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Criminal Justice Secrets

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CRIMINAL JUSTICE SECRETS

Meghan J. Ryan*

ABSTRACT

The American criminal justice system is cloaked in secrecy. The government employs covert surveillance operations. Grand-jury proceedings are hidden from public view. Prosecutors engage in closed-door plea-bargaining and bury exculpatory evidence. Juries convict defendants on secret evidence. Jury deliberations are a black box. And jails and prisons implement clandestine punishment practices. Although there are some justifications for this secrecy, the ubiquitous nature of it is contrary to this nation's Founders' steadfast belief in the transparency of criminal justice proceedings. Further, the pervasiveness of secrecy within today's criminal justice system raises serious constitutional concerns. The accumulation of secrecy and the aggregation of these concerns create a real constitutional problem.

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INTRODUCTION

Our criminal justice system is cloaked in immense secrecy. From beginning to end, covert operators and legal rules hide the inner workings of the system. Undercover police officers and confidential informants work surreptitiously to arm the government with secret information.¹ Covert technologies such as Stingray cell phone trackers² further provide the government with information it can use to uncover criminal activity and convict criminal offenders.³ Prosecutors attack criminal suspects in secret grand jury proceedings without allowing these prospective defendants the opportunity to defend themselves.⁴ Prosecutors engage in plea-bargaining behind closed doors, preventing defendants the opportunity to fairly compare the prosecutors' plea offers with those offered to similarly situated defendants. Even "discovery" proceedings are full of secrecy. Under the Supreme Court's due process jurisprudence, prosecutors are required to disclose only minimal evidence to criminal defendants, and violations of even this basic demand are rampant.⁵ That means that evidence exculpating defendants is often hidden from

1. See *infra* Part I.A.

2. As described by the ACLU:

Stingrays, also known as "cell site simulators" or "IMSI catchers," are invasive cell phone surveillance devices that mimic cell phone towers and send out signals to trick cell phones in the area into transmitting their locations and identifying information. When used to track a suspect's cell phone, they also gather information about the phones of countless bystanders who happen to be nearby.

Stingray Tracking Devices: Who's Got Them?, ACLU, <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/stingray-tracking-devices-whos-got-them> (last visited Feb. 23, 2022).

3. See Susan Freiwald & Stephen Wm. Smith, *The Carpenter Chronicle: A Near-Perfect Surveillance*, 132 HARV. L. REV. 205, 205–06 (2018) ("For well over a quarter century, law enforcement has surreptitiously converted the personal cell phone into a tracking device, capable of compiling a comprehensive chronicle of the user's movements over an extended period of time."); Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. L. & POL'Y REV. 15, 15–16 (2016) ("New technologies have altered surveillance discretion by lowering its costs and increasing the capabilities of the police to identify suspicious persons."); Rachel Levinson-Waldman, *Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public*, 66 EMORY L.J. 527, 537 (2017) ("[A]s of late 2014, nearly fifty state and local police departments in the United States were known to be using a device popularly called a Stingray to directly intercept all cell phone signals in a given area.")

4. See Carrie Leonetti, *When the Emperor Has No Clothes: A Proposal for Defensive Summary Judgment in Criminal Cases*, 84 S. CAL. L. REV. 661, 678–79 (2011); see also, e.g., FED. R. CRIM. P. 6(d)(1) (providing that only "[t]he following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device").

5. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting) ("There is an epidemic of Brady violations abroad in the land. Only judges can put a stop to it.")

defendants, judges, juries, and the public more broadly. Beyond hiding exculpatory evidence, prosecutors are also using secret evidence to convict criminal defendants.⁶ Breathalyzer and some DNA evidence, for example, are based upon source codes and algorithms to which defendants are generally denied access because they are categorized as trade secrets.⁷ This means that defendants lack the opportunity to truly challenge this evidence in court. Further, secrecy obscures jury deliberations on the evidence. These deliberations happen behind closed doors and, even if there is evidence of juror misconduct infecting the discussions, this information ordinarily cannot be used to legally undercut the verdict that was reached. Instead, jury deliberations ordinarily remain a black box. Extensive secrecy even shrouds criminal punishment. The government fails to disclose some aspects of incarceration, such as jail operating procedures and lethal injection protocols, claiming that those details constitute trade secrets.⁸ It even hides the particulars of the ultimate punishment, masking the identities of executioners and lethal injection drugs, as well as death row inmates' physical reactions to the drugs.⁹

There are some justifications for this extensive secrecy. Most of them relate to the government's prosecutorial interests. For example, more surveillance evidence of criminal wrongdoing assists the government in uncovering and punishing this behavior.¹⁰ Secrecy also helps prosecutors by easing the burdens associated with disclosing information such as the details of plea bargains or immaterial exculpatory evidence.¹¹ But secrecy also serves prosecutors' interests in securing convictions, regardless of whether those convictions further the broader goal of achieving justice.¹² For example, a prosecutor's refusal to disclose certain exculpatory evidence places the defendant at an informational disadvantage about the strength of the prosecutor's case, making it easier for the prosecutor to secure a plea agreement. By withholding this evidence, prosecutors may also give a skewed picture to the judge and jury about the strength of the government's case and thus have a greater likelihood of prevailing at trial. Finally, commentators sometimes justify government secrecy in certain segments of the criminal justice system as a practice that protects witnesses and other third parties.¹³ One example of such third-party

6. See Meghan J. Ryan, *Secret Conviction Programs*, 77 WASH. & LEE L. REV. 269, 270 (2020) ("Across the country, judges and juries are convicting defendants based on secret evidence.").

7. See *id.* at 304–05, 319; see also Meghan J. Ryan, *Secret Algorithms, IP Rights, and the Public Interest*, 61 NEV. L.J. 61, 64 (2020).

8. See Samantha Michaels, *Want to Know How Your Local Jail Operates? Sorry, That May Be a Trade Secret*, MOTHER JONES (Mar./Apr. 2019), <https://www.motherjones.com/crime-justice/2019/03/want-to-know-how-your-local-jail-operates-sorry-that-may-be-a-trade-secret/> (explaining the denial of information concerning the jail's operational standards); William W. Berry III & Meghan J. Ryan, *Cruel Techniques, Unusual Secrets*, 78 OHIO ST. L.J. 403, 423–24 (2017) (discussing the details of lethal injections that are kept secret).

9. See Berry & Ryan, *supra* note 8, at 423.

10. See *infra* Part II.

11. See Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 995–97 (2021); see also *infra* Part II.

12. See *infra* Part II.

13. See *id.*

protection is masking the identities of confidential informants from criminal defendants to avoid witness intimidation. Another is invoking trade secret protection to guard the underlying source codes and algorithms of breathalyzer devices and probabilistic genotyping systems, which, in turn, protects the profit motives of these programs' developers.

Despite these asserted justifications for shrouding the workings of our criminal justice system, this extensive secrecy is contrary to the system's transparency roots. At the time of the Founding, transparency in criminal justice was extremely important. This is reflected in the various constitutional provisions guaranteeing transparency in criminal proceedings. For example, the Sixth Amendment provides criminal defendants with the rights to a public trial and to be judged by a jury of their peers.¹⁴ The Amendment also guarantees that defendants cannot be kept in the dark about the charges against them¹⁵ and that there cannot be secret witnesses against the accused—defendants have the right to confront witnesses against them.¹⁶ Openness in criminal proceedings was embedded in English common law, and the Founders' focus on transparency intensified as a reaction to outrageous historical actions such as those of the English Court of Star Chamber, which involved covertly extracting witness testimony—sometimes through torturous means.¹⁷ Transparency in criminal proceedings has always been considered essential to ensuring fairness and, relatedly, to instilling confidence in the fairness of the system. Such transparency can also provide a necessary civic education and spark new innovations to improve the system. Blocking the citizenry from accessing the various facets of our criminal justice system contravenes these transparency roots of the system and also strips the system of the much needed benefits that transparency provides.

Not only is the overwhelming amount of secrecy in today's criminal justice system contrary to our transparency foundations, but it also poses some very real, concrete constitutional concerns.¹⁸ The government's extensive surveillance network, and the secrecy of that surveillance, raises constitutional concerns under the "mosaic theory" of the Fourth Amendment.¹⁹ Grand jury secrecy, while once a useful defendant protection practice may now actually hurt the defendant more than it helps.²⁰ Secrecy in plea-bargaining raises equal protection concerns by creating an environment in which similarly situated defendants may very well be treated differently due to a variety of factors, such as race, sex, gender, economic status, or

14. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .").

15. See *id.* ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . .").

16. See *id.* ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .").

17. See *infra* Part III.

18. See *infra* Part IV.

19. See *infra* Part IV.A.

20. See *infra* Part IV.B.

prosecutorial retaliation.²¹ The system's significant limitations on discovery and prosecutors' resulting tendency to hide exculpatory evidence lead to situations in which defendants' due process rights may be violated and defendants may be convicted on incomplete and misleading evidence.²² The secrecy surrounding some of the evidence prosecutors use to convict defendants at trial—such as breathalyzer results and certain DNA evidence—implicates both confrontation and due process concerns.²³ Because defendants are denied access to the underlying source codes and algorithms for the computer programs producing these results, and because courts have found this information to be protected by trade secret law, defendants are unable to confront these witnesses against them—whether those be the program developers or the programs themselves.²⁴ Further, denying defendants access to this information contravenes due process guarantees by stripping defendants of an opportunity to mount a sufficient defense and denying them access to potentially exculpatory *Brady* material.²⁵ The secrecy surrounding jury deliberations means that bias or juror misconduct may infect jury verdicts, undercutting a defendant's right to an impartial jury.²⁶ Finally, the constitutional concerns of criminal justice secrecy even reach into the realm of punishment, where denying access to information about the details of incarceration or inmates' impending executions creates questions about whether the sentence contravenes the Eighth Amendment ban on cruel and unusual punishments.²⁷ Secrecy hides the true intensity of a punishment, raising concerns about whether sentencers not privy to this information can impose a constitutionally proportionate punishment.²⁸ Secrecy about the details of punishment could also be masking the imposition of torturous punishment—something clearly prohibited by the Eighth Amendment.²⁹ And masking the true nature of punishment exacerbates the possibility of imposing unconstitutional punishment: if the public is unaware of the true nature of punishment, citizens' moral views on the punishment cannot inform legislation, yet state

21. See *infra* Part IV.C.

22. See *infra* Part IV.D.

23. See Ryan, *supra* note 6, at 330–40 (“Ultimately, defendants’ due process and confrontation rights suggest that the algorithms and source codes underlying secret conviction programs should be disclosed. It is only with access to this information that defendants and their counsel and experts can examine whether the evidence used against them is valid.”); see also *infra* Part IV.E.

24. See Ryan, *supra* note 6, at 330–40; see also *infra* Part IV.E.

25. See Ryan, *supra* note 6, at 330–40; see also *infra* Part IV.E.

26. See *infra* Part IV.F.

27. See *infra* Part IV.G; see also U.S. CONST. amend. VIII (providing that “cruel and unusual punishments [shall not be] inflicted”).

28. See *infra* Part IV.G.

29. See *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878) (noting that “it is safe to affirm that punishments of torture . . . are forbidden by [the Eighth Amendment] to the Constitution”); Berry & Ryan, *supra* note 9, at 414 (“The Court has firmly and repeatedly stated that the Eighth Amendment prohibits all punishments involving torture.”).

legislation is a significant factor in courts' determinations of whether a punishment is unconstitutionally cruel and unusual.³⁰

Each of these constitutional concerns resulting from the secrecy cloaking the criminal justice system is important. Further, the accumulation of secrecy from each step of the criminal process creates a monstrous wall of secrecy that criminal defendants face. Not only are defendants confronting prosecutors hiding exculpatory evidence or being convicted based on secret evidence, but defendants are facing secrecy at every step of the criminal justice process. The system is so replete with constitutional problems that the particularly identified, often compound, constitutional questions at issue should be viewed more critically.

This Article calls out the secrecy ubiquitous in today's criminal justice system. Part I explains how secrecy is a part of every step of today's criminal justice process—all the way from the investigation stage to punishment.³¹ Undercover surveillance, grand jury proceedings, closed-door plea bargaining, the slippery rules of discovery, conviction evidence such as breathalyzer results and DNA evidence, jury deliberations, and the particulars of punishment are all cloaked in secrecy.

Part II recognizes that there are some justifications for this secrecy.³² Most of these justifications relate to the government's prosecutorial interests—namely uncovering criminal conduct and evidence to prosecute it, as well as easing prosecutors' burdens in disclosing information. But not all of the asserted justifications relate to the government's goal of achieving justice; instead, many of them relate to the *prosecutor's* goal of securing convictions. And the goal of securing convictions—if those convictions do not achieve justice—is not a worthy one and is at odds with the justice-oriented objective of the system.

Part III delves into the foundations of our criminal justice system, explaining that the system is rooted in the value of transparency, not secrecy.³³ The Sixth Amendment's pledge to ensure criminal defendants a “public trial, by an impartial jury,” notice of the charges against them, and the right to confront witnesses against them, is perhaps the best evidence of the importance the Founders placed on criminal justice transparency. The Article notes that, not only does the tremendous secrecy in today's system contravene our transparency roots, but it also raises numerous constitutional concerns.

30. See Berry & Ryan, *supra* note 9, at 428. Berry and Ryan have explained this phenomenon:

It is important to note that societal assessments of these death penalty techniques should bear heavily on legal assessments of the techniques. The Court's historical Eighth Amendment analysis that focuses on dignity and evolves with societal standards relies in part on societal assessments—primarily state-counting. If societal assessments change, then legal assessments might change as well. Accordingly, the societal shield protecting the death penalty feeds back into the doctrinal shield, making legal assessments of death penalty techniques ineffective.

Id.

31. See *infra* Part I.

32. See *infra* Part II.

33. See *infra* Part III.

Part IV outlines these concerns raised throughout the criminal justice process. For example, the secrecy surrounding plea-bargaining raises questions about equal protection under the law and denying defendants access to evidence used to convict them raises both confrontation and due process concerns. Even if these individual acts of secrecy within the system were not enough to implicate the Constitution, the overwhelming quantum of secrecy—which is present in every step of the criminal justice process—creates a problem of constitutional proportions.

This Article concludes by suggesting that proper regard for the Constitution requires that we begin dismantling this system of secrecy. That is the only way to address the constitutional concerns implicated by the many layers of secrecy and restore fairness and confidence to the system.

I. CRIMINAL JUSTICE SECRECY

Secrecy has become pervasive in the criminal justice system. Even though the system is an instrument of the people—with cases often styled as “The People” versus a defendant—and even though the Constitution guarantees criminal defendants the right to a public trial, secrecy abounds. In phase after phase of a criminal investigation, charge, trial, conviction, and punishment, criminal defendants—and even the public that is pursuing their conviction and punishment—lack access to information relevant to major decisions and conditions within the criminal justice system.

A. Investigation

One significant aspect of the tremendous secrecy cloaking the American criminal justice system is the nature of surveillance the government employs in its investigations. Since ancient times, the government has made use of undercover operations and confidential informants.³⁴ But this practice has exploded over time. The government’s use of secret operations proliferated as the government concentrated on uncovering the production and sale of alcohol during Prohibition and smoking out alleged communists during the Second Red Scare.³⁵ The government’s list of secret surveillance targets expanded in the 1960s to include Ku Klux Klan, New Left, Black, and antiwar groups.³⁶ Since then, its use of undercover

34. See GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 17 (1998) (“Deception, temptation, and informers are ancient and virtually universal forms of social control.”).

35. See ROBERT M. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM 1, 7 (2002) (“Prohibition and communism increased the demand for informer activity. Confronted with the threat of Bolshevism from Russia at the end of World War I, American citizens and law enforcement officials alike supported the use of informers to combat crime.”); MARX, *supra* note 34, at 30–32 (“Covert practices took on new life for the FBI in 1936. President Franklin Roosevelt charged it with the investigation of Communist and Fascist groups operating in the United States. As part of its domestic intelligence goals, the FBI became responsible for combatting espionage, sabotage, and subversion.”).

36. MARX, *supra* note 34, at 32.

agents and confidential informants has continued to boom.³⁷ Once focused more narrowly on street crimes like drug offenses, the government now also deploys its undercover operations to expose other criminal activity, such as prostitution, burglary, white-collar crime, major drug distribution, and the dumping of hazardous waste.³⁸

In the last two decades, government use of secret surveillance has continued to grow. After the terrorist attack on September 11, 2001, the government significantly increased its reliance on confidential informants in terrorism cases.³⁹ Moreover, after Congress enacted the USA Patriot Act, the Foreign Intelligence Surveillance Court (“FISA Court”) began issuing significantly broader secret subpoenas requiring internet and telecommunications companies to surrender customers’ personal data, browsing data, and details of their conversations.⁴⁰ “It also began issuing ground-breaking secret legal interpretations that allowed mass surveillance. All of this was done in the name of national security.”⁴¹

In the summer of 2020, the government took secrecy to a new level, deploying anonymous police officers in the streets.⁴² In June of that year, Americans in Washington, D.C., encountered “heavily armed law enforcement officers who share[d] an unexpected characteristic: Neither their affiliation nor their personal identities [were] discernible.”⁴³ The following month, armed police officers who similarly lacked identification flooded the streets of Portland, Oregon, pulling protesters out of the crowd and putting them in unmarked vehicles bound for unknown destinations.⁴⁴ This uncommon practice (at least in functioning democracies)⁴⁵ of

37. See BLOOM, *supra* note 35, at 7 (“Since much of the crime in America today involves willing participants, the need for informants has increased substantially.”); see MARX, *supra* note 34, at 34.

38. See MARX, *supra* note 34, at 7–8.

39. See ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 167 (2009) (“Since September 11, 2001, . . . there has been an explosion of attention, funding, and organizational commitment to developing informants in terror investigations.”).

40. Ryan, *supra* note 6, at 326.

41. *Id.* (internal quotations and citations omitted).

42. Because “secret police” is a term more often used for officers engaged in covert *operations* (and against political rivals) rather than for officers with covert *identities*, I refer to the police officers deployed during the summer of 2020 as “anonymous” instead.

43. Philip Bump, *A Dangerous New Factor in an Uneasy Moment: Unidentified Law Enforcement Officers*, WASH. POST (June 4, 2020), <https://www.washingtonpost.com/politics/2020/06/03/dangerous-new-factor-an-uneasy-moment-unidentified-law-enforcement-officers/>; see also Rachel Brown & Coleman Saunders, *Can Law Enforcement Officers Refuse to Identify Themselves?*, LAWFARE (June 12, 2020), <https://www.lawfareblog.com/can-law-enforcement-officers-refuse-identify-themselves/> (“On June 3, protestors in Washington, D.C., who rallied in response to the death of George Floyd were met with federal law enforcement officers equipped with riot gear and rifles but who lacked badges or other identifying information.”).

44. See Adam K. Raymond & Chas Danner, *Unidentified Federal Agents Are Detaining Protesters in Portland*, N.Y. MAG. (July 17, 2020), <https://nymag.com/intelligencer/2020/07/unidentified-federal-agents-detaining-protesters-in-portland.html>; Katie Shepherd & Mark Berman, *“It Was Like Being Preyed Upon”*: *Portland Protesters Say Federal Officers in Unmarked Vans Are Detaining Them*, WASH. POST (July 17, 2020), <https://www.washingtonpost.com/nation/2020/07/17/portland-protests-federal-arrests/>.

