliance on principles of property law for Fourth Amendment protection is readily apparent in the majority opinion of the

27 *See infra* Part IV.
28 *See infra* Part I.
29 *See infra* Part II.
30 *See infra* Part III.
31 *See infra* Part IV.
32 *See infra Section* I.A.
33 *See infra Section* I.B.
34 *See infra* Section I.C.
35 389 U.S. 347 (1967).
36 *Id.* at 351.
37 *Id.* at 361 (Harlan, J., concurring); *see also* United States v. Jones, 132 S. Ct. 945, 950 (2012) (noting that the Supreme Court applied Justice Harlan's analysis from *Katz*).
38 *See* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich. L. Rev. 801, 822 (2004) (calling the *Katz* doctrine a "Rorschach test" that "can support a narrow or broad reading equally well"); Jed Rubenfield, *The End of Privacy*, 61 Stan. L. Rev. 101, 106 (2008) (calling the *Katz* doctrine as "ineluctably circular").
39 Kerr, *supra* note 38, at 815-27.
40 *Id.* at 838.

recent decision of *United States v. Jones*.[41] The majority relied heavily on the pre-*Katz* "physical intrusion" or "trespass" doctrine of Fourth Amendment protection.[42] In *Jones*, the Court also acknowledged that *Katz* extended Fourth Amendment protections beyond common-law trespasses.[43] One such extension exists for when the government uses technology "not in general public use" in order to view a constitutionally protected area that is not in plain view.[44] These protected areas are any area in which a person has placed his or her effects and has "manifested an expectation that the contents would remain free from public examination."[45] Protected areas are not static, but can move with the person and remain protected because "the Fourth Amendment protects people, not places."[46] One such protected area is in an opaque container that a person controls.[47]

B. Reasonable Expectations of Privacy and Containers

The general rule for searches under the Fourth Amendment is that "in cases where the securing of a warrant is reasonably practicable, it must be used."[48] The Supreme Court has recognized a general protection for objects a person keeps within the curtilage of his or her own property.[49] This protection also extends to hotel rooms[50] and rental storage lockers that are kept outside of the home.[51] Unless the object is in plain view from outside the curtilage, the object is protected from warrantless police searches.[52] Plain view does not necessarily equate to visibility with the naked eye, but to objects that are visible using technology that is available for "general public use."[53]

However, once a person leaves the curtilage of her home, the objects she carries with her do not necessarily receive the same protection as they would in the home.[54] The reasoning behind this distinction is that obtaining a war-

41 132 S. Ct. 945 (20132012).

42 *Id.* at 949 ("The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."). *See also*, Florida v. Jardines, 133 S. Ct. 1409, 1413 (2013) (holding that the use of a drug-sniffing dog within the curtilage of the defendant's home without a warrant was a physical intrusion and was unconstitutional).

43 *Jones*, 132 S. Ct. at 952. ("The *Katz* reasonable-expectation-of-privacy test has *added to*, not *substituted for*, the common-law trespassory test."). *See also* United States v. Knotts, 460 U.S. 276, 286 (1983) (Brennan, J., concurring) ("[W]hen the government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment . . . .").

44 Kyllo v. United States, 533 U.S. 27, 29-30, 40 (2001) (noting the police used, without a warrant, a thermal imager to detect infrared radiation emitting from heat lamps used to grow marijuana inside the defendant's house.

45 United States v. Chadwick, 433 U.S. 1, 11 (1977).

46 *Katz v. United States*, 389 U.S. at 351.

47 *See generally Chadwick*, 433 U.S. 1.

48 Carroll v. United States, 267 U.S. 132, 156 (1925).

49 *Jardines*, 133 S. Ct. at 1409.

50 Stoner v. California, 376 U.S. 483, 489 (1964).

51 *See United States v. Karo*, 468 U.S. 705, 721 n. 6 (1984) (noting that defendants "surely . . . had a reasonable expectation of privacy in their own storage locker."). *But see* United States v. Lnu, 544 F.3d 361 (1st Cir. 2008) (holding that a defendant did not have a reasonable expectation of privacy in a rented storage unit after he failed to pay rent for several months).

52 *Compare* Oliver v. United States, 466 U.S. 170 (1984) (holding that police searching an open field is not an unreasonable search), *and* California v. Ciraolo, 476 U.S. 207 (1986) (holding that it was not unreasonable for police officers to survey a house from aircraft over 500 feet above the defendant's house because they were in "within public navigable airspace" and "from this point they were able to observe plants readily discernible to the naked eye as marijuana"), *with Jardines*, 133 S. Ct. 1409 (holding that a search was unreasonable when evidence was found by a drug-sniffing dog while within the defendant's curtilage without a warrant).

53 Kyllo v. United States, 533 U.S. 27, 28 (2001).

54 *See Carroll v. United States*, 267 U.S. 132 (1925).

rant for searching a movable object is impractical.[55] However, these objects are not without protection.[56] The Fourth Amendment generally provides protection to the possessor of every container that conceals its contents from plain view because there is a reasonable expectation of privacy of objects contained within opaque containers.[57] This protection from searches only extends to the person who is the actual controller of the container.[58]

The first case to recognize Fourth Amendment protection of containers outside the home was *Ex Parte Jackson*, which recognized the Fourth Amendment protection from warrantless searches of all containers delivered in the mail.[59] This long-standing precedent bars the government from opening without a warrant any sealed container that is sent in the mail.[60] Even if the mail was delivered to the wrong recipient, the protection from warrantless searches continues.[61] However, if the package is damaged or opened by a third party so that the contents are in plain view, the Fourth Amendment protection dissipates.[62]

The Fourth Amendment has also generally extended to opaque, portable containers.[63] The Court has defined a container as "any object capable of holding another object."[64] For example, in *United States v. Chadwick*, the defendant was transporting a 200-pound footlocker when the police, suspecting it contained marijuana, searched the container without a warrant.[65] The Supreme Court held this search unconstitutional.[66] The Court explained that the defendant had the same reasonable expec-

[55] *Id.* at 154 ("[T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.").

[56] *See* United States v. Chadwick, 433 U.S. 1, 7 (1977), *abrogated by* California v. Acevedo, 500 U.S. 565, 580 (1991) ("The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained"). *See also* Bond v. United States, 529 U.S. 334 (2000) (holding that the physical manipulation of a person's bag by a law enforcement officer was an unreasonable search).

[57] Robbins v. California, 453 U.S. 420, 427 (1981) plurality opinion) ("[U]nless the container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment."). *But see* United States v. Ross, 456 U.S. 798, 824 (1982) (overruling *Robbins* in the context of searching an automobile and holding that the scope of a warrantless search of an automobile "is defined by the object of the search and the places in which there is probable cause to believe that [contraband] may be found."); *Acevedo*, at 580 ("The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.").

[58] Rakas v. Illinois, 439 U.S. 128, 155-56 (1978) (holding that passengers do not have legitimate expectation of privacy in the glove compartment or area under the seat of a car in which they were merely passengers and have no standing to challenge evidence found through searching these areas).

[59] 96 U.S. 727, 733 (1877) ("The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household.").

[60] *Id.* However, if the government does have a valid warrant, they may open the package searching for contraband, then reseal it and deliver the package to its intended recipient. *Illinois v. Andreas*, 463 U.S. 765, 771 (1983).

[61] *See* Walter v. United States, 447 U.S. 649 (1980) (holding that the FBI cannot remove film from a container without a warrant and view it when the package had been delivered to the wrong person).

[62] *See* United States v. Jacobsen, 466 U.S. 109 (1984).

[63] United States v. Chadwick, 433 U.S. 1 (1977) *abrogated by* California v. Acevedo, 500 U.S. 565 (1991).

[64] New York v. Belton, 453 U.S. 454, 461 n.4 (1981).

[65] *Chadwick*, 433 U.S at 4.

[66] *Id.* at 15-16.

tation of privacy in placing items in a locked footlocker as if he would have kept the items in his home.[67]

The Fourth Amendment protection similarly extends to unreasonable searches of opaque lens containers,[68] purses,[69] filing cabinets,[70] and briefcases.[71] No protection, however, exists for containers that have a "single purpose," such as a kit of burglar tools or a gun case, which "by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance."[72]

Fourth Amendment protection from warrantless searches extends beyond mere visual inspection of containers.[73] In *Bond v. United States*, the Supreme Court examined a case in which an officer examined the exterior of a person's luggage by squeezing the outside of the bag and noticing the contours of a "brick" of amphetamines.[74] The Court determined this was an unconstitutional search,[75] reasoning that even though a person expects her luggage will be touched and handled by other persons, there is no reasonable expectation that the container would be handled in an "exploratory manner."[76]

However, there are several exceptions to the warrant requirement.[77] The number of exceptions has grown so much that it has led one Justice to comment that the warrant requirement has "become so riddled with exceptions that it [is] basically unrecognizable."[78] For example, exceptions exist for searching closed containers for when the container had been thrown away,[79] when searching containers "incident to arrest,"[80] when conducted during an automobile search,[81] when part of a border search,[82] when part of an administrative search of regulated businesses,[83] when there are exigent circumstances for the search,[84] when part of an inventory search,[85] when the search is of children at school,[86] and when the search was conducted in objectively reasonable reliance on binding appellate precedent.[87] Even with so many exceptions, any warrantless search cannot extend in scope beyond what the officer had probable cause to search.[88]

[67] *Id.* at 11 ("By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause.").

[68] United States v. Donnes, 947 F.2d 1430, 1438 (10th Cir. 1991).

[69] United States v. Monclavo-Cruz, 662 F.2d 1285, 1287 (9th Cir. 1981).

[70] O'Connor v. Ortega, 480 U.S. 709 (1987).

[71] United States v. Freire, 710 F.2d 1515, 1519 (11th Cir. 1983) ("Few places outside one's home justify a greater expectation of privacy than does the briefcase.").

[72] Arkansas v. Sanders, 442 U.S. 753, 764 n.13 (1979) *abrogated on other grounds by* California v. Acevedo, 500 U.S. 565 (1991). *But see* United States v. Gust, 405 F.3d 797 (9th Cir. 2005) (holding a gun case was a constitutionally protected container because it was not readily identifiable as a gun case).

[73] Bond v. United States, 529 U.S. 334 (2000).

[74] *Id.* at 335.

[75] *Id.* at 339.

[76] *Id.*

[77] *See generally* Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 Mich. L. Rev. 1468 (1985) (listing exceptions to the Fourth Amendment).

[78] *Acevedo*, 500 U.S. at 582-583 (Scalia, J., concurring).

[79] California v. Greenwood, 486 U.S. 35 (1988).

[80] Chimel v. California, 395 U.S. 752, 763 (1969) (holding that police officers may search an arrestee's person and area "within his immediate control").

[81] United States v. Ross, 456 U.S. 798, 823-24 (1982).

[82] United States v. Martinez-Fuente, 428 U.S. 543, 557-59 (1976).

[83] United States v. Biswell, 406 U.S. 311, 314-15 (1972).

[84] Kentucky v. King, 563 U.S. 452, 459-60. (2011).

[85] Illinois v. Lafayette, 462 U.S. 640, 643-44 (1983).

[86] New Jersey v. T.L.O., 469 U.S. 325, 347 (1985).

[87] Davis v. United States, 564 U.S. 229 (2011).

[88] United States v. Ross, 456 U.S. 798, 825 (1982) ("The scope of the warrantless search authorized by [an]

Yet another, more far-reaching exception is the third-party doctrine.[89] The doctrine was first introduced to hold evidence that was gathered by government informants whom the defendant had confided in constitutionally admissible, such as an associate who is wearing a recording device[90] or an undercover agent.[91] The basic rationale was put forward in *Katz* when the Court acknowledged that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[92] This information, while only revealed to one person, is the same as revealing the information to the public because the Fourth Amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrong doing will not reveal it."[93]

The third-party doctrine extended beyond things confided to actual people to include records stored in the course of business, such as bank records[94] and automated telephone pen registers.[95] Pen registers are automated mechanical devices used by telephone companies that recorded the numbers a person dials on a telephone.[96] Pen registers were used by telephone companies for the purposes of checking billing operations, detecting fraud and preventing violations of law.[97]

The Supreme Court in *Smith v. Maryland* reasoned that accessing these pen register records without a warrant is reasonable since there is no reasonable expectation of privacy in the phone numbers dialed by a person.[98] The Court also noted that no property interest of the defendant was violated since the pen registers were installed on the phone company's property.[99] While expanding the third-party doctrine to automated pen registers, the Court was cautious to point out the "limited capabilities" of the pen register since pen registers do not reveal any of the contents of the communication.[100]

While the third-party doctrine is still controlling law, as technology advances, the third-party doctrine has drawn heavy criticism.[101] Several states' courts have backed away from the third-party doctrine or outright abandoned it.[102] In addition, one Justice of the Su-

exception is no broader and no narrower than a magistrate could legitimately authorize by warrant.").

89 *See, e.g.*, Hoffa v. United States, 385 U.S. 293, 301-04 (1966); United States v. White, 401 U.S. 745, 748 (1971).

90 *Hoffa*, 385 U.S. at 311.

91 Lewis v. United States, 385 U.S. 206 (1966).

92 Katz v. United States, 389 U.S. 347, 351 (1967). *See also White*, 401 U.S. 745, 748 (holding the third-party doctrine to be constitutional post-*Katz*).

93 *Hoffa*, 385 U.S. at 302.

94 United States v. Miller, 425 U.S. 435, 453 (1976).

95 Smith v. Maryland, 442 U.S. 735 (1979).

96 *Id*. at 736 n. 1 (defining a pen register as "a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed.").

97 United States v. N. Y. Tel. Co., 434 U.S. 159, 174-75 (1977).

98 442 U.S. at 742.

99 *Id*. at 741.

100 *Id.* at 742.

101 *See generally,* Sylvain, *supra* note 23 (arguing that the third party exception offers little privacy protection for many activities on the Internet); Stephen E. Henderson, *After United* States v. Jones, *After the Fourth Amendment Third Party Doctrine*, 14 N.C.J.L & Tech. 431 (2013) (arguing that the Supreme Court may be shifting away from the third-party exception); Stephen E. Henderson, *The Timely Demise of the Fourth Amendment Third Party Doctrine*, 96 Iowa L. Rev. Bull. 39 (2011) (arguing that the third-party doctrine will soon be defunct). *But see* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 Mich. L. Rev. 561 (2009) (arguing that the third-party exception is still viable).

102 Stephen E. Henderson, *Learning from Fifty States: How to Apply the Fourth Amendment and its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 Cath. U.L. Rev. 373, 376 (2006) (finding that eleven states had rejected the federal third-party doctrine and ten more have possibly rejected it).

preme Court has openly called into question the validity of the third-party doctrine in the digital age.[103] This distaste for the third-party doctrine likely draws heavily on the copious amount of information people give out to third parties online and how little of that information they actually expect humans to access.[104]

C. The Internet and Metadata

To fully understand the intricacies of privacy expectations in the digital era, it is important to take a step back and describe exactly what the Internet is and how the computers people use every day interact with the Internet. According to the U.S. Census Bureau in 2014, 78.9% of all United States households have a computer at home, with 94.8% of those homes using their computer to connect to the Internet.[105] In addition, 70.6% of individuals 25–34 years of age use smartphones.[106] Smartphones have become such a ubiquitous part of Americans' daily lives that the Supreme Court has noted "the proverbial visitor from Mars might conclude they were an important feature of human anatomy."[107] While the Internet is used at a nearly universal level, how exactly it works is rarely explained.

To begin, the Internet is not so much a place as much as it is a thing. When two or more computers are connected and share data, they create a network or an "internet." [108] The "Internet" is the name given to the large infrastructure of these connections. [109] This data and information contained within the Internet is most commonly found on the platform known as the World Wide Web.[110]

There is also an important distinction between the Internet and the way users *access* the Internet.[111] Every computer that is connected to the Internet is part of a network that is usually created and maintained by a private company known as an Internet Service Provider or ISP who connects the computer's network to the larger network of networks that is the Internet.[112] Every machine that connects to the Internet has a unique identifying number, called an Internet Protocol Address or an IP

[103] United States v. Jones, 132 S. Ct. 945, 957 (2013) (Sotomayor, J., concurring) ("[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information disclosed to third parties . . . . This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.").

[104] *Id.* ("[P]eople reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."). *See also* Sylvain, *supra* note 23 (stating that consumers are of two minds when it comes to sharing information, one being that consumers are subjectively concerned with privacy, the other that we are willing to share personal information with Internet service providers); Matthew Tokson, *Automation and the Fourth Amendment*, 96 Iowa L. Rev. 581, 616-17 (2011) (arguing that the third-party doctrine should apply if the information is "observed" by an actual person, not just an automated process).

[105] United States Census Bureau, *Computer & Internet Trends in America*, United States Census Bureau (Oct. 28, 2014), http://www.census.gov/hhes/computer/files/2012/Computer_Use_Infographic_FINAL.pdf.

[106] *Id.*; *Smartphone*, *supra* note 8 (defining smartphones as "a mobile phone that performs many of the functions of a computer, typically having a touchscreen interface, Internet access, and an operating system capable of running downloaded applications.").

[107] Riley v. California, 134 S. Ct. 2473, 2484 (2014).

[108] *In re* DoubleClick Inc. Privacy Lit., 154 F. Supp. 2d 497, 501 (S.D.N.Y. 2001).

[109] *Id.* ("The Internet is the physical infrastructure of the online world: the servers, computers, fiber-optic cables and routers through which data is shared online.").

[110] *Id.* ("The [World Wide] Web is data: a vast collection of documents containing text, visual images, audio clips and other information media that is accessed through the Internet.").

[111] *Id.* ("The Internet is the physical infrastructure of the online world: the servers, computers, fiber-optic cables and routers through which data is shared online.").

[112] Jeff Tyson, *How Internet Infrastructure Works*, How Stuff Works, http://web.stanford.edu/class/msande91si/www-spr04/readings/week1/Howstuffworks.htm. (last visited Apr. 10, 2016).

Address.[113] This number is present regardless of whether the computer is a "client" computer, which requests data, or is a "server," which provides data.[114]

These servers can take up a large physical space.[115] The reason for their colossal size is due to the fact that the servers often need to store an immense amount of data.[116] This data includes the content that is found on the Internet, as well as data regarding the access to that content.[117] This data regarding the access to data is called "metadata."[118]

Metadata is often cumulated using a computer program known as a "cookie," which tracks an Internet user's actions.[119] Popular computer servers, such as Facebook and Google, use these cookies to track their users' actions.[120] By tracking a user's activities online, companies are able to aggregate and sell the metadata to advertisers,[121] who are able to take the metadata and target advertisements based on what the individual user has been looking at online.[122] It is possible to access the Internet without having some cookies tracking one's movements by using a web browser's privacy mode,[123] or by using data encryption.[124] However, it is extremely difficult to eliminate all cookies, as any activity online will bring more cook-

[113] *Id.*

[114] *Id.* ("A server has a static IP address that does not change very often. A home machine that is dialing up through a modem, on the other hand, typically has an IP address assigned by the ISP every time you dial in. That IP address is unique for your session – it may be different the next time you dial in. This way, an ISP only needs one IP address for each modem it supports, rather than one for each customer.").

[115] *See* Mark Prigg, *Inside the Internet: Google Allows First Ever Look at the Eight Vast Data Centres That Power the Online World*, Daily Mail (Oct. 19, 2012 9:55 AM), http://www.dailymail.co.uk/sciencetech/article-2219188/Inside-Google-pictures-gives-look-8-vast-data-centres.html. (noting that Google maintains hundreds of thousands of servers, located in data centers ranging from a warehouse in Iowa, a converted paper mill in Finland, and other large spaces.).

[116] Jeffrey Dean & Sanjay Ghemawat, *MapReduce: Simplified Data Processing on Large Clusters*, 51 Comms. ACM 113, 3 (2008) (stating in 2008, Google was processing over twenty petabytes (a petabyte is 1000 terabytes or 10 bytes to the 15th power) of data per day).

[117] *See infra* notes 143-148 and accompanying text.

[118] *Metadata*, Oxford Dictionaries, http://www.oxforddictionaries.com/us/definition/american_english/metadata. For examples of metadata, *see*, *e.g., A Guardian Guide to Your Metadata*, The Guardian, http://www.theguardian.com/technology/interactive/2013/jun/12/what-is-metadata-nsa-surveillance#meta=1111111. (last visited Sept. 3, 2015) (Metadata is defined as "[a] set of data that describes and gives information about other data.").

[119] Christina Tsuei, *How Advertisers Use Internet Cookies to Track You*, Wall St. J., (July 30, 2010), http://www.wsj.com/video/how-advertisers-use-Internet-cookies-to-track-you/92E525EB-9E4A-4399-817D-8C4E6EF68F93.html.

[120] *Facebook Data Use Policy*, *supra* note 15; Google Privacy Policy, Google, http://www.google.com/intl/en/policies/privacy/ (last visited Apr. 10, 2016) (describing Google's uses of cookies).

[121] *Google Privacy Policy*, *supra* note 120 ("[Google] may share, non-personally identifiable information publicly and with our partners – like publishers, advertisers or connected sites. For example, we may share information publicly to show trends about the general use of our services.); *Facebook Data Use Policy: Cookies, Pixels and Other Similar Technologies*, Facebook, https://www.facebook.com/about/privacy/cookies (last visited Apr. 10, 2016) ("[Facebook] may provide [advertising] partners with information about the reach and effectiveness of their advertising without providing information that personally identifies you, or if we have aggregated the information so that it does not personally identify you."); *Netflix Privacy Policy*, Netflix, https://www.netflix.com/PrivacyPolicy (last visited Apr. 10, 2016) ([Netflix] may provide analysis of and information from or about our users in the aggregate or otherwise in anonymous form to partners, Service Providers and other third parties.").

[122] *Id.*

[123] *Google Support Forum*, Google, https://support.google.com/chrome/answer/95464?hl=en. (last visited Apr. 10, 2016) (For example, Google Chrome has an "incognito mode." In this browser, Google will not save cookies, however the information that is gathered by websites a person accessed can still be saved by that server).

[124] *See* Jeffrey Rosen, The Unwanted Gaze 173-78 (2000) (discussing how encryption works and services that provide online encryption).

ies, and if cookies are disabled, many websites will not function properly.[125]

Metadata from computers is similar to the metadata that is stored by phone service providers.[126] The term *metadata* is used to refer to both data regarding phone usage and data regarding computer usage.[127] While differences exist between the two, both fall within the same federal statutory definition under the Stored Communications Act (SCA).[128] Metadata reveals similar information for both cell phones and computer usage.[129] For example, metadata accrued when using e-mail services will include the sender's and recipient's e-mail addresses, the unique IP address of the sender, the date and time the e-mail was sent, and whether the e-mail made it to the recipient.[130] Metadata for search-engine queries includes the search terms used, which web pages appeared as a result, and which pages from those results were accessed.[131] Telephone metadata includes the phone numbers dialed, the location in relation to a cell tower, duration of calls, and in the case of smartphones, any computer metadata it creates while using the Internet.[132] While metadata may contain information that may be individualized or personal to the user, neither computer nor telephone metadata contains any true "content" of messages.[133]

There is a paradox of how people expect privacy while using the Internet.[134] On one hand, people would like to be, at least occasionally, anonymous while on the Internet.[135] In 2013, 86% of Internet users took steps to remain anonymous online, with 41% of users setting their browser to disable or turn off cookies.[136] The data that Internet users felt was most important to keep private was the content of e-mail (83%).[137] A majority of people also felt it is important to keep private certain metadata, such as the people they exchange e-mail with (78%), the files you download (74%), websites

[125] *See Mozilla Support: Disable Third-party Cookies in Firefox to Stop Some Types of Tracking by Advertisers*, Mozilla, https://support.mozilla.org/en-US/kb/disable-third-party-cookies (last visited Apr. 10, 2016) (stating that many e-mail services will not work without third-party cookies).

[126] *Guardian*, *supra* note 118.

[127] *Id.*

[128] *See* 18 U.S.C. § 2703(c)(A)(B) (2009) ("[a] governmental entity may require a provider of electronic communication service or remote computing service to disclose *a record or other information* pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity . . . obtains a warrant . . . [or] obtains a court order . . . ") (emphasis added). 18 U.S.C. § 2510(15) (2015) (defining electronic communication services as "any service which provides to users thereof the ability to send . . . electronic communications."); 18 U.S.C. § 2510(12) (2015) (defining electronic communication as "any transfer of . . . signals, . . . sounds, [or] data . . . of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce.").). *See also United States v. Perrine*, 518 F.3d 1196, 1199-1201 (10th Cir. 2008) (stating computer metadata falls within the Electronic Communications Privacy Act); *In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600, 607 (5th Cir. 2013) (stating cell phone metadata falls within the Stored Communications Act).

[129] *See supra* note 126.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] Barton Gellman, *U.S. Surveillance Architecture Includes Collection of Revealing Internet, Phone Metadata*, Wash. Post, June 15, 2013, http://www.washingtonpost.com/investigations/us-surveillance-architecture-includes-collection-of-revealing-Internet-phone-metadata/2013/06/15/e9bf004a-d511-11e2-b05f-3ea3f0e7bb5a_story.html. *But see* Matthew J. Tokson, *The Content/Envelope Distinction in Internet Law*¸ 50 Wm. & Mary L. Rev. 2105, 2123-31 (2009) (arguing that metadata can reveal just as much as content).

[134] Sylvain, *supra* note 23, at 493.

[135] Lee Raine et al, *Anonymity, Privacy, and Security Online*, Pew Res. International Project 1 (Sept. 5, 2013), http://www.pewInternet.org/2013/09/05/anonymity-privacy-and-security-online/.

[136] *Id.*

[137] *Id.*

you browse (69%), and the time of day you are online (50%).[138]

On the other hand, a majority of people (59%) do not believe it is possible to be completely anonymous online.[139] In addition, Internet users appear to give up their reasonable expectation of privacy by accepting clickwrapped contracts during the user's online use.[140] Accepting a contract is important for many courts' analysis of whether any expectation of privacy is reasonable.[141] Scholars have argued that these contracts give away privacy rights without the individual even knowing they are doing it, because people "agree" to the terms of use without reviewing them.[142]

For example, by using Google's services, a person is agreeing to Google's "Terms of Service," which allows them to collect the following information:[143] search queries, IP addresses, cookies, actual location information (such as GPS signals sent by a mobile device), and personal information (such as names, e-mail addresses, telephone numbers or credit card information given to Google).[144] Google also reserves the right to share information if it has a good-faith belief the disclosure is reasonably necessary to "meet any applicable law, regulation, legal process or enforceable government request."[145]

One possible explanation for why people simultaneously believe that they are revealing information while still keeping the information private is because of the infinitesimal likelihood that any actual person will see that information.[146] The processing and storage of the vast amount of metadata is automated out of efficiency.[147] For example, online bookstore Amazon lists the "Automatic Information" that it stores and the software it uses to gather and analyze the metadata.[148] It is the gathering and aggregation of metadata that makes the Internet possible.[149] However, to what extent metadata is protected from government searches is a question that has not yet been clearly answered.

[138] *Id.* This information falls within the definition of metadata. *See supra* note 132.
[139] Raine, et al., *supra* note 135.
[140] Brandon Crowther, *(Un)reasonable Expectation of Digital Privacy*, 2012 B.Y.U. L. Rev. 343, 353-54 (2012).
[141] *See, e.g.*, *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 763-65 (2010) (determining that even if there is an expectation of privacy in text messages, a contract between the plaintiff and his governmental employer made a search of plaintiff's cell phone reasonable); *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000) (holding that a remote search of defendant's work computer did not violate the Fourth Amendment because of a contract with the employer that allowed the employer to audit his computer).
[142] Crowther, *supra* note 140, at 354.
[143] *Google Terms of Service*, Google, http://www.google.com/intl/en/policies/terms/ (last visited Apr. 10, 2016). ("By using our Services, you agree that Google can use such data in accordance with our privacy policies.").
[144] *Google Privacy Policy*, *supra* note 120.
[145] *Id.*
[146] *See* Toksonssory test.rson of the use of their services f privacy), , , *supra* note 104, at 604-09.
[147] *Id.* at 603 ("ISPs . . . automatically collect and process enormous amounts of data about users' web-surfing habits. ISPs maintain logs of the IP addresses of each website a user visits as well as the volume of data transmitted to and from the user. Some service providers even monitor and retain the address of each individual page a user visits. Many affiliated groups of websites collect the URLs of each page a user sees within their group. These service providers and website networks then automatically use this information to target advertisements to the individual user, or sell the information to third-party advertisers for the same purpose.").
[148] *Privacy Notice*, Amazon, http://www.amazon.com/gp/help/customer/display.html?nodeId=468496#GUID-A2C397AB-68FE-4592-B4A2-7550D73EEFD2__SECTION_87C837F9CCD84769B4AE2BEB14AF4F01 (last visited Apr. 10, 2016).
[149] *See* Alon Even, *Big Data and Mobile Analytics: Ready to Rule 2015*, Venturebeat, (Jan. 22, 2015, 4:33 AM), http://venturebeat.com/2015/01/22/big-data-and-mobile-analytics-ready-to-rule-2015 (stating that the market for analyzing metadata is expected to grow to $16.9 billion in 2015).

II. Current Protections for Computer Data and Metadata

With the rise of the Internet, computers and cell phones are becoming an important part of everyday life.[150] The problem for courts in analyzing Fourth Amendment protections is that the use of these devices creates metadata, which contains information that does not fit neatly into any category of current Fourth Amendment protections.[151]

Under the Stored Communications Act (SCA), the government may obtain from Internet Service Providers (ISPs) or telephone companies any metadata of a user by obtaining a court order.[152] This court order does not require a showing of probable cause, but only a "specific and articulable showing that there was reasonable grounds to believe that the contents . . . are relevant and material to an ongoing criminal investigation."[153]

The Supreme Court has yet to address the issue of whether warrantless searches of metadata are constitutional.[154] Without any guidance from the Supreme Court, circuit courts have diverged widely in the constitutionality of searching either computer or phone metadata without a warrant and relied on a range of rationales.[155] Cases discussing telephone metadata provide a useful comparison for computer metadata, since both types of metadata fall within the same federal statute.[156] Circuits fall into three categories: (1) holding warrantless inspections of data and metadata under the SCA are unconstitutional because there is a reasonable expectation of privacy in that information;[157] (2) holding warrantless inspections of metadata constitutional because metadata falls under the third-party doctrine or is analogous to a pen register;[158] and (3) holding that warrantless inspection of metadata is not *per se* unconstitutional, but that magistrate judges have discretion to require a showing of probable cause.[159]

A. Warrantless Searches under the Stored Communications Act Are Unconstitutional

The first court to attack the constitutionality of warrantless searches under the SCA was the Sixth Circuit in *United States v. Warshak*.[160] In *Warshak*, the government obtained 27,000 of the defendant's private e-mails from his ISP without a warrant.[161] The case did not directly implicate Fourth Amendment protection of metadata, but the protection of contents on the Internet, which in this case were the de-

[150] *See supra* note 105.
[151] *See American Civil Liberties Union v. Clapper*, 785 F.3d 787, 821 (2d Cir. 2015) (stating that metadata "presents potentially vexing [Fourth Amendment] issues.").
[152] 18 U.S.C. § 2703(c) (2009) ("A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity . . . obtains a warrant . . . [or] obtains a court order . . . .").
[153] *Id.* § 2703(d). *See In re Application of the U. S. for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013) (noting this burden is less than that required for probable cause).
[154] *See Riley*, 134 S. Ct. at 2489 n.1 (2014) (stating that their ruling on searches incident to arrest of a defendant's cell phone does "not implicate the question whether the collection or inspection of aggregated digital information amounts to a search under other circumstances."). *See also City of Ontario, Cal. v. Quon*, 560 U.S. 746, 746 (2010) (suggesting that a person might have a reasonable expectation of privacy in data sent from a cell phone).
[155] *See infra* Part II.
[156] 18 U.S.C. § 2703(c). *See also supra* note 128.
[157] *See infra* Section II.A.
[158] *Infra* Section II.B.
[159] *Infra* Section II.C.
[160] 631 F.3d 266 (6th Cir. 2010) (en banc).
[161] *Id.* at 282.

fendant's e-mail.[162] The Sixth Circuit held that there is a reasonable expectation of privacy in e-mails because they are the digital equivalent of letters.[163]

In analyzing the relationship between the ISP and e-mails, the court treated the ISP not as a third party, but as an "intermediary" that had the ability to access the data, but did not diminish the reasonable expectation of privacy in that data.[164] The court concluded that section 2703(d) of the SCA, allowing the government to obtain e-mails from ISPs without a warrant, was unconstitutional.[165]

In 2014, a panel from the Eleventh Circuit held unconstitutional the same provision of the SCA as applied to the warrantless searches of cell phone metadata in the case of *United States v. Davis*.[166] In *Davis*, the government obtained information from the defendant's cell-phone service provider that showed the defendant had placed and received cell-phone calls in close proximity to the locations of the robberies for which he was charged.[167] This cell site location information is a form of telephony metadata.[168] In striking down the law, the Eleventh Circuit relied heavily on the Supreme Court's decision in *United States v. Jones*[169] and determined that tracking a person's movements via cell phone was turning a person's private whereabouts into a public event.[170] The Eleventh Circuit pointed out that metadata regarding the location of a cell phone did not fall within the third-party exception.[171] The court relied on reasoning from a case from the Third Circuit that stated that a cell-phone user is not voluntarily revealing her location to the phone company, even when placing a call.[172] Moreover, even if the user is willingly giving metadata, the user is unaware the information will be stored.[173]

This opinion was later vacated en banc.[174] The en banc 11th Circuit determined that obtaining cell site location information from the service provider without a warrant was not a violation of the Fourth Amendment because the information was a "business record" similar to the bank records from *Miller* or the pen reg-

[162] *Id.* at 288 ("The government may not compel a commercial ISP to turn over the *contents* of a subscriber's emails without first obtaining a warrant based on probable cause." (emphasis added)).

[163] *Id.* at 285-86 ("Given the fundamental similarities between email and traditional forms of communication, it would defy common sense to afford emails lesser Fourth Amendment protection. . . . Email is the technological scion of tangible mail, and it plays an indispensable part in the Information Age."). *But see United States v. Lifshitz*, 369 F.3d 173, 193 (2d Cir. 2004) (concluding that the Fourth Amendment protects against searches of a probationer's home computers and e-mails, but that "the 'special needs' of the probation system are sufficient to justify conditioning [defendant's] probation upon his agreement to submit to computer monitoring.").

[164] *Id.* at 286-87. ("As an initial matter, it must be observed that the mere *ability* of a third-party intermediary to access the contents of a communication cannot be sufficient to extinguish a reasonable expectation of privacy. . . Similarly, the ability of a rogue mail handler to rip open a letter does not make it unreasonable to assume that sealed mail will remain private on its journey across the country.").

[165] *Id.* at 288.

[166] 754 F.3d 1205, 1213, *vacated*, 573 Fed.Appx. 925 (11th Cir. 2014) (mem.).

[167] *Id.* at 1209-10.

[168] *See supra* note 127.

[169] 132 S. Ct. 945 (2012).

[170] *Davis*, 754 F.3d at 1216.

[171] *Id.* at 1216-17.

[172] *Id.* at 1217 ("[W]hen a cell phone user makes a call, the only information that is voluntarily and knowingly conveyed to the phone company is the number that is dialed, and there is no indication to the user that making that call will also locate the caller.") (quoting *In re Application of the U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to the Gov't*, 620 F.3d 304, 317 (3d Cir. 2010)).

[173] *Davis*, 754 F.3d at 1217.

