NEW ENGLAND LAW REVIEW

VOLUME 55
Fall 2020

NEW ENGLAND LAW | BOSTON

New England Law Review (ISSN 0028-4823) is published by the *New England Law Review*, New England Law | Boston, 154 Stuart Street, Boston, Massachusetts 02116-5616. *New England Law Review* maintains a Web site at http://www.NewEngLRev.com.

Individual issues of *New England Law Review* are available for $15.00. The annual subscription rate for domestic subscribers is $35.00 ($40.00 for foreign subscribers), payable in advance. Subscriptions are renewed automatically unless notice to the contrary is received. Address changes or other requests regarding subscriptions should be directed to the Business Managing Editor by email at lawreview@nesl.edu

Back issues may be obtained from William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, New York 14068. William S. Hein & Co., Inc. can be reached by telephone at (716) 882-2600, and by fax at (716) 883-8100. William S. Hein & Co., Inc. maintains a Web site at http://www.wshein.com. Recent issues may be obtained directly from *New England Law Review*. The *Law Review* is also available on LEXIS and WESTLAW, and individual articles from recent editions may be obtained from the *Law Review*'s website located at www.NewEngLRev.com.

The *Law Review* invites the submission of unsolicited manuscripts either through the mail or electronically. Directions for electronic submission are available on the *Law Review*'s website at http://www.nesl.edu/lawrev/submissions.cfm. Manuscripts should be sent to the attention of the Editor-in-Chief. Manuscripts submitted through the mail cannot be returned. The *Law Review* requests that submitting authors disclose any economic interests and affiliations that may influence the views expressed in submissions.

The citations in the *Law Review* conform to THE ALWD GUIDE TO LEGAL CITATION (Coleen M. Berger ed., 6th ed. 2017).

Postage is paid at Boston, Massachusetts, and additional mailing offices. POSTMASTER: send address changes and corrections to *New England Law Review*, New England Law | Boston, 154 Stuart Street, Boston, MA 02116-5616.

NEW ENGLAND LAW REVIEW

VOLUME 55 | 2020-2021 | NUMBERS 1-2

NEW ENGLAND LAW | BOSTON CORPORATION

HON. PETER L. BROWN, B.A., J.D.
President

CARY W. SUCOFF, B.A., J.D.
Treasurer

WILLIAM M. CASEY, B.S., J.D.
Secretary

DIANA L. WHEELER, B.A., J.D.
Vice President

ALBERT A. BALBONI, B.A., J.D.
HON. SUSAN J. CRAWFORD, B.A., J.D., Jur. D.
RICHARD J. LAWTON, B.A., J.D.
PETER G. FLAHERTY II, B.A., J.D.
JOHN F. O'BRIEN, B.A., J.D., LL.M., Jur. D.
C. BRENDAN NOONAN III, B.S., J.D.

BOARD OF TRUSTEES

ALBERT A. BALBONI, B.A., J.D.
Chairman

DIANA L. WHEELER, B.A., J.D.
Vice Chairman

WILLIAM M. CASEY, B.S., J.D.
Secretary

RICHARD C. BARDI, B.A., J.D.
HON. PETER L. BROWN, B.A., J.D.
HON. JACKIE A. COWIN, B.A., J.D.
HON. SUSAN J. CRAWFORD, B.S., J.D., Jur. D.
PETER G. FLAHERTY II, B.A., J.D.
STEPHANIE C. NARANJO, B.A., J.D.
C. BRENDAN NOONAN III, B.S., J.D.
KATHLEEN M. PFEIFER SPURLING, B.S., J.D
CARY W. SUCOFF, B.A., J.D.
JUDITH A. WAYNE, B.A., J.D.

FACULTY

SCOTT BROWN, *Dean and President (December 2020)*, B.A., J.D.
ALLISON M. DUSSIAS, *Interim and Associate Dean and Professor of Law*, A.B., J.D.
LISA R. FREUDENHEIM, *Associate Dean, Professor of Academic Excellence, and Director of the Academic Excellence Program*, B.A., J.D.

CHRISTINE ABELY, *Faculty Fellow*, B.A., J.D.
RUTH ADEYINKA, *Visiting Clinical Professor*, B.S., J.D.
GARY ALLEN, *Visiting Clinical Professor*, B.A., J.D., M.B.A.
BREANISHEA AMAYA, *Clinical Teaching Fellow*, B.A., J.D.
GARY M. BISHOP, *Professor of Law and Director of Legal Research and Writing*, B.A., J.D.
ROBERT A. COULTHARD, *Professor of Academic Excellence and Director of Bar Examination Preparation Services*, B.A., J.D., LL.M.
TIGRAN W. ELDRED, *Professor of Law*, A.B., J.D.
RUSSELL ENGLER, *Professor of Law and Director of Clinical Programs*, B.A., J.D.
LAWRENCE M. FRIEDMAN, *Professor of Law*, B.A., J.D., LL.M.
JUDITH G. GREENBERG, *Professor of Law*, B.A., J.D., LL.M.
VICTOR M. HANSEN, *Professor of Law*, B.A., J.D., LL.M.
DINA FRANCESCA HAYNES, *Professor of Law*, B.A., J.D., LL.M.
WILTON B. HYMAN, *Professor of Law*, B.A., J.D., LL.M.
PETER J. KAROL, *Professor of Law*, B.A., J.D.
ILENE S. KLEIN, *Clinical Law Professor*, B.A., J.D.

LISA J. LAPLANTE, *Professor of Law and Director of the Center for International Law and Policy*, B.A., M.Ed., J.D.
ERIC A. LUSTIG, *Professor of Law and Director of the Center for Business Law*, B.S., M.S., J.D., LL.M.
SEAN LYNESS, *Faculty Fellow*, A.B., J.D.
PETER M. MANUS, *Professor of Law*, B.A., J.D.
KRISTIN C. MCCARTHY, *Director of the Law Library and Assistant Professor of Law*, B.A., J.D., M.L.S.
CHANCE MEYER, *Academic Excellence Lecturer on Law*, B.S., J.D.
CARYN R. MITCHELL-MUNEVAR, *Clinical Law Professor*, B.A., J.D.
GARY L. MONSERUD, *Professor of Law*, B.A., J.D., LL.M.
NICOLE NOËL, *Assistant Professor of Law and Assistant Director of the Academic Excellence Program*, B.A., J.D.
KENT D. SCHENKEL, *Professor of Law*, B.A., J.D., LL.M.
DAVID M. SIEGEL, *Professor of Law and Director of the Center for Law and Social Responsibility*, B.A., J.D.
JORDAN M. SINGER, *Professor of Law*, A.B., J.D.
CHARLES W. SORENSON, JR., *Professor of Law*, B.A., M.A., J.D.
MONICA TEIXEIRA DE SOUSA, *Professor of Law*, B.A., J.D.
NATASHA N. VARYANI, *Associate Professor of Law*, B.A., M.B.A., J.D.
J. RUSSELL VERSTEEG, *Professor of Law*, A.B., J.D.

ADJUNCT PROFESSORS OF LAW

DAVID M. BAE, *Lecturer on Law*, B.A. & Sc., J.D.
HON. AMY LYN BLAKE, *Lecturer on Law*, B.A., J.D.
ERIC K. BRADFORD, *Lecturer on Law*, B.A., J.D.
DARREN L. BRAHAM, *Lecturer on Law*, LL.B., LL.M.
HON. RANDY S. CHAPMAN, *Lecturer on Law*, B.B.A., J.D.
ALAN L. CHOW, *Lecturer on Law*, B.A., J.D.
JACK CINQUEGRANA, *Lecturer on Law*, B.A., J.D.
ANDREW P. CORNELL, *Lecturer on Law*, B.A., J.D.
HON. PETER M. COYNE, *Lecturer on Law*, B.A., J.D., M.S.
BERNARDO G. CUADRA, *Lecturer on Law*, B.S., J.D.
THOMAS H. DAY, *Lecturer on Law*, A.B., J.D.
HON. NEALS-ERIK WILLIAM DELKER, *Lecturer on Law*, B.A., J.D.
DAWN D. EFFRON, *Adjunct Professor of Law*, B.A., J.D.
TYSON R. ENCE, *Lecturer on Law*, B.S., J.D.
JUSTIN M. FABELLA, *Lecturer on Law*, B.A., J.D.
BRIAN FLAHERTY, *Lecturer on Law*, B.A., M.L.S.
MICHELLE D. FORZLEY, *Lecturer on Law*, B.A., J.D., M.S.
DAVID J. FREDETTE, *Lecturer on Law*, B.A., J.D.
LAURA GREENBERG-CHAO, *Lecturer on Law*, B.A., J.D.
HON. SYDNEY HANLON, *Lecturer on Law*, A.B., J.D.
DIMITRY HERMAN, *Lecturer on Law*, B.A., J.D.
PAUL-JOHAN JEAN, *Lecturer on Law*, B.A., J.D.
TODD JOHNSON, *Lecturer on Law*, B.A., J.D., ARM, ARM-E, ARM-P, AIC
PATRICIA A. JONES, *Adjunct Professor of Law*, A.B., M.M.E., J.D
JOHN KIERNAN, *Adjunct Professor of Law*, A.B., J.D.
ROSA LICEA-MAILLOUX, *Lecturer on Law*, B.A., J.D.
HON. STEPHEN M. LIMON, *Adjunct Professor of Law*, A.B., J.D.
DAVID H. LONDON, *Lecturer on Law*, B.A., J.D.

HON. DAVID A. LOWY, *Adjunct Professor of Law*, B.A., J.D.
MAUREEN A. MACFARLANE, *Lecturer on Law*, B.A., M.A., M.S., J.D., M.E.L.
HALIM MORIS, *Lecturer on Law*, B.S., J.D.
FRANCIS C. MORRISSEY, *Lecturer on Law*, B.A., J.D.
MATTHEW C. MOSCHELLA, *Lecturer on Law*, B.A., M.S.W., J.D.
WENDY J. MURPHY, *Adjunct Professor of Law*, B.A., J.D.
RYAN H. NELSON, *Lecturer on Law*, B.S.B.A., J.D., LL.M.
ELENA NOUREDDINE, *Lecturer on Law*, B.A., J.D.
DANIEL P. PARADIS, *Lecturer on Law*, B.A., J.D., LL.M.
PETER J. PERRONI, *Lecturer on Law*, B.A., J.D.
LAWRENCE R. PLAVNICK, *Lecturer on Law*, B.S., J.D.
HOLLY CHAMBERLAIN RIGBY, *Lecturer on Law*, B.S., J.D.
HON. ROBERTO RONQUILLO, JR., *Adjunct Professor of Law*, B.A., J.D.
HON. JAMES P. ROONEY, *Lecturer on Law*, A.B., J.D.
DAVID P. RUSSMAN, *Lecturer on Law*, B.A., J.D.
BENNETT R. SAVITZ, *Lecturer on Law*, B.A., M.A., J.D.
THOMAS G. SHACK III, *Lecturer on Law*, B.A., M.B.A., J.D.
JUSTIN SILVERMAN, *Lecturer on Law*, B.A., J.D.
JOSEPH F. STANTON, *Lecturer on Law*, B.A., J.D.
JENNIFER A. SUNDERLAND, *Lecturer on Law*, B.A., J.D.
GARY OWEN TODD, *Lecturer on Law*, B.A., J.D.
HON. RICHARD WELCH II, *Adjunct Professor of Law*, B.A., J.D.
DONNA M. WHITE, *Lecturer on Law*, A.L.B., J.D., LL.M.
TANASIA WHITE, *Lecturer on Law*, B.S., J.D.
TIMOTHY L. WILLIAMSON, *Lecturer on Law*, B.A., J.D.

LEGAL RESEARCH AND WRITING FACULTY

STEFANIE GIULIANO ABHAR, *Instructor of Legal Writing*, B.A., J.D.
BRYAN M. ABRAMOSKE, *Instructor of Legal Writing*, B.A., J.D.
CHANISE ANDERSON, *Instructor of Legal Writing*, B.A., J.D.
TERESA ANDERSON, *Instructor of Legal Writing*, B.A., M.A., J.D.
EMANUEL N. BARDANIS, *Instructor of Legal Writing*, B.A., J.D.
ASHLEY BARKOUDAH, *Instructor of Legal Writing*, B.A., J.D.
BARRY BISSON, , *Instructor of Legal Writing*, B.S., J.D.
SANDRA WYSOCKI CAPPLIS, *Instructor of Legal Writing*, B.S., J.D.
MEDORA S.L. CHAMPAGNE, *Instructor of Legal Writing*, B.A., J.D.
SARA COLKET, *Instructor of Legal Writing*, B.A., J.D.
BETH PIRRO COOK, *Instructor of Legal Writing*, B.A., J.D.
STEVEN E. DICAIRANO, *Instructor of Legal Writing*, B.A., J.D.
JENNIFER L. DICARLO, *Instructor of Legal Writing*, B.S., J.D.
JOSEPH M. GALVIN, *Instructor of Legal Writing*, B.A., J.D.
MELISSA A. GAUTHIER, *Instructor of Legal Writing*, B.A., J.D.
HILLARY GELL, *Instructor of Legal Writing*, B.A., J.D.
LANE N. GOLDBERG, *Instructor of Legal Writing*, B.S., J.D.
JORDANA GOODMAN, *Instructor of Legal Writing*, B.S., J.D., M.S.
KAREN GUTHRIE, *Instructor of Legal Writing*, B.A., J.D.
LAURA HENNESSEY, *Instructor of Legal Writing*, B.A., J.D.
NINA S. HIRSCH, *Instructor of Legal Writing*, B.A., J.D.
DOUGLAS R. HYNE, *Instructor of Legal Writing*, B.A., J.D.

SALLYANN JANULEVICUS, *Instructor of Legal Writing*, B.A., J.D.
LISA JOHNSON, *Adjunct Professor of Legal Writing*, B.A., J.D.
JARED KELLY, *Instructor of Legal Writing*, B.S., J.D.
MICHELLE R. KING, *Adjunct Professor of Legal Writing*, B.A., M.P.H., J.D.
RITA KRANER, *Instructor of Legal Writing*, B.A., J.D.
CHRISTOPHER MARKHAM, *Instructor of Legal Writing*, B.A., J.D.
MARIAN MCGRATH, *Instructor of Legal Writing*, B.A., J.D.
NANCY L. MCPHEETERS, *Adjunct Professor of Legal Writing*, B.S., J.D.
REBECCA MOOR, *Instructor of Legal Writing*, B.A., J.D., LL.M.
BRANDON MOSS, *Instructor of Legal Writing*, B.S., J.D.
SHANE O'SULLIVAN, *Instructor of Legal Writing*, B.S., J.D.
NICOLE PAQUIN, *Instructor of Legal Writing*, B.A., J.D.
KRISTEN SCHULER SCAMMON, *Instructor of Legal Writing*, B.A., J.D.
JESSICA MAHON SCOLES, *Instructor of Legal Writing*, B.S., J.D.
CHRISTOPHER SHEA, *Instructor of Legal Writing*, B.S., J.D.
STACY J. SILVEIRA, *Instructor of Legal Writing*, B.A., M.A., J.D.
CHRISTINA SIMPSON, *Instructor of Legal Writing*, B.A., J.D.
HEATHER STEVENSON, *Instructor of Legal Writing*, B.A., M.S.E., J.D., LL.M.
MARK D. SZAL, *Instructor of Legal Writing*, B.A., J.D.
RENA VAN HAREN, *Instructor of Legal Writing*, B.A., M.A., J.D.
SIDRA VITALE, *Instructor of Legal Writing*, B.S., J.D.
KIERSTEN ZAZA, *Instructor of Legal Writing*, B.A., J.D.

VOL. 55 PUBLICATION TEAM

LAWRENCE M. FRIEDMAN, *Professor of Law and Faculty Advisor*, B.A., J.D., LL.M.
KYLE SUTTON, *Editor-in-Chief, New England Law Review*, Vol. 56
EMILY HORJUS, *Senior Executive Editor, New England Law Review*, Vol. 56

* * * *

* * * *

NEW ENGLAND LAW REVIEW

VOLUME 55 FALL 2020 NUMBER 1

CONTENTS

SYMPOSIUM ISSUE

USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM

ARTICLES

The Language of Criminal Justice Reform: Reflections on Karakatsanis' *Usual Cruelty*
Lauryn P. Gouldin 1

Review of *Usual Cruelty: The Complicity of Lawyers in the Criminal Injustice System* by Alec Karakatsanis
Michael Meltsner.....21

COMMENTS

Unlocking Your Phone Could Lock You Up: Say Your Goodbyes to the Right Against Self-Incrimination
Cambrea Beller 27

The Doctrine of Abatement *Ab Initio* in *Commonwealth v. Hernandez*
Jenna DeAngelo.....45

The Dangers of Malingering as the Basis for a Two-Level Sentence Enhancement Under U.S.S.G. § 3C1.1
Melanie Falzone.....59

* * * *

The Language of Criminal Justice Reform: Reflections on Karakatsanis' *Usual Cruelty*

LAURYN P. GOULDIN*

INTRODUCTION: NEW POLITICS, NEW NARRATIVES

Until relatively recently, the politics surrounding criminal justice reform were infamous for operating as a "one-way ratchet."[1] For at least a decade immediately before and after the turn of this century, political conversations about criminal justice were dominated by "tough-on-crime" rhetoric that both fed and responded to broad public support for punishment.[2] During this period, Mary Fan explains that it was "much easier to accelerate penal severity and much harder to shift course, even if the lessons of experience counsel[ed] for change."[3] In the book *Prisoners of*

* Crandall Melvin Professor of Law, Syracuse University College of Law; J.D., New York University School of Law; A.B., Princeton University. For their thoughtful comments and suggestions, I am grateful to Nicolas Commandeur, Ian Gallacher, Janet Moore, and Anna Roberts. Thank you also to Kyle Sutton, Emily Horjus, Gabrielle Mainiero, and Danielle Walsh at the *New England Law Review* and to Alec Karakatsanis and the other attendees at the 2020 *New England Law Review* Fall Symposium. I am indebted to Mariah Almonte, Marina De Rosa, John Mercurio, Meghan Mueller, and Jane Skinner for outstanding research assistance. I look forward to continuing this conversation about the power of language with the participants in the 2022 AALS Criminal Justice Section Panel on Rethinking Criminal Law Language.

[1] Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223 n.1, 225 (2007) (collecting descriptions of the criminal justice system as a "one-way ratchet" but noting that the "one-way ratchet" description was an oversimplification that ignored "long and continuing" state decriminalization efforts); Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 592 (2012) ("[F]or more than a decade, we have been caught in a one-way ratchet and a rut."); *see* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509–10 (2001) (discussing the historical trend of broadening the reach of criminal law in an effort to appear "tough on crime[,]").

[2] RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 2 (2019) (explaining that this "penal populism" is "an embedded feature of U.S. politics").

[3] Fan, *supra* note 1, at 592.

Politics, Rachel Barkow describes in detail the political and media forces that drove the public's appetite for more punitive criminal justice policies.[4]

In recent years, however, the dominant criminal justice discourse in the United States has changed, and the country "is increasingly described as being in the midst of a cultural sensibility shift around crime and punishment."[5] We seem to be leaving the era of mass incarceration behind, in our rhetoric, at least. Michelle Phelps credits the range of diverse voices ("including prisoners and their advocates, policymakers, researchers, think tanks, and journalists") whose advocacy and "contestation" during our more punitive decades "coalesced" into an increasingly powerful "critique[]" of "the value of a massive carceral system oriented toward retribution and incapacitation."[6]

Bipartisan efforts to shrink jail and prison populations and widespread calls for police reform make clear that criminal justice reform has moved away from its political third-rail status.[7] As New York Times criminal justice editor Shaila Dewan explained after the election in 2020: "[C]riminal justice reform offers something for just about everyone: social justice crusaders who point to yawning racial disparities, fiscal conservatives who decry the extravagant cost of incarceration, libertarians who think the government has criminalized too many aspects of life . . . ."[8] There seems to be a growing consensus that the current system is unsustainable, even if there is no agreement about how to fix it or whether to abandon it.[9]

---

[4] BARKOW, *supra* note 2, at 105–12.