45. See Bump, *supra* note 43 (“Such anonymity echoes the way in which enforcers in autocratic regimes have worked to avoid accountability.”).

using anonymous law enforcement raised concerns about police accountability: How can officers be held accountable for abusive tactics if the public cannot discern who they are?⁴⁶

Beyond changes to the numbers of confidential informants in play, scope of undercover operations, and visibility of officer credentials, secret government surveillance operations have exploded as a result of improved technology.⁴⁷ The government now has the ability to collect and scour monumental volumes of data in search of criminal evidence. For example, numerous law enforcement agencies now use “Stingray” devices, which “mimic cell phone towers and send out signals to trick cell phones in the area into transmitting their locations and identifying information.”⁴⁸ In addition to allowing law enforcement to identify the cell phone’s location, these devices “capture texts, numbers of outgoing calls, emails, serial numbers, identification, . . . actual content of conversation, and other raw and detailed information from unsuspecting phones.”⁴⁹ Further, these devices do more than provide evidence on the targets of investigation; they also provide the same information on other individuals in the area.⁵⁰ Stingray devices are just one example. City surveillance cameras, store and ATM video surveillance, tapped telephone conversations, cellular phone geolocation data, electronic banking records, smart devices such as Siri and Alexa, and social media platforms all provide the government with an overwhelming amount of information that has been used to convict criminal defendants.⁵¹ Indeed such technology-based surveillance now

46. *See id.* As Bump explained:

The point isn’t necessarily that the lack of identification offered by the men in Washington is intended to facilitate abuse. It’s that it hampers accountability, intentionally or not, which itself makes abuse more likely to go unchecked. Officers of the law are accountable to the public, something that’s harder to achieve if you don’t know who they are.

Id.

47. *See* MARX, *supra* note 34, at 3; Hannah Bloch-Wehba, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 CAL. L. REV. 917, 943–44 (2021) (“[A]gainst the consensus view that policing ought to be more democratic, more accountable, and more transparent, significant evidence suggests that new technology and shifts in Fourth Amendment doctrine have undermined these values.”).

48. ACLU, *supra* note 2. “Stingrays” are also known as “cell site simulators” or “IMSI catchers.” *Id.*

49. Harvey Gee, *Almost Gone: The Vanishing Fourth Amendment’s Allowance of Stingray Surveillance in A Post-Carpenter Age*, 28 S. CAL. REV. L. & SOC. JUST. 409, 431 (2019). These devices “can even make the tracked device send texts and make calls.” *Id.*

50. *See id.* at 431 (explaining that Stingrays “track the location of targets and non-targets in apartments, cars, buses, and on streets through mapping software”).

51. *See, e.g.*, Reginald A. Hirsch, *Privacy Rights in a Public Society: Protecting Your Client and Yourself from Invasions of Privacy*, 57 S. TEX. L. REV. 579, 600 (2016) (referencing cases in which “the courts upheld the use of pictures and posts from the defendants’ MySpace and Facebook pages as evidence to support their convictions.”); Sara Morrison, *The Capitol Rioters Put Themselves All Over Social Media. Now They’re Getting Arrested.*, VOX (Jan. 19, 2021), <https://www.vox.com/recode/22218963/capitol-photos-legal-charges-fbi-police-facebook-twitter> (describing the role of social media in identifying and providing grounds for arrest of the January 2021 U.S. Capitol insurrectionists); Gerald Sauer, *A Murder Case Tests Alexa’s Devotion to Your Privacy*, WIRED (Feb. 28, 2017), <https://www.wired.com/2017/02/murder-case-tests-alexa-s-devotion-privacy/> (noting law enforcement’s demand that Amazon hand over an Alexa recording for use in a criminal case); Kathryn R. Taylor, “Anything You Post Online Can and Will Be Used Against You in a Court of Law”, 71 NAT’L

“dwarf[s]” evidence developed from human informants.⁵² And this technological evidence will likely only continue to grow as our world becomes increasingly electronically interconnected.

The quantity of covert surveillance the government relies on is overwhelming, but the legal rules governing—or failing to govern—this information exacerbate the level of secrecy involved in this surveillance enterprise. Criminal investigations are some of the most unregulated and undocumented aspects of the criminal justice system,⁵³ meaning that the fog of secrecy is even denser in this area. And relying on confidential informants in the investigation process heightens this problem.⁵⁴ In case after case where informant investigations are at issue, the Court has carved out exceptions from Fourth, Fifth, and Sixth Amendment rules limiting searches and seizures, requiring *Miranda* warnings, and ensuring the right to counsel.⁵⁵ For example, police officers seeking a search or arrest warrant may rely on “phantom affidavits,” where the officer applying for the warrant did not learn directly from the confidential informant the relevant information justifying the warrant; instead, another police officer, who was not under oath, provided him with that information.⁵⁶ This circumvents the reliability process for obtaining warrants. Officers can also obscure the source of their information through “parallel construction,” which allows them to use information from a secret source but then indicate that the information was sourced from another line of investigation.⁵⁷ All

LAW. GUILD 78, 81 (2014) (“[T]here are instances in which social media activity directly provides the evidence at trial to convict a defendant . . .”).

52. MARX, *supra* note 34, at 208 (“The scale of human informing is, however, dwarfed by electronic informers and blacklists.”).

53. See NATAPOFF, *supra* note 39, at 84 (“As a general matter, the process of investigating crime is one of the least regulated, least public aspects of the legal system.”).

54. See *id.* at 85 (“The use of criminal informants is a paradigmatic example of this kind of discretionary, undocumented decision making; it is also a powerful engine of its expansion.”).

55. See *id.* at 55–57, 85 (“[T]he Supreme Court has methodically exempted informant creation and deployment from the kinds of constitutional regulations that cover other investigative techniques, including Fourth Amendment rules on searches, seizures, and warrants, the Fifth Amendment requirement that suspects be given *Miranda* warnings and counsel, and Sixth Amendment right-to-counsel rules.”); Andrew E. Taslitz, *Prosecuting the Informant Culture*, 109 MICH. L. REV. 1077, 1080 (2011) (“The ease of using informants stems partly from the freedom it grants law enforcement from many otherwise applicable legal and practical investigative limitations.”); see also, e.g., *Illinois v. Perkins*, 496 U.S. 292, 294 (1990) (“*Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement.”); *United States v. White*, 401 U.S. 745, 746–47 (1971) (rejecting the claim that “the Fourth Amendment bars from evidence the testimony of governmental agents who related certain conversations which had occurred between defendant . . . and a government informant” and “which the agents overheard by monitoring the frequency of a radio transmitter carried by [the informant] and concealed on his person”); *Hoffa v. United States*, 385 U.S. 293, 300–312 (1966) (rejecting the petitioner’s Fourth, Fifth, and Sixth Amendment challenges arising from the government’s use of a government informant to report and testify about conversations the petitioner had in the informant’s presence).

56. See NATAPOFF, *supra* note 39, at 88.

57. See HUM. RTS. WATCH, DARK SIDE: SECRET ORIGINS OF EVIDENCE IN US CRIMINAL CASES 1 (Jan. 9, 2018), <https://www.hrw.org/report/2018/01/09/dark-side/secret-origins-evidence-us-criminal-cases> (“Through a practice known as ‘parallel construction,’ an official who wishes to keep an investigative activity hidden from courts and defendants—and ultimately from the public—can simply go through the motions of re-discovering

of these exceptions to the traditional constitutional requirements encourage even greater reliance on secret sources of information. Even beyond the informational advantages that covert intelligence provides, these secret sources offer a way for police officers to avoid the constitutional constraints that are meant to protect criminal defendants. This has further cultivated a “culture of secrecy.”⁵⁸ Indeed, “[u]sing snitches has become a method of concealing investigative techniques, a practice in which the usual disclosure rules do not apply, and in which cutting corners and breaking rules can easily be hidden.”⁵⁹ As Professor Alexandra Natapoff has explained:

[B]ecause police are less constrained when using informants, this naturally makes informant-based investigations easier, cheaper, and more inviting. If the police can persuade an informant to cooperate in order to obtain information about a target, that decision is hard for others to challenge, and if it turns up no evidence, it need never be revealed. Likewise, a wired informant can collect information whenever the police want him to, off the record. By contrast, if the police apply for a warrant or a wiretap, they must justify their requests to a court, their requests could be denied, and their justifications can be challenged later by defense counsel.⁶⁰

The neglectful nature of the law with regard to secret surveillance does not stop there. The general lack of oversight related to secret FISA Court decisions is another example. Although judicial review is a fundamental feature of the criminal justice system, only warrant denials from the FISA Court—rather than warrant grants—are reviewable.⁶¹ Overall, secret surveillance is attractive in obtaining more extensive evidence of criminal wrongdoing, in covering police mistakes, in avoiding public scrutiny, and in circumventing constitutional rules.

B. Grand Juries

Grand jury proceedings is one area in which secrecy dates back to the time of the Founding.⁶² Grand jury secrecy grew out of the desire to protect “grand jurors

evidence in some other way.”); Natasha Babazadeh, *Concealing Evidence: “Parallel Construction,” Federal Investigations, and the Constitution*, 22 VA. J.L. & TECH. 1, 8 (2018) (“Parallel construction is a law enforcement process of building a separate and *parallel* evidentiary basis for a criminal investigation to conceal how the investigation actually began.”).

58. NATAPOFF, *supra* note 39, at 88 (“Because investigative constraints tend not to apply to informant practices, this has generated a culture of secrecy that goes beyond the lack of documentation.”).

59. *Id.*

60. *Id.* at 86.

61. See ELIZABETH GOITEIN, *THE NEW ERA OF SECRET LAW* 22 (2016) (“[I]nstead of several hundred judges weighing in publicly on difficult legal questions and honing the answer through three levels of appeal, the FISA system has traditionally consisted of one court secretly deciding issues presented by one party, with appeal available only if that party loses.”). After reforms in 2015, however, the FISA Court has the opportunity to call on a panel of independent attorneys—“amici”—for guidance on these issues but has no obligation to do so. See *id.*

62. See *Costello v. United States*, 350 U.S. 359, 362 (1956) (explaining that “[t]here is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor” and that “in

and witnesses from government coercion.”⁶³ But courts have listed a number of reasons for grand jury secrecy today. As the Court noted in the 1958 case of *United States v. Procter & Gamble Co.*,⁶⁴ the secrecy of grand jury proceedings serves several goals:

- (1) To prevent the escape of those whose indictment may be contemplated;
- (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
- (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it;
- (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes;
- (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.⁶⁵

These are the same reasons that proponents of secrecy in grand jury proceedings cite today.

Commentators question whether these reasons still support the same level of secrecy.⁶⁶ Many of the justifications relate to the government’s ability to secure an indictment. Problems such as outside influence, witness tampering, and timid witnesses could interfere with this goal.

But, today, prosecutors have significant control over grand jury proceedings. They advise the grand jury on the law.⁶⁷ They often may present evidence

this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor”). The topic of grand jury secrecy requirements is quite complex. This Article offers only very basic generalizations on the topic.

63. WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE* § 8.5(a) (4th ed. 2021).

64. 356 U.S. 677 (1958).

65. *Id.* at 681 n.6. In its later case *Douglas Oil Co. of Cal. v. Petrol Stops N.W.*, 441 U.S. 211 (1979), the Court highlighted similar concerns:

In particular, we have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Id. at 218–19.

66. See, e.g., Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 72 (2002) (“Unlike the grand jury itself, the mandated secrecy for grand jury proceedings is truly a historical artifact that no longer serves any useful purpose.”).

67. See Thomas J. Farrell, *An Overview of How Grand Juries Operate*, CHAMPION, July 2007, at 31 (explaining that grand juries “receive their instructions in the law from the prosecutor”).

inadmissible at trial.⁶⁸ They are not constitutionally required to present exculpatory evidence.⁶⁹ And the prospective defendants generally have no right to defend themselves. As the old saying goes, prosecutors could “indict a ham sandwich.”⁷⁰ Thus, the concern that prosecutors will be unable to convince a grand jury to indict in most cases is rather meager. Further, if the prospective defendant (or his network) is capable of meddling with the prosecutor’s hold over the grand jury, the prospective defendant’s stranglehold on the process is probably even more concerning at the time of trial, when punishment for the defendant looms even larger⁷¹ and the government cannot depend on the same secrecy to shield jurors and potential witnesses from the defendant’s threats. Perhaps the methods used to protect the legitimacy of the trial—such as thoroughly managing witnesses and vigorously prosecuting intimidators—can be employed to protect the legitimacy of the grand jury proceedings as well.⁷² If nothing else, the secrecy of grand jury proceedings could be limited in duration, such that the information may become available once the grand jury hands down its indictment.⁷³ Such a limitation on secrecy could also address

68. See *Costello v. United States*, 350 U.S. 359, 363–64 (1956); LAFAVE ET AL., *supra* note 63, § 15.5(c).

69. See *United States v. Williams*, 504 U.S. 36, 55 (1992).

70. Josh Levin, *The Judge Who Coined “Indict a Ham Sandwich” Was Himself Indicted*, SLATE (Nov. 25, 2014), <https://slate.com/human-interest/2014/11/sol-wachtler-the-judge-who-coined-indict-a-ham-sandwich-was-himself-indicted.html>. The only grand jury proceedings in which prosecutors do not regularly receive indictments are cases involving police officers. See Ben Casselman, *It’s Incredibly Rare For A Grand Jury To Do What Ferguson’s Just Did*, FIVETHIRTYEIGHT (Nov. 24, 2014), <https://fivethirtyeight.com/features/ferguson-michael-brown-indictment-darren-wilson/> (“Grand juries nearly always decide to indict . . . Or at least, they nearly always do so in cases that don’t involve police officers.”); MARK MOTIVANS, BUREAU OF JUST. STAT., FEDERAL JUSTICE STATISTICS, 2012-STATISTICAL TABLES 12 tbl. 2.3 (2015), <https://bjs.ojp.gov/content/pub/pdf/fjs12st.pdf>. This may be because grand jurors place more trust in police officers than in other prospective defendants. See Casselman, *supra*. Or perhaps prosecutors do not try as hard to obtain indictments in cases involving police officers, who often work closely with prosecutors. *Id.*

71. See Kristine Hamann & Jessica Trauner, *Witness Intimidation: What You Can Do to Protect Your Witness*, PROSECUTOR, Apr. 2018, at 14 (“The greatest risk of intimidation for a witness may occur during or immediately before hearings and trial, when the consequences for the defendant are most apparent and looming.”); cf. Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 71 (2005) (“General deterrent effects depend on a number of factors: the severity of the penalty; the swiftness with which it is imposed; the probability of being caught and punished . . .”).

72. See PETER FINN & KERRY MURPHY HEALEY, PREVENTING GANG- AND DRUG-RELATED WITNESS INTIMIDATION 13 (1996). It is worth noting that these strategies are not always effective and that witness intimidation seems to be a significant problem throughout criminal proceedings. See *id.* at 4; see also Hamann & Trauner, *supra* note 71, at 13 (stating that “witness intimidation is an insidious problem”). A study from the National Institute of Justice explained:

No one knows the precise extent of witness intimidation because only limited scientific research has been conducted on the problem. However, most of the prosecutors, police officers, judges, and victim advocates interviewed for this report agreed that witness intimidation is widespread, that it is increasing, and that it seriously affects the prosecution of violent crimes.

FINN & HEALEY, *supra*, at 4.

73. See LAFAVE ET AL., *supra* note 63, § 8.5(a); Joseph E. Martineau, Benjamin A. Lipman & Eric D. Block, *Grand Jury Records – Can the Public Get Them?* LEWISRICE (Aug. 21, 2015), <https://www.lewisrice.com/publications/grand-jury-records-can-the-public-get-them/> (analyzing the public’s ability to obtain grand jury materials in four states); *Secret Justice: Grand Juries*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Fall 2004), <https://www.rcfp.org/wp-content/uploads/imported/SJGRANDJURIES.pdf> (“In California, transcripts of

the concern of preventing the prospective defendant's escape if no arrest is made prior to indictment. Again, this justification vanishes once the grand jury hands down an indictment, as the defendant then learns about the charges against him anyway.

The one interest meant to protect the prospective defendant rather than the government's interest is also questionable. First, considering that most grand jury targets are indicted, this interest in protecting the reputations of prospective defendants arises in only a small percentage of cases, primarily police shootings.⁷⁴ Once the case proceeds to trial, the information will most likely become public, thus raising a serious risk of tarnishing the defendant's reputation. Second, today's powerful media influence may cut against the protective role that grand jury secrecy traditionally played.⁷⁵ The media often learns about grand jury proceedings, leading to the possibility that the goals of secrecy—especially the goal of preserving the defendant's reputation—are no longer achieved. A leading example of this relates to the frenzy of reporting surrounding the grand jury's decision not to indict Officer Darren Wilson for his 2014 fatal shooting of an unarmed Black man, Michael Brown, in Ferguson, Missouri.⁷⁶ This was a well-publicized case. After the shooting, protests broke out across Ferguson.⁷⁷ Once the grand jury decided not to indict, another wave of protests erupted.⁷⁸ Although Wilson was not indicted, and although he was of course not tried in a court of law, there was much speculation about his guilt. He received numerous death threats and was forced to go into hiding.⁷⁹ Today—more than seven years later—he remains

grand jury testimony become public record once an indictment is returned, unless a defendant can show a reasonable likelihood that release of part or all of the transcripts would prejudice his right to a fair trial.”)

74. See Casselman, *supra* note 70 (“Grand juries nearly always decide to indict Or at least, they nearly always do so in cases that don’t involve police officers.”); MOTIVANS, *supra* note 70, at 12 tbl. 2.3. Moreover, the notion that grand jury secrecy exists to protect prospective defendants’ reputations may be “historically flawed.” Simmons, *supra* note 66, at 69.

75. Cf. LAFAVE ET AL., *supra* note 63, § 8.5(a) (noting that, often, the public becomes aware that the grand jury is considering an indictment when the suspect is arrested prior to the commencement of those proceedings).

76. See, e.g., Eyder Peralta & Bill Chapell, *Ferguson Jury: No Charges for Officer In Michael Brown’s Death*, NPR (Nov. 24, 2014), <https://www.npr.org/sections/thetwo-way/2014/11/24/366370100/grand-jury-reaches-decision-in-michael-brown-case> (“A grand jury did not indict Ferguson, Mo., police officer Darren Wilson for any crimes related to the death of 18-year-old Michael Brown in August.”); Jon Swaine, Paul Lewis & Dan Roberts, *Grand Jury Decline to Charge Darren Wilson for Killing Michael Brown*, GUARDIAN (Nov. 25, 2014), <https://www.theguardian.com/us-news/2014/nov/24/ferguson-police-darren-wilson-michael-brown-no-charges> (similarly reporting on the matter).

77. See Eyder & Chapell, *supra* note 76; Swaine et al., *supra* note 76.

78. See *Ferguson Unrest: From Shooting to Nationwide Protests*, BBC (Aug. 10, 2015), <https://www.bbc.com/news/world-us-canada-30193354> (“Protests in Ferguson followed Michael Brown’s death and a grand jury declining to charge the officer with murder.”). This was actually the second round of protests. See Larry Buchanan, Ford Fessenden, K.K. Rebecca Lai, Haeyoun Park, Alicia Parlapiano, Archie Tse, Tim Wallace, Derek Watkins & Karen Yourish, *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>. The shooting sparked the first round of protests. See *id.*

79. See Jake Halpern, *The Man Who Shot Michael Brown*, NEW YORKER (Aug. 3, 2015), <https://www.newyorker.com/magazine/2015/08/10/the-cop>.

widely reviled.⁸⁰ Regardless of whether he should have been indicted and convicted, the secrecy of the grand jury proceedings did not preserve his reputation.

The intricacies of grand jury secrecy requirements today are quite complex, and secrecy is not absolute. Ordinarily, grand jurors are prohibited from disclosing information presented to them, and violations of this rule constitute punishable offenses.⁸¹ Along with grand jurors, the prosecutors presenting to the grand jury, and the clerks and stenographers involved in these proceedings, are similarly bound to secrecy.⁸² And in about a quarter of states, grand jury witnesses are also required to remain silent about grand jury proceedings.⁸³

Despite all of these rules, in recent years, “courts and legislatures . . . have moved steadily in the direction of relaxing the rules of secrecy.”⁸⁴ According to Professor Wayne LaFave et al., widespread criticism of broad grand jury secrecy and greater concern for criminal defendants’ rights have contributed to this development.⁸⁵ Perplexingly, though, despite this erosion of grand jury secrecy that can be traced back to the time of the Founding, criminal justice secrecy in other areas—areas where secrecy was not originally deemed necessary—continues to swell.