[174] *United States v. Davis*, 573 Fed.Appx. 925 (11th Cir. 2014) (mem.).

ister from *Smith*.[175] The majority emphasized the importance that the metadata was a form of "non-content evidence" created for use by a third party.[176] However, this ruling only applied to cell site location metadata and no other forms of metadata.[177]

In dissent, two judges echoed the sentiments of the original panel's ruling and argued the majority's reason could "allow the government warrantless access to not only where we are at any given time, but also to whom we send e-mails, our search histories, our online dating and shopping records, and by logical extension, our entire online personas.[178] The dissent latched onto the ambiguous line between content and non-content evidence.[179]

A divided Fourth Circuit, in a similar case involving the warrantless obtaining of cell phone metadata, disagreed with the en banc Eleventh Circuit in *United States v. Graham*.[180] Relying on the Supreme Court's decisions from *Karo* and *Kyllo*, the Eleventh Circuit held that the warrantless obtaining of cell site location information, a form of metadata, is unconstitutional because it could "allow the government to place an individual and her personal property—specifically, her cell phone—at the person's home and other private locations at specific points in time."[181] Furthermore, the court relied concurrences of *Riley* and *Jones*, the Fourth Circuit held that obtaining cell phone locations was the form of long term tracking and dragnet-style surveillance of a person's movements that is an unreasonable search.[182]

B. Metadata Under the Third-Party Doctrine and Pen Registers

The Fourth Circuit's decision in *Graham* contrasts with an earlier Fourth Circuit decision in an unpublished opinion from 2000 that held there is no reasonable expectation of privacy of any information, including metadata, shared with Internet service providers.[183] While not explicitly reciting the third-party exception, the court pointed to a lack of a reasonable expectation of privacy because the defendant "entered into an agreement to obtain Internet access from [his ISP and] he knowingly revealed his name, address, credit card number, and telephone number to [the ISP] and its employees."[184]

In 2001, the Sixth Circuit echoed this sentiment and determined that computer users do not have a reasonable expectation of privacy in metadata relating to "their subscriber information because they have conveyed it to another person—the system operator."[185] This subscriber information was metadata that included the names, addresses, birthdates, and passwords of subscribers to an online bulletin board.[186] The court equated subscriber infor-

[175] *United States v. Davis*, 785 F.3d 498, 511 (11th Cir. 2015) (en banc).
[176] *Id.* at 511.
[177] *Id.* at 505 (calling the ruling "narrow").
[178] *Id.* at 533 (Martin, J., dissenting).
[179] *Id.* at 537 (Martin, J., dissenting). *But see*, Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 Stan. L. Rev. 1005, 1019-20 (2010) (articulating that the content/non-content distinction can be a viable way to structure Fourth Amendment protections).
[180] 796 F.3d 322, 355-56 (4th Cir. 2015) *vacated for rehearing en banc*, 624 Fed. Appx. 75 (mem.).
[181] *Id.* at 346.
[182] *Id.* at 347-49.
[183] *United States v. Hambrick*, 225 F.3d 656 (4th Cir.2000), *aff'g United States v. Hambrick,* 55 F.Supp. 2d 504, 508-09 (W.D. Va. 1999).
[184] *Hambrick*, 55 F. Supp. 2d at 508.
[185] *Guest v. Leis*, 255 F.3d 325, 335 (6th Cir. 2001).
[186] *Id.* This subscriber information is similar to information Google gathers from its users, which Google will only share with the user's consent or if they have a "good-faith belief that . . . disclosure of the information is reasonably necessary to . . . meet any applicable law, regulation, legal process or enforceable governmental request." *Google Privacy Policy*, *supra* note 120.

mation to bank records and pointed to the Supreme Court ruling that there is no reasonable expectation of privacy in bank records.[187] By 2010, the Sixth Circuit formed a distinction between metadata regarding subscriber information from the metadata created when sending e-mails.[188]

The Ninth Circuit in 2007 addressed the warrantless inspections of metadata and found them to be functionally equivalent to pen registers.[189] The court looked in particular at metadata displaying the "to/from addresses of [defendant's] e-mail messages, the Internet protocol ("IP") addresses of the websites that he visited[,] and the total volume of information transmitted to or from his account."[190] The court equated the surveillance of this metadata to surveillance of the physical mail.[191] The court treated e-mail as contents of mail and all the metadata as information transmitted to a third party, the ISP, similar to the address on the outside of a package.[192]

The Tenth Circuit joined in a similar line of reasoning when looking at whether there is a reasonable expectation of privacy in Internet subscriber information.[193] In that case, Pennsylvania law enforcement obtained, via court order, the subscriber information from Yahoo!, from which they were able to determine each day in which the defendant had logged into his account from his home computer.[194] The court determined there was no reasonable expectation of privacy in subscription information because it had been revealed to a third party; namely the ISP.[195] Similar to all the circuits in this category, the Tenth Circuit relied on the third-party doctrine and found no reasonable expectation of privacy in metadata.[196]

C. Magistrate Judge Discretion

The Third Circuit currently stands alone in determining that it is in the discretion of the magistrate judges, who grant the court order compelling metadata from a cell phone service or ISP, as to whether probable cause is neces-

[187] *Id.* (citing *United States v. Miller*, 425 U.S. 435 (1976)).
[188] *United States v. Warshak*, 631 F.3d 266, 286 (6th Cir. 2010) (en banc) ("[T]he mere *ability* of a third-party intermediary to access the contents of communication cannot be sufficient to extinguish a reasonable expectation of privacy."). *See also* Warshak v. United States 490 F.3d 455, 472 (6th Cir. 2007) ("*Guest* [*v Leis*] did not hold that the mere use of an intermediary such as an ISP to send or receive e-mails amounted to a waiver of a legitimate expectation of privacy,").
[189] *United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2007) ("We conclude that the surveillance techniques [that reveal the to/from addresses of e-mail messages, the IP addresses of websites visited and the total amount of data transmitted to or from an account] are constitutionally indistinguishable from the use of a pen register that the Court approved in *Smith.*" (referring to *Smith v. Maryland*, 442 U.S. 735 (1979) (holding pen registers constitutional)); *But see In re Application of the U. S. for an Order Authorizing the Use of a Pen Register & Trap on [xxx] Internet Serv. Account/User Name [xxxxxxxx@xxx.com]*, 396 F.Supp.2d 45 (D. Mass. 2005) (holding that a pen register cannot extend to content).
[190] *Id.* at 504. This information falls within the definition of metadata. *Supra* note 127.
[191] *Id.* at 511 ("The government's surveillance of e-mail addresses . . . may be technologically sophisticated, but it is conceptually indistinguishable from government surveillance of physical mail.").
[192] *Id.* ("E-mail, like physical mail, has an outside address 'visible' to the third-party carriers that transmit it to its intended location, and also a package of content that the sender presumes will be read only by the intended recipient. . . . The contents may deserve Fourth Amendment protection, but the address and size of the package do not."). *But see* Kerr, *supra* note 179, 1017-19 (arguing to replace this type of distinction).
[193] *United States v. Perrine*, 518 F.3d 1196, 1204-05 (10th Cir. 2008) (citing cases).
[194] *Id.* at 1199.
[195] *Id.* at 1204-05. The court also pointed out that the defendant had peer-to-peer software on his computer which allowed other computers access to files on his computer which "additionally vitiates any expectation of privacy he might have in his computer and its contents." *Id.*
[196] *Id.*

sary to obtain the metadata.[197] The court pointed out that the government did not seek the contents of any electronic communication, but metadata regarding the cell site location.[198] The court nonetheless deferred to the magistrate judge's ruling that cell phone metadata could be the functional equivalent of a tracking device, which would require a showing of probable cause.[199] The court relied heavily on the legislative history of the SCA in giving discretion to magistrate judges on whether probable cause should be required to compel a company to provide the government with a customer's metadata.[200]

The concurrence added an alternative reasoning for why a magistrate judge could turn down a court order compelling disclosing metadata.[201] The concurrence reasoned that using cell-phone metadata could allow the government to track a user's location within his home and that doing so without a warrant would be an unreasonable search.[202] The current circuit split as to whether the Fourth Amendment protects metadata shows the need for a unified analytical framework for distinguishing when there is a reasonable expectation of privacy in metadata.[203] Some circuits hold that an ISP's or cell phone service provider's ability to access a user's metadata is enough, under the third-party doctrine, to defeat a reasonable expectation of privacy.[204] Others circuits hold that access alone is not enough to view metadata without a warrant,[205] or at least not enough to view metadata that shows the location of an individual.[206] The main source of conflict comes from when a defendant's expectation of privacy can be considered "reasonable."[207]

III. Shortcomings of Current Protections of Metadata

Scholars have argued that the *Katz* test of a "reasonable expectation of privacy" will progressively get less workable as technology progresses since the courts lack the intricate knowledge of new technologies and the third-party doctrine will put the court in a difficult position.[208] This position appears to be closing in when applying *Katz* and the reasonable expectation of privacy to computer and

[197] *In re Application of the U. S. for an Order Directing a Provider of Elect. Commc'n Serv. to Disclose Records to the Gov't*, 620 F.3d 304, 319 (3d Cir. 2010) ("Because (SCA § 2703) as presently written gives the [magistrate judge] the option to require a warrant showing probable cause, we are unwilling to remove that option . . . .").

[198] *Id.* at 306 ("The Government does not . . . seek disclosure of the contents of wire or electronic communications. Instead, the Government seeks what is referred to in the statute as 'a record or other information pertaining to a subscriber to or customer of such service' . . . .").

[199] *Id.* at 310-11 ("The [magistrate judge] held that . . . the government must show probable cause because a cell phone . . . cell phone location information . . . make[s] a cell phone act like a tracking device.").

[200] *Id.* at 313-14.

[201] *Id.* at 320 (Tashima, J., concurrence) ("[T]he magistrate may refuse to issue [a court order compelling metadata disclosure] only if she finds that the government failed to present specific and articulable facts sufficient to meet the standard under [28 U.S.C] § 2703(d) or, alternatively, finds that the order would violate the Fourth Amendment absent a showing of probable cause because it allows police access to information which reveals a cell phone user's location within the interior or curtilage of his home.").

[202] *Id.* (citing *Kyllo v. United States,* 533 U.S. 27, 35-36 (2001)).

[203] *See* Sylvain, *supra* note 23, at 523 (concluding that the "Fourth Amendment doctrine today has nothing to offer in the way of privacy protection when even courts are uncertain about how to define public expectation as a descriptive matter.").

[204] *Supra* Section II.B. *See also*, *United States v. Davis*, 785 F.3d 498 (11th Cir. 2015) (en banc) (holding similarly).

[205] *Supra* Section II.A.

[206] *Supra* Section II.C.

[207] *See generally* Sylvain, *supra* note 23 (discussing the failure to establish a clear reasonable expectation of privacy in a digital context).

[208] Crowther, *supra* note 140.

cell phone metadata.[209] All three categories of courts tend to have the same flaw; namely, they all lack a clear conception of what metadata has a reasonable expectation of privacy and what does not.[210]

The first group of circuits[211] only addressed a narrow category of metadata. The Sixth Circuit in *Warshak* dealt with the acquiring of only the content of e-mail.[212] The court left open the possibility that non-content metadata, such as IP addresses, subject lines of e-mails, and other forms of metadata do not get protection.[213] The Fourth Circuit in *Graham* did draw a distinction between information that was voluntarily conveyed to a third party and metadata that was not.[214] However, the case dealt only with cell site information, leaving questions about computer metadata unanswered.[215] Similarly, the panel in the Eleventh Circuit in *Davis* dealt only with cell phone location.[216] If the rationales regarding telephone metadata from the Fourth Circuit and the panel from the Eleventh Circuit extend to computer metadata, it could support Fourth Amendment protection for metadata that reveals a user's location or that is automatically generated, such as a person's IP address.[217]

The first category of circuits also tends to gloss over the third-party doctrine in its analysis.[218] The Sixth Circuit does attempt to vitiate the applicability of the third-party doctrine by referring to an e-mail server as an "intermediary" and not a third party.[219] Similarly, the Fifth Circuit treats cell phone companies as intermediaries who are entrusted with users' location information that is not intended "to be open to inspection of others."[220] The Eleventh Circuit panel in *Davis* addressed the third-party doctrine in the context of cell-phone location and determined that a cell-phone company was not a third party because the only metadata that a person voluntarily shares with a phone company "is the number that is dialed."[221] Neither the Eleventh Circuit panel nor the Fifth Circuit address what would happen to the reasonable expectation of privacy if access to a person's location, via GPS location, becomes part of the

[209] *See generally* Sylvain, *supra* note 23.
[210] *See* Crowther, *supra* note 140, at 358-63 (providing examples of "where the traditional reasonable expectation of privacy standard has failed in digital contexts and where the courts have yet to clearly define boundaries.").
[211] *Supra* Section IIA.
[212] *United States v. Warshak*, 631 F.3d 266, 286-87 (6th Cir. 2010) (en banc).
[213] *Id.* at 288. ("[A] subscriber enjoys a reasonable expectation of privacy in the *contents* of emails." (emphasis added)). *See also* Kerr, *supra* note 179, at 1019-31 (arguing that content of Internet communications is protected by the Fourth Amendment but non-content metadata is not).
[214] *United States v. Graham*, 796 F.3d 332, 376-77 (4th Cir. 2015).
[215] *Id. See also United States v. Bynum*, 604 F.3d 161, 162-63 (4th Cir. 2010) (holding there was no unreasonable search when police acquired a defendant's Yahoo! account information without a warrant).
[216] *See United States v. Davis*, 754 F.3d 1205, 1208 (11th Cir. 2014).
[217] *Graham*, 796 F.3d at 358 ("Like a user of web-based email who intends to maintain the privacy of her messages, however, there is nothing the typical cell phone user can do to hide information about her location from her service provider."). *See also* Tokson, *supra* note 133, at 2131-36 (arguing that search terms and IP addresses are content similar to e-mails).
[218] *Warshak*, 631 F.3d at 287 ("We recognize that our conclusion may be attacked in light of the Supreme Court's decision in *United States v. Miller* . . . ."); *United States v. Graham*, 796 F.3d 332, at 378. (Motz, J., dissenting) (arguing that the third party doctrine should apply to metadata).
[219] *Warshak*, 631 F.3d at 287. *See also* Patricia L. Bellia & Susan Freiwald, *Fourth Amendment Protection for Stored E-Mail*, 2008 U. Chi. Legal F. 121 (arguing that ISPs are not third parties under existing precedent).
[220] *Graham*, 796 F.3d at 358.
[221] *Davis v. United States*, 754 F.3d 1205, 1217 *vacated* 573 Fed.Appx. 925 (11th Cir. 2014) (mem.).

contract for using a cell phone or Internet service.[222]

The rationales of the second group of circuits[223] rely heavily on cases from the 1970s, namely *Miller*[224] and *Smith*.[225] These courts seem to commit the folly of "contend[ing] that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."[226] While the information was gathered from individuals' home computers, none of the circuits discuss the technology's "general public use" requirement set forth in *Kyllo* for when viewing inside a person's curtilage.[227] Some scholars have argued that these circuits' rationales are drawn from judges' relative lack of experience in the context of swiftly evolving digital technologies.[228]

Additionally, the rationales of courts in the second category seem to strain the third-party doctrine to a great extent.[229] Many activities done on the Internet are not knowingly exposed to the public or confided to third parties since these third parties are not persons, but automated machines.[230] Treating these automated machines as functionally equivalent to pen registers looks past critical dicta from *Smith* where the Court acknowledges the "limited capabilities" of the pen register,[231] which points out that pen registers were not even capable of indicating if the call was even completed.[232] Metadata reveals far more information than a pen register could reveal.[233]

The rationale of the third group[234] strikes a middle ground between the first and second groups. By giving deference to magistrate judges, the court some shows flexibility in determining which metadata is protected and which is not.[235] The problem with this deference is that this will lead to inconsistent rulings on the same types of metadata based on which magistrate judge is making the ruling.[236] Additionally, the reasoning that allows magistrate judge discretion in requiring a heightened showing of probable cause may not be on firm statutory grounds.[237]

[222] *See* Crowther, *supra* note 140, at 353-55 (arguing that contracts greatly affects the reasonable expectation of privacy). For an example of a contract that has a clause allowing for tracking GPS location, see *Google Privacy Policy*, *supra* note 120 ("When you use a location-enabled Google service, we may collect and process information about your actual location, like GPS signals sent by a mobile device."). *See also*, *City of Ontario, Cal. v. Quon*, 560 U.S. 746 (2010) (holding that an employment contract affects the reasonable expectation of privacy in messages sent from a work pager).

[223] *Supra* Section II.B.

[224] *United States v. Miller*, 425 U.S. 435 (1976).

[225] *Smith v. Maryland*, 442 U.S. 735 (1979).

[226] *Kyllo v. United States*, 533 U.S. 27, 33 (2001).

[227] *See, e.g.*, *United States v. Perrine*, 518 F.3d 1196 (10th Cir. 2008) (stating that the police were able to track the sending of illegal content sent from defendant's computer to inside his house).

[228] Kerr, *supra* note 38, at 875-76 ("Judges struggle to understand even the basic facts of [digital] technologies, and often must rely on the crutch of questionable metaphors to aid their comprehension."); Crowther, *supra* note 142, at 356 ("[H]ow can a judge with no technological background grasp the intricacies of an IP address that allows substantial tracking of individuals online, and at the same time gauge how much privacy society feels it is giving up by going online?").

[229] *See* Tokson, *supra* note 104, at 588-601.

[230] *Id*.

[231] *Smith v. Maryland,* 442 U.S 735, 742 (1979).

[232] *Id*. at 736 n. 1.

[233] *See supra* note 130-132 and accompanying text.

[234] *Supra* Section II.C.

[235] *Id.*

[236] *See* Kerr, *supra* note 179, at 1029 (stating every Internet application generates its own data and the line between protected data and non-protected data is difficult to establish.").

[237] *See In re Application of the U. S. for Historical Cell Site Data*, 724 F.3d 600, 606-07 (5th Cir. 2013) (arguing that the Third Circuit's analysis allowing discretion ignores the intervening "shall" in 28 U.S.C. § 2703(d)).

With a circuit split on whether there is a reasonable expectation of privacy in metadata, a simplified analytical framework is needed to determine when metadata is protected from search. As the use of computers becomes more prevalent,[238] it becomes imperative to create established protections for metadata.[239] The next Part seeks to establish this framework.[240]

IV. Container Law and Metadata

Courts should consider computers as a container, treat all metadata as contents stored within computers, and apply the same Fourth Amendment protections for metadata as for other contents of containers. By treating computers as containers, a person's reasonable expectation of privacy in metadata is shaped by how they use ISPs and a clear line is established between what metadata is protected and what metadata is not. Courts can address computers kept within the home and computers used outside the home, i.e. smartphones, and applying container law, find identical Fourth Amendment protections for metadata.

A. Computers and Smartphones as Containers

The Supreme Court defines a container as "any object capable of holding another object"[241] and both computers and phones fit squarely within the definition of an opaque container.[242] Both are portable and could potentially contain objects that a person wishes to keep from public view. The Supreme Court has already recognized that modern cell phones are a container that hold a person's "privacies of life" and deserves Fourth Amendment protection.[243] Computers follow similarly since they contain vast amounts of information and smartphones are already considered "minicomputers."[244]

Furthermore, computers are implicitly referred to as containers in the Stored Communications Act.[245] Section 2703(b) requires disclosure of contents of electronic communication that are "held or maintained" by a provider of "remote computer service."[246] Part (c) of that section applies to the disclosure of "other information pertaining to a subscriber or customer of such service" that the computer service provider maintains.[247] Both the contents of electronic communications and information are stored by ISPs in massive computer servers.[248] While their contents are electronic data and are not physically tangible, the Supreme Court has recognized that data is still an object that can be contained in a computer or cell phone.[249] Since computers and cell phones are containers, all of their contents should receive similar protection.

B. Metadata as Contents

Computers contain not only data, but also metadata.[250] Scholars have articulated there is a distinction between metadata that is "content" and metadata which in non-con-

238 File, *supra* note 7.
239 *See* Sylvain, *supra* note 23, at 523.
240 *See* Part IV.
241 *New York v. Belton*, 453 U.S. 454, 461 n.4 (1981).
242 A computer is defined as an "electronic device that can store, retrieve, and process data" Merriam Webster Collegiate Dictionary 256 (11th ed. 2006).
243 *Riley v. California*, 134 S. Ct. 2473, 2495 (2014).
244 *Id.* at 2489.
245 *See supra* note 128.
246 28 U.S.C. § 2703(b)(2) (2009). The term "remote computer service" is defined as "the provision to the public of computer storage or processing services by means of an electronic communications system[.]" 18 U.S.C. § 2711(2) (2009).
247 28 U.S.C. § 2703(c).
248 *See supra* notes 115-118 and accompanying text.
249 *See, e.g.*, *Riley*, 134 S. Ct. at 2485 (applying Fourth Amendment protection to data on cell phones).
250 *See supra* notes 117-118 and text accompanying.

tent "transactional data."[251] However, the line between metadata that could be considered content and metadata that could be considered transactional is blurred and difficult to find.[252] IP addresses and search queries are metadata that fall around the hazy line.[253] By treating all metadata as contents of a computer similar to data, the analysis avoids finding this difficult distinction and recognizes that metadata is contained the same as data.[254]

1. *Internet Servers as Rented Space*

Treating metadata as contents in a container then moves the analysis of whether there is a reasonable expectation of privacy to who has a possessory interest in the container so that it has protection from unreasonable searches.[255] The easy answer would be the ISP who owns the server.[256] Yet that ISP did not create the metadata and has no interest in any particular metadata created by any one individual.[257] The ISP's interest is in aggregating the metadata and selling it to advertisers.[258] Often, larger Internet companies will remove any metadata that could be used to identify a particularized individual.[259]

A possessory interest is shared between the ISP and the creator of the metadata, the user of the computer.[260] This makes the storage of the metadata akin to a rental storage unit.[261] The user allows, consciously or not, their metadata to be stored within third-party servers, via third-party cookies, in order to use the Internet effectively.[262] In exchange for the use of the storage, the user agrees, via contract, to allow the ISP to sell its aggregated metadata.[263] Part of this agreement is the understanding that the

[251] *See,* Tokson, *supra* note 133, at 2123-26 (arguing the distinction of information as either content or non-content is "perhaps the most important determinant of the constitutional and statutory protection which that information receives."); Kerr, *supra* note 192, at 1019-22 (formulating a distinction between content and non-content metadata); Susan W. Brenner & Leo L. Clarke, *Fourth Amendment Protection for Shared Privacy Rights in Stored Transactional Data*, 14 J.L. & Pol'y 211, 279-80 (2006) (arguing that transaction data should be constitutionally protected).

[252] *See* Kerr, *supra* note 192, at 1029-30 ("Every different Internet application generates its own data, and lines must be drawn to distinguish content from non-content for each. Some cases are difficult").

[253] Tokson, *supra* note 133, at 2109-10.

[254] *See id.*, at 2126-32 (stating that e-mails and the transmission of website data are sent using "packets of digitalized information" which includes content as well as metadata). *But see* Kerr, *supra* note 192, at 1021-22 (arguing the "fact that content and non-content information are actually jumbled together as packets shouldn't matter").

[255] *See Rakas v. Illinois*, 439 U.S. 128, 148 (1978) (a possessory interest is required for a reasonable expectation of privacy).

[256] *See, e.g.*, Brian I. Simon, *The Tangled Web We Weave: The Internet and Standing Under the Fourth Amendment*, 21 Nova L. Rev. 941, 968 (1997) (arguing only system operators, and not users, have standing to challenge searches).

[257] Neil M. Richards & Jonathan H. King, *Big Data Ethics*, 49 Wake Forest L. Rev. 393, 417 (2014) (stating that it is illegal for ISPs to sell their customer's identifying information or data, but that metadata "can be aggregated with other information to reveal as much or more about individuals as personally identifying information or actual data").

[258] *See* Sylvain, *supra* note 23, at 490-91 (Internet companies "see personal user data as the currency of the networked information economy. For them, it is to be 'reused, repurposed and sold to other companies' for secondary uses that no one really anticipated when the data were first collected" (footnotes omitted)).

[259] For example, see *supra* note 121.

[260] Brenner, *supra* note 251, at 274-76 (noting that a consumer has a shared privacy interest in metadata). *See also United States v. Warshak*, 631 F.3d 266, 286 (6th Cir. 2010) (stating that ISPs are only an "intermediary" which make Internet communications possible).

[261] *See* Bellia &Freiwald, *supra* note 219, at 165-66 (paralleling ISPs with rental storage and arguing that "one does not engage the third party because one wants the intermediary to have access . . . she engages with the ISP out of the desire to use its intermediary services.").

[262] *See supra* note 125 (stating many Internet programs, such as e-mailing platforms, do not function without allowing third-party cookies).

[263] *See Google Privacy Policy*, *supra* note 120.

user's metadata is handled by automated machines and the user's activities on the Internet will not be viewed by a person who could identify the user.[264]

Treating the servers as rental storage is similar to the Sixth Circuit's reasoning that an e-mail service provider is an "intermediary" and avoids implicating the third-party doctrine in establishing Fourth Amendment protection.[265] This reasoning could be expanded to protect all Internet services and not just e-mail.[266] E-mails are easy to conceptualize as sending data and content since they are similar to ordinary mail.[267] However, using any Internet service is a similar sending and receiving of data.[268] For example, typing in a search query on Google is sending data from the user, i.e., the requested search terms.[269] Google's server receives the data and then sends data, i.e., the search results, and links to other web pages back to the user.[270] Google's servers then store all the metadata.[271]

Computer servers are far different than the third parties that were originally envisioned by the Court in *Katz*.[272] The Court in *Katz* excluded from protection what persons "knowingly expose[]s to the public"[273] and things shared with an individual[274] or even a machine, such as a pen register.[275] The Supreme Court was cautious to point out these limited capabilities of the pen register.[276] While a computer server is an automated machine and has been equated to a pen register by some courts,[277] a computer server reveals far more information than a pen register.[278] Because of the similarities between computers and other containers, the Fourth Amendment protections of containers should be instructive on how metadata is protected from unreasonable searches.

2. *Container Law and Personal Computers.*

Using metadata created from this exchange of data, ISPs and advertisers can follow the user's activities online.[279] By accessing metadata from these companies, the government could also see a person's movements online by seeing what websites a person accessed, when she accessed those websites, who she e-mailed, and other information gathered by

[264] *See supra* notes 146-148.
[265] *United States v. Warshak*, 631 F.3d 266, 286-87 (6th Cir. 2010) (en banc). *See also* Bellia & Freiwald, *supra* note 219 (stating ISPs are not third parties).
[266] *See*, *e.g.*, Tokson, *supra* note 133, at 2131-32 (arguing that all Internet communication is similar to sending an e-mail).
[267] *Id.* at 286. (referring to e-mail as the "technological scion of tangible mail").
[268] *See* Tyson, *supra* note 112. ("All of the machines on the Internet are either servers or clients. . . . When you connect to [a website] to read a page, you are a user sitting at a client's machine. You are accessing the [website's] server. The server machine finds the page you requested and sends it to you.").
[269] *See* Tokson, *supra* note 133, at 2134 (referring to search queries as "content" which receives Fourth Amendment protection); *See also In re Application of the U. S. of America for an Order Authorizing the Use of a Pen Register and Trap on [xxx] Internet Service Account/User Name [xxxxxxxx@xxx.com]*, 396 F. Supp.2d 45, 49-50 (D. Mass. 2005) (excluding from a warrant all metadata that contains search queries).
[270] Tyson, *supra* note 112.
[271] *See supra* note 116.
[272] Crowther, *supra* note 140, at 366 ("The third party doctrine was established prior to the digital age, and its advocates could not have fully contemplated society's heavy reliance on digitally stored information."). *See also United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) (arguing that the Court should reconsider the third-party doctrine because it "is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks").
[273] *Katz v. United States*, 389 U.S. 347, 351 (1967).
[274] *Hoffa v. United States*, 385 U.S. 293, 302 (1966).
[275] *Smith v. Maryland*, 442 U.S. 735 (1979).
[276] *Id.* at 742.
[277] *E.g.*, *United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2007).
[278] *See supra* notes 129-133.
[279] *See supra* note 22.

third-party cookies.[280] The Supreme Court has been wary of letting the government track the activities of a person without a warrant, especially when those movements are within a person's home.[281] The activities of a person online should be even more protected when the use of the Internet is within the curtilage of the home, which about 75% of Americans have a computer at home that they uses to connect to the Internet.[282] By allowing the government to view metadata of a computer, it would allow the government to peer within the curtilage and see what a person is doing within the privacy of his or her home.[283] By examining metadata, the government is in essence viewing a container within the home, something that already has a reasonable expectation of privacy.[284]

A warrantless search can also be seen as a trespass onto a person's curtilage.[285] Even without a physical entering of land, the governmental official is able to trespass onto the curtilage by using technology not within general public use.[286] ISPs and Internet advertisers have the ability to extract and analyze metadata; however, the general public does not use these technologies.[287]

In addition to the trespass in viewing the contents of a computer, there is a popular expectation of privacy in metadata held within a computer.[288] There is a difference between what people think is anonymous and private online and what people think ought to be private.[289] People expect, and are often willing, to reveal information to ISPs that they want to keep private from the government or other individuals.[290] But this willingness does not dispel a person's reasonable expectation of privacy results under the *Katz* analysis since that information is not being exposed to the public, but is being

[280] *See supra* notes 119-125 and accompanying text.
[281] *See, e.g.*, *United States v Jones*, 132 S. Ct. 945, 957 (Alito, J., concurring) (finding that using a GPS tracker on defendant's vehicle without a warrant for four weeks was an unreasonable search); *United States v. Karo*, 468 U.S. 705 (1984) (holding that tracking to the inside of a defendant's house was an unreasonable search).
[282] File, *supra* note 105.
[283] *Compare United States v. Perrine*, 518 F.3d 1196, 1199-1200 (2008) (upholding the constitutionality of using a court order to obtain metadata that disclosed the dates defendant had logged onto a Yahoo! account from his house), *with United States v. Karo*, 468 U.S. 705, 715 (1984) (excluding evidence gathered when "the Government surreptitiously employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house."). *See also In re Application of the U. S. for an Order Directing a Provider of Elect. Commic'n Service to Disclose Records to the Gov't,* 620 F.3d 304, 320 (3d Cir. 2010) (Tashima, J., concurring) (holding that telephony metadata is protected because it allows the police to see a user's location within the curtilage of their home).
[284] *See Karo*, 468 U.S. 705.
[285] *Jones*, 132 S. Ct. at 952 (majority opinion of Scalia, J.) (holding that for Fourth Amendment protection from unreasonable searches, the reasonable expectation of privacy test has been "*added to*, not *substituted for*, the common-law trespassory test."); *Id.* at 955 (Sotomayor, J., concurring) (stating the trespassory test is the "irreducible constitutional minimum.").
[286] *Kyllo v. United States*, 533 U.S. 27, 40 (2001). *See also Florida v. Jardines*, 133 S. Ct. 1409, 1419 (2013) (Kagan, J., concurring) (stating that a drug detecting dog was a device not in general public use when used to explore within the curtilage of the home).
[287] For example, Google requires vast amounts of computer memory to process their data. *See* Dean, *supra* note 116. This processing can require large physical spaces. *See supra* note 96. In comparison, thermal imaging cameras, which the Court in *Kyllo* determined were not in general public use, are now commercially available at less than $300. Daniel Terdiman, *Heat Seeker: Meet the Thermal-Imaging Camera You Can Afford*, Cnet, (Sept. 25, 2014, 9:00 AM), http://www.cnet.com/news/heat-seaker-thermal-imaging-camera-for-the-masses/ (stating that, for example, Google requires vast amounts of computer memory to process their data); *See* Dean, *supra* note 116 (noting that this processing can require large physical spaces); *See supra* note 96 (holding thermal imaging cameras, which the Court in *Kyllo* determined were not in general public use, are now commercially available at less than $300).
[288] *See supra* notes 135-138 and text accompanying.
[289] Raine, et. al., *supra* note 135.
[290] Sylvain, *supra* note 23, at 492.

shared with automated machines.[291] Furthermore, several popular Internet services make explicit in their terms of service that a user's metadata will remain anonymous or aggregated if accessed by a third party.[292]

3. *Container Law and Smartphones*

Even when a computer is not held within the curtilage, such as a smartphone, it still receives the same high level of Fourth Amendment protection that an opaque container would.[293] Opaque containers are free from unreasonable governmental searches.[294] The physical viewing of the data on a person's smartphone by a police officer without a warrant or probable cause is already unconstitutional.[295] The viewing of metadata without a warrant would also be similarly unconstitutional since metadata can reveal many of the same privacies of life that content data can.[296] For example, metadata can reveal whom the person emails,[297] the number of times and the durations of time spent on websites,[298] and the person's actual location.[299]

Viewing metadata of a smartphone is also a nonvisual inspection of a container in an "exploratory manner."[300] Just like an officer who squeezes a bag to inspect its contents, inspecting the metadata of a smartphone reveals the contents of that smartphone without actually opening the phone and visually inspecting it.[301] Metadata, by its definition, reveals information about the data contained in the computer.[302] Since the content stored on the smartphone is protected,[303] all information about that content should be similarly protected.[304]

Even when the metadata is stored in an external source such as a computer server, the metadata is the contents of the smartphone that the person is keeping out of public view.[305] Similar to using telephony metadata without a warrant to track a person's whereabouts, viewing the metadata of a person's smartphone tracks a person's use of their phone and converts a seemingly private event into a public one.[306] Similar to computers held within the home or briefcases carried on the person, smartphones

[291] Tokson, *supra* note 104, at 632-36.
[292] *See, e.g.*, *Google Privacy Policy*, *supra* note 120 (stating Google "may share aggregated, non-personally identifiable information publicly and with our partners – like publishers, advertisers or connected sites."); *Netflix Privacy Policy*, *supra* note 16. (stating Netflix "may provide analysis of and information from or about our users in the aggregate or otherwise in anonymous form to partners, Service Providers and other third parties.").
[293] *Riley v. California*, 134 S. Ct. 2473, 2489 (2014) (the amount of information a person carries in their phone is similar to having to "drag[ging] behind them a trunk of the sort held to require a warrant in *Chadwick*") (citing *United States v. Chadwick*, 433 U.S. 1 (1977)).
[294] *Robbins v. California*, 453 U.S. 420, 427 (1981) (plurality opinion) ("[U]nless the container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment.").
[295] *Riley*, 134 S. Ct. at 2495.
[296] *See* Richards, *supra* note 257, at 417 (noting that aggregated metadata can reveal personal information).
[297] *E.g.*, *United States v. Warshak*, 631 F.3d 266, 282 (6th Cir. 2010) (en banc).
[298] *Contra United States v. Perrine*, 518 F.3d 1196, 1199 (10th Cir. 2008).
[299] *See, e.g.*, *Google Privacy Policy*, *supra* note 120 ("When you use a location-enabled Google service, we may collect and process information about your actual location. We use various technologies to determine location, IP address, GPS, and other sensors. . . "). *See also United States v. Davis*, 754 F.3d 1205 (11th Cir. 2014) (holding that obtaining a customer's location using metadata obtained via court order is unconstitutional).
[300] *See Bond v. United States*, 529 U.S. 334 (2000).
[301] *See id.*
[302] *See supra* note 126.
[303] *Riley v. California*, 134 S. Ct. 2473 (2014).
[304] *See* Tokson, *supra* note 133, at 2170-71 (metadata that reveals the underlying content of Internet communications should be treated as the same as content).
[305] *See* Brenner, *supra* note 251, at 257-59.
[306] *See* Davis, 754 F.3d at 1216.

should be treated as containers.[307] Conceptualizing both smartphones and computers will simplify the protections the Fourth Amendment provides.

C. Benefits of Container Framework

The benefits of using a presented analytic framework is two-fold. First, it gives clear Fourth Amendment protections for metadata in current technologies.[308] Second, it provides a clear framework to analyze Fourth Amendment protections of future technologies.[309]

1. *Current Technologies*

With container law guiding the Fourth Amendment protections of computers and phones, it simplifies the analysis for what metadata is protected under the Fourth Amendment. Treating computers as containers shifts the focus away from whether there is a reasonable expectation of privacy in evolving digital technologies, which many judges struggle with.[310] By treating computers as containers, judges can begin to conceptualize warrantless viewing metadata as a trespass, either by using technology not in public use to look into a person's curtilage or by viewing the contents of a personal computer in an exploratory manner.[311] By treating viewing metadata as a trespass, it creates the default rule that there is a reasonable expectation of privacy in a person's metadata.[312]

Additionally, analyzing computers as containers avoids difficulties with the third-party doctrine. Courts and scholars have suggested several ways around the third-party doctrine in looking at digital privacy.[313] By treating computers as containers, metadata gathered by ISPs and stored on servers is not treated as being revealed to a third party, but as being stored on the server under a contractual arrangement, analogous to a rented storage unit.[314] These contracts can then alter a person's reasonable expectation of privacy.[315]

Because the metadata is being stored by a private party, the user's reasonable expectation of privacy in metadata can be altered primarily based on the privacy agreements between the Internet user and the ISP.[316] Because servers are automated machines, the metadata would be presumed to be protected as being reasonably private.[317] If the server's privacy agreement states that a user's metadata will be held anonymously or will be shared only in aggregated form,[318] such as Google's Privacy

[307] *See supra* Subsection IV.B.3.
[308] *See infra* Subsection IV.C.1.
[309] *See infra* Subsection IV.C.2.
[310] *See* Crowther, *supra* note 140, at 356-57.
[311] *See supra* Subsections IV.B.2-IV.B.3.
[312] *See United States v. Jones*, 132 S. Ct. 945, 952 (2012) ("The *Katz* reasonable-expectation-of-privacy test has *added to*, not *substituted for*, the common-law trespassory test.").
[313] *See, e.g.*, *United States v. Warshak*, 631 F.3d 266, 286-87 (6th Cir. 2010) (en banc) (referring to ISPs as "intermediaries" and distinguishing them from the third-party doctrine); *United States v. Graham*, 796 F.3d 332, 353 (4th Cir. 2015) (stating that cell phone users do not "convey" their metadata to their service provider). *See also*, Brenner, *supra* note 251, at 266-68 (stating that transaction metadata is protected because of the "shared privacy" interest between users and ISPs).
[314] *See generally,* Bellia & Freiwald, *supra* note 219.
[315] *Compare Riley v. California,* 134 S. Ct. 2473, 2495 (2014) (protecting content stored using a cell phone), *with City of Ontario, California v. Quon*, 560 U.S. 746, 764-65 (2010) (not protecting content of text messages because of an employment contract for using the cell phone). *See also* Terms of Service, Didn't Read, https://tosdr.org/ (summarizing terms of service for several popular Internet sites).
[316] *See* Crowther, *supra* note 140, at 353-55 (noting that terms of agreement alter a user's reasonable expectation of privacy).
[317] *See* Tokson, *supra* note 104, at 638.
[318] *See supra* note 121 for examples.