[5] Michelle S. Phelps, *Possibilities and Contestation in Twenty-First-Century US Criminal Justice Downsizing*, 12 ANN. REV. L. SOC. SCI. 153, 154 (2016).

[6] *Id.* at 159–61 (explaining that these "struggles" against the status quo "open[ed] up channels of dissent and develop[ed] the policy discourses and proposals that have become popular today.").

[7] *See* Shaila Dewan, *Here's One Issue That Could Actually Break the Partisan Gridlock*, N.Y. TIMES (Nov. 24, 2020), https://perma.cc/M3KL-8CJT ("In an election season in which no one seemed to agree on anything . . . criminal justice reform was the rare issue upon which the two parties seemed to find some common ground."); Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law – and What Happens Next*, BRENNAN CENTER FOR JUST. (Jan. 4, 2019), https://perma.cc/72FE-2L4G ("The FIRST STEP Act's overwhelming passage demonstrates that the bipartisan movement to reduce mass incarceration remains strong.").

[8] Dewan, *supra* note 7; *see* Jamiles Lartey, *What Biden's Win Means for the Future of Criminal Justice*, MARSHALL PROJECT (Nov. 8, 2020), https://perma.cc/A44H-585F ("Biden has . . . been elected on the most progressive criminal justice platform of any major party candidate in generations.").

[9] *See* JOSEPH R. BIDEN, JR. ET AL., SOLUTIONS: AMERICAN LEADERS SPEAK OUT ON CRIMINAL JUSTICE (Inimai Chettiar & Michael Waldman eds., 2d ed., 2015) [hereinafter SOLUTIONS], https://perma.cc/R6L3-2FWE; THE SENTENCING PROJECT, TO BUILD A BETTER CRIMINAL JUSTICE

Perhaps unsurprisingly, there is also a growing academic critique of this "consensus" narrative. Although there may be agreement that our rates of incarceration are too high or that our policies are counterproductive and inefficient,[10] there are significant differences of opinion about the scale of the problem and the degree to which transformative (or abolitionist) solutions are required.[11] Ben Levin cautions that reformers need to "recognize how tenuous this consensus is and how much it relies upon different frames and different goals."[12]

The shift from general calls for reform to specific policy development reveals fractures and fragility in this bipartisan or multiparty coalition.[13] Calls for criminal justice reform and decarceration are nuanced, merging and blending moral objections to the carceral state, libertarian visions of individual freedom and small government, and fiscal conservatives' economic claims about system inefficiency and waste.[14] The fiscal goals that

---

SYSTEM: 25 EXPERTS ENVISION THE NEXT 25 YEARS OF REFORM (Marc Mauer & Kate Epstein eds., 2012), https://perma.cc/5YKC-Y52R; *America's Hidden Common Ground on Race and Police Reform*, PUB. AGENDA (June 29, 2020), https://perma.cc/34XY-EC2V; Megan Brenan, *Fewer Americans Call for Tougher Criminal Justice System*, GALLUP (Nov. 16, 2020), https://perma.cc/73MU-V9RH; Dewan, *supra* note 7.

[10] Fan, *supra* note 1, at 596 ("The fiscal and human consequences are becoming so impossible to ignore that even traditionally fiercely tough-on-crime conservative leaders are calling for a reorientation of the conservative stance."); BARKOW, *supra* note 2, at 5 ("We are wasting billions of dollars on too many practices that achieve the worst of both worlds: they do not protect victims or increase public safety, while at the same time they have catastrophic effects on millions of individuals and entire communities, especially poor people of color.").

[11] PHILIP GOODMAN, JOSHUA PAGE & MICHELLE PHELPS, BREAKING THE PENDULUM: THE LONG STRUGGLE OVER CRIMINAL JUSTICE 130 (2017) ("[C]onsensus around reform is an illusion, even as more and more Americans believe the country incarcerates too many people. . . . [W]hile many celebrate the unique coalitions supporting reform, distance between group members means that coalition efforts are often ideologically incoherent."); Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 263–64 (2018).

[12] Levin, *supra* note 11, at 263–64 (identifying the differences that exist between, and within, the mass incarceration reform framework and the overcriminalization reform framework as evidence of the divide within the general consensus).

[13] Phelps, *supra* note 5, at 162 ("[R]eforms today are bounded by the discourses advocates used to challenge the penal buildup, including the focus on cost-benefit analyses, reentry, and recidivism. These collisions are producing fissures that have the potential not only to limit or derail downsizing efforts but to expand the reach of the carceral state.").

[14] Phelps, *supra* note 5, at 163 ("Even as former defenders of punitive policies join efforts for moderate reforms, the diverse composition of these emergent coalitions sharply bounds thinkable reform. Although groups as varied as Koch Industries, the American Civil Liberties Union, and Freedom Works have banded together . . . they are clearly motivated by different underlying ideologies . . . .").

brought many conservatives to criminal justice reform, for example, do not necessarily require a reduced carceral footprint and may, in fact, obscure "the human costs of mass imprisonment."[15] Levin also highlights scholars' tendency to conflate two different critiques—critiques of mass incarceration[16] and critiques of overcriminalization[17]—in the rush to claim that there is political consensus in support of criminal justice reform.[18] He argues that while "the two approaches might be complementary [this] does not mean that they are consistent or congruent[,]" and he urges scholars, reformers, policymakers, and practitioners to be precise in describing the project of criminal justice reform.[19]

Abolitionists, in particular, are critical of "reformists" who they accuse of seeking only marginal policy adjustments.[20] Critics also argue that some

---

[15] *See* Phelps, *supra* note 5, at 164 ("The limits of these coalitions can also be seen in the contradictions of the fiscal narrative in driving reforms. . . . The rhetoric of cost-effectiveness was a key piece of critiques of mass incarceration and has gained salience over time. Yet punishment can get cheaper without becoming more moderate. . . . Concerns about the fiscal costs of mass imprisonment also distract from the deeper moral and ethical arguments against the carceral state. . . . Media analyses consistently find that the discourses of reform are dominated by fiscal costs, with little mention of the human costs of mass imprisonment.") (citing HADAR AVIRAM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT (2015); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015); Michael Tonry, *Making Peace, Not a Desert: Penal Reform Should Be About Values Not Justice Reinvestment*, 10 CRIMINOLOGY & PUB. POL'Y, no. 3, 2011, at 637–49; Katherine Beckett, Anna Reosti & Emily Knaphus, *The End of an Era? Understanding the Contradictions of Criminal Justice Reform*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 238, 238–59 (2016); The Opportunity Agenda, *An Overview of Public Opinion and Discourse on Criminal Justice Issues*, PRISON LEGAL NEWS (August 2014), https://perma.cc/J8NQ-SQYQ); *see also* Levin, *supra* note 11, at 263–64.

[16] Levin, *supra* note 11, at 262–63 (demonstrating that the mass critique "focuses on the criminal system as a sociocultural phenomenon. The issue is not a miscalibration; . . . criminal law is doing ill by marginalizing populations and exacerbating troubling power dynamics and distributional inequities. Every incarcerated person might have been guilty of the charged offense, but the critique would still hold.").

[17] Levin, *supra* note 11, at 262–63 (explaining that the overcriminalization critique "is rooted in a belief that the criminal law has an important and legitimate function, but that it has exceeded that function. There is an optimal rate of incarceration and an optimal rate of criminalization, but the current criminal system . . . has criminalized too much and incarcerated too many").

[18] Levin, *supra* note 11, at 262–64.

[19] Levin, *supra* note 11, at 264; *see* Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 201 (2013).

[20] *See, e.g.*, Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. FORUM 90, 101 (2020) ("The non-reformist reform framework is prevalent in abolitionist organizing against the prison industrial complex, and deployed by those who embrace racial

"reform" commitments to surveillance and risk management incorporate and amplify old systemic problems;[21] and that many new reform proposals merely tinker at the margins[22] or apply "smart" new labels to tired retributive or punitive approaches.[23]

In the 2019 collection of essays *Usual Cruelty: The Complicity of Lawyers in the Criminal Injustice System*, Alec Karakatsanis explains that "we would need eighty percent reductions in human caging to return to historical U.S. levels and to those of other comparable countries."[24] He and others

justice, anti-capitalism, and socialism more broadly."); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 114 (2019) ("[A]bolitionist philosophy is defined in contradistinction to reform: reforming prisons is diametrically opposed to abolishing them. Efforts to improve the fairness of carceral systems and to increase their efficiency or legitimacy only strengthen those systems and divert attention from eradicating them."); *Reformist Reforms vs. Abolitionist Steps to End Imprisonment*, CRITICAL RESISTANCE, https://perma.cc/463Z-YBXU (last visited Sept. 26, 2021).

[21] Jessica M. Eaglin, *Technologically Distorted Conceptions of Punishment*, 97 WASH. U. L. REV. 483, 526–29 (2019) (explaining that "actuarial risk tools reify race in the sense that they breathe life into the pervasive stereotype of black criminality, framed in the rhetoric of objective and empirical data"); *see also* Brandon L. Garrett & John Monahan, *Judging Risk*, 108 CALIF. L. REV. 439, 457 (2020) (discussing concerns that the use of risk assessment tools "can result in racial disparities or disparities based on other invidious criteria"); Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2222 (2019) ("Given that algorithmic crime prediction tends to rely on factors heavily correlated with race, it appears poised to entrench the inexcusable racial disparity so characteristic of our justice system and to dignify the cultural trope of black criminality with the gloss of science.").

[22] BARKOW, *supra* note 2, at 5 (explaining that reform proposals "focused predominantly on the harshest punishments for nonviolent drug and property offenders who do not have much in the way of a criminal record" are not going to "make much of a dent in the overall sweep of incarceration or criminal punishment in the United States"); Phelps, *supra* note 5, at 166 ("It does appear that the United States is in the midst of a moment of carceral reckoning. Yet all signs still point to efforts merely 'tinkering with the machinery' . . . rather than addressing the profound reach and tragic consequences of the penal state.") (quoting Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting)).

[23] Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 541 (2015) (calling for "a reflection about the limits and potential misuses of popular evidence-based correctional practices" and arguing "practitioners and policymakers [must] monitor the implementation of [these new] evidence-based practices to ensure consistency between the ways they are being used and the purposes they are intended to advance"); Joan Petersilia, *Book Review:* Caught: The Prison State and the Lockdown of American Politics *by Marie Gottschalk*, 19 PUNISHMENT & SOC'Y, no. 5, 2017, at 625, 627 ("[I]n order to move beyond symbolic sound bites to achieve real and lasting progress, we need more nuanced discussions of the challenges [of mass incarceration in the USA] and a thoughtfully planned effort to overcome them."); SOLUTIONS, *supra* note 9.

[24] ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL

emphasize that the path forward will also require much broader socioeconomic transformation.[25]

Crafting transformative legislative reforms that significantly reduce prison and jail populations or otherwise limit the reach of the carceral state will require fundamental changes to the way that criminal justice policies are set.[26] In *Usual Cruelty*, Karakatsanis reflects on the state of reform efforts and emphasizes that meaningful reform will require radical changes to the ways that we talk about our "criminal legal system," which he describes as a "punishment bureaucracy."[27] As he explains:

> Whether we can improve and scale these and other transformative [reform] ideas depends on whether we can change the stories that the punishment bureaucracy tells about why it exists and what it does. Only by having an honest conversation about what the punishment bureaucracy is can an informed movement dismantle it. Many human beings have a lot at stake in whether we can.[28]

Karakatsanis wrote these essays at different points during his years (just over a decades-worth, to date) of front-line advocacy as a public defender (in both the federal and state systems) and then as a founder and lead litigator at two civil rights litigation nonprofits.[29] In the book's introduction,

---

INJUSTICE SYSTEM 87 (2019).

[25] *Id.*; *see, e.g.*, ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 16 (2003) ("This is the ideological work that the prison performs – it relieves us of the responsibility of seriously engaging with the problems of our society, especially those produced by racism and, increasingly, global capitalism."); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1819–20 (2020) (discussing Ruth Wilson Gilmore's work tracing "California's twentieth-century prison boom to crises in capitalism rather than to rising crime rates"); GOODMAN, *supra* note 11, at 131 ("[S]ocial-movement groups are pushing electoral candidates, lawmakers, and legal professionals to address structural issues that contribute to poverty, crime, victimization, and other 'social problems' rather than simply tweak individual practices and policies (such as equipping cops with body cameras). Many activists insist that struggles to decrease violence and to reform criminal justice will prove ineffective if disconnected from campaigns to reduce racial and class inequality."); Levin, *supra* note 11, at 273 (pointing out that the mass incarceration framework in particular is "less a critique of the criminal system as such than it is a critique of legal, social, economic, and racial injustice that uses the criminal system as an example or point of entry"). *See generally* JACKIE WANG, CARCERAL CAPITALISM (2018).

[26] Rachel Barkow warns that "the existing political process is capable of producing only modest changes." BARKOW, *supra* note 2, at 12.

[27] As just one example, Karakatsanis very deliberately refuses to adopt conventional labels for a system that he views as anything but just. In his book, he refers to our "criminal legal system" or "criminal injustice system" but never to a "criminal justice system." KARAKATSANIS, *supra* note 24.

[28] KARAKATSANIS, *supra* note 24, at 98.

[29] KARAKATSANIS, *supra* note 24, at 1; *Our Team*, CIVIL RIGHTS CORPS, https://perma.cc/BVM7-

Karakatsanis explains that part of what binds together his collection of essays was his long-standing "interest[] in the chasm between how the law is written and how the law is lived."[30] Karakatsanis describes this divide in sharp and unsparing language as:

> [T]he difference between how we advertise the law with beautiful inscriptions on our public monuments or lofty words in judicial opinions taught in law schools, and how we use the law to crush the bodies and minds of poor people and people of color in our streets, our prisons, and our courtrooms.[31]

Looking ahead, a key piece of criminal justice reform efforts will be changing the way that we describe the current system and being strategic about the language that is used to promote reforms. Changes in our criminal justice discourse have not (yet) produced transformational system reforms,[32] but there are signs of progress.[33]

This essay focuses on the language, rhetoric, and framing of criminal justice reform. Part I explores the power of language and framing to shape

---

GVPU (click on Alec Karakatsanis) (last visited Sept. 26, 2021); Yael Marans, *Q&A with Alec Karakatsanis, Founder of the Civil Rights Corps*, DAILY PRINCETONIAN (Feb. 28, 2019, 10:40 PM EST), https://perma.cc/WT3L-KC6X.

[30] KARAKATSANIS, *supra* note 24, at 3.

[31] KARAKATSANIS, *supra* note 24, at 3; KARAKATSANIS, *supra* note 24 at 5 (For Karakatsanis, these are not merely linguistic divides, they are also incongruous visual images. He describes many of the country's courtrooms as being nestled in the "grandest buildings" where "society does some of its worst deeds.").

[32] BARKOW, *supra* note 2, at 124 ("[A]lthough there has been some rollback in imprisonment because of a growing number of forces speaking out against mass incarceration, their achievements have been slight and have come nowhere close to tackling the record high levels of incarceration in the United States. Strong political and psychological forces remain decidedly in favor of long sentences and an expansive criminal state—even when doing so is best characterized as pathological.").

[33] See Phelps, *supra* note 5, at 156 (noting that while essays suggest "we should avoid assuming that policy reforms will translate directly into more moderate imprisonment rates," markers of progress include relevant legislation, "new court commitments," parole violation admissions, and carceral population decreases) (citing Katherine Beckett, Emily Knaphus & Anna Reosti, *The End of Mass Incarceration? Mapping the Contradictions of Criminal Justice Policy and Practice*, SSRN: SOC. SCI. RES. NETWORK (Jan. 14, 2016), https://perma.cc/W7DM-9YAX; E. Ann Carson, *Prisoners in 2014*, BUREAU OF JUST. STAT. (Sept. 2015), https://perma.cc/HM8G-S9M9; Susan F. Turner, et al., *A National Picture of Prison Downsizing Strategies*, 10 VICTIMS & OFFENDERS, no. 4, Oct. 2015, at 401, 401–19; E. Ann Carson & Daniela Golinelli, *Prisoners in 2012: Trends in Admissions and Releases, 1991-2012*, BUREAU OF JUST. STAT. (Dec. 2013), https://perma.cc/9P3Q-FJCT; Danielle Kaeble, Lauren Glaze, Anastasios Tsoutis & Todd Minton, *Correctional Populations in the United States, 2014*, BUREAU OF JUST. STAT. (Dec. 2015), https://perma.cc/PH7D-VE9D).

policy making in general, and in the criminal justice system, in particular. In Part II, inspired by Karakatsanis' special critique of lawyers' "complicity" in the harms wrought by the criminal system, I consider the special culpability that lawyers bear when policy failures are, at least in part, attributable to inaccurate labels and dishonest descriptions. Finally, this essay concludes with preliminary thoughts about how best to change criminal law conversations going forward, including perspectives from Karakatsanis and other activists and scholars about who ought to dictate the terms of a new criminal justice discourse.

I. The Impacts of Language

The words we use to frame criminal justice reform conversations are important and impactful.[34] Those labels shape how community members, voters, or system actors perceive the way that our system works, the victimization it is supposed to remedy or prevent, and the harms it inflicts. The specific terms used to describe issues and explain policy proposals can also build alliances or expose fragile coalition fault lines.[35] In a 2005 article that outlined how criminal justice reformers could reshape political conversations and influence criminal justice system policymakers, political strategist Peter Loge explained this connection between language and political influence:

> A critical piece in the politics of the policy puzzle is language—how an issue is understood by both the public and political elites determines whether each will act, and, if so, how. . . . These understandings are driven by language, such as what an issue is named, the metaphors used, and the terms employed. The language "frames" an issue, which sets the political and policy route the issue will follow. Well-selected language and frames can significantly increase the chance for success in policy disputes, while poorly chosen words and frames can mean near-certain failure. As such, political language and issue framing is hotly contested ground.[36]

---

[34] Eaglin, *supra* note 21 at 534 ("Framing narratives shape, drive, and justify reforms and debate."); *see* Lauryn P. Gouldin, *Reforming Pretrial Decision-Making*, 55 WAKE FOREST L. REV. 857, 890–95; 898–900 (2020) (highlighting the potential for overly broad labels to lead judges to overestimate pretrial risks); *cf.* Al Tompkins, *What Words Should We Use to Describe What Happened in the Capitol?*, POYNTER. (Jan. 8, 2021), https://perma.cc/9MTU-UXVZ (identifying the various terms used to describe the January 6, 2021, attack on the U.S. Capitol).

[35] Peter Loge, *How to Talk Crimey and Influence People: Language and the Politics of Criminal Justice Policy*, 53 DRAKE L. REV. 693, 694 (2005) ("How an issue is perceived determines the range of allies, advocates, opponents, and outcomes in debates around that issue.").