C. Plea-Bargaining

The pervasive secrecy within the criminal justice system has many sources, but perhaps the most significant contributor to this secrecy has been the rise of plea-bargaining and concomitant prosecutorial power.⁸⁶ The judiciary discouraged plea-bargaining during this country’s infancy.⁸⁷ But, by the end of the nineteenth century, plea-bargaining had “bec[o]me a dominant method of resolving criminal cases.”⁸⁸ Indeed, by the 1920s, around 70% or more cases ended in guilty pleas in numerous (especially urban) areas.⁸⁹ Reliance on plea-bargaining continued to grow, and, in 1970, the Supreme Court pronounced that “guilty pleas are not constitutionally forbidden.”⁹⁰

80. In fact, another St. Louis County prosecutor reviewed the case in 2020, although he also concluded that Wilson should not be charged. See John Eligon, *No Charges for Ferguson Officer Who Killed Michael Brown*, *New Prosecutor Says*, N.Y. TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/30/us/michael-brown-darren-wilson-ferguson.html>.

81. See LAFAVE ET AL., *supra* note 63, § 8.5(a).

82. *See id.*

83. *See id.*

84. *Id.*

85. *See id.*

86. For an excellent discussion of secrecy in plea-bargaining, see generally Turner, *supra* note 11.

87. See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 5, 16 (1979).

88. *Id.* at 6.

89. *See id.* at 27.

90. *Brady v. United States*, 397 U.S. 742, 751–52 (1970). Professor Alschuler noted the *Brady* Court’s language that “plea bargaining was ‘inherent in the criminal law and its administration.’” Alschuler, *supra* note 87, at 6 (quoting *Brady*, 397 U.S. at 751).

In 2012, the Supreme Court explained that our “criminal justice [system] today is for the most part a system of pleas.”⁹¹ More than 95% of cases are resolved by guilty pleas, and plea-bargaining is generally opaque to criminal defendants and the public alike.⁹² Most plea-bargaining takes place behind closed doors, where prosecutors and defense attorneys informally negotiate what charges defendants will plead guilty to and what punishments they will receive.⁹³ No record is ordinarily kept of these conversations, nor even of the individual offers made.⁹⁴ Even final plea agreements are often not reduced to writing, and in only about half the jurisdictions is there a requirement that the plea agreement reached be on the record.⁹⁵ One can gain access to individual plea agreements by attending the public plea colloquies held in court—where the defendant actually pleads guilty to particular charges and the prosecutor makes a sentencing recommendation if relevant.⁹⁶ But these plea colloquies generally reveal only the most basic information about the agreement. They do not reveal the negotiation record, and they might also conceal particular facts.⁹⁷ Even if this information were more robust, though, it would be difficult to gain a sense of what types of offers defendants were receiving for particular types of crimes because even the bargains struck are ordinarily not recorded in a searchable database.⁹⁸ This makes it difficult for defendants to assess the quality of the plea offers they are receiving and for the public to assess the quality of the plea-bargaining process and the results it achieves.⁹⁹

91. *Lafley v. Cooper*, 566 U.S. 156, 170 (2012); *see also Missouri v. Frye*, 566 U.S. 134, 143 (2012) (stating that “ours ‘is for the most part a system of pleas, not a system of trials’” (quoting *Lafley*, 566 U.S. at 170)); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992) (stating that plea-bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system”).

92. *See Turner*, *supra* note 11, at 974–75; *cf. MOTIVANS*, *supra* note 70, at 12 tbl. 4.2 (indicating that approximately 89% of federal criminal cases were resolved by guilty plea in 2012).

93. *See Scott & Stuntz*, *supra* note 91, at 1911–12 (“Most cases are disposed of by means that seem scandalously casual: a quick conversation in a prosecutor’s office or a courthouse hallway . . . with no witnesses present, leading to a proposed resolution that is then ‘sold’ to both the defendant and the judge.”). Ordinarily, these agreements are subject to judicial approval. *See Julian A. Cook, III, Plea Bargaining, Sentence Modifications, and the Real World*, 48 *WAKE FOREST L. REV.* 65, 85 (2013) (“[A]bsent judicial assent, a plea agreement is devoid of legal significance.”).

94. *See Turner*, *supra* note 11.

95. *See id.* at 978–79 (“Typically, plea offers are not publicly announced or placed on the record. They are often not even reduced to writing, but are instead conveyed informally—over the phone, in the courtroom corridor, or in the prosecutor’s office.”).

96. *See Jocelyn Simonson, The Criminal Court Audience in a Post-Trial World*, 127 *HARV. L. REV.* 2174, 2195 (2014).

97. *See Turner*, *supra* note 11, at 980, 985.

98. *See id.* at 978–979.

99. *See Turner*, *supra* note 11, at 993. As Professor Jenia Turner has explained:

Because there are no searchable databases of plea offers, defense attorneys often do not know what the “going rate” for plea bargains in particular cases are, particularly if the attorneys are not part of a public defender’s office, are relatively inexperienced in handling the type of case at issue, or are new to the jurisdiction. Accordingly, they cannot be sure whether an offer they have received for a client is reasonable and consistent with the norm. Nor can they point to plea precedent in arguing for equal treatment of their clients.

D. “Discovery”

Ironically, secrecy is also central to criminal discovery.¹⁰⁰ Contrary to the civil system, in which discovery is ordinarily quite liberal, criminal discovery is usually exasperatingly limited.¹⁰¹ Most jurisdictions maintain fairly closed-file systems, meaning that prosecutors will often disclose to the defense only material that is required by the Constitution or applicable, generally narrow, statutes.¹⁰² In contrast, under open-file systems, prosecutors often provide the defense with access to the entire (or almost the entire) case file.¹⁰³ The very narrow access to information allowed by closed-file systems is shaped by *Brady v. Maryland*,¹⁰⁴ a decision significantly limiting the information that prosecutors must disclose to the defense under the Due Process Clause.¹⁰⁵ Although modern interpretations of constitutional discovery requirements are more liberal than they once were, they are still very limited. Today, the Constitution requires only that prosecutors disclose exculpatory and impeachment evidence that is material to the defendant’s guilt or punishment.¹⁰⁶ And “material” in this context has been interpreted to mean that there is a reasonable likelihood the undisclosed evidence would have undermined confidence in the result at trial.¹⁰⁷ As Justice Marshall explained in his dissent in *United States v. Bagley*,¹⁰⁸ this difficult standard

100. Professor Natapoff has noted: “Ironically, the very existence of discovery rules can drive police and prosecutors to act in more clandestine ways.” NATAPOFF, *supra* note 39, at 93.

101. See Stephanos Bibas, *Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?*, in *CRIMINAL PROCEDURE STORIES* 129, 147 (Carol S. Steiker ed., 2006) (“Oddly, since the 1930s criminal discovery has been far more restrictive than civil discovery.”).

102. See Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, 302–05, 400–08 (2016). Professors Jenia Turner and Allison Redlich identified just seventeen jurisdictions as “open-file,” meaning these jurisdictions, “while not directly requiring the prosecution to disclose all non-work-product items in its file, mandate the disclosure of critical items such as witness names, witness statements, and police reports.” *Id.* at 304. They found the remainder of the jurisdictions to either be “closed-file” (10)—meaning that they “largely follow the federal rules of criminal procedure and require a relatively limited set of items to be disclosed”—or somewhere between strictly closed-file and open-file (23). *Id.* at 303–05. I have grouped these in-between jurisdictions with the closed-file jurisdictions, as they still require minimal disclosure, such as “witness names and statements but not police reports” or “witness names, but not statements, or . . . only portions of a police report (e.g., those concerning surveillance or identification procedures).” *Id.* at 305.

103. See *id.* at 304.

104. 373 U.S. 83 (1963).

105. See *id.* at 87 (“We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”).

106. See *Giglio v. United States*, 405 U.S. 150, 154 (1972) (“When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule [of *Brady*].”); *Brady*, 373 U.S. at 87.

107. See *United States v. Bagley*, 473 U.S. 667, 678 (1985) (“[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.”); *id.* at 682 (opinion of Blackmun, J.) (“The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”).

108. *Id.* at 685–709 (1985) (Marshall, J., dissenting).

encourages prosecutors to withhold exculpatory evidence and perhaps roll the dice on, first, whether a defendant uncovers this evidence and files a *Brady* claim, and, second, whether the defendant can convince a court, after the fact, that disclosure of the evidence was reasonably likely to have changed the outcome at trial.¹⁰⁹ As one might imagine, *Brady* claims are very difficult to establish. Despite prosecutors regularly withholding *Brady* material, only in about twelve percent of *Brady* (and *Giglio*) cases are defendants successful in establishing a due process violation such that they are entitled to a new trial.¹¹⁰

Within the last decade or so, about a third of jurisdictions have opted to open up prosecutors' files to the defense, allowing the defense to view almost all information recorded by the prosecution.¹¹¹ Proponents of such open-file discovery argue that this approach provides for fairer and more informed guilty pleas and that it also mitigates the concern of prosecutors treating some defendants more favorably by giving them greater insight into evidence the prosecution has in the case.¹¹² In addition to these fairness interests, open-file discovery can promote efficiency.¹¹³ It helps prosecutors learn of weaknesses in their cases at an earlier point in time, fostering earlier dismissals.¹¹⁴ It also can encourage earlier guilty pleas, as defendants have better knowledge of the evidence to be used against them.¹¹⁵ Further, an

109. See *id.* at 701 (explaining that the *Brady* "standard invites a prosecutor, whose interests are conflicting, to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive").

110. See Bibas, *supra* note 101, at 145; see also Bill Moushey, *Win at All Costs: Out of Control*, PITTSBURGH POST-GAZETTE, Nov. 22, 1998, at A1 (examining more than 1,500 misconduct complaints and finding that "[p]rosecutors routinely withhold evidence that might help prove a defendant innocent"). Some time ago (before he was a federal appellate judge), Stephanos Bibas examined "210 *Brady* and *Giglio* cases" from 2004 and found that "twenty-five of 210 claims (11.9%) succeeded, eleven (5.2%) were remanded, and 174 (82.9%) were unsuccessful." Bibas, *supra* note 101, at 144–45. Of course, defendants' lack of success could be due to the fact that the withheld evidence truly was immaterial. In fact, Bibas concluded that "[e]mpirical evidence confirms that most *Brady* and *Giglio* claims involve not smoking guns but ambiguous evidence, which prosecutors can easily overlook." *Id.* at 145. Daniel Medwed, however, has characterized courts as "frugal in doling out *Brady* reversals." Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1543 (2010).

111. See Turner & Redlich, *supra* note 102, at 400–08 (listing jurisdictions' discovery rules and labeling the jurisdictions as "Open-file," "Closed-file," or "Intermediate").

112. See *id.* at 307–09 (explaining that "[e]arly and broad discovery provides defense attorneys with critical information that enables them to counsel their clients more effectively" and that "discretionary discovery invites the risks of favoritism and discrimination").

113. See *id.* at 307 ("Indeed, efficiency has been a key reason behind discovery reforms in a number of jurisdictions."); see also Strickler v. Greene, 527 U.S. 263, 283 n.23 (1999) (recognizing that an open-file policy "may increase the efficiency and the fairness of the criminal process").

114. See Turner & Redlich, *supra* note 102, at 307. Professors Turner and Redlich have explained: "Open-file offers informational benefits to the prosecution as well. Because the defense is better educated and prepared early on, it can provide critical feedback to the prosecution about potential weaknesses in the case and allow the prosecution to make a more informed decision about the disposition of the matter." *Id.*

115. See Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 516 (2009) ("Open file discovery is also thought to bring more pragmatic advantages. Defendants confronted with the evidence against them may be quicker to plead guilty if the evidence is strong, or to argue persuasively for dismissal if the evidence is weak, leading to the earlier resolution of cases . . ."); Turner & Redlich, *supra* note 102, at 307 ("As

open-file approach naturally reduces discovery disputes thereby increasing efficiency of the system.¹¹⁶

Still, open-file discovery remains a minority approach, primarily because of concerns that it puts witnesses at risk—if defendants have access to who is working against them in this capacity, they might retaliate¹¹⁷—and that it is overly burdensome for prosecutors.¹¹⁸ Although open-file jurisdictions have attempted to address these concerns,¹¹⁹ that approach has not yet won out in the United States.¹²⁰ For the most part, then, defendants and the public lack access to all but the most basic information possessed by the prosecution and law enforcement even once the case has ended in either conviction or acquittal.

Although the Constitution requires prosecutorial disclosure of at least *some* information at trial, it very well may not require any such disclosure prior to a defendant pleading guilty. The Supreme Court has determined that the prosecution is not constitutionally required to disclose impeachment information prior to trial,¹²¹ and circuit courts are split as to whether prosecutors must provide defendants with other exculpatory information at that time.¹²² Considering the pervasive role of plea-bargaining in our criminal justice system,¹²³ this drastically diminishes the value of discovery and significantly heightens the secrecy surrounding criminal

the parties gain clarity about the facts in a timely fashion, open-file is also said to promote speedier resolution of the case, whether through a guilty plea or dismissal.”)

116. See Turner & Redlich, *supra* note 102, at 307 (“Supporters of open-file discovery further argue that the practice fosters cooperation between the parties and reduces discovery disputes.”).

117. See *id.* at 309–10 (“The first and chief concern is that open-file discovery endangers witness safety and witness privacy Relatedly, opponents of open-file worry that disclosure of witness information would discourage some citizens from cooperating with law enforcement and jeopardize the integrity of investigations.”).

118. See *id.* at 311 (“A second concern is that an open-file discovery regime would be unduly burdensome, particularly for prosecutors and law enforcement officers.”). There are some additional concerns related to open-file discovery. As Professors Turner and Redlich have explained, “[s]ome critics further worry that open-file discovery will lead to defense abuses, such as the fabrication of stories to explain the evidence, and that this will undermine legitimate prosecution.” *Id.* at 311. Further, “commentators have argued that open-file discovery will tip the balance of advantages too far in favor of the defense.” *Id.* at 311–12. “Finally, supporters of restrictive discovery rules maintain that *Brady* violations are rare and that switching to open-file is not necessary to ensure that prosecutors consistently disclose exculpatory evidence.” *Id.* at 312.

119. See *id.* at 310 (“Open-file discovery rules do provide some safeguards against abuses of the process.”).

120. See *id.* at 400–08 (demonstrating that open-file is the minority approach).

121. See *United States v. Ruiz*, 536 U.S. 622, 625 (2002) (holding that the Constitution does not require prosecutors to disclose impeachment information to the defendant before he pleads guilty).

122. The Supreme Court has not decided whether the government must disclose exculpatory information to the defendant before he pleads guilty, but some circuit courts have determined that such a disclosure is not constitutionally required. See, e.g., *Alvarez v. Brownsville*, 904 F.3d 382, 392 (5th Cir. 2018) (“[W]e conclude that the defendant’s guilty plea precludes her from claiming that the government’s failure to disclose was a *Brady* violation.” (internal quotations and alterations omitted)); *Friedman v. Rehal*, 618 F.3d 142, 154 (2d Cir. 2010) (suggesting that the *Ruiz* rule would apply to exculpatory evidence); see also *United States v. Bagley*, 473 U.S. 667, 676 (1985) (“This Court has rejected any such distinction between impeachment evidence and exculpatory evidence.”).

123. See *supra* Part I.A.

convictions.¹²⁴ Some prosecutors opt to voluntarily provide defendants with certain exculpatory and impeachment information before the defendant pleads guilty, but this is far from a universal practice.¹²⁵ Thus, although some discovery practices are constitutionally required, the quantum of information revealed to defendants prior to conviction—information highly important to their futures—is quite minimal. Instead, secrecy is ubiquitous.

E. Conviction Evidence

Secrecy has also seeped into trial, where the government increasingly relies on science- and technology-based evidence that is shielded from public view. Indeed, modern criminal justice practices have added layers of complexity and secrecy to traditional practices.

This secrecy stems from modern police departments, prosecutors, and judges relying on commercial technology to carry out their duties.¹²⁶ For example, in drunk driving cases, prosecutors often rely on breathalyzer evidence.¹²⁷ However, when criminal defendants have requested to examine the technology underlying these instruments, courts have generally denied them access to the source codes and algorithms producing the breathalyzer outputs.¹²⁸ Similarly, when prosecutors have presented DNA evidence in criminal cases and that evidence was developed using probabilistic genotyping software, courts have generally denied criminal defendants access to the inner workings of the software that produced the inculpatory evidence.¹²⁹

In both of these situations, courts' decisions to deny defendants access to this important information relevant to the accuracy and reliability of the evidence being presented against them was based on the business interests of third parties that

124. See NATAPOFF, *supra* note 39, at 96–97 (“To put it another way, one of the reasons why the public lacks access to and understanding of the criminal process is that defendants who plead guilty—i.e., most defendants—lack tools to access information held by the government about their own cases.”).

125. See *id.* at 93 (“In practice, some prosecutors’ officers provide this information to defendants anyway, even though constitutionally speaking they do not have to.”).

126. See Ryan, *supra* note 6, at 293 (“Prosecutors, judges, and juries today rely on a wide range of evidence to convict criminal defendants. Much of this evidence is produced by scientific and technological research that is captured in generally inaccessible computer programs and their underlying algorithms and source codes.”).

127. See *id.* at 294 (“[W]hen a police officer pulls over a suspected drunk driver, he often has the driver blow into a breathalyzer machine to determine the driver’s blood or breath alcohol content.”)

128. See, e.g., *Hills v. State*, 663 S.E.2d 265, 266 (Ga. Ct. App. 2008) (affirming the trial court’s denial of defendant’s discovery request for breathalyzer source code); *Fargo v. Levine*, 747 N.W.2d 130, 135 (S.D. 2008) (“We affirm the district court’s judgment, concluding the district court did not abuse its discretion in denying [the defendant’s] motion to compel disclosure of the source code”); Ryan, *supra* note 6, at 307 (“Despite this need for the program information that controls breathalyzers, courts have generally refused to grant defendants access to these algorithms and source codes.”).

129. See Ryan, *supra* note 6, at 321 (“Commercial PGS developers have generally sought to protect their creations through secrecy, and many courts have granted them this sphere of secrecy with respect to the programs’ algorithms and source codes.”).

developed the commercial technology.¹³⁰ The breathalyzer and probabilistic genotyping software developers claimed that their technology constitutes protected trade secrets and argued that forced disclosure would substantially harm the developers' business interests.¹³¹ If, for example, a judge ordered disclosure of the source code for the breathalyzer that produced inculpatory results, the breathalyzer developer's competitors could capture that source code and produce their own competing instruments without making the same investment in research and development.¹³² Courts have generally held that these trade secret interests weigh in favor of denying requests for the details of these programs in criminal cases.¹³³ This leads to some criminal defendants being convicted by secret evidence even though further examination of this evidence could reveal inaccuracies and expose the potential for wrongful convictions.¹³⁴

F. Jury Deliberations

A wall of secrecy also protects the privacy of jury deliberations which has long been a central feature of the American jury.¹³⁵ Not only do jurors deliberate in private, behind closed doors, but jurors are generally prohibited from testifying about the details of those deliberations.¹³⁶ Whether secrecy was a historical accident or deliberate,¹³⁷ it has been considered axiomatic to the jury's functioning.¹³⁸ Jury secrecy is said to secure a number of goals. It protects the jurors from outside pressure and thus encourages a process and verdict similarly free from external

130. See Ryan, *supra* note 6, at 319–20.

131. See Ryan, *supra* note 7, at 105 (explaining that, “where criminal justice algorithms are concerned, the problem of secrecy pits the profit motives of algorithm developers against the justice concerns associated with incorrect and discriminatory recidivism predictions and wrongful convictions”); Ryan, *supra* note 6, at 330 (“[I]n many cases, for-profit companies have created the programs prosecutors regularly employ.”).

132. See Ryan, *supra* note 7, at 64 (“As companies migrate from patent to trade secret protection and bolster the secrecy surrounding their new technologies, not only do these technologies become unavailable to the companies' competitors, but they also become unavailable to the general public more broadly.”).

133. See *id.* at 88.

134. Ryan, *supra* note 6, at 270 (“Across the country, judges and juries are convicting defendants based on secret evidence.”).

135. See Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 217 (2005) (“The form of jury trial that reached the American colonies also included the type of jury isolation that facilitated secret deliberations.”).

136. See *id.* at 218; see also, e.g., FED. R. EVID. 606(b) (“During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations . . .”).