Policy,[319] then that metadata will be reasonably considered private, and thus protected from unreasonable searches. Conversely, if the ISP's terms of use make clear that the metadata is not private, there would be no reasonable expectation of privacy.

This analytic framework is different than the ones currently being employed by circuit courts[320] because it recognizes the realities of how privacy on the Internet works.[321] The analysis, like the first category of courts, would find Fourth Amendment protections for contents stored communications.[322] The analysis differs from the first category because it acknowledges that there is more than a privacy interest in e-mail contents and in cell phone location, but that the warrantless viewing of metadata is actually a trespass by viewing inside the person's computer or phone.[323]

The analysis differs from the second category of circuit courts[324] by not using tenuous analogies of treating computer servers as persons or pen registers under the third-party doctrine.[325] It instead treats metadata as stored within a container that the ISP and the user have a shared interest in because they have a contractual agreement akin to rental storage.[326] The analysis recognizes that the government cannot view inside this container using technology not in general public use or view inside in any exploratory manner without a showing the search is reasonable.[327]

Finally, the analysis differs from the third category of courts[328] by avoiding difficult questions as to what metadata is content and what is not.[329] The analysis treats all metadata as content since metadata is contained within a computer just like any other content that is protected.[330] Fourth Amendment protections would not be based on magistrate discretion, but would apply to metadata that the ISP and the user have agreed is private.[331] In addition to having implications on Fourth Amendment protection for current technologies, the same rationales can apply to future technologies.

2. *Future Technologies*

While it is difficult to predict how future technologies will affect the reasonable expectation of privacy, it is clear that computers and the Internet will play a crucial role in determining privacy expectation.[332] With technology rapidly changing, a clear line of analysis for reasonable expectations of privacy will be needed.[333] Scholars have articulated a need for legislative initiative in clearly defining privacy interests in technologies.[334] Additionally, as Justice Sotomayor has noted, "A legislative body is well situated to gauge changing public attitudes, to

[319] *Google Privacy Policy*, *supra* note 120.
[320] *Supra* Section II.A.
[321] *See* Crowther, *supra* note 142, at 357 ("judges' technological inexperience and misunderstandings threaten to further undermine digital privacy interests.").
[322] *See United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010) (en banc) (finding SCA 2703(d) unconstitutional in the context of e-mails); *United States v. Davis*, 754 F.3d 1205, 1217 (finding SCA 2703(d) unconstitutional in the context of cell phone location information).
[323] *Supra* Subsection IV.B.2-IV.B.3.
[324] *Supra* Section II.B.
[325] *See* Kerr, *supra* note 38, at 875-76 ("Judges struggle to understand even the basic facts of [digital] technologies, and often must rely on the crutch of questionable metaphors to aid their comprehension.").
[326] *Supra* Subsection IV.B.1.
[327] *Supra* Subsections IV.B.1-2.
[328] *Supra* Section II.C.
[329] *See* Kerr, *supra* note 179, at 1029-30.
[330] *Supra* Section IV.B.
[331] *Id.*
[332] *See generally*, Sylvain, *supra* note 23.
[333] *Id.*
[334] *Id.* at 514-519; Kerr, *supra* note 38, at 875 ("The task of generating balanced and nuanced rules requires a comprehensive understanding of technological facts. Legislatures are well-equipped to develop such understandings; courts generally are not.").

draw detailed lines, and to balance privacy and public safety in a comprehensive way."[335] While a legislative scheme is preferable, if the legislature is unwilling or incapable of keeping up with technological changes, treating computers as containers will provide a useful base to analyze future technologies.

In addition, applying Fourth Amendment protections of containers to new technologies will have practical benefits. By treating a user's metadata as shared by user and the ISP, it will discourage users from hiding or eliminating their metadata in order to feel anonymous online.[336] While it is currently difficult to use the Internet without creating metadata,[337] future technologies may make anonymous Internet use practical.[338] Avoiding anonymous use on the Internet has a two-fold advantage.

First, accumulating, aggregating, and selling metadata is how many successful Internet companies operate.[339] By recognizing metadata as being private content within a user's computer, users could be more willing to accumulate metadata and share it with ISPs.[340] The sharing of metadata will help improve the economy by improving the online marketplace.[341] When users have a privacy interest in their metadata, they will they be more willing to share more of their metadata.[342]

Second, if persons do not accumulate metadata, the information it reveals could not be viewed by the government in the event it is the product of a reasonable search.[343] The government will not be able to view the metadata because it simply would not exist.[344] Similar to how persons maintain incriminating material within their property,[345] treating metadata as contained within a personal computer will lead persons to accumulate metadata that could be useful to prosecute them. Treating metadata as something exposed to the public would lead criminals to be more protective of their metadata and destroy useful evidence.

D. Shortcomings of Analytical Framework

Treating metadata as contained within a computer does not address the issue of contents that are shared with other individuals using the Internet.[346] For example, using container law would not address the reasonable expectation of privacy for contents stored using

[335] *United States v. Jones*, 132 S. Ct. 945, 964 (2012) (Sotomayor, J., concurring).
[336] *See* Rosen, *supra* note 124, at 196-224 (arguing the importance of anonymity online); Raine et al., *supra* note 135 (Forty-one percent of Internet users already take steps to disable or remove cookies from their computer).
[337] *Id.* (Fifty-nine percent of Americans do not believe it is possible to be completely anonymous online); *Mozilla, supra* note 125 (stating it is possible to access the Internet without accumulating metadata, however it then becomes difficult to use many Internet services, such as e-mail).
[338] *See* Rosen, *supra* note 124, at 173-78.
[339] *See supra* notes 22-23.
[340] *See* Raine et. al., *supra* note 135 (Five percent of Internet users who take steps to hide metadata do so to hide it from the government).
[341] *See* Even, *supra* note 149 (stating that the market for analyzing metadata is expected to grow to $16.9 billion in 2015).
[342] *See* Rosen, *supra* note 124, at 198-200.
[343] *See, e.g.*, *United States v. Lifshitz*, 369 F.3d 173, 193 (7th Cir. 2004) (searching the defendant's computer without a warrant was reasonable since the defendant was on probation and part of the agreement was to allow monitoring).
[344] Rosen, *supra* note 124, 174 (one encryption service "destroys all documents and logs on its central server within twenty-four hours, to avoid subpoenas.").
[345] *See, e.g.*, *California v. Ciraolo*, 476 U.S. 207, 209 (1986) (defendant kept marijuana plants in his house).
[346] *See* Kerr, *supra* note 192, at 1029-31. (arguing that there exists Fourth Amendment protections for content on the Internet but they can be waived if shared publically).

"cloud computing"[347] or using peer-to-peer file sharing.[348] The third-party doctrine would have more of an impact on shared content than on metadata.[349] However, content could still be protected under a similar framework if the server that the content is on maintains a clear privacy policy as to who may view the content.[350]

Additionally, the analytical framework may become unworkable if technology that is used to access and analyze metadata becomes in general public use or if people no longer believe things done on the Internet should be private. As technology changes, the reasonable expectation of privacy using technology will likely change as well.[351] This change could lead to inconsistent rulings similar to those currently splitting lower courts.[352] However, this inconsistency is more a product of the varying applications of the third-party doctrine and the reasonable expectation of privacy test.[353] Using container law as a guide simplifies the courts' analysis of whether there is a reasonable expectation of privacy by using well-established concepts of Fourth Amendment jurisprudence.[354]

Conclusion

The Internet started out as computer protocols and has evolved into an entire digital world.[355] It has revolutionized the world and altered American's concepts of privacy.[356] Courts have the problem of reflecting these changing concepts of privacy when they apply Fourth Amendment protections to metadata.[357] By treating computers as containers under the Fourth Amendment and the metadata as content contained within those containers, a simplified analysis can be used to establish Fourth Amendment protections for metadata.[358]

A computer may be just a box, but the contents of that box are often very private. In order to protect those intimate contents, all contents have to be protected equally. Exposing a person's metadata may turn their computer into a Pandora's box and reveal all their secrets, to terrifying effect.

[347] *Riley v. California*, 134 S. Ct. 2473, 2491 (2014). ("Cloud computing" is the capacity of Internet-connected devices to "display data stored on remote servers rather than on the device itself"). *See id.* at 2494-95. (Content on a cell phone that is stored in the cloud already has Fourth Amendment protection). *See also,* Kerr, *supra* note 179, at 1029 ("The Fourth Amendment should generally protect the contents of communications stored in 'the cloud' of the Internet, including remotely stored files maintained on a server that is hosted for individual users.").

[348] *Metro-Goldwyn-Mayer Inc.* v Grokster, *Ltd*., 545 U.S. 913, 919 (2005). ("Peer-to-peer file sharing" is software that allows computer users to share electronic files "because users' computers communicate directly with each other, not through central servers."). *See also*, *United States v. Perrine*, 518 F.3d 1196, 1205 (10th Cir. 2008) (peer-to-peer software lowers a person's reasonable expectation of privacy in metadata).

[349] *See, e.g.*, *United States v. King*, 509 F.3d 1338, 1341-42 (11th Cir. 2007) (holding there was no reasonable expectation of privacy in content shared over an open computer network).

[350] *See supra* Section IV.B.

[351] Crowther, *supra* note 140 at 368.

[352] *Supra* Part II.

[353] *Supra* Part III.

[354] *Supra* Subpart IV.B.

[355] Leiner, *supra* note 4.

[356] Sylvain, *supra* note 23, at 489-92.

[357] *Supra* Part III.

[358] *Supra* Part IV.

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THE ALLEGED VICTIM'S RIGHT TO *MANDAMUS* IN MILITARY COURTS-MARTIAL

*Leila Mullican**

I. Introduction

At trial and on interlocutory appeal, an accused is constitutionally entitled to the presumption of innocence unless and until he or she is eventually proven guilty beyond a reasonable doubt. Aspects of Congress' new, wide-sweeping changes to military justice legislation encroach upon, and sometimes violate, the constitutional protections historically afforded to criminal defendants at courts-martial. However, the United States Constitution requires courts to strictly construe statutes that provide third parties standing to file for writs of *mandamus*. (citation) By granting standing to alleged victims only for procedural violations of a victim's rights, military courts of criminal appeals will provide an appropriate stop-gap against the increasingly crushing weight of sexual assault charges upon an accused.

Although the federal Crime Victim's Rights Act (CVRA)[1] was first passed in 2004, Congress only began establishing those rights for alleged victims,[2] namely victims of rape and sexual assault, in the military criminal justice system in 2014.[3] Proponents of "providing due-process-like rights of participation" to alleged victims seek to prevent "secondary harm, which comes from governmental processes and governmental actors within those processes."[4] In the movement to change victims' rights and roles in military justice, all services established victims' legal counsel programs, which provide legal advice and advocacy for eligible victims of sexual assault.[5]

Congress' last wide-sweeping reforms to victims' rights in the courts-martial process were in the Fiscal Year 2016 and 2015 National Defense Authorization Acts (NDAA).[6] The 2015 NDAA amended Article 6b, Uniform Code of

[1] * B.A., 2005, John Brown University; M.P.A., 2008, Cornell University; J.D., 2011, University of Missouri-Columbia School of Law. Since entering the United States Navy Judge Advocate General's Corps in August of 2011, Lieutenant Mullican has served as legal assistance and defense counsel, a law clerk for the Navy-Marine Corps Court of Criminal Appeals, and an assistant legal advisor at the Office of Military Commissions, Convening Authority. The views presented herein are the Author's personal views and do not represent those of the Navy, Department of Defense, or United States government. 18 U.S.C. § 3771(a), (d)(3) (2015).

[2] The words "alleged victim" and "victim" in this Article mean the named victim in a case that has yet to be fully adjudicated. The word "alleged" is meant to highlight the presumed innocence of the accused. The word "petitioner" in this Article describes an alleged victim who petitions for a writ of *mandamus*.

[3] 113 Pub. L. No. 291, § 535, 128 Stat. 3292 (2014) (codified as amended at 10 U.S.C. § 806b) (2014 ed.) [hereinafter Article 6b].

[4] Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 Utah L. Rev. 289, 293-96 (1999).

[5] *See, e.g.,* Navy Victims' Legal Counsel Program, http://www.jag.navy.mil/legal_services/vlc.htm; Army Special Victim Counsel Program, http://www.army.mil/standto/archive_2013-12-02/; Air Force Special Victims' Counsel Program, http://www.afjag.af.mil/sexualassaultprosecution/index.asp.

[6] NDAA for Fiscal Year 2015, 113 Pub. L. No. 291, 128 Stat. 3292 (2014) (codified as amended in scattered sections of title 18 of the United States Code); NDAA for Fiscal Year 2016, 114 S. 1356 (2015) (codified as amend-

Military Justice (UCMJ),[7] to give alleged victims,[8] as nonparties to courts-martial, standing to petition military Courts of Criminal Appeals (CCA) for writs of *mandamus*.[9] *Mandamus* is "[a] command by order or writ" from a superior court that is "directed to some inferior court . . . requiring the performance of a particular duty therein specified."[10] Under the 2015 Article 6b(e), petitioners could only request writs of *mandamus* if they believed their rights afforded by Military Rules of Evidence 412[11] or 513[12] were violated by a military's judge's ruling. The 2015 Article 6b(e) read as follows:

> (e) **Enforcement By Court of Criminal Appeals.--**
>
> (1) If the victim of an offense under this chapter believes that a court-martial ruling violates the victim's rights afforded by a Military Rule of Evidence specified in paragraph (2), the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the court-martial to comply with the Military Rule of Evidence.
>
> (2) Paragraph (1) applies with respect to the protections afforded by the following:
>
> (A) Military Rule of Evidence 513, relating to the psychotherapist-patient privilege.
>
> (B) Military Rule of Evidence 412, relating to the admission of evidence regarding a victim's sexual background.

In the 2016 NDAA, Article 6b(e)[13] was expanded to extend to the protections afforded by Article 6b(a), the rights of a victim of an offense, and additional Military Rules of Evidence:

> (e) **Enforcement By Court of Criminal Appeals.--**
>
> (1) If the victim of an offense under this chapter believes that a preliminary hearing ruling under Section 832 of this title (article 32) or a court-martial ruling violates the rights of the victim afforded by a section (article) or rule specified in paragraph (4), the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the preliminary hearing officer or the court-martial to comply with the section (article) or rule.
>
> (2) If the victim of an offense under this chapter is subject to an order

ed in scattered sections of title 18 of the United States Code).

7 *See generally* Manual for Courts-Martial (MCM), United States (2012 ed.) [hereinafter MCM].

8 113 Pub. L. No. 291, § 535, 128 Stat. 3292 (2014) (codified as amended at 10 U.S.C. § 806b(b)) (defining a victim as "an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense" under the UCMJ). .

9 *Id.* at subsection (e).

10 Ballentine's Law Dictionary 770 (3d ed. 1969).

11 MCM (2012 ed. & Supp. 2015) (Mil. R. Evid. 412(a) provides that "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior" or "[e] vidence offered to prove any alleged victim's sexual predisposition" is generally inadmissible "in any proceeding involving an alleged sexual offense.").

12 Mil. R. Evid. 513(a) (providing: "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist . . . in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.").

13 MCM (2016 ed.) (available at http://jsc.defense.gov/Portals/99/Documents/UCMJAsOfFY16NDAA.pdf).

to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense, the victim may petition the Court of Criminal Appeals for a writ of mandamus to quash such order.

(3) A petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals, by such means as may be prescribed by the President, and, to the extent practicable, shall have priority over all other proceedings before the court.

(4) Paragraph (1) applies with respect to the protections afforded by the following:

(A) This section (article).

(B) Section 832 (article 32) of this title.

(C) Military Rule of Evidence 412, relating to the admission of evidence regarding a victim's sexual background.

(D) Military Rule of Evidence 513, relating to the psychotherapist-patient privilege.

(E) Military Rule of Evidence 514, relating to the victim advocate-victim privilege.

(F) Military Rule of Evidence 615, relating to the exclusion of witnesses.

Article 6b is now similar to the CVRA, which allows the victim to petition for a writ of *mandamus* if any of his or her rights enumerated under the CVRA are violated.[14]

However, Article 6b(e) has created several questions of interpretation for judges and practitioners. Particularly, it is not clear whether a CCA has jurisdiction over all claims concerning Mil. R. Evid. 412, 513, 514,[15] and 615. It is also unclear whether victims can petition for writs on substantive issues regarding a military judge's ruling or only for violations of their procedural rights. Finally, the text of Article 6b(e) does not state whether the alleged victim is entitled to a writ of *mandamus* for any issues outside of those enumerated in the article if the CCA finds the alleged victim is a holder of a separate right or privilege.

This Article interprets the meaning and effect of Article 6b by analyzing the text of the article and case precedents concerning the CVRA. Part II reviews a CCA's jurisdiction to hear victims' writs under the All Writs Act and Article 6b. Part III analyzes the question of victims' standing to petition for writs of *mandamus* and ultimately argues that Article 6b provides the alleged victim with only limited standing to request a writ. Part IV discusses the standard of review for a writ of *mandamus* and when writs of *mandamus* are appropriately issued to an alleged victim-petitioner. Part V addresses false complaints of sexual assault and how they can impact petitions requesting *mandamus* and defense responses to those petitions. Practitioners should understand these issues to best analyze petitions for and oppositions to *mandamus* under Article 6b.

[14] 18 U.S.C. § 3771(a), (d)(3).

[15] *See* Exec. Order No. 13,696, 80 Fed. Reg. 35,820 (June 22, 2015) (amending Mil. R. Evid. 514 to include a privilege between a victim and Department of Defense Safe Helpline staff and provided the victim with procedural rights similar to those under Mil. R. Evid. 513).

II. Jurisdiction & the All Writs Act

Whether a court has jurisdiction is a question of law that is reviewed *de novo*.[16] CCAs may review a trial military judge's ruling under three circumstances: (1) review in the ordinary course of appellate review under Article 66, UCMJ; (2) interlocutory appeal by the government under Article 62, UCMJ;[17] and (3) petition of extraordinary relief by "a person with standing to challenge the ruling."[18]

The court-martial and CCAs' "constitutional origin is based on the congressional authority to govern the armed forces set out in Article I, § 8, clause 14."[19] "[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[20] "'[M]ilitary courts [of appeals], like Article III tribunals, are empowered to issue extraordinary writs under the All Writs Act.'"[21] The All Writs Act neither serves as "an independent grant of jurisdiction, nor does it expand a [CCA]'s existing statutory jurisdiction."[22] "Rather, the All Writs Act requires two determinations: (1) whether the requested writ is 'in aid of' the [CCA]'s existing jurisdiction; and (2) whether the requested writ is 'necessary or appropriate.'"[23]

"'The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'"[24] In the context of military justice, "in aid of" includes cases where a petitioner seeks "'to modify an action that was taken within the subject matter jurisdiction of the military justice system.'"[25] "To establish subject-matter jurisdiction, the harm alleged [by the petitioner] must have had the potential to directly affect the findings and sentence" of the court-martial.[26] "A writ petition may be 'in aid of' a [CCA]'s jurisdiction even on interlocutory matters where no finding or sentence has been entered in the court-martial."[27]

It is clear that CCAs have jurisdiction under the All Writs Act to hear victims' petitions for writs of *mandamus* concerning Mil. R. Evid. 412, 513, 514, and 615 rulings and rulings

16 *United States v. Ali*, 71 M.J. 256, 261 (C.A.A.F. 2012) (citations omitted).

17 18 U.S.C. § 862, Art. 62 (2015) (The government can challenge an order or ruling of the military judge that: (A) "terminates the proceedings with respect to a charge or specification;" (B) "excludes evidence that is substantial proof of a fact material in the proceeding;" (C) "directs the disclosure of classified information;" or (D) "imposes sanctions for nondisclosure of classified information." The government may also file an interlocutory appeal when the military judge refuses to : (E) "issue a protective order sought by the United States to prevent the disclosure of classified information;" or (F) enforce a protective order for classified information "that has previously been issued by appropriate authority.").

18 *See LRM v. Kastenberg*, 72 M.J. 364, 376 (C.A.A.F. 2013) (citations and internal punctuation omitted) (Stucky, J. dissent).

19 *United States v. Weiss*, 36 M.J. 224, 228 (C.M.A. 1992).

20 28 U.S.C. § 1651(a) (1949) [hereinafter "All Writs Act"]; *see also United States v. Denedo*, 556 U.S. 904, 911 (2009); Rule for Courts-Martial 1203(b), MCM (2012 ed.), Discussion.

21 *Kastenberg*, 72 M.J. at 367 (quoting *Denedo*, 556 U.S. at 911).

22 *Id.* (citing *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999)).

23 *Id.* (quoting *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008), *aff'd*, 556 U.S. 904 (2009)).

24 *United States v. Booker*, 72 M.J. 787, 791 (N-M. Ct. Crim. App. 2013) (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)).

25 *Kastenberg*, 72 M.J. at 367 (quoting *Denedo*, 66 M.J. at 120).

26 *Id.* (citations omitted).

27 *Id.*; *see also Roche*, 319 U.S. at 25 (stating appellate court authority to issue writs of *mandamus* "is not confined to the issuance of writs in aid of jurisdiction already acquired by appeal but extends to [cases within] its appellate jurisdiction although no appeal has been perfected.").

regarding a victims' rights under Article 6b(a) and (c) and Article 32 (preliminary hearings). An alleged victim's request that a CCA reverse the military judge's ruling on those matters is an effort "'to modify an action that was taken within the subject matter jurisdiction of the military justice system.'"[28] The Court of Appeals for the Armed Forces (CAAF) and CCAs regularly review military judges' rulings under those rules of evidence and those articles.[29] Furthermore, a military judge's ruling on those matters, such as the admissibility of evidence of a previous sexual relationship between the accused and the alleged victim (Mil. R. Evid. 412), or psychological evidence that the alleged victim has a personality disorder (Mil. R. Evid. 513), "has a direct bearing on . . . the evidence considered by the court-martial on the issues of guilt or innocence -- which will form the very foundation of a finding and sentence."[30] As such, the harm from an improper ruling on such evidence would have "the potential to directly affect the findings and sentence" of a court-martial.[31]

However, the Army Court of Criminal Appeals recently found that they did not need to consider whether a matter was in aid of their jurisdiction under the All Writs Act if the petition is filed for one of the enumerated reasons under Article 6b(e).[32]

III. Standing

After an appellate court reviews whether it has jurisdiction, the next question concerns whether the petitioner has standing. "As 'an essential and unchanging part of the case-or-controversy requirement of Article III,' constitutional standing 'is a threshold issue in every case before a federal court, determining the power of the court to entertain the suit.'"[33] Military courts, Article I courts, generally apply standing requirements "as a prudential matter."[34] Thus, an alleged victim's failure to satisfy standing requirements would preclude a court's consideration of his or her petition for *mandamus* relief.

To have standing, a petitioner must establish an injury in fact, causation, and redressability.[35] An injury in fact is "a concrete and particularized invasion of a legally protected

[28] *Kastenberg*, 72 M.J. at 368.

[29] *See, e.g., United States v. Gaddis*, 70 M.J. 248, 250 (C.A.A.F. 2011) (addressing the Mil. R. Evid. 412 balancing test); *United States v. Key*, 71 M.J. 566, 569 (N-M. Ct. Crim. App. 2012), *review denied*, No. 13-0018 NA, 2012 CAAF LEXIS 1189 (C.A.A.F. Oct. 31, 2012) (analyzing judge's Mil. R. Evid. 412 ruling); *United States v. Klemick*, 65 M.J. 576, 578 (N-M. Ct. Crim. App. 2006) (reviewing military judge's Mil. R. Evid. 513 ruling); *United States v. Brown*, 17 M.J. 544, 546 (A.C.M.R. 1983) (holding that disallowing evidence offered under Mil. R. Evid. 412 by the defense was erroneous).

[30] *Kastenberg*, 72 M.J. at 368.

[31] *Id.* (quoting *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013)).

[32] *DB v. Lippert*, No. 20150769, 2016 CCA LEXIS 63, at *5 (A. Ct. Crim. App. Feb. 1, 2016).

[33] *United States v. McVeigh*, 106 F.3d 325, 334 (10th Cir. 1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Boyle v. Anderson*, 68 F.3d 1093, 1100 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1266 (1996)) (internal citations omitted).

[34] *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008) (citing *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003)) ("This Court, which was established under Article I of the Constitution, has applied the principles from the 'cases' and 'controversies' limitation as a prudential matter."); *see, e.g., United States v. Loving*, 41 M.J. 213, 244 (C.A.A.F. 1994) (assuming *arguendo* that appellant would have had standing to object to search of another's home); *see also Kastenberg*, 72 M.J. at 368-69 (addressing whether petitioner-victim had standing by using federal precedent); *United States v. Disney*, 62 M.J. 46, 48-49 (C.A.A.F. 2005) (finding the appellant had standing to assert claim).

[35] *Wuterich*, 67 M.J. at 69.

interest."[36] Causation is a "traceable connection between the alleged injury in fact and the alleged conduct of the [respondent]."[37] Redressability is shown when "it is likely . . . that the [petitioner's] injury will be remedied by the relief [petitioner] seeks in bringing suit."[38]

In the United States' current system of public prosecutions, "federal courts have frequently permitted third parties to assert their interests in preventing disclosure of material sought in criminal proceedings or in preventing further access to materials already so disclosed."[39] For example, some courts have found that third parties have standing to assert a recognized privilege, such as the attorney-client privilege, or a claim that they have been wronged by the actions of the defendant.[40] In *United States v. Nixon*, the Supreme Court decided a case where the President asserted his Presidential privilege as a third party against a *subpoena duces tecum* filed by the Special Prosecutor in a criminal case.[41] The Fifth Circuit has found a third party has standing to request redaction of a criminal record that has impugned his reputation.[42] Other courts have held that the press has standing to intervene in criminal cases to challenge the abridgment of free speech.[43]

However, those cases deviate from the norm in criminal proceedings: "a citizen [generally] lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."[44] Courts that deny standing to alleged victims in criminal trials often do so because there was no injury in fact:

> The direct, distinct and palpable injury in a criminal sentencing proceeding plainly falls only on the defendant who is being sentenced. It is the defendant and he alone that suffers the direct consequences of a criminal conviction and sentence. Collateral individuals to the proceeding . . . have not suffered an Article III direct injury sufficient to invoke a federal court's jurisdiction to rule on their claim.[45]

Military courts should be wary of extending standing in contravention of a clear mandate by Congress. In a criminal trial, the accused risks losing the very foundation of what the United States Constitution was created to protect: freedom and liberty.

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[36] *Sprint Communs. Co..v. APCC Servs.*, 554 U.S. 269, 274 (2008) (quoting *Lujan*, 504 U.S. at 560-61).

[37] *Id.*

[38] *Id.*

[39] *Kastenberg*, 72 M.J. at 369 (citing *United States v. Hubbard*, 650 F.2d 293, 311 n.67 (D.C. Cir. 1980)..

[40] *Anthony v. United States*, 667 F.2d 870, 878 (10th Cir. 1981) (holding that a third-party psychologist, who was the victim of illegal wiretapping, had standing to object to appellant-wiretapper's request for discovery and had standing to bring motion to suppress the contents of the unlawfully recorded tapes).

[41] *United States v. Nixon*, 418 U.S. 683, 686-88, 715-16 (1974).

[42] *In re Smith*, 656 F.2d 1101, 1107 (5th Cir. 1981) (holding the liberty and property concepts of the Fifth Amendment protect an individual from being publicly and officially accused of having committed a serious crime, particularly where the accusations gain wide notoriety) (citing *United States v. Briggs*, 514 F.2d 794, 799 (5th Cir. 1975)).

[43] *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1, 15 (1986) (holding there is a First Amendment right of access to criminal proceedings); *In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records*, 864 F.2d 1559, 1561 (11th Cir. 1989) (citing *In re Application of Dow Jones & Co.*, 842 F.2d 603, 607 (2d Cir. 1988) ("The rights of potential recipients of speech, like the news agencies, to challenge the abridgment of that speech has already been decided.")).

[44] *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973).

[45] *United States v. Grundhoefer*, 916 F.2d 788, 791 (2d Cir. 1990).

> "The Bill of Rights was written to protect the individual from the overreaching and intrusive power of the government when it seeks to deprive the individual of life, liberty or property. Preventing the encroachment of government into a person's rights, not actually requiring state action to protect these rights, is the philosophical underpinning of our democracy."[46]

Upholding the accused's constitutional rights also comports with the first purpose of military law "to promote justice."[47] Finally, a non-party's limited right to appeal a military judge's ruling is consistent with an accused's constitutional rights to due process and a speedy trial.[48]

Extraordinary writs slow down trials while the parties await an appellate decision. Thus, the military justice system, and even more so the judiciary, should stand as a bulwark against the encroachment of the accused's constitutional rights.

Although "[t]here is long-standing precedent that a holder of a privilege has a right to contest and protect the privilege,"[49] Congress specifically granted standing to alleged victims under Article 6b for alleged violations of their procedural rights under Article 6b, Article 32, and specific Military Rules of Evidence. (cite) "Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases."[50] Accordingly, Article 6b provides the alleged victim with limited standing to file a writ of *mandamus* only on those issues specified under the article.[51] CCAs should not extend standing to alleged victims on any matters not explicitly granted by Congress.

A. Standing for Alleged Victims Prior to the CVRA

"[P]rior to the CVRA most courts denied crime victims any opportunity to challenge lower court decisions impairing their rights as victims, whether through *mandamus* or otherwise."[52] In *United States v. McVeigh*, the Tenth Circuit dismissed the victims' *mandamus* petition for lack of standing when they appealed a district court order prohibiting the victims from attending trial.[53] That court held the victims did not have a personal First Amendment right to attend the trial.[54] Both before and even

[46] Rachel King, *Why a Victims' Rights Constitutional Amendment Is a Bad Idea: Practical Experiences from Crime Victims*, 68 U. Cin. L. Rev. 357, 366-67 (2000); *see also id.* at 368 ("[Bills of] rights were supposed to guard against the tyranny of autocrats and kings. Abuse of power by Federalist judges only strengthened the ideas that underlay the Bill of Rights. Criminal procedure, on paper, gave a whole battery of protections to persons accused of [sic] crime. The defendant had the right to appeal a conviction; the state had no right to appeal an acquittal.") (quoting

Lawrence M. Friedman, A History of American Law 150 (2d ed. 1985)).

[47] UCMJ, Part I.

[48] *See Will v. United States*, 389 U.S. 90, 96 (1967) (citing *DiBella* v. *United States*, 369 U.S. 121, 126 (1962)).

[49] *Kastenberg*, 72 M.J. at 368 (citations omitted).

[50] *Roche*, 319 U.S. at 30 (citation omitted).

[51] *See Kastenberg*, 72 M.J. at 368.

[52] *United States v. Monzel*, 641 F.3d 528, 534 (D.C. Cir. 2011) (citations omitted).

[53] *McVeigh*, 106 F.3d at 336.

[54] *Id.* at 335 (finding "recognition of such an entitlement, arguably affording a constitutional basis for disruptive interlocutory review in every criminal prosecution at the behest of any disappointed would-be trial attendee, would entail an unprecedented expansion/transformation of the public trial-access right unwarranted by the policies cited by the Supreme Court

after the CVRA, several courts have found victims do not have standing to appeal a criminal restitution order.[55] However, at least one court found it could hear a petition from an alleged victim concerning Federal Rule of Evidence 412, which is substantially similar to Mil. R. Evid. 412,[56] concerning the admissibility of the alleged victim's other sexual behavior.[57] In *Doe*, the Fourth Circuit found the district court's order on such an issue met the test of "practical finality" but never squarely addressed whether the victim had standing.[58]

B. Rights under the CVRA and Article 6b, UCMJ

A comparison of the CVRA with Article 6b is instructive in understanding Article 6b's limitations on standing. The CVRA provides victims, their lawful representatives, and government attorneys standing to petition for a writ of *mandamus* to assert the following victims' rights:

> (1) The right to be reasonably protected from the accused. (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused. (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding. (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding. (5) The reasonable right to confer with the attorney for the Government in the case. (6) The right to full and timely restitution as provided in law. (7) The right to proceedings free from unreasonable delay. (8) The right to be treated with fairness

as the rationale for gleaning the right from the First Amendment").

55 *United States v. Mindel*, 80 F.3d 394, 398 (9th Cir. 1996) (dismissing victim's appeal of criminal restitution order and related *mandamus* petition for lack of standing); *see also United States v. Aguirre- González*, 597 F.3d 46, 54 (1st Cir. 2010) ("[T]he default rule [is] that crime victims have no right to directly appeal a defendant's criminal sentence, under the CVRA or otherwise."); *United States v. Kelley*, 997 F.2d 806, 807 (10th Cir. 1993) (finding victim has no standing under the Victim and Witness Protection Act, 18 U.S.C. 3663, Pub. L. No. 97-291, § 5(a), 96 Stat. 1253 (1984) (as amended by Pub. L. No. 110-326, § 202, 122 Stat. 3561 (September 26, 2008)), to appeal a court's criminal restitution order); *United States v. Johnson*, 983 F.2d 216, 221 (11th Cir. 1993); *Grundhoefer*, 916 F.2d at 791-792.

56 Federal Rules of Evidence 412 provides:

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) *Criminal Cases.* The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

57 *Doe v. United States*, 666 F.2d 43, 45 (4th Cir. 1981).

58 *Id.* at 46.

and with respect for the victim's dignity and privacy.[59]

Under Article 6b(a), the victim has substantially similar rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any of the following:

(A) A public hearing concerning the continuation of confinement prior to trial of the accused.

(B) A preliminary hearing . . . relating to the offense.

(C) A court-martial relating to the offense.

(D) A public proceeding of the service clemency and parole board relating to the offense.

(E) The release or escape of the accused, unless such notice may endanger the safety of any person.

(3) The right not to be excluded from any public hearing or proceeding described in paragraph (2) unless the military judge or investigating officer, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that hearing or proceeding.

(4) The right to be reasonably heard at any of the following:

(A) A public hearing concerning the continuation of confinement prior to trial of the accused.

(B) A sentencing hearing relating to the offense.

(C) A public proceeding of the service clemency and parole board relating to the offense.

(5) The reasonable right to confer with the counsel representing the Government at any proceeding described in paragraph (2).

(6) The right to receive restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under . . . [the UCMJ].

Significantly, both Article 6b(e) and the CVRA primarily focus on the procedural rights of victims, such as their rights to be present and heard..

C. Rights v. Protections under Article 6b, UCMJ

To understand whether Article 6b grants standing to petition for substantive verses procedural rights under Mil. R. Evid. 412, the practitioner must analyze the meaning of the word "rights" under Article 6b(e)(1) as compared to the word "protections" under Article 6b(e)(4), as the terms are not interchangeable. The subsections are contradictory. Article 6b(e)(1) states that an alleged victim may file a writ if he or she "believes that a court-martial ruling violates the *rights* of the victim afforded by a

[59] 18 U.S.C. § 3771(a), (d)(1) (2015).

section (article) or rule specified in paragraph (4)"; whereas, Article 6b(e)(4) states that 6b(e)(1) "applies with respect to the *protections* afforded by" those articles and rules.[60] A right is defined as "[a] power, privilege, or immunity secured to a person by law."[61] A substantive right is "[a] right that can be protected or enforced by law; a right of substance rather than form."[62] For example, psychotherapist-patient, victim advocate-victim, or attorney-client privilege are substantive rights. A procedural right is a right that derives from legal or administrative procedure" and can also be used to "help[] in the protection or enforcement of a substantive right."[63] For example, a procedural right is the right to notice or to be heard at a proceeding. However, the word "protection," the "state of being protected," is much broader and denotes being "shield[ed] from injury or destruction."[64]

Mil. R. Evid. 513 clearly grants a victim the substantive right, and the protection, of confidential, privileged communications with a psychotherapist, and the procedural right to assert the psychotherapist-patient privilege.[65] Because of this dual grant, the alleged victim has the ability to petition both substantive and procedural aspects of a judge's Mil. R. Evid. 513 rulings. Therefore, this section primarily addresses a victim's rights vs. protections under Mil. R. Evid. 412.

