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The 2014 SMU Criminal Justice Colloquium: An Introduction

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THE 2014 SMU CRIMINAL JUSTICE COLLOQUIUM: AN INTRODUCTION

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THE 2014 SMU Criminal Justice Colloquium brought together scholars from across the country to discuss cutting-edge issues in criminal law and procedure. Headlined scholars Stephen Garvey, Albert Alschuler, Darryl Brown, Nancy King, Nancy Marder, and Ronald Wright have graciously contributed their articles to this Colloquium Issue. Their pieces explore the state's authority to criminalize and punish, and how safeguards are necessary to ensure that actors within the criminal justice system are using their delegated powers responsibly.

A state's authority to criminalize and punish has limits. One possible limit is that only those possessing a guilty mind should be subject to the criminal law—a notion challenged by the creation of strict liability crimes and by the punishment of those ignorant of the law. Another possible limit is that criminal statutes must be clear and unambiguous. Lawmakers should draft statutes carefully to ensure that they clearly define criminal conduct and reach only those who are truly culpable. Prosecutors, too, must use their powers responsibly, charging suspects and negotiating pleas with offenders in a manner consistent with truth and fairness. Juries might be able to provide a check on the state's powers to prosecute, convict, and punish, but there are limits to juries' effectiveness in this regard. Juries may give too much or too little weight to particular evidence, or they may be distracted by unreliable evidence. As citizens, lawmakers, attorneys, and scholars work to improve the American criminal justice system, it is important to keep in mind the unique roles that each of these actors play. Neither prosecutors nor juries are infallible, and it is important to incorporate safeguards into the system to ensure that their actions advance our objectives of fairness, truth, and justice.

In *Authority, Ignorance, and the Guilty Mind*, Stephen Garvey takes the reader through a nuanced discussion of mens rea and the maxim that ignorance of the law is no excuse to criminal liability. He begins by describing mens rea as a limitation on the state's authority to censure and punish. This mens rea consists of both an actor's ability to freely choose to engage in an activity contrary to the criminal law and the actor's choice "manifest[ing] a quality of will inconsistent with that of a law-abiding

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citizen."[1]

Garvey argues that knowledge of, or at least regard for, the criminality of one's actions is essential to mens rea—that a state lacks the authority to censure or punish an individual who has no knowledge that the conduct in which he engaged was criminal.[2] Garvey stakes out a minority view in this regard, although he continues to pare away at this position as he fleshes out the boundaries of his claim.

Central to Garvey's view are the limits of the state's authority and the ambit of mens rea. He explains that the state possesses the authority to require its citizens to obey certain moral obligations, but that the state is bound by the requirement that actors must possess sufficient mens rea before being held criminally liable. Cognitive attitudes lie along at least two different axes—the first being the actor's "confidence in the truth" of his determination about the criminality of his actions, and the second being the extent of the actor's awareness of his knowledge of criminality at the time of his actions.[3] Garvey suggests that the mens rea threshold is met when the actor at least suspects the criminality of his actions and this suspicion "could be summoned to mind with little or no effort."[4]

Garvey's understanding of mens rea is in tension, though, with the maxim that ignorance of the law is no excuse. He explains that an actor may sometimes be found criminally liable despite this ignorance, such as when the actor, prior to acting, failed on his obligation to gather relevant evidence regarding the criminality of his later action and discern its criminal nature. This, Garvey explains, preserves the notion that "[a]n actor cannot legitimately be subject to criminal liability unless at some point in the story he has made a choice realizing that in so choosing he has done something that can render him vulnerable to criminal liability."[5] This seems to be akin to the felony murder doctrine and in some respect narrows Garvey's position that ignorance of the law does indeed excuse. Garvey explains, though, that an actor may escape liability if his ignorance results from one facet of his mind distracting or overwhelming his entire will.[6] Garvey compares this to a rogue actor on the stage hijacking the scene from the rest of the cast and distracting the audience in doing so; it is the rogue actor, not the rest of the cast, which is responsible for this diversion.[7] In the same way, one rogue desire may distract a would-be offender from his entire will, and we cannot hold the entire will re-

1. Stephen P. Garvey, *Authority, Ignorance, and the Guilty Mind*, 67 SMU L. REV. 545, 547 (2014).

2. *Id.* at 547–48 (noting that a person acts with a guilty mind when he engages in criminal activity knowing that it was criminal, or at least acting with "insufficient concern or regard for" that fact).

3. *Id.* at 557–58.