137. See Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 893 (1983) (“Secrecy, some jury critics maintain, is an historical accident.”).

138. See Courselle, *supra* note 135, at 218 (“While over time jury service lost some of its privations, the secrecy of deliberations remains an integral part of the jury trial.”); Note, *supra* note 137, at 886 (“[T]he notion that a jury deliberates in secret has long been taken for granted by every American jurisdiction. Indeed, secrecy seems fundamental to the deliberative process.”); see also *Tanner v. United States*, 483 U.S. 107, 117 (1987) (“By the beginning of this century, if not earlier, the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict.”).

influences.¹³⁹ Secrecy encourages open and honest deliberation among the jurors.¹⁴⁰ Furthermore, secrecy is said to sanitize the verdict. Generally not subject to interrogation, jury verdicts can paper over any mistakes made during jury deliberations. By delivering a single verdict in each case, jury verdicts can be held up as the “truth” and thus inspire confidence in the system.¹⁴¹

Just like the historically secret grand jury proceedings, jury deliberations have become somewhat more open in recent years. In 2017, after previously rejecting challenges to jury deliberations based on accusations that deliberating jurors were under the influence¹⁴² and that a juror had lied during voir dire about her impartiality,¹⁴³ in the 2017 case of *Peña-Rodriguez v. Colorado*,¹⁴⁴ the Supreme Court determined that a concern of racism infecting jury deliberations was important enough to overcome this strong presumption of impenetrability.¹⁴⁵ As with grand jury proceedings, then, courts have recently let some light into the jury deliberation room.

G. Punishment

Secrecy in the criminal justice system extends even to punishment. Although sentences are ordinarily public in nature, how sentences are actually carried out is more often hidden from the public. Perhaps not surprisingly, much punishment happens behind closed doors. With more than two million persons in American jails and prisons, the United States has the highest incarceration rate in the entire

139. See Courselle, *supra* note 135, at 211 (“[D]eliberative secrecy preserves the jury’s independence by protecting jurors from outside influences.”); Note, *supra* note 137, at 890 (“A related danger is that juries may be intimidated into rendering certain verdicts by the specter of subsequent pressures.”).

140. See Courselle, *supra* note 135, at 211 (“[D]eliberative secrecy enables jurors to engage in the open discussion and free exchange of ideas that can lead to more well-considered verdicts.”); Note, *supra* note 137, at 890–91 (“A juror who realizes, consciously or subconsciously, that deliberations may become a part of the public domain is less likely to argue for judgments contrary to public opinion, and the deliberative process is therefore less likely to produce them.”).

141. See *Tanner*, 483 U.S. at 120–21 (“[F]ull and frank discussion in the jury room, jurors’ willingness to return an unpopular verdict, and the community’s trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.”); George Fisher, *The Jury’s Rise As Lie Detector*, 107 *YALE L.J.* 575, 706 (1997) (“The inexorable flow of factfinding power to the jury was due, finally, to the jury’s capacity to erase all blemishes.”); Note, *supra* note 137, at 891 (“Finally, and most subtly, exposure of jury deliberations brings to light not only differences of opinion among jurors, but also decisional premises with which various members of the public are bound to disagree. The revelation of these inevitable yet disquieting divergences may unnecessarily undermine public acceptance of jury verdicts.”).

142. See *Tanner*, 483 U.S. at 127 (explaining that “long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry” and concluding that, “[i]n light of . . . other sources of protection of petitioners’ right to a competent jury,” a post-verdict inquiry into juror misconduct was unnecessary).

143. See *Warger v. Schauers*, 574 U.S. 40, 44 (2014). Note that *Warger* was a civil case. See *id.* at 42.

144. 137 S. Ct. 855 (2017).

145. *Id.* at 869. The Court explained: “A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.” *Id.*

world.¹⁴⁶ The punishment related to this significant incarcerated population is often hidden—in some instances dramatically so, by high walls protected by security guards and razor wire.¹⁴⁷ While the relatively small number of visitors who venture within the prison walls may get a glimpse of the conditions of confinement, these peeks into prison culture are, for the most part, extremely limited.¹⁴⁸ Certainly, some horrendous conditions of incarceration have become fairly widely known. For example, the 2011 Supreme Court case of *Brown v. Plata*¹⁴⁹ detailed the severe overcrowding problem in California prisons.¹⁵⁰ The Court even took the rare step of including grainy photographs in an appendix to its opinion to drive home the egregiousness of the conditions caused by the overcrowding.¹⁵¹ Other examples of *known* poor prison conditions include the lack of air conditioning in some blistering Texas prisons and the regular use of solitary confinement despite evidence establishing that it has a significant negative impact on individuals' health.¹⁵² Many details of prison conditions remain generally unknown, however.

146. See THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 2 (Meghan J. Ryan & William W. Berry III eds., 2020); *United States Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/US.html> (last visited Jan. 29, 2021) (“With over two million people behind bars at any given time, the United States has the highest incarceration rate of any country in the world.”). In the wake of the global pandemic, though, there has been a decrease in this population due to fewer defendants being sentenced because of court closures, jails and prisons releasing inmates to help control the spread of the virus, and courts sending fewer individuals back to prison for parole violations. See Damini Sharma, Weihua Li, Denise Lavoie & Claudia Lauer, *Prison Populations Drop by 100,000 During Pandemic But Not Because of COVID-19 Releases*, THE MARSHALL PROJECT (July 16, 2020) <https://www.themarshallproject.org/2020/07/16/prison-populations-drop-by-100-000-during-pandemic#:~:text=There%20has%20been%20a%20major,Project%20and%20The%20Associated%20Press> (“There has been a major drop in the number of people behind bars in the U.S. Between March and June, more than 100,000 people were released from state and federal prisons, a decrease of 8 percent . . .”).

147. Note that a significant portion of the population that is touched by incarceration is in local jails. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>. Although the opacity of their punishment is not as dramatically protected—they are in small local jails rather than high-security prisons—their punishment is similarly hidden from public view.

148. Cf. Ruth Delaney, Ram Subramanian, Alison Shames & Nicholas Turner, *Examining Prison Culture Today*, VERA INST. OF JUST. (Sept. 2018), <https://www.vera.org/reimagining-prison-web-report/examining-prisons-today> (explaining how difficult it is for prisoners to maintain connections with the outside world); *Take the #VisitAPrison Challenge!*, FAMILIES AGAINST MANDATORY MINIMUMS, <https://famm.org/visitaprison/> (last visited Oct. 2, 2021) (urging legislators to visit prisons because “[y]ou don’t know if you don’t go”).

149. 563 U.S. 493 (2011).

150. See *generally id.* For example, the Court explained:

Because of a shortage of treatment beds, suicidal inmates may be held for prolonged periods in telephone-booth sized cages without toilets. A psychiatric expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. Prison officials explained they had “no place to put him.”

Id. at 503–04 (internal citations omitted).

151. See *id.* at Appx.

152. See Meghan J. Ryan, *Framing Individualized Sentencing for Politics and the Constitution*, 58 AM. CRIM. L. REV. 1747, 1766 (2021).

Furthermore, there appears to be a growing trend of incarceration facilities claiming trade secret protection over their practices.¹⁵³ For example, when the American Civil Liberties Union requested the operating procedures of a Utah jail to help determine how an inmate who had slipped off her bunk bed ended up dead, the jail refused to turn over its procedures.¹⁵⁴ Although they would have been discoverable had the jail employees written the procedures themselves, here, the task was outsourced, and the author of the procedures claimed that sharing the work would harm his business interests.¹⁵⁵ Such maneuvering erects a wall of secrecy around practices integral to the everyday lives of incarcerated persons—a population that lacks a vociferous mouthpiece to the outside world and has very little political influence.¹⁵⁶ This secrecy makes it more difficult for inmates to successfully challenge the conditions of their confinement, and it also makes it difficult, if not impossible, for the public to truly understand the nature of a punishment. Not only does this affect political outcomes that could have an impact on incarceration, but it also means that sentencers—whether those be judges or jurors—may very well lack full understanding of the punishments they actually impose in real cases.¹⁵⁷

Perhaps even more concerning, the government has hidden the particulars of the ultimate punishment: the death penalty. On this front, states have maintained secrecy in several areas.¹⁵⁸ In a number of instances, they have refused to disclose the combination of drugs to be used in lethal injections and the dosages of each drug used.¹⁵⁹ They have refused to disclose the suppliers of the drugs they are using.¹⁶⁰ They do not disclose the identities and qualifications of the individuals administering the drugs.¹⁶¹ They significantly limit the number of people who may

153. Cf. Michaels, *supra* note 8 (explaining how “[j]ails are keeping more than their rules out of the public eye”).

154. *See id.*

155. *See id.* (“The guidelines had been written by a contractor named Gary DeLand, who insisted that sharing his copyrighted work would jeopardize his business of developing jail guidelines and would open sheriffs to lawsuits.”).

156. *See* Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1463 (2017) (explaining “that participants in the political process have little incentive to be responsive to the constitutional rights of prisoners, criminal defendants, or those who are not citizens” because “[t]hese individuals lack political power—they do not give money to political candidates; they are generally prohibited from voting; and they are unpopular and often unsympathetic”).

157. Further, judges’ refusal to inform jurors about the punishment consequences of convictions in cases, *see* Jeffrey Bellin, *Is Punishment Relevant After All? A Prescription for Informing Juries of the Consequences of Conviction*, 90 B.U. L. REV. 2223, 2237 (2010) (“The prevailing rule in American courts forbids witnesses, attorneys, or judges from informing jurors of the consequences of conviction—whether through testimony, arguments of counsel, or jury instructions.”), let alone the conditions associated with those punishments, exacerbates this secrecy.

158. *See* Berry & Ryan, *supra* note 9, at 423.

159. *See id.* (“In many cases, states have elected to keep the identity of the new drugs secret, as well as the names of the drug manufacturers.”).

160. *See id.*

161. *See id.* (noting that the recent rise in secrecy around lethal injection protocols “complements states’ traditional determinations to keep the identities of executioners secret”).

observe the execution taking place.¹⁶² And some lethal injection protocols employ a paralytic to mask any outward manifestations of pain that the inmate may be experiencing while being killed.¹⁶³ Some litigants have objected to this secrecy, but they have generally been unsuccessful in gaining access to important execution information.¹⁶⁴ In *Sepulvado v. Jindal*,¹⁶⁵ for instance, the Fifth Circuit rejected the death-row plaintiff's request that the state disclose the details of the execution protocol and concluded that "[t]here is no violation of the Due Process Clause from the uncertainty that Louisiana has imposed on Sepulvado by withholding the details of its execution protocol."¹⁶⁶ Provocatively, the court conceded that "[p]erhaps the state's secrecy masks 'a substantial risk of serious harm'"¹⁶⁷ stemming from the protocol, "but," the court furthered, "it does not create one."¹⁶⁸ Defending its position, the court pronounced that "[c]ourts are not supposed to function as 'boards of inquiry charged with determining best practices.'"¹⁶⁹ In a parallel fashion, the Supreme Court in *Baze v. Rees*¹⁷⁰ rejected the petitioner's claim that a lethal injection protocol employing a paralytic that could possibly mask the petitioner's pain constituted cruel and unusual punishment.¹⁷¹ Although the trial court had "specifically found [that the paralytic] . . . serve[d] 'no

162. See *id.* ("Not only have executions transitioned from the public to the private sphere, leaving most Americans without the experience of watching someone die by lethal injection or firing squad, but also gaining any access to the details of these executions is exceedingly difficult, if not impossible."). There is at least one additional layer of secrecy with respect to lethal injections. This stems from the government's use of a paralytic to hide the corporal writhing that would likely otherwise be observed as the death row offender is being put to death. See *id.* at 423–24. There seems to be no clinical reason for this paralytic, which actually complicates the execution process by making it more difficult to determine whether the offender has been sufficiently sedated before he is killed. See Brief for Petitioners at 51, *Baze v. Rees*, No. 07-5439, 2007 WL 3307732 (Nov. 5, 2007) (stating that "[i]t is undisputed that pancuronium is not a necessary component of the execution procedure" and pointing out that the lower court "concluded that the 'use of pancuronium in Kentucky's lethal injection protocol serves no therapeutic purpose'" (internal alterations omitted)); Gregory D. Curfman, Stephen Morrissey & Jeffrey M. Drazen, *Physicians and Execution*, 358 NEW ENG. J. MED. 403, 403 (2008) ("The use of a neuromuscular blocker, pancuronium bromide, as part of the protocol has been especially controversial, since it has no anesthetic properties and only paralyzes the person, which can mask inadequate anesthesia if a sufficient dose of sodium thiopental has not been administered.").

163. See Berry & Ryan, *supra* note 9, at 406.

164. See Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1392 (2014) ("The majority of courts, especially federal appellate courts, have permitted states to keep secret important details from their lethal injection procedures.").

165. 729 F.3d 413 (5th Cir. 2013).

166. *Id.* at 420.

167. *Id.*

168. *Id.* For a summary of how various courts have decided this and other issues, see Berger, *supra* note 164, at 1392–95.

169. *Sepulvado*, 729 F.3d at 419 (quoting *Baze v. Rees*, 553 U.S. 35, 51 (2008) (plurality opinion)).

170. 553 U.S. 35.

171. See *id.* at 41, 58 (stating that "Kentucky's decision to include the [paralytic in the lethal cocktail] does not offend the Eighth Amendment" and ultimately concluding that the petitioners failed to "carr[y] their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment").

therapeutic purpose,”¹⁷² the Court suggested that using the paralytic made the execution more palatable to the public, as it would “prevent[] involuntary physical movements during unconsciousness that may accompany the injection of potassium chloride.”¹⁷³ The Court further explained that the state “has an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress.”¹⁷⁴ Indeed, these possible signs of distress were exactly what the state sought to hide. Criminal justice secrecy, it seems, extends even to the very last moments of punishment.

II. JUSTIFICATIONS FOR SECRECY

Secrecy is pervasive within the criminal justice system, and its extent may very well be shocking, but there are some justifications for secrecy in at least some circumstances. Primarily, the government relies on secrecy to preserve its prosecutorial interests. These concerns involve gathering and maintaining evidence, as well as concentrating prosecutorial efforts on pursuing justice. But secrecy also furthers the government’s interest in securing convictions even if these convictions are not just. For example, secrecy may provide prosecutors with an informational advantage over defendants, making it easier to land convictions. Beyond promoting prosecutorial interests, secrecy is also cited as protecting witnesses, the interests of other third parties, and defendants themselves in some circumstances. Finally, secrecy may further confidence in the system, limit excessive litigation, and promote finality—even if this secrecy involves covering up mistakes.

A. *The Government’s Prosecutorial Interests*

A significant reason for criminal justice secrecy is to preserve the government’s interest in prosecution. This can be seen throughout the entire course of criminal proceedings—in government investigations, grand jury proceedings, plea-bargaining, discovery, trial proceedings, jury deliberations, and punishment. From beginning to end, secrecy serves the government’s aim in prosecution, at least to some extent.

Secret surveillance allows the government to uncover criminal activity and collect more information on suspects, furthering prevention, prosecution, and conviction.¹⁷⁵ The government’s undercover agents, confidential informants, and covert technological resources unearth vast amounts of criminal evidence that can be used both for deterrence purposes and convictions. Not only does the secrecy associated with these sources allow the government to uncover information in the first instance, but it also allows the government to continue cashing in on these sources

172. *Id.* at 73 (Stevens, J., concurring).

173. *Id.* at 57. Additionally, the Court noted that the trial court “specifically found” that the paralytic also functions to “hasten[] death” by “stop[ping] respiration.” *Id.*

174. *Id.*

175. *See supra* Part I.A.

and thus furthers its criminal law enforcement efforts.¹⁷⁶ Indeed, the government can sometimes maintain the secrecy of the source even once the information is used in a particular case.¹⁷⁷ For example, an undercover source might be able to maintain his covert identity and thus continue providing further important information on criminal behavior.¹⁷⁸ Additionally, the government can sometimes maintain the secrecy of the information itself, which might lead to additional information that can be used in prosecuting a defendant.¹⁷⁹ One area in which maintaining secrecy is especially important is where national security issues are at play.¹⁸⁰ But the government also benefits from maintaining the secrecy of other information as well.

Secrecy also serves the government's prosecutorial interests in grand jury proceedings, plea-bargaining, discovery, and jury deliberations. When grand jury proceedings are kept secret, it is less likely that witnesses and suspects will disappear, or that grand jurors will be unduly influenced by public pressure before indictments are handed down and all relevant evidence can be collected.¹⁸¹ Secrecy in plea-bargaining is said to ease the burden on prosecutors, as greater transparency might require prosecutors to record the details of their plea offers or the deals struck with defendants.¹⁸² Freeing prosecutors from these administrative responsibilities means that they can instead focus their efforts on securing convictions or achieving other just results. Plea-bargaining secrecy also promotes candor between the prosecution and defense as they try to hammer out a deal.¹⁸³ An inability to speak candidly could jeopardize any chance of a deal and further heighten prosecutors' burdens as they instead take the case to trial.¹⁸⁴ The secrecy associated with discovery also eases the burdens on prosecutors and allows them to focus on achieving justice in individual cases.¹⁸⁵ Finally, jury deliberation secrecy further serves to foster open and honest deliberations that are free of outside influence.

176. See NATAPOFF, *supra* note 39, at 62.

177. See *id.* at 72.

178. See *id.* at 62.

179. See *id.* at 95.

180. See Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. REV. 103, 107–08 (2017) (“[N]ational security is a longstanding basis for withholding otherwise relevant information during litigation.”).

181. See *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681–82 (1958).

182. See Turner, *supra* note 11, at 992 (noting that “[s]ome commentators . . . advanc[ing] practical arguments in favor of continued secrecy . . . have argued that documenting plea discussions or plea offers would be time consuming and unfeasible”).

183. See *id.* at 988 (“A common reason given for confidentiality in plea negotiations is that it is necessary to encourage candor among the participants.”).

184. See *id.* (“If the parties were concerned that their statements and offers would become public, the reasoning goes, they may not be as forthcoming or flexible in the negotiations. Under this view, publicity may discourage some parties to engage in the process altogether.”).

185. See Turner & Redlich, *supra* note 102, at 311 (“A second concern is that an open-file discovery regime would be unduly burdensome, particularly for prosecutors and law enforcement officers.”). Professors Turner and Redlich explained:

Beyond advancing the government's prosecutorial interests in protecting the public and achieving justice, secrecy in the criminal justice system also aids the prosecution in securing convictions and implementing punishments. Although the government's ultimate goal is justice, its interests are complicated by its adversarial relationship with criminal defendants.¹⁸⁶ And prosecutors, spurred on by promotions based on conviction rates and a prosecutorial culture that respects "wins,"¹⁸⁷ are sometimes blinded by their position opposite criminal defendants.¹⁸⁸ In this environment, and with these incentives, secrecy furthers prosecutorial interests beyond seeking justice; it furthers securing convictions and implementing punishments regardless of whether these goals are consistent with achieving justice.

Along these lines, the secrecy of grand jury proceedings not only aids prosecutors in preventing evidence from disappearing, but it may also be useful in reaching results regardless of the integrity of prosecution.¹⁸⁹ Secrecy in this context allows prosecutors to intimidate prospective defendants in a case—or even in related cases—and persuade them to plead guilty.¹⁹⁰ In particular, they could exaggerate evidence in a case or offer a defendant the opportunity to avoid further publicity by pleading guilty.

[P]rosecutors would need to maintain a log of documents disclosed to the defense to avoid claims that certain evidence was not in the file and was not disclosed. While an electronic discovery system can help with this, a switch to such a system is quite costly, at least at the outset. Open-file discovery is also expected to require additional manpower to redact documents containing sensitive information and to litigate protective measures.

Id.

186. See *Berger v. United States*, 295 U.S. 78, 88 (1935) (explaining that the prosecutor "is the representative not of an ordinary party to a controversy, but of a Sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done"); AM. BAR ASS'N MODEL CODE OF PRO. RESP. EC 7-13 (1982) ("The responsibility of a public prosecutor is different from that of the usual advocate; his duty is to seek justice, not merely to convict.").