Defense practitioners may aver the rights afforded to an alleged victim under Mil. R. Evid. 412 only include the procedural rights to notice of any Mil. R. Evid. 412 motion; to attend the hearing; and to a reasonable opportunity to be heard and provide argument at the hearing before a military judge determines whether the evidence is admissible.[66] If the alleged victim was afforded these rights and does not claim they were violated, the accused could claim the alleged victim lacked standing to petition a CCA for a writ of *mandamus* under Article 6b.

On the other hand, the alleged victim could claim that the rights afforded under Mil. R. Evid. 412 extend to challenging the military judge's substantive evidentiary rulings if they fail to comply with that rule. For example, the alleged victim may argue the military judge erred by admitting evidence that was not covered by one of the exceptions under Mil. R. Evid. 412. Such a writ of *mandamus* would then "appl[y] to the protections afforded by" Mil. R. Evid. 412.[67] To determine whether Article 6b applies to the "rights" or "protections" of Mil. R. Evid. 412, would-be petitioners would turn to the intent of the rule.

Mil. R. Evid. 412 was intended to "safeguard the alleged victim against the invasion of privacy and potential embarrassment that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process. . . . By affording victims protection in most instances, the rule encourages victims of sexual misconduct to

[60] Mil. R. Evid. 412 (emphasis added); Mil. R. Evid. 513 (emphasis added).
[61] Black's Law Dictionary 1322 (7th ed. 1999).
[62] *Id.* at 1324.
[63] *Id.* at 1323.
[64] Webster's New Collegiate Dictionary 926 (1975).
[65] Mil. R. Evid. 513(e) (On 17 June 2015, the President signed Exec. Order No. 13,696, 80 C.F.R. 119 (Jun. 22, 2015), implementing significant changes to the MCM, including Mil. R. Evid. 513 and 514. Mil. R. Evid. 513(e) now provides the patient the procedural rights to notice of the evidence, a "reasonable opportunity to attend the [closed] hearing and be heard," and the opportunity to call witnesses and present evidence).
[66] *See* E-mail from David W. Warning, Appellate Defense Counsel, Navy-Marine Corps Appellate Review Activity, to Leila Mullican (May 28, 2015, 15:49:36 EST) (on file with author); *see also* Mil. R. Evid. 412 (requiring the hearing to be closed and the record of the hearing sealed but not stating whether those are enforceable procedural rights of the alleged victim).
[67] UCMJ, Article 6b(e).

institute and to participate in legal proceedings against alleged offenders."[68] Further, Mil. R. Evid. 412 was intended to protect victims of sexual offenses from the degrading and embarrassing disclosure of intimate details of their private lives while preserving the constitutional rights of the accused to present a defense.[69]

Guarding the alleged victim's privacy is clearly one of the "protections" afforded by Mil. R. Evid. 412. The alleged victim-petitioner would argue nothing from legislative history supports that Congress intended to limit the rights under Mil. R. Evid. 412 to the procedural rights of notice and an opportunity to appear and be heard. They would support that reasoning by also claiming that the military judge's substantive ruling violated their "right to be treated with fairness and with respect for the[ir] dignity and privacy" under Article 6b(a)(8). A reading that *mandamus* can only be granted for procedural violations of Mil. R. Evid. 412 could deprive an alleged victim of a remedy even when a military judge's ruling depriving the alleged victim of privacy amounted to a clear deviation from established law or precedent. Such a result could frustrate the intent of Congress.[70]

However, since the alleged victim in a criminal trial does not have constitutional rights equivalent to those of the accused in the trial, the text of the statute granting the victim's right to appeal prevails. But the rights and the protections afforded to the alleged victim under Mil. R. Evid. 412 differ, making Article 6b's use of those two words in different subsections contradictory. Although Mil. R. Evid. 412 provides the victim with protection from improper disclosure of his or her sexual history and predisposition, the text of the rule does not endow the alleged victim with any substantive right to privacy, as Mil. R. Evid. 513 or 514 do with privilege.[71] Rather, the alleged victim is provided the following procedural rights: the right to notice of a motion seeking to admit evidence of the victim's sexual behavior under Mil. R. Evid. 412(c)(1)(B) and the right to "be afforded a reasonable opportunity to attend and be heard" under Mil. R. Evid. 412(c)(2). Therefore, a plain reading of the statute reveals that alleged victims can only petition CCAs for writs of *mandamus* if their procedural rights under Mil. R. Evid. 412 are violated.

Courts should also deny victims' petitions claiming that a military judge violated an alleged "right to privacy" under Article 6b(a)(8) in a Mil. R. Evid. 412 ruling. Article 6b(a)

[68] *United States v. Banker*, 60 M.J. 216, 219 (C.A.A.F. 2004) (citations omitted).

[69] *See United States v. Ellerbrock*, 70 M.J. 314, 322 (C.A.A.F. 2011) ("M.R.E. 412 is a rape shield law. It is intended to protect the privacy of victims of sexual assault while at the same time protecting the constitutional right of an accused to a fair trial through his right to put on a defense."); *United States v. Sanchez*, 44 M.J. 174, 177-78 (C.A.A.F. 1996) (finding Mil. R. Evid. 412 is "designed to protect a victim's privacy and thereby protect them from further trauma"); *United States v. Fox*, 24 M.J. 110, 112 (C.M.A. 1987) (finding purpose of Mil. R. Evid. 412 is to "protect victims of nonconsensual sexual offenses against needless embarrassment and unwarranted invasions of privacy"); MCM, App. 22, at A22-36 ("Rule 412 is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common in prosecutions of such offenses. . . . "The purpose of [the 1998 amendment] is to safeguard the alleged victim against the invasion of privacy and potential embarrassment that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process.").

[70] *See Doe*, 666 F.2d at 46 ("[T]he congressional intent embodied in rule [Federal Rules of Evidence] 412 will be frustrated if rape victims are not allowed to appeal an erroneous evidentiary ruling made at a pre-trial hearing conducted pursuant to the rule.").

[71] Mil. R. Evid. 513 (clearly providing a substantive right to confidential communications between the alleged victim and a psychotherapist because "[a] patient has a privilege to refuse to disclose" such communications).

(8)'s "right to be treated with fairness and with respect for . . . dignity and privacy" does not guarantee a victim a substantive right to privacy. Rather, it guarantees a procedural right to be treated with fairness and respect. In a criminal proceeding, the victim's privacy interest takes a back seat to the government's interest in prosecuting the case and the accused's constitutional rights. (cite). Therefore, if the trial judge adequately follows the procedures outlined in Mil. R. Evid. 412, the judge has complied with Article 6b(a)(8) by treating the victim with fairness and respect for the victim's privacy, and the victim should have no right to a writ of *mandamus* attacking the substantive ruling.[72] Even if no plain meaning can be ascertained from the statute, established cannons of interpretation also promote such a result. Under the general/specific cannon of interpretation,[73] the broader word "protection" under Article 6b(e)(2) should be limited by the more specific word "rights" in Article 6b(e)(1). The legislative history of the 2015 version of Article 6b states subsection (e) authorizes a victim "who believes that a court-martial ruling violates the victim's rights afforded by" Mil. R. Evid. 412 and 513 "to petition the Court of Criminal Appeals for a writ of mandamus to require the court-martial to comply with the MRE."[74] Therefore, under this rubric, the alleged victim would only have standing to petition for a writ of *mandamus* to assert his or her stated procedural rights under Mil. R. Evid. 412; the alleged victim would not have standing to assert a substantive right of privacy.

Under the nearest reasonable referent cannon,[75] Article 6b(e)(1)'s phrase, "violates the rights of the victim afforded by" one of the enumerated articles or rules, means only those rights provided by the specified article or rule of evidence are applicable.

This reading of Article 6b(e) is consistent with the CAAF's decision in *Kastenberg*, which held the alleged victim had standing to assert her right to be heard but the military judge retained appropriate discretion to determine "the manner in which her argument [wa] s presented."[76] As stated by CAAF, "M.R.E. 412 and 513 do not create . . . any right to appeal an adverse evidentiary ruling."[77] Article 6b(e) may be Congress' sanction of *Kastenberg*'s decision that a petitioner has standing to request a writ when his or her procedural rights have been violated, and *Kastenberg* should not be read to further expand the alleged victim's standing to substantive issues.[78]

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[72] *See United States v. BP Prods. N. Am. Inc.*, No. H-07-434, 2008 U.S. Dist. LEXIS 12893, at *50 (S.D. Tex. Feb. 21, 2008) ("The reasonable right to confer with the government and the government's obligation to use its best efforts to provide notice of this right are . . . mechanisms through which the CVRA guarantees victims' right to fairness").

[73] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 183 (2012) ("If there is a conflict between a general provision and a specific provision, the specific provision prevails."); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (citing *Morton* v. *Mancari*, 417 U.S. 535, 550-51 (1974)) ("The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one.").

[74] 113 Cong. Rec. H8684 (daily ed. Dec. 4, 2014).

[75] *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 152 (2012) ("When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent."); *see also United States Fire Ins. Co. v. Kelman Bottles*, 538 Fed. Appx. 175, 180 (3d Cir. 2013) (applying the nearest reasonable referent cannon).

[76] 72 M.J. at 371.

[77] *Id.*

[78] E-mail from David W. Warning, Appellate Defense Counsel, Navy-Marine Corps Appellate Review Activity, to Leila Mullican (May 28, 2015, 15:49:36 EST) (on file with author). However, Congress seemingly did extend

Article 6b(e)(4) limits standing to only the protections afforded by Articles 6b and 32 and Mil. R. Evid. 412, 513, 514, and 615.. Therefore, many potential victims do not have standing to file *mandamus* petitions under Article 6b(e) even though subsection (b) broadly defines a victim to be anyone who "has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense" under the UCMJ. For example, under Article 6b(e), a victim of an assault does not have standing under Article 6b(e) to contest a military judge's decision under Mil. R. Evid. 403, 404, or 405 even if the military judge errs in entering a negative trait of the victim's character into evidence. An assault victim does not have standing to petition a military judge's ruling admitting evidence that the victim was the aggressor under Mil. R. Evid. 404(a)(2). A victim, even a victim of sexual assault, cannot petition a military judge's ruling admitting evidence of his or her bias under Mil. R. Evid. 608 or of his or her former crime under Mil. R. Evid. 609. Although such evidence could be just as harmful to the privacy of the alleged victim of a sexual assault as evidence that he or she had a certain sexual relationship in the past or a discussion with a psychotherapist, Congress did not include those rules of evidence as grounds for *mandamus* petitions under Article 6b(e).

Congress also decided to leave out other provisions related to Mil. R. Evid. 412 and 513, such as Mil. R. Evid. 413 (similar crimes in sexual offense cases) and 414 (similar crimes in child-molestation cases), under the article's grant of standing. Even though Mil. R. Evid. 413 and 414 cover other similar offenses of an alleged accused, they could become relevant to the alleged victim in a case of sexual assault if, for example, the prosecution sought to admit evidence of the alleged victim's past abuse by the same accused under those rules. Although Mil. R. Evid. 412 may also be implicated under those circumstances, the alleged victim could have a desire to keep such prior abuse private or have a different perspective about the admissibility of such evidence under Mil. R. Evid. 413 and 414 than the military judge or the prosecutor.

D. Standing under the CVRA

Federal case law concerning the CVRA focuses on procedural, rather than substantive, potential errors of the lower courts.[79] This procedural focus highlights the petitioner's heavy burden when petitioning for writs of *mandamus* on substantive issues and reflects how narrowly courts have interpreted congressional grants of standing to petition for *mandamus* relief.[80] Several appellate cases decided under the CVRA involve the right to be "reasonably heard" at hearings and obtain evidence.[81] Oth-

standing under Article 6b to substantive violations of Mil. R. Evid. 513 and 514.

[79] *See* notes 84-86 *infra; cf. In re K.K.*, 756 F.3d 1169, 1170 (9th Cir. 2014) (per curiam) (deciding substantive issue of whether district court abused its discretion in denying victim's motion to squash subpoena requested by defendant).

[80] *See also Lippert*, No. 20150769, 2016 CCA LEXIS 63, at *33 (interpreting Article 6b and focusing on improper procedure).

[81] *See, e.g., In re Siler*, 571 F.3d 604, 611 (6th Cir. 2009) (finding no abuse of discretion in court's denial of disclosure of presentence report (PSR) to victim); *In re Brock*, 262 Fed. Appx. 510, 512 (4th Cir. 2008) (per curiam) (finding no abuse of discretion in denying the victim access to the PSR because victim could exercise right to be heard without such access and no abuse of discretion in refusing to consider victim's arguments on sentencing guidelines because the court considered his statements regarding the assault); *United States v. Moussaoui*, 483 F.3d 220, 233-34, 238-39 (4th Cir. 2007) (reversing district court's order granting victims access to all the government's information turned over to defense counsel in discovery in the criminal case for use in civil litigation); *In re Kenna* , 453 F.3d 1136, 1137 (9th Cir. 2006) (per curiam) (finding that CVRA

er cases involve the victim's right to attend the court hearing.[82] At least one court has found the victim's right to confer with the prosecutor "on a proposed plea agreement and the government's obligation to provide notice of that right is subject to the limit that the CVRA not impair prosecutorial discretion."[83]

"Neither the text of the [CVRA] nor its legislative history provides guidance as to what specific procedures or substantive relief, if any, Congress intended [the provision concerning the victim's right to be treated with fairness and with respect for the victim's dignity and privacy] to require or prohibit."[84] Some courts have applied the right to fairness broadly, finding that the right to fairness provision was "intended to conform to the sponsors' expectation that the statute will be applied liberally to the extent consistent with other law."[85] However, even those courts have focused on the procedural rights of crime victims and the fact that the other protections afforded by the CVRA are mechanisms to ensure the victim's right to fairness is upheld.[86] This provision has also been used to protect the disclosure of victims' private information to the general public.[87]

E. Conclusion

The Constitution requires that CCAs must strictly construe statutes providing standing to request a writ of *mandamus*.[88] A comparison between the CVRA and Article 6b, along with a review of the plain reading of the statutes and historical precedent, highlights Congress' narrow grant of standing in Article 6b(e). Although a petitioner has a privacy interest in Mil. R. Evid. 412 evidence, that privacy interest does not rise to the level of a right guaranteed by Mil. R. Evid. 412. Petitioners should not be

did not confer a general right for victims to access the PSR); *United States v. Ingrassia,* No. CR-04-0455 (ADS), 2005 U.S. Dist. LEXIS 27817, at *50 (E.D.N.Y. Sept. 7, 2005) (CVRA does not require disclosure of PSR or "all discovery in a criminal case to promote the goal of giving victims a voice at plea proceedings"); *cf. Kenna v. United States Dist. Court for the C.D. of Cal.*, 435 F.3d 1011, 1018 (9th Cir. 2006) (holding district court erred by limiting the victims to presenting written statements at sentencing hearing).

[82] *See, e.g., In re Mikhel*, 453 F.3d 1137, 1139 (9th Cir. 2006) (per curiam) ("A crime victim . . . does not have an absolute right to witness a trial at the expense of the defendant's rights," but the court must consider reasonable alternatives to exclusion); *United States v. L.M.*, 425 F. Supp. 2d 948, 957 (N.D. Iowa 2006) (holding that the deceased victim's family was granted the right to not be excluded from any *public* court proceeding but could be excluded from private hearings).

[83] *United States v. BP Prods. N. Am. Inc.*, No. H-07-434, 2008 U.S. Dist. LEXIS 12893, at *47 (S.D. Tex. Feb. 21, 2008).

[84] *United States v. Turner*, 367 F. Supp. 2d 319, 335 (E.D.N.Y. 2005).

[85] *Turner*, 367 F. Supp. 2d at 335.

[86] *BP Prods. N. Am. Inc.*, No. H-07-434, 2008 U.S. Dist. LEXIS 12893, at *50; *United States v. Heaton*, 458 F. Supp. 2d 1271, 1272 (D. Utah 2006) ("When the government files a motion to dismiss criminal charges that involve a specific victim, the only way to protect the victim's right to be treated fairly and with respect for her dignity is to consider the victim's views on the dismissal."); *Turner*, 367 F. Supp. 2d at 335 (mandating that the government must provide the court with the victims' names and contact information so the court could ensure their rights are afforded them);

[87] *See United States v. Patkar*, No. 06-00250 JMS, 2008 U.S. Dist. LEXIS 6055, at *19-20 (D. Haw. Jan. 28, 2008) (finding fairness and respect for victim's privacy outweighed public interest in disclosure of sealed information).

[88] *See Will*, 389 U.S. at 96 ("All our jurisprudence is strongly colored by the notion that appellate review should be postponed, except in certain narrowly defined circumstances, until after final judgment has been rendered by the trial court."); *Carroll v. United States*, 354 U.S. 394, 415 (1957) ("Delays in the prosecution of criminal cases are numerous and lengthy enough without sanctioning appeals that are not plainly authorized by statute."); *see also Lippert*, No. 20150769, 2016 CCA LEXIS 63, at *33 (declining to determine whether Mil. R. Evid. 513 records were admissible at trial in deciding victim's petition for writ of *mandamus* because there had "not yet been a proceeding or determination that correctly applies the procedural and substantive requirements of Mil. R. Evid. 513 to the facts of this case").

granted standing to claim the military judge clearly abused his or her discretion on substantive matters. Only if a military judge does not properly afford alleged victims their procedural rights under Mil. R. Evid. 412 should they be allowed to petition for a writ of *mandamus* under that rule. For the other articles and rules enumerated under Article 6b(e), CCAs should primarily focus on whether the alleged victim's procedural rights under the articles and rules were violated prior to ruling on any substantive issues presented by the petition.

IV. Issuance of the Writ of *Mandamus*

Once the petitioner shows the requested writ is "'in aid of' the [CCA]'s existing jurisdiction" and that he or she has standing to bring the claim, the petitioner must next prove that "the requested writ is 'necessary or appropriate.'"[89] For the purposes of this Part, the Author will assume *arguendo* that the CCAs allow alleged victims to petition for writs of *mandamus* on procedural and substantive claims of error under the articles and rules under Article 6b(e)(4).

A. Traditional *Mandamus* Standard of Review for CCA Petitions

Mandamus is an extraordinary remedy that should be used in only extraordinary circumstances.[90] Otherwise, "every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction."[91]

Under military precedent, a "writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary situations."[92] To establish that a writ of *mandamus* is necessary or appropriate, the petitioner "must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances."[93] Petitioners bear the heavy burden to show they have "'a clear and indisputable right' to the extraordinary relief" requested.[94] Under this heightened standard, a CCA must find a discretionary "judicial decision [] amount[s] to more than even 'gross error'" in order to reverse.[95] Instead, only exceptional circumstances amounting to a "clear abuse of discretion or usurpation of judicial power . . . justify the invocation of this extraordinary remedy."[96] A military judge exceeds his or her discretionary power under a Military Rule of Evidence if "by its very language, the rule of evidence relied upon as the basis for [the judge's] ruling can, under no circumstance as applied to the limited issue presented to him, support that ruling."[97]

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[89] *Kastenberg*, 72 M.J. at 367 (quoting *Denedo*, 66 M.J. at 119).

[90] *Ex parte Rowland*, 104 U.S. 604, 617 (1882) ("The general principle which governs proceedings by mandamus is, that whatever can be done without the employment of that extraordinary remedy, may not be done with it. It only lies when there is practically no other remedy.").

[91] *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953).

[92] *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983) (per curiam) (citations omitted).

[93] *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012) (citing *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004)).

[94] *Ponder v. Stone*, 54 M.J. 613, 616 (N-M. Ct. Crim. App. 2000) (quoting *Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993); *see also Will*, 389 U.S. at 96.

[95] *Murray v. Haldeman*, 16 M.J. 74, 76 (C.M.A. 1983) (citations omitted).

[96] *Booker*, 72 M.J. at 791.

[97] *United States v. Wade*, 15 M.J. 993, 997 (N.M.C.M.R. 1983).

B. Circuit Split on Standard of Review for CVRA Petitions

The federal circuits are split on the question of which standard of review applies to *mandamus* petitions brought under the CVRA. Four circuits apply the traditional, heightened *mandamus* standard.[98] These circuits reason that "Congress could have drafted the CVRA to provide for 'immediate appellate review' or 'interlocutory appellate review,' something it has done many times. Instead, it authorized and made use of the term 'mandamus.'"[99] When

> Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.[100]

"Mandamus is the subject of longstanding judicial precedent."[101] Courts should "'assume that Congress knows the law and legislates in light of federal court precedent.'"[102]

Four other circuits apply an appellate review standard of "abuse of discretion."[103] The circuit courts that eschew the traditional *mandamus* standard do so because they find "the CVRA contemplates active review of orders denying victims' rights claims even in routine cases . . . The CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute."[104] Since those circuit courts find the CVRA creates a presumption that courts of appeals will review an alleged victim's petition, they find the victim is not required to meet the heightened standard of traditional *mandamus* review. Such courts issue a writ of *mandamus* under the CVRA whenever they "find that the district court's order reflects an abuse of discretion or legal error."[105]

C. When a Writ of Mandamus Should Issue for Violations of Articles and Rules Enumerated Under Article 6b(e)(4)

CCAs should decline to depart from CAAF precedent on writs of *mandamus* and instead concur with the District of Columbia Circuit that since "Congress called for 'mandamus' strongly suggests it wanted 'mandamus.'"[106] The case for the traditional *mandamus* standard of review is particularly strong since Congress knew of the circuit split on the interpretation of the *mandamus* standard under the CVRA and yet drafted Article 6b(e) to specifi-

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[98] *See Monzel*, 641 F.3d at 533*; In re Acker*, 596 F.3d 370, 372 (6th Cir. 2010); *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008); *In re Antrobus*, 519 F.3d 1123, 1129 (10th Cir. 2008).

[99] *In re Antrobus*, 519 at 1124.

[100] *Id.* (quoting *Morissette v. United States,* 342 U.S. 246, 263 (1952)).

[101] *Id.* at 1125.

[102] *Id.* (quoting *Bd. of Cnty. Comm'rs v. U.S. E.E.O.C.*, 405 F.3d 840, 845 (10th Cir. 2005)).

[103] *See Kenna*, 435 F.3d at 1017 (reviewing petition under the more generous "abuse of discretion or legal error" standard); *In re W.R. Huff Asset Mgmt. Co*., 409 F.3d 555, 563 (2d Cir. 2005) (reviewing petition for abuse of discretion); *see also In re Stewart*, 552 F.3d 1285, 1288-89 (11th Cir. 2008) (granting petition without asking whether victim had a clear and indisputable right to relief); *In re Walsh*, 229 Fed. Appx. 58, 60 (3d Cir. 2007) (stating in dicta that "mandamus relief is available under a different, and less demanding, standard under [CVRA]").

[104] *Kenna*, 435 F.3d at 1017 ("The CVRA explicitly gives victims aggrieved by a district court's order the right to petition for review by writ of mandamus, provides for expedited review of such a petition, allows a single judge to make a decision thereon, and requires a reasoned decision in case the writ is denied.").

[105] *Id.*

[106] *Monzel*, 641 F.3d at 533.

cally state the victim may petition the CCA "for a writ of mandamus." Furthermore, the Army Court of Criminal Appeals recently applied the heightened standard in its review of an alleged victim's *mandamus* petition.[107]

1. Other Adequate Means to Attain Relief

Under the traditional *mandamus* standard, the petitioner must first show there is no other adequate means to attain relief.[108] Issuance of a writ of *mandamus* may be the only available means for an alleged victim suffering violations of his or her rights under the articles and rules under Article 6b(e)(4) to attain the relief requested. By requesting a writ of *mandamus* for substantive issues under those rules, alleged victims would complain of an improper ruling to admit evidence of the petitioner's sexual history, conversations with a victim advocate, or mental health records. The relief they request is to keep that information private. Once such evidence is admitted, the alleged victim's privacy rights, if violated, would be difficult, if not impossible, to repair on appeal because the information would have already been disclosed at a public trial.[109] As a result, the relief requested by such a petitioner would not be attainable on direct review of any potential findings and sentence approved by a convening authority under Articles 66 or 69, UCMJ, because the loss in his or her privacy interest would have already occurred.

Other alleged victims may complain that the military judge did not provide them with their procedural rights as required. CAAF has already found there may be "no other meaningful way for these issues to reach appellate review."[110]

2. Clear and Indisputable Right to Issuance of the Writ

Once the petitioner establishes there are no other adequate means to attain relief, he or she must next show that his or her right to "issuance of the writ is clear and indisputable."[111] Petitioners show a clear and indisputable right to the issuance of a writ of *mandamus*, if the military judge's discretionary "judicial decision amounts to more than even 'gross error'"[112] and is a "usurpation of judicial power."[113]

For a procedural claim of error under Mil. R. Evid. 412, the petitioner must show that the military judge did not allow the petitioner one of his or her procedural rights, such as the right to be present and heard at the hearing. "A reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel."[114]

To prevail on a substantive claim of error under Mil. R. Evid. 412, the petitioner must show the military judge usurped his or her judicial authority in admitting evidence in violation of the petitioner's right to privacy. Mil. R. Evid. 412(a) is a rule of exclusion, which provides that, unless an exception applies, "[e]vi-

[107] *Lippert*, No. 20150769, 2016 CCA LEXIS 63, at *5.
[108] *Hasan*, 71 M.J. at 418 (citing *Cheney*, 542 U.S. at 380-81).
[109] See *Doe*, 666 F.2d at 46 ("Without the right to immediate appeal, victims aggrieved by the court's order will have no opportunity to protect their privacy from invasions forbidden by the rule. Appeal following the defendant's acquittal or conviction is no remedy, for the harm that the rule seeks to prevent already will have occurred.").
[110] *Kastenberg*, 72 M.J. at 372.
[111] *Hasan*, 71 M.J. at 418 (citing *Cheney*, 542 U.S. at 380-81).
[112] *Murray*, 16 M.J. at 76 (citations omitted).
[113] *Booker*, 72 M.J. at 791.
[114] *Kastenberg*, 72 M.J. at 370.

dence offered to prove that any alleged victim engaged in other sexual behavior" is "not admissible in any proceeding involving an alleged sexual offense."[115]

The rule provides three exceptions. "[D]efense counsel has the burden of demonstrating why the general prohibition in [Mil. R. Evid.] 412 should be lifted to admit evidence of the sexual behavior of the victim . . ."[116] "In particular, the proponent must demonstrate how the evidence fits within one of the exceptions to the rule."[117] If the military judge performs the proper analysis on the record under each exception, his or her discretionary ruling admitting or excluding such evidence will rarely amount to a usurpation of judicial authority.[118]

First, Mil. R. Evid. 412(b)(1)(A) allows the entry of "evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence." For example, evidence that the alleged victim had sexual intercourse with another person on the same evening as the alleged sexual assault by the accused would be admissible under this subsection to show that the other person may have caused the victim's injuries that the victim attributed to the accused. Second, "evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct [can be] offered by the accused to prove consent or by the prosecution."[119] For example, evidence that the alleged victim had consensual sex with the accused on the morning prior to the alleged sexual assault may be admissible to show the victim consented to the sexual conduct at issue. Under the first and second exceptions, the military judge is also required to perform the Mil. R. Evid. 412(c)(3) balancing test: to determine whether the probative value of the evidence outweighs the danger of unfair prejudice to the petitioner's privacy. The military judge must also review the admissibility of the evidence under Mil. R. Evid. 401 and 403.[120]

The third exception under Mil. R. Evid. 412(b)(1)(C) allows evidence of prior sexual acts that is "constitutionally required."[121] Evidence is constitutionally required if it is "essential to a fair trial."[122] Under this exception, the "'alleged victim's privacy' interests cannot preclude the admission of evidence 'the exclusion of which would violate the constitutional rights of the accused.'"[123] Therefore, the military judge is

[115] *Ellerbrock*, 70 M.J. at 322 (citation omitted) (finding several legitimate interests in the military context support Mil. R. Evid. 412's limitation of an accused to present relevant testimony, including "a societal interest in the reporting and prosecution of sexual offenses and maintenance of a justice system that is fair to both the accused and to the victims. They also include maintenance of good order and discipline in the military as well as the morale and welfare of those who serve in the armed forces").

[116] *United States v. Moulton*, 47 M.J. 227, 228 (C.A.A.F. 1997).

[117] *Banker*, 60 M.J. at 222 (citing *Moulton*, 47 M.J. at 228-29).

[118] A military judge's proper analysis generally is not even overturned under the lower abuse of discretion standard. *See, e.g.*, *Banker*, 60 M.J. at 225 ("In the context of M.R.E. 412, it was within the judge's discretion to determine that such a cursory argument did not sufficiently articulate how the testimony reasonably established a motive to fabricate."); *Moulton*, 47 M.J. at 228 (agreeing with CCA that military judge did not abuse his discretion in precluding further questioning under Mil. R. Evid. 412 because the defense had failed "to articulate a theory of admissibility").

[119] Mil. R. Evid. 412(b)(1)(B).

[120] Mil. R. Evid. 412(c)(3); *see United States v. Andreozzi*, 60 M.J. 727, 738 (A.C.C.A. 2004) (citing *Banker*, 60 M.J. at 220).

[121] *See, e.g.*, *United States v. Gray*, 40 M.J. 77, 80 (C.M.A. 1994) (finding abuse of discretion to exclude evidence that same 9-year-old girl who was currently accusing defendant of rape had previously falsely accused him of rape).

[122] *Ellerbrock*, 70 M.J. at 322.

[123] *Gaddis*, 70 M.J. at 250 (citing Mil. R. Evid. 412(b)(1)(C)).

not required to perform a Mil. R. Evid. 412(c)(3) balancing test to determine whether the probative value of the evidence outweighs the danger of unfair prejudice to the petitioner's privacy.[124]

"In order to properly determine whether evidence is admissible under the constitutionally required exception the military judge must evaluate whether the proffered evidence is relevant, material, and favorable to the defense."[125] The military judge must then conduct a Mil. R. Evid. 403 balancing test.[126] If a military judge "does not sufficiently articulate [the Mil. R. Evid. 403] balancing on the record, his [or her] evidentiary ruling will receive less deference from" appellate courts.[127] The military judge's decision to admit Mil. R. Evid. 412 evidence is further safeguarded by a determination that a reasonable panel might receive a significantly different impression of the petitioner's credibility if defense counsel was permitted to inquire into the other sexual behavior.[128]

An accused has the constitutional right "to be confronted by the witnesses against him."[129] That right includes the right to cross-examine those witnesses.[130] "'[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'"[131] "[A]n accused's Confrontation Clause rights are violated when a reasonable jury might have received a significantly different impression of the witness's credibility had defense counsel been permitted to pursue his proposed line of cross-examination."[132] To cross-examine a witness on a subject, the proponent must establish the subject has "a direct nexus to the case that is rooted in the record."[133]

Evidence of motive is relevant and essential to the trier of fact to determine the petitioner's reason for reporting the alleged sexual assault at issue. "There is little question that . . . the credibility of the putative victim is of paramount importance, and that a statement by that person that she had made up some or all of the allegations to get attention might cause members to have a significantly different view of her credibility."[134] Generally, Article 120, UCMJ, charges concern the accused's conduct with the petitioner, the only other witness to the activity in question. In such a scenario, the petitioner's credibility is central to the government's case. Under those circumstances, military judges are more likely to find that evidence is constitutionally required and petitioners are less likely to show the military judge usurped his or her judicial authority in admitting the evidence.

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[124] *See id.* (For example, the military judge can find the evidence to be constitutionally required in order to preserve the accused's rights to confrontation and due process).

[125] *United States v. Smith*, 68 M.J. 445, 452 (C.A.A.F. 2010) (citation omitted).

[126] *Ellerbrock*, 70 M.J. at 319 (citations omitted) (finding the probative value of the evidence must outweigh the danger of unfair prejudice, to include "'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant").

[127] *United States v. Berry*, 61 M.J. 91, 96 (C.A.A.F. 2005) (citations omitted).

[128] *See Gaddis*, 70 M.J. at 256 (quoting *Del. v. Van Arsdall*, 475 U.S. 673, 680 (1986)); *United States v. Dorsey*, 16 M.J. 1, 7 (C.M.A. 1983) (concluding that the judge erred in excluding relevant evidence that "would have had a reasonable likelihood of affecting the judgment of the trier of fact").

[129] U.S. Const. amend. VI.

[130] *Van Arsdall*, 475 U.S. at 678 (citation omitted).

[131] *Id.* at 678-79 (quoting *Davis v. Alaska*, 415 U.S. 308, 316 (1974)).

[132] *United States v. Jasper*, 72 M.J. 276, 281 (C.A.A.F. 2013) (citation and quotation marks omitted).

[133] *United States v. Sullivan*, 70 M.J. 110, 115 (C.A.A.F. 2011).

[134] *Jasper*, 72 M.J. at 281.

To prevail on a claim of error under Mil. R. Evid. 513 or 514, the petitioner must show the military judge usurped his or her judicial authority in admitting evidence in violation of the petitioner's psychotherapist-patient or victim-victim advocate privilege or procedural rights under those rules. Under Mil. R. Evid. 513(d), the psychotherapist-patient privilege does not apply in seven circumstances:

> (1) when the patient is dead;
>
> (2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;
>
> (3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;
>
> (4) when a psychotherapist . . . believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;
>
> (5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;
>
> (6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;
>
> (7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation . . .[135]

[135] Until 2015, there had always been an eighth exception: "(8) when admission or disclosure of a communication is constitutionally required." However, the 2015 NDAA struck that exception. *See* § 537. That change may be unconstitutional because, in many cases, it would violate the accused's right to confrontation. *See, e.g., Davis*, 415 U.S. at 320 ("The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness."); *United States v. Lindstrom*, 698 F.2d 1154, 1167 (11th Cir. 1983) ("While we recognize the general validity of those interests, they are not absolute and, in the context of this criminal trial, must 'yield to the paramount right of the defense to cross-examine effectively the witness in a criminal case.'"). The Supreme Court has not squarely addressed this issue. *See Swidler & Berlin v. United States*, 524 U.S. 399, 408 n.3 (1998) (not addressing whether "exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the [attorney-client] privilege"); *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996) (holding, in a civil case, the psychotherapist-patient privilege is not subject to a test balancing "the relative importance of the patient's interest in privacy and the evidentiary need for disclosure"); *Johnson v. Norris*, 537 F.3d 840, 846 (8th Cir. 2008) (finding that, although "in at least some circumstances, an accused's constitutional rights are paramount to a State's interest in protecting confidential information, . . . [there is no] specific legal rule that answers whether a State's psychotherapist-patient privilege must yield to an accused's desire to use confidential information in defense of a criminal case"); *Sullivan*, 70 M.J. at 117 (citing *Lindstrom*, 698 F.2d at 1165-66) ("In sexual assault cases, evidence of an alleged victim's psychological condition could directly impact the members' impressions of the accused's mistake of fact as to consent, the alleged victim's credibility in making the accusation, and the alleged victim's consent to the alleged sexual assault. CAAF has found a witness's psychological state 'should be admitted if it relates to the witness's ability to perceive events and testify accurately.'"); *see infra* Part V.(Psychological evidence regarding the sexual assault complainant, especially if he or she was diagnosed with an attention-seeking disorder, bipolar disorder, or some

When a party seeks to admit evidence covered under the psychotherapist-patient privilege, Mil. R. Evid. 513(e)(2)[136] provides the patient with the following procedural rights: "a reasonable opportunity to attend the hearing and be heard," which "includes the right to be heard through counsel," and the opportunity to call witnesses and present evidence.[137] Before ordering production of or admitting such evidence, the military judge "must conduct a hearing, which shall be closed.[138] The military judge may examine the patient's records *in camera* and may issue protective orders concerning the evidence or "admit only portions of the evidence."[139] "Any production or disclosure permitted by the military judge must be narrowly tailored to only the specific records or communications . . . that meet the requirements for one of the enumerated exceptions to the privilege . . ."[140]

Under Mil. R. Evid. 514, a victim or victim advocate can claim a privilege to the victim's confidential communications with a victim advocate.[141] The privilege does not apply in six circumstances: (1) if the victim is dead; (2) if there is a duty to report under law; (3) if the advocate believes the victim may be a danger to any person, including the victim; (4) if the communication clearly contemplated the future commission of a fraud or crime; (5) when necessary to ensure the safety and security of military personnel, property, or information; and (6) when disclosure is constitutionally required.[142] Before communications between a victim and his or her victim advocate may be produced to the defense or admitted as evidence at trial, the court must hold a closed hearing, where the victim has a right to be in attendance and heard.[143] Any disclosure of such information must be "narrowly tailored" to meet one of the six exceptions to the privilege and to the stated use of the information.[144]

Petitioners may also attempt to claim a privilege in their restricted reports[145] of sexual assault that do not pertain to the case at trial under Mil. R. Evid. 514.[146] Such petitioners may request a writ of *mandamus* if they believe the military judge did not adequately protect their restricted reports from the defense or from release. An alleged victim's communications to his or her victim advocate "made for the purpose of facilitating advice or supportive assistance to the victim" are confidential com-

other disorder that could have impacted someone's lack of memory of their consent later, could be integral to the accused's defense. Such psychological evidence would also contribute to the fact finder's analysis as to whether a person falsified a complaint to obtain sympathy and attention or for other personal reasons).