[36] *Id.*

Like political strategists, trial lawyers are particularly focused on these questions of framing. As Ian Gallacher explains, effective trial lawyers frame their clients' narratives to match the evidence that has been presented in a case, but also "to engage and co-opt the jury's cultural narrative."[37] Karakatsanis, as both a trial and policy advocate, seems particularly attuned to this potential for "the language society uses to talk about the punishment system" to create "a different cultural narrative."[38] He explains that "[l]egal decisions are made and legal commentary is written on the level of shared cultural consciousness."[39]

Decades of psychology research, grounded in the work of Amos Tversky and Daniel Kahneman, support these conclusions: the way that choices are

---

[37] Ian Gallacher, *Thinking Like Non-Lawyers: Why Empathy Is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance*, 8 LEGAL COMM. & RHETORIC 109, 122 (2011) (citing Judith D. Fisher, *Framing Gender: Federal Appellate Judges' Choices About Gender-Neutral Language*, 43 U.S.F. L. REV. 473 (2009) (quoting ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON ORGANIZATION OF EXPERIENCE* 21 (1974))); *see* Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989); Gallacher, *supra*, at 119 (noting that there is an increased "interest[ ] in the power of narrative, and especially the role of rhetoric and storytelling in legal communication").

[38] KARAKATSANIS, *supra* note 24, at 10. In a 2019 interview, Karakatsanis noted that some of these efforts to change the narrative did not involve changes in language but in specific actions that worked to rehumanize his clients for judges and juries. Karakatsanis would request that his clients "be unshackled while in court" and also asked "marshals to allow [his] clients' children to come hug them before sentencing." He explained:

> Little acts like these may not be significant in the broader sense, in the sense that they're not taking down capitalism or white supremacy, but they change the way that this mass assembly-line bureaucracy is able to process human beings: It slows it down, it makes everybody a little bit more sensitized to the cruelty that they're about to inflict on a child or on a parent, on a human being.

Alice Speri, *The Criminal Justice System Is Not Broken. It's Doing What It Was Designed to Do*, THE INTERCEPT (Nov. 9, 2019, 10:32 AM), https://perma.cc/WVS4-7PNQ.

[39] KARAKATSANIS, *supra* note 24, at 136. In this way, Karakatsanis taps into existing discussions of what Dan Kahan and others have termed "cultural cognition" theory. Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 151–52 (2006) ("By 'the cultural cognition of public policy' (or simply 'cultural cognition'), we mean to refer to the psychological disposition of persons to conform their factual beliefs about the instrumental efficacy (or perversity) of law to their cultural evaluations of the activities subject to regulation."); *see* David Jaros, *Flawed Coalitions and the Politics of Crime*, 99 IOWA L. REV. 1473, 1479 n.21 (2014) ("The cultural theory of risk asserts that individuals selectively attend to risks and related facts in a way that reflects and reinforces their 'cultural worldviews,' or preferences about how society should be organized.") (quoting Dan M. Kahan et al., *Who Fears the HPV Vaccine, Who Doesn't, and Why? An Experimental Study of the Mechanisms of Cultural Cognition*, 34 LAW & HUM. BEHAV. 501, 502 (2010)).

framed affects decision-making behavior and changes outcomes.[40] Study after study has demonstrated that individuals' decisions are influenced by the ways that choices are described. People "make decisions based not only on their consequences—as would be predicted by expected utility theory—but also based on how the choices are framed."[41]

Particularly in contexts like criminal justice where communities and policymakers are focused on risk, lawyers should pay special attention to whether the words they use to describe various phenomena cause people to overestimate the relevant risks.[42] There are opportunities to temper potential community overreaction with careful word choice. For example, terms like "felon" that may once have meaningfully signaled the perpetration of serious wrongdoing or crimes, have, as the felony category has bloated beyond recognition, been watered down significantly.[43] As Alice Ristroph explains, however, the term "felon" still suggests serious wrongdoing to listeners, in ways that lead listeners to overestimate a person's culpability for past misconduct or risk of future harm.[44] The same can be said of common references to "flight risk" or to "dangerousness."[45] Scholars have

---

[40] Robert Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 J. OF COMM., no. 4, 1993, at 51; *see* Jeffrey R. Brown, Arie Kapteyn & Olivia S. Mitchell, *Framing and Claiming: How Information-Framing Affects Expected Social Security Claiming Behavior*, 83 J. RISK & INS., no. 1, 2016, at 139, 140 ("[I]mportant economic decisions can be substantially altered by the way in which information is framed. . . . Kahneman and Tversky (1981) famously reported that presenting a public policy choice in terms of 'lives saved' versus 'lives lost' dramatically shifted the proportion of the respondents who supported a given policy."); Thomas E. Nelson, Zoe M. Oxley & Rosalee A. Clawson, *Toward a Psychology of Framing Effects*, 19 POL. BEHAV., no. 3, 1997, at 221, 235 (defining "framing" as the "process by which a communication source constructs and defines a social or political issue for its audience" and outlining findings from studies supporting the claim that "framing can affect the balance of considerations that individuals weigh when contemplating political issues"). *See also* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI., no. 4481, 1981, at 453, 453–58.

[41] Brown, Kapteyn & Mitchell, *supra* note 40, at 140.

[42] Gouldin, *supra* note 34, at 898 (explaining that risk assessment tools that sort defendants into "low, moderate, or high risk" categories can cause people to overestimate the risks posed by those labeled as "moderate-high" or "high").

[43] BARKOW, *supra* note 2, at 31.

[44] Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563, 567–69 (2018) (identifying dual meanings of the word "felon" to include a legal meaning and a social meaning where the latter meaning connotes an "intrinsic wrongfulness" or "character flaw" of the individual).

[45] Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 678 (2018); Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2506 n.31 (2020) ("Valuable work has been done, for example, in pointing out that the 'violence' required for something to be classified as a 'violent offense' falls considerably short of mainstream conceptions of 'violence.'") (citing

also written about how terms like "offender" are used in ways that are both inaccurate[46] and counterproductive.[47]

Although Karakatsanis does not analyze these concepts through behavioral economists' visions of framing, he is particularly attuned to the power of language, labeling, and narrative to reshape our cultural awareness and to motivate political engagement. Karakatsanis' renaming and relabeling project has an additional and unmistakable aim: to sharpen the edges of the discourse—to bring the community into direct contact with the dysfunction of the system. He seeks to create empathy in a "powerful," "shape-shifting" bureaucracy that seems immune to it.[48] Karakatsanis explains that his word choices are part of a deliberate strategy to humanize his clients and other defendants for judges, prosecutors, other lawyers, and court personnel whose work inside what Karakatsanis calls the "punishment bureaucracy" may lead them to trade away liberty and dignity for efficiency.[49] In Karakatsanis' view, lawyers must remember that "all abstract policy debates are about real people. We owe it to those people to ensure that their stories are not shortchanged when we make the difficult tradeoffs that governing a society of humans requires."[50]

Karakatsanis' use of the term "human cages" steers attention back to the individuals impacted by the system. It is much harder to avert one's gaze

---

Levin, *supra* note 11); *see* Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX L. REV. 497, 548 (2012); Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 566 (2018).

[46] *See* Roberts, *supra* note 45, 2506–07 (criticizing lawyers' and scholars' stigmatizing overuse of the term "offender" and references to "their 'recidivism,' their redemption, and their rehabilitation" given all the flaws in the system, including, but not limited to overcriminalization); *id*. at 2506 n.31 ("Even as important points are made about the messiness, error, and ambiguity in deciding who is which kind of offender, one can sometimes lose track of similar vulnerabilities in deciding who is an offender in the first place.").

[47] Lynn Branham has written about how using the term "offender" undermines efforts to achieve "systemic and cultural change." Lynn S. Branham, *Eradicating the Label "Offender" from the Lexicon of Restorative Practices and Criminal Justice*, 9 WAKE FOREST L. REV. ONLINE 53, 64 (2019) ("Referring to people in ways that denude them of their humanness makes it difficult, if not impossible, to fuel and foster widespread receptivity to restorative processes that, at their core, are founded on an unflagging commitment to accord respect to every human being.").

[48] KARAKATSANIS, *supra* note 24, at 72.

[49] KARAKATSANIS, *supra* note 24, at 16 ("If the function of the modern punishment system is to preserve racial and economic hierarchy through brutality and control, then its bureaucracy is performing well.").

[50] KARAKATSANIS, *supra* note 24, at 104–05; *see* Phelps, *supra* note 5, at 159–60 (describing writing, documentaries, and other media portrayals of drug users that "implicitly shifted the vision of the drug offender from a social menace worthy of the steepest penalties to 'regular' people suffering from a health disorder").

from the individual person inside the "cage" or from the human whose "body" is being "transfer[red]" by the system.[51] As Karakatsanis explains it:

> [A]t some point lawyers allowed the legal system to view caging a person as more acceptable than other physical and psychological punishments and, then, we allowed those cages to degenerate into places in which people will contract life-threatening illness, endure the torture of solitary confinement, be raped and physically assaulted, be deprived of sunlight and fresh air, and experience a variety of other horrors. We then found it unimportant to incorporate those harms into our lawyerly doctrinal thinking.[52]

Paul Butler's compelling description of the entire criminal justice system as a "chokehold" operates in a similar way.[53] Karakatsanis seems convinced—and his confidence is persuasive—that abandoning false narratives for more honest descriptions will bring people closer to the harms inflicted by the system and force reform.

Of course, as Walter Probert explained, "one great service of words is to allow intellectual manipulation of the absent parts of the world environment."[54] We have developed ways of talking about the criminal justice system that obscure the reality of the system.[55] Political scientist Hannah Arendt was particularly focused on this potential for words to "separate humans from reality."[56] That distance or separation creates space for ignorance, for misrepresentation, and for apathy. While this critique may be levelled at lawyers across the board, it seems particularly apt as applied to those working in what Karakatsanis calls the "punishment

---

[51] KARAKATSANIS, *supra* note 24, at 2.

[52] KARAKATSANIS, *supra* note 24, at 148.

[53] PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 5–6 (2017) ("The Chokehold is a way of understanding how American inequality is imposed. . . . The Chokehold means that what happens in places like Ferguson, Missouri, and Baltimore, Maryland . . . is not a flaw in the criminal justice system. Ferguson and Baltimore are examples of how the system is supposed to work.").

[54] Walter Probert, *Law and Persuasion: The Language-Behavior of Lawyers*, 108 U. PA. L. REV. 35, 44 (1959).

[55] KARAKATSANIS, supra note 24, at 16–17 ("These punishment bureaucrats are dangerous because, in order to preserve the human caging apparatus that they control, they must disguise at the deepest level its core functions. As a result, they focus public conversation on the margins of the problem without confronting the structural issues at its heart. Theirs is the language that drinks blood.").

[56] HANNAH ARENDT, THE LIFE OF THE MIND 4 (Mary McCarthy ed., 1981) ("Clichés, stock phrases, adherence to conventional, standardized codes of expression and conduct have the socially recognized function of protecting us against reality, that is, against the claim on our thinking attention that all events and facts make by virtue of their existence.").

bureaucracy."[57]

II. Language Failures as Lawyers' Failures

As the subtitle of Karakatsanis' book—"The Complicity of Lawyers in the Criminal Injustice System"—makes clear, he is particularly focused here on the special responsibilities and specific failures of his peers in practice, on the bench, and in classrooms.[58] He lays responsibility for the mismatch between our idealized system descriptions and its grim realities at the feet of fellow lawyers who perpetuate myths about our legal system's commitments to the rule of law "without understanding that policing and prosecution are used as a tool of politics and power to benefit some and to hurt others":

> One of the most insidious notions pervading standard discourse is that people are investigated and punished because they break laws and therefore that, if one breaks the law, one will be investigated and punished. This principle supports a larger idea: our legal system is objective, trying its best to promote well-being, morality, and human flourishing. The myth that an objective "rule of law" determines the outcomes is important to the system's perceived legitimacy and to our acceptance of its authority over us.[59]

Lawyers' failures to investigate, challenge, and correct the defects in conventional rule-of-law narratives are, perhaps, especially surprising because lawyers are trained to be language experts.[60] The study of the law is, in many ways, a study of words and how to parse key passages.[61] Law students learn to home in on key words in statutes, judicial decisions, and

---

[57] KARAKATSANIS, *supra* note 24, at 17 ("The common understanding of the 'rule of law' and the widely accepted use of the term 'law enforcement' to describe the process by which those in power accomplish unprecedented human caging are both delusions critical to justifying the punishment bureaucracy. This is why it is important to understand how they distort the truth.").

[58] KARAKATSANIS, *supra* note 24, at 146 ("The failure of lawyers is a tragedy in two parts. First, there has been an intellectual failure of the profession to scrutinize the evidentiary and logical foundations of modern policing and mass human caging. Second, the profession has failed in everyday practice to ensure that the contemporary criminal legal system functions consistently with basic rights and values.").

[59] KARAKATSANIS, *supra* note 24, at 68; *see* KARAKATSANIS, *supra* note 24, at 69 ("The standard 'criminal justice' discourse lulls people into abandoning scrutiny of their assumptions.").

[60] *See* George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 334 (1987).

[61] Brenda Danet, *Language in the Legal Process*, 14 LAW & SOC'Y REV., no. 3, 1980, at 445, 448 ("Words are obviously of paramount importance in the law; in a most basic sense, the law would not exist without language.").

witness interviews. Lawyers use language to guide courtroom testimony, mine discovery for keywords, and spar with adversaries over contract terms. Developing precision about language and word choice is one of the core skills that lawyers acquire during their education and refine throughout their careers.[62] Of course, the fact that lawyers should be good with language does not mean that they always are.[63]

For decades, law scholars have recognized the need to examine the language of law beyond formal legal documents but also in other types of "language behavior" and "law talk."[64] As Brenda Danet explains, the overarching lesson is that "words count and there are 'serious' as well as 'frivolous' uses of language."[65]

Legal commentators have long understood that, because "[law] is the greatest instrument of social control,"[66] the words we use to describe legal systems drive our collective perceptions of the fairness of those systems.[67]

---

[62] Lawyers should always be particular about the words that they use, but that does not mean that precision is always the goal. As Gopen explained:

> Lawyers need particularly to be able to write with both precision and anti-precision: for some documents they have to nail down particulars in order to avoid vagueness and ambiguity, while for others they will have to keep the letter free in order to protect the plasticity of the spirit in the advent of unforeseen circumstances.

Gopen, *supra* note 60, at 335.

[63] Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE, no. 3, 1985, at 519, 520 ("Criticizing lawyers' language has been an amusing parlor game for many generations now, but it has done little to get rid of legalese.") (reviewing the long history of critiques of legalese); *see, e.g.*, BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH (2001).

[64] Danet, *supra* note 61, at 448 (agreeing that "'[t]here needs to be greater concern in the law, of all places, with language behavior, not just language, but language behavior'") (quoting Walter Probert) (citation omitted); *see* Probert, *supra* note 54, at 43 ("[I]f we would understand how people, including judges, reach the decisions they do, we must understand the people themselves. . . . [O]ne good way to obtain this understanding was to note the words they used to justify their decisions.") (attributing this insight to Felix Cohen); *see, e.g.*, WALTER PROBERT, LAW, LANGUAGE AND COMMUNICATION (1972).

[65] Danet, *supra* note 61, at 448 (emphasis omitted).

[66] Glanville Williams, *Language and the Law–I*, 61 LAW Q. REV., no. 1, 1945, at 71; *see* Benson, *supra* note 63, at 530 ("Every lawyer's personal experience bears witness to the fact that legalese can be a weapon. Is there a lawyer among us who has not employed the magic of legal language as a psychological device to dominate some lay person?").

[67] Probert, *supra* note 54, at 43 ("One of the most able legal analysts of this generation, Felix Cohen, in effect suggested that if we would understand how people, including judges, reach the decisions they do, we must understand the people themselves. He went on to say in effect that one good way to obtain this understanding was to note the words they used to justify their decisions. Rather than ask a man what he thinks of segregation, give him an actual segregation

Our legal language creates social order, reflects cultural preferences, and legitimizes systems, helping to "maintain[] societal equilibrium."[68] The way we talk about criminal law, criminal procedure, and criminal justice reform has special importance because the words we use are not merely descriptive of existing relationships, they work to create and reshape human relationships.[69] Anna Roberts highlights a prime example of this problem in recent work challenging the ubiquitous and largely unchallenged use of the word "victim" in contexts where defendants are supposed to enjoy the presumption of innocence.[70] As Roberts asks: "What might it be that leads even those who trade in words, definitions, precision, and accuracy, to adopt this word that appears to elide the most central distinction within criminal procedure and criminal law theory, often without acknowledging the issue?"[71]

Criminal law talk guides pivotal decisions, every day, about human liberty. Given the importance of the task and lawyers' special skill with language, we might expect that our descriptions of the criminal justice system would be a model of precision. Instead, the words that judges, lawyers, and legal scholars use to describe the criminal system are a surprisingly poor fit. Karakatsanis outlines the culpability of actors within our criminal legal system for this failure:

> In order for the legal system to unleash police on poor communities and communities of color such that the United States came to imprison black people at a rate six times that of South Africa during the height of apartheid, it was necessary for popular culture and legal culture to develop and nurture serious intellectual pathologies. So deeply have these pathologies captured the legal elite that the wholesale normalization and rationalization of this brutality has become arguably the chief daily

problem to solve and see what he has to say, what kind of persuasive definitions, if you will, he uses."); Danet, *supra* note 61, at 542 ("Not only the legal profession but also the groups represented by it benefit from legal language, which serves to keep weaker groups in their place.") (collecting sources).

[68] Danet, *supra* note 61, at 448–49 (explaining that her project "focus[es] on the relation between language and the two basic functions of law: the ordering of human relations and the restoration of social order when it breaks down" and examines "the ways in which language maintains societal equilibrium, let me hasten to add that I will also be concerned with the ways in which language usage may be *dys*functional for groups or individuals, or for society as a whole" (emphasis in original)).

[69] Danet, *supra* note 61, at 448 (describing "the ability of law to regulate human affairs").

[70] Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449 (2021).

[71] *Id.* at 1499.

bureaucratic function of most of us who work in the system.[72]

CONCLUSION: LANGUAGE AND POWER

Usual Cruelty is intended to force a reckoning; to compel the community to confront our immoral, illogical, and counterproductive criminal system. Ultimately, though, Karakatsanis's critique of the indefensible realities of the system is tempered by his optimism about the capacity for change. As he explains, "[h]uman colonies, for all their multitudes of intricacies, seem to have an internal compass of compassion."[73] The landscape of criminal justice reform writing and advocacy beyond *Usual Cruelty* inspires confidence that meaningful change is beginning to happen. These changes are reflected both in more progressive policy discourse and in the new community voices being amplified in reform conversations.

For some writers and activists, the focus is on creating empathy and rehumanizing defendants and their affected families and communities for readers and system actors who have become desensitized.[74] In the bestselling book *Just Mercy*, for example, Bryan Stevenson describes this as a question of "proximity to the condemned and incarcerated":

> This book is about getting closer to mass incarceration and extreme punishment in America. It is about how easily we condemn people in this country and the injustice we create when we allow fear, anger, and distance to shape the way we treat the most vulnerable among us.[75]

This problem of distance from the people affected by legal policies and controversies is not unique to the criminal justice context. Others have expressed concern that the legal academy's emphasis on training law students to think like lawyers—to distill facts from a narrative, to "emphasize[] logic over emotion," to weigh costs and benefits—may make it difficult for young lawyers to connect and "communicate with

---

[72] KARAKATSANIS, *supra* note 24, at 147.

[73] KARAKATSANIS, *supra* note 24, at 111.

[74] Marans, *supra* note 29 (Karakatsanis argues that "[h]ow we use language is incredibly important because it's connected to how we think[,]" and, given that the current language used in the "criminal punishment system" is "designed to minimize the humanity of the people they're talking about[,]" reformers must use terminology that "resensitiz[es] the people who work in the legal system and the public at large to the brutality of what [the current system is] doing every single day").