187. See Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851, 900 (1995) ("Prosecutorial culture dictates that the prosecutor is heavily invested in winning her case."); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 *B.U. L. REV.* 125, 135 (2004) ("Individual prosecutors may not have explicit financial incentives to procure convictions—such as receiving money for each guilty verdict—yet the inducements are implicit in a system where promotions are contingent on one's ability to garner convictions."); Erik Luna, *System Failure*, 42 *AM. CRIM. L. REV.* 1201, 1213 (2005) ("In general, front-line prosecutors are evaluated for promotion (and thus higher salary and prestige) by their win-loss record, while chief prosecutors will be reelected or retained based on, inter alia, the rate and number of convictions obtained by their office.").

188. See Eric S. Fish, *Against Adversary Prosecution*, 103 *IOWA L. REV.* 1419, 1432–35 (2018).

189. Secrecy also sometimes allows the government to sidestep Fourth Amendment protections in its information-gathering, and, although I would not classify this as supporting convictions necessarily adverse to justice, it could be said to trample on important privacy rights.

190. Cf. Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 *MICH. L. REV.* 857, 889 (1995) ("The secrecy of the grand jury room is in effect the wall between prisoners that creates a classic 'prisoner's dilemma' to confess the truth.").

Where plea-bargaining is concerned, secrecy does more than just ease administrative burdens on prosecutors.¹⁹¹ It also prevents defendants from gaining useful information about plea deals prosecutors have offered to other defendants, putting defendants at an informational disadvantage; this means that, at least in some cases, defendants may not be getting as good of deals in plea-bargaining as prosecutors are willing to offer. This allows prosecutors to more easily persuade defendants to plead guilty, cooperate with the prosecution, and aid the government in other ways.

Secrecy in discovery also does more than ease the burdens on prosecutors;¹⁹² it furthers the government's interest in securing convictions (even if that does not necessarily achieve justice). The less information that a defendant receives in advance of a plea or trial, the greater informational advantage and leverage the prosecution has in obtaining a guilty plea or trial conviction and in securing a more severe punishment. In this sense, limited discovery certainly advances the government's interest in convicting and punishing defendants. Although secrecy in discovery is generally not heralded as promoting this governmental interest as divorced from justice, the Court and commentators have suggested that this secrecy is consistent with the adversarial nature of the American criminal justice system.¹⁹³ And this adversarial approach, which pits the prosecution against the defense,

emphasizes the prosecutor's role in seeking convictions rather than the government's ultimate goal of achieving justice. Secrecy in discovery thus primarily facilitates this narrower conviction goal.

Finally, although the secrecy involved in prosecutors' uses of some types of conviction evidence and the details of punishment do not necessarily serve the government's interest in ensuring community safety or justice, it does further prosecutors' goals of securing convictions and carrying out punishments. If defendants cannot gain access to the evidence presented against them, it of course makes it difficult for those defendants to challenge that evidence. This means that defendants have very limited defenses where the accuracy of evidence like breathalyzers and certain types of DNA evidence are at play.¹⁹⁴ Unfortunately, this creates a very

191. See *supra* text accompanying note 182.

192. See *supra* text accompanying note 185.

193. See, e.g., *United States v. Bagley*, 473 U.S. 667, 675 & n.6 (1985) (suggesting that *Brady* represents a compromise between secrecy, which is consistent with the adversary system, and disclosure, which helps avoid miscarriages of justice); see also H. Lee Sarokin & William Zuckermann, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1090–91 (1991) (“Beyond the practical and unsubstantiated concern of preventing defendants’ misconduct before and during trial, the argument in favor of continued restrictions on criminal discovery is usually premised on the theory that to allow criminal defendants greater access to the government’s evidence is to undermine the adversary system of trial.”). But see *Bagley*, 473 U.S. at 694 (Marshall, J., dissenting) (explaining that the “grim reality” that a prosecutor may fail to disclose evidence essential to a fair trial “poses a direct challenge to the traditional model of the adversary criminal process”); cf. *Williams v. Florida*, 399 U.S. 78, 82 (1970) (“The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.”).

194. See Ryan, *supra* note 6, at 310, 319–20.

real possibility of wrongful conviction. Further, if the prosecution cares more about an imposed sentence being carried out than the conditions of that punishment or whether the implementation of the punishment is actually just, then secrecy related to punishment serves the prosecution's interests.

B. Additional Justifications for Secrecy

The government's interests in prosecution seem to be the primary justifications for the extensive secrecy within the criminal justice system. There are, however, additional reasons that could perhaps justify this secrecy. These relate to protecting witnesses and other third parties, safeguarding prospective defendants' reputations, and boosting confidence in the system while also furthering finality and limiting excessive litigation.

One significant justification for cloaking criminal procedures in secrecy is to protect witnesses. This is the primary justification for closed-file discovery,¹⁹⁵ for example, and it is a significant justification for the secrecy surrounding government surveillance where confidential informants are at play.¹⁹⁶ Certainly, protecting witnesses is important. Not only is it necessary to the government's general charge of protecting the public, but protecting witnesses also helps encourage witnesses to come forward with information, which also furthers the government's interest in prosecution. But witness protection might also be achieved by more targeted protective orders in many instances, and secrecy cannot always fully protect witnesses anyway, as witness identities must often be revealed at trial.

Somewhat surprisingly, another proffered justification for secrecy is the protection of other third parties. At trial, for example, defendants are regularly denied access to the source codes and algorithms underlying breathalyzers and probabilistic genotyping systems.¹⁹⁷ Similarly, courts have refused to require jails to turn over their operating procedures to investigators looking into, for example, unexplained prisoner deaths.¹⁹⁸ Further, states deny death row inmates the opportunity to know who their executioners are and the source of the lethal drugs that will be pumped into their veins to kill them.¹⁹⁹ These secrets are kept in the name of protecting third parties—the developers and manufacturers of the computer programs and procedures used to convict criminal defendants and the identities of the lethal

195. See Turner & Redlich, *supra* note 102, at 309 (“The first and chief concern is that open-file discovery endangers witness safety and witness privacy and therefore conflicts with the government's duty to protect the public.”).

196. See *Roviaro v. United States*, 353 U.S. 53, 59 (1957) (explaining that the purpose of the “informer's privilege . . . is the furtherance and protection of the public interest in effective law enforcement” and that “[t]he privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation”).

197. See Ryan, *supra* note 6, at 307–08, 319–21.

198. See Michaels, *supra* note 8.

199. See Berry & Ryan, *supra* note 9, at 423 (noting that states often maintain secrecy with respect to the types of lethal injection drugs being used, from where those drugs have been sourced, and identities of the executioners).

drugs, procedures, and executioners that are used to kill or otherwise punish them.²⁰⁰ In some circumstances, these secrets are meant to uphold statutory trade secret law.²⁰¹ In other circumstances—and especially in the execution context—they are meant to uphold additional policy considerations, such as preserving the reputations of the executioners injecting and the pharmaceutical companies and compounding pharmacies supplying the lethal drugs.²⁰²

Secrecy is also thought to protect the defendant in some circumstances. The primary example of this is grand jury secrecy, for which one of the central purposes is to preserve defendants' reputations.²⁰³ If the grand jury does not indict, the secrecy enconcing the grand jury proceedings is meant to shield the public from knowing who was suspected of a crime but against whom the grand jury determined there was not probable cause to pursue the matter. This secrecy is not always effective in serving this purpose, though. The media frenzy surrounding the grand jury's refusal to indict Officer Darren Wilson for the 2014 deadly shooting of Michael Brown in Ferguson, Missouri is just one example.²⁰⁴ Indeed, this defendant-reputation-preservation goal of jury secrecy will likely become increasingly less effective in an ever increasingly connected world, where the appetite for alluring new content seems insatiable.

Beyond these considerations, three additional, and related, justifications could be argued to further support criminal justice secrecy: maintaining confidence in the system, limiting excessive litigation, and buttressing the goal of finality. For example, although transparency is heralded as important to improving police accountability and thus boosting confidence in the system, one might argue that keeping some police errors—such as certain illegal searches—secret could promote confidence in the system. The idea is that, if these errors are not publicized, citizens will believe that police affairs are proceeding smoothly, efficiently, and fairly, as is the criminal justice system overall. And one could argue that this approach is consistent with the Fourth Amendment, which has the primary goal of protecting ordinary citizens' privacy rather than protecting individual criminal defendants.²⁰⁵ Thus,

200. See Mary D. Fan, *The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy*, 95 B.U. L. REV. 427, 446 (2015) (“Sponsors of existing confidentiality laws [for lethal injection drug suppliers] and similar pending legislation state the goals of these laws are to protect lethal injection drug suppliers from threats and other forms of intimidation.”); see also Berger, *supra* note 164, at 1418–19 (explaining that the government would like to keep the source of its drugs secrets so that its suppliers may maintain anonymity and will not be pressured to stop supplying lethal drugs to the government).

201. See Michaels, *supra* note 8; Ryan, *supra* note 6, at 319.

202. See Berger, *supra* note 164, at 1418–19; Fan, *supra* note 200.

203. See *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958); *supra* text accompanying note 74. Commentators also suggest that the secrecy of plea-bargaining protects defendants, as it allows prosecutors the flexibility to show mercy when negotiating deals with criminal defendants. See Turner, *supra* note 11, at 989 (“Secrecy may also be defended on the ground that it enables prosecutors to use their discretion to exercise mercy where the circumstances warrant it.”).

204. See *supra* text accompanying notes 76–80.

205. See *Herring v. United States*, 555 U.S. 135, 141 (2009) (“First, the exclusionary rule is not an individual right and applies only where it results in appreciable deterrence.” (internal citations and quotations omitted));

one might argue that it does not always further constitutional goals to make mistakes that occur during police investigations public. Indeed, in modern cases involving Fourth Amendment violations resulting from police officers' errors, the Court has ordered that the traditional Fourth Amendment remedy of excluding the evidence is unavailable.²⁰⁶ A more blatant example of citing public confidence (and, relatedly, finality) in support of secrecy is in relation to jury deliberations. As the Court unapologetically explained in *Tanner v. United States*:²⁰⁷

There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of post-verdict scrutiny of juror conduct.²⁰⁸

In instances such as these, making mistakes within the system public may not further constitutional goals, but it could threaten otherwise legitimate convictions and simultaneously undermine confidence in the criminal justice system. And if confidence in the system wanes too significantly, it could potentially have disastrous consequences. If people do not believe in the system, they may neglect to follow

United States v. Leon, 468 U.S. 897, 906 (1984) ("The [exclusionary] rule thus operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." (internal quotations omitted)). Another example is a prosecutor's mistake in failing to turn over *Brady* material to the defense. In *United States v. Bagley*, 473 U.S. 667 (1985), the Court indicated that the high materiality standard courts are to use in *Brady* cases supports the interest in finality. See *Bagley*, 473 U.S. at 675 n.7 ("Furthermore, a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments."); see also Steven M. Dettelbach, *Commentary: Brady from the Prosecutor's Perspective*, 57 CASE W. RES. L. REV. 615, 617 (2007) (hypothesizing that "courts have developed this materiality requirement in order to serve as a self-defense mechanism and to protect from second guessing rightful convictions" and stating that, "as a self-defense mechanism, unfortunately, we have had a narrowing of the *Brady* rule by this materiality requirement to prevent against the kind of armchair quarterbacking and second guessing that gives no finality in the criminal justice system"); see also John G. Douglass, *Can Prosecutors Bluff? Brady v. Maryland and Plea Bargaining*, 57 CASE W. RES. L. REV. 581, 589 (2007) (noting that "judicial efforts to enforce *Brady* conflict with judicial interests in preserving the finality of a jury's verdict").

206. See, e.g., *Herring*, 555 U.S. at 144 (concluding that the police error in the case did "not rise to [the] level" of being "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system"); see also *Leon*, 468 U.S. at 925 (determining that exclusion would be an inappropriate remedy in the case).

207. 483 U.S. 107 (1987).

208. *Id.* at 120–21 (internal citations omitted).

the law, undermining the deterrence value of criminal laws.²⁰⁹ Taken to the extreme, anarchy could ensue. Neglecting to disclose these mistakes could also further the goals of minimizing excessive litigation and preserving finality. If the public is not aware of a police officer's mistake or of juror misconduct that does not directly bear on the defendant's substantive innocence, it will not lead to additional questions about whether the conviction should stand, and the parties will not be driven to pour additional resources into litigating the matter further. Of course, these arguments may very well fly in the face of traditional understandings of constitutional rights. And if it became known that the police were hiding their errors and denying individuals the benefits of their constitutional rights, or that there were juror misconduct underlying a verdict, this could very well torpedo confidence in the system. Indeed, these arguments for secrecy are not necessarily good ones, but individuals might still rely on them, and the system does in fact rely on them in some circumstances to justify today's pervasive criminal justice secrecy.

III. CONTRAVENING OUR TRANSPARENCY ROOTS

The extensive secrecy that has evolved in the criminal justice system over the past two centuries is at odds with the very foundations of the system as created and envisioned by the Founders.²¹⁰ This country was built on the idea that the people,

209. See Amy Farrell, Liana Pennington & Shea Cronin, *Juror Perceptions of the Legitimacy of Legal Authorities and Decision Making in Criminal Cases*, 38 L. & SOC. INQUIRY 773, 775 (2013) ("Empirical research on legitimacy demonstrates that individuals' trust and confidence in the police and courts have important consequences for legal outcomes because perceptions of legal institutions can affect behavior in a number of ways."); Jonathan Jackson, Ben Bradford, Mike Hough, Andy Myhill, Paul Quinton & Tom R. Tyler, *Why Do People Comply with the Law?*, 52 BRIT. J. CRIMINOLOGY 1051, 1053 (2012) ("[L]egitimacy leads individuals to follow rules not because they agree with each specific rule, nor because they expect punishment, but because they accept that it is morally right to abide by the law."). Amy Farrell et al. have explained:

People who perceive the police as legitimate are more likely to follow rules, obey the law, cooperate with the police, and empower the police to use their discretion. Similar effects have been found with criminal courts. Defendants are more likely to follow legal orders, accept legal decisions, and offend less often when they perceive the legal process as legitimate. More broadly, belief in the institutional legitimacy of courts translates into individuals obeying court directives, even in the face of personal disagreements with court decisions.

Farrell et al., *supra*, at 775 (internal citations omitted).

210. Professor David Pozen helpfully summarizes numerous arguments for broad government transparency. See David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 292–305 (2010). For example, he explains:

[W]e have a general historical understanding that the Framers were strongly motivated by a desire to avert government tyranny and by a concomitant desire to achieve popular sovereignty. Inasmuch as official secrecy seems anathema to these ideals, we might draw on the revolutionary spirit and etiology of our Constitution to deny its legitimacy. If the original Constitution failed to recognize or achieve these ideals, the subsequent addition of the First Amendment might also suggest a pro-openness trajectory, inflecting the preceding text and history with a deeper commitment to the values associated with free speech.

Id. at 298–99.

not a monarch, could rule themselves.²¹¹ Our government is one “of the people, by the people, [and] for the people,”²¹² and it is the people who decide who will govern on our behalf. It is the people’s government.

This sentiment applies even more forcefully to the criminal justice system. Unlike cases in the civil system, criminal cases are prosecuted on behalf of the *people* of the relevant jurisdiction. As such, they are often styled as “The People vs. [the defendant]” or “[The State or United States] vs. [the defendant].” This basic tenet of the system suggests that the people should have access to information about these cases. Indeed, the Court has interpreted the First Amendment to ensure public access to court proceedings in all but the most extreme circumstances.²¹³

Not only does the criminal justice system contemplate public access to criminal proceedings, but the Sixth Amendment guarantees that individual defendants have the right to public trials.²¹⁴ Further, the Amendment provides that defendants have the right to “an impartial jury,” “to be informed of the nature and cause of the accusation” against them and “to be confronted with the witnesses against [them].”²¹⁵ These Sixth Amendment guarantees are ones of transparency, pledging that defendants have the right to have the public watch over their trials and determine their fates, that they should be provided with information related to their prosecutions, and that they have the opportunity to face their accusers.²¹⁶ Keeping information at the heart of the prosecution process secret is entirely opposed to these basic constitutional principles.

These criminal justice transparency guarantees are deeply rooted. Open criminal proceedings date back to the time of the Norman Conquest of 1066.²¹⁷ Openness continued as the jury was established in England, and transparency was considered

211. See Jack M. Balkin, *Republicanism and the Constitution of Opportunity*, 94 TEX. L. REV. 1427, 1432 (2016) (“[T]he Founders opposed republicanism not merely to direct popular rule, but also to monarchy, aristocracy, and oligarchy. A republic is therefore an antimonarchical, antiaristocratic, and anti-oligarchical form of government.”); Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183, 185 (2020) (“[T]he Framers’ experience taught them that monarchy was inherently corrupt and tyrannical. They embraced self-government, in the form of representative democracy, as its antidote.”).

212. President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

213. See LEE LEVINE, SETH D. BERLIN, JAY WARD BROWN, GAYLE C. SPROUL & DAVID A. SCHULZ, *NEWSGATHERING AND THE LAW* § 3.01[1] (5th ed. 2021); see also U.S. CONST. amend. I; *infra* notes 240–242 (noting the variety of criminal proceedings to which this applies).

214. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”). The particular constitutional provisions emphasizing the importance of transparency in the criminal justice system more often focus on trial rights rather than pre-trial rights. Although greater secrecy may be more justified at one point in the proceedings than another, some level of transparency is important throughout the criminal justice system. For an argument that the transparency principle is even broader than what I describe in this Article, see Aliza Cover, *The Constitutional Guarantee of Criminal Justice Transparency*, ALA. L. REV. (forthcoming 2023).

215. See *id.*

216. See *id.*

217. See *Press-Enterprise Co. v. California*, 464 U.S. 501, 505 (1984) (“The roots of open trials reach back to the days before the Norman Conquest . . .”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 565 (1980).

an important aspect of criminal trials.²¹⁸ American colonists found this key feature of English trials to also be important in a fledgling United States.²¹⁹ This well-established right of public proceedings was perhaps also a reaction to, among other things, the odious practices used by the English Court of Star Chamber.²²⁰ Although defendants before the Star Chamber pleaded their cases in public, had a right to counsel, and had a public hearing, witness testimony—including from the defendant himself—was extracted in private and often through torturous means (and without the right against self-incrimination).²²¹ Although the public initially praised these practices for improving law and order, it soon turned against the Star Chamber practices, leading to the demise of the Chamber in 1641.²²² Despite its abolition, the Star Chamber’s legacy lived on, and concern about its evil practices animated discussions about the importance of transparency during the American constitutional debates.²²³

The importance of the Sixth Amendment transparency guarantees endures, but their boundary lines remain somewhat murky under the Supreme Court’s existing jurisprudence. The Court has issued very few cases clarifying the parameters of a defendant’s right to a public trial.²²⁴ It has made clear, however, that the public nature of trial proceedings works “as a safeguard against any attempt to employ our courts as instruments of persecution.”²²⁵ In other words, “[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public

218. See *Press-Enter. Co.*, 464 U.S. at 505–07.

219. See *id.* at 508 (“The presumptive openness of the jury selection process in England, not surprisingly, carried over into proceedings in colonial America.”); *Richmond Newspapers, Inc.*, 448 U.S. at 566, 573 (stating that, “[f]rom these early times, although great changes in courts and procedures took place, one thing remained constant: the public character of the trial at which guilt or innocence was decided,” and concluding that, “[f]rom this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.”); see also *In re Oliver*, 333 U.S. 257, 266 (1948) (“This nation’s accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage.”).

220. See *In re Oliver*, 333 U.S. at 268–69 (“The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy’s abuse of the *lettre de cachet*.”); cf. Max Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 383 (1932) (“It must, then, be admitted that a public trial was a common law right, but we are justified in asking whether at common law it did the prisoner any good or was intended to do him any good.”).

221. See Eric J. Walz, Note, *The Star-Spangled Chamber: The Venire’s Role in Satisfying the Sixth Amendment to the United States Constitution*, 46 SUFFOLK U. L. REV. 701, 705 (2013).