136 Mil. R. Evid. 513(e)(2) (Supp. 2015).

137 Mil. R. Evid. 513(e)(2) (2012 ed. & Supp. 2013) (Prior to Exec. Order No. 13,696, Mil. R. Evid. 513(e)(2) only provided the patient "a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless . . . subpoenaed." That rule was formerly only permissive in that the military judge did not have to but "may order the hearing closed." Finally, the rule formerly did not require production or disclosure of psychological records to be narrowly tailored).

138 Mil. R. Evid. 513(e)(2) (Supp. 2015).

139 *Id.* at subsection (3), (5).

140 *Id.* at subsection (4).

141 Mil. R. Evid. 514(a), (c) (Supp. 2015).

142 *Id.* at subsection (d).

143 *Id.* at subsection (e)(2).

144 *Id.* at subsection (4).

145 Department of Defense Instruction (DoDI) 6495.02 at 92 (Mar. 28, 2013) (incorporating Change 1, Feb. 12, 2014) ("Restricted reporting" is defined as a "[r]eporting option that allows sexual assault victims to confidentially disclose the assault to specified individuals . . . and receive medical treatment, including emergency care, counseling, and assignment of a [sexual assault response coordinator] SARC and [sexual assault prevention and response victim advocate] SAPR VA, without triggering an investigation.").

146 For example, this argument could be that a military judge abused her discretion in reviewing the petitioner's restricted reports of sexual assault *in camera* and in subsequently releasing these reports to the defense.

munications protected by Mil. R. Evid. 514.[147] However, "[c]ommunications between the victim and a person other than the SARC, SAPR VA, or healthcare personnel are NOT confidential and do not receive the protections of Restricted Reporting."[148]

The rights given to victims under Mil. R. Evid. 615(e) and Articles 6b and 32, UCMJ, are primarily procedural. Under Mil. R. Evid. 615(e), a victim of an offense cannot be excluded from a trial of an accused for that offense "unless the military judge, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that hearing or proceeding."[149] Article 32, UCMJ, states that the victim will not be forced to testify at a preliminary hearing and allows the victim to obtain a copy of a recording of the preliminary hearing.

A petition that effectively proves a clear and indisputable right to the issuance of the writ would clearly state how the military judge usurped his or her judicial authority at any of the decision points under the articles and rules.

3. Issuance Is Appropriate under the Circumstances

Finally, the petitioner must establish that the issuance of the writ is appropriate under the circumstances.[150] Courts analyze at least two separate factors to determine whether the issuance of the writ is appropriate. First, is the lower court's ruling "an oft-repeated error" or likely to reoccur; in other words, does it "manifest[] a persistent disregard of federal rules"?[151] Second, does "[t]he lower court's order raise[] new and important problems, or issues of law of first impression"?[152] The CCA is more likely to grant a petitioner's petition for a writ of *mandamus* if the military judge's decision is likely to reoccur and/or raises new issues that have not been previously addressed on appellate review.

V. False Complaints of Sexual Assault

False complaints of sexual assault cause practitioners confusion. Alleged victims may attempt to petition CCAs on these matters. However, under Article 6b, petitioners do not have standing to seek writs of *mandamus* concerning military judges' rulings on admission of false complaints of sexual assault.

As stated in the drafter's analysis of Mil. R. Evid. 412, evidence of past false complaints of sexual assault by an alleged victim does not fall within the protections of Mil. R. Evid. 412 and is "not objectionable when otherwise admissible."[153] Therefore, an alleged victim does not have standing to petition the admission of evidence of a false complaint under Article 6b. Insofar as the allegations are proven to be false by a preponderance of the evidence[154] and the evidence to be presented at trial does not in-

[147] DoDI 6495.02 at Enclosure 4, ¶ 1(b)(4).
[148] *Id.* at ¶ 1(e)(2).
[149] (Supp. 2015).
[150] *Hasan*, 71 M.J. at 418 (citing *Cheney*, 542 U.S. at 380-81).
[151] *Dew v. United States*, 48 M.J. 639, 649 (A.C.C.A. 1998) (citing *In re Am. Med. Sys., Inc.,* 75 F.3d 1069, 1078 (6th Cir. 1996); *Bauman v. United States Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977)); *see also Booker*, 72 M.J. at 807.
[152] *Dew*, 48 M.J. at 649 (citations omitted); *Booker*, 72 M.J. at 807 (providing "we are aware that the circumstances present here have not been addressed in any decision revealed in the parties' pleadings or by this court").
[153] MCM, App. 22-36; Mil. R. Evid. 412.
[154] R.C.M. 801(e)(4) ("Questions of fact in an interlocutory question shall be determined by a preponderance of the evidence, unless otherwise stated in this Manual. In the absence of a rule in this Manual assigning the burden of persuasion, the party making the motion or raising the objection shall bear the burden of persuasion.").

clude other evidence protected under Mil. R. Evid. 412, the military judge is not required to conduct a Mil. R. Evid. 412 analysis in order to admit such evidence.[155] Even if the CCA decides to review a petition concerning the admission of a false complaint, a military judge has not usurped his or her judicial authority in admitting that evidence after the complaint is proven to be false by a preponderance of the evidence.

Defense counsel should not overlook the false complaint exception to Mil. R. Evid. 412. The three major reasons an alleged victim would file a false sexual assault complaint include "providing an alibi, seeking revenge, and obtaining sympathy and attention."[156] At least one scholar has written that false rape allegations "reflect impulsive and desperate efforts to cope with personal and social stress situations."[157] Military culture is rife with personal and social stress situations, including being far from loved ones, uprooted every two to four years, and sent on deployments to war zones and onboard military ships. At the same time, the military climate provides several potential economic and personal incentives for an alleged victim to falsely report a sexual assault. First, a report can enable a false complainant to avoid, or return early from, a deployment or be moved from a command or a duty location the alleged victim does not like. If the complainant files an unrestricted report, meaning the alleged offender would be investigated and that investigation could ultimately lead to a court-martial, the alleged victim is entitled to immediate transfer to another duty station, including off of a deployment or ship that is at sea.[158]

Second, false complainants can use their complaint to avoid personal misconduct.[159] For example, if service members from the same command had a consensual sexual relationship, one could accuse the other of sexual assault to avoid personal fraternization charges. The stakes for a service member facing discipline are high in the context of the military justice system. Charges of misconduct could lead to the service member's non-judicial punishment, where the person's military commander can adjudge several punishments, including but not limited to forfeiture of pay, reduction to an inferior pay grade, restriction to specified limits, and extra duties.[160] Charges of misconduct could also subject the service member to loss of their military career through administrative separation, which can result in something other than an honorable discharge, or a federal crime, and its attendant punishments and consequences, by court-martial.

Third, an alleged victim-complainant has access to medical and psychological services, including potential medical separation with disability benefits. Because "[s]exual assault victims shall be given priority, and treated as emergency cases,"[161] a person who regretted engaging in a consensual one-night stand could claim sexual assault to jump to the first of the line to obtain birth control and/or a sexually transmitted disease check. In such a scenario, false complainants may feel more comfortable saying they were sexually assaulted to avoid the

[155] MCM, Appendix 22-36; Mil. R. Evid. 412.
[156] *See* Eugene J. Kanin, *False Rape Allegations*, 23.1 Archives of Sexual Behavior 81, 81 (1994).
[157] *Id.*
[158] DoDI 6495.02 at 5 ("Service members who file an Unrestricted Report of sexual assault shall be informed . . . at the time of making the report, or as soon as practicable, of the option to request a temporary or permanent expedited transfer from their assigned command or installation . . .").
[159] *Id.* at 42, Encl. 5, ¶ 7(a) ("Commanders shall have discretion to defer action on alleged collateral misconduct by the sexual assault victims (and shall not be penalized for such a deferral decision), until final disposition of the sexual assault case, . . . so as to encourage reporting of sexual assault and continued victim cooperation . . .").
[160] MCM, Part V(5).
[161] DoDI 6495.02 at 4, ¶ 4(l).

potential judgment they may receive if they just stated the truth.

VI. Conclusion

Because the landscape surrounding sexual assault cases is frequently changing, practitioners must be aware of all changes to the law. Several of the changes in the 2014-2016 NDAAs and subsequent executive orders have potential constitutional implications and consequences for both defendants and alleged victims.

CCAs have jurisdiction to hear any writ of *mandamus* brought forward by an alleged victim under those articles and rules enumerated in Article 6b(e)(4). However, the Constitution requires, and a comparison between the CVRA and Article 6b along with a review of the plain reading of the statutes and historical precedent highlights, that CCAs strictly construe statutes providing standing to file a writ of *mandamus*.[162]

A petitioner may request a writ of *mandamus* if a military judge does not afford the petitioner procedural rights under Mil. R. Evid. 412. However, petitioners should not be granted standing to claim the military judge abused his or her discretion on substantive Mil. R. Evid. 412 matters because, although Mil. R. Evid. 412 may generally protect an alleged victim's privacy interest, that protection does not rise to the level of a right. For the other articles and rules enumerated under Article 6b(e), CCAs should primarily focus on whether the alleged victim's procedural rights under the articles and rules were violated prior to ruling on any substantive issues presented by the petition.

The heightened *mandamus* standard should be used to review alleged victims' petitions for writs of *mandamus* under Article 6b. Under that standard, the petitioner "must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances."[163] The alleged victim most likely will be able to meet the first prong in claims of violations of the applicable articles and rules under Article 6b(e)(4). The most difficult prong for the petitioner to meet is the second one because the military judge's decision must have amounted to more than "gross error[164]: it must have been a "usurpation of judicial power."[165] Finally, if the petitioner meets the first and the second prong, the CCA may not grant a writ of *mandamus* unless the same type of usurpation of judicial power is likely to reoccur and/or raises new issues that have not been previously addressed on appellate review.

False allegations of sexual assault present additional challenges for practitioners. False complaints do not fall under Mil. R. Evid. 412, and, thus, claims regarding their improper admission should not be taken up on a writ to a CCA.

Aspects of Congress' new, wide-sweeping changes to military justice legislation encroach upon, and sometimes violate, the constitutional protections historically afforded to criminal defendants at courts-martial. At trial and on interlocutory appeal, an accused is entitled to the presumption of innocence unless and until he or she is eventually proven guilty by "reasonable and competent evidence beyond a reasonable doubt."[166] By granting standing to alleged victims only under the specific circumstances outlined under Article 6b, CCAs provide an appropriate rampart against the heavy weight of sexual assault charges upon an accused.

[162] *See Will*, 389 U.S. at 96-97; *Carroll*, 354 U.S. at 415.

[163] *Hasan*, 71 M.J. at 418 (citing *Cheney*, 542 U.S. at 380-81).
[164] *Murray*, 16 M.J. at 76 (citations omitted).
[165] *Booker*, 72 M.J. at 791 (citations omitted).
[166] UCMJ, Article 51(c)(1).

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Ohio v. Clark: The Primary Purpose of the Mandatory Reporting Provisions & Child Testimonial Statement in Relation to the Confrontation Clause

Eun Jin Kim

1. Introduction

The Confrontation Clause of the Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]"[1] Under the pre-*Crawford* rubric of *Ohio v. Roberts*, the United States Supreme Court interpreted the Confrontation Clause to admit a hearsay statement made by an unavailable witness if the statement bore "adequate 'indicia of reliability.'"[2] In other words, the Court required the out-of-court statement to either "fall[] within a firmly rooted hearsay exception" or contain "particularized guarantees of trustworthiness."[3]

In 2004, the Supreme Court radically changed its approach to the Clause and overruled the *Roberts* substance-based test.[4] In *Crawford v. Washington*, the Court declared that "the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee."[5] The *Roberts* substance-based test allowed a jury to hear an out-of-court statement once a court determined that it was reliable regardless of whether there had been a prior opportunity for cross examination of the witness offering testimony as to the statement.[6] In contrast, the *Crawford* procedure-based test prohibits the admission of a testimonial hearsay statement by a nontestifying witness, unless the witness is unavailable, and a defendant had a prior opportunity to cross-examine the witness.[7] Thus, the *Crawford* test acts irrespective of the statement's indicia of reliability.

Not all hearsay statements are subject to the Confrontation Clause, but a testimonial statement is subject to the Confrontation Clause.[8] In *Crawford*, although the Court defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact[,]"[9] it failed to provide a comprehensive definition of a testimonial statement.[10] Two years after *Crawford*, in *Davis*

1 U.S. Const. amend. VI.

2 Ohio v. Roberts, 448 U.S. 56, 66 (1980).

3 *Id.*; *see also* Lilly v. Virginia, 527 U.S. 116, 124–25 (1999) (plurality opinion) (citing *Roberts*, 448 U.S. at 66) ("[I]t contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability."); Ann Hetherwick Pumphrey, *Admissibility of Hearsay Statements to Police:* Davis v. Washington *and* Hammon v. Indiana, Boston B.J. 17 (2006) (stating that "the excited utterance exception generally used in domestic violence cases" could be an example of a firmly rooted hearsay exception").

4 *See* Crawford v. Washington, 541 U.S. 36, 62 (2004).

5 Crawford v. Washington, 541 U.S. at 61.

6 *Compare* Ohio v. Roberts, 448 U.S. at 56, *with* Crawford v. Washington, 541 U.S. at 53.

7 *Id.*

8 Crawford v. Washington, 541 U.S. at 51.

9 *Id.* (citation omitted).

10 Ohio v. Clark, 135 S. Ct. 2173, 2179 (2015) ("Our decision in *Crawford* did not offer an exhaustive definition of "testimonial" statements. Instead, *Crawford* stated that the label "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.").

v. Washington and *Hammon v. Indiana*, the Supreme Court set forth the primary purpose test to further elucidate what it means for a statement to be labeled "testimonial."[11] The Court explained:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[12]

The primary purpose test applies solely to a statement given to law enforcement officers; the Supreme Court remained silent on the issue of a similar statement offered to individuals who are not law enforcement officers until its 2015 decision in *Ohio v. Clark*.[13] Moreover, even though the Court had previously attempted to further clarify the primary purpose test by requiring consideration of "all of the relevant circumstances," it had not explicitly addressed the matter of a declarant's age in determining a testimonial statement until *Ohio v. Clark*.[14]

The significance of *Ohio v. Clark* is that it clarifies, for the first time, how to consider the primary purpose of a non-law enforcement individual who receives a statement and the age of a victim who made the statement when evaluating a challenged statement.[15] This article first explores *Ohio v. Clark* in light of its background and the Court's legal analysis. Next, it discusses why *Ohio v. Clark* renders itself significant on the issue of the principal purpose of a non-law enforcement individual's interview with a child victim, and recommends a possible way to determine a non-law enforcement individual's purpose in a given interview and assistance provided to a child victim. It then describes what social science research has told us about how a victim's age affects his or her cognitive and perceptive abilities.

2. Ohio v. Clark

2.1. Factual and Procedural Background

Darius Clark lived with his girlfriend who was a mother of two: her three-year-old son, L.P., and her eighteen-month-old daughter, A.T.[16] When his girlfriend went out of state to work as a prostitute, Clark agreed to care for L.P. and A.T.[17]

In March 2010, when the two children were in Clark's care, one of L.P.'s preschool teachers noticed that his eye was "bloodshot."[18] When she questioned him about his blood-stained eye, L.P. told his teacher that he fell.[19] When they moved from the lunchroom to a classroom which had better lights, the teach-

[11] *See* Davis v. Washington, 547 U.S. 813 (2006).
[12] Davis v. Washington, 547 U.S. at 822.
[13] *See* Davis v. Washington, 547 U.S. 813 (2006); Ohio v. Clark, 135 S. Ct. 2173, 2179 (2015) (noting that because prior cases involved statements to law enforcement officers, the Court "reserved the question whether similar statements to individuals other than law enforcement officers would raise similar issues under the Confrontation Clause").
[14] Michigan v. Bryant, 562 U.S. 344, 369 (2011).
[15] Ohio v. Clark, 135 S. Ct. at 2081–82.
[16] *Id.* at 2178.
[17] *Id.* at 2177–78.
[18] *Id.* at 2178.
[19] *Id.*

er found additional "red marks" on L.P.'s face.[20] After being notified by the teacher, the lead teacher asked L.P. who did it and what happened to him.[21] L.P. replied: "Dee, Dee."[22] "Dee" turned out to be a nickname by which Clark went.[23] The lead teacher took L.P. to her supervisor.[24] When the supervisor found more bruises and other injuries on L.P.'s body, they called a child abuse hotline to report to authorities the possibility of abuse.[25]

Later, Clark arrived at the preschool to pick up L.P.[26] He denied responsibility of the bruises and injuries on the boy's body.[27] On further investigation, a social worker took both of Clark's girlfriend's children to a hospital where a physician discovered more injuries not only on L.P. but also on his sister.[28]

Before trial, L.P. was ruled incompetent to testify due to his age.[29] Under Ohio law, a witness under ten years old is generally barred from testifying if he or she "appear[s] incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly."[30] In other words, L.P. would be prohibited from testifying unless he showed that he was able to understand the difference between truth and falsity and appreciate his responsibility to be truthful.[31]

At trial, the judge decided that L.P. was not competent to testify. But one of the hearsay exceptions under Ohio Rule of Evidence allows the admission of a child's out-of-court statement in an abuse case.[32] Consequently, over the defense attorney's objection, the judge allowed the State to introduce testimony from the teachers who had talked with L.P. and heard his statements about the alleged abuse by Clark.[33]

Clark moved to exclude this evidence under the Confrontation Clause, but the court denied his motion on the ground that L.P.'s hearsay statements were not testimonial and so were not covered by the Clause.[34] The jury found Clark guilty and sentenced him to twenty-eight years' imprisonment.[35] The state appellate court reversed his conviction on the ground that L.P.'s hearsay statements were testimonial and thus covered by the Sixth Amendment.[36] The Supreme Court of Ohio affirmed.[37] It held that there was no ongoing emergency, and that under the state mandatory reporting law, the teachers were acting as agents of law enforcement.[38] Thus, the court found their primary purpose of questioning was "gather[ing] evidence potentially relevant to a subsequent criminal prosecution."[39] In reaching its conclusion on the issue of whether this was a testimo-

[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] Ohio v. Clark, 135 S. Ct. at 2177–78.
[24] *Id.* at 2178.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* (stating that the boy had "a black eye, belt marks on his back and stomach, and bruises all over his body"; the girl had "two black eyes, a swollen hand, and a large burn on her cheek, and two pigtails had been ripped out at the roots of her hair").
[29] *Id.*
[30] Ohio R. Evid. 601(A) (Lexis 2015).
[31] *See generally* State v. Frazier, 61 Ohio St. 3d 247, 251 (Ohio 1991) (enumerating five factors that a trial court must consider in determining whether a child witness under ten is competent to testify: "the child's ability to receive accurate impressions of fact," "the child's ability to recollect those impressions," "the child's ability to communicate what was observed," the child's ability to understand "truth and falsity," and "the child's appreciation of his or her responsibility to be truthful").
[32] *See* Ohio v. Clark, 135 S. Ct. at 2178; Ohio R. Evid. 807.
[33] Ohio v. Clark, 135 S. Ct. at 2178.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] State v. Clark, 137 Ohio St. 3d 346, 347 (Ohio 2013).
[39] *Id.* at 350.

nial statement, the court did not consider or mention L.P.'s age and his primary purpose of revealing the abuser's name.[40]

2.2. Legal Analysis

The United States Supreme Court held that the trial court's decision to allow the admission of L.P.'s out-of-court statements did not violate the Confrontation Clause.[41] In rendering its judgment under the primary purpose test, the Court considered five factors to determine "whether statements to persons other than law enforcement officers are subject to the Confrontation Clause."[42] In this section, all of the five factors are discussed in the order the Court considered them in its opinion.[43] Following a brief analysis of the five factors, the next two sections offer an in-depth examination of the fifth and third factors, successively.

First of all, the Court concluded that L.P.'s statements were made in the context of an ongoing emergency implicating suspected child abuse.[44] Unlike the Supreme Court of Ohio, which found that there was no ongoing emergency because L.P. did not complain about his injuries, and the nature of the teachers' questions suggested a purpose to establish facts of potential child abusive activities and to identify the abuser, the Court pointed out several facts of the case to explain why it found the existence of the ongoing emergency at the time of L.P.'s statements.[45] The Court said that the teachers' "immediate concern was to protect a vulnerable child" in that they were not certain if it would be safe to release the boy to Clark, his guardian, at the end of the day; the circumstances were not clear to the teachers; and the teachers' inquiries were meant to identify the abuser to protect L.P. from future attacks.[46] Accordingly, the Court found that the boy's statements were offered in the context of the ongoing emergency.

Second, the Court brought attention to the nature of the conversation between L.P. and his teachers, which was "informal and spontaneous."[47] The Court stated that his teachers queried L.P. about his injuries in the preschool lunchroom and classroom but not in a place like a "formalized station-house."[48] The Court also pointed out that the teachers "did so precisely as any concerned citizen would talk to a child who might be the victim of abuse."[49] Therefore, the nature of the conversation in this case implied that it was held informally rather than formally.[50]

Third, while the Supreme Court of Ohio did not take L.P.'s age into account, the United States Supreme Court viewed L.P.'s age as an indication that neither L.P. nor his teachers had the primary purpose of establishing evidence for the prosecution.[51] Because few preschool students like L.P. appreciate "the details of [the] criminal justice system," the Court found that a three-year-old boy in L.P.'s situation would

[40] *See id.* (never mentioning L.P.'s age in its analysis of the case).
[41] Ohio v. Clark, 135 S. Ct. at 2183.
[42] *Id.* at 2181.
[43] *See Id.* at 2181–82.
[44] *Id.* at 2181.
[45] *Compare* State v. Clark, 137 Ohio St. 3d at 352, *with* Ohio v. Clark, 135 S. Ct. at 2181.
[46] Ohio v. Clark, 135 S. Ct. at 2181.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Compare* State v. Clark, 137 Ohio St. 3d at 349–55 (finding that the teachers were acting as agents of law enforcement and that there was lack of an ongoing emergency to support its conclusion that L.P.'s statements were testimonial), *with* Ohio v. Clark, 135 S. Ct. at 2181–82 (2015).

have not intended his answers to his teachers to be "a substitute for trial testimony."[52]

Fourth, the Court cited common law history.[53] It referred to eighteenth century London, where courts "tolerated flagrant hearsay . . . involving a child victim who was not competent to testify because she was too young to appreciate the significance of her oath."[54] Because the Court has recognized that the Confrontation Clause does not bar the admission of out-of-court statements that would have been admissible in a criminal case "at the time of the founding," L.P.'s statements were not prohibited by the Sixth Amendment.[55]

The Court finally gave some guidance to lower courts on the issue of a statement provided to individuals who are not law enforcement officers.[56] The Court ruled that although it would not adopt a categorical rule on this matter, it believed that the identity of the questioner and the relationship between people involved in the challenged conversation is important.[57] Moreover, the Court stated that statements offered to a person who does not have a principal duty to discover potential criminal acts are "significantly less likely to be testimonial than statements given to law enforcement officers."[58] Hence, as the relationship between L.P. and the questioners was that of student-and-teacher, the Court found that the introduction of L.P.'s hearsay statements into evidence did not violate the Confrontation Clause.[59]

[52] Ohio v. Clark, 135 S. Ct. at 2182.
[53] *Id.*
[54] *Id.* (citation omitted).
[55] *Id.* at 2176.
[56] *See Id.* at 2182.
[57] *Id.*
[58] *Id.*
[59] *See Id.* (explaining that the identity of the questioner and a student-teacher relationship should be considered as one of the circumstantial factors in determining the primary purpose of the conversation).

3. Non-Law Enforcement Officials who have a Statutory duty to report[60]

When assessing challenged statements in context, the Supreme Court stated that "part of context is the questioner's identity," and concluded that L.P. and the questioners' rela-

[60] *See generally* Michigan v. Bryant, 131 S. Ct. 1143, 1162 (2011). (noting that the primary purpose test implicates not only the declarant's primary purpose in making statements but also the questioner's primary purpose in asking the declarant queries). The Court admitted that its approach was somewhat complicated, however, the Court justified the complexity of its approach as necessitated by its unwillingness "to sacrifice accuracy for simplicity." *Id.* Therefore, from the Court's perspective, in order to enhance the accuracy of the primary purpose assessment, "consulting all relevant information, including the statements and actions of interrogators" is necessary. *Id. But see Id.* at 1170 (Scalia, J., dissenting) (stating that "[t]he only virtue of the Court's approach . . . is that it leaves judges free to reach the 'fairest' result under the totality of the circumstances"). Justice Scalia also criticized the majority holding, noting that "[i]f the defendant 'deserves' to go to jail, then a court can focus on whatever perspective is necessary to declare damning hearsay nontestimonial. And when all else fails, a court can mix and match perspectives to reach its desired outcome." *Id.* In *Crawford*, the Court defined a testimonial statement as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford v.* Washington, 541 U.S. 36, 51. A prima facie reading of the Court's definition demonstrates that the purpose at issue is that of the individual who made the statement. The author agrees in part with the majority and in part with Justice Scalia. The author believes that because the statement is made by the declarant, his or her primary purpose should be given greater weight than that of the questioner. Nevertheless, the primary purpose of the questioner must be considered in determining the motive of the declarant since the primary purpose test requires consideration of all of the relevant circumstances. Stated differently, the fundamental difference between the Court's determination of whether a statement is testimonial and that proposed by the author is that under the Court's approach, the primary purpose of both the declarant and questioner/listener should be considered, and in deciding their primary purpose all the relevant circumstances must be examined, whereas the author's view is that the declarant's primary purpose must be weighed more heavily than others and in deciding his or her primary purpose, all the relevant circumstances including the questioner/listener's primary purpose should be assessed

tionship was that of a student-and-teacher.[61] In other words, in contrast to a law enforcement officer, a teacher making queries of her student does not have a principal duty to discover and prosecute criminal acts, especially when there was an ongoing emergency and an urgent concern to protect a vulnerable child.[62]

In this evaluation, the Court discussed the teacher's mandatory reporting obligation briefly in rebutting Clark's argument that under Ohio law ("the Safe Havens Law"), the teachers had a duty to report suspected abuse to appropriate authorities, which in turn made them act as agents of state law enforcement, so they should be treated like the police.[63] Clark's position was accepted by the Supreme Court of Ohio:

> At the time [the teacher] questioned L.P., she acted as an agent of the state for purposes of law enforcement because at a minimum, teachers act in at least a dual capacity, fulfilling their obligations both as instructors and also as state agents to report suspected child abuse pursuant to [the Safe Havens Law], which exposes them to liability if they fail to fulfill this mandatory duty.[64]

However, the United States Supreme Court ultimately reversed the decision of Ohio's highest court by stating that "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution."[65]

The Court's ruling concurs with the legislative intent of all state statutes that impose a mandatory reporting duty upon certain individuals—professionals and/or other persons—who are not law enforcement officers.[66] None of the fifty states' laws describe the primary policy of mandatory obligation as criminal prosecution; indeed, the purpose of mandatory reporting statutes is and should be considered *child protection*.[67]

Although the Court did not explicitly discuss a legislative scheme of the Safe Havens Law in its decision, looking at the legislative intent would be one of the important ways to address an issue of a testimonial statement under the Confrontation Clause. This approach is consistent with the Court's 2009 decision of *Melendez-Diaz v. Massachusetts*.[68] In *Melendez-Diaz*, the Court held that affidavits of a state laboratory analyst who did not testify at a drug trial violated the accused's right under the Sixth Amendment to confront the witnesses against him in that under the state law "the *sole purpose* of the affidavits was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance."[69] Therefore,

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61 Ohio v. Clark, 135 S. Ct. at 2182.

62 *Id.*

63 *Id.* at 2182–83.

64 State v. Clark, 999 N.E.2d 592, 594 (Oh. 2013). Ohio law requires professionals including teachers and school authorities to report suspected child abuse and neglect to the public children services agency, a municipal, or county peace officer when he or she knows or suspects that a child has suffered mental or physical injury that reasonably indicates abuse or neglect of the child. Ohio Rev. Code Ann. § 2151.421.

65 Ohio v. Clark, 135 S. Ct. at 2183.

66 *See infra* notes 75, 80, and text accompanying notes 87–88.

67 *See infra* notes 75, 80, and text accompanying notes 87–88.

68 *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2009).

69 *Id.* (citation omitted).

the Court, in *Melendez-Diaz*, explicitly considered and respected the legislative scheme of the state statute in addressing the testimonial nature of challenged statements, in that case an affidavit, under the Confrontation Clause.[70]

As the Court has previously recognized, a legislative policy behind mandatory reporting statutes can serve a crucial role in determining whether an out-of-court statement made pursuant to a state statute is testimonial. Thus, an in-depth analysis of each state law that mandates either professionals or the general public to report suspected child maltreatment is highly relevant in determining whether the purpose of questions made by a teacher is to investigate and gather evidence for prosecution.

All fifty states have adopted mandatory reporting statutes imposing a duty on certain individuals to report possible child abuse to appropriate state authorities if they suspect or have reason to believe that a child has been abused or neglected.[71] Although these statutes vary in who has such an obligation,[72] in the types of state authorities which receive the report and take appropriate action, in procedures as to the time to report and the disclosure of the reporter's identity,[73] and in standards of making a report such as reporter's suspicion of, knowledge of, or actual observation of latent child abuse,[74] they all share, explicitly or implicitly, the legislative policy of protecting maltreated children.[75] The mandatory reporting statutes of the fifty states can be divided into three categories: (1) states whose explicit primary concern is to protect a child's health, safety, and welfare, (2) states that place child's protection as one of many purposes of the statute, and (3) states which do not explicitly declare their policy.[76]

First, there are twenty-one states that articulate the paramount concern and primary legislative intent of their mandatory reporting statutes as protecting "children whose health and welfare may be adversely affected through abuse and neglect."[77] Like *Ohio v. Clark*, when

[70] *Id.*

[71] Child Welfare Information Gateway, Mandatory Reporters of Child Abuse and Neglect 1 (2014) [hereinafter Child Welfare Information Gateway], https://www.childwelfare.gov/pubPDFs/manda.pdf (stating that "[a]ll states, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have statutes identifying persons who are required to report suspected child maltreatment . . ." For the purpose of this article, fifty states' statutes are discussed).

[72] *See* Child Welfare Information Gateway, *supra* note 71 at 1–2 (noting that eighteen states require "any person" to report possible child abuse whereas forty-eight states mandate certain groups of professionals such as social workers, teachers, physicians, or commercial film or photograph processors to report).

[73] *See* Child Welfare Information Gateway, *supra* note 71, at 4 (explaining that "[a]ll jurisdictions have provisions in statute to maintain the confidentiality of abuse and neglect record," but only thirty-nine states specifically protect the identity of the reporters). *Compare* Ala. Code § 26-14-3 *and* Tex. Fam. Code § 261.101 (in general, a child abuse mandatory reporting statute requires an immediate report to appropriate authorities), *with* Idaho Code § 16-1605 *and* Vt. Ann. Stat. Tit. 33, § 4911 (requiring a report within twenty-four hours).

[74] *See Child Welfare Information Gateway*, *supra* note 71 at 3.

[75] *See infra* notes 77?, 80, and text accompanying notes 87–88.

[76] *See infra* notes 77? 80, 87–88.

[77] Ala. Code § 26-14-2; *see also* Cal. Pen. Code § 11164(b) ("The intent and purpose of this article is to protect children from abuse and neglect."); Colo. Rev. Stat. §19-3-302 ("[I]t is the intent of the general assembly to protect the best interests of children of this state and to offer protective services in order to prevent any further harm to a child suffering from abuse."); Del. Code Ann. tit. 16, § 901 ("The child welfare policy of this State shall serve to advance the best interests and secure the safety of the child, while preserving the family unit whenever the safety of the child is not jeopardized."); Idaho Code § 16-1601 ("At all times the health and safety of the child shall be the primary concern."); Iowa Code § 232.67 ("It is purpose and policy . . . to provide the greatest possible protection to victims or potential victims of abuse through encouraging the

the issue is whether a hearsay statement is subject to the Confrontation Clause, a court must determine the primary purpose of the teachers' queries "by objectively evaluating the statements and actions of the parties . . . in light of the circumstances in which the [conversation] occur[red]."[78] As held in *Melendez-Diaz*, one of the numerous circumstances can be the purpose of the statute which creates the duty to report and impose that duty on certain persons.[79]

Therefore, in the twenty-one states where the principal legislative intent is protection of abused children, the statutory mandatory reporting obligation would indeed support the Court's position that the L.P.'s teachers' "immediate concern was to protect a vulnerable child who needed help."[80] This argument is rather strong because the primary purpose test requires a court to examine circumstances *objectively*.[81] Accordingly, if a teacher questions her student in order to clarify if the student has been abused, the teacher is acting pursuant to the relevant statute. From an objective perspective, the teacher's primary efforts to fulfill her duty are equivalent to acting consistent with the paramount concern and policy of the statute which enforces that duty: Protecting abused children.

Second, twenty-two states and the District of Columbia enumerate numerous purposes simultaneously, including the intent of child's protection, in their mandatory reporting statutes.[82] For example, Alaska's law states three purposes:

increased reporting of suspected cases of abuse . . . ."); Kan. Stat. Ann. § 38-2201(b) ("The code shall be liberally construed to carry out the policies of the state which are to [c]onsider the safety and welfare of a child to be paramount in all proceedings under the code . . . ."); Ky. Rev. Stat. Ann. §§ 610.101, 620.010 ("The Commonwealth shall direct its efforts to promoting protection of children"); La. Child's Code Art. 601 ("The purpose of this Title is to protect children . . ." and [t]his Title is intended to provide the greatest possible protection as promptly as possible for such children. The health, safety, and best interest of the child shall be the paramount concern . . . ."); Me. Rev. Stat. tit. 22, § 4003 ("[T]he health and safety of children must be of paramount concern . . . ."); Mass. Ann. Laws ch. 119, § 1 ("The health and safety of the child shall be of paramount concern . . . ."); Minn. Ann. Stat. § 626.556, subd. 1. ("[T]he public policy of this state is to protect children . . ." and "the health and safety of the children shall be of paramount concern."); Neb. Rev. Stat. Ann. § 28-710.01 ("The Legislature declares that the public policy of the State of Nebraska is to protect children whose health or welfare may be jeopardized by abuse or neglect."); N.H. Rev. Stat. Ann. § 169-C:2 ("It is the purpose of this chapter, through the mandatory reporting of suspected instances of child abuse or neglect, to provide protection to children whose life, health or welfare is endangered . . . ."); N.J. Stat. Ann. § 9:6-8:8 ("The purpose of this act is to provide for the protection of children under 18 years of age who have had serious injury inflicted upon them by other than accidental means."); Ohio Rev. Code Ann. § 2151.01 ("The Section . . . shall be liberally interpreted and construed so as to effectuate the following purposes [] [t]o provide for the case, protection . . . of children . . . ."); S.D. Codified Laws § 26-8A-1 ("It is the purpose of this chapter to establish an effective state and local system for protection of children from abuse or neglect."); Tenn. Code Ann. § 37-1-402 ("The purpose of this part is to protect children whose physical or mental health and welfare are adversely affected by brutality, abuse or neglect by requiring reporting of suspected cases by any person having cause to believe that such case exists."); Wash. Rev. Code § 26.44.010 ("[T]he Washington state legislature hereby provides for the reporting of [child abuse] cases to the appropriate public authorities . . ." and "[i]t is intent of the legislature that, as a result of such reports, protective services shall be made available in an effort to prevent further abuse, and to safeguard the general welfare of such children."); Wis. Stat. § 48.01 ("[T]he paramount goal of this chapter is to protect children . . . ."); Wyo. Stat. Ann. § 14-3-201 ("The child's health, safety and welfare shall be of paramount concern in implementing and enforcing this article.").