[75] BRYAN STEVENSON, JUST MERCY 12, 14 (One World 2015) ("Proximity to the condemned and incarcerated made the question of each person's humanity more urgent and meaningful, including my own.").

nonlawyers, as they must do much of the time."[76] From Stevenson's perspective, the traditional law school curriculum, particularly in the first year, creates too much distance between students and potential clients. He describes feeling "lost" as a first-year student and then finding his legal calling through client contact in this way: "Proximity to the condemned, to people unfairly judged; that was what guided me back to something that felt like home."[77]

Shortening this distance—through language and experience—seems essential to achieving meaningful change.

Equally important—and getting increasing attention in criminal justice reform debates—are the related questions of who writes the relevant language, and whose narratives dominate the discourse.[78] As Peter Loge explains: "[t]he control over the language of policy is at least as important as—if not more important than—control over the policy itself."[79] The idea that the people who control the language control the policy is not unique to the criminal justice reform context. George Gopen eloquently explained this as a general legal principle decades ago:

> There is a glory, it seems, in the mystery of a language that can be deciphered only by initiates of the secret society; there is a great sense of power and an even greater actuality of power in controlling a language that in turn controls the most pressing

[76] Gallacher, *supra* note 37, at 109, 116–18 (expressing concern that "the empathetic response is systematically trained out of [law students] in a first-year curriculum in which most, if not all, their doctrinal classes share the common attribute of changing the way students think, from intelligent laypeople to 'lawyers'" and explaining that law students "are the product of a training scheme designed to convince them that lawyers think differently from non-lawyers").

[77] STEVENSON, *supra* note 75, at 14.

[78] *See* Joshua Kleinfeld, *Introduction Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1397 (2017) ("'Democracy' as we use that term in the movement to democratize criminal justice refers to a form of criminal law and procedure that is responsive to the laity rather than solely to officials and experts; that cares about prudential, equitable, and individualized moral judgment rather than merely formal rule compliance and technical expertise; that is more value rational than instrumentally rational; that submits the law and administration of criminal justice to public deliberation and to the values embedded in the way we live together as a culture, rather than treating it mainly as a tool of social management under the control of our institutional bureaucracies; that is substantially given into the hands of local communities as an instrument of collective self-determination and cultural self-creation; but that channels popular rule into constitutional forms meant to resist domination, disperse power, and permit contestation by a restless and animated citizenry.").

[79] Loge, *supra* note 35, at 696 ("Considered in this light, the important political fights are not just over what ought to happen and why; they also involve the language of that change. If there is no meaningful political reality outside of or apart from language, the most critical political concerns are over how a policy is described.").

> affairs of individuals and communities; and there is a monopolistic safety in being able to manipulate a language which because it was part of the creation of legal problems must be part of their solutions as well.[80]

This question—who controls reform conversations—is also a key theme in Karakatsanis' collection of essays where he cautions that our current system gives "[p]unishment bureaucrats" too much authority to "set the outer bounds of acceptable discussion."[81] Karakatsanis is concerned that some lawyers monopolize reform conversations in ways that ensure that reforms remain marginal and that curb the possibility of transformational reform or abolition.[82]

This critique is gaining traction in the criminal justice reform literature, where scholars are increasingly attentive to this question of who decides what labels, language, and frames are appropriate. Scholars and activists promote more participatory forms of democratic engagement that will give a real voice to community members most affected by oppressive criminal justice policies.[83] Amna Akbar, Sameer Ashar, and Jocelyn Simonson call for

---

[80] Gopen, *supra* note 60, at 334.

[81] KARAKATSANIS, *supra* note 24, at 82–83 ("Punishment bureaucrats" claim "minor tweaks as huge changes" and "make it difficult for the public to figure out who or what promises significant change and who or what does not. . . . [B]y touting achievements of little significance, they quell popular energy for dramatically changing the punishment system"); *cf.* Kleinfeld, *supra* note 79, at 1383, 1397 (explaining that his vision of a more democratic criminal justice system stands in stark contrast to the "bureaucratization" of the current system).

[82] KARAKATSANIS, *supra* note 24, at 82 (explaining that limits on the reform dialogue "ensure that more significant changes do not happen."); *see* Eaglin, *supra* note 21, at 535 ("The language of technical accuracy 'disaggregate[s] . . . crime from social and governmental forces' and instead focuses on individual character and responsibility. Even as scholars and policymakers try to write politics into tools, the standard narrative operates to silence them.") (quoting Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 427 (2009)) (citing Eaglin, *supra* note 19, at 201).

[83] *See* Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1615 (2017) (explaining that for meaningful criminal justice reform, we must "open[] new channels of contestation accessible to the groups and communities that are most affected by the state's domination but have the least input into the state's policies and practices"); *id.* at 1621 (emphasizing that community engagement in copwatching, courtwatching and participatory defense practices "use[] the voices of those affected by policies in the aggregate to demonstrate to the larger public the harms of those policies. And each of them puts forth new visions of what our criminal justice system can and should look like."); *see also* Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1414 (2017) ("Many of our modern woes in the criminal justice system can be traced to the loss of the community voice and decisionmaking ability in adjudicating crime and punishment."); Kleinfeld, *supra* note 79, at 1383 ("Deliberative and participatory democracy

legal scholars seeking transformative system change to redefine their perspective, moving away from traditional studies of social movements from a distance and toward closer partnerships with these movements: "When we write alongside movement ideas, strategies, and horizons, we incrementally transform the discourse in which we participate. The lenses provided by social movements have the capacity to change what we study and how we study it."[84]

In Cincinnati, for example, a recent collaboration between academic researchers, lawyers, and community members is looking to the community to define what "public safety" means.[85] This project provides a model for how impacted communities might reclaim control over the definition of terms at the center of criminal justice debates. Savvy politicians on both sides of the aisle have long recognized the power of appealing to constituents' concerns about "public safety."[86] The Cincinnati project disrupts traditional reliance on government leaders to dictate the meaning of public safety, instead giving the community a voice to determine how well government officials (the community's agents) are responding to community conceptions of safety.[87]

Across the country, old narratives and descriptions are being jettisoned for newer, more honest, more compelling descriptions that are being solicited from new voices. Many scholars, practitioners, and policymakers are, like Karakatsanis, acknowledging that this new language and these new perspectives are required to force and shape transformative system change.[88]

---

insist, as their names imply, on the importance of the broader political community's *deliberation* on matters of public concern and *participation* in the activity of government, such that the law, policies, and practices of the state substantially reflect and result from the will, beliefs, and values of the people living within the state." (emphasis in original).

[84] Amna Akbar, Sameer Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 833 (2021); *see* Simonson, *supra* note 84, at 1612 ("Without facilitating critical resistance from below, well-meaning reforms are in danger of reproducing the anti-democratic pathologies that plague our existing criminal justice system.").

[85] *See* Lauren Johnson, Cinnamon Pelly, Ebony Ruhland, Simone Bess, Jacinda K. Dariotis & Janet Moore, *Reclaiming Safety: Participatory Research, Community Perspectives, and Possibilities for Transformation*, 18 STAN. J. C.R. & C.L ___ (forthcoming), https://perma.cc/U4JZ-VNHG.

[86] BARKOW, *supra* note 2, at 106 ("People fear first and foremost for their safety, and crime threatens their sense of security.").

[87] Johnson, et al., *supra* note 86.

[88] *See, e.g.*, Phelps, *supra* note 5, at 154–55 (collecting descriptions of the new era of criminal justice reform, including "penal moderation"; "penal optimism"; or "neorehabilitation"); *see also* Levin, *supra* note 11, at 263–64; Roberts, *supra* note 45, at 2506–07.

* * * *

Review of *Usual Cruelty: The Complicity of Lawyers in the Criminal Justice System* by Alec Karakatsanis

MICHAEL MELTSNER*

A polemic is "an aggressive attack on or refutation of the opinions or principles of another" or "the art or practice of disputation or controversy."[1] Perhaps because the origins of the word are from the Greek hostile or warlike, polemics are often regarded as negative. In truth, a strong, "aggressive attack" is only negative if it is your ox that is gored. *Usual Cruelty: The Complicity of Lawyers in the Criminal Injustice System* convincingly trades in polemical outrage. Three essays of only 161 pages (and 64 of notes; the volume has no index) bring the reader's blood to the boiling point with compelling examples of the systematic perfidy of lawyers, judges, and police and analysis of the choices that have brought us the senseless incarceration of millions.[2]

The allegations in this indictment are not new—not that this detracts from their force—and recently we have seen a few green shoots suggesting reforms are on the way. In the final analysis, however, it is the system-normalizing impact of half-baked, halfway, over touted political compromises in the face of a record of blindness to the results of what the author sarcastically calls "law enforcement" that constitute the gravamen of his charge: The legal profession in its many forms has brought about this usual cruelty, though, of course, lawyer behavior must be understood as reflecting the social and economic values of the society in which lawyers operate.

* George J. & Kathleen Waters Matthews Distinguished University Professor of Law, Northeastern University School of Law. The author was first assistant counsel to the NAACP Legal Defense Fund in the 1960s, co-founded the clinical program at Columbia Law School, and served as the dean of Northeastern University School of Law from 1979 to 1984. This review was accepted by the Review in 2020; publication has been delayed by the pandemic.

[1] *Polemic*, MERRIAM-WEBSTER'S DICTIONARY, https://perma.cc/3BJJ-5CY6 (last visited Oct. 2, 2021).

[2] ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM (2019).

Knowing, for example, something of the five-decade struggle to rid the criminal process of money bail—a system that not only empowers private businesses to allow those with money to go free and those who are poor to remain jailed, thus predictably facilitating widespread loss of employment, separation of families, and coerced guilty pleas—I am put in mind of the comment of an English Lord of the 1840s who was sick of hearing about the need for reform—"Reform Sir, reform! I've heard enough about reform. Things are bad enough as they are."[3]

In 1966, when I was the in-house director (for the NAACP Legal Defense Fund) of the criminal law program of the National Office of the Rights of the Indigent, we managed in a matter of months against the odds to bring a constitutional challenge to the money bail system on equal protection grounds all the way to the Supreme Court. The Court denied certiorari, Justice Douglas dissenting. Ironically, the New York Court of appeals decision we appealed did not really reject our arguments about discrimination but instead passed the buck to the legislature, where it was ignored. In a moment of candor, however, the Court opined that even if our constitutional challenge was largely successful, the defendant might still not deserve release because he was charged with "a vicious crime." In fact, the offense was hardly that, but, at any rate, despite the charge under the money bail system then in force, all Mr. Gonzalez needed to walk the streets until trial was a few bucks and the complicity of a bail bondsmen.[4]

> Too long a sacrifice
>
> Can make a stone of the heart.
>
> O when may it suffice?
>
> That is Heaven's part, our part
>
> To murmur name upon name[.][5]

Karakatsanis does not "murmur"—he calls out. One group of reformers he labels "punishment bureaucrats"[6] include big names usually thought to be open to progressive change. But their good works are not referenced in *Usual Cruelty*. Preet Bharara, Eric Holder, Sally Yates, and Kamala Harris are former prosecutors who have "devoted a career to mass human caging."[7] Bharara became a drug prosecutor, "a job devoted to putting human beings

---

[3] Roger C. Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 335 (1982).

[4] The story of People ex rel. Gonzalez v. Warden, 21 N.Y.2d 18 (1967) is told in my memoir WITH PASSION: AN ACTIVIST LAWYER'S LIFE 229 (2017).

[5] William Butler Yeats, "Easter, 1916," POETRY FOUND., https://www.poetryfoundation.org/poems/43289/easter-1916 (last visited Oct. 2, 2021).

[6] KARAKATSANIS, *supra* note 2, at 74.

[7] KARAKATSANIS, *supra* note 2, at 74.

in prison cells" and his Wall Street prosecutions targeted the "impoverished."[8] Holder "pioneered the now-ubiquitous strategy of police stopping young black men based on pretextual reasons in order to search their bodies."[9] Sally Yates "overruled or refused to act on the Pardon Office's recommendation for clemency."[10] She rejected the Inspector General's "recommendat[ions] for greater compassionate release" of the terminally ill.[11] Kamala Harris used the "cash bail system in California to illegally jail thousands of impoverished people."[12] She "laughed about sending 'gang' and 'homicide' prosecutors to threaten poor mothers of truant children."[13]

You can tell Karakatsanis takes no prisoners. A similar reaction applies even to the recently elected wave of urban "progressive prosecutors" who ran as reformers. His reaction: "None of them have reported reducing prosecutions by more than a few percentage points, and most of them have not reported any reductions at all."[14] As a former public defender in Alabama and Washington DC and now founder of a human rights NGO he calls the Civil Rights Corps, Karakatsanis is not looking for a job in the next administration. But he claims that his efforts are forward looking.

Examples of cruelty point the way to change. Each of these prosecutors, as well as myriad officials who have joined the bandwagon, can be counted on to support reform, but reform as it has been understood just will not do. Only big changes are acceptable because they are necessary for any semblance of justice. The systems of criminal justice are so bad—run by a "punishment bureaucracy"—they need to be totally dismantled.[15] It is notable that in these pages, he makes little effort to include positive aspects of the reformer DAs' criminal justice records. The most he can summon is to say:

> To their credit, many with whom I have interacted genuinely believe that reforms need to be made. . . . But almost uniformly, they lack what is necessary for big change: critical analysis of structural problems, genuine self-reflection and organized political support from groups powerful enough to hold them accountable.[16]

Back in the day, I argued a criminal case before the New York Court of

[8] KARAKATSANIS, *supra* note 2, at 74.

[9] KARAKATSANIS, *supra* note 2, at 76.

[10] KARAKATSANIS, *supra* note 2, at 77.

[11] KARAKATSANIS, *supra* note 2, at 76.

[12] KARAKATSANIS, *supra* note 2, at 77.

[13] KARAKATSANIS, *supra* note 2, at 77.

[14] KARAKATSANIS, *supra* note 2, at 87.

[15] KARAKATSANIS, *supra* note 2, at 13.

[16] KARAKATSANIS, *supra* note 2, at 80.

Appeals in Albany. The successful prosecution was handled by lawyers from the New York County District Attorney's office headed by its long-time chief Frank Hogan. The issue before the Court was technical—whether the jury had been correctly instructed about a lessor included offense. It had nothing to do with the violence *vel non* of the crime, yet the DA's brief began with a full description of the charged offense, implying in quite misleading but perhaps effective fashion that my client was a serious offender. When I asked the young prosecutor handling the case why the brief had gone off in this "poisoning the well" direction, he told me candidly it was office policy to always begin an appellate brief regardless of the issue with such a recitation.

American lawyers, prosecutors most of all, are so embedded in the values of the adversary system they rarely question the behavior it calls forth. If you need a helpful metaphor, just watch a football game. As Vince Lombardi put it, "Winning is not a sometime thing, it is an all the time thing." But while prosecutors hold enormous power, Karakatsanis's indictment encompasses all the players in law enforcement—legislators, police, lower court judges, Supreme Court justices, government administrators, and even defenders. The insensitivity, the cruelty, is rampant.

The Alabama woman sitting with her children when police entered was arrested in her home, put in metal restraints, and jailed when too poor to pay old traffic tickets. She "sat out" her debts in prison at the rate of fifty dollars a day, increased to seventy-five if she was lucky enough to be selected to clean the bathrooms and jail walls.[17]

The Louisiana man was jailed for three years because he could not meet a five-hundred-dollar bond "while he waited for the state to run lab tests" on a small quantity of drugs.[18]

The children were restrained in metal chains "including their hands, feet, and waists" as they awaited hearings on charges of juvenile delinquency in the District of Columbia,[19] a venue where the incarceration rate for Black Americans is nineteen times that of white people.[20]

A federal government that finally moderated the differential treatment between sentences for powdered and crack cocaine (a good thing) but could not bring itself to either eliminate the entire difference (one totally based on racial usage disparity) or make the change retroactive, thus continuing the

[17] KARAKATSANIS, *supra* note 2, at 14.

[18] KARAKATSANIS, *supra* note 2, at 4.

[19] KARAKATSANIS, *supra* note 2, at 7.

[20] KARAKATSANIS, *supra* note 2, at 15.

incarceration of thousands (a morally reprehensible one).[21]

The absurdity of three strike laws imprisoning for life after a trivial theft. The infamous life sentence for stealing golf clubs.[22]

The lack of effective judicial oversight over prosecutorial discretion to charge and the common and almost never challenged practice of imposing greater prison sentences on defendants who refuse to plead guilty, a consequence of which is to legally coerce waivers of the right to a trial.

These are just a very few of the horrific examples marshalled in these slim pages, examples I even hesitate to repeat because they might suggest to the untutored reader that they are a list of *unusual* occurrences, but as Karakatsanis puts it to us in his apt title they are all too *usual*. The litany of cruelties is so extensive, so present to anyone who cares to look into the matter, as to leave us as the author puts it—desensitized. In short, numb.

While the legal profession is "complicit" in adopting and maintaining the system from debtors' prisons to mass incarceration, dismantling a "mammoth system" will take a social movement.[23]

What to do?

Here the author struggles with replacing well-meaning but limited efforts at change with his goal of transformation. It is an approach to transcend present political forces that you might think doomed to failure. To begin with, Karakatsanis insists, we must recognize that the problems of criminal justice do not exist in a "silo"; they are closely linked to a whole range of obstacles and disparities—white supremacy, access to health care and education, etc.[24] Sending additional resources to institutional actors who operate with punishment and incarceration in mind will not "shift centers of power and control."[25] Indeed, fewer resources should go to the "punishment bureaucracy." These resources should go toward "dismantling incarceration and . . . alternative community-based wellness" programs.[26]

With these changes in present approaches, Karakatsanis provides a "small list" of the sort of interventions that he favors and which presumably serve as models for future change agents—worker owned cooperatives, stopping new jail construction, reserving marijuana licenses for members of communities previously targeted for drug arrests, affordable housing, "reparations for police torture," restorative justice approaches "when a person harms another person," individual supportive alternatives to the

[21] KARAKATSANIS, *supra* note 2, at 26–7.

[22] KARAKATSANIS, *supra* note 2, at 104.

[23] KARAKATSANIS, *supra* note 2, at 92.

[24] KARAKATSANIS, *supra* note 2, at 93.

[25] KARAKATSANIS, *supra* note 2, at 94.

[26] *See* KARAKATSANIS, *supra* note 2, at 95–6.

money bail system, cultural programs to build personal and community strength for those "who are survivors of human caging."[27]

I think most observers, even progressive observers who share his outrage at what the justice system looks like today, will be skeptical that we are likely to arrive at any version of the new world Karakatsanis has sketched. One lack, an intentional one I assume, in the *Usual Cruelty* narrative is the absence of any serious political analysis of the social, political, and financial obstacles to change that transcends the reform efforts he finds utterly useless. Not all the forces that would be arrayed against his agenda reflect right wing extremists and bigots. Millions believe, for example, they need a muscular police presence for their safety, that there are criminals who should be incarcerated for long periods, that law enforcement players—politicians and judges as well as police and prosecutors—need a rebalanced, more evidence-based, sensitive, and humane approach rather than wholesale efforts to dismantle a complex, contested, and troubled set of still necessary institutions.

The path ahead requires courage and ambition. Although we are currently awash in statements condemning racism from public officials and corporate CEOs, the thousands that have demonstrated in the streets are waiting to gauge the follow up. This time white Americans seem to get that racism is a matter for them to deal with also. But changes in hearts must follow; new laws are necessary but not sufficient. The nation's record here is at best mixed. As the author Heli Meltsner, who happens to be my wife, puts it, "complacency is complicity." And the forces of resistance are yet to be fully mobilized.[28] The trail ahead is indistinct, but, heh, who knows what will happen? This is America.