222. See *id.*; James F. Ianelli, *The Sound of Silence: Eligibility Qualifications and Article III*, 6 SETON HALL CIR. REV. 55, 61 (2009) (“[T]he Star Chamber operated as a court until 1641 and gained notoriety for its judges conducting secret and politically motivated proceedings against foes of the Crown.”).

223. See II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 633, 635 (Max Farrand ed., 1911) (expressing concern that the judiciary—without the check of a jury—could devolve into an American Star Chamber); see also Ianelli, *supra* note 222, at 61–62 (“A primary goal that emerged in Constitutional debates was preventing the judiciary from devolving into America’s Star Chamber.” (internal quotations omitted)).

224. See Erwin Chemerinsky, *Foreword to SUSAN N. HERMAN, THE RIGHT TO A SPEEDY AND PUBLIC TRIAL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* xii (2006).

225. *In re Oliver*, 333 U.S. 257, 270 (1948).

opinion is an effective restraint on possible abuse of judicial power.”²²⁶ This translates into an assurance that the defendant “is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.”²²⁷ Further, “a public trial encourages witnesses to come forward and discourages perjury.”²²⁸ As a result, the Court has indicated that the open nature of proceedings is paramount and, although there may be exceptions to the general rule of openness, such exceptions should be “rare.”²²⁹ As the Court articulated in *Waller v. Georgia*,²³⁰ “[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”²³¹ Indeed, “courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials.”²³² Finally, public trials inspire confidence in the criminal justice system.²³³

The defendant’s right to a public trial is of foundational importance, which is highlighted by the Court’s conclusion that a violation of the right is one of the rare structural errors requiring reversal even if prejudice is not specifically demonstrated.²³⁴ Whereas most criminal procedure violations are subject to harmless

226. *Id.*

227. *Id.* at 270 n.25. Professor Akhil Amar has described the purpose of the right as follows:

[T]he public trial right protects the innocent man from an erroneous verdict of guilt. Witnesses for the prosecution may be less willing to lie or shade the truth with the public looking on; and bystanders with knowledge of the underlying events can bring missing information to the attention of court and counsel. A defendant will be convicted only if the people of the community (via the jury) believe the criminal accusation—believe both that he did the acts he is accused of, and that these acts are indeed criminal and worthy of the community’s moral condemnation. This last aspect—passing judgment on a defendant’s normative guilt or innocence—is an especially important part of the public trial idea.

Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 642–43 (1996).

228. *Waller v. Georgia*, 467 U.S. 39, 46 (1984); see also *In re Oliver*, 33 U.S. at 270 n.24 (“Public trials come to the attention of key witnesses unknown to the parties. These witnesses may then voluntarily come forward and give important testimony.”).

229. See *Waller*, 467 U.S. at 45. In *Waller*, the Court stated:

In each of these cases the Court has made clear that the right to an open trial may give way in certain cases to other rights or interests, such as the defendant’s right to a fair trial or the government’s interest in inhibiting disclosure of sensitive information. Such circumstances will be rare, however, and the balance of interests must be struck with special care.

Id.

230. *Id.*

231. *Id.* (quoting *Press-Enterprise Co. v. California*, 464 U.S. 501, 510 (1984)). The Court further explained that “[t]he interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” *Id.* (quoting *Press Enter. Co.*, 464 U.S. at 510).

232. *Presley v. Georgia*, 558 U.S. 209, 215 (2010) (per curiam).

233. See *In re Oliver*, 333 U.S. at 270 n.24 (noting that publicity provides the benefit that “[t]he spectators learn about their government and acquire confidence in their judicial remedies.”).

234. See *Johnson v. United States*, 520 U.S. 461, 468 (1997); see also *Waller*, 467 U.S. at 49–50 & n.9 (indicating that “defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee”).

error review—meaning that a defendant prevails on such a claim only when he can establish that the error prejudiced him—a claim of a violation of the right to a public trial is one of “a very limited class of cases” that constitutes a structural error requiring automatic reversal.²³⁵ This indicates the primary importance of the open nature of trials.

Despite the Sixth Amendment language that the right to a public trial belongs to the accused,²³⁶ the Court has made clear that public trials are also a right of the public. For example, in *Press-Enterprise Co. v. California*,²³⁷ the Court found a public trial violation despite both the prosecution and the defense arguing that the transcript of the voir dire proceedings should remain secret.²³⁸ Because the Sixth Amendment focuses on “the *accused*[’s] . . . right to a . . . public trial,”²³⁹ the Court has handled the public’s and the media’s right to access in this context under the First Amendment instead.²⁴⁰ Pursuant to this right of free speech and of the press,²⁴¹ the Court has explained that courtroom procedures—including everything from bail hearings and arraignments to judgment and sentencing²⁴²—should generally be open to the public, as this serves several important interests.²⁴³ Of course, openness provides greater assurance that the trial proceeds in a fair manner, curbing government corruption and favoritism.²⁴⁴ And this is integrally intertwined with the defendant’s Sixth Amendment right to a public trial, as criminal

235. *Johnson*, 520 U.S. at 468.

236. See U.S. CONST. amend. VI (referencing “the *accused*[’s] . . . right to a . . . public trial” (emphasis added)).

237. 464 U.S. 501 (1984).

238. See *id.* at 503–04; see also *Presley*, 558 U.S. at 214–15 (referencing this example).

239. U.S. CONST. amend. VI (emphasis added).

240. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (“We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment, without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated.” (internal quotations omitted)); see also *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 603 (1982) (“The Court’s recent decision in *Richmond Newspapers* firmly established for the first time that the press and general public have a constitutional right of access to criminal trials.”).

241. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

242. See Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2216 (2014); see also, e.g., *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 7, 13 (1986) (concluding “that the qualified First Amendment right of access to criminal proceedings applies to preliminary hearings as they are conducted in California” and noting that “the First Amendment question cannot be resolved solely on the label we give the event, . . . particularly where the preliminary hearing functions much like a full-scale trial.”); *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 175 (5th Cir. 2011) (“The first question in this case is whether the press and public, including the Chronicle, have a First Amendment right of access to a sentencing proceeding. We conclude that they do.”).

243. See *Richmond Newspapers, Inc.*, 448 U.S. at 569–80.

244. See *id.* at 569 (noting that, historically, open criminal trials “gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality”). As Justice Louis Brandeis famously wrote in 1914, “sunlight is said to be the best of disinfectants.” LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY: AND HOW THE BANKERS USE IT* 92 (1914). Although Justice Brandeis was referring to how transparency can better the regulation of banking, the idea that transparency is important was widely exported to apply to government more broadly. See generally David E.

defendants are probably the most likely victims of corruption and favoritism in criminal proceedings.²⁴⁵ But, beyond this basic fairness concern, open proceedings are also important to maintaining confidence in the system.²⁴⁶ Even if individuals are not themselves attending court proceedings, the knowledge that they and others have the right to attend provides comfort that the court and its actors are following the rule of law.²⁴⁷ Relatedly, open criminal proceedings provide something of a “community therapeutic value” as well.²⁴⁸ As the Court in *Press-Enterprise Co.* explained, “[c]riminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done.”²⁴⁹ If the public is confident that the system is properly functioning, it can more easily be satiated.²⁵⁰ If criminal proceedings remain secret, the public may lose confidence that justice is being done and may instead lash out through extralegal means²⁵¹—a result obviously undesirable in a functioning society that respects the rule of law. Finally, openness also serves an important educational role, helping American citizens learn about how the legal

Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100 (2018) (describing the evangelization of transparency but also explaining how the focus on calls for transparency have changed over time).

245. See *Richmond Newspapers, Inc.*, 448 U.S. at 569.

246. See *Press-Enter. Co.*, 464 U.S. at 508; *Richmond Newspapers, Inc.*, 448 U.S. at 571–72 (“To work effectively, it is important that society’s criminal process satisfy the appearance of justice, and the appearance of justice can best be provided by allowing people to observe it.” (internal citations and quotations omitted)). As the Court explained in *Press-Enterprise Co.*:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press-Enter. Co., 464 U.S. at 508.

247. See *Press-Enter. Co.*, 464 U.S. at 510.

248. *Id.* at 508.

249. *Id.* at 508–09; see also *Richmond Newspapers, Inc.*, 448 U.S. at 571 (“When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion.” (internal citations omitted)). The Court in *Press-Enterprise Co.* noted that “[w]hether this is viewed as retribution or otherwise is irrelevant.” *Press-Enter. Co.*, 464 U.S. at 509.

250. See *Press-Enter. Co.*, 464 U.S. at 509 (“When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions.”).

251. See *Richmond Newspapers, Inc.*, 448 U.S. at 571 (“Without an awareness that society’s responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful ‘self-help,’ as indeed they did regularly in the activities of vigilante ‘committees’ on our frontiers.”); see also *Press-Enter. Co.*, 464 U.S. at 509 (“Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.”).

process operates.²⁵² And considering the many public misconceptions about our criminal justice system,²⁵³ civic education remains exceedingly important.

In addition to guaranteeing the right to a public trial, the Sixth Amendment provides that defendants have the right to have a jury help decide their fate.²⁵⁴ Like the openness of trials, the fundamental right to a jury trial is meant to prevent government oppression—to be a “safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”²⁵⁵ Constitutionally required to be drawn from a fairly representative sample of the community,²⁵⁶ the jury ensures that the public continues to have a say in how criminal justice is dispensed. In including members of the public, then, the right to a jury adds to the constitutional guarantee of transparency.

The Sixth Amendment also provides that defendants are “to be informed of the nature and cause of the accusation” against them.²⁵⁷ As with the right to a public trial, there have been few Supreme Court cases exploring the scope of this right in any depth. The cases focusing on this notice requirement, though, have explained that the right is meant to facilitate the defendant’s ability to defend himself and to ward off subsequent prosecutions for the same offense.²⁵⁸ And the right also

252. See *Richmond Newspapers, Inc.*, 448 U.S. at 572 (1980) (suggesting that “public inclusion affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice”); Andrew Guthrie Ferguson, *Jury Instructions as Constitutional Education*, 84 U. COLO. L. REV. 233, 236 (2013) (referencing the jury’s “role in fostering the democratic skills of citizenship”); Turner, *supra* note 11, at 984 (“[P]ublic proceedings inform citizens about the functioning of the criminal justice system.”); see also *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 604 (1982) (noting that “the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government”).

253. See, e.g., James M. Anderson, Carl Matthies, Sarah Greathouse & Amalavoyal Chari, *The Unrealized Promise of Forensic Science—A Study of Its Production and Use*, 26 BERKELEY J. CRIM. L. 121, 125 (2021) (“Some prosecutors have expressed concern that these shows can give jurors unrealistic expectations for forensic evidence in criminal cases, termed the ‘CSI Effect.’”); *Wasteful & Inefficient*, EQUAL JUST. USA, <https://ejusa.org/resource/wasteful-inefficient/> (Mar. 29, 2021) (“Many people believe that the death penalty is more cost-effective than housing and feeding someone in prison for life. In reality, the death penalty’s complexity, length, and finality drive costs through the roof, making it much more expensive.”).

254. See U.S. CONST. amend. VI. *But see* *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968) (“It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States.”).

255. *Duncan*, 391 U.S. at 156.

256. See *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (determining that “petit juries must be drawn from a source fairly representative of the community”). More precisely, venirees must not systematically exclude particular groups. See *id.* at 538 (“Defendants are not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels, or venirees from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.”); cf. Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L. REV. 849, 878 (2014) (“Of course juries cannot be perfectly representative.”).

257. U.S. CONST. amend. VI.

258. See *Rosen v. United States*, 161 U.S. 29, 34, 40 (1896); see also U.S. CONST. amend. V (“No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . .”).

extends to notice of punishment.²⁵⁹ Although the Court's cases in this area are limited, the Court has made clear that this notice requirement is of exceeding importance.²⁶⁰ Transparency in this regard is paramount.

The Sixth Amendment also contains a right for criminal defendants to confront their accusers.²⁶¹ This right has seen a revival over the past fifteen years or so. In 2004, the Supreme Court decided the groundbreaking case of *Crawford v. Washington*,²⁶² which reinvigorated the Sixth Amendment's Confrontation Clause²⁶³—a Clause that had previously been rather dormant.²⁶⁴ In that case, the Court made clear that defendants indeed have a strong right to be face-to-face with witnesses against them.²⁶⁵ Parties may not constitutionally present out-of-court testimonial statements unless the declarant is unavailable and there was a prior opportunity for cross-examination by the defense.²⁶⁶ Since the Court decided *Crawford*, it has ruled on several additional Confrontation Clause cases.²⁶⁷ In this fairly active area of law, the Court has made clear that transparency about the source of accusations and evidence is extremely important.²⁶⁸

259. See *Presnell v. Georgia*, 439 U.S. 14, 16 (1978) (“These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial.”).

260. See *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) (“No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.”).

261. See U.S. CONST. amend. VI (“In all criminal prosecutions, he accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

262. 541 U.S. 36 (2004).

263. See U.S. CONST. amend. VI.

264. Cf. Ellen Liang Yee, *Confronting the “Ongoing Emergency”: A Pragmatic Approach to Hearsay Evidence in the Context of the Sixth Amendment*, 35 FLA. ST. U. L. REV. 729, 731 (2008) (“In 2004, after nearly twenty-four years of this well-entrenched reliability approach, the Supreme Court substantially altered the course of Confrontation Clause analysis with its pathbreaking decision in *Crawford v. Washington*.”).

265. See *Crawford*, 541 U.S. at 61. The Court explained:

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of “reliability.” Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.

Id.

266. See *id.* at 68 (“Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”).

267. See, e.g., *Ohio v. Clark*, 576 U.S. 237 (2015); *Williams v. Illinois*, 567 U.S. 50 (2012); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Michigan v. Bryant*, 562 U.S. 344 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Davis v. Washington*, 547 U.S. 813 (2006).

268. See, e.g., *Crawford*, 541 U.S. at 61 (“To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

The transparency foundations of our criminal justice system go even beyond these Sixth Amendment guarantees. For example, the Sixth Amendment requirement that a defendant be informed of the charges against him finds complementary protection under the Due Process Clause.²⁶⁹ The Court's analysis in this area indicates that an overly broad criminal statute—one that does not provide sufficient notice of what constitutes a criminal act—is unconstitutional.²⁷⁰ More specifically, this “void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”²⁷¹ It also requires sufficient notice of the consequences for failing to abide by the terms of the statute.²⁷²

These constitutional provisions serve numerous goals. Open proceedings allow for the public to act as a watchdog to ensure that courts and their actors are following the rule of law.²⁷³ Relatedly, openness helps citizens uncover nefarious or unfair practices, and, if they do not, it nonetheless reinforces confidence in the system.²⁷⁴ And, of course, confidence in the system supports crime-fighting goals by strengthening the deterrence value of criminal laws.²⁷⁵ Further, not only do public proceedings help ordinary citizens uncover questionable practices, but they also enable researchers to study the workings and effects of the criminal justice system

269. See U.S. CONST. amend. V; U.S. CONST. amend. XIV.

270. See *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) (“That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement”); John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 245 (2002) (“The Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution . . . have been construed as requiring that citizens have notice of what behavior is or is not illegal.”); Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1137–38 (2016) (“The void-for-vagueness doctrine is hardly a new invention. Since 1914, the Court has insisted that the Due Process Clause requires that a criminal statute clearly define the conduct it proscribes.” (internal quotation marks omitted)).

271. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

272. See *Beckles v. United States*, 137 S. Ct. 886, 892 (2017) (“[T]he Court has invalidated two kinds of criminal laws as ‘void for vagueness’: laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses.”); *United States v. Batchelder*, 442 U.S. 114, 123 (1979) (“So too, vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.”).

273. This is also one of the goals animating the Sixth Amendment right to a public trial. See *supra* text accompanying notes 215, 225, 243–246.

274. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 429 (1979) (Blackmun, J., concurring in part and dissenting in part) (“Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court’s decision sealed from public view.”). Again, these are goals underlying Sixth Amendment protects as well. See *supra* text accompanying notes 224–226, 243–245.

275. See Jessie Larson, *Unequal Justice: The Supreme Court’s Failure to Curtail Selective Prosecution for the Death Penalty*, 93 J. CRIM. L. & CRIMINOLOGY 1009, 1030 (2003) (“[L]ow public confidence in the criminal justice system reduces the deterrent effect of prosecuting individuals.”); see also *supra* text accompanying note 208.

more deeply and unearth additional concerns.²⁷⁶ Moreover, this research could lead to new innovations that further improve the system.²⁷⁷ Finally, public trials provide civic education, allowing citizens to learn about how the criminal justice system operates.²⁷⁸

Not only is secrecy at odds with the foundations of our criminal justice system, but it is also contrary to the increasing openness of society and government more broadly. Transparency became important during the Progressive Era at the turn of the twentieth century.²⁷⁹ At that time, Progressives viewed transparency as essential to “limit[ing] the influence of big business and to produc[ing] more efficient, scientific, and democratically accountable regulation.”²⁸⁰ The importance of transparency again took center stage in the 1960s and 1970s, leading Congress to pass landmark transparency legislation such as the Freedom of Information Act,²⁸¹ the Truth in Lending Act,²⁸² and the Government in the Sunshine Act.²⁸³ Many of these statutes still serve as models for the rest of the world.²⁸⁴ The U.S. government’s embrace of transparency during this period “created an unprecedented openness of institutions to critical public view.”²⁸⁵ And this shift toward increased openness has continued to flourish over time.²⁸⁶ In recent years, there have been repeated, deafening cries for a similar increase in transparency within the criminal justice system.²⁸⁷ These calls have not yet toppled the secrecy ensconcing the criminal justice system just yet, though.

276. See Turner, *supra* note 11, at 999 (“Because the great majority of criminal cases are resolved through guilty pleas, the lack of data about plea bargaining frustrates efforts toward evidence-based criminal justice reform.”).

277. See *id.* at 999–1000.

278. See Herbert Kritzer, *Where Are We Going? The Generalist vs. Specialist Challenge*, 47 TULSA L. REV. 51, 58 (2011) (“Jury service is a form of civic education, and recent research has shown that persons who had served on a jury evidence an increase in civic engagement.”).

279. See Pozen, *supra* note 244, at 102 (“American law concerning disclosures of information to the public, or what we now call transparency, was substantially forged during two historical periods: the Progressive Era around the turn of the twentieth century and the decade between the mid-1960s and the mid-1970s.”).

280. *Id.* at 108.

281. Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2018)); see also Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561 (codified as amended at 5 U.S.C. § 552) (significantly strengthening the Act). Professor Pozen has argued that FOIA, which was “passed with overwhelming support,” and which was argued “in explicit constitutional terms,” is one of “the closest thing[s] we have to a constitutional amendment on state secrecy” more broadly. Pozen, *supra* note 210, at 314.

282. Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1667f).

283. Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified as amended in scattered sections of 5 and 39 U.S.C.).

284. See Pozen, *supra* note 244, at 117 (“Several of the statutes from this period would go on to serve as templates for reformers worldwide, and they continue to supply the legal scaffolding within which government transparency is produced and contested in the United States today.”).

285. Hugh Hecl, *The Sixties’ False Dawn: Awakenings, Movements, and Postmodern Policy-Making*, in INTEGRATING THE SIXTIES 34, 57 (Brian Balogh ed., 1996).

286. See Pozen, *supra* note 244, at 123 (“As a norm of public administration, transparency’s stature has only grown.”). But see also *id.* at 102 (noting that the propagation of transparency has suffered from “ideological drift”).

287. See Turner, *supra* note 11, at 998 (“Over the last several years, the United States has witnessed the rise of a broad social and political movement for transparent, data-based criminal justice.”).

IV. CONCRETE CONSTITUTIONAL CONCERNS

The pervasive secrecy endemic to the modern criminal justice system is not only contrary to the foundations of that system, but it also raises some serious constitutional and policy-based concerns. Many of these concerns, alone, are sufficient grounds for dismantling this system of secrecy, but the aggregation of these issues creates a real constitutional problem, necessitating reform.