[78] Michigan v. Bryant, 562 U.S. at 370; *see also* Ohio v. Clark, 135 S. Ct. at 2182.

[79] *See* Melendez-Diaz, 557 U.S. at 311.

[80] Ohio v. Clark, 135 S. Ct. at 2181.

[81] Davis v. Washington, 547 U.S. 813, 822 (2009); *See also supra* note 10.

[82] *See* Alaska Stat. § 47.17.010; Ark. Code Ann. § 12-18-102; Conn. Gen. Stat. § 17a-101(a); D.C. Code § 4-1321.01; Fla. Stat. § 39.001(1); Ga. Code Ann. § 19-7-5(a); 325 Ill. Comp. Stat. 5/2(a); Ind. Code Ann. § 31-33-

> It is the intent of the legislature that, as a result of these reports, protective services will be made available in an effort to (1) prevent further harm to the child; (2) safeguard and enhance the general well-being of children in this state; and (3) preserve family life unless that effort is likely to result in physical or emotional damage to the child.[83]

Similar to Alaska, many states are concerned with the integrity of family life in addition to their efforts to protect physically or mentally maltreated children.[84] To satisfy this purpose, some states explicitly stress rehabilitation rather than prosecution.[85]

Even though approximately eleven states in the second category announce that—in addition to their intent to protect abused children—it is their legislative intent to "encourage the cooperation of state law enforcement officials" and to "provide effective child services to quickly investigate reports of child abuse or neglect" by requiring reporting of a suspected child abuse case, none of these eleven states explicitly declare prosecution as their paramount legislative intent.[86] Therefore, these eleven state statutes cannot be read as giving more weight to prosecution over other concerns such as child's protection and family rehabilitation. Indeed, the legislative intent to facilitate investigation of the reported child abuse is mere acknowledgment by those states that a report may have the natural tendency to result in prosecution of the abuse case.

Finally, while all fifty states have adopted mandatory reporting statute, there are six remaining states where the state legislature did not specifically pronounce its policy behind the obligatory reporting provision.[87] Nonetheless, despite the lack of a stated legislative purpose provision, their intent can be implicitly deduced by the plain language of their mandatory reporting provisions. For instance, the United States District Court for the District of Nevada held that "[t]he plain and unambiguous language of [the mandatory reporting provision] along with the underlying statutory

1-1; Md. Fam. Law § 5-702; Mich. Comp. Laws Serv. § 722 Note; Mo. Ann. Stat. § 210.115; Mont. Code Ann. § 41-3-101; N.M. Stat. Ann. § 32A-1-3; N.Y. Soc. Serv. Law § 411; N.C. Gen. Stat. § 7B-301; N.D. Cent. Code, § 50-25.1-01; Okla. Stat. tit. 10A, § 1-1-102; Or. Rev. Stat. § 419B.007; 23 Pa. Cons. Stat. § 6302; S.C. Code Ann. § 63-7-10; Utah Code Ann. § 62A-4a-401; Vt. Ann. Stat. tit. 33, § 4911; W. Va. Code § 49-6A-1.

[83] Alaska Stat. § 47.17.010.

[84] *See* Code Ann. § 12-18-102; D.C. Code § 4-1321.01; Fla. Stat. § 39.001(1); Ga. Code Ann. § 19-7-5(a); 325 Ill. Comp. Stat. 5/2(a); Ind. Code Ann. § 31-33-1-1; Mich. Comp. Laws Serv. § 722 Note; Mont. Code Ann. § 41-3-101; Or. Rev. Stat. § 419B.007; 23 Pa. Cons. Stat. § 6302; Utah Code Ann. § 62A-4a-401; W. Va. Code § 49-6A-1.

[85] *See* Ind. Code Ann. § 31-33-1-1; Pa. Cons. Stat. § 6302.

[86] Ark. Code Ann. § 12-18-102; Ind. Code Ann. § 31-33-1-1; *see also* Md. Fam. Law § 5-702; Mich. Comp. Laws Serv. § 722 Note; Mo. Ann. Stat. § 210.115; N.Y. Soc. Serv. Law § 411; Pa. Cons. Stat. § 6302; Utah Code Ann. § 62A-4a-401; Vt. Ann. Stat. Tit. 33, § 4911; W. Va. Code § 49-6A-1. *See generally* N.M. Stat. Ann. §§ 32A-1-2, 1-3, 4-3. In New Mexico, the duty to report child abuse provision is included in the Child Abuse and Neglect Act, which is Article 4 of the Children's Code. Although the Child Abuse and Neglect Act itself does not contain its legislative policy, the Children's Code has the Children's Code General Provisions Act placed in Article 1 of the Children's Code that generally applies to every Article in the Children's Code "unless the context otherwise requires." *Id.* § 32A-1-2. Two of eight legislative purposes of the Children's Code General Provisions Act are "to provide for the care, protection and wholesome mental and physical development of children" and "to provide for the cooperation of coordination of the civil and criminal systems for investigation . . . to achieve the best interests of a child victim." *Id.* § 32A-1-3.

[87] *See* Ariz. Rev. Stat. § 13-3620; Haw. Rev. Stat. § 350-1.1; Miss. Code Ann. § 43-21-353; Nev. Rev. Stat. § 432B.220; Tex. Fam. Code § 261.101; Va. Code Ann. § 63.2-1500.

schemes, indicates that these sections are designed to protect children from abuse and neglect by reporting instances of such conduct."[88]

In summation, under the primary purpose test, the inquiry must take into account all of the relevant circumstances that should be deemed objectively.[89] If a teacher, or any persons who have been identified by state law to have a duty to report suspected abuse, acted in a way pursuant to mandatory reporting law, the primary purpose of the teacher's inquiry must be viewed objectively. A court must look at the very statute which mandates the teacher to question her student and to report the possible abuse to appropriate authorities since the legislative intent of the mandatory reporting statute is the teacher's primary purpose of her fulfilling the duty from the objective viewpoint.

Therefore, in the first category, it is apparent that the reporter's paramount concern is to protect a child whose safety and welfare may be adversely affected by abuse and neglect.[90] In the second category, the reporter's principle intent is to protect the child unless the context otherwise indicates she acted for the different purposes of the statute.[91] Finally, in the third category of six states, the legislative intent can be implied by the plain and unambiguous languages of the statute, and the primary purpose of the reporter can also be presumed by the implied legislative policy unless the context indicates differently otherwise.[92]

[88] Doe v. State, State Dep't of Educ., No. 02:03CV01500LRHRJJ, 2006 WL 2583746, at *5 (D. Nev. Sept. 7, 2006).

[89] Ohio v. Clark, 135 S. Ct. at 2180 (citation omitted).

[90] *See supra* text accompanying notes 75–79.

[91] *See supra* text accompanying notes 80–86.

[92] *See supra* text accompanying notes 87–88.

4. The Declarant's Age as a Crucial Factor under the Primary Purpose Test

The United States Supreme Court's consideration of L.P.'s age in its opinion is significant in that lower courts and states' highest courts have long been split as to how to address hearsay statements given by a very young child, like L.P.[93] Some courts have held that a declarant's age is pertinent under the primary purpose test because the declarant's age is one

[93] *Compare* Com. v. Allshouse, 614 Pa. 229, 36 A.3d 163 (2012) (holding that a four-year-old declarant's statements to the children and youth services caseworker and psychologist were not testimonial; among other circumstances, a declarant's age is a pertinent characteristic for analysis), State v. Miller, 293 Kan. 535, 264 P.3d 461 (2011) (holding that a four-year-old declarant's statements in response to the sexual assault nurse examiner's inquiry about what happened were not testimonial, for Confrontation Clause purposes, under the objective evaluation of the totality of the circumstances because these circumstances include the victim's age), People v. Stechly, 225 Ill. 2d 246, 302, 870 N.E.2d 333 (2007) (holding that a five-year-old declarant's statements to her mother concerning defendant's sexual abuse were not testimonial under the primary purpose test because among other reasons, she would not have anticipated the statement being used in prosecution), *and* Com. v. DeOliveira, 447 Mass. 56, 65, 849 N.E.2d 218 (2006) (holding that a six-year-old declarant's statement to an emergency room physician did not indicate that a reasonable person in the victim's position would have anticipated use of her statements against the abuser in prosecution; the victim's lack of knowledge or sophistication is attributed to her young age), *with* State v. Siler, 116 Ohio St.3d 39, 876 N.E.2d 534, 544 (holding that a three-year-old declarant's statements made in the course of police interrogation were testimonial; "the age of a declarant is not determinative of whether a testimonial statement has been made during a police interrogation"), People v. Vigil, 127 P.3d 916, 926 n. 8 (Colo. 2006) (holding that a seven-year-old declarant's statement made to "a government agent as part of a police interrogation . . . is testimonial irrespective of the child's expectations regarding whether the statement will be available for use at a later trial[]"), *and* State v. Mack, 337 Ore. 586, 588 (Or. 2004) (holding that the victim's three-year-old brother's statement to a social worker is testimonial and subject to the Confrontation Clause).

of the circumstantial factors which determines if a statement is testimonial while others have not even bothered to consider the declarant's age, as did the Supreme Court of Ohio.[94]

Generally, in the current legal system, if a very young child makes a statement to an authority figure depicting a criminal activity against an accused at trial then the result is one of the following: (1) the child may testify at trial;[95] (2) evidence of the child's statement may not be introduced at trial;[96] or (3) the evidence may be admitted as an exception of the hearsay rule.[97] On the other hand, if adults had made the similar statement in a similar situation, it is rather a simple result. Given that they would appreciate gravity of their conduct and, either consciously or unconsciously, intend to establish some facts potentially relevant to later criminal prosecution, that statement would be used in a prosecution of the accused assuming that they testify at trial.[98] If they do not appear before the court, their hearsay statement is likely to be excluded pursuant to the Confrontation Clause upon a finding that it is testimonial.

Because all the circumstances have to be examined in an objective manner, a declarant's age should not be precluded in court's analysis especially in a case where the declarant is very young.[99] The Court's decision in *Ohio v. Clark*—looking at a victim's age—renders itself consistent with its precedent, *Michigan v. Bryant*, clarifying the need of objective assessment to take *all* of the circumstances into consideration.[100] This approach is also harmonious with social science research.[101]

Since 1980s, a small but growing numbers of scholars have conducted research to examine a child's understanding of the legal system.[102] Typically, the research has been motivated by the need of understanding children's knowledge of their rights in dependency court[103] and their competency to stand at trial as a witness.[104] Results of this research can be nonetheless read broadly to encompass the present issue whether a child's statement concerning a criminal activity made to a non-law enforcement individual would be considered to be testimonial. This approach is appropriate because the primary purpose test inquires

94 *See Compare* Allshouse, 614 Pa. 229, 36 A.3d 163.

95 *See, e.g.*, State v. Cochran, 2004 ME 138 (Me. 2004) (holding that a five-year-old witness was competent to be a witness under Me. R. Evid. 601(b)).

96 *See, e.g.*, State v. Mack, 337 Ore. 586 (Or. 2004) (holding that because a three-year-old witness was not competent to be a witness at trial, and his hearsay statements were testimonial, the evidence should be excluded).

97 *See, e.g.*, State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006) (finding that a three-year-old child victim's statements to child protection worker during risk-assessment interview were not testimonial and thus admissible).

98 Richard D. Friedman & Stephen J. Ceci, Symposium, *The Child Quasi Witness*, 82 U. Chi. L. Rev. 89, 90 (2015).

99 *See* Allshouse, 614 Pa. 229, 36 A.3d at 181.

100 *See* Michigan v. Bryant, 562 U.S. at 369.

101 *See infra* text accompanying notes 102–21.

102 Alexia Cooper, Allison R. Wallin, Jodi A. Quas, & Thomas D. Lyon, *Maltreated and Nonmaltreated Children's Knowledge of the Juvenile Dependency Court System*, 14(3) Child Maltreatment 255, 255 (2010).

103 *See generally* Black's Law Dictionary (10th ed. 2014) ("A court having jurisdiction over matters involving abused and neglected children, foster care, the termination of parental rights, and (sometimes) adoption.").

104 *See* Cooper et al., *supra* note 102, at 255, 258 (stating that research of children's understanding of legal system is important because "a lack of knowledge predicts increased distress and perceptions of unfairness of the legal system which not only lead the children to be vulnerable in proceedings but also make them have negative attitude toward the legal system"); Rhona H. Flin, Yvonne Stevenson, & Graham M. Davies, *Children's Knowledge of Court Proceedings*, 80 British J. Psychol. 285, 285 (1989) (stating that "[t]he role of child witnesses in criminal prosecutions and the appropriateness of the legal procedures for gathering and testing their evidence have become a matter of intense public concern" because children who have witnessed a criminal activity or were a victim of physical or sexual abuse may be involved in such court proceedings).

if the young declarants' statements were made to "establish or prove past events potentially relevant to later criminal prosecution."[105] In other words, the primary purpose test asks if the young declarants know the consequences of their statements. In order to answer this, one must first ask if they comprehend the legal system.

Numerous studies, not surprisingly, have revealed that the younger children are, the less understanding of the legal system they have. In these studies, children appear to have little knowledge of the roles and responsibilities of legal professionals.[106] For instance, some researchers conducted a study where they asked eighty-five children aged from seven to ten various questions about the roles of key professionals in legal proceedings.[107] The questionnaire included items such as "What does a judge do?" and "What does a social worker do?"[108] In the study, age was one of six variables—age, abuse type, ethnicity, referred to criminal court, participation, anxiety—that the researchers considered as possible predictors of the participants' knowledge of the court system.[109] The results revealed that "knowledge was significantly predicted *only* by age" and "increased linearly with increasing age."[110] The researchers also noted that the remaining variables were not significantly associated with children's knowledge "once the effect of age was estimated."[111]

This finding may be attributed to children's limited exposure to legal language.[112] Some linguists noted that children's comprehension of legal terminology is not "an all-or-nothing procedure, but, rather a protracted process."[113] The linguists conducted a study to examine children's understanding of legal terms including "burglary," "police officer," "arrest," "judge," "criminal," "prosecution," "law," guilty," and "social workers."[114] The young participants were divided into four age-groups: five, seven, eight, and ten.[115] Results of the study indicated that while more than a half of each group understood meanings of "burglary," "police officer" and "criminal," none of them could define "prosecution."[116] More interesting findings of the study were their own primitive definitions of the legal terms offered by the participants: "A court is a sort of jail," "[a judge is] someone who gets money, like at a pet show," and "[arrest] means you're lying down."[117]

[105] Davis v. Washington, 547 U.S at 822.

[106] *See, e.g.*, Cooper et al., *supra* note 104, at 255, 258 (describing research about age differences in maltreated and nonmaltreated children's knowledge of juvenile dependency court vocabulary and proceedings in a study involving young participants whose ages were between four and fourteen); Flin et al., *supra* note 104 at 285, 285 (stating that the study included young children aged six, eight, ten years old, and adults, all of whom were examined by researchers about their knowledge of criminal court procedures and legal vocabulary).

[107] Stephanie D. Block et. Al., *Abused and Neglected Children in Court: Knowledge and Attitudes*, 34 Child Abuse & Neglect (2010) 559 (noting that the objective of their study was to assess maltreated children's understanding and attitudes about their court experiences). This study was conducted immediately after the participants attended their dependency court hearings. Although this research focused on the group of children who already had some experience of the court proceeding, it also examined the participant's age difference in understanding the legal system. This study is worth mention here because children's age difference has a strong correlation with their knowledge of the legal system, regardless of their previous exposure to it.

[108] Block et al., *supra* note 106, at 669 app.

[109] *See* Block et al., *supra* note 106, at 664.

[110] Block et al., *supra* note 106, at 664 (emphasis added).

[111] Block et al., *supra* note 106, at 664.

[112] *See* Block et al., *supra* note 106, at 660.

[113] Michelle Aldridge, Kathryn Timmins, & Joanne Wood, *Children's Understanding of Legal Terminology: Judges Get Money at Pet Shows, Don't They?*, 6 Child Abuse Rev. 141, 141 (1997).

[114] Aldridge et al., *supra* note 112, at 142.

[115] Aldridge et al., *supra* note 112, at 142.

[116] Aldridge et al., *supra* note 112, at 142–43.

[117] Aldridge et al., *supra* note 112, at 144–45.

Considering the outcomes of the study, it is nearly impossible to conclude that young children have the same mindset as that of adults when they describe a criminal activity to someone.[118] These results are not unique in children who are raised in the United States; it is rather a universal phenomenon across the world and is likely due to children's incomplete cognitive development.[119]

There is a biological explanation for this finding.[120] The prefrontal cortex of the brain, which governs "so-called executive functions such as monitoring, planning, and impulse control," is not fully developed until late adolescence.[121] This deficit affects "a web of interrelated psychological abilities that are involved in understanding the mental states of others as well as the effects that one's own actions and statements have on others."[122] Stated differently, a combination of young children's lack of understanding of the legal system with their not-yet-fully-developed pre-frontal cortex of the brain renders them vulnerable in interacting with others, especially in a situation like *Clark v. Ohio*. For instance, when engaging in an interview with L.P., although the teacher might have intended to establish facts for a later prosecution of the abuser, it is highly likely that not only is L.P. incapable of appreciating or even imagining why the teacher wanted to know what happened to him, but also he was unable to consider the significance of his statements against Clark. Indeed, from the true objective perspective based on social science research, very young children lack capacity to offer testimonial statements under the Confrontation Clause.

At least two unsolved problems—concerning the Court's ruling on the issue of L.P.'s age remain here. First, while the Court found it "extremely unlikely" that a child declarant at the age of three intended his statement to be used for trial testimony,[123] it did not provide a bright-line rule as to at what age should a minor's statement be deemed testimonial and thus subject to the Confrontation Clause.[124] Like L.P., there is a group of very immature children who are generally considered to lack an understanding of the gravity of their statement describing a criminal activity. It is hard to imagine that they intend their statement to be used at trial. On the other hand, there is another group of children who are likely to appreciate the legal system and thus may understand

[118] *See generally* Karen Saywitz, Carol Jaenicke, & Lorinda Camparo, *Children's Knowledge of Legal Terminology*, 14 Law & Hum. Behav. 523 (1990) (explaining that the study assessed children's "age-related patterns in communicative ability relevant to providing testimony" and tested "knowledge of legal terms commonly used with children in court." Sixty participants were divided into three groups for which the mean ages were five, eight, and eleven, respectively. The researchers used a list of thirty-five legal terms, including "evidence," "testify," "attorney," "jury," and "oath," to evaluate the participant's understanding. The study revealed that there was "a significant [age]-related effect).

[119] *See, e.g.*, Anna Emilia Berti & Elisa Ugolini, *Developing Knowledge of the Judicial System: A Domain-Specific Approach*, 159(2) J. of Genetic Psychology 211 (1998) (concluding that Italian children's knowledge of the court system, including roles of judges, lawyers, witnesses and the jury, improves with increasing age. First graders showed poor knowledge whereas eighth graders revealed better understanding); Michele Peterson-Bradali, Rona Abramovitch, & Juiane Duda, *Young children's legal knowledge and reasoning ability*, 39 Canadian J. Criminology 145, 162 (1997) (describing that "[w]hile . . . overall lack of legal knowledge generally applied to both the Canadian younger and the older children in the present study, the older participants did possess a somewhat better sense" than the younger ones).

[120] *See* Friedman & Ceci, *supra* note 98, at 97.

[121] *See* Friedman & Ceci, *supra* note 98, at 97. *See generally* Monica Luciana & Charles A. Nelson, *The Functional Emergence of Prefrontally-Guided Working Memory System in Four- to Eight-Year-Old Children*, 36 Neuropsychologia 273 (1998).

[122] *See* Friedman & Ceci, *supra* note 98, at 97–98.

[123] Ohio v. Clark 135 S. Ct. at 2182.

[124] *See id.*

the significance of their statement implicating the accused with a criminal activity. However, due to the existence of a gray area between the two groups and various factors affecting individuals' knowledge and understanding of the criminal justice system, it seems rather illegitimate to draw a bright-line between the groups and presuppose a group of children younger than a particular age is either capable or incapable of making a testimonial statement.

A possible solution to this problem does not depend on a sole endeavor made by the legal system. Law practitioners and legal scholars must look to results and implications of social science research and derive benefits from their work. And social science researchers must study not only children's understanding of legal vocabulary and court system (indirect way) but also children witnesses' understanding of the consequence of their statements (direct way).

The second unsolved question is why out-of-court statements made by an incompetent witness can be introduced into evidence. Here, L.P. was ruled incompetent to testify because of his age.[125] The trial court found that L.P. appeared incapable of differentiating between truth and falsity.[126] In other words, L.P. was considered too unreliable to testify in court. But the Court held that L.P.'s hearsay statements were not testimonial and thus should be admitted at trial.[127] One of the disturbing aspects of the case is that Clark was convicted based on the hearsay statements of L.P. who was statutorily incompetent to testify at trial.

One possible way to reconcile this discrepancy necessitates a review of the *Crawford* case where the Court declared that the Confrontation Clause's fundamental aim is to "ensure reliability of evidence, but it is a *procedural* rather than a substantive guarantee."[128] As aforementioned, not every out-of-court statement is open to being challenged under the Confrontation Clause; rather, the procedural protection against hearsay statements is against testimonial statements made against the accused. Provided that the totality of the circumstances shows the challenged statement is not testimonial, like in *Ohio v. Clark*, there is no confrontation problem so far as the Sixth Amendment is concerned.

This unsolved issue illustrated in the *Clark* case is not solely related to the Confrontation Clause, but it is in fact one of the classic concerns of hearsay exceptions: choice between exclusion of unreliable evidence and inclusion of imperfect evidence. All evidence is imperfect to some extent. Generally out-of-court statements are not admissible because they are neither subject to cross-examination nor made under oath. Further, they raise credibility, accuracy, and confrontation concerns. Nonetheless, some hearsay statements are admissible as long as they are relevant, and the statement's probative value is not substantially outweighed by a danger of unfair prejudice.[129] Once admitted, the substantive reliability and credibility of the evidence must be decided by the trier of fact. Therefore, although the Ohio statute deemed L.P. incompetent due to his age and considered him unreliable to testify in court, the reliability of his out-of-court statement made in his daily life—different from the court setting—must be addressed by the jury. This answer to the second question appears to be consistent with the Court's position.

[125] Ohio v. Clark, 135 S. Ct. at 2178.
[126] *See id.*
[127] *See id.* at 2183.
[128] Crawford v. Washington, 541 U.S. at 61 (emphasis added).
[129] *See* Fed. R. Evid. 401, 403.

5. Conclusion

In *Clark v. Ohio,* the United States Supreme Court finally addressed the issue of a statement provided to individuals who are not law enforcement officers and considered a declarant's age to support its holding of the non-testimonial nature of L.P.'s statements.[130]

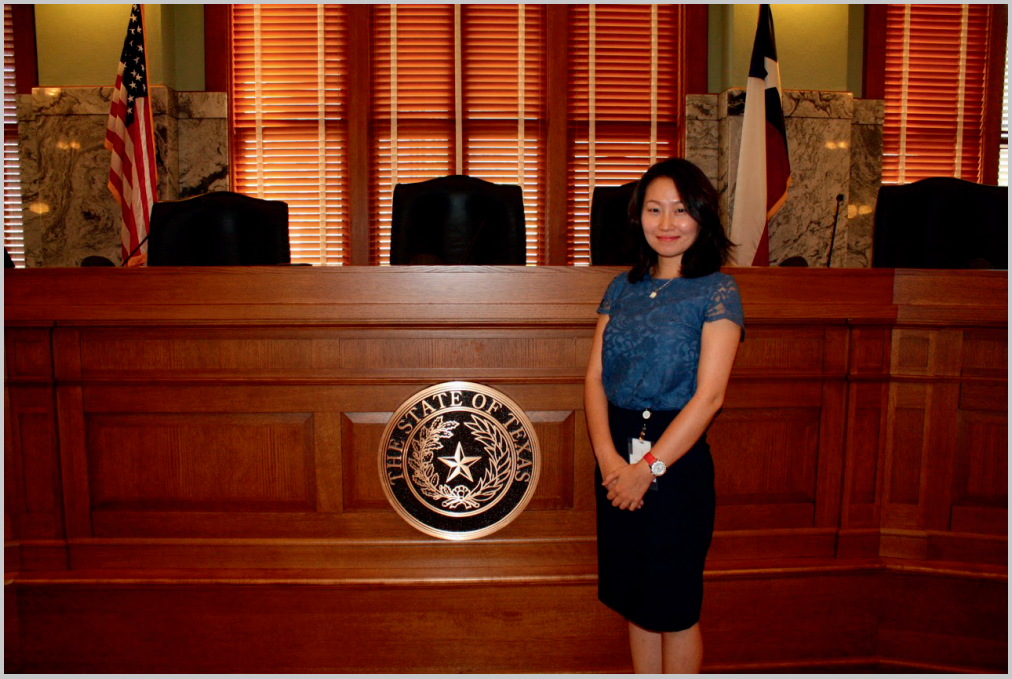
As to the first issue, the Court disagreed with the Supreme Court of Ohio's finding that the teacher's mandatory reporting duty made them act as agents of the state law enforcement, and stated that "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into communication aimed primarily at gathering evidence for a prosecution."[131] Although the Court declined to adopt a categorical rule on this matter, the legislative scheme of the relevant statute must be considered, especially when the statute provides the *sole* legislative purpose.[132]

This approach—looking to the legislative intent of the statute— is consistent with the Court's decision in *Melendez-Diaz*.[133] Nonetheless, the legislature's declaration of policy must not be treated as a dispositive factor in determining what the reporter's purpose was in questioning a child. As suggested above, it should be considered as one of all the relevant factors including, but not limited to, the identity of the person who asked the declarant questions, and "the content and tenor of his [or her] questions[.]"[134] Thus, if the content and tenor of the teacher's questions along with the other relevant circumstances—the legislative scheme of the statute— demonstrate that the primary purpose of the teacher's inquiries was to establish or prove past events, the trier of fact could objectively find that the teacher's primary purpose was prosecution—acting as an agent of law enforcement—and not protection.

Concerning the declarant's age, the Court explicitly stated that statements made by very young children like L.P. will hardly ever implicate the Confrontation Clause.[135] The Court not only acknowledged the implications of research on children's understanding of the judicial system but also found that it is "extremely unlikely" that a three-year-old child would ever intend his statement to be used for trial testimony.[136] As stated above, young children do not have the cognitive capacity that adults have. Therefore, unless the context shows differently, a very young child's statement should not be considered to have testimonial nature due to the very reason that the Court mentioned.

[130] *See* Ohio v. Clark, 135 S. Ct. at 2181–82.
[131] Ohio v. Clark, 135 S. Ct. at 2183.
[132] *See id.* at 2182.
[133] *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).
[134] Michigan v. Bryant, 562 U.S. 344, 369 (stating that "'the identity of an interrogator, and the content and tenor of his questions,' can illuminate the 'primary purpose of the interrogation[]'").
[135] Ohio v. Clark 135 S. Ct. at 2182.
[136] *Id*.

About the AUTHOR



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During her tenure in law school, she has worked for various legal entities. In the winter of 2013, after she finished her first semester of law school, she worked for Kansas Legal Services in Manhattan, KS and during the 1L spring, she interned at the Advocate for Human Rights in Minneapolis, MN. In the summer of 2014, she worked for U.S. Magistrate Judge T. Lane Wilson at the Northern District of Oklahoma in Tulsa, OK, as a judicial intern, and in the summer of 2015, she also worked for Justice Sharon McCally at the Texas Fourteenth Court of Appeals in Houston, TX. During her 3L year, she was clerking for the Travis County Attorney's Office where she solidified her interest in criminal law even more.

After she began her legal education, she made four publications including this. She is co-author of two development articles published by the Texas Environmental Law Journal in its May and spring 2015 issues. Her third piece was published by the Southern University Law Review in its spring 2016 issue: The Role of Five Gulf Coast States Under Cooperative Federalism: Allocation of the Gulf Coast Restoration Trust Fund Under the RESTORE Act & State Initiatives for Large-scale Ecosystem Restoration.

Campus Insecurity: Due Process, Proof, and Procedure in Campus Sexual Assault Investigations

Travis J. Nemmer

Introduction

At one in the morning on July 7, 2012 Xavier University basketball star Dezmine "Dez" Wells had engaged in a game of "Truth or Dare" in his on campus dormitory with a number of his friends.[1] The game quickly became sexual in nature. One of the participants in the game was Wells' resident advisor, Kristen Powers. Over the course of the game, Powers removed her pants for Wells, exposed her breasts to him, and finally performed a lap dance for him, all while kissing him several times.[2]

Eventually, Rogers and Wells retired to Rogers's room at her invitation, where she asked Wells if he had a condom.[3] Rogers and Wells then engaged in sexual intercourse. At 5:15 AM Rogers and Wells then returned to Wells' room to retrieve Wells' phone. All witnesses reported that both Wells' and Rogers's demeanors and reactions were "completely normal."[4]

The next morning, Rogers went to campus police and accused Wells of raping her the prior night. Rogers was taken to the local hospital, where it was found that she had not suffered any of the physiological trauma consistent with rape.[5] Wells's case was later investigated by the head of the Hamilton County District Attorney's Criminal Division, and brought before the grand jury. The Grand Jury refused to indict Wells, with Hamilton County District Attorney later commenting that "It wasn't even close."[6]

Wells's troubles didn't end there. Despite the direct objections of the Hamilton County District Attorney to the President of Xavier University, the University proceeded with an internal investigation of Wells and his actions before the police and the District Attorney's office had completed their investigation.[7] Wells was brought before a tribunal known as the University Conduct Board, which was conducting its own investigation. During this hearing, in order to "preserve fundamental fairness," Wells was denied his right to present character evidence,[8] the right to have counsel present at his hearing,[9] and was forced to prove that his sex was consensual, rather than have the burden placed on his accuser to prove that Wells had in fact raped her.[10]

Xavier's University Conduct Board was comprised of four administrators, eight faculty members, and ten students that were tasked with examining the evidence regarding the

1 *See Wells v. Xavier University,* 7 F. Supp. 3d. 746, 747 (S.D. Ohio 2014).
2 *See id.*
3 *See id.*, Compl. at ¶ ¶ 21, 22.
4 *See id.* at ¶t24.
5 *See Wells supra* n. 1, at 747.
6 *See* Michael Winerip, *Stepping up to Stop Sexual Assault*, New York Times, (Feb. 7, 2014) http://www.nytimes.com/2014/02/09/education/edlife/stepping-up-to-stop-sexual-assault.html?_r=2.
7 *See Wells*, Compl. at ¶ 44.
8 *See id.* at ¶ a33(e).
9 *See id.* at ¶ 33(b).
10 *See id.* at ¶ 49.

rape claim that Wells was faced with. None of the persons ruling on Xavier University's board had any actual training in examining sexual assault evidence,[11] and did not provide anybody who was actually trained in the interpretation of sexual assault evidence.[12] An undergraduate student that examined the rape kit (that both police and prosecutors found to be evidence that no sexual assault had actually occurred),[13] reported in a confused manner, "I don't know what I'm looking at."[14] This was compounded by the fact that Wells was not permitted to cross examine, or even question any of the witnesses that had been arraigned against him.[15]

Less than two hours after the Grand Jury had cleared Wells' name, the Xavier University Conduct Board held that Wells was "responsible" for the rape of Kristen Rogers, and he was expelled from the University.[16] Xavier released a statement, boldly claiming that the University Conduct Board heard evidence that "may or may not have been heard by the Grand Jury."[17] Wells's case was sharply criticized almost immediately by the Hamilton County District Attorney's Office, with the prosecuting attorneys holding that Xavier University's handling of the matter was "seriously flawed."[18]

Wells went on to sue Xavier University for defamation and gender-based discrimination. Xavier settled after a federal court refused to dismiss his case, holding that the University Conduct Board was "well equipped to handle cheating cases but was . . . over their head [*sic*]" in relation to a sexual assault case.[19] After Wells was expelled, Rogers reportedly recanted her accusation.[20]

Dezmine Wells's case is not an isolated incident. There has been a troubling trend of students being expelled from their schools based on spurious, or even nonexistent evidence against them.

Xialou Yu was dismissed from Vassar University following a complaint of sexual assault. During Yu's hearing, Vassar University ignored evidence that the victim had emailed him following the event saying that she "had a wonderful time," and that she was "really sorry" that she had led him on in thinking that her and Yu could have a continuing relationship.[21]

Caleb Warner was expelled on charges of sexual assault from the University of North Dakota following his tribunal. Warner's tribunal had been completed before the District Attorney's office and the Grand Jury had refused to indict. Not only did the District Attorney's office not pursue charges against Warner, they pursued a warrant against Warner's accuser for filing a false claim.[22] In response to the new information relating to his case, Warner requested an appeal of his expulsion. Not only did the University refuse to overturn Warner's expulsion, it refused to grant him a new hearing based on the new information, holding that the District Attorney's development did not consti-

11 *See id.* at ¶ 55
12 *See id.*
13 *See id. at* ¶ 56.
14 *See Winerip, supra* n. 6.
15 *See Wells*, 7 F. Supp at 749.
16 *See id.* at 748.
17 Eamonn Brennan, *The Strange Case of Dezmine Wells*, ESPN, (Aug. 29, 2012), http://espn.go.com/blog/college-basketballnation/post/_/id/63416/the-strange-case-of-dezmine-wells.
18 *See id.*
19 *See Wells*, 7 F. Supp 3d at 749.
20 *See* Theresa Watanabe, *More College Men Are Fighting Against Sexual Misconduct Cases*, Los Angeles Times (Jun. 7, 2014), http://www.latimes.com/local/la-me-sexual-assault-legal-20140608-story.html
21 *See id.*
22 *See* Harvey Silverglate, *Yes Means Yes, Except on College Campuses*, Wall Street Journal (July 15, 2011), http://www.wsj.com/articles /SB10001424052702303678704576 44001411996 8294.

tute "substantial new evidence."[23] Furthermore, the University held that the hearings conducted by its campus proceedings were not "legal, but educational in nature."[24]

The dereliction of due process as it relates to campus sexual assault investigations has proven to be a pervasive problem throughout campuses in the United States. This issue can – most recently – be traced to a unilateral and unequivocal order from the Department of Education to stymie the rights of the accused in sexual assault cases issued in 2011. A "Dear Colleague" memorandum was drafted by the Department of Education's Office of Civil Rights in response to an "epidemic" of sexual assaults that have been allegedly committed or attempted against one in five women on college campuses.

This paper holds that the Dear Colleague memo represents a basic departure from the Due Process rights of students accused of sexual assault. The Dear Colleague memo admonishes schools to complete their investigations before the police or the District Attorney's Office have come to their own, professional conclusions.[25] It further proscribes a preponderance of the evidence standard to be employed through a sexual assault hearing,[26] restricts a student's right to have counsel present at their hearing,[27] and holds that a student accused of sexual assault is not permitted to cross-examine witnesses against him, so as not to create an environment that is "traumatic or intimidating" for the victim.[28]

This whole new schema is based on the false premise that one-in-five female students will suffer sexual assault during their undergraduate careers. Part I of this paper intends to investigate the unsound methodology that went into creating this flawed premise, and emphasize a more accurate and much lower rate of sexual assault as it occurs in colleges. Part II of this paper takes a look at the Dear Colleague memo, the specific circumvention of Due Process that takes place in the proscribed methods emphasized by the Department of Education. The conclusion explores acceptable alternatives to the existing schema brought forth in the Dear Colleague letter, and strikes an acceptable balance between victim protection and Due Process rights for the accused.