4. Garvey refers to this two-part cognitive attitude as "dispositional suspicion." *Id.*

5. *Id.*

6. *See id.* at 569–70. According to Garvey, "The culprit in such cases is not the actor's will. The culprit is a *part* of his will, and a part is not a fair reflection of the whole." *Id.* at 570.

7. *See id.* at 570–71.

sponsible for this.[8] As Garvey recognizes, analyses such as this require drawing "metaphysical boundaries"[9]—a task that has become more difficult as scientific knowledge begins to invade the realm of moral philosophy, and a task that also becomes difficult when trying to put theory into practice.

Finally, Garvey narrows his position on ignorance as an excuse by suggesting that, while these individuals may be found criminally liable, they ought not be *punished* if their acts were committed with ignorance of the law. As Garvey acknowledges, this position deserves greater explanation:[10] Why might censure be deserved in this circumstance but not punishment? And what is the value of censure without punishment? Moreover, Garvey's view of punishment seems to be rooted in retributivism.[11] But are other theories of punishment relevant here, and if so, do they support this position that censure, but not punishment, is appropriate when an individual commits a crime ignorant of the criminality of his conduct? And how does this approach to censure and punishment dovetail with states' uses of strict liability crimes? These are just some of the questions that Garvey's unique understandings of mens rea, ignorance, and punishment raise, and Garvey's article provides helpful fodder for continuing the discussion and addressing important limitations on state authority.

In addition to observing limits on the state's authority to punish, it is important to recognize that there are limitations on how effectively and intelligently lawmakers summon their powers to criminalize and punish. In *Terrible Tools for Prosecutors: Notes on Senator Leahy's Proposal to "Fix"* Skilling v. United States, Albert Alschuler highlights the problems created in the criminal justice system when lawmakers concentrate more on getting reelected than on creating sound criminal statutes.[12] Illustrating these difficulties, Alschuler examines Senator Leahy's proposal to

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8. *See id.*

9. *Id.* at 568. In discussing the related issue of whether we should hold liable an actor who was ignorant that his act constituted a crime but simply "didn't give a damn," Garvey muses:

> We shouldn't expect to reach consensus. The answer after all involves drawing the metaphysical boundaries of the responsible self. Can we bear responsibility for the wrongs we choose to do only if we realize we are choosing to do wrong? Is the responsible self-confined to the will *qua* executive capacity? Or can we also bear responsibility for the quality of our will, at least when the quality of our will is ill and blinds us to the wrong we do? Does the responsible self also include the will *qua* conative capacity?

Id. at 568–69.

10. *See id.* at 573 n.70 ("More needs to be said here about *why* the state's response to the defiant can involve punishment, while its response to the non-defiant must be limited to censure. My sense is that imposing the hardship or burden or whatnot associated with punishment is simply *unfair* . . . .").

11. *See id.* ("Punishment is conventionally, if not uncontroversially, understood as the intentional infliction of some hardship, burden, suffering and so forth on a culpable wrongdoer for the wrong he culpably committed with the intent thereby to censure or condemn him for that culpably-committed wrong.").

12. Albert W. Alschuler, *Terrible Tools for Prosecutors: Notes on Senator Leahy's Proposal to "Fix"* Skilling v. United States, 67 SMU L. REV. 501 (2014).

shore up the honest-services section[13] of the federal mail fraud statute[14] to save it from being unconstitutionally vague as the Supreme Court suggested in *Skilling v. United States*.[15] The *Skilling* Court stated that, "In proscribing fraudulent deprivations of 'the intangible right of honest services,' . . . Congress intended at least to reach schemes to defraud involving bribes and kickbacks. [But] [c]onstruing the honest-services statute to extend beyond that core meaning . . . would encounter a vagueness shoal."[16] Senator Leahy's proposal attempts to buoy the honest-services statute by providing that a "'scheme or artifice to defraud' also includes a scheme or artifice by a public official to engage in undisclosed self-dealing."[17]

According to Alschuler, this proposal, and its near-passage by both the House and Senate, highlights the fact that Washington is full of politicians rather than lawyers, despite the fact that most of Washington's politicians are trained as lawyers.[18] Alschuler's concerns with Senator Leahy's proposed statute are several, and he laments that the Senator's proposal would, like other aspects of federal criminal law, just offer additional tools to prosecutors rather than provide an appropriately narrowly tailored statute to target well-defined wrongdoing.