A. Investigation

The intense secrecy surrounding much of today's government surveillance raises Fourth Amendment questions. This Amendment guarantees citizens the right to be free from unreasonable searches and seizures,²⁸⁸ and, historically, the Court has interpreted this right to protect society's reasonable expectations of privacy.²⁸⁹ Significant advances in surveillance technology have raised serious questions about where the line of constitutionality lies, however.²⁹⁰ Various new technologies, such as Stingray devices, raise their own Fourth Amendment concerns.²⁹¹ For example, a Maryland court of appeals determined that "people have a reasonable expectation of privacy in real-time cell phone location information" and thus found the use of real-time tracking devices constitutes a Fourth Amendment search requiring a warrant.²⁹² Beyond constitutional concerns about particular intrusions into individuals' privacy, the vast array of technological advances, combined, raise additional constitutional questions. Several Supreme

288. See 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, . . .").

289. See *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (indicating that "a person has a constitutionally protected reasonable expectation of privacy" under the Fourth Amendment); cf. *United States v. Jones*, 565 U.S. 400, 409 (2012) (explaining that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.").

290. See Levinson-Waldman, *supra* note 3, at 550 ("Despite the wealth and range of new technologies available to law enforcement, the judiciary has not yet developed a single, coherent framework to address their Fourth Amendment repercussions.").

291. See *State v. Andrews*, 134 A.3d 324, 327 (Md. Ct. App. 2016); see also *In re Use of a Cell-Site Simulator to Locate a Cellular Device Associated with One Cellular Tel.* Pursuant to Rule 41, 531 F. Supp. 3d 1 (D.D.C. 2021) ("[T]he possibility that a cell-site simulator may target a location in which a person has a 'reasonable expectation of privacy' means that it necessarily 'constitutes a Fourth Amendment search.'"); WAYNE R. LAFAVE, *SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 2.7(f) (6th ed. 2021) (suggesting that it is unclear whether employing a stingray device without a warrant constitutes a Fourth Amendment search but noting that *State v. Andrews* held that it would always do so).

292. *Andrews*, 134 A.3d at 349–50. The Court of Special Appeals stated:

We conclude that people have a reasonable expectation that their cell phones will not be used as real-time tracking devices by law enforcement, and—recognizing that the Fourth Amendment protects people and not simply areas—that people have an objectively reasonable expectation of privacy in real-time cell phone location information. Thus, we hold that the use of a cell site simulator requires a valid search warrant, or an order satisfying the constitutional requisites of a warrant, unless an established exception to the warrant requirement applies.

Id. at 327.

Court Justices have expressed unease about the accumulation of individual, perhaps innocent, acts of surveillance, which together create a high and intrusive level of government surveillance.²⁹³ The notion that the aggregation of individual acts of surveillance that may not, themselves, be constitutionally problematic may amount to a Fourth Amendment violation has become known as the “mosaic theory.”²⁹⁴ Although the Court has not explicitly adopted such an approach, five Justices seemed to embrace it in *United States v. Jones*,²⁹⁵ and, as surveillance methods continue to blossom, the Court may very well augment its Fourth Amendment jurisprudence in this way.²⁹⁶ Indeed, some lower courts have already adopted and applied the mosaic theory.²⁹⁷ Considering the broad growth of secrecy in surveillance—including expansions in the government’s uses of technology, as well as confidential informants and undercover agents²⁹⁸—the accumulation of intrusive government surveillance on individual citizens creates matters of real constitutional concern.

B. Grand Juries

Grand jury secrecy—one of the few real original homes for secrecy in the criminal justice system—raises some questions as well. Even though the Founders considered secrecy in grand jury proceedings important, as time has progressed, some jurisdictions have retreated from requiring absolute secrecy in these proceedings.²⁹⁹ Relatedly, modern grand jury secrecy raises greater policy concerns than it did in 1787. Today, with the pervasiveness of media reporting on criminal matters, it is more likely that a prospective defendant will not be shielded from public scrutiny by the secrecy of grand jury proceedings but will instead be spotlighted for his alleged crime while the proceedings are taking place. This is especially likely

293. See *Jones*, 565 U.S. 400, 416 (Sotomayor, J., concurring); *id.* at 430 (Alito, J., concurring).

294. Orin Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 313, 320 (2012).

295. 565 U.S. 400; see also Kerr, *supra* note 294, at 313 (“The concurring opinions in *Jones* raise the intriguing possibility that a five-justice majority of the Supreme Court is ready to endorse a new mosaic theory of Fourth Amendment protection.”).

296. Kerr, *supra* note 294, at 313.

297. See *United States v. Howard*, 426 F. Supp. 3d 1247, 1254 (M.D. Ala. 2019) (“Four Supreme Court justices, the D.C. Circuit, and the Sixth Circuit have endorsed an idea that could reconcile these disparate holdings under a mosaic theory of electronic location tracking.”); see, e.g., *United States v. Maynard*, 615 F.3d 544, 562–63 (D.C. Cir. 2010) (seemingly adopting the mosaic theory); *Commonwealth v. McCarthy*, 142 N.E.3d 1090, 1106 (Mass. 2020) (“The limited number of cameras and their specific placements, however, also are relevant in determining whether they reveal a mosaic of location information that is sufficiently detailed to invade a reasonable expectation of privacy.”); *United States v. Diggs*, 385 F. Supp. 3d 648, 652 (N.D. Ill. 2019) (“The GPS data at issue here fits squarely within the scope of the reasonable expectation of privacy identified by the *Jones* concurrences and reaffirmed in *Carpenter*.”); see also Paul Ohm, *The Many Revolutions of Carpenter*, 32 HARV. J.L. & TECH. 357, 373 (2019) (explaining that the Supreme Court case of *Carpenter v. United States* “in effect endorses the mosaic theory of privacy”). But see *United States v. Tuggle*, 4 F.4th 505, 520 (7th Cir. 2021) (“[M]any courts that have considered the theory have expressed disapproval, although not without exception.”).

298. See *supra* Part I.A.

299. See *supra* Part I.B.

when the prospective defendant is a celebrity or committed a particularly divisive crime such as the shooting of an unarmed Black man.³⁰⁰ Similarly, today's inescapable news coverage might foil grand jury secrecy's goal of protecting unnamed alleged co-conspirators.³⁰¹ One well-known example of this is when the media reported on Michael Cohen's testimony before the House Oversight Committee, which declared: "I pled guilty in federal court to felonies for the benefit of, at the direction of, and in coordination with 'Individual 1, And for the record individual no. 1 is Donald J. Trump.'"³⁰² Despite this unwelcome push into the limelight, prospective defendants (or unnamed alleged co-conspirators) are often deprived of sufficient information about the investigation or charges to defend themselves.³⁰³ This is a result of the rules of grand jury secrecy. And at the same time, because of the lax evidentiary rules at play in most jurisdictions' grand jury proceedings, prosecutors may very well be feeding grand jurors unreliable evidence and failing to disclose evidence that exculpates the prospective defendant.³⁰⁴ Thus, today's grand jury secrecy may actually deprive a prospective defendant's chance to preserve his reputation more than protect it.

C. Plea-Bargaining

The secrecy associated with plea-bargaining is also problematic. Because different defendants lack information about what sort of plea-bargains similarly situated defendants have been offered,³⁰⁵ there is a concern that prosecutors may be treating similarly situated defendants differently. This could be because of explicit or implicit biases against the defendant.³⁰⁶ It could result from the bad luck of being assigned a more aggressive prosecutor.³⁰⁷ Or it could flow from having less

300. See e.g., *supra* text accompanying notes 76–80 (explaining the unwanted publicity Officer Darren Wilson received after shooting Michael Brown in Ferguson, Missouri).

301. See Anthony Ripley, *Jury Named Nixon a Co-Conspirator But Didn't Indict*, N.Y. TIMES, June 7, 1974, at 73; cf. Steve Chapman, *The Unindicted Co-Conspirator in the Oval Office*, CHICAGO TRIB. (Aug. 22, 2018), <https://www.chicagotribune.com/columns/steve-chapman/ct-perspec-chapman-trump-cohen-manafort-guilty-20180823-story.html> ("Americans will be living under the administration of someone who has been implicated in a crime by a close associate—and who they may eventually learn is guilty of one or more felonies. The nation is being governed by an unindicted co-conspirator.").

302. See Hearing with Michael Cohen, Former Attorney to President Donald Trump, Before the H. Comm. On Oversight & Reform, 116th Cong. 11 (2019) (statement of Michael Cohen); also Dara Lindarra, *Michael Cohen: "Individual 1 is Donald J. Trump,"* VOX (Feb. 27, 2019), <https://www.vox.com/2019/2/27/18243038/individual-1-cohen-trump-mueller>.

303. See Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1184–85 (1960).

304. See *United States v. Williams*, 504 U.S. 36, 55 (1992) (concluding that prosecutors do not need to present exculpatory evidence to grand juries); *Costello v. United States*, 350 U.S. 359, 364 (1956) (concluding that it is not constitutionally problematic for prosecutors to present hearsay evidence to grand juries).

305. See *supra* text accompanying notes 93–99.

306. See generally Meghan J. Ryan & John Adams, *Cultivating Judgment on the Tools of Wrongful Conviction*, 68 S.M.U. L. REV. 1073, 1100–02 (2015) (describing the traps of explicit and implicit biases).

307. See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 921 (2006) (suggesting that prosecutors' "assessment of just punishment tends to soften over time . . . as they

experienced or qualified defense counsel.³⁰⁸ Whatever the reasons, treating similarly situated defendants differently is unfair. Surely, no two cases are exactly the same, and differences among cases may justify disparate treatment. But any sense of uniformity in defendant treatment is nearly impossible under the secrecy cloaking plea-bargaining today.³⁰⁹ And, to the extent that scholars have been able to study this issue, they have found that there are indeed “striking . . . disparities” in the plea deals prosecutors reach with defendants.³¹⁰

The Court has expressed its apprehension about similarly situated criminal defendants being treated differently. In selective prosecution cases under the Equal Protection Clause, for example, the Court has explained that, although prosecutors have broad discretion as to whom to file charges against, “the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.”³¹¹ The Court has also indicated that vindictive prosecution—basing a decision to prosecute upon a defendant’s “exercise of protected statutory and constitutional rights”³¹²—is unconstitutional, as it violates a defendant’s due process guarantees.³¹³ The concern here is “that the State might be retaliating against the accused for lawfully attacking his conviction.”³¹⁴ In both selective and vindictive prosecution claims, it is very difficult for defendants to establish that there was, indeed, unconstitutional conduct on the part of the prosecutor, however. For selective prosecution claims, the defendant must show that the action “had a discriminatory effect and that it was motivated by a discriminatory purpose.”³¹⁵ Establishing discriminatory effect requires showing that similarly

become jaded or mellowed”); Ron Wright & Kay Levine, *The Cure for Young Prosecutors’ Syndrome*, 56 ARIZ. L. REV. 1065 (2014) (noting that younger, less experienced prosecutors are often more aggressive).

308. See Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 150 (2012) (explaining how the quality or experience of defense counsel affects the quality of plea offers prosecutors offer defendants); see also AM. BAR ASS’N, GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE V 7 (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf (noting the poor quality of much publicly funded defense).

309. See *supra* Part I.C (outlining the aspects of this secrecy).

310. Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1190–91 (2018) (finding “striking racial disparities” in prosecutors’ plea-bargaining practices); see also Turner, *supra* note 11, at 993 (“There is some preliminary evidence to suggest that similarly situated defendants are not treated consistently in plea bargaining. When scholars have been able to access and review plea, charging, and sentencing data, they have found disparities on the basis of wealth and race.”).

311. *Wayte v. United States*, 470 U.S. 598, 608 (1985) (internal quotations and citations omitted).

312. *Id.*

313. See *Blackledge v. Perry*, 417 U.S. 21, 28–29 (1974).

314. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

315. *Wayte*, 470 U.S. at 608. These are the ordinary requirements in establishing an equal protection violation. See *id.* (“It is appropriate to judge selective prosecution claims according to ordinary equal protection standards.”).

situated defendants of a different race, religion, or the like were not prosecuted.³¹⁶ Vindictive prosecution claims are similarly difficult to establish.

In the modern criminal justice system—where plea-bargaining *is* the system³¹⁷—defendants regularly suffer a penalty for deciding to exercise their right to go to trial.³¹⁸ But the Court has concluded that, because this *is* the system,³¹⁹ it cannot find a constitutional violation where a prosecutor increases the charges against a defendant for refusing to plead guilty and instead go to trial.³²⁰ Under today's jurisprudence, then, a criminal defendant can establish a vindictive prosecution generally only if there is no possible explanation for the prosecutor increasing the charges or sentence against the defendant other than vindictiveness.³²¹

Despite a defendant's difficulty in establishing selective and vindictive prosecution claims in most cases, the constitutional issues of equal and fair treatment remain. The secrecy surrounding plea-bargaining makes it even more difficult to unearth evidence that similarly situated defendants are being treated differently

316. See *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (“To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.”). And to even be granted discovery in such a case, the claimant must show that similarly situated defendants were treated differently, see *id.* at 470 (“We think the required threshold—a credible showing of different treatment of similarly situated persons—adequately balances the Government’s interest in vigorous prosecution and the defendant’s interest in avoiding selective prosecution.”)—a very difficult, but not insurmountable, hurdle. See *id.* (“In the present case, if the claim of selective prosecution were well founded, it should not have been an insuperable task to prove that persons of other races were being treated differently than respondents.”).

317. See *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials.”).

318. See RICK JONES, GERALD B. LEFCOURT, BARRY J. POLLACK, NORMAL L. REIMER & KYLE O’DOWD, *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT*, NAT’L ASS’N CRIM. DEF. LAWYERS 20–21, Fig. 1 (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf>.

319. See *Bordenkircher v. Hayes*, 434 U.S. 357, 361–62 (1978) (“We have recently had occasion to observe: Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country’s criminal justice system. Properly administered, they can benefit all concerned.” (internal quotation marks omitted)).

320. See *id.* at 364. In *Bordenkircher*, the Court explained:

While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant’s assertion of his trial rights, the imposition of these difficult choices is an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

Id. (citation, alteration, and internal quotation marks omitted).

321. See Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 FED. SENT’G REP. 256, 257 (2019) (“On average, trial conviction increases the odds of incarceration by two to six times and produces sentence lengths that are 20 to 60 percent longer.”); Nancy J. King, David A. Soulé, Sara Steen & Robert R. Weidner, *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 973–75, 992 (2005) (finding significant trial penalties in a study of five states’ sentencing practices).

because of prosecutors' biases. There may very well be violations of defendants' constitutional rights here even if defendants are unable to prove them in court.

D. "Discovery"

Limitations on discovery in criminal cases also raise constitutional concerns. As Justice Marshall explained in his *Bagley* dissent, the Court's existing standard for *Brady* violations, which provides a remedy only when the prosecution has failed to disclose *material* exculpatory (or impeachment) evidence, encourages prosecutors to roll the dice and gamble that either the criminal defendant will never learn about the withheld evidence or else that courts will determine that the exculpatory (or impeachment) evidence was not material.³²² This gamble results in potential due process violations. Indeed, criminal defense lawyers maintain that *Brady* violations are a regular occurrence.³²³ As one commentator has explained:

At best, prosecutors commit *Brady* violations because they are fallible, and they suffer from confirmation bias, which leads them to focus on evidence that validates what they already believe. At worst, they care only about conviction rates, and, as former Ninth Circuit appellate judge Alex Kozinski believes, "they consider [*Brady* violations] feathers in their caps."³²⁴

In most circumstances, there are no negative consequences for prosecutors committing *Brady* violations.³²⁵ Exacerbating the hurdles defendants must overcome in establishing materiality, courts also tend to apply that standard strictly because of their interest in finality and consequent hesitancy to overturn convictions.³²⁶ All of this amounts to prosecutors concealing exculpatory material in the hope of securing convictions. But this exculpatory material may, by definition, prove a criminal defendant to be innocent. This means that not only are there due process violations at issue here, but innocent people may be found guilty and punished because of this prosecutorial secrecy. And ensuring that no innocent person is wrongly convicted is at the heart of the criminal justice system. It is the reason we have a high standard of proof—proof beyond a reasonable doubt³²⁷—and the numerous

322. See *United States v. Bagley*, 473 U.S. 667, 701 (1985) (Marshall, J., dissenting) (explaining that the *Brady* "standard invites a prosecutor, whose interests are conflicting, to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive"); see also *supra* notes 108–109 and accompanying text (referencing this dissent).

323. See Jessica Brand, *The Epidemic of Brady Violations: Explained*, THE APPEAL (Apr. 25, 2018), <https://theappeal.org/the-epidemic-of-brady-violations-explained-94a38ad3c800/> ("Ask any public defender in the country, and they will tell you that *Brady* violations occur regularly in the courthouse.").

324. *Id.* (alteration in original).

325. See *id.* ("Even when it is uncovered, however, the penalties for prosecutors can be virtually meaningless."). State bars rarely impose disciplinary action for this behavior, courts rarely impose sanctions for it, and "[i]t is nearly impossible to sue prosecutors in civil court." *Id.* Further, improperly withholding *Brady* material may actually *help* a prosecutor's career. See *id.*

326. See *id.* ("[C]ourts regularly apply this standard in the strictest way possible.").

327. See *In re Winship*, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused

constitutional provisions meant to protect innocent defendants.³²⁸ Indeed, our system is based on the sentiment that it is “better that ten guilty persons escape than that one innocent suffer.”³²⁹ The secrecy inherent in today’s constitutional discovery standards, then, risks both due process violations and conceding values at the very heart of the criminal justice system.

E. Conviction Evidence

The growing secrecy surrounding prosecutors’ conviction evidence is similarly problematic. When the source codes and algorithms underlying programs that create evidence like breathalyzer and DNA results cannot be discovered by criminal defendants due to their status as trade secrets,³³⁰ it makes it very difficult for defendants to effectively defend their cases.³³¹

It also creates constitutional concerns.³³² This secrecy poses Confrontation Clause issues, as the programs are used as evidence against defendants, but defendants lack the opportunity to cross-examine anyone about the programs’ intricacies.³³³ The forensic experts that usually testify about the results in court ordinarily lack knowledge about the mechanisms of the underlying programs.³³⁴ Further, even if someone knowledgeable about the underlying source codes and algorithms were called to testify, most courts have classified this as trade-secret information that cannot be revealed.³³⁵ The defendant’s resulting inability to cross-examine anyone knowledgeable about the program, or otherwise have access to the underlying source codes or algorithms, means that the defendant cannot confront an important witness against him—the program itself.³³⁶ This constitutes a Sixth Amendment violation.³³⁷ It also constitutes a due process

against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

328. See, e.g., U.S. CONST. amend. VI (ensuring defendants the right to “the assistance of counsel”); *id.* amend. VIII (prohibiting “cruel and unusual punishments”).

329. 4 WILLIAM BLACKSTONE, COMMENTARIES *358; see also Meghan J. Ryan, *Miranda’s Truth: The Importance of Adversarial Testing and Dignity in Confession Law*, 43 N. KY. L. REV. 413, 431 (2016) (explaining that we have “adopt[ed] prophylactic rules that protect innocent persons as well as those who are guilty,” which “is reflected in our criminal justice system’s strict proof-beyond-a-reasonable-doubt standard that must be met by the prosecution”).

330. See *supra* Part I.E.

331. See Ryan, *supra* note 6, at 319–20.

332. See *generally id.* at 329–41 (outlining Fifth and Sixth Amendment concerns about the secrecy associated with these “conviction programs”).

333. See *id.* at 334–38 (“Defendants’ inability to gain access to information that may be essential to presenting a complete defense thus poses a significant constitutional concern under both the Due Process Clauses and the Confrontation Clause.”).

334. See *id.* at 336–37 (“Often, the forensic examiner is not even entirely aware of how the algorithm and source code reach their results. Instead, the examiner may understand only how he must set up the test and how to interpret the results reached by the algorithm and source code embedded in the computer program.”).