I. The Pervasive Myth of "One-In-Five"

It has been said many times and by so many people that doubting it has become near *verboten* in higher education. None other than President Barack Obama[29] and Vice President Joe Biden[30] have come out and claimed that one in five female students will be sexually assaulted during their time at college.[31] Nearly every law review article addressing campus sexual assault parrots the statistic as well.[32] Activist

[23] *See id.*
[24] *See id.*
[25] *See* Russlyn Ali, *Dear Colleague Memorandum*, Department of Education Office of Civil Rights, (Apr. 4, 2011), pg. 1 http://www2.ed.gov/ about/offices/list/ocr/letters/colleague-201104.pdf.
[26] *Id.* at pg. 11.
[27] *Id.* at pg. 12.
[28] *Id.*

[29] Glen Kessler, *One in Five Women in College Sexually Assaulted: An Update on this Statistic*, Washington Post, (Dec. 17, 2014), https://www.washingtonpost.com/news/fact-checker/wp/2014/12/17/one-in-five-women-in-college-sexually-assaulted-an-update/.
[30] *Id.*
[31] *See* Tessa Berenson, *1 in 5: Debating the Most Controversial Sexual Assault Statistic*, Time Magazine (Jun. 27, 2014), http://time.com/2934500/1-in-5%E2%80%82campus-sexual-assault-statistic/.
[32] *E.g.*, Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 Psychol. Pub. Pol'y & L. 1, 3 (2015); Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 B.Y.U. Educ. & L.J. 143, 156 (2013).

groups have also been known to cite even more alarming statistics, with the National Rape, Abuse and Incest National Network holds that women in college are three times more likely than women in general to suffer from sexual assault.[33]

The one-in-five statistic should be called into question for just how dangerous it alleges our college campuses to be. Those who believe that one in five women will be sexually assaulted at an undergraduate institution are saying that a woman attending college in Tenleytown, College Park, or New Haven is just as – if not more likely – to be raped than a woman in civil-war torn Congo, where rape is regularly used as a weapon of war, and human rights activists maintain that four women are raped every five minutes.[34]

A. The 2007 CSA Study – Selection Bias, Unrepresentative Sampling and Fuzzy Language

So what study does the actual statistic come from? One of the most widely cited studies is the Department of Justice's Campus Sexual Assault Study (Hereafter "the CSA Study"). The CSA study involved sending a blanket email out to all undergraduate students at just two unnamed universities, one in the South, and another in the Midwest.[35] Students were offered an Amazon gift card in exchange for their participation, and results were gathered anonymously.[36] Despite this, less than half of the students who responded to the original blanket email filled out the actual survey.[37] The low response rate has opened the study to criticism by feminist scholars. Christina Hoff Sommers raises the concern of selection bias, claiming that "[t]he people who feel the most strongly about the survey, for whatever reason, are most likely to respond."[38]

Furthermore, many of the CSA's questions were vaguely worded, and the absence of a trained interviewer led respondents to be unable to clarify the vagaries contained therein. The CSA study, for example, defines "grabbing, fondling, or . . . rubbing up against someone in a sexual way" as sexual assault." The study ties these instances, where there is no sense in denying that they are dependent on the interpretation of the person they are inflicted on, alongside with "oral sex, anal sex, sexual intercourse, and sexual penetration with a finger or foreign object" in the catch all definition of "sexual assault."[39] The first question simply offers a Yes/No binary, without allowing for clarification until "Yes" had already been selected. As a result, nineteen percent of respondents stated that they had suffered sexual assault – but only thirteen percent said it had been completed, and twelve percent said that it had been attempted.[40] This methodology has been roundly criticized even by sexual assault victim advocates. Most notably, John Foubert, President of the advocacy group One in Four, has stated that "When we throw 'unwanted sexual contact' into the mix, we risk equating a forced

[33] *See* National Rape, Abuse and Incest National Network, *Who Are the Victims?, https://rainn.org/get-information/statistics/sexual-assault-victims*.

[34] *See* Amber Peterman, *Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of Congo*. American Journal of Public Health: June 2011, Vol. 101, No. 6, pp. 1060-1067; *see also* Jeffrey Gettleman, *Congo Study Sets Estimate for Rapes Much Higher*, New York Times, (May 11, 2011), http://www.nytimes.com/2011/05/12/world/africa/12congo.html.

[35] *See* Christopher Krebs, Christine Lundquist, Tara Warner, *The Campus Sexual Assault (CSA) Study*, National Institute of Justice, 3- (Oct. 2007).

[36] *See id.* at 3-5, 3-6.

[37] *See id.* at 3-2.

[38] *See* Berenson *supra* n. 31.

[39] *See* CSA *supra* note 35 at App. A, Part 1.

[40] *See Id.*

kiss (which is a bad thing obviously) with rape (which is a fundamentally different act)."[41] Foubert has gone on to claim that the Obama Administration "probably got some bad advice about which stat to trust," and the proliferation of the one in five statistic, "drives him nuts."[42]

These already spurious numbers are compounded by the fact that "consent" is never actually defined at any point in the questionnaire. There is no clarification of whether explicit verbal consent should be required, creating discordant results amongst survey takers. This creates issues further in the study, when the issue of intoxication is addressed. Without a level of explicitness required for consent, the study concludes that sexual contact with any person who is intoxicated is "unacceptable."[43]

Seven years after the study was released, its lead author sat down with Slate Magazine and sharply criticized his own study, saying that the one-in-five statistic that his study is in part responsible for proliferating is "in no way a nationally representative statistic" due to the fact that his study only investigated two actual universities.[44]

B. The 2014 Barnard University Study – Serious Selection Bias and Misleading Questions

In 2014, Barnard College released a new study that would soon also be quoted as confirming the one in five statistic. The Barnard study came to the truly alarming conclusion that twenty percent of their students would suffer a sexual assault during just twelve months at Barnard.[45] The Barnard study suffers from many of the same methodological shortcomings as the CSA study, and then some. The Barnard study employed the same methodologies as the CSA Study – a blanket email is sent out to the student body, and respondents fill out an anonymous survey. Respondents are asked a list of questions about their experiences, and if they answer affirmatively for any of the questions posed, they are registered as a positive response in the catch-all pool of "reporting sexual assault."

The response rate for the Barnard study was even more anemic than the already suspect turnout in the CSA study: Only thirty-four percent of all students responded to the survey.[46] Needless to say, this raises the same issues of selection bias discussed *supra*.

Furthermore, the questions employed in Barnard's study are even more spurious and misleading than those utilized in the CSA study. For starters, eight percent of respondents answered affirmatively to Barnard's first question, whether the respondent had "sexual intercourse when you didn't want to because you were pressured, forced, or otherwise did not provide consent."[47] The language here poses a stark and troubling semantic problem. Attorney David French clarifies that there is a differ-

[41] *See* Kelly Wallace, *23% of Women Report Sexual Assault in College, New Study Finds,* CNN, (Sep. 25, 2015), http://www.cnn.com/2015/09/22/health/campus-sexual-assault-new-large-survey/.

[42] *See* Jake New, *One in Five?*, Inside Higher Education, (Dec. 15, 2014). https://www.insidehighered.com/news/2014/12/15/critics-advocates-doubt-oft-cited-campus-sexual-assault-statistic.

[43] *See* CSA *supra* note 35 at 6-5.

[44] *See* Emily Offer, *The College Rape Overcorrection*, Slate Magazine, (Dec. 7, 2014). http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html.

[45] *See Barnard Campus Climate Survey Results*, Spring 2014, 3.

[46] *See id.* at 2.

[47] *See id.* at 7.

ence between "unwanted," and "without consent." "Unwanted" sexual contact, according to French, can constitute a number of situations, including mutual misunderstanding created by the silence of one party, and legal (although immoral), emotional manipulation.[48] Obviously, in cases where a respondent was pressured or forced to have sex, that constitutes *bona fide* rape. But the Barnard study makes no effort to distinguish between cases where consent was denied, versus not explicitly given, or with a person unable to give consent. Since there is no way of distinguishing between these cases the Barnard study's very first question opens itself up to criticism.

The Barnard Study only becomes more problematic from that point onwards, with the sixth question asking respondents whether they "gave into sexual play, (fondling, kissing, and touching, but not intercourse), when you didn't want to because you because you were overwhelmed by the person's pressure or argument."[49] The sixth question, which factors into the catch-all category of "sexual assault," presumably includes scenarios where, due to a person's *verbal argument*, the respondent actually gave consent to engage in non-intercourse sexual conduct. In the grand total of affirmative responses, these events are considered the same for counting "instances of sexual assault" as the forcible rape outlined in the first question.[50]

The conclusion page tallies up all of the affirmative responses, calls them all "sexual assault" and holds that, of the third of the students that responded to the survey, twenty percent have been subjected to the above, extraordinarily liberal definition of sexual assault.

C. The BJS Study – Different Methodology, Different Results

The most comprehensive and in depth study of campus sexual assault was published in December of 2014 by the Department of Justice's Bureau of Justice Statistics. Titled *Rape and Sexual Assault Among College-Age Females, 1995-2013* (but referred to hereafter as "the BJS Study"), it concluded differently than CAS or the Barnard study. This is likely due to the fact that the BJS study used a radically different methodology than the prior studies' blanket emails and web forums. The BJS study relied on a series of in person and telephone interviews handled by trained screeners, and had a response rate of over eighty-eight percent of all respondents, more than twice the response rate found in the CAS study.[51] It's also important to note that the BJS study examined students nationally, polling over a quarter million female respondents a year.[52]

Furthermore, the BJS study was the first study to treat campus sexual assault as a criminal justice issue, rather than a public health issue.[53] Accordingly, only events that would rise to a level of criminal prosecution are considered sexual assault, and vague events about unwanted contact are not considered in the same category as actual sexual assault.[54] This was established by having trained interviewers ask respondents behaviorally specific questions

[48] *See* David French, *The Post's New Poll on Campus Sexual Assault is Bogus*, National Review, (Jun 12, 2015), http://www.nationalreview.com/article/419716/posts-new-poll-campus-sexual-assault-bogus-david-french.

[49] *See* Barnard *supra* n. 4445 at 7.

[50] *See id.* at 8.

[51] *See* Lynn Langton and Sofi Sinozich, *Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013, 15*-16, Bureau of Justice Statistics, Dec. 2014.

[52] *Id.* at 19.

[53] *Id.* at 2.

[54] *Id.*

about their attacker's behavior, rather than compelling the respondent to fill in their own blanks by filling out a web survey.[55]

The differences in the results are staggering. The BJS study found that not only was the total rate of sexual assault in colleges substantially lower than the prior studies have found, but also that students were at a lower risk of sexual assault than their peers who did not attend college.[56] Furthermore, sexual assault, far from being an "epidemic" on college campuses, had actually been declining over the sixteen-year period than had been covered in the BJS study.[57]

The BJS study found that the rate of sexual assaults on campuses broke down as follows: Of every thousand female undergraduate students, two female students suffered a completed rape, 1.5 suffered attempted rape, 1.9 would be sexually assaulted in a manner that did not include intercourse, and 0.7 were under serious threat of rape or sexual assault.[58] When combined, the actual prevalence of sexual assault on campus came out to be 6.1 for every thousand students.[59]

The country's most wide-ranging, comprehensive, and representative study on sexual assault on campus found that one in 164 one in students will be sexually assaulted during their college years, not one in five.

Despite the findings of the BJS study, "one in five" continues to be a rallying cry for campus activists and politicians. New York Senator Kirsten Gillibrand (D) has used the one in five statistic to push a bill that would institute a uniform disciplinary standard for universities across the country, federalizing student discipline, which has, for centuries, been within the purview of schools.[60] Missouri Senator Claire McCaskill (D), who has also criticized lawsuits like Dez Wells' as "an incredible display of entitlement, the same entitlement that drove [them] to rape,"[61] has attacked a congressional bill that ensured the right to counsel at sexual assault hearings as "disturbing."[62]

"One in five" has served as the rallying cry for those looking to implement the changes present in the Department of Education's "Dear Colleague" letter that laid the foundation for campuses implementing policies that have led to what civil rights activists and feminist scholars refer to as "The College Rape Overcorrection."[63] The flawed statistic can be found on the second page of the Dear Colleague Letter, and is a part of the essential foundation for the Department of Education's new and troubling procedural rules.

[55] *Id.* at 3.
[56] *Id.* at 4.
[57] *Id.* at 3.
[58] *Id.* at 4.
[59] *Id.*

[60] *See, e.g.* Kirsten Gillibrand, *Campus Accountability & Safety Act – Resource Center – Explainer*, http://www.gillibrand.senate.gov/casa-explainer; *see also* Poughkeepsie Journal Ed. Bd., *Zero Tolerance For Sexual Assault on Campus*, (Apr. 30, 2014), http://www.poughkeepsiejournal.com/story/life/collegeaid/2014/04/30/zero-tolerance-for-sexual-assaults-on-campus/8542553/.
[61] *See* Nick Anderson, *Men Punished in Sexual Misconduct Cases on College Campuses are Fighting Back*, Washington Post, https://www.washingtonpost.com/local/education/men-punished-in-sexual-misconduct-cases-on-colleges-campuses-are-fighting-back/2014/08/20/96bb3c6a-1d72-11e4-ae54-0cfe1f974f8a_story.html.
[62] Jake New, *Court Wins for the Accused*, Inside Higher Education, (Nov. 5, 2015), https://www.insidehighered.com/news/2015/11/05/more-students-punished-over-sexual-assault-are-winning-lawsuits-against-colleges.
[63] *See* Yoffe *supra* n. 44; s*ee also* Susan Kruth, *Emily Yoffe on the College Rape Overcorrection*, The Foundation for Individual Rights in Education, (Dec. 8, 2014) https://www.thefire.org/emily-yoffe-college-rape-overcorrection/; Heather McDonald, *The Campus Rape Myth*, City Journal, (Winter 2008) http://www.city-journal.org/html/campus-rape-myth-13061.html.

II. The "Dear Colleague" Cudgel – Proscribed Methods of Investigating Sexual Assault and Federal School Funding

In 2011, the Department of Education's Office of Civil Rights released its Dear Colleague letter to universities receiving federal funding. "Dear Colleague" letters are used by officials in the Executive Branch to communicate updates, changes, and notices to persons who will be affected by changes in the existing administrative law schemas. Generally, the release of these letters is a mundane exercise – a rather rote and routine listing of regulatory law. Very rarely is the release of a Dear Colleague letter the subject of joint statements by the Secretary of Education and the Vice President of the United States.[64] Even though the letter claimed that it "did not add requirements to applicable laws" or do anything other than "provide information and examples" for schools covered by the umbrella of the Department of Education[65], it was lauded as a "historic event."[66]

There were three major proscriptions made by the letter. The first was that the letter proscribed that all schools should conduct their sexual assault investigations under a preponderance of the evidence standard.[67] Second, it informed schools that they are not to wait for a criminal investigation be completed, or even started before the schools initiate their own investigations or procedures.[68] Third, the letter gives the school complete authority to dictate which students are permitted to have legal counsel present during their hearing, as well as suppresses accused students' rights to cross examine their accusers and witnesses against them.[69] Finally, there is an unwieldly and self-contradictory system of appeal proscribed by the letter which can substantially impact even students that have been cleared by the tribunal of any wrongdoing. [70]

These proscriptions shall be addressed in turn, but it is also worth noting a serious administrative flaw with the creation of the letter. The Department of Education's Dear Colleague Letter was announced and released without going through any of the usual notice and comment procedures that are mandated under the 1946 Administrative Procedure Act.[71] Notice and Comment is not required when the rule is not "substantive."[72] However, the line between what is and is not "substantive" in the view of the Court has been muddled and murky over the years. The only common thread is that those rules that affect "individual rights and obligations" are found to be substantive.[73] The Foundation for Individual Rights in Education compellingly argues that a creating a rule affecting individual rights and obligations is exactly what the Dear Colleague letter does, as this is the first time that the Department of Education has *specifically mandated* that a university conduct its hearings with a preponderance of the evidence standard.[74] Indeed, the invitation for notice and/or comment appeared after

64 *See,* Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 Duke L.J. 487, 505 n. 101(2012).
65 *See* Ali *supra* n. 25 at 1 n. 1.
66 *See* Kate Harding, *Asking for It: The Alarming Rise of Rape Culture and What We Can Do About It*, 213 (2015)
67 *See* Ali *supra* n. 25 at 10.
68 *See id.*
69 *See id.* at 12.
70 *See id.* at 12, 18.
71 Ari Cohn, *Did the Office for Civil Rights' April 4 'Dear Colleague' Letter Violate the Law?,* Foundation for Individual Rights in Education, (Sep. 12. 2011) https://www.thefire.org/did-the-office-for-civil-rights-april-4-dear-colleague-letter-violate-the-law/.
72 *See id.*
73 *See id.* (Quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1979).
74 *See id.*

the letter was first released, the means of providing comment was hidden in a footnote, and invited persons looking to comment to email or send a letter to the Department of Education.[75] To date, no action has been taken on any sort of comment that was made, and no formal comment has been posted by the Department of Education. Schools across the country have also changed their review standards to reflect the new "voluntary" standards.[76]

The manner in which the changes were implemented at schools has also been met with criticism. Most notably, a group of law faculty at Harvard University including Alan Dershowitz and noted feminist legal scholar Janet Halley, have attacked Harvard's post-Dear Colleague letter. In an open letter, they stated that the University "deferred to federal administrative officials, rather than exercise independent judgment," and, even more concerning, failed to consult the law faculty of the school when implementing its policy.[77] Their specific criticisms of the policy mirror those made by this paper – that the Dear Colleague proscriptions leave the accused bereft "of any adequate opportunity to discover the facts charged, to confront witnesses, and present a defense at an adversary hearing."[78]

Certainly, the most controversial proscription from the Department of Education has been that Universities must implement a preponderance of the evidence standard when investigating alleged sexual assaults on campus. The Dear Colleague Letter states, in no uncertain terms, that a school that fails to adhere to this standard runs the risk of losing its federal funding.[79] This is the lowest possible standard of proof required in any administrative or judicial hearing. Accordingly, it has been criticized by the American Association of University Professors on the grounds that it infringed on the due process rights afforded to tenured professors.[80] The Association held that the adoption of a national preponderance of the evidence standard would erode the due process rights of tenured professors, who can face dismissal following sexual harassment complaints. It raised the specter of false accusations, and the deleterious effect that it could have on an accused professor's future career and academic freedom.[81] While the rights of tenured professors are not the focus of this paper, the fact that the Dear Colleague Letter does not do anything to distinguish between students and faculty is telling.

This is compounded by the fact that Congress has demonstrated its legislative intent against this manner of regulation by repeatedly voting down bills that would have

[75] *See* Ali *supra* n. 25 at n. 1.

[76] *See e.g. Rights and Responsibilities 2014-2015*, 51, Brandeis University (2015) https://www.brandeis.edu/studentlife/srcs/rr/RR14_15version11.4.pdf; *See c.f. Rights and Responsibilities,* §e19.13, Brandeis University (2010-11) *https://www.brandeis.edu/studentlife/srcs/pdfs/rr2010.pdfl; See also* Hans Bader, *Education Dept Unlawfully Changes Burden of Proof in College Sexual Harassment Cases*, College Insurrection, (Sep. 12, 2012) http://collegeinsurrection.com/2012/09/education-dept-unlawfully-changes-burden-of-proof-in-college-sexual-harassment-cases/.

[77] *Rethink Harvard's Sexual Assault Policy*, Boston Globe, (Oct. 15, 2014) https://www.bostonglobe.com / opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html.

[78] *See id. See also* Andrew M. Duehren, *A Call to Arms*, Harvard Crimson (May 29, 2014), http://www.thecrimson. com/article/2015/5/28/janet-halley-title-ix/

[79] *See* Ali *supra* n. 25 at 16

[80] Cary Nelson, *Open Letter to Asst. Secy. Russlyn Ali*, American Association of University Professors, (Aug. 18, 2011) http://www.aaup.org/NR/rdonlyres/FCF5808A-999D-4A6F-BAF3-027886AF72CF/0/officeofcivilrightsletter.pdf.

[81] *See id.*

enshrined a national preponderance of the evidence standard for campus investigations of sexual assault.[82] Repeatedly, Congress has allowed bills proscribing a preponderance of the evidence standard to either die in committee, or, as in the case of the Leahy Amendment that would have added the standard to the 2011 Violence Against Women Reauthorization Act, specifically withdrew the Amendment from the bill under sharp criticism.[83]

This also runs counter to the body of legal scholarship that has advised that the clear and convincing evidence standard is the appropriate standard to employ in *all* student misconduct cases prior to the announcement of the Dear Colleague Letter.[84]

The next disturbing facet of the Dear Colleague Letter is that schools are advised to begin their investigations of sexual assault even if the police have not completed, or even begun an investigation of a possible sexual assault. The Dear Colleague letter states that police investigations may be "useful for fact gathering but . . . conduct may constitute sexual harassment under Title IX even if the police do not have evidence of a criminal violation."[85] This is concerning for a number of reasons, not least of which is the failure by many schools to train their investigators, which generally include a mix of students, faculty, and administrators in how to handle a sexual assault case.[86] The Dear Colleague letter holds that "the fact finders and the decision-makers should have adequate training."[87] It, however, offers no guidance on how to schools are supposed to find, or furnish this training. Indeed, the only example, aid, or clarification that the Dear Colleague Letter provides is crammed in a footnote stating simply that "forensic evidence should be reviewed by a trained forensic examiner."[88]

In some cases, such as Wells, this can lead to untrained students ignoring an exculpatory rape kit. In other cases, the results can be more prejudicial and odious. At Stanford University, shortly after the announcement of the Dear Colleague letter, training manuals passed to student jurors state that if accused, an abuser will try to act "persuasive[ly] and logical[ly]," and that "to remain neutral is to collude with the abusive man, whether or not that is your goal."[89]

Professor Robert Shibley, writing for the Duke Law Review, has identified over eight hundred schools that rely on the benign-sounding National Center for Higher Education Risk Management. The organization was founded by a self-described "sexual assault activist" who has stated that he "wants to see more students expelled."[90] The model that NCHERM employs says that schools can stay "abreast of liability"

[82] Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. Ky. L. Rev. 49, 62 (2013).

[83] *See* Robert Shibley, *Threat to Student Due Process Rights Dropped from Draft of Violence Against Women Act*, The Foundation for Individual Rights in Education, (Nov. 14, 2011) https://www.thefire.org/threat-to-student-due-process-rights-dropped-from-draft-of-violence-against-women-act/.

[84] *See e.g.* James M. Picozzi, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 Yale L.J. 2132, 2159 (1987) *(citing* Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J. College & U.L. 71).

[85] *See* Ali *supra* n. 25 at 9-10.

[86] *See* Triplett *supra* n. 64 at 493.

[87] *See* Ali *supra* n. 25 at 12.

[88] *See id.* at n. 30.

[89] *See* Mike Armstrong, *A Thumb on the Scale of Justice*, Stanford Daily, (Apr. 29, 2011). http://www.stanforddaily.com/2011/04/29/op-ed-a-thumb-on-the-scale-of-justice/

[90] *See* Shibley *supra* n. 81 at 64; *see also* Sandy Hingston, *The New Rules of College Sex*, Philadelphia Magazine (Aug. 22, 2011) http://www.phillymag.com/articles/the-new-rules-of-college-sex/.

by mandating that fact finders employ an affirmative consent model – which mandates that a male looking to initiate sexual contact must ask permission for each advancing stage of sexual contact. The burden of proof, according to NCHERM, should be that the accused must prove that he asked for affirmative consent – thus placing the burden on the accused to demonstrate his innocence in a matter far outpacing that even placed by the Dear Colleague Letter.[91] As of writing, the methods employed by NCHERM have not been condemned or clarified to any degree by the Department of Education.

Finally, the Dear Colleague Letter sharply curtails the rights of the accused to have counsel present at their hearings, or to cross-examine their accusers. The Dear Colleague Letter "does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties."[92] This creates situations where, if the accuser does not feel as though it is necessary to retain her own attorney, the school is not obligated to permit the accused to obtain his own counsel.

Even more concerning is the approach that the Dear Colleague Letter proscribes with regard to cross-examination. The Department of Education "strongly discourages" permitting students to cross-examine each other – which begs the question of how actual cross examination is performed without lawyers – due to the fact that cross-examination "may be traumatic or intimidating and . . . possibly escalating or perpetuating a hostile environment."[93]

Due process rights for students have not been extensively examined in court. There are two seminal cases in this matter. The first is *Dixon v. Alabama Bd. of Ed. Dixon,* a Fifth Circuit case that held students who were expelled for their role in a lunchroom sit-in. The majority in *Dixon* held that it was indisputable that education was "vital, and indeed, basic to a civilized society."[94] It then went on to hold that if the students were expelled from their universities it "may well prejudice the student in completing his education at any other institution."[95]

To this end, the *Dixon* court held that schools do not have the authority to remove students without holding a hearing. While hearings did not have to be "full-dressed judicial proceeding[s], with the right to cross-examine witnesses," the university has an obligation to hear "both sides in considerable detail . . . best suited to protect the rights of all involved."[96] Even though cross-examination is not specifically mandated by the *Dixon* court in these hearings, "the rudiments of an adversarial process may be preserved without encroaching on the interests of the college."[97]

The holding in *Dixon* was lauded as "landmark" by the Supreme Court in *Goss v. Lopez.*[98] *Goss* held that schools are bound to "recognize a student's right to . . . education as a property interest that is protected by the Due Process Clause."[99]

This right has been expanded even further in the Northern District of New York where a federal court held in *Donahue v. Lopez* that

[91] *See id.*
[92] *See Ali supra* n. 25 at 12.
[93] *See id.*

[94] *See Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150, 157 (5th Cir. 1961).
[95] *See id.*
[96] *See id.* at 159.
[97] *See id.*
[98] *See Goss v. Lopez,* 419 U.S. 565, n. 8 (1975).
[99] *See id.* at 732.

despite the "sensitivity" of the proceedings, the accused student has a right to cross-examine witnesses against him is one based on the credibility of his accuser.[100] The *Donahue* court, however, held that the accused does not have a right to counsel at his hearing.[101] This has been disputed by a holding in the Eastern District of Pennsylvania in *Furey v. Temple University*, where a federal court held a student facing expulsion has a right to have counsel at his hearing.[102] This right was also held by the court to be particularly important when a witnesses' credibility is a critical factor in determining the outcome of the hearing.[103] As of writing this, the Department of Education has provided no guidance on how schools are supposed to manage this patchwork of competing rulings.

The Department of Education justifies many of its policies by holdings, including the restriction of due process and the preponderance of the evidence standard by stating that this is the standard generally employed in all other administrative law hearings. Even if the diminishing of sexual assault investigations to mere "administrative hearings" was not reductive in and of itself, it is a thin cloak to deny the accused the right to counsel or cross examination. In the Duke Law Review, Professor Matthew Tripplet noted that in similar administrative law hearings, such as those under the Administrative Protection Act, or those regarding military members that are facing involuntary discharge, the right to counsel and cross examination are protected.[104]

Schools may also attempt to justify their restrictions on due process by stating that these hearings are intended to be educational in nature, rather than punitive. This was the case in the University of North Dakota's decision to not grant a student-defendant a new hearing despite the fact that his accuser both recanted, and was facing charges for filing a false complaint.[105] Since there was no precipitous deprivation of liberty at stake in a campus adjudication, the university should not be compelled to establish an adversarial process. This is a patently disingenuous and unreasonable excuse. There is a whole bevy of due process rights available for defendants in civil suits that also face no deprivation of liberty, but only the taking of property. The Supreme Court addressed this issue in *Addington v. Texas*, where it held that the standard of review in civil cases alleging "fraud, or any other kind of quasi-criminal wrongdoing" should have a clear, unequivocal and convincing standard of proof due to the fact that there are interests at stake beyond the mere "loss of money."[106] There should not be any dispute that an adjudication that a person is "responsible" for the sexual assault of another is responsible for a "quasi-criminal" wrongdoing. As stated in *Dixon*, an expulsion from a school can have a seriously deleterious and prejudicial effect on a student's ability to achieve matriculation at another university.[107] This also begs the question of what possible educational value there is in punishing a student for an act that he is not clearly and convincingly guilty of.[108]

[100] *See Donahue v. Baker*, 976 F. Supp 136, 146-47 (N.D.N.Y 1997); *but see Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972) (holding that "[t]he right to cross-examine witnesses has not been considered an essential requirement of due process in school disciplinary proceedings.").
[101] *See id.* at 146.
[102] *See Furey v. Temple University*, 730 F.Supp.2d 380, 397 (E.D. Penn. 2010).
[103] *See id.*
[104] *See* Triplett *supra* n. 64 (citing *Doe v. United States*, 132 F.3d 1430 (1997)).
[105] *See* Silvergate *supra* n. 22.
[106] *See Addington v. Texas*, 441 U.S. 418, 424 (1979).
[107] *See Dixon supra* n. 94 at 156-57.
[108] *See* Shibley *supra* n. 81 at 89.

This is all to say nothing of the fact that a student's investment in his higher education represents a substantial property interest that he should not be relieved of without Due Process, as held in *Goss*. The *Goss* court was correct to recognize a student's interest in his education as a property right, and that case concerned the rights of students in compulsory pre-tertiary educations, where the students presumably have invested none of their own.[109] This is compounded by two factors. The first, especially at state-run public institutions that the State's role in providing for the education of its citizens is "perhaps the most important role of state and local governments."[110] The interest in these colleges should be in providing education, rather than acting as amateur police officers or prosecutors on matters in which they lack the training of those designated by the State to perform those duties. The second is that education represents a far more substantial property interest now than it did in 1975, when the Supreme Court decided *Goss*. Since 1975, the average cost of a year at a four-year college has nearly tripled, from $7,833 to $19,548. At private colleges, it has more than tripled, going from $10,088 to $32,405.[111]

Also, the lackadaisical attitude that the Dear Colleague Letter takes towards any kind of appellate process is troubling. The only mention that it makes of it in the nineteen pages of the document is that "if the school provides for appeal of the findings or remedy, it must do so for both parties."[112] The Dear Colleague letter makes no reference as to what persons should review this appeal, what sort of procedures should be in place, or what standard of review should be used in the midst of the appellate process. The only proscription is that an appeal should be "available to both sides," and that any tribunal that the accused faces shall be furnished with a means of reviewing the content of the meeting. This may be in the form of audio recordings or transcripts, or even something as anemic as a "written finding of fact" from the tribunal.[113] Again, this creates the same complex patchwork of cases that is created by the disparate rulings regarding the rights of students to counsel and their rights to cross examination. In New York, even private universities are subject to a judicial review of their tribunal's decisions.[114] In Arizona, all students enrolled in public colleges enjoy a statutory right to judicial review of hearings at the university level.[115] However, students in Nevada can only have their decisions reviewed by the Dean of Students, who enjoys the right to impose an even greater sanction than those imposed by the university tribunal.[116] As mirrored by their silence on the rights to counsel and cross examination, the Department of Education offers neither students nor schools guidance on how to navigate this patchwork.

The Dear Colleague letter then contradicts itself six pages later by stating that an accuser is given the exclusive opportunity to

[109] *See Goss supra* n. 96 at 576.
[110] *See Brown v. Board of Education*, 347 U.S. 483, 493 (1954).
[111] *See e.g.*, *Tuition and Fees and Room and Board over Time, 1975-76 to 2015-16, Selected Years*, The College Board (2015), http://trends.collegeboard.org/college-pricing/figures-tables/tuition-and-fees-and-room-and-board-over-time-1975-76-2015-16-selected-years#Key%20Points.
[112] *See* Ali *supra* n. 25 at 12.
[113] *See id.*
[114] *See* Henrick *supra* n. 81 at 80 (citing *Gertler v. Goodgold*, 487 N.Y.S.2d 565 (N.Y. App. Div. 1st Dep't 1985))
[115] *See id.* (citing Ariz. Rev. Stat. Ann. §§12-910, 12-348, 41-1007 (2012).
[116] Office of Student Conduct, *Academic Policy for Students,* University of Nevada at Reno, (2015), http://www.unr.edu/ student-conduct/policies/university-policies-and-guidelines/academic-standards/policy.

meet with the school's Title IX coordinator to seek a remedy that is outside of the jurisdiction of the investigative tribunal.[117] The letter goes on to clarify that an accuser may not wish to be in the same classes or dorm rooms their alleged attacker, and the Title IX coordinator at the school is graced with the powers to grant the accuser remedies.[118] Under the authority of a Title IX coordinator, "remedies" can presumably include barring the accuser's alleged attacker from certain dormitories or classes if an accuser feels uncomfortable around the person that they accused. Even a student who has been adjudicated non-responsible, and cleared of wrongdoing may be forced to incur substantial monetary costs if he is forced to move buildings, or remain on campus for an extra semester because he has been barred from a class due to the actions of an unaccountable Title IX coordinator. At no point in the Dear Colleague letter is it mentioned how an accused student would be able to seek redress from the Title IX coordinator, or provide for any manner of appeal for the Title IX coordinator's decision.

As it stands, the "historic" and "clarifying" Dear Colleague Letter has offered little in the way of clarification of how to address due process concerns for students accused of sexual assault, and stands to strip many potentially innocent students of their educations and their future. The current framework provided by the Department of Education is one that allows for the presumption of guilt, does not take into account the due process rights of students or faculty, and will, in all likelihood, lead to a rash of senseless expulsions on spurious grounds. This is all to say nothing of the fact that it is badly worded, contradictory to its goal of "equal representation" of both the accused and the accuser – which may have been prevented had the Dear Colleague letter been subjected to the usual notice and comment procedures.

Conclusion – Proposed Solutions for Addressing both Due Process Rights and Victim Protection

Despite the seeming inflexibility created by the Department of Education and the "Dear Colleague" letter, there is reason to believe that due process rights and victim protection are not, and should not be mutually exclusive. The most important thing to bear in mind is that, regardless of the amount and the quality of training that school administrators and those who sit on university tribunals undergo, they will, in almost all cases, be less equipped to handle cases of sexual assault than trained professionals in police or prosecutor's offices. As the court noted in *Wells*, campus tribunals are certainly more equipped to handle instances of academic dishonesty, rather than the complex, trying and traumatic practice of adjudicating sexual assault allegations.[119] These investigations have been blessed by the government on an illusory foundation of faulty sociology and statistics, promulgated by an overly zealous, if well-meaning Department of Education, and clumsily implemented by schools administrators in fear of activist backlash or loss of federal funding.

This is not to suggest, as Professor Henrick does, that campuses should get out of the business of investigating assaults that happen on their campuses entirely.[120] There is certainly a compelling interest in schools to keep their campuses free and safe from sexual assaults committed. There is also the very real concern

[117] *See* Ali *supra* n. 25 at 18.
[118] *See id.* at n. 45.
[119] *See Wells supra* n. 1 at 749.
[120] *See* Hendrick *supra* n. 81 at 80-81.

that the nature of sexual assault investigations is one that often is overlooked by law enforcement.[121]

Addressing this issue is one that requires the joint focus of school administrators, law enforcement, politicians and activists alike. In short, the current state of campus safety would not be legally or morally bereft by injecting a degree of nuance into their adjudications that would currently run contrary to the proscriptions of the Dear Colleague letter. Bearing in mind the substantial property interest that students invest in their education, the quasi-criminal nature of a finding that they are "responsible" for sexual assault, and the ease with which schools can promulgate information – including black marks on a student's transcript, students accused of sexual assault on campus should be afforded a full measure of due process rights, including their right to counsel, and the rights to cross examine witnesses, including their accuser. If schools truly wish to embrace the mantle of law enforcement within the confines of their own campuses, they should divest themselves of the flimsy notion that their adjudicative proceedings are "cooperative," or "educational" in nature.[122]

To reflect the gravity of the situation that both students and schools face, proceedings that could potentially result in expulsion, or suspension for more than a semester, adjudication proceedings should be conducted to a clear and compelling evidence standard. It is not unreasonable to adjudicate lesser offenses that don't bear the possibility of expulsion and permanent censure to a preponderance of the evidence standard.

Most importantly though, school adjudicators and administrators should look to train their juries and other triers of fact on how to *actually* rule impartially and efficaciously on how to examine evidence in a sexual assault investigation. The Department of Education should mandate, rather than suggest, that all persons looking to adjudicate sexual assault accusations should enter intensive training on how to treat witnesses, the accused parties and evidence. This training should come from local professionals, rather than ideologically driven groups like NCHERM. If there is forensic evidence present at the adjudication, it should be presented and explained by professionals, to prevent untrained undergraduate students from discarding exculpatory forensic evidence because they "don't know what they're looking at."

The fight to stop sexual assault on campuses is an admirable one, and there should be no argument that one sexual assault at an institution of higher learning is one too many. But overeager bureaucrats and activists are enabling feckless administrators to bring about an environment where individual rights are sacrificed on the altar of grand social correction. This never has, and never should be a hallmark of any American justice system, from the Supreme Court on down to the Xavier University Conduct Board. Avoiding that is how you not only avoid more victims like Dez Wells in the country, but achieve real and lasting justice for all.

[121] *See e.g.* Alexandra Brodksy and Elizabeth Deutsch, *No, We Can't Leave Campus Sexual Assault to the Police*, Politico Magazine, (Dec. 3, 2014), http://www.politico.com/magazine/story/2014/12/uva-sexual-assault-campus-113294_Page2.html#.VmXsR79sH8l.

[122] *See* Silvergate *supra* n. 105.

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Deconstructing the Crimeless Gender: Women's Prison Gangs

Emma Burgess Roy

Introduction

There is a myth surrounding women and crime. Women, often stereotyped as frail, fragile, or otherwise "weak," are viewed as incapable of crime.[1] Even when women's criminality is acknowledged, responsibility for the crime committed is often mitigated.[2] In the current social narrative, predation and deviance become strictly male endeavors.[3] In reality women do commit crimes, and they do so to the tune of twenty two percent of all crimes annually.[4] When women commit crime, the social narrative understands these acts as one of three things: abnormal, coerced, or desperate. This narrative removes the female criminal from an actor in her crimes, to a passive participant; sometimes nearly described as a victim of her own crimes. This view of women's criminality is both dangerous and inaccurate, as will be explained in this Article.