---

[27] KARAKATSANIS, *supra* note 2, at 96–8.

[28] A few examples of what we can expect: Nicholas Bogel-Burroughs & Jack Healy, *Minnesota Lawmakers Vowed Police Reform. They Couldn't Agree on Any.*, N.Y. TIMES (June 20, 2020), https://perma.cc/YQQ9-RE8W; Jan Ransom, *After Rift Over Protests, N.Y.P.D. Pulls Out of Prosecutors' Offices*, N.Y. TIMES. (June 15, 2020), https://perma.cc/LQS8-K348; Joan Vennochi, *Is Beacon Hill Serious About Police Reform? The Mayor of Somerville Has His Doubts*, BOS. GLOBE, https://perma.cc/3JXR-DM8K (last updated June 15, 2020, 5:06 PM).

Unlocking Your Phone Could Lock You Up: Say Your Goodbyes to the Right Against Self-Incrimination

Cambrea Beller[*]

INTRODUCTION

As the U.S. legal system is struggling to adapt to the digital world,[1] more and more Americans own and use electronic devices.[2] Today, ninety-six percent of American adults own cell phones, with individuals looking at their phones an average of fifty-two times per day.[3] The cell phone is an omnipresent device with the ability to carry "millions of pages of text, thousands of pictures, or hundreds of videos" inside a person's pocket.[4] Despite an increased preference to use cell phones to manage daily activities, eighty-three percent of American citizens are "very" or "fairly" concerned about the storage of their personal data.[5] This concern is well-founded as the contents of electronic devices are not afforded adequate protection under the U.S. Constitution.[6]

The disconnect between the law and the digital world is demonstrated by the failure of the courts to satisfactorily apply the Fifth Amendment right

[*] J.D., *cum laude*, New England Law | Boston (2021). B.S., Political Science, Weber State University (2018).

[1] *See, e.g.*, Eunice Park, *Traffic Ticket Reasonable, Cell Phone Search Not: Applying the Search-Incident-To-Arrest Exception to the Cell Phone as "Hybrid,"* 60 DRAKE L. REV. 429, 440–41 (2012) (discussing the disconnect between the law and technology as it relates to search warrants and cell phones).

[2] *See Mobile Fact Sheet*, PEW RES. CENTER (Apr. 7, 2021), https://perma.cc/9CKY-XNHP .

[3] *Id.*; *2018 Global Mobile Consumer Survey: US Edition*, DELOITTE 3, https://perma.cc/MAU3-96ZY (last visited Oct. 16, 2021) (discussing cell phone use by Americans, with around ninety percent or more of eighteen to fifty-four year olds owning a cell phone).

[4] Riley v. California, 573 U.S. 373, 375 (2014).

[5] *2018 Global Mobile Consumer Survey: US Edition*, *supra* note 3, at 8.

[6] *See* Orin S. Kerr, *Compelled Decryption and the Privilege Against Self-Incrimination*, 97 TEX. L. REV. 767, 769 (2019) ("Courts have disagreed on the correct answer, as have scholars, with both offering a range of standards for how the Fifth Amendment privilege should apply.").

against self-incrimination as it pertains to warranted searches of a defendant's electronic device.[7] The immense storage capacity of electronic devices, particularly smartphones, intensifies the need to protect the contents on the device.[8] For example, an Apple iPhone can store more than 512 gigabytes of data, depending on the model.[9] This is equivalent to millions of pages of personal information "about who we are, what we know, and what we have done."[10] Phones are no longer just a means of communication; they create a digital footprint that details nearly every aspect of an individual's life.[11]

To search an electronic device without violating the Fourth Amendment, the government is required to obtain a search warrant.[12] But what happens when the government is unable to execute a search warrant because the device is encrypted?[13] Do we force a defendant who has raised a Fifth Amendment right against self-incrimination to assist the government's case by unlocking the device?[14] While the authors of the Constitution and the Bill of Rights could never imagine today's convenient world of technology, it does not stand to reason that the information found on an electronic device is any less worthy of constitutional protection than physical documents.[15] If

---

[7] *See* Kerr, *supra* note 6. *Compare* United States v. Apple MacPro Comput., 851 F.3d 238, 247 (3d Cir. 2017) (holding that the privilege against self-incrimination does not apply if the government can describe the incriminating files that are on the device with reasonable particularity), *with* State v. Stahl, 206 So. 3d 124, 136 (Fla. Dist. Ct. App. 2016) (holding that the privilege against self-incrimination does not apply when the government can show the defendant has the ability to unlock the device).

[8] *See Riley*, 573 U.S. at 393 (concluding that the storage capacity of cell phones "implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse").

[9] *Compare iPhone Models*, APPLE, https://perma.cc/4A4V-DA2D (last visited Oct 16, 2021) (showing the storage capacity of iPhones ranges from 16 gigabytes for the iPhone 6 to up to 1 terabyte (equivalent to 1024 gigabytes) for the newest models).

[10] Orin S. Kerr, *Foreword: Accounting for Technological Change*, 36 HARV. J.L. & PUB. POL'Y 403, 404–05 (2013).

[11] *See generally* Kerr, *supra* note 10, at 405.

[12] *See* U.S. CONST. amend. IV (recognizing the right to be protected against unreasonable searches and seizures, unless the government gets a search warrant based on probable cause that particularly describes the place to be searched, and the persons or things to be seized); *Riley*, 573 U.S. at 403.

[13] *See, e.g.*, Commonwealth v. Jones, 481 Mass. 540, 541 (2019) ("The search warrant has yet to be executed, however, as the Commonwealth was—and currently remains—unable to access the cell phone's contents because they are encrypted. The contents can only be decrypted with the entry of a password.").

[14] *See, e.g.*, *id.* at 561 (compelling the defendant who raised the Fifth Amendment privilege to enter the password into the cell phone at issue).

[15] *See generally id.*

anything, the capability of electronic devices to store vast quantities of information points to a greater need for legal protection.[16]

This Comment illustrates that the Supreme Judicial Court ("SJC") failed to follow precedent in *Commonwealth v. Jones* by incorrectly concluding that the only fact conveyed by compelling a defendant to unlock an electronic device is that the defendant knows the password to the device. This Comment further argues that this conclusion violates an individual's Fifth Amendment right against self-incrimination. Part I of this Comment details the right against self-incrimination as a fundamental right under the U.S. Constitution. Part II discusses *Commonwealth v. Jones*, focusing on the analytic framework created by the SJC. Part III argues that the knowledge of the password is not the only testimony conveyed by entering the password to an electronic device. Part IV proposes a new standard to compel a defendant to decrypt an electronic device without violating the Fifth Amendment.

I. Background

A. *The Right Against Self-Incrimination Guaranteed to Citizens of Massachusetts*

The Massachusetts Constitution guarantees the right against self-incrimination in Article 12 of the Declaration of Rights.[17] This right derives further protection under Massachusetts case law (as outlined by the Massachusetts Guide to Evidence),[18] and, most importantly, under the Fifth Amendment of the U.S. Constitution.[19] To properly assert the right against self-incrimination under the U.S. Constitution, an individual compelled to testify or produce evidence must be subject to criminal liability,[20] the evidence must have a testimonial aspect, and the state must compel the production.[21]

B. *An Exception to the Right Against Self-Incrimination*

The *Massachusetts Guide to Evidence* lists six exceptions to a defendant's right against self-incrimination.[22] The exception of most relevance here is the

---

[16] *See Riley*, 573 U.S. at 398 (discussing how the privacy interests of electronic devices "dwarf" those in physical form).

[17] MASS. CONST. art. XII.

[18] SJC ADVISORY COMM. ON MASS. EVIDENCE LAW, MASSACHUSETTS GUIDE TO EVIDENCE § 511 (2021), https://perma.cc/3GVC-59CR [hereinafter MASS. GUIDE TO EVID.]

[19] U.S. CONST. amend. V.

[20] *See* In re Enforcement of Subpoena, 435 Mass. 1, 1–3 (2001).

[21] Commonwealth v. Conkey, 430 Mass. 139, 142–43 (1999).

[22] MASS. GUIDE TO EVID., *supra* note 18, § 511(c).

"foregone conclusion" doctrine.[23] The "foregone conclusion" doctrine deems that "an otherwise testimonial act of production is not testimonial if the government establishes that, at the time it sought the compelled production, it already knew of that which would explicitly or implicitly be conveyed by the production."[24] Simply put, if the government can demonstrate it had knowledge of the compelled testimony, that testimony is not protected by the Fifth Amendment.[25]

The U.S. Supreme Court introduced the "foregone conclusion" exception in *Fisher v. United States*.[26] The defendants in *Fisher* invoked their Fifth Amendment right against self-incrimination after the government compelled them to produce certain tax return documents.[27] The Court reasoned that, by producing evidence in compliance with a subpoena, the defendants implicitly acknowledged the existence and control of the compelled documents.[28]

The Court concluded that the tax documents were not protected by the Fifth Amendment because the government demonstrated it already knew of the existence and location of these tax documents.[29] The Court explained that the government was "in no way relying on the 'truth-telling' of the [defendant] to prove the existence of or his access to the documents."[30] Compelled production would not contribute to the sum total of the government's information; thus, the government sufficiently demonstrated that the existence and location of the papers were a "foregone conclusion."[31] The Court further stated that "however incriminating the contents . . . might be, the act of producing them the only thing which the [defendant] is compelled to dowould not itself involve testimonial self-incrimination."[32] Consequently, the "foregone conclusion" doctrine allows the government to compel the production of incriminating testimony without violating the Fifth Amendment.[33]

---

[23] MASS. GUIDE TO EVID., *supra* note 18, § 511(c)(6).

[24] Commonwealth v. Gelfgatt, 468 Mass. 512, 531 (2014) (Lenk, J., dissenting).

[25] *Id.*

[26] 425 U.S. 391, 410–11 (1976).

[27] *Id.* at 395.

[28] *Id.* at 410.

[29] *Id.* at 411.

[30] *Id.*

[31] *Id.*at 410.

[32] *Fisher*, 425 U.S. at 410–11.

[33] Jesse Coulon, Comment, *Privacy, Screened Out: Analyzing the Threat to Individual Privacy Rights and Fifth Amendment Protections in* State v. Stahl, 59 B.C. L. REV. E.-SUPPLEMENT 225, 233 (2018).

C. *The Compelled Decryption of an Electronic Device May Be Considered Testimonial Communication*

While the "foregone conclusion" exception originated in the context of the compelled production of documents,[34] the SJC expanded its application to the compelled production of passwords to encrypted electronic devices in *Commonwealth v. Gelfgatt*.[35] The SJC found that the "factual statements that would be conveyed by entering an encryption key in the computers are 'foregone conclusions,'" and therefore held that "decryption is not a testimonial communication that is protected by the Fifth Amendment"; thus, the Court did not permit a self-incrimination privilege for the compelled decryption of electronic devices.[36]

The defendant in *Gelfgatt* was arrested for orchestrating a fraudulent mortgage scheme, ultimately scamming people out of more than $13 million.[37] The police obtained four of the defendant's computers, and the Commonwealth filed a motion to compel the defendant to decrypt the computers by entering a password.[38] The defendant later refused to comply with the motion, claiming that compliance would force the defendant to incriminate himself.[39]

The Commonwealth asserted that the computers were "virtually impossible to circumvent"—therefore, the motion was necessary to discover material evidence relating to the defendant's purported mortgage scheme.[40] The Commonwealth further raised a "foregone conclusion" argument, contending that "decryption would not communicate facts of a testimonial nature to the [government] beyond what the defendant already had admitted to investigators."[41] The *Gelfgatt* Court concluded that the defendant would implicitly be acknowledging ownership and control of the computers and their contents by decrypting the four computers seized by the Commonwealth;[42] thus, the defendant's compelled act of decryption appeared to be testimonial communication afforded protection under the Fifth Amendment.[43]

---

[34] *See Fisher*, 425 U.S. at 391.

[35] 468 Mass. 512, 512 (2014).

[36] *Id.* at 523.

[37] *Id.* at 515.

[38] *Id.* at 516-17. *See generally* Commonwealth v. Jones, 481 Mass. 540, 542 (2019) (defining a motion to compel decryption of an electronic device as a "*Gelfgatt* motion").

[39] *Gelfgatt*, 468 Mass. at 517.

[40] *Id.* at 517–18.

[41] *Id.* at 514.

[42] *Id.* at 522.

[43] *Id.*

Once the Court determined that the Fifth Amendment might protect the compelled testimony, it then analyzed whether the "foregone conclusion" doctrine stripped the act of decryption of its "testimonial character" (and thus its constitutional protection).[44] The Court stated that the doctrine requires the government to demonstrate its knowledge of (1) the existence of the evidence demanded; (2) the defendant's possession or control of such evidence; and (3) the authenticity of the evidence.[45] In *Gelfgatt*, the Commonwealth showed that the defendant claimed ownership and control of the computers during his interrogation, acknowledged that the computers were encrypted, and admitted he knew the encryption key.[46] Therefore, the factual statements conveyed to the Commonwealth from the defendant's decryption would be a "foregone conclusion" because they would merely reveal information the government already possessed.[47] Accordingly, the SJC agreed with the Commonwealth that the "foregone conclusion" exception applied, concluding that compelling a defendant to unlock an encrypted device did not violate the Fifth Amendment if the decryption did not relate testimonial facts to the government beyond what the defendant had already revealed to investigators.[48]

II. *Commonwealth v. Jones*

A. *Factual Background*

The defendant, Dennis Jones ("Jones"), was ultimately convicted by a grand jury for trafficking a person for sexual servitude,[49] in violation of Mass. Gen. Laws. ch. 265, § 50(a),[50] and deriving support from the earnings of a prostitute,[51] in violation of Mass. Gen. Laws. ch. 272, § 7.[52] The police arrested Jones shortly after his former girlfriend, Sara,[53] reported that Jones stole her purse and, upon the officers' arrival, revealed Jones was operating

---

[44] *Id.*

[45] *Gelfgatt*, 468 Mass. at 522.

[46] *Id.* at 523–24.

[47] *Id.* at 523.

[48] *Id.* at 514.

[49] Commonwealth v. Jones, 481 Mass. 540, 541 (2019).

[50] MASS. GEN. LAWS ANN. ch. 265, § 50(a) (West 2012) (making it a crime for someone to knowingly entice another person to engage in commercial sexual activity).

[51] *Jones*, 481 Mass. at 541.

[52] MASS. GEN. LAWS ANN. ch. 272, § 7 (West 2021) (making it a crime for someone who, knowing a person is a prostitute, lives, derives support, or shares, "in whole or in part, from the earnings or proceeds of his prostitution, from moneys loaned, advanced to or charged against him" by any manager or inmate of a place where prostitution is practiced or allowed).

[53] *Jones*, 481 Mass. at 543 n.4 (noting that Sara is a pseudonym).

a human trafficking ring.[54] Sara told the police that she met Jones through an online dating website a few weeks prior to the arrest.[55] Sara was initially under the impression that the two were dating, but Jones quickly persuaded her to work as a prostitute in exchange for housing.[56]

The police then began investigating Jones, linking him to an LG brand cell phone ("LG phone").[57] Sara informed the police that Jones primarily used the LG phone to communicate with her, and a subsequent inspection of Sara's cell phone confirmed several prostitution related messages between the two phones.[58] Sara explained that both Jones and a female associate regularly used the LG phone to conduct their prostitution business.[59] The police further discovered a website advertising Sara as an escort that listed the LG phone number as the principal point of contact for prospective customers.[60] The police recovered two phones from Jones upon his arrest, ultimately finding the LG phone in Jones's pants pocket.[61]

B. *Procedural History*

The police were granted a warrant to search the LG phone during the investigation, but the phone's contents were encrypted, making them inaccessible.[62] The Commonwealth then filed a *Gelfgatt* motion to compel Jones to unlock the LG phone by entering in its password, causing Jones to raise his Fifth Amendment right against self-incrimination.[63] The Commonwealth argued that compelling Jones to enter the password did not implicate the Fifth Amendment because "the act itself would not reveal any information that the Commonwealth did not already know."[64] A judge disagreed and denied the *Gelfgatt* motion, concluding that the Commonwealth did not demonstrate with "reasonable particularity" that Jones's knowledge of the password was a "foregone conclusion."[65] A renewed *Gelfgatt* motion with additional evidence was similarly denied

---

[54] *Id.* at 542.

[55] *Id.* at 543.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Jones*, 481 Mass. at 543–44 (explaining that Jones responded to text messages, while the female associate answered phone calls).

[60] *Id.* at 544.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 545.

[64] *Id.*

[65] *Jones*, 481 Mass. at 545.

several months later.[66]

The Commonwealth thereupon filed for relief under Mass. Gen. Laws. ch. 211, § 3,[67] and the case was reported by the single justice to the SJC to address three specific issues.[68] First, the Court had to determine the necessary burden of proof that the Commonwealth bears on a *Gelfgatt* motion in order to establish a "foregone conclusion."[69] Second, it had to determine whether the Commonwealth met that burden in this case.[70] Third, the SJC had to determine whether a judge, before considering any additional information included in a renewed *Gelfgatt* motion, must initially find that the additional information was not known or reasonably available to the Commonwealth when the first motion was filed.[71]

C. *The SJC's Analysis*

Before addressing the three reported issues, the SJC created an analytic framework to establish when an individual can invoke the right against self-incrimination in response to a *Gelfgatt* motion.[72] The Fifth Amendment applies when the government compels an individual to produce evidence that constitutes an incriminating testimonial communication.[73] Following *Gelfgatt*, a court looks to "whether the government compels the individual to disclose the contents of his [or her] own mind to explicitly or implicitly communicate some statement of fact" in order to determine whether an act of production is testimonial.[74] The SJC concluded that unlocking an electronic device says nothing about the contents of the device, nor does it produce any evidence for the Commonwealth beyond the fact that the defendant knows the password to the device.[75] Put simply, the SJC determined that compelling the defendant to enter the password into a computer could be a testimonial act of production, unless the facts conveyed by the defendant through this act of decryption were already known to the

---

[66] *Id.* at 556–57 (noting that the Commonwealth offered additional evidence that Jones possessed the phone at the time of his arrest: Jones listed the LG phone number as his own during a previous, unrelated arrest; the backup telephone number registered for the LG phone belongs to Jones; and the LG phone has been in the same location as another cell phone belonging to Jones).

[67] MASS. GEN. LAWS ANN. ch. 211, § 3 (West 2012).

[68] *Jones*, 481 Mass. at 542.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 547–49.

[73] *Id.* at 545.

[74] *Jones*, 481 Mass. at 546 (quoting Commonwealth v. Gelfgatt, 468 Mass. 512, 520 (2014)).

[75] *Id.* at 547.