335. See Ryan, *supra* note 7, at 88; Ryan, *supra* note 6, at 319–20.

336. See Ryan, *supra* note 6, at 335–36.

337. See *id.* at 334–38.

violation.³³⁸ In *Holmes v. South Carolina*,³³⁹ the Court explained that “the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’”³⁴⁰ But without access to the underlying source code and algorithm, a defendant is effectively denied this opportunity.³⁴¹ This secrecy similarly raises questions under *Brady v. Maryland*³⁴² by preventing the prosecution from disclosing important evidence that could potentially be exculpatory.³⁴³

F. Jury Deliberations

Jury secrecy, the other original source for secrecy within the system, raises serious constitutional questions, which the Court explored in *Peña-Rodriguez v. Colorado*.³⁴⁴ In that case, the Court assessed whether the no-impeachment rule—the law that jurors may not testify about juror misconduct to impeach a verdict—should yield to allegations that racism invaded the deliberation process.³⁴⁵ The Court noted the important values that the secrecy of jury deliberations supports, namely encouraging the open and honest deliberation process, quelling the role of outside influence, and buoying confidence in the system.³⁴⁶ But the Court concluded that these interests give way when there is evidence that racial discrimination seeped into the jury deliberation process. The Court explained that racial discrimination is so abhorrent that the Sixth Amendment right to trial demands such claims of racial bias be further investigated.³⁴⁷ If such “a familiar and recurring evil [were instead] left unaddressed,” the Court determined, this “would risk systemic injury to the administration of justice.”³⁴⁸ In taking this route, the Court emphasized that racial discrimination in the deliberation process is worse than other juror misconduct, such as deliberating while under the influence.³⁴⁹ But, as

338. See *id.* at 335 (arguing that using these “secret conviction programs” in court constitutes a due process violation).

339. 547 U.S. 319 (2006).

340. *Id.* at 324 (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)); see also *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (explaining that “[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations”).

341. See Ryan, *supra* note 6, at 335–36 (“Without access to . . . information [about the source codes and algorithms underlying conviction programs], criminal defendants are denied the fair opportunity to defend against the State’s accusations to which *Chambers* and *Holmes* held they are entitled.” (internal quotation marks omitted)).

342. 373 U.S. 83 (1963).

343. See Ryan, *supra* note 6, at 339–40 (outlining the potential *Brady* violation).

344. 137 S. Ct. 855 (2017).

345. See *id.* at 861.

346. See *id.* at 865.

347. See *Peña-Rodriguez*, 137 S. Ct. at 868 (“The unmistakable principle underlying these precedents is that discrimination on the basis of race, ‘odious in all aspects, is especially pernicious in the administration of justice.’” (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979))).

348. *Id.*

349. See *id.*

the dissenters noted, the distinction seems somewhat strained.³⁵⁰ While racial animus is certainly odious, it is also problematic that other juror misconduct could similarly deprive a defendant of his right to an impartial jury. The *Peña-Rodriguez* decision suggests that the jury-room door remains mostly closed for now, but perhaps the Court will continue to slowly push it open. And greater transparency may very well be warranted here. As in *Peña-Rodriguez*, greater transparency could better instill confidence in the system than the time-honored tradition of secrecy.

G. Punishment

Secrecy in punishment is also worrisome. Prisons are not known for their pleasant, or even humane, conditions,³⁵¹ and the Court has found that certain prison conditions can indeed be unconstitutionally cruel and unusual under the Eighth Amendment.³⁵² For example, in *Hope v. Pelzer*,³⁵³ the Court found that it was unconstitutional for prison officials to handcuff a prisoner to a hitching post for seven hours in the blazing heat and subject him “to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation.”³⁵⁴ The Court explained that this treatment failed to uphold the “dignity of man” and “amount[ed] to gratuitous infliction of wanton and unnecessary pain that . . . precedent clearly prohibits.”³⁵⁵ The secrecy surrounding prison practices can make it difficult for prisoners to establish factual bases for these claims and recognize patterns of poor treatment, though. This secrecy also allows prison officials to claim ignorance with respect to the offensive conditions. Because the Court has insisted that establishing an Eighth Amendment violation in this context requires showing “[a] prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate,”³⁵⁶ siloing knowledge of prison risks impedes inmates’ abilities to obtain relief and allows prison officials to escape

350. See *id.* at 875 (Alito, J., dissenting) (“This is a startling development, and although the Court tries to limit the degree of intrusion, it is doubtful that there are principled grounds for preventing the expansion of today’s holding.”).

351. See *supra* notes 147–152 and accompanying text.

352. See, e.g., *Brown v. Plata*, 563 U.S. 493, 499 (2011) (“This case arises from serious constitutional violations in California’s prison system.”); *Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (“We agree with the Court of Appeals that the attachment of Hope to the hitching post under the circumstances alleged in this case violated the Eighth Amendment.”).

353. 536 U.S. 730.

354. *Id.* at 738.

355. *Id.*

356. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). More specifically, in *Farmer*, the Court held that an Eighth Amendment prison conditions claim is dependent on “the official know[ing] of and disregard[ing] an excessive risk to inmate health or safety” and that “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Id.* at 837; see also Sharon Dolovich, *Evading the Eighth Amendment: Prison Conditions and the Courts*, in *THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT*, *supra* note 146, at 133, 134 (explaining that, over time, the Court has “condition[ed] findings of unconstitutional conditions on defendants’ subjective awareness of the risk of harm”).

liability. Moreover, this secrecy makes it more difficult for the public to fully understand the nature of punishments, making reform in this area unlikely.

The public's lack of knowledge about prison conditions also raises questions about the proportionality of punishment.³⁵⁷ If a sentencing judge or jury is unaware of prison conditions, how can she effectively assess what punishment a defendant deserves?³⁵⁸ A sentence of ten years in a clean prison with humane treatment, adequate healthcare, and healthy food is very different from a sentence of ten years in prison where the prison is severely overcrowded, lacks air conditioning, provides inadequate healthcare, and offers insufficient or disgusting food to its prisoners. These types of considerations could similarly affect deterrence and rehabilitation calculations. Without transparency in the conditions of punishment, there is a real risk of issuing disproportionate punishments.³⁵⁹ And, in some cases, that could even result in Eighth Amendment violations, as the Court has determined that the Amendment's prohibition on cruel and unusual punishments prohibits, at a minimum, grossly disproportionate punishments.³⁶⁰ To be clear, courts have not declared that the Eighth Amendment requires sentencers to take into account the probable conditions of punishment when imposing a sentence, but both the proportionality of an imposed punishment and the conditions of the punishment, themselves, are important considerations under the Court's existing Eighth Amendment jurisprudence.³⁶¹ And secrecy makes true proportionality assessments impossible—just as it makes patrolling conditions of confinement to ensure that they comply with Eighth Amendment requirements quite difficult.

Secrecy in punishment could also be enabling torture—something clearly prohibited by the Eighth Amendment.³⁶² Through the use of a paralytic, many existing lethal injection protocols hide a death row inmate's reaction to the injected

357. See Ryan, *supra* note 152, at 1759 (“These [prison] conditions are certainly relevant to the question of retribution, and they likely impact deterrence calculations and the effectiveness of rehabilitation as well.”).

358. *Cf. id.* at 1758–59 (“Perhaps judges should take into account . . . prison conditions—and other conditions of punishment—in determining the appropriate punishment in each case.”).

359. Proportionality in offender desert, deterrence, rehabilitation, or some other punishment purpose could be at risk. See Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 592–97 (2005) (explaining that the concept of proportional punishment may include both ends- and means-proportionality).

360. See, e.g., *Ewing v. California*, 538 U.S. 11, 23–24 (2003) (explaining that the Eighth Amendment prohibits grossly disproportionate sentences in the noncapital context); *Solem v. Helm*, 463 U.S. 277, 284 (1983) (stating that the Punishments Clause “prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed”).

361. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 832 (1995) (“The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones . . .” (internal quotations and citations omitted)); *Ewing*, 538 U.S. at 20–23 (discussing the proportionality principle under the Eighth Amendment).

362. See *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878) (“Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture . . . are forbidden by that amendment [sic] to the Constitution.”); Berry & Ryan, *supra* note 9, at 414 (“The Court has firmly and repeatedly stated that the Eighth Amendment prohibits all punishments involving torture.”).

execution drugs, thus potentially masking evidence of excruciating pain.³⁶³ Inmates who have survived (initial) lethal injection attempts have described their experiences as torturous—like they were being burned alive.³⁶⁴ But by hiding the identities of the drugs used, the sources of those drugs, and the identities and qualifications of the executioners,³⁶⁵ the government creates a situation in which any red flags about potential causes of a torturous event remain buried.³⁶⁶ Further, to establish a claim that an execution protocol is unconstitutionally cruel and unusual under the Eighth Amendment, a petitioner must show that the protocol creates a “substantial risk of serious harm,”³⁶⁷ but uncovering the evidence necessary to make this showing is exceedingly difficult when the physical effects, drugs, drug sources, and executioners are kept secret.³⁶⁸ Hiding executions from the public by limiting the number of observers at an execution³⁶⁹ is also problematic, as this practice shields the public from understanding exactly what an execution entails.³⁷⁰ This is of particular importance, considering that the legality and constitutionality of these procedures depend upon public understanding.³⁷¹ Naturally, citizens’

363. See Berry & Ryan, *supra* note 9, at 406 (“The use of a paralytic agent hides from those witnessing the execution what is really happening to the offender, as it renders the offender unable to move.”); Noah Caldwell, Ailsa Chang & Jolie Myers, *Gasping For Air: Autopsies Reveal Troubling Effects Of Lethal Injection*, NPR (Sept. 21, 2020, 7:00 AM), <https://www.npr.org/2020/09/21/793177589/gasping-for-air-autopsies-reveal-troubling-effects-of-lethal-injection> (reporting that autopsy reports of those executed by lethal injection reveal prolonged, painful deaths).

364. See *Glossip v. Gross*, 576 U.S. 863, 949 (2015) (Sotomayor, J., dissenting).

365. See *supra* text accompanying notes 157–160.

366. See Berry & Ryan, *supra* note 9, at 406 (“In essence, then, the secretive nature of lethal injection has resulted in a series of executions that may in reality constitute a form of hidden torture by masking severe physical and psychological pain.”).

367. *Glossip*, 576 U.S. at 877. The Court’s lethal injection jurisprudence departs somewhat from its other Eighth Amendment jurisprudence in this regard. See Berry & Ryan, *supra* note 9, at 420 (explaining that, in assessing the constitutionality of the three-drug lethal injection protocol, the *Baze* Court “strayed from its traditional Eighth Amendment framework of assessing dignity and the evolving standards of decency and instead focused on the potential pain imposed by the punishment”).

368. See Berry & Ryan, *supra* note 9, at 425–27 (detailing this “doctrinal shield”).

369. See *supra* text accompanying note 161.

370. See Berry & Ryan, *supra* note 9, at 427–28 (“[B]y limiting the number of observers, states stifle observational accounts of what might be experienced by those being executed.”). Note that limiting the number of execution observers and prohibiting the airing of executions has been defended on the ground of the offender’s dignity. See, e.g., G. Mark Mamantov, *The Executioner’s Song: Is There A Right to Listen?*, 69 VA. L. REV. 373, 401 (1983) (“Sharing his pain and suffering with unrelated observers should not necessarily be part of the penalty the prisoner pays for his crime.”); Jef I. Richards & R. Bruce Eastwood, *Televising Executions: The High-Tech Alternative to Public Hangings*, 40 UCLA L. REV. 381, 406–08 (1992) (noting that dignity is one argument in opposition to televising executions). This may well be a legitimate justification in some circumstances.

371. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 584–91 (2010) (explaining that punishments that contravene the “evolving standards of decency” are unconstitutional); Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1198 (2009) (“The Court also feels the pull of the public. The public has grown increasingly concerned with the administration of the death penalty, and it will continue to rely on the Court to police it. The Court, for its part, is unlikely to ignore these expectations.” (footnotes omitted)).

views on the death penalty can affect legislation, and, if citizens are not exposed to the gruesome nature of executions, they cannot develop knowledgeable opinions on the practice.³⁷² Not only does this influence legislation, but it also affects the constitutionality of the practice. Because Eighth Amendment jurisprudence depends on the “evolving standards of decency,”³⁷³ and because the Court interprets these standards in large part through objective measures, such as the number of states adopting such a practice,³⁷⁴ legislation affects constitutionality. And if legislation is not properly informed, that means determinations of constitutionality are also ill-informed. Secrecy, then, hinders constitutional progress in the direction of the “evolving standards of decency”³⁷⁵ as contemplated by the Eighth Amendment.

Even if all of these constitutional infirmities would not translate into winning claims for defendants under existing doctrine, the aggregation of all of these issues might tip the balance in the direction of determining that the extensiveness of criminal justice secrecy is constitutionally unacceptable. This notion of assessing constitutional violations in light of the accumulation of constitutional concerns is not entirely new. Perhaps the most well-known example is in the Supreme Court case of *Employment Division v. Smith*.³⁷⁶ In that case, the Court denied the petitioners’ claim that their First Amendment free exercise rights were violated when the state denied them unemployment benefits because they had been fired for ingesting peyote—even if only for religious reasons—in violation of state law.³⁷⁷ The Court explained that, while it had occasionally upheld similar claims before, “[t]he only decisions in which [it had] held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections.”³⁷⁸

372. See Berry & Ryan, *supra* note 9, at 427–28 (outlining this “societal shield”); see also *Furman v. Georgia*, 408 U.S. 238, 362 (1972) (Marshall, J., concurring) (“[T]he question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.”).

373. See *Trop*, 356 U.S. at 101 (“The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

374. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 564–67 (2005) (engaging in state-counting); *Atkins v. Virginia*, 536 U.S. 304 (2002) (examining state legislation); see also Meghan J. Ryan, *On the Road to Abolition: Capital Punishment and Its Uncertain Future in the United States*, JURIST (Feb. 24, 2016, 9:07 AM), <https://www.jurist.org/commentary/2016/02/meghan-ryan-capital-punishment/> (discussing the Court’s practice of surveying state legislation to determine constitutionality under the Eighth Amendment).

375. *Trop*, 356 U.S. at 101.

376. 494 U.S. 872 (1990).

377. *Id.* at 874, 890.

378. *Id.* at 881; see also Meghan J. Ryan, *Can the IRS Silence Religious Organizations?*, 40 IND. L. REV. 73, 86 (2007) (explaining that the *Smith* “Court held that most free exercise challenges are subject only to a deferential rational basis standard of review,” but that “[t]he Court carved out an exception . . . when the case

Such “hybrid” claims could trigger stricter scrutiny by the Court.³⁷⁹

Although *Smith* may be the most famous example of the Court viewing the aggregation of constitutional claims with greater scrutiny, the Court has espoused similar views in the area of criminal justice as well.³⁸⁰ For example, in the Fourth Amendment case of *United States v. Jones*,³⁸¹ five Justices seemed to accept some version of the “mosaic theory” of Fourth Amendment rights, which involves assessing whether a collection of non-searches, when aggregated and viewed as a whole, amount to a Fourth Amendment search.³⁸² Commentators have debated the wisdom of taking such an approach in interpreting the Fourth Amendment,³⁸³ but the Court has adopted similar aggregation-focused analyses in other areas of criminal justice as well. For example, in *Kyles v. Whitley*,³⁸⁴ the Court emphasized that, when determining whether there has been a *Brady* violation, courts should look at *all* of the undisclosed evidence in the aggregate.³⁸⁵ This could be interpreted as assessing whether the accumulation of several individual *Brady* claims amounts to a constitutional violation.

One might apply a similar approach when examining the criminal justice system as a whole. The accumulation of each instance of secrecy and corresponding constitutional concern amounts to an even larger, more troubling, constitutional problem. Indeed, there is now an entire landscape of secrecy shielding the criminal justice system and its sometimes-questionable practices from public view. If the government continues its extensive secret surveillance programs, if grand juries operate in secret to impugn rather than protect prospective defendants, if plea-bargaining takes place behind closed doors, if prosecutors continue to hide important

involves a colorable free exercise claim in addition to the claim of another fundamental right, such as a free speech claim”).

379. *Smith*, 494 U.S. at 882.

380. Further, at least one commentator has suggested that “cases of this kind are legion.” See Dan T. Coenen, *Reconceptualizing Hybrid Rights*, 61 B.C. L. REV. 2355, 2391 (2020).

381. 565 U.S. 400 (2012); see also Kerr, *supra* note 294, at 313 (“The concurring opinions in *Jones* raise the intriguing possibility that a five-justice majority of the Supreme Court is ready to endorse a new mosaic theory of Fourth Amendment protection.”).

382. See Kerr, *supra* note 294, at 320 (“The mosaic theory is therefore premised on aggregation: it considers whether a set of nonsearches aggregated together amount to a search because their collection and subsequent analysis creates a revealing mosaic.”); David Gray & Danielle Keats Citron, *A Shattered Looking Glass: The Pitfalls and Potential of the Mosaic Theory of Fourth Amendment Privacy*, 14 N.C. J.L. & TECH. 381, 397 (2013) (“Although its various proponents differ in the details, the core insight that drives the mosaic theory of Fourth Amendment privacy is that we can maintain reasonable expectations of privacy in certain quantities of information and data even if we lack reasonable expectations of privacy in the constituent parts of those wholes.”); see also *supra* notes 293–298 and accompanying text (explaining the relevance of mosaic theory to the extensiveness of secret surveillance).

383. See generally, e.g., David Gray, Danielle Keats Citron & Liz Clark Rinehart, *Fighting Cybercrime After United States v. Jones*, 103 J. CRIM. L. & CRIMINOLOGY 745 (2013) (examining the challenges of the mosaic approach); Kerr, *supra* note 294 (urging courts to reject the mosaic theory).

384. 514 U.S. 419 (1995).

385. See *id.* at 436 (“[One] aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item.”). Further, the Court’s approach in *Kyles* demonstrated that, when determining whether there has been a *Brady* violation, courts should look at the undisclosed *Brady* material in light of *all* the evidence in the case. See *id.* at 451.

information related to defendants' possible innocence, if the government convicts defendants based on secret evidence, if juror misconduct remains hidden from public view, and if the world remains blind to the details of criminal punishment, then the criminal justice system is no longer the *people's* system. The transparency so important to the Founders that they made sure to explicitly include it in the Constitution has disappeared.

CONCLUSION

Secrecy is pervasive in today's criminal justice system, and this secrecy stands in stark contrast to the system's roots in transparency. Due to improved technology and police officers' evolving practices, secret surveillance has become ubiquitous. Grand jury proceedings, which historically were secret, no longer effectively serve all the reasons that original secrecy was put in place. The American criminal justice system has morphed into a system of plea-bargaining—a practice that happens behind closed doors. Prosecutors regularly hide exculpatory evidence to more easily secure convictions. Today, even the evidence presented at trial has an element of secrecy. Prosecutors often present evidence produced by computer programs, but defendants lack access to the source codes and algorithms underlying these programs. Jury deliberations are surrounded by a wall of secrecy, papering over inappropriate considerations that may have affected the verdict. Even punishment takes place in secret. In dark corners and out-of-the-way places, the government is subjecting prisoners to harsh prison conditions and, in the most egregious of circumstances, torture.

The many levels of secrecy—all the way from the moment an investigation begins to the final moments of punishment—create serious constitutional concerns. The Fourth, Fifth, Sixth, and Eighth Amendments were drafted and ratified to protect individuals' privacy rights, ensure transparency and fairness in criminal proceedings, and prohibit torturous punishment. But the secret practices pervasive within today's criminal justice system push against these constitutional guarantees. Not only do the individual acts of secrecy create constitutional concerns, but the accumulation of all these constitutionally questionable practices creates a real constitutional quagmire. This tangle of constitutional problems dictates that we must begin dismantling this system of secrecy. The dismantling is likely something that we must do slowly, brick by brick; but reevaluating the need for secrecy at each step of the criminal justice system is necessary. Certainly, secrecy may sometimes be justified, and, in beginning to tear down the immense wall of secrecy within the system, we must once again be careful not to create unintended consequences that may be damaging to effective law enforcement and defendants' constitutional rights. But, over time, secrecy has grown and there has not necessarily been a careful consideration of the advantages and disadvantages of that secrecy. It is now time to revisit the constitutional rules surrounding the secrecy that has become ubiquitous within our criminal justice system despite our Founding Fathers' sincere belief in the transparency of the American criminal justice system.