To recognize women as powerful in positive instances, society must also own the negative behavior of which women are capable. Feminist discourse often seeks to make space for women as role models and leaders, without recognizing or fully analyzing the full range of behaviors and activities of which women are capable.[5] A concept of women that excludes crime or other bad acts is simply incomplete. To establish a feminist ideology that represents and works toward real equality, the current purification of women's action within the social narrative must be critiqued.

This Article explores women's criminality by examining the prevailing social narratives that function to reduce female culpability and agency. It does so by using women's prisons as a locus of analysis for criminal behavior, which necessarily lacks significant male influence, other than the specific influence of male guards. Part I of this Article discusses the history of women as criminals, and the way the aforementioned societal narratives were employed to reduce women's responsibility for their crimes. Part II of this Article discusses traditional gang

[1] Note the term women is inclusive all individuals that identify as women, however, some of the social narratives discussed in this paper may not equally apply to trans* women who are often disadvantaged by transphobia and so do not always receive the same treatment regarding criminal activity that this Article grapples with.

[2] *See* Dan Bilefsky, *Murder Trial Hinges on Questions of Domestic Abuse*, The New York Times (Sept. 18, 2011) http://www.nytimes.com/2011/09/19/nyregion/barbara-sheehan-accused-of-murdering-husband-cites-abuse.html?pagewanted=all.

[3] *See* Brenda V. Smith, *Boys, Rape, and Masculinity: Reclaiming Boys' Narratives of Sexual Violence in Custody*, 29 N.C.L. Rev. 1559 (2015).

[4] Lawrence Greenfeld & Tracy Snell, *Bureau Of Justice Statistics Special Report: Women Offenders* (2000) http://www.bjs.gov/content/pub/pdf/wo.pdf ("Based on the self-reports of victims of violence, women account for about 14% of violent offenders & an annual average of about 2.1 million violent female offenders.").

[5] *See, e.g.*, Jean Bethke Elshtain, *Feminist Discourse and Its Discontents: Language, Power, and Meaning*, 7 Feminist Theory 3 (1982).

organization, including an overview of gang activity as it relates to both men and women. Part III of this Article employs feminist and legal theory to analyze women's criminality within the correctional environment. Part IV of this Article discusses the impact that disregarding female crime has had on the arrests and prosecution of women, and the way in which regarding the propensity to commit crime as genderless can, and should, change these phenomena.

I. Women, Crime, and Culpability

Women have a long history of being held less than fully culpable for criminal acts they commit. This discussion of diminished responsibility occurs in one of three ways. First, woman criminals are abnormal; similar to the treatment of many women in early female correctional facilities, which treated all women that committed crime as ill and tainted.[6] Second, woman criminals are coerced or under the control of their male criminal partners. Third, woman criminals are desperate, as with women who strike back to kill their longtime abusers. The discussion of "desperate" women treats them as singular criminals, who would not act if not for the extreme circumstances that they have endured.

These three social narratives are damaging in that they lessen women's criminal culpability. This limitation applies not only to women who are actively criminal, but is part of a broader societal discussion that lessens how women can be seen as powerful, or actors in their own right. The failure to recognize women as criminals illustrates how women are marginalized in society through agency exclusion, even within the context of their own actions.[7] If modern feminism is to succeed by recasting women as actors in business, politics, etc., it must necessarily also embrace women as actors in the more sinister areas of their behavior as well.[8] Recognizing female responsibility for criminal acts—breaking away from the perpetrator-victim and male-female false dichotomy that exists within the current social narrative in this way is a feminist act that empowers women though it draws attention to their misdeeds. The first step in breaking down this false and institutionalized dichotomy is by analyzing the effectiveness of the three aforementioned narratives; the primary three ways in which female acts are retooled as submissive and non-threatening.

A. Female Criminals as "Abnormal"

The first way in which female perpetrators are repurposed narratively is through categorization as abnormal. In early criminal cases this seems to mean non-gender-normative, as committing a crime was unfeminine and indicative of a "taint" that needed to be isolated.[9] This concept of female criminals removes them not just from actors within their own crimes,

[6] Cristina Rathbone, A World Apart: Women, Prison, and Life Behind Bars (2006).

[7] *Cf.* Tammy Anderson et al., Neither Villain Nor Victim: Empowerment and Agency Among Women Substance Abusers (2008).

[8] *See* Brenda V. Smith, *Uncomfortable Places, Close Spaces: Female Correctional Workers' Sexual Interactions With Men and Boys in Custody*, 59 U.C.L.A. L. Rev. 1690 (2012).

[9] Rebecca Onion, *The Pen: Inmates at America's Oldest Women's Prison Are Writing A History Of It—And Exploding The Myth Of Its Benevolent Founders*, The Slate (Mar. 22, 2015) http://www.slate.com/articles/news_and_politics/history/2015/03/indiana_women_s_prison_a_revisionist_history.html ([T]heir approach was invasive and personally constrictive—the institution focused on reintegrating prisoners into Victorian gender roles, training them (as the prison's 1876 annual report put it) to "occupy the position assigned to them by God, viz., wives, mothers, and educators of children.").

but also from gender all together. Women that fall under the label of "abnormal" for their societal treatment are essentially ostracized. Their behavior runs against how women are understood, so that they either are treated as adopting a perverted masculinity, or as unknowably "other."[10]

This scope of abnormality is not inclusive of women found to be actually insane, or otherwise psychologically abnormal. This is an important distinction to make, because though psychological conditions can be implicated in or complicated by gender this is not contemplated within this Article's category of abnormal. The abnormality herein is imposed completely by society, exterior to the individual subject to that categorization or narrative marginalization.[11]

A good example of this narrative category is Amelia Dryer. Amelia Dryer lived during the mid-nineteenth century and operated what can only be described as a baby farm.[12] She took babies from families, which could not financially afford to raise those children, and promised to care for or "rehome" them for a small fee.[13] Instead of doing either of these things, Dryer took the fees which families paid her to care for their children but then allowed the children to die.[14] Sometimes the children died from negligence, other times from outright murder.[15] Dryer's behavior flew directly in the face of narrow and gendered concepts of nurturing and maternal femininity. Instead, she was in fact a depraved criminal that placed profit above care, and in doing so the media and historical coverage that details her cleaves away at her gender, and categorizes her as abnormal.[16] This behavioral recasting occurred because her acts were inconceivable in light of expectations of gender norms. Were Dryer a man, her acts would maintain their depravity but the narrative surrounding them would likely be condemned in a different fashion.

The best way to remedy this disempowering narrative is to broaden concepts of gender. One reason this label of abnormality is powerful and damaging is because it treats societal conceptions of femininity and masculinity as both static and natural. If we broaden our concept of gender to include a variety of expressions on a spectrum of behavior that would have more to do with an individual than an ideal, we broaden the roles that people can take on. Adopting this modern and frankly necessary concept of gendered behavior would

[10] *Id.*

[11] *Id.* Note that for the purposes of this Article the narrative of "abnormality" is not conflated with actual mental illness. Here, the narrative of abnormal is imposed by society to explain behavior as non-gender normative.

[12] Mara Bovsun, *'Angel Maker' Amelia Dyer Snuffed Out The Lives of An Estimates 400 Babies in Britain*, New York Daily News (June 1, 2013) http://www.nydailynews.com/news/justice-story/amelia-dyer-killed-400-babies-late-1800s-article-1.1360132 (stating that "[A] woman who had made a 30-year career of murdering babies. Her real name was Amelia Dyer and she was what was euphemistically known as an "angel maker." For a modest fee, Dyer took in babies whose mothers could not or would not care for them. Some of these women assumed that she would find new homes for the children or raise them herself. More often, though, the mothers disappeared, without a question or care about the fate of their inconvenient offspring.").

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* (stating that"She confessed but her lawyers tried to save her life with an insanity defense, citing her opium addiction and her history of time in mental hospitals.

The jury took less than five minutes to declare her sane, guilty, and worthy of the ultimate penalty. The angel maker spent her last days writing a voluminous account of her crimes, and offered no last words as the hangman put the noose around her neck on June 10, 1896.").

wholly deconstruct the abnormality label to female criminality.

B. Female Criminals as "Coerced"

An additional concept, which surrounds the acts of female criminals and lessens the responsibility of the female actor, is the theory of coercion. This concept of female criminality places the blame for acts of female wrongdoing with the male partner in the crime, or if there is no such partner, as the direct result of a man's otherwise coercive influence.[17] This narrative of female criminal actors diminishes their responsibility by shifting the ability to commit wrong solely to men, and finding that corruption or coercion of a woman by a man must have occurred for this behavior to take place.[18]

There can be, however, coercive aspects in partnered crime, and women are sometimes subject to the men they are in a relationship with.[19] Women can be subject to the criminality of the men in their lives, as when women are implicated in a drug charges because they occurred in a residence shared with a partner. This concept of the coerced woman may include these women but often is used broadly on all women, regardless of the actual relationship between the partners. Further, the concept of the coerced woman, as it occurs within this social narrative, is highly heteronormative.[20] Actual coercion that may occur in these relationships need not be romantic or heterosexual.[21] This concept can be implicitly considered fabricated coercion or coercion by narrative and should be contemplated separately from the relationship it tries to represent.

The horrors surrounding the scandal in the U.S. Army's former Iraqi prison, Abu Ghraib, illustrate a good example of female criminals cast into the coerced narrative position.[22] In April 2004, the abuses at this prison location became public through a *60 Minutes II* reporting segment that sparked international controversy.[23] One reason why so many people became so rapidly and viscerally outraged was photographic evidence of the abuse and torture that occurred at the site.[24] Particularly startling to some were the photos of "a young female soldier holding a naked Iraqi man on the end of a leash . . . giving a thumbs up and pointing at naked Iraqi men as they [were forced to] masturbat[e]."[25] That young female soldier was the now infamous Lynndie England, then a Unit-

[17] Note that in situations where there is no male partner the language of narratives that fall into this category is still used but the "controlling" party is notably coded as masculine through language and other writing choices and so can still be analyzed using the same framework.

[18] *Cf.* Lesley Wischmann, *The Killing Spree That Transfixed A Nation: Charles Starkweather and Caril Fugate, 1958* Wyoming State Historical Society http://www.wyohistory.org/essays/killing-spree-charles-starkweather-and-caril-fugate (detailing the relationship between Caril Fugate, a fourteen year old girl, and Charles Starkweather, a prolific serial killer—though Caril only participated after Starkweather threatened her life and those of her family, and brutally killed a neighbor in front of her as proof that this was a legitimate threat, she was convicted and served 18 years in prison. In fact before kidnapping Fugate and forcing her to accompany him, Starkweather had already killed her entire immediate family).

[19]

[20] Erik Ortiz, *Gay Connecticut Couple Accused of Raping Adopted Children Will Face Trial*, New York Daily News (April 7, 2013) *available at* http://www.nydailynews.com/news/crime/gay-conn-couple-accused-rape-face-trial-article-1.1310010 (stating that "George Harasz, 49, and Douglas Wirth, 45, of Glastonbury, withdrew a deal with prosecutors that would have given them suspended prison sentences and probation, according to reports. The surprise move comes as new allegations by three more adopted children surfaced Friday.").

[21] *Id.*

[22] Christopher Graveline & Michael Clemens, The Secrets of Abu Ghraib Revealed (2010).

[23] *Id.* at 8.

[24] *Id.*

[25] *Id.*

ed States Army specialist who appears in many of the most graphic torture and abuse photos made public following the Abu Ghraib scandal.[26] A later investigation found that Charles Graner, then a Corporal in the Army and England's boyfriend, was the ringleader and orchestrator of some of the worst acts.[27]

Notably, England was not assigned to the prison location but rather intentionally and repeatedly came to join in, going out of her way and far beyond her duty to be present at the prison and participate in the abuse.[28] Much of the evidence points to England as a ringleader, much like Graner, and at least an equal instigator with other abuse participants.[29] England, however, stated during prosecution she was subordinate to Graner, only participated because of his influence, and posed in the pictures because she feared she would otherwise "lose him" as a romantic partner.[30] England's case was complicated because she was pregnant at the time with Charles Graner's child.[31] Regardless of whether this was England's actual reasons for participating in the Abu Ghraib abuse, or a way to leverage the implicitly understood "acceptable" way to participate in crime, it worked to her advantage. Ultimately, England received three years in prison compared to the higher average sentence for the other individuals prosecuted in the Abu Ghraib scandal, [32] and the ten years to which Graner was ultimately sentenced.[33]

The concept of the coerced woman as an unwitting or unwilling criminal strikes against concepts of female power and self-determination. Further, how this narrative is conveyed and functions also implicitly expresses that women cannot be equals in any relationship with men and must become subject to them during male-female partnership. This conflation of relationship with coercion casts all male-female partnerships as always already containing the victim-perpetrator dynamic.[34] This concept of gender relationships is damaging to both men and women.[35] To dismantle the societal narrative of the coerced female criminal, we must create a more egalitarian concept of gender relationships, in any partnered relationship, and do so in a way not bound by heteronormative or gender normative pre-conceptions of relationship dynamics.

C. Female Criminals as "Desperate"

Finally, when neither of the other societal narratives can be employed, female criminals are treated as fueled by desperation in their crimes. This narrative of female crime involves women who kill their abusers, women who strike out in jealous rages, and women who commit any other reactionary and often violent crime.[36] To discredit these women

[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 25.(RULE OF 5)
[30] *Rumsfeld Knew*, Stern (Mar. 17, 2008) http://www.stern.de/politik/ausland/lynndie-england-rumsfeld-knew-614356.html?nv=ct_cb (stating that "At the time I thought, I love this man [Graner], I trust this man with my life, okay . . . Graner and Frederick tried to convince me to get into the picture with this guy. I didn't want to, but they were really persistent about it. At the time I didn't think that it was something that needed to be documented but I followed Graner. I did everything he wanted me to do. I didn't want to lose him.").
[31] *See* Graveline, *supra* note 22, at 24 (detailing further the relationship between Graner and England. The two were engaged but Graner left England and later married another woman involved in the Abu Ghraib prison abuse scandal. At the time of the judicial oversight of the incident—England was pregnant with Graner's child).
[32] *Id.*
[33] *Id.*
[34] *See generally* Brenda V. Smith, *supra* note 3.
[35] *Id.*
[36] *See supra* note 2 (parenthetical needs to be explanatory The first lines of this case article read: "She stood

as desperate, they are coded as radical, erratic, and most of all emotional. This concept serves to both diminish the abuse against which a woman is fighting, while also undermining that individual's decision-making process.

A case in which a female reactionary-criminal, responsive to outside forces and acting against them, was cast as the desperate female criminal is the case of Barbara Sheehan.[37] Sheehan killed her abusive husband when he was, allegedly, directly threatening her life.[38] Sheehan immediately spoke out about the abuse, and her two adult children corroborated that she had been the victim of ongoing and serious abuse throughout her relationship with their father.[39] Sheehan stated that she felt she was in a kill or be killed situation, which her defense attorney claimed was only compounded by the relationship-long trauma she experienced.[40] Despite Sheehan's legitimate claims of abuse as a mitigating factor regarding her self-defense, articles, media analysis, and even prosecutors on her case focused entirely on her emotion.[41] Although emotion is a factor for the victim/survivor in a situation of obvious trauma and abuse, the facts of the situation should be of tantamount importance to everyone else.[42] Instead, in most news articles about Sheehan, her emotional state is described in more detail than the killing or the abuse that prompted it.[43] How Sheehan's case is discussed indicates the narrative around women who commit abuse responsive crimes. Though tragic in result, Sheehan was taking action, action to save her own life. Sheehan is very clear in public statements she was acting to save her own life, and that the indictment and prosecution functioned as an institutional re-victimization.[44] This places her as a criminal actor who has moved beyond mere reaction and who now has real agency relating to her case, helping to elevate it to the national stage as a domestic violence issue.[45] Sheehan's courtroom emotions represent the reactions any human on trial might have and are not dissimilar to those which male perpetrators display.[46] She is coded, however, as emotional to subordinate her within the narrative surrounding her own case, and fit her into the acceptable concept of who women are and how they commit crimes.

The essential function of this concept of female criminality is to undermine the decision making process of the female criminal and re-characterize women as irrational and emotional, in line with negative gender stereotypes otherwise applied to women. This narrative treatment diminishes the role that the opposing force plays in such an act. Reactionary criminals, narratively cast as desperate, are pushing back against what is affecting them, affecting

outside the courthouse, emotionally spent but resolute, on trial for killing her husband — an act that she does not dispute. But there were extenuating circumstances, she said, and sometimes killing someone is not the same as committing murder." Note that Sheehan here is only described in relationship to her emotional state, and is referenced by female pronoun rather than name. These writing choices are indicia of her narrative diminution as desperate.").

37 *Id.*

38 *Id.*

39 *Id.* (detailing incidents of abuse, for example an incident in which her husband threw a pot of boiling water on her).

40 *Id.*

41 *Id.*

42 *Id.* ("Ms. Sheehan, a churchgoing mother of two who wears sober gray suits, has cut a striking figure during the trial. Sometimes she can be seen stoically scribbling notes during witness testimony; other times she sobs openly and clasps her hands as if in prayer. On Wednesday, she bolted from the courtroom on the verge of fainting after the prosecution showed the jury graphic autopsy photos of Mr. Sheehan's wounds."). (RULE OF 5!!!!!)

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

them so strongly that they act out in means beyond a legal measure. As highlighted above, this force can be abusive, and refocusing the narrative around the responsive force can draw attention away from and diminish abusive acts. This concept of female criminality both undermines the logical processes of the woman as the actor, but also refocuses attention away from other societal negatives, which may act as mitigating factors in the criminal action itself.

In order to rectify these stark and troubling characterizations that strip women of their agency, we must create an alternate discourse surrounding such crimes. Instead of analyzing merely the actions taken by the women coded as desperate, attorneys, academics, and the media need to also look at the force that creates that desperation. Was Sheehan a desperate criminal or a woman acting out to protect her own life? Certainly looking to the content of her actions, and the abuse that catalyzed those actions, would be more fruitful than an analysis of her emotional state. In order to dismantle this social narrative diverting women's culpability, we must retrain ourselves to focus on the actor, their context, and action, rather than the frenzy which we may impute to those actions.

II. Background

A. Traditional Gang Organization and Criminal Activity

A traditional gang is an organization of three or more individuals who come together with a common criminal purpose and commit crimes in furtherance of that enterprise.[47] Notable gangs that fall under this category include street gangs such as Mara Salvatrucha 13 (MS-13),[48] more traditionally structured organized crime such as La Costra Nostra,[49] and prison gangs such as the Aryan Brotherhood.[50] There are some considerable crossovers because as the Department of Justice (DOJ) notes, "prison gangs are also self-perpetuating criminal entities that can continue their operations outside the confines of the penal system."[51] These organizations bring individuals together to further goals often violent and always criminal.

[47] *See* The Department of Justice, *About Violent Gangs*, http://www.justice.gov/criminal/ocgs/gangs/ (stating that "(1) an association of three or more individuals; (2) whose members collectively identify themselves by adopting a group identity which they use to create an atmosphere of fear or intimidation frequently by employing one or more of the following: a common name, slogan, identifying sign, symbol, tattoo or other physical marking, style or color of clothing, hairstyle, hand sign or graffiti; (3) the association's purpose, in part, is to engage in criminal activity and the association uses violence or intimidation to further its criminal objectives; (4) its members engage in criminal activity . . . ; (5) with the intent to enhance or preserve the association's power, reputation, or economic resources.").

[48] Gang Library, *Mara Salvatrucha,* http://gangs.umd.edu/gangs/MS13.aspx (stating that "Mara Salvatrucha 13 (MS-13) was formed in Los Angeles, California in the 1980s by immigrant Salvadorian youth and young adults who were being victimized by other gangs. MS-13 quickly became known as one of the most violent gangs in the area because many of their founding members had experience or training in guerilla warfare, thus gaining a level of sophistication that superseded their rivals.").

[49] *Id.*

[50] The Department of Justice, *Prison Gangs*, https://www.justice.gov/criminal-ocgs/gallery/prison-gangs (stating that "The Arayan Brotherhood, also known as the AB, was originally ruled by consensus but is now a highly structured entity with two factions, one located within the California Department of Corrections (CDC) and the other within the Federal Bureau of Prisons (BOP). The majority of the members of the AB are Caucasian males, and the gang is primarily active in the Southwestern and Pacific regions of the U.S. The main source of income for the AB is derived from the distribution of cocaine, heroin, marijuana and methamphetamine within the prison systems as well as on the street.").

[51] *Id.*

Gangs range from loosely to highly structured and are usually comprised of younger members. A gang is best described as a:

> self-formed association of peers, bound by mutual interests, with identifiable leadership, well-developed lines of authority, and other organizational features, who act in concert to achieve a purpose or purposes which include the conduct of illegal activity and control over a particular territory, facility, or type of enterprise.[52]

With prison gangs, the particular area over which the group seeks control is the prison facilities, and the prison membership is limited to the population of the prison itself. Just as in street gangs, however, peer association in a prison gang typically means shared aspects of identity as members of the same racial or ethnic group, as in the Aryan Brotherhood an exclusively white gang.[53]

Many gangs, specifically street gangs, are comprised mainly of men—and in fact these gangs are analyzed as a site of hyper-masculinity.[54] Indeed, the gang is considered to be a monster of men's creation.[55] This may not be the case.[56] Female participation in street gangs began as a collateral enterprise to all male gangs, but progressed to broader membership.[57] Unfortunately, however, female gangs "maintain many of the sexist roles they filled historically" and women in gangs "maintain a level of subordination that outweighs any progress."[58]

As such, a criminal street gang is a group of individuals with common signs and identifiers that join together to further a criminal purpose. These groups occur both inside and outside of prison. As aforementioned, gangs are traditionally considered the beast of men, but female participation in such organizations has been on the rise for a number of years. Even in street gangs in which women have a high amount of participation—women's position in the gang reflect their position in society, subordinate to men and subject to sexism. The conditions and analysis, however, are different in the context of women's prisons and prison gangs.

B. Women's Criminality in the Correctional Environment

Women's prisons are historically different from men's prisons, and originally served to separate and later to reform female criminals.[59] As women's prisons developed, they became more similar in administration and policy to men's prisons—maintaining some unique differences in culture and programming.[60] Among these similarities was the advent of prison gangs in all female institutions.

The appearance and membership of women in criminal gangs is not novel or unique to the prison context.

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[52] Malcom Klein & Cheryl Maxson, *Gang Structures, Crime Patterns, and Police Responses*, Department of Justice (2001), https://www.ncjrs.gov/pdffiles1/nij/grants/188511.pdf.

[53] *Id.*

[54] Tine Davids, *Youth Gangs: Hyper-Masculinity and Transnationalized Violence to Combat Homelessness?* Paper presented at the annual meeting of the International Studies Association Annual Conference "Global Governance: Political Authority in Transition" (2011).

[55] *Id.*

[56] *See supra* Part IV.

[57] Allison Eckelkamp, *Girl Gangs: The Myth of Rising Inequality*, http://wrt-intertext.syr.edu/XII/girlgangs.htm.

[58] *Id.*

[59] Onion *supra* note 9.

[60] *Id.*

> Female participation in gangs is not a new phenomenon. In fact, "girls have been a part of gangs since the earliest accounts from New York in the early 1800s." However, throughout the latter half of the twentieth century, female gang activity has seen the sharpest increase in participation, especially in comparison to boys. For example, a study found that there had been a, "50 percent increase in serious crimes by teenage girls between 1968 and 1974, compared to a 10 percent increase for boys." In addition, arrests of girls under 18 for violent crimes rose 393 percent between 1960 and 1978, compared to 82 percent for boys." Also, compared to 1950, "youth gangs of the 1980's and 1990's are more numerous, more prevalent, and more violent than in the 1950's, probably more than at any time in the country's history."[61]

This female gang membership is not exclusive to street gangs. In fact, some exist in a variety of environments of confinement, including "juvenile institutions, prisons, or drug treatment centers" and more recently immigration detention facilities.[62] Female gang membership, as among males, tends to be a youth endeavor and require a "formal initiation ceremony . . . which usually takes the form of a prearranged fistfight between the prospect and an established member. The function of this 'jumping in' is to prove publicly the new girl's ability to fight . . . she must demonstrate her 'heart' or courage."[63] There are differences, however, because as mentioned earlier a female gang usually comes into being as an extension of an already existing male gang but are more democratically led.

Ultimately, the center of gang life is criminality, and that criminality—especially in prison—demands violence. Women participants in gangs are equally involved with violence and in fact "violence . . . plays a role in the lives of female gang members once they join a gang," because "female involvement in violent activity is on the rise" in fact girls are often involved in fist or even knife fights.[64]

Female gang participation is gendered. As male gang membership is a function of macho role placement on men and hyper-masculinity, female participation in gangs is also influenced by outside gender narratives.[65] "Many girls who do not have a loving home or support structure seek it outside of the home in hopes that the gang will be their surrogate family" and "this is exemplified in the observation that, "gang members refer to one another as 'sisters' or 'homegirls' and to the gangs as a 'family' which conjure the sense of belonging and identification" and this "sense of a familial relationship may also serve to increase loyalty among its members. As . . . intense in-group loyalty is particularly important to gang members."[66]

Additionally, specifically in the prison context the focus on male criminals—both in study but also in housing and rehabilitation ef-

[61] Valaree Carrasco, *Female Gang Participation: Causes and Solutions*, Poverty and Prejudice: Gang Intervention and Rehabilitation (June 2, 1999), https://web.stanford.edu/class/e297c/poverty_prejudice/ganginterv/hfemalegang.htm.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*

forts, leads girls in the criminal justice system to feel abandoned completely.[67] Women usually get attention only when they are "very bad or profoundly evil."[68] In fact, the response of criminologists has been astounding, and girl gangs are analyzed as feminist—as though these girls are breaking the glass ceiling of the criminal world.[69]

> Gone are the days when girls were strictly sidekicks for male gang members, around merely to provide sex and money and run guns and drugs. Now girls also do shooting[s] . . . the new members, often as young as twelve, are the most violent . . . *Ironic, as it is, just as women are becoming more powerful in business and government, they same thing is happening in gangs*.[70]

This analysis leads to questioning of the aforementioned social narratives.[71] Are girl gang members just rebelling against the patriarchy and gender stereotyping that prevented them from achieving the level of violence they desired? Are girls in gangs simply seeking family and support when this is a system, which they sorely lack? Do incarcerated women specifically seek to form gangs as a reaction to the male focused criminal justice system? The answers to these questions are, to an extent, both yes and no.

Women form gangs because women and men are not dissimilar from one another in their desire to commit crimes or enact violence. The reasons that women chose violence and gangs to become part of their social life may vary—and could indeed result from unmoored families,[72] (footnote in the middle of a sentence?)lack of institutional oversight,[73] or long time repression based on gender.[74] The traditional analysis, however, suffers from the same shortcomings as the social narratives, i.e., they do not give women enough credit or agency recognition. Instead of focusing on the gender of the person who is part of a gang, or who has committed a violent act the narrative and analysis should look at the crime committed.

The social narratives that seek to mitigate the culpability of women in their own crimes—that women are abnormal, coerced or desperate—all function to look at the gender of a perpetrator. These narratives hone in on gender and essentially attempt to correct the "wrongness" of a woman committing a violent crime, by explaining the act in a different light or context. The explanation of female gangs as fundamentally different than male gangs, functions in the same way. The difference between a

[67] Meda Chesney-Lind et al., *Girls, Gangs, and Violence: Reinventing the Liberated Female Crook, in* Female Gangs in America 295 (Meda Chesney-Lind & John M. Hagedorn eds.,1999).
[68] *Id.* at 296.
[69] *Id.* at 297.
[70] *Id.* at 299. (emphasis added).
[71] *See supra* Part I.
[72] *See* Tara Young, et al., *The Role of the Family in Facilitating Gang Membership, Criminality and Exit*, 67 (Jan. 8, 2013), http://www.catch-22.org.uk/wp-content/uploads/2013/06/Catch22-Dawes-Unit-The-role-of-the-family-June-2013.pdf.
[73] Steven Cohen, *Cali's Gang Crisis Represents 'Total Failure of Social Institutions': Cali Ombudsman*, Colum. Reports (Nov. 2, 2013), http://colombiareports.com/calis-gang-crisis-represents-total-failure-social-institutions-cali-ombudsman/ (stating that "The numbers obviously matter," said Santamaria — who added that his office does its best to record and present social statistics, and has encouraged the city to do more on that front — "but Cali does not have a gang problem. It does not have a drug problem. It does not have a poverty problem. All these things exist, but the true problem is so much deeper than that. What you have here is a total failure of social institutions to protect the citizens of Cali and provide them with opportunities to learn, grow and prosper.").
[74] David Musick, An Introduction to the Sociology of Juvenile Delinquency 188 (1995).

male and female gang is no larger than the difference between two male street gangs with different ethnic or cultural backgrounds. Yet, the focus remains on gender. This comes from the same places as the social narrative, and feeds into a kind of meta-narrative: the girl gang.

The social narratives that make the acts of women dependent on men are disproven by the mere existence of female gangs in all female institutions. Deprived almost completely of male influence how would such violent organization flourish? That is simple, here—as in many other contexts—the male influence is irrelevant. Women form gangs for a variety of interesting and complex reasons, which merit further study, but these reasons are largely not dependent on men. In fact, the female prison gang proves that such violence and criminality can occur without male influence.

Ultimately, the social narratives—as well as the more ambiguous meta-narrative shrouding girls in gangs—are functions of gender stereotypes. In order to better understand and reform female criminals, they should be recognized simply as criminals and judged by their actions, as unexpectedly terrible or deprave as they may be. Violence is not a gendered phenomenon and so the way we understand violence also should not be.

III. Violence as Feminine, A Case Study in Social Narratives

As gangs are particularized groups with certain ascertainable goals necessarily centered on violence, what does it mean that female gang participation both inside and outside of prison has risen markedly in the last few decades? What does it mean that this violence continues to occur, and even escalates, within the prison context—a context that is by nature immune to the aforementioned societal narratives? Perhaps violence is wedded not to maleness, but to criminality; and the differences we note between men and women are located with the observer rather than the perpetrator.

The Bureau of Justice Statistics (BJS) data betrays this reality. Though women are less likely to commit a violent crime,[75] the rate at which women do commit crime overall is on a marked rise as women represent more and more of the criminal cases in this country.[76] This overall increase in women's criminal activity and convictions naturally indicate that over time an increasing number of women are becoming involved in violent crime.[77] Furthermore, the nature of women's violent crime is unique because women are more likely to attack strangers and commit more serious acts of violence—i.e., the difference between aggravated assault and homicide. [78]

Considering this data, it seems evident that women are violent in their criminal acts, and are violent at an increasing rate.[79] This issue, however, is not addressed due to the afore-

[75] Lawrence Greenfeld & Tracy Snell, The Bureau of Justice Statistics, NCJ 175688, Women Offenders (2004).
[76] *See, e.g.*, The National Criminal Justice Reference Service, *In the Spotlight: Women and Girls in the Justice System*, https://www.ncjrs.gov/spotlight/wgcjs/summary.html ("Female criminal behavior has been commonly perceived as a less serious problem than male criminal behavior. Historically, women have been more likely to commit minor offenses and have made up only a small proportion of the offender population. Although women remain a relatively small number of all prisoners, these facts have concealed a trend in the rising percentage of female offenders, their participation in violent crime.").
[77] *See* Greenfeld & Snell, *supra* note 75 at 3.
[78] *Id.* at 4 (stating that "[t]he estimated rate for murder offending by women in 1998 was 1.3 per 100,000 & about 1 murderer for every 77,000 women" which is lower than the male rate but still noticeable high relative to their representation both in the criminal context generally and in the area of violent crime specifically).
[79] *See, e.g.*, *id.*

mentioned social narratives.[80] Take for example a *New York Times* article that remarks that women in prison are less dangerous, pointing the specific cases of Angela and Sandra.[81] Both Angela and Sandra are incarcerated for violent crimes, but they are described as "especially striking in this dreary prison—their unscarred skin, animated eyes" marking them as special and untainted.[82]

The author speaks about these women in a particularle way, purifying their experience so they may be re-feminized for the purpose of the articles narrative. For example, the author notes that Sandra is incarcerated for second-degree murder, a serious and violent crime, but that "she was manipulated by her estranged father" to participate, i.e. coerced.[83] Angela is given the same treatment, because though she tried to rob a 15-year-old girl and later tried to intimidate a witness from testifying against her, she was acting "stupid and impulsive" due to her emotional state regarding her personal and romantic life.[84] This violence-dismissive treatment is especially striking in light of the revelation that Angela spent years of her incarceration fighting, was often punitively placed in solitary confinement.[85] Despite this evidence, which should be an indication of women's violence complicated fixed notions of gendered behavior, the author persists with sexually-hyper-typical commentary such as: "[r]arely do men become intimate with their keepers. Many women share their lives with officers shift after shift after shift. Men either honor orders or defy them. Women ask why."[86]

This article, and all the other which are so like it, indicate the schism between research and reality and social narratives, and why re-analysis is so necessary.

IV. Suggested Remedies

In light of this discussion of female criminality, several measures might help to work against these damaging narratives. First, to combat the effect of these narratives there needs to be further discussion of women as criminals and bad actors. This conversation about women is necessary to critique feminism, a discourse which itself already has many blind spots.[87] This critique will help both men and women and move toward a concept of the individual, regardless of gender, as complete

[80] *See supra* Part I.

[81] Adrian Nicole LeBlanc, *A Woman Behind Bars Is Not a Dangerous Man*, The N.Y. Times Magazine (June 2, 1996), http://www.nytimes.com/1996/06/02/magazine/a-woman-behind-bars-is-not-a-dangerous-man.html?pagewanted=all.

[82] *Id.*

[83] *See id.* ("In 1992, after pleading guilty to second-degree murder, Sandra was sentenced to 15 years to life. She was 20 years old. She says she manipulated her estranged father, Danny Reloba, into killing the man she says raped her when she was 18. "If I wouldn't have held a vengeance, I wouldn't be in prison," Sandra often says. "Because I could have let that go and lived on in my life." Her father, convicted of the murder, is serving 29 years to life. They no longer correspond, and Sandra says her family has disowned her. She has not received a visit in at least a year.").

[84] *See id.* ("Angela is serving five years for second-degree robbery and threatening a witness. She demanded money from a woman at a bus stop in San Diego the night of her 19th birthday, a "stupid and impulsive" response to the realization that her Navy boyfriend, the father of the baby she was carrying, stood her up. A 15-year-old girlfriend who was with Angela -- the witness she later threatened--turned her in.").

[85] *Id.* (detailing Angela's rocky years, including her lengthy disciplinary history including a history, which "to date, Angela's write-ups run more than 70 pages -- for assaultive behavior, starting a fire, destroying state property (her prison-issued clothes), resisting staff members and at least one suicide attempt. She has thrown objects at the guard tower while exercising in the restricted exercise cage. She has been shot at by the guards twice, with rubber rounds out of a .37-caliber rifle, for refusing to stop fighting.").

[86] *Id.*

[87] *See supra* Part I.

emotional beings with unique reasoning and cause for action. Hopefully, this discourse can reach beyond merely criminal law, as the problem here is deeply tied to broad social conceptions of gender and power.

Just talking about the problem will not accomplish all of the work, however, as the issue itself will require further study. This calls for dissecting the issue, delving into how women commit crime, why, and the way it is discussed in the media and other settings. This further study and research is necessary in order understand further, and to fight the prevalent social narratives with factual rejoinders.

Utilizing the fruits of this analysis and research, the social narratives that diminish female culpability and therefore the agency of female criminals can be dismantled. Should the early stages of prosecution exclude gender pronouns or any reference to gender? Should prosecutors be encouraged to frame issues not in a gendered context but in another way, which makes sense within the larger factual background? Is there a way to prevent women from leveraging the implicit but well-known social narratives surrounding gender to benefit themselves, especially during sentencing? These are all determinations that will help in working to end these social narratives.

Discuss, dissect, and dismantle. These are the steps to take to work against and ultimately end the social narratives discussed in this Article.

Conclusion

The essential function of these concepts of female criminality is to diminish the responsibility, which can be attributed to women for their crimes, and therefore the seriousness with which female criminals, and women, can be treated. For feminism to succeed as a movement in pursuit of genuine equality, it must both elevate women in their successes and hold them accountable in their disgraces. One way in which this can be accomplished is by dismantling the complex social narratives that surround women in the criminal context, narratives that undermine female criminal culpability and undermine women themselves. By viewing all criminal actors, regardless of gender through the same lens both justice and equality will be more readily within our grasp.

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