Alschuler explains that Senator Leahy's proposal is vague and overbroad, potentially criminalizing public officials' everyday activities. As Alschuler puts it, public officials "cannot avoid . . . self-dealing."[19] They are often going to take official action that happens to further the financial interests of a variety of people—many of whom may have provided things of value to the officials. At the same time, though, the proposed statute may be overly narrow. A public official could "reward someone who had previously given something of value to [his] spouse" and not run afoul of the self-dealing prohibition.[20] Moreover, a lobbyist could serve as a middle-man, accepting payment from a contributor and purportedly independently providing a benefit to the public official.[21] This, too, would not constitute "self-dealing" under the proposal.[22] Senator Leahy's proposal also poses problems of determining what type of interests—

13. *See* 18 U.S.C. § 1346 (2012) ("For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services.").

14. *See, e.g.*, 18 U.S.C § 1341 (2012) ("Whoever, having devised or intending to devise any scheme or artifice to defraud . . . shall be fined under this title or imprisoned not more than 20 years, or both.").

15. 561 U.S. 358, 368 (2010) ("Construing the honest-services statute to extend beyond that core meaning, we conclude, would encounter a vagueness shoal.").

16. *Id.*

17. S. 3854, 111th Cong. (2010); Alschuler, *supra* note 12, at 514.

18. *See* Alschuler, *supra* note 12, at 521 ("No member of Congress and no staff member . . . seems to have adverted to the defects of the Leahy proposal described in this article. Although many people on Capitol Hill are law school graduates and members of the bar, there appear to be no lawyers there.").

19. *Id.* at 516.

20. *See id.* at 511.

21. *See id.* at 512.

22. *See id.*

whether financial or other—are being advanced, and discerning an official's purpose in performing an official act—something difficult to establish.

In addition to concerns about the meaning of "self-dealing," the proposal's conception of "non-disclosure" is problematic. Rather than outlining the instances in which an official must disclose self-dealing, the proposal relies on state disclosure requirements.[23] This contributes to a lack of uniformity in how the proposal could be applied. Moreover, by pilfering state disclosure requirements, but ignoring state punishment provisions for violations of these requirements, Senator Leahy's proposal diminishes state power by federalizing a crime that was originally the state's domain.

Perhaps most concerning is the attempt to include the proposal as a type of mail fraud. The mail fraud statute allows the prosecution to regale the jury with tales of the defendant's bad behavior—to throw dirt at the wall and see what sticks, "to convict the defendant simply for being a bad person," to engage in a "smear campaign[ ]."[24] Adding Leahy's proposal to the mix would only exacerbate these concerns. It would give prosecutors free reign to convict defendants based on bad character and questionable acts with less focus on actual mens rea and actus reus requirements, and it would further obscure the reasons for which mail fraud defendants were actually being convicted and punished.

As Alschuler suggests, broadly worded legislation, such as the federal mail fraud statute, greatly expands the power held by American prosecutors. It remains critical, therefore, to ensure that prosecutors use their discretion fairly and effectively. One way in which the American system attempts to guide prosecutorial discretion is through elections of chief prosecutors. Yet as Ronald Wright shows in *Beyond Prosecutor Elections*, these elections fail to hold prosecutors accountable in a meaningful way.[25]

Wright surveys a sample of primary and general elections in fifteen states and finds that the elections are strikingly uncompetitive. Incumbent prosecutors rarely face challengers, and, even when they do, incumbents win most of the time.[26] Wright finds that certain features of the electoral system, such as term limits and non-partisan elections, can help increase turnover in prosecutors' offices to some degree.[27] But on the whole, prosecutorial elections remain non-competitive and fail to provide prosecutors with sufficient "guidance about the priorities and policies they should pursue to achieve public safety at an appropriate fiscal and human cost."[28]

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23. *See* S. 3854, 111th Cong. § 2 (2010).

24. *See* Alschuler, *supra* note 12, at 520.

25. Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593 (2014).

26. *Id.* at 600–04. Wright finds that incumbent chief prosecutors run unopposed 80% of the time in both general elections and primaries. *Id.* at 601.

27. *Id.* at 602–03.

28. *Id.* at 593.

Election campaigns also focus on the wrong issues. Wright reviews news reports of candidate statements and finds that campaign rhetoric tends to concentrate on the chief prosecutor's individual qualifications, the quantity of cases processed, the conviction rate, and perhaps a few high-profile trials.[29] By contrast, routine practices that define the bulk of the prosecutor's work, such as plea bargaining and charging, are not discussed.