Commonwealth, and thus were a "foregone conclusion."[76] Therefore, for the "foregone conclusion" exception to apply to a *Gelfgatt* motion, the Commonwealth need only demonstrate that the defendant knew the password to the LG phone.[77]

The SJC determined that the Commonwealth must prove a defendant knows the password beyond a reasonable doubt,[78] concluding that the Commonwealth satisfied its burden in this case.[79] The SJC further concluded that a judge acting on a renewed *Gelfgatt* motion may consider additional information without initially requiring the Commonwealth to show that the information was not known or reasonably available when the earlier motion was filed.[80] Accordingly, the SJC found that the motion judge abused his discretion by failing to consider the Commonwealth's renewed *Gelfgatt* motion and its additional information.[81] The SJC reversed the motion judge's denial of the renewed *Gelfgatt* motion and remanded the case to the Superior Court to enter a *Gelfgatt* motion compelling Jones to unlock the LG phone.[82]

D. *Concurring Opinion*

In a concurrence, Justice Lenk agreed with the outcome of the case but believed that entering the password to the phone revealed more than mere knowledge of the password.[83] Accordingly, the government should have been required to show, with reasonable particularity, that the defendant knew the password and that the government knew of the existence and location of incriminating evidence on the device.[84]

ANALYSIS

III. Mistaken Interpretation of Testimonial Communication

A. *The Password Is Not the Only Testimonial Communication*

An act of production is testimonial for purposes of the Fifth Amendment

---

[76] *See id.*

[77] *Id.* at 543.

[78] *Id.*

[79] *Id.* at 557–58 (reasoning that the additional evidence in the renewed *Gelfgatt* motion coupled with Sara's statements demonstrated Jones's knowledge of the password beyond a reasonable doubt).

[80] *Jones*, 481 Mass. at 558.

[81] *Id.* at 558–59.

[82] *Id.* at 561.

[83] *See id.* at 561 (Lenk, J., concurring).

[84] *Id.* at 565–66 (Lenk, J., concurring).

if "the government compels the individual to disclose the contents of his [or her] own mind to explicitly or implicitly communicate some statement of fact."[85] The SJC stated that the only testimony conveyed in the context of compelled decryption is that "the defendant knows the password . . . . The entry would convey no information about the contents of the LG phone."[86] Although the SJC is correct that entering the password discloses the fact that the defendant knows the password, this Comment will explain that the password is not the only testimony conveyed.[87] Moreover, the conclusion that the contents of the phone would not be conveyed by requiring decryption cannot coincide with the definition of testimonial communication provided by the SJC.[88]

1. If Unlocking the Phone Does Not Convey its Contents, Then Why Does the Commonwealth Want the Password?

The testimony conveyed by entering a password into a phone is not merely the password but also includes additional statements of fact that this decryption explicitly or implicitly communicates.[89] The SJC itself concluded that the "Commonwealth must be certain that the compelled act of production will not implicitly convey facts not otherwise known to the Commonwealth."[90] However, the SJC only used this principle to justify raising the burden of proof to beyond a reasonable doubt.[91] Had it applied this reasoning during its "foregone conclusion" analysis, the SJC would have realized that the compelled production of a password implicitly conveys evidence that the Commonwealth did not already know.[92]

By entering a password to a device, an individual also conveys control of the device, and therefore knowingly admits possession of the incriminating documents found on it.[93] Producing the password accords the implicit communication of these documents with protection under the Fifth Amendment because they are "reflective of the knowledge, understanding, and thoughts" of the defendant.[94] Moreover, the moment the defendant

---

[85] *Id.* at 546 (quoting Commonwealth v. Gelfgatt, 468 Mass. 512, 520 (2014)).

[86] *Jones*, 481 Mass. at 548 n.10; *see also* Kerr, *supra* note 6 at 769–70 (arguing that the only testimony conveyed is that the individual who unlocked the device knows the password).

[87] *See infra* Part III(A)(1)–(2).

[88] *See infra* Part III(A)(2).

[89] *See* Laurent Sacharoff, *Unlocking the Fifth Amendment: Passwords and Encrypted Devices*, 87 FORDHAM L. REV. 203, 225, 229–30 (2018).

[90] *Jones*, 481 Mass. at 555.

[91] *See id.*

[92] *See id.*; Sacharoff, *supra* note 89, at 231.

[93] Sacharoff, *supra* note 89, at 229.

[94] *Jones*, 481 Mass. at 546.

unlocks the device, it is more likely that the material found on it belongs to the defendant and no one else.[95] Since the Commonwealth did not compel Jones to produce specific, relevant evidence on the LG phone,[96] it did not demonstrate that the testimony conveyed by Jones entering the password was a "foregone conclusion."[97]

By filing a *Gelfgatt* motion, the government essentially requires the defendant to "enter his password to the device and walk away," giving the government virtually unlimited access to the defendant's "entire digital life."[98] As it stands now, this unlimited access could allow the government to probe around for evidence of new crimes.[99] According to the SJC's conclusion, the government can force a defendant to enter the password in any case in which it can prove the defendant owns the device.[100] This conclusion permits the government to search a defendant's entire digital life for evidence of new crimes supposedly without violating the Fifth Amendment.[101] This goes against a fundamental principle of the Fifth Amendment that the government must "shoulder the entire load" in building its case against the defendant.[102] Therefore, the password should not be the only focus of analysis when applying the "foregone conclusion" doctrine.[103]

The *Gelfgatt* Court stated that entering a password to a device implicitly admits ownership and control of the device and its contents, as well as communicates "knowledge about particular facts that would be relevant to the Commonwealth's case."[104] In *Gelfgatt*, the Commonwealth listed the exact documents in its search warrant, negating any need to consider what would happen if the Commonwealth did not know which facts conveyed

---

95 *See* Sacharoff, *supra* note 89, at 231 ("The moment the suspect opens [the smartphone], in this context, makes it more likely the child pornography is his and not someone else's.").

96 *Jones*, 481 Mass. at 548 n.10.

97 *See* United States v. Doe, 670 F.3d 1335, 1347 (11th Cir. 2012) (holding that the government must show it possessed knowledge as to the "files on the [encrypted] hard drives at the time it attempted to compel production"); Sacharoff, *supra* note 89, at 229.

98 Sacharoff, *supra* note 89, at 208; *see* Commonwealth v. Gelfgatt, 468 Mass. 512, 517–18 (2014).

99 *See* Sacharoff, *supra* note 89, at 208.

100 *Jones*, 481 Mass. at 557.

101 *See id.* at 557–58.

102 United States v. Balsys, 524 U.S. 666, 690 (1998) (quoting Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964)).

103 *See* United States v. Apple MacPro Comput., 851 F.3d 238, 247–48 (3d Cir. 2017); Eunjoo Seo v. State, 148 N.E.3d 952, 957–58 (Ind. 2020) (finding that, for the "foregone conclusion" to apply, the state must show that (1) the suspect knows the password to the phone; (2) the files on the device exist; and (3) the suspect possessed those files).

104 Commonwealth v. Gelfgatt, 468 Mass. 512, 522 (2014).

would be relevant to its case.[105] This is distinguishable from *Jones* where the Commonwealth did not know what relevant evidence it would encounter once Jones entered the password.[106] The Commonwealth merely wanted to conduct a search of "the entire phone, all contacts, calendar entries, files, photographs, videos, caller-ids, text messages, voice mails, email messages and the contents of all of the above to *identify the 'regular user of the phone.'*"[107]

In defense of its *Gelfgatt* motion, the Commonwealth argued that password entry was necessary to execute the search warrant to identify the user of the LG phone.[108] The Commonwealth claimed that the *Gelfgatt* motion did not violate the Fifth Amendment because, as Jones was a regular user of the phone, it was a "foregone conclusion" that he knew the password.[109] To put it another way, the Commonwealth wanted to search the LG phone to determine who controlled it, but claimed that compelling Jones to unlock the LG phone would not violate the Fifth Amendment because the Commonwealth knew that he controlled it.[110] Actual application of the Commonwealth's illogical reasoning renders the search warrant completely unnecessary because the Commonwealth claimed it already knew Jones was the "regular user of the phone."[111] The success of this circular reasoning further supports the argument that greater protection is needed because it subjects the device to a "fishing expedition," which the Fifth Amendment aims to limit.[112]

2. An English Lesson

The SJC's conclusion that the password is the only testimony conveyed runs afoul with the Court's own definition of testimonial communication.[113] The SJC defined an act of production as testimonial if "the government compels the individual to disclose the contents of his [or her] own mind to explicitly or implicitly communicate some statement of fact."[114] When a sentence is structured as "to [blank] to [blank]," the reader cannot simply

---

[105] *Id.* at 520 (stating that the Commonwealth "believes that those devices contain information about the defendant's alleged mortgage payoff scheme").

[106] *See* Brief of the Appellee at 9, Commonwealth v. Jones, 481 Mass. 540 (2019) (No. SJC-12564) (showing that the Commonwealth's search warrant was to identify the user of the phone and not to locate certain incriminating evidence).

[107] *Id.* (emphasis added).

[108] *See id.*; Commonwealth v. Jones, 481 Mass. 540, 544 (2019).

[109] *See Jones*, 481 Mass. at 556–57.

[110] Brief of the Appellee, *supra* note 106, at 9.

[111] *See Jones*, 481 Mass. at 542, 556–57; *see also* Brief of the Appellee, *supra* note 106, at 9.

[112] *See* Sacharoff, *supra* note 89, at 208.

[113] *See Jones*, 481 Mass. at 546.

[114] *Id.* (quoting Commonwealth v. Gelfgatt, 468 Mass. 512, 520 (2014)).

chop it off halfway and ignore the second half of the sentence.[115] The second half of the sentence is the precise purpose of the proposition.[116] Take, for example, the following statement: "I gave ten dollars to Amy to bake cookies."[117] The speaker of this sentence gave Amy ten dollars *in order to* bake cookies.[118] Applying this same reasoning to testimonial communication, it is apparent that the defendant disclosed the evidence *in order to* communicate some statement of fact.[119]

In the context of compelled decryption, the evidence disclosed is the password itself because that is literally what the government compels.[120] This disclosure must further "explicitly or implicitly communicate some statement of fact."[121] The statement of fact cannot be the password itself, because that is what the defendant disclosed.[122] It stands to reason that the statements of facts implicitly communicated are the actual contents of the phone.[123]

Consider the following analogy: the act of entering a password to a decrypted phone in order to help the government execute a search warrant is comparable to the act of producing documents in compliance with a subpoena.[124] To force a defendant to produce subpoenaed documents, the Court does not ask the government to demonstrate that the defendant is physically capable of doing so.[125] Rather, the government is required to show that the documents exist and are in the defendant's possession.[126] Applying this same principle to compelled decryption, the government must show that the underlying documents on the device exist, not that the defendant

---

[115] *See To, In Order To, So As To*, ENG. GRAMMAR (Jan. 21, 2014), https://perma.cc/UK3M-Q9NT.

[116] *See Infinitives of Purposes*, GRAMMAR LAB, https://perma.cc/Z3LP-5PC7 (last visited Oct. 16, 2021) ("We use infinitives of purpose to say why someone does something.").

[117] *Cf. id.* ("They are going to the grocery store to buy some milk.").

[118] *See id.*

[119] *See id.* ("We use infinitives of purpose to say why someone does something.")

[120] *See, e.g.*, Commonwealth v. Jones, 481 Mass. 540, 547 n.9 (2019) (stating that the Commonwealth "requested that the defendant 'produce' or 'provide' the password to the LG phone").

[121] *Id.* at 546 (quoting Commonwealth v. Gelfgatt, 468 Mass. 512, 520 (2014)).

[122] *Id.* at 561 (compelling defendant to enter the password to the phone).

[123] *See* Sacharoff, *supra* note 89, at 232 (arguing that, in the context of encryption, "the government must show it can authenticate the files independently of the defendant's act of entering the password").

[124] Sacharoff, *supra* note 89, at 229.

[125] Sacharoff, *supra* note 89, at 237.

[126] Sacharoff, *supra* note 89, at 236.

knows the password and therefore is capable of entering it.[127] In the context of compelled decryption, the password itself is not produced; instead, the act of entering the password produces the documents on the electronic device.[128] These contents produced must be given Fifth Amendment protection.[129]

B. *Conclusion Alone Prohibits Assertion of the Fifth Amendment*

The Fifth Amendment only applies when the defendant "is compelled to make a testimonial communication that is incriminating."[130] The SJC concluded that the *only* testimony conveyed by compelling Jones to enter the password is that he knows the password.[131] This conclusion itself prohibits assertion of the Fifth Amendment because a password alone is not incriminating.[132] In other words, while the act of entering the password is sufficiently testimonial, the password itself is not incriminating.[133] If the SJC is correct that the password is the only testimony conveyed, then entering the password does not satisfy the requirements to invoke the Fifth Amendment.[134]

Despite concluding that the only evidence at issue is the password, the SJC created an analytic framework requiring the Commonwealth to prove that the defendant's knowledge of the password to the device is a "foregone

---

[127] *See* Sacharoff, *supra* note 89, at 236.

[128] Sacharoff, *supra* note 89, at 237.

[129] *See* Sacharoff, *supra* note 89, at 236–37 ("If the government cannot identify any documents on the device, the suspect's compelled act—entering the password—will communicate to the government the person's possession of the documents and their authenticity, facts the government did not know previously.").

[130] Fisher v. United States, 425 U.S. 391, 408 (1976).

[131] Commonwealth v. Jones, 481 Mass. 540, 547 (2019).

[132] *See* United States v. Pearson, No. 1:04-CR-340, 2006 U.S. Dist. LEXIS 32982, at *54 (N.D.N.Y. May 24, 2006) (discussing the government's argument that the password itself is not incriminating); United States v. Mitchell, 76 M.J. 413, 421 (C.A.A.F. 2017) (Ryan, J., dissenting) (reasoning that even if unlocking an iPhone "could constitute a *testimonial* statement, the entry of a passcode . . . does not constitute an *incriminating* statement"); Phillip R. Reitinger, *Compelled Production of Plaintext and Keys*, 1996 U. CHI. LEGAL F. 171, 197.

[133] Reitinger, *supra* note 132, at 197–98 (finding that a password is not compelled testimonial evidence because its contents are not privileged; rather, using the password to unlock the incriminating encrypted document makes the act of producing the password testimonial and incriminating); *see Mitchell*, 76 M.J. at 421 (Ryan, J., dissenting).

[134] *See* United States v. Castro, 129 F.3d 226, 229 (1st Cir. 1998) (noting that the defendant must "open himself to prosecution" by testifying in order to invoke the privilege against self-incrimination); In re Enforcement of a Subpoena, 435 Mass. 1, 3 (2001) (finding that the compelled evidence must subject the individual to criminal liability in order to assert the Fifth Amendment).

conclusion."[135] The SJC essentially concluded that the Fifth Amendment did not apply, and created an analytic framework requiring the Commonwealth to show then that the Fifth Amendment did not apply.[136] Applying a "foregone conclusion" analysis, an exception to the Fifth Amendment, to a non-incriminating testimonial communication illustrates that the SJC misinterpreted the definition of testimonial communication.[137] To logically defend the creation of this framework, the SJC must concede either that the password is incriminating or that the password conveys testimonial facts that are incriminating.[138] The former does not coincide with the accepted fact that a password alone is not incriminating,[139] whereas the latter derives considerable support from the growing body of literature regarding compelled decryption of electronic devices.[140] Since the password alone cannot trigger the Fifth Amendment, it stands to reason that the Commonwealth compelled incriminating testimony other than the password.[141]

C. *The SJC Ignored the Purpose Behind the "Foregone Conclusion" Doctrine*

The Fifth Amendment only protects compelled testimonial communications that are incriminating.[142] The government can negate this constitutional protection by demonstrating that the facts conveyed by the compelled act are a "foregone conclusion."[143] The U.S. Supreme Court in *Fisher* stated that compelling the defendant to admit the existence and possession of certain tax papers was a "foregone conclusion" because the

---

[135] *Jones*, 481 Mass. at 547–48.

[136] *Id.*

[137] *See generally* Fern L. Kletter, Annotation, *Construction and Application of "Foregone Conclusion" Exception to Fifth Amendment Privilege Against Self-Incrimination*, 25 A.L.R. FED. 3D Art. 10 (Westlaw through Oct. 16, 2021).

[138] *See* Cuadra v. State, 715 S.W.2d 723, 725 (Tex. Crim. App. 1986) ("Only incriminating, *testimonial* communications are privileged.").

[139] *See* United States v. Suarez, Army Misc. 20170366, 2017 CCA LEXIS 631, at *8 n.3 (A. Ct. Crim. App. Sep. 27, 2017) (stating that the government maintains a passcode is not incriminating); Reitinger, *supra* note 132, at 188–89 (noting that a password will not be incriminating unless the government used "that fact to show possession or control over other encrypted documents not involved in the act of production, such as other encrypted documents the government had previously seized").

[140] *See, e.g.*, Bryan H. Choi, *The Privilege Against Cellphone Incrimination*, 97 TEX. L. REV. ONLINE 73, 74 (2019); Aloni Cohen & Sunoo Park, *Compelled Decryption and the Fifth Amendment: Exploring the Technical Boundaries*, 32 HARV. J.L. & TECH. 169, 174 (2018); Sacharoff, *supra* note 89, at 229.

[141] *See generally Cuadra*, 715 S.W.2d at 725.

[142] *Id.*

[143] Fisher v. United States, 425 U.S. 391, 411 (1976).

"taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers."[144] When applying the "foregone conclusion" doctrine to the compelled decryption of electronic devices, the SJC narrowly interpreted the *Fisher* Court's ruling to mean that "the facts conveyed" only applied to the password.[145] The SJC ultimately concluded that the Commonwealth proved beyond a reasonable doubt that Jones had knowledge of the password to the LG phone.[146] Therefore, the knowledge of the password was a "foregone conclusion," and Jones was not entitled to the protections of the Fifth Amendment.[147]

By ignoring the line that the facts conveyed must "add little or nothing to the sum total of the government's information," the SJC completely changed the meaning and ignored the purpose of the "foregone conclusion" doctrine.[148] The U.S. Supreme Court implemented the "foregone conclusion" doctrine to apply in scenarios where the compelled evidence does not contribute to the government's case.[149] However, the SJC's determination that the foregone conclusion only applies to the defendant's knowledge of the password created an avenue for the government to gain access to a significant amount of new and incriminating information that would, in fact, help build the government's case.[150]

IV. Proposed Resolution

This issue deserves attention from the U.S. Supreme Court in that a federal standard is necessary to safeguard this fundamental right.[151] To invoke the "foregone conclusion" doctrine, the government must show with reasonable particularity it already knew of the subpoenaed materials at the time of the request.[152] Therefore, a *Gelfgatt* motion should require the Commonwealth to show with reasonable particularity that the existence and location of incriminating documents on a device are a "foregone

---

144 *Id.*

145 Commonwealth v. Jones, 481 Mass. 540, 546–47 (2019).

146 *Id.* at 557.

147 *Id.* at 558.

148 *Fisher*, 425 U.S. at 411.

149 *See id.*

150 *See* Sacharoff, *supra* note 89, at 208.

151 *See generally* U.S. CONST. amend. IV.

152 United States v. Doe, 670 F.3d 1335, 1345–46 (11th Cir. 2012) ("[U]nder the 'foregone conclusion' doctrine, an act of production is not testimonial . . . if the Government can show with 'reasonable particularity' that, at the time it sought to compel the act of production, it already knew of the materials, thereby making any testimonial aspect a 'foregone conclusion.'").

conclusion."[153]

If the government is not required to show that a device contains particular facts relevant to its case, then we are essentially giving the government access to go blindly hunting in hopes of finding incriminating evidence to build its case.[154] On top of that, we are forcing the hunted individual to hold the government's hand and guide the way.[155] This goes against the very purpose of the Fifth Amendment: to protect individuals from being forced to provide testimony that is then used against them by the government.[156]

This Comment proposes that, if the government attempts to execute a search warrant to a device containing incriminating information by compelling a defendant to decrypt it and that defendant subsequently raises a Fifth Amendment right against self-incrimination, the government must initially demonstrate there are no other reasonable means available to unlock the device.[157] Additionally, the government must show with reasonable particularity: (1) the location and existence of incriminating evidence on the device; (2) the government's knowledge of the defendant's control and ownership of the device; and (3) the government's knowledge that the defendant knows the password.[158] The defendant should then decrypt only the incriminating evidence that the government proved to exist with reasonable particularity.[159]

To be clear, this proposed resolution does not require the government to state in its search warrant the files it wants to search with reasonable particularity.[160] However, if the defendant subsequently raises a Fifth Amendment right against self-incrimination, then the government must show with reasonable particularity its knowledge of the files to rebut this constitutional protection.[161] While it may be simpler to hold that the Fourth

---

[153] *Id.* at 1346.