It is difficult to know whether these shortcomings of the electoral process are a function of its non-competitiveness, or if there are deeper problems with popular oversight of prosecutors. For example, it is possible that the public does not know or believe that "convictions as charged"—Wright's preferred metric—is a better measure by which to evaluate prosecutors than the standard conviction rate. More generally, the public might not be interested in the way prosecutors run their offices as long as the crime rate is not unusually high. Wright mentions some of these concerns about popular oversight of prosecutors, but he does not appear to share them.[30] Instead, he believes that greater transparency about prosecutorial activities and more sustained deliberation on these issues can produce well-informed public opinions that can helpfully guide prosecutorial work.

To this end, Wright proposes building on the community prosecution model to increase transparency of prosecutorial work and promote public deliberation about it. He describes how community prosecution initiatives have helped advance these goals by soliciting public feedback through polls, questionnaires, and other community events.[31] Wright proposes that prosecutors' offices build on this model and make more data about their priorities and outcomes publicly available. Data interpreters—such as the media, non-profit organizations, advocacy groups, and scholars—could then analyze the information and use the results to rank prosecutors' offices, educate the public about the findings, and highlight areas in need of reform.[32] Even if the public at large might be apathetic or ignorant, special-interest groups are likely to have more intense preferences and a better understanding of prosecutorial practices. Wright suggests that competition among these groups would help ensure that the data analyses and rankings are fair, objective, and useful. Above all, Wright convincingly argues that this process can help ignite a conversation that can enhance public understanding of prosecutorial functions and offer more informed guidance to prosecutors. His contribution not only uncovers the failure of elections to provide a meaningful check on prosecutors, but also offers a constructive and politically feasible proposal for using data, rankings, and public deliberation to recharge the democratic accountability of prosecutors.

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29. *See id.* at 604–05.

30. *Id.* at 605 (noting views that it might be better to insulate prosecutors from voters, who tend to focus on convictions and long sentences).

31. *Id.* at 610.

32. *Id.* at 610–15.

Broad prosecutorial discretion, as both Alschuler and Wright acknowledge, gives rise to concerns that defendants who have not engaged in blameworthy conduct may be unjustly punished. This may happen when legislators draft vague and broadly worded statutes, or when they fail to require proof of mens rea for certain offenses. Darryl Brown observes in *Strict Liability in the Shadow of Juries* that England and the United States rely on such strict liability offenses more broadly than other countries.[33] He argues that this reliance on strict liability can be explained at least in part as a consequence of these two countries' reliance on juries to decide facts in criminal cases.

Brown notes that certain crimes, such as public-welfare or regulatory offenses, are particularly likely to entail circumstantial evidence about the defendant's state of mind.[34] Yet jurors—whom we entrust with factual determinations in criminal cases—are presumed to be especially weak at finding facts by inference.[35] Brown points to legal rules and practices which show that we do not trust the jury with circumstantial evidence. Such rules and practices include the tradition of judicial commentary on the evidence[36] and formal rules about evidentiary inferences, which are conveyed to jurors through legal instructions. Both of these procedural devices encourage jurors to draw particular conclusions about the defendant's state of mind from certain kinds of evidence. Brown argues that they reflect a concern about jurors' capacity to reach these conclusions on their own.[37]

Brown suggests that this concern about the jury has affected not only our evidentiary rules, but also some of our substantive criminal law principles, including strict liability. He argues that the U.S. and English criminal justice systems adopted strict liability more broadly than other legal systems at least in part as a means of addressing the unique difficulty of using circumstantial evidence to prove mens rea to jurors. Brown acknowledges that strict liability is driven by other goals as well: "deterrence, providing special protection to certain interests, the magnitude of harms that follow from certain conduct."[38] But he emphasizes that U.S. courts have frequently pointed to difficulties of proof in justifying strict liability and that this presents an important additional motivation for the adoption of the doctrine.

While American and English legislatures and courts have accepted the broad use of strict liability, they have also recognized the tension between the doctrine and the notion that a culpable mind is a prerequisite for just

33. Darryl K. Brown, *Strict Liability in the Shadow of Juries*, 67 SMU L. REV. 525 (2014).

34. *Id.* at 535–37.

35. *Id.* at 534–35.

36. Judicial commentary in the United States has sharply declined since the nineteenth century because of concerns that it could unduly influence the jury. *Id.* at 534–37; *see also* Paul Marcus, *Judges Talking to Jurors in Criminal Cases: Why U.S. Judges Do It So Differently from Just About Everyone Else*, 30 ARIZ. J. INT'L & COMP. L. 1 (2013).

37. *Id.* at 534.

38. *Id.* at 537.

punishment.[39] To address this concern, U.S. courts have placed their trust in juries—and in jurors' "common sense instincts" and "capacity for normative judgment"— as a procedural safeguard against unjust convictions in strict liability cases.[40]

Although Brown is skeptical of these claims about the jury, some of the available empirical evidence does suggest that jurors are more likely than judges to acquit and that this pro-acquittal tendency reflects jurors' insistence on a higher standard of proof.[41] This may lend some support to the view that juries offer a buffer against unjust convictions of non-culpable defendants in strict liability cases. It may also offer an additional explanation for the broad use of strict liability in the United States and England. Strict liability may be a response not only to jurors' cognitive difficulties in interpreting circumstantial evidence, but also to jurors' demanding views of the beyond-a-reasonable-doubt standard. Whatever the precise way in which the jury shapes strict liability, Brown convincingly argues that it does so, and in the process, deepens our understanding of the complex interactions between criminal law and procedure.

In *Juries and Prior Convictions: Managing the Demise of the Prior Conviction Exception to* Apprendi, Nancy King discusses another example where mistrust of juries' cognitive capacities has affected procedural and evidentiary rules in our criminal justice system.[42] In *Apprendi v. New Jersey*,[43] the Supreme Court restored to juries the task of determining a range of sentence-related facts that had long been decided by judges at sentencing hearings. Facts that trigger an increase in the defendant's penalty must now be proven to a jury beyond a reasonable doubt. The court carved out an important exception to this rule, however—prior convictions may still be determined by judges rather than juries. As a result of this exception, defendants may find out only at sentencing that they are facing significantly harsher punishment than they realized when admitting guilt or deciding to stand trial.[44]

One of the central reasons that the Supreme Court has given for preserving this exception to *Apprendi* is that submitting prior convictions to the jury would unduly prejudice defendants.[45] Specifically, jurors would tend to convict defendants based on evidence of the prior convictions, rather than based on the facts of the case.[46]

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39. *Id.* at 525.
40. *Id.*
41. HARRY KALVEN, JR., & HANS ZEISEL, THE AMERICAN JURY 101–106 (1966); Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven & Zeisel's The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171, 173 (2005). *But see* Andrew Leipold, *Why Are Federal Judges So Acquittal Prone*, 83 WASH. U. L. Q. 151 (2005) (finding that the conviction rate after federal bench trials was significantly lower than the conviction rate after federal jury trials).
42. Nancy J. King, *Juries and Prior Convictions: Managing the Demise of the Prior Conviction Exception to* Apprendi, 67 SMU L. REV. 577 (2014).
43. 530 U.S. 466 (2000).
44. King, *supra* note 42, at 578.
45. Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998).
46. *Id.*

King points out, however, that as an empirical matter, the prejudicial effect of prior convictions is not as significant as many tend to assume; it appears to make a difference only in borderline cases.[47] More importantly, King describes in useful detail how courts and legislatures in different jurisdictions have handled the problem of prejudice from prior convictions for more than a century.[48] They have developed a range of procedural tools for minimizing any prejudice associated with allowing juries to consider prior convictions. These tools include: 1) partial guilty pleas, whereby the defendant admits only the prior conviction and goes to trial before a jury on the remaining facts; 2) partial jury waivers, whereby the judge decides the prior conviction; 3) bifurcation of the trial proceeding; and 4) stipulations and rules limiting what information about the prior conviction may be admitted.[49]

Some of these options—partial guilty pleas and jury waivers—exclude the jury from determining prior convictions in most cases. Others, such as bifurcation, stipulations, and rules limiting the information given to the jury about the prior conviction, simply channel or restrict the jury's discretion. King expresses no preference among the different options for reducing prejudice to defendants. She seems concerned not so much with involving the jury in factfinding, but rather with providing defendants with early notice about the punishment they might be facing upon conviction. She points out that such notice helps defendants knowingly choose between a guilty plea and trial.[50] For this purpose, any of the options she discusses would be satisfactory.

The concern about notice could also be accommodated to some degree by discovery rules that require such information be disclosed before a trial or guilty plea.[51] Likewise, the related due process concern—that sentence-enhancing facts be proven beyond a reasonable doubt—could be addressed by using the higher burden of proof at sentencing, even when sentencing is by the judge.[52] As a practical matter, however, submitting prior convictions to a jury is currently a more feasible alternative than the other two potential reforms—it merely requires ending an already-controversial exception to the *Apprendi* doctrine.