[154] *Cf.* United States v. Fox, 721 F.2d 32, 38 (2d Cir. 1983) (reasoning that the government's "broad-sweeping summons" required the defendant to become the primary informant against himself, which is essentially a "fishing expedition").

[155] *See id.*

[156] *See* Miranda v. Arizona, 384 U.S. 436, 477–78 (1966) (stating that the purpose of the Fifth Amendment is to protect defendants from making incriminating statements as a result of governmental compulsion).

[157] *See* Erin M. Sales, Note, *The "Biometric Revolution": An Erosion of the Fifth Amendment Privilege to Be Free from Self-Incrimination*, 69 U. MIAMI L. REV. 193, 208 (2014).

[158] *See Doe*, 670 F.3d at 1345–46; *see also* Commonwealth v. Gelfgatt, 468 Mass. 512, 521–22 (2014).

[159] Sacharoff, *supra* note 89, at 208.

[160] *See supra* text accompanying notes 157–59.

[161] *See supra* text accompanying notes 157–59.

Amendment will "somehow limit or trump the Fifth Amendment whenever there is a valid search warrant," these two rights should not be isolated from one another.[162] Rather, they must work together in order to consistently and adequately protect the rights of an individual.[163]

CONCLUSION

Fundamental constitutional rights are diminished when the law fails to evolve with technology. An individual has a fundamental constitutional right against compulsory self-incrimination, but the SJC's holding in *Commonwealth v. Jones* effectively interred this right in the digital world. The decision to limit the applicability of the "foregone conclusion" doctrine to a defendant's knowledge of a password is a gross misinterpretation of the law. The U.S. Supreme Court introduced the "foregone conclusion" doctrine to compel incriminating testimony that adds little information to that which the government already possesses. However, the SJC with this decision gives the government virtually limitless access to individuals' electronic devices without requiring any prior demonstration of the government's knowledge of incriminating evidence on those devices.

The SJC inaccurately concluded that the act of unlocking a device does not implicitly convey its contents. This determination is both logically unsound and ignores the purpose of legal doctrine. In order for the government to succeed on a *Gelfgatt* motion, while simultaneously protecting the defendant's Fifth Amendment right, the government should be required to demonstrate with reasonable particularity the location and existence of incriminating evidence on the device and that the defendant controls the device and knows the password. Once the government demonstrates this, the defendant may then be compelled to decrypt only those files listed with reasonable particularity. Without federal implementation of these safeguards, an individual's right against self-incrimination in the digital world is essentially worthless.

---

[162] Commonwealth v. Jones, 481 Mass. 540, 564 n.1 (2019) (Lenk, J., concurring).

[163] *See id.*

The Doctrine of Abatement *Ab Initio* in *Commonwealth v. Hernandez*

Jenna DeAngelo[*]

INTRODUCTION

The doctrine of abatement *ab initio* (hereinafter "the doctrine" or "abatement doctrine") erases a defendant's conviction if the defendant dies while an appeal is pending.[1] Most federal courts, as well as several states, have adhered to this doctrine for decades.[2] Over time, some states have modified the doctrine, and others have abolished it entirely.[3] The doctrine was recently called into question in Massachusetts when former football star Aaron Hernandez died in prison after his murder conviction but before the appeal of his conviction could be heard by the court.

This Comment will argue that the Massachusetts Supreme Judicial Court (hereinafter "SJC") engaged in improper judicial activism when it abolished the abatement doctrine in *Commonwealth v. Hernandez*. The Court should have put more consideration into adopting the Commonwealth's substitution approach, which allows a third party to voluntarily stand in for the deceased defendant to carry out the appeal. The Court erred by not abiding by either one of the parties' requests—Hernandez wanted the doctrine to stand while the Commonwealth sought modification of the doctrine so that a substitute for the defendant could complete the appeal.

Part I of this Comment details the history of the abatement doctrine. Part II lays out the facts of the *Hernandez* case and the Court's decision. Part III details why the Court went awry in deciding to abolish the abatement doctrine, and Part IV offers a potential modification to the doctrine that the

[*] J.D., *cum laude*, New England Law | Boston (2021). M.S., Urban & Regional Policy, Northeastern University (2015). B.S., Economics, *cum laude*, Northeastern University (2009).

[1] United States v. Pauline, 625 F.2d 684, 684 (5th Cir. 1980).

[2] *See* Commonwealth v. Hernandez, 118 N.E.3d 107, 113 (Mass. 2019); Tim A. Thomas, Annotation, *Abatement of State Criminal Case by Accused's Death Pending Appeal of Conviction—Modern Cases*, 80 A.L.R.4th 189, § 3 (Westlaw through Oct. 25, 2021).

[3] Thomas, *supra* note 2, § 1.

Court should have considered more seriously.

I. Background

A. *History of the Abatement Doctrine in the United States*

The common law abatement doctrine provides that a criminal conviction is vacated and the indictment dismissed if the defendant dies while the appeal of that conviction is pending.[4] In essence, the case is extinguished as if the defendant was never indicted or convicted.[5] The doctrine's origin is unclear, but the doctrine is well-established and followed to varying degrees by many state and federal courts.[6]

The U.S. Supreme Court upheld the doctrine in 1971 and narrowed it in 1974 to apply only when a convicted defendant dies pending a direct appeal as of right, not when there is a petition for certiorari.[7] All except one of the U.S. Courts of Appeals applies the doctrine.[8] Eighteen states and the District of Columbia apply the doctrine; some states have narrowed or modified the doctrine, and other states have abolished the doctrine altogether.[9]

Less than a month before Massachusetts abolished the doctrine, the Missouri Court of Appeals reaffirmed its application of the doctrine when it abated Daniel Mott's conviction for possession of a controlled substance after Mott died while serving his twelve-year sentence and before the Court of Appeals could issue a mandate on his appeal.[10] Mere days after Massachusetts abolished the doctrine, the Supreme Court of Mississippi narrowed the doctrine when ruling on a case where the defendant died in prison awaiting appeal for his convictions of kidnapping and raping a female college student.[11] The Court stated that the policies underlying stare decisis would not be served by continuing to apply the doctrine and cited the increased recognition of victim's rights as another reason for its departure from precedent.[12] The Mississippi Rules of Appellate Procedure allow for substitution of the deceased party; however, in this case, the

---

[4] *Pauline*, 625 F.2d at 684.

[5] United States v. Libous, 858 F.3d 64, 66 (2d Cir. 2017).

[6] *Hernandez*, 118 N.E.3d at 112–15.

[7] *See id.* at 112–13 (citing Durham v. United States, 401 U.S. 481, 483 (1971); Dove v. United States, 423 U.S. 325 (1976)).

[8] *Id.* (indicating the one Court of Appeals that has not applied the doctrine has never taken a case on this issue).

[9] *Id.* at 114.

[10] State v. Mott, 569 S.W.3d 555, 556 (Mo. Ct. App. 2019).

[11] Payton v. State, 266 So. 3d 630, 631–33 (Miss. 2019).

[12] *Id.* at 641–42.

deceased defendant's appellate counsel did not move for substitution.[13]

Most recently, the Supreme Court of Tennessee abolished the abatement doctrine when ruling on a case where the defendant was convicted of reckless homicide, sentenced to three years in prison, and then died while his appeal was pending.[14] The Court reasoned that the doctrine was obsolete and contrary to public policy.[15]

Several states have adopted a rule that allows for substitution, whereby a representative of the deceased defendant takes the place of the defendant and continues the appeals process.[16] Hawaii gives the appellate court the most discretion in determining how to proceed on an appeal if the convicted defendant dies.[17] The Hawaii Rules of Appellate Procedure give the appellate court discretion to allow substitution.[18] However, absent a motion for substitution, the court is empowered to dismiss the appeal as moot, abate the conviction and all proceedings, or enter any other order as the court deems appropriate.[19]

B. *History of the Abatement Doctrine in Massachusetts*

In Massachusetts, the first reported SJC case recognizing the abatement doctrine was in 1975.[20] It appears the doctrine was adopted because it was the favored approach in other jurisdictions.[21] The SJC applied the doctrine to a direct appeal of right in only two other reported cases, both of which resulted in very short opinions that shed little light on the rationale behind the Court's opinion.[22]

While there are scant reported cases of the doctrine's application in Massachusetts, there are a few well-known instances where lower courts applied the doctrine.[23] In 1996, John Salvi III was convicted of terrorist attacks on two abortion clinics in Massachusetts, where he killed two people

---

[13] *See id.* at 642.

[14] State of Tennessee v. Al Mutory, 581 S.W.3d 741, 743–44 (2019).

[15] *Id.* at 750.

[16] Thomas, *supra* note 2, § 2.

[17] *See* State v. Weldon, 445 P.3d 103, 112 (Haw. 2019).

[18] *See* HAW. R. APP. P. 43(a).

[19] *See* HAW. R. APP. P. 43(a); *Weldon*, 445 P.3d at 112.

[20] Commonwealth v. Hernandez, 118 N.E.3d 107, 111 (Mass. 2019).

[21] *See id.*

[22] *Id.* (discussing Commonwealth v. Harris, 379 Mass. 917 (1980) and Commonwealth v. Latour, 397 Mass. 1007 (1986)).

[23] *See* Theo Emery, *Court Voids Conviction of Defrocked Priest*, SOUTH COAST TODAY (Sept. 27, 2003, 12:01 AM), https://perma.cc/SP55-BSFQ; *see also* Brendan McCarthy, *Victims Challenge Voiding Geoghan Record*, BOS. GLOBE (Aug. 28, 2003), https://perma.cc/XGY5-4EFT.

and wounded several others.[24] During his appeal, Salvi committed suicide.[25] The appellate court "instructed the trial court to vacate the conviction and dismiss the indictment . . . ."[26] Former state senator and attorney, William Keating, introduced legislation in 1997 to abolish the doctrine.[27] The legislation had the support of then-Governor William Weld and passed the Senate, but the bill did not make it out of the House.[28] In 2002, John Geoghan, a priest, was convicted of sexually abusing a child in the wake of the Catholic church child sex abuse scandal.[29] Geoghan, who was also accused of molesting almost 150 children, was later murdered in prison while serving his sentence.[30] The court applied the abatement doctrine, and Geoghan's conviction was vacated.[31] Because Massachusetts courts continued to apply the abatement doctrine, the doctrine was the law in the state when Aaron Hernandez died in 2017.[32]

II. The Court's Opinion

A. *Factual Background of* Commonwealth v. Hernandez

On August 22, 2013, Aaron Hernandez (hereinafter "Hernandez"), a former professional football player for the New England Patriots, was indicted for the murder of Odin Lloyd, who was shot five times and left for dead in a secluded area near Hernandez's house in July.[33] Hernandez plead "not guilty."[34] In May 2014, Hernandez was charged with two counts of first-degree murder in the 2012 killing of two men in Boston and, again, plead

---

[24] Patrick Johnson, *After Aaron Hernandez Suicide, Murder Conviction in Odin Lloyd Death Legally Considered 'As If It Never Occurred*,' MASS LIVE (Apr. 19, 2017, 4:53 PM), https://perma.cc/NS32-H7NS.

[25] *Id.*

[26] Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal*, 73 U. COLO. L. REV. 943, 943 (2002).

[27] McCarthy, *supra* note 23.

[28] McCarthy, *supra* note 23.

[29] Emery, *supra* note 23.

[30] Emery, *supra* note 23.

[31] Tim E. Staggs, Note, *Legacy of a Scandal: How John Geoghan's Death May Serve as an Impetus to Bring Abatement* Ab Initio *in Line with the Victims' Rights Movement*, 38 IND. L. REV. 507, 507–08 (2005); Emery, *supra* note 23.

[32] *See generally* Commonwealth v. Hernandez, 118 N.E.3d 107 (Mass. 2019); Eric Levenson & Evan Simko-Bednarski, *New Details on Aaron Hernandez's Apparent Suicide in Prison*, CNN, https://perma.cc/FR6A-9ERV (last updated May 5, 2017, 6:16 AM EDT).

[33] Tracy Connor, *Aaron Hernandez Indicted for First-Degree Murder in Death of Odin Lloyd*, NBC NEWS (Aug. 22, 2013, 5:17 PM EDT), https://perma.cc/4LXW-TF9G.

[34] *Id.*

"not guilty."[35] Both legal proceedings were highly publicized and fraught with procedural issues, such as motions to suppress evidence and a motion for change of venue.[36] On April 15, 2015, Hernandez was convicted of first-degree murder in the death of Odin Lloyd, unlawful possession of a firearm, and unlawful possession of ammunition;[37] he was sentenced to life in prison with no possibility for parole.[38] On April 15, 2017, Hernandez was found not guilty of two counts of murder for the 2012 killings.[39] Hernandez died in prison, of an apparent suicide, two days later on April 19, 2017.[40]

Before his death, Hernandez's appeal was still being assembled and had not yet been docketed in the court.[41] After his death, Hernandez's appellate counsel filed a suggestion of death and motion to abate.[42] In May 2017, the court vacated the convictions and dismissed the indictments based on the doctrine of abatement *ab initio*.[43] The Commonwealth appealed, and the SJC granted the application for direct appellate review.[44]

B. *The SJC Abolished the Abatement Doctrine*

In its analysis, the SJC first explored the doctrine in general, then considered past Massachusetts case law, federal case law, and other states'

---

[35] Kevin Armstrong, *Ex-Patriots TE Aaron Hernandez Pleads Not Guilty to All Charges in 2012 Murders That DA Says Were Sparked by a Spilled Drink*, N.Y. DAILY NEWS (May 28, 2014, 5:26 PM), https://perma.cc/R8EC-Q8QZ; Ashley Fantz, *Aaron Hernandez Charged in 2012 Double Homicide*, CNN, https://perma.cc/RW7X-M9PV (last updated May 15, 2014, 7:02 PM EDT).

[36] *See, e.g.*, Commonwealth v. Hernandez, No. 128590, 2014 Mass. Super. LEXIS 153, at *1 (Nov. 10, 2014) (denying a motion for a change of venue); Commonwealth v. Hernandez, No. 128514, 2014 Mass. Super. LEXIS 149, at *1 (Oct. 10, 2014) (denying a motion to suppress evidence); Commonwealth v. Hernandez, No. 128513, 2014 Mass. Super. LEXIS 145, at *1 (Oct. 10, 2014) (allowing in part and denying in part a motion to suppress evidence); Commonwealth v. Hernandez, No. 128512, 2014 Mass. Super. LEXIS 146, at *1 (Oct. 10, 2014) (denying a separate motion to suppress); Commonwealth v. Hernandez, No. 128852, 2014 Mass. Super. LEXIS 186, at *1 (Oct. 2, 2014) (allowing a motion to suppress); Commonwealth v. Hernandez, No. 128510, 2014 Mass. Super. LEXIS 144, at *1 (Aug. 26, 2014) (allowing a motion to suppress); Commonwealth v. Hernandez, 31 Mass. L. Rptr. 445, 445 (Mass. Super. Ct. 2013).

[37] *See* Commonwealth v. Hernandez, 118 N.E.3d 107, 109 (Mass. 2019).

[38] Susan Candiotti, Laura Dolan & Ray Sanchez, *Aaron Hernandez Guilty of Murder in Death of Odin Lloyd*, CNN, https://perma.cc/M7EU-JFV6 (last updated Apr. 16, 2015, 11:50 AM EDT).

[39] Eric Levenson, *Aaron Hernandez Found Not Guilty of Double Murder*, CNN, https://perma.cc/RXM9-L2WD (last updated Apr. 19, 2017, 8:09 AM EDT),

[40] Levenson & Simko-Bednarski, *supra* note 32.

[41] *See Hernandez*, 118 N.E.3d. at 110.

[42] *See id.*

[43] *Id.*

[44] *Id.*

case law.[45] The Court next examined the two main reasons underlying the doctrine: the finality principle and the punishment principle.[46] Finally, the SJC reviewed the substitution approach and the role of the legislature before concluding that the abatement doctrine should be abolished in Massachusetts.[47]

The SJC stated that little is known about why the doctrine was initially used in Massachusetts and concluded that "the justification for adopting the doctrine was the simple fact that it was perceived to be the favored approach elsewhere."[48] The SJC called attention to the first reported Massachusetts appellate case acknowledging the doctrine, claiming the written opinion did not declare that the court was adopting the doctrine.[49] Rather, the opinion stated that "[w]hen a criminal defendant dies pending his appeal, *normally* the judgment should be vacated and the indictment dismissed. This is the general practice elsewhere."[50]

The Court acknowledged that all except one U.S. Court of Appeals applies the doctrine.[51] The Court also acknowledged that some states apply the traditional doctrine, some states have narrowed it, and other states have abolished it altogether.[52] The Court concluded that the doctrine may no longer be the majority approach.[53]

The SJC identified the first reason behind the doctrine to be the finality principle, which contends that a defendant should not only have the right to a trial, but should also have the right to appeal a conviction, because both are critical aspects of our criminal justice system.[54] When a defendant appeals a conviction, the conviction hangs in limbo and cannot be seen as final until the appeal is resolved.[55] Also, it may be unjust to use a contested conviction in a civil suit against the deceased's estate if the deceased did not have the opportunity to see an appeal through.[56] The SJC reasoned, however, that while a Massachusetts statute does give a defendant the right to appeal,

---

[45] *See id.* at 110–17.

[46] *Id.* at 117.

[47] *See Hernandez*, 118 N.E.3d at 121–22.

[48] *Id.* at 117.

[49] *Id.* at 111 (discussing Commonwealth v. Eisen, 368 Mass. 813 (1975)).

[50] *Id.* (citing *Eisen*, 368 Mass. at 813–14).

[51] *Id.* at 113 (indicating the one Court of Appeals that has not applied the doctrine has never taken a case on this issue).

[52] *See id.* at 113–14.

[53] *Hernandez*, 118 N.E.3d at 116.

[54] *Id.* at 117.

[55] *See id.* at 117.

[56] *See id.* at 119.

one can be deprived of that right, because there is no constitutional right to appeal.[57] The Court cited other reasons why the finality principle lacks merit: the presumption of innocence is terminated after a defendant is convicted of a crime; "a trial court judgment is final for purposes of res judicata or issue preclusion"; and the punishment ordered takes place immediately (it is not suspended while an appeal is sought).[58]

The second reason for the doctrine is the punishment principle, which asserts that one purpose of the justice system is to punish, and the system cannot realistically punish a dead person.[59] The purpose is to punish the person who committed the crime, not the person's heirs or beneficiaries.[60] The SJC reasoned that "the [s]tate, as the representative of the community, continues to have an interest in maintaining a conviction" and that the justice system should account for the rights of victims.[61] The SJC highlighted the enactment of the Massachusetts victims rights bill and the creation of the Domestic and Sexual Violence Prevention and Victim Assistance Fund, which both signal the importance of restitution.[62]

Finally, the SJC rejected the substitution approach requested by the Commonwealth, whereby a third party steps into the shoes of the deceased defendant to carry out the appeal.[63] The SJC stated that this approach poses practical issues and that the legislature is the appropriate body to adopt that approach.[64] Unsatisfied with the lack of established precedent within Massachusetts and aware of dwindling support for the doctrine across the country, the SJC retroactively abolished the abatement doctrine and reversed the lower court's order to abate Hernandez's conviction.[65] The SJC created a new common law rule in Massachusetts: if a convicted defendant dies pending appeal, the appeal is dismissed, and the trial court is instructed to place a note in the record that the defendant's conviction removed the presumption of innocence but the conviction was neither affirmed nor reversed because the defendant died while an appeal was pending.[66]

---

[57] *Id.* at 118.