Anticipating that the Supreme Court will reconsider this question in the near future, King persuasively rebuts the policy arguments for retaining the recidivism exception. If the Court agrees with her analysis and holds that juries should determine prior convictions, she has also pro-

47. King, *supra* note 42, at 579.

48. *Id.*

49. *Id.* at 580–90.

50. *Id.* at 582–83.

51. *See, e.g.*, MINN. CRIM. PROC. R. 9 (requiring disclosure "before the Rule 11 Omnibus Hearing" of "evidence the prosecutor may rely on in seeking an aggravated sentence").

52. *See, e.g.*, Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CALIF. L. REV. 1665 (1987).

vided a useful guide to procedures that minimize any prejudice that might follow from this holding.

Another type of evidence that might unduly affect jury decisionmaking is social media evidence—an area that Nancy Marder explores in *Jurors and Social Media: Is a Fair Trial Still Possible?*[53] In this piece, Marder asserts that social media's pervasive presence in the courtroom is eroding defendants' constitutional rights to fair trials. In previous decades, the Supreme Court has employed due-process analysis to address concerns about media attention tainting the jury pool,[54] but the pervasiveness and near unavoidability of social media brings this concern to a new level. There are tales of jurors "tweeting" from the jury room and judges "friending" jurors on Facebook. Yet judges have found it difficult to rein in jurors and preserve fair trials in this new world of seemingly inescapable texting, blogging, friending, Instagramming, connecting, and tweeting.

To address these fair-trial concerns, Marder advocates a "process view" of juror education.[55] She emphasizes the importance of informing, and reminding, jurors at every possible stage of a proceeding that they are prohibited from using social media to communicate about the case or learn new details of the case. Marder explains that this process approach will transform uninformed jurors into informed jurors who will refrain from accessing social media about the case at bar. Marder acknowledges, though, that the process view will not be effective in changing the behaviors of "recalcitrant jurors"; if jurors are set on improperly accessing information via social media, there is little that courts can do about it, absent taking the extreme measure of sequestering jurors.[56]

Marder's concern about fair trials in our modern, technologically advanced society could be extended beyond these lay actors in the criminal justice system. Judges, too, could be affected by social media and other electronic resources. In fact, many judges today seem to have fairly open approaches to obtaining evidence outside of the traditional adversary process. For example, Justice Breyer has unapologetically conducted his own Internet research in determining the facts of a case.[57] And Judge Posner made a splash earlier this year when he reported that one judge on the Seventh Circuit Court of Appeals independently "experiment[ed] with a novel approach," asking the court staff to don and doff specialized clothing and equipment to thereby determine how long it would take the plaintiffs in the case to do the same.[58] Pervasive social media, other elec-

53. Nancy S. Marder, *Jurors and Social Media: Is a Fair Trial Still Possible*, 67 SMU L. REV. 617 (2014).

54. *See, e.g.*, Skilling v. United States, 561 U.S. 358, 377–99 (2010) (examining due process concerns related to pretrial publicity).

55. Marder, *supra* note 53, at 618.

56. *Id.* at 618, 662–64.

57. *See* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1260–61 (2012).

58. *See* Mitchell v. JCG Indus., Inc., 745 F.3d 837, 842 (7th Cir. 2014).

tronic sources, and arguably overly inquisitive actors in the criminal justice system are a real concern to defendants' trial rights. While Marder's "process view" may partially address this problem, it does not offer a complete solution. As technology evolves and becomes even more accessible, we will need to conjure up additional solutions to preserve defendants' fair trial rights.

The jury remains an important institution in providing fair trials and safeguarding against unjust prosecutions. Yet as Marder, King, and Brown all show in their contributions, the jury is an imperfect factfinder. Criminal procedure and evidentiary rules must at times restrain its discretion and limit the information it receives in order to protect against prejudice and inaccurate verdicts. Prosecutors are likewise fallible and not sufficiently constrained by juries, judges, criminal codes, or elections. We must therefore consider alternative ways to hold them accountable. Wright proposes harnessing the power of technology and the media to do so. As Alschuler suggests, legislators can also do more to prevent abusive prosecutions by tailoring statutes more narrowly to truly culpable conduct. Delving further into the state's authority to define crimes, Garvey urges us to reconsider the extent to which the state should censure or punish those who are ignorant of the law. From the philosophical exploration of mens rea to the practical questions of institutional design and fair procedures, these Colloquium contributions help us to better understand our criminal justice system and offer some innovative ideas about how it can be improved.