[58] *Id.* at 118–19.

[59] *Hernandez*, 118 N.E.3d at 119.

[60] *Id.* at 120.

[61] *Id.* at 120.

[62] *Id.*

[63] *Id.* at 121.

[64] *Id.* at 121–22.

[65] *Hernandez*, 118 N.E.3d at 121.

[66] *Id.* at 124.

ANALYSIS

III. The SJC Incorrectly Abolished the Abatement Doctrine Against the Requests of Both Parties

A. *Judicial Activism and the Soundness of the Abatement Doctrine*

Common law consists primarily of written judicial decisions and is derived from centuries of published case law in the United States and England.[67] Many courts of the highest authority in the United States have declared that they have the power to "modify, overrule, or change existing common law to conform to the changing conditions of society."[68] Judicial activism is a term used to describe a broad set of court actions, including, but not limited to, using reasoning that is inconsistent with history or tradition, issuing an order that blatantly contradicts precedent, and inventing new rights and remedies.[69] Judicial activism is also sometimes called "legislating from the bench."[70]

While the SJC has the self-proclaimed right to change common law, it engaged in improper judicial activism when it abolished the abatement doctrine, going against the wishes of both parties in *Hernandez*.[71] When judges stray from precedent, they place their judgment above that of prior courts.[72] In seeking "to achieve certain policy results regardless of doctrine, they put their judgment about what is 'right' above what various other actors believe the law to be."[73] Unelected judges steal the function of the legislative branch "when they [use] legal principles to effectuate their own preferred policy aims."[74]

In *Hernandez*, the SJC referred to its own recent reaffirmation in *Shiel v. Rowell* that its preferred course is to adhere to precedent.[75] Yet, the Court strayed from precedent, possibly because this was a high-profile case, one in which the public generally believed Hernandez was guilty, and the SJC did

---

[67] *See* J. Lyn Entrikin, *The Death of Common Law*, 42 HARV. J.L. & PUB. POL'Y 351, 362 (2019).

[68] Tory A. Weigand, *Lost Chances, Felt Necessities, and the Tale of Two Cities*, 43 SUFFOLK U. L. REV. 327, 330 (2010).

[69] Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 Nw. U. L. REV. 1, 10 (2011).

[70] *See* Jane S. Schacter, *Putting the Politics of "Judicial Activism" in Historical Perspective*, 2017 SUP. CT. REV. 209, 217.

[71] *See* Weigand, *supra* note 68, at 333.

[72] Yung, *supra* note 69, at 12.

[73] Yung, *supra* note 69, at 12.

[74] Schacter, *supra* note 70, at 215.

[75] Commonwealth v. Hernandez, 118 N.E.3d 107, 116 (Mass. 2019).

not want to reward Hernandez for committing suicide.[76] The New England Patriots and the NFL were withholding money that they owed Hernandez because of his involvement in the murder, which they might have been compelled to pay to his estate if his conviction was erased.[77]

Indeed, the crime Hernandez was convicted of is appalling, but the courts did not attempt to abolish the doctrine when Salvi or Geoghan's convictions for equally, if not more, horrendous crimes were abated.[78] While courts of last resort have declared their power and duty to change or overrule existing common law to conform to the changing conditions of society, it is difficult to see what changing condition of society prompted the Court to take action here.[79] The Court cites the victims' rights movement as one reason for abolishing the doctrine, but that movement began decades ago, and the federal government and several states still have not modified or abolished the doctrine in response to the movement.[80]

Furthermore, the victims' rights movement may not be the appropriate concept to justify abolishing the doctrine because "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."[81] Nonparties offended by the criminal justice process can seek relief through a civil or administrative suit.[82] The government's representative, here the Massachusetts District Attorney, represents the interests of the people in a criminal case.[83] A victim of a crime lacks standing to challenge a sentence imposed on a criminal defendant.[84] A victim lacks standing to move to vacate a lengthy stay of the convicted defendant's

---

[76] *See, e.g.*, Lynn Johnston Splitek, Note, State v. McDonald*: Death of a Criminal Defendant Pending Appeal in Wisconsin—the Appeal Survives*, 1989 WIS. L. REV. 811, 831 (arguing the Wisconsin Supreme Court in State v. McDonald did not abate McDonald's conviction after he killed himself because the Court was worried that abatement may appear to reward suicide); Brian Fraga, *Judge Denies Defense Request to Move Aaron Hernandez Trial*, THE PATRIOT LEDGER (Oct. 30, 2014, 3:24 PM), https://perma.cc/K53F-A83V.

[77] Des Bieler, *'You're Rich': Aaron Hernandez Suicide Note Points to Effort to Provide for His Family*, WASH. POST (May 5, 2017), https://perma.cc/QJ29-4Y9A.

[78] *See supra* Part I(B).

[79] *See* Weigand, *supra* note 68, at 330–32.

[80] *See Hernandez*, 118 N.E.3d 107 at 120; Alexander F. Mindlin, Note, *"Abatement Means What It Says": The Quiet Recasting of Abatement*, 67 N.Y.U. ANN. SURV. AM. L. 195, 197 (2011).

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

[82] Br. and App. for Appellee Aaron J. Hernandez at 43, Commonwealth v. Hernandez, 118 N.E.3d 107 (2019) (No. SJC-12501) [hereinafter Hernandez Brief].

[83] *Id.* at 45.

[84] H.T. v. Commonwealth, 989 N.E.2d 424, 424–25 (Mass. 2013).

sentence.[85] A victim lacks standing to obtain judicial review of any aspect of another's prosecution.[86] Relying on the victims' rights movement as a justification for abolishing the abatement doctrine undermines this line of authority that limits the interests and rights of individuals who are not parties to a criminal case.[87]

One major function of the criminal justice system is to punish the guilty defendant.[88] Criminal law has evolved to also be protective in nature, to ensure members of society feel and are protected.[89] However, the defendant's rights are just as important as the victim's rights, especially in a legal atmosphere where trial court convictions are often reversed.[90] Here, abrogation of the abatement doctrine creates an injustice to Hernandez.[91] A defendant's death does not automatically foreclose the need for justice; the defendant's family and friends, as well as members of the general public, still want to know the truth about whether the defendant was innocent or not.[92] The "surviving family has an interest in preserving, unstained, the memory of the deceased defendant or his reputation."[93] This interest is significant enough to warrant abating a conviction when the conviction's validity or correctness has not been tested or determined.[94]

Additionally, "appellate review of a conviction is so integral to the array of procedural safeguards due a criminal defendant that incapacity to obtain such review nullifies the jury verdict."[95] A conviction is unreliable when it cannot be subjected to the rigors of appellate review.[96] Appeal is a statutory right in Massachusetts as well as most other states and the federal system.[97]

---

[85] Hagen v. Commonwealth, 772 N.E.2d 32, 37–38 (Mass. 2002).

[86] Manning v. Mun. Court of Roxbury Dist., 361 N.E.2d 1274, 1276 (Mass. 1977).

[87] *See* Hernandez Brief, *supra* note 82, at 44.

[88] *See* Sabrina Margret Bierer, Note, *The Importance of Being Earned: How Abatement After Death Collaterally Harms Insurers, Families, and Society at Large*, 78 BROOK. L. REV. 1699, 1724–25 (2013).

[89] *See id.* at 1725.

[90] *See* Criminal Appeals in State Courts, NJC No. 248874, at 6 (DOJ Bureau of Justice Statistics Sept. 2015), https://perma.cc/W32R-ZE8Q; James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2053–54 (2000). *See generally* Wendy Kaminer, *Victims Versus Suspects*, AM. PROSPECT (Dec. 19, 2001), https://perma.cc/BL82-V2UB (examining how giving rights to victims creates tension with the rights of defendants).

[91] *See generally* Hernandez Brief, *supra* note 82.

[92] *See* Samuel Wiseman, *Innocence After Death*, 60 CASE W. RES. L. REV. 687, 703 (2010).

[93] State v. Morris, 328 So. 2d 65, 67 (La. 1976).

[94] United States v. Pauline, 625 F.2d 684, 684–85 (5th Cir. 1980).

[95] Cavallaro, *supra* note 26, at 945.

[96] Cavallaro, *supra* note 26, at 954.

[97] *See* Commonwealth v. Hernandez, 118 N.E.3d 107, 118 (Mass. 2019); Cavallaro, *supra* note

Enforcement of the abatement doctrine may not have attractive results, but justice demands protection of such procedural rights.[98] For example, the exclusionary rule suppresses unconstitutionally obtained evidence, even if the evidence clearly proves the defendant's guilt.[99] The world will never know, but had Hernandez seen his appeal through, his conviction may have been overturned.[100]

B. *It Is the Legislature's Job to Make Laws*

The separation of powers doctrine is a longstanding limitation on the judiciary.[101] The legislature is generally in the best position to make public policy decisions because the legislative law-making process encompasses a broad range of information gathering with input from many parties.[102] If the Court felt strongly that the abatement doctrine should be abolished based on public policy, it should have made a call to the legislature to address this issue.[103] "Where a long-standing common-law rule is the subject of challenge, the notions underlying separation of powers require refraining from judicial alteration absent a history of inconsistent application and 'Herculean need.'"[104] Here, the Court abolished the doctrine because it felt that the legislature was not doing its job.[105] However, a recent Second Circuit case said it best: "Abatement *ab initio* is a common law doctrine: If Congress deems it an undesirable one, it can act accordingly."[106]

The Massachusetts legislature attempted to abolish the doctrine in 1997, but was unsuccessful in getting a bill passed.[107] The only other known attempt by the legislature to modify the doctrine was a 2017 House bill (named after Odin Lloyd) stating that "the death of a defendant due to suicide who is convicted of a criminal offense shall automatically forfeit any and all rights to appeal that conviction."[108] A request for a study on the

26, at 946.

[98] *See* Mindlin, *supra* note 80, at 228.

[99] *See* Mindlin, *supra* note 80, at 228–29.

[100] *See* Cavallaro, *supra* note 26, at 977–81.

[101] *See* Weigand, *supra* note 68, at 332.

[102] *See* Weigand, *supra* note 68, at 332–33.

[103] *See* Weigand, *supra* note 68, at 332.

[104] Weigand, *supra* note 68, at 335.

[105] *See* Justin Hansford, *Cause Judging*, 27 GEO. J. LEGAL ETHICS 1, 17 (2014); Weigand, *supra* note 68, at 330.

[106] United States v. Libous, 858 F.3d 64, 69 (2d Cir. 2017).

[107] McCarthy, *supra* note 23.

[108] An Act Relative to Odin Lloyd, H.R. 3835, 190th Gen. Court (Mass. 2017), https://perma.cc/6C3J-WH2K.

amendment, along with other proposed and unrelated amendments, was ordered, but the bill never made it out of the House.[109] The legislature's inability or unwillingness to modify or abolish the doctrine is strong evidence of a legislative intent to preserve the abatement doctrine.[110]

C. *Reliance on the Law*

The reliance principle is prevalent in criminal law—people must be on notice about what the laws are in order to understand what conduct constitutes a crime.[111] The same principle can be applied outside of criminal law.[112] Let us assume Hernandez was fully aware of the abatement doctrine before he committed suicide.[113] This means Hernandez may have relied on the law as it currently stood in Massachusetts in making his decision to commit suicide.[114] There is value in the certainty of law, as "it protects the individual's right to rely on existing law in managing his affairs."[115] While the general rule has been to give retroactive effect to an overruling decision, this rule is subject to exceptions, such as if "there has been justifiable reliance on decisions which are subsequently overruled and those who have so relied may be substantially harmed if retroactive effect is given to the overruling decision."[116] The SJC retroactively abolishing the abatement doctrine so that the doctrine is inapplicable to Hernandez undermines the reliance principle and results in substantial harm to Hernandez.[117]

---

[109] *Id.*

[110] *See* Andrew White, Comment, *Perpetuating Injustice: Analyzing the Maryland Court of Appeals's Refusal to Change the Common Law Doctrine of Contributory Negligence*, 78 MD. L. REV. 1042, 1044 (2019).

[111] *See* Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 308 (2016).

[112] *See* Thomas S. Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 234–35 (1965).

[113] *See* Bieler, *supra* note 77 (stating Hernandez may have heard a rumor in prison that if a defendant dies while he has an open appeal, he will be acquitted of the charge and deemed not guilty).

[114] *See* Bieler, *supra* note 77.

[115] Currier, *supra* note 112, at 235.

[116] S. R. Shapiro, Annotation, *Comment Note.—Prospective or Retroactive Operation of Overruling Decision*, 10 A.L.R.3d 1371, § 5(a) (1966).

[117] *See* John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1, 52–53 (1997); *supra* Part III(A) (detailing how a defendant's rights are equally as important as the victim's rights and how appellate review of a conviction is so integral to the range of procedural safeguards due to a criminal defendant that the inability to obtain such review makes a conviction unreliable).

IV. If the SJC Wanted to Change the Doctrine, It Should Have Considered Adopting the Substitution Approach

Instead of abolishing the doctrine altogether, the Court should have put more consideration into implementing the substitution approach.[118] In its written opinion, the SJC spent little time considering the substitution approach.[119] The Court felt that it was not its place to adopt the substitution approach due to practical considerations.[120] It stated that the Massachusetts Rules of Appellate Procedure would need to be modified, yet the Court acknowledged this change was within its powers.[121] The Court also grappled with the issue of if and how the system would handle substitution for a deceased indigent defendant.[122]

The Commonwealth itself argued for application of the substitution approach in this case.[123] This approach allows for an eligible third party, such as the defendant's family member, to step into the shoes of the deceased defendant and complete the appeals process.[124] The substitution approach would solve many of the problems identified by opponents of the abatement doctrine and is an approach already used in several states.[125] This approach "affords defendants their right to post-trial review, [and] gives defendants' families the opportunity to appeal the conviction and thus the restitution orders . . . ."[126] Further, if the appeal process is eventually carried out by a third party, the general public would benefit from knowing if the defendant

---

[118] *See* Patrick H. Gallagher, *The Aaron Hernandez Case: The Inconsistencies Plaguing the Application of the Abatement Doctrine*, 53 GONZ. L. REV. 263, 286 (2017).

[119] *See* Commonwealth v. Hernandez, 118 N.E.3d 107, 122 (Mass. 2019).

[120] *Id.*

[121] *Id.* at 122–23.

[122] *Id.* at 123.

[123] Commonwealth's Br. at 14, Commonwealth v. Hernandez,118 N.E.3d 107 (Mass. 2019) (No. SJC-12501).

[124] *See* Bierer, *supra* note 88, at 1709.

[125] *See* Bierer, *supra* note 88, at 1702, 1731–33 (stating opponents of the abatement doctrine argue that victims' interests, the government's interests, and insurance providers' interests are harmed when the abatement doctrine is applied); *see also* Barry A. Bostrom, Chad Bungard & Richard J. Seron, *John Salvi III's Revenge from the Grave: How the Abatement Doctrine Undercuts the Ability of Abortion Providers to Stop Clinic Violence*, 5 N.Y.C. L. REV. 141, 165 (2002) (arguing that abating Salvi's conviction led to an undesirable and harsh result for the key informant in the case who was ultimately unable to collect the cash award for providing information leading to the conviction of Salvi).

[126] *See* Bierer, *supra* note 88, at 1702.

truly committed the crime.[127] It is in the interest of the defendant, the defendant's estate, and the public that a defendant's challenge to a conviction is fully reviewed.[128]

CONCLUSION

In *Commonwealth v. Hernandez*, the SJC improperly abolished the common law doctrine of abatement *ab initio*. The Court did not side with either the Commonwealth or Hernandez. Instead, it chose to travel its own route. Further, the Court retroactively applied the change in law so that Hernandez's conviction could not be abated. The SJC's departure from precedent amounts to impermissible judicial activism and creates an unjust result for not only Hernandez, but also his family and society. If the Court wanted to change this long-standing doctrine, the Court should have put more consideration into adopting the substitution approach, which allows a third party to voluntarily stand in for a deceased defendant to carry out an appeal.

* * * *

[127] *See* Gallagher, *supra* note 118, at 286, 288.

[128] Commonwealth v. Walker, 447 Pa. 146, 147 (1972).

The Dangers of Malingering as the Basis for a Two-Level Sentence Enhancement Under U.S.S.G § 3C1.1.

Melanie Falzone[*]

INTRODUCTION

Efficient case resolution is necessary to effectuate the accused's right to a speedy trial under the Sixth Amendment, but it is also necessary to ensure the effective utilization of judicial resources more broadly.[1] Yet, balancing judicial efficiency with quality case processing and ensuring just outcomes remains a challenge.[2] Additionally, there are constant reminders throughout the legal system that truth and honesty are among the highest values.[3] Witnesses are sworn in by oath to ensure truthful testimony, judges and lawyers swear to conduct themselves honestly, and the legal process is expected to result in truthful and just outcomes.[4] Accordingly, dishonest and disruptive conduct that obstructs the judicial process is taken extremely seriously.[5] Obstructive conduct undermines respect for the justice system and strikes against the integrity of the court.[6] For these reasons, judges tend to take great offense to deliberate attempts to impede the administration of justice and will punish culprits harshly upon conviction.[7] However, shielding the legal system from obstructive conduct risks injuring

[*] J.D., *cum laude*, New England Law | Boston (2021). B.A., English Language & Literature, College of the Holy Cross (2014).

[1] *Speedy Trial*, AM. BAR ASS'N, https://perma.cc/883S-JGAR (last visited Nov. 4, 2021).

[2] *Efficiency, Timeliness, and Quality: A New Perspective from Nine State Criminal Trial Courts*, NCJ No. 181942, at 1 (DOJ National Institute of Justice June 2000), https://perma.cc/4XXT-BX5B.

[3] Joseph T. McCann, Review, Detecting Malingering and Deception: Forensic Distortion Analysis (FDA), by *Harold V. Vall & David A. Pritchard*, 24 VT. B.J. & L. DIG. 63 (1998).

[4] *Id.*

[5] *See Obstruction of Justice*, LAW OFFICES OF JEFFREY LICHTMAN, https://perma.cc/WZQ7-TTRS (last visited Nov. 4, 2021).

[6] *Id.*

[7] *Id.*

equally important individual rights because, for example, proving *specific intent to obstruct*, a required element of obstruction of justice, is a challenge.[8] Obstructive conduct that results from confusion or mistake on a defendant's part can look a lot like intentional obstruction.[9] Still, the general distaste for obstructive conduct among judges leads to legal consequences on the basis of perceived intent without sufficient proof.[10] Without proper protection mechanisms and clearly defined standards, this risk can materialize itself and threaten the integrity of the court.[11]

In a case of first impression, the U.S. District Court for the District of Maine confronted conduct that is particularly susceptible to being misperceived as intentionally obstructive in *United States v. Nygren.* [12] In that case, the Court determined that the defendant intentionally feigned incompetence in an effort to evade criminal responsibility, and, as a result, the Court significantly increased the length of the defendant's sentence.[13] This Comment will illustrate that the U.S. Court of Appeals for the First Circuit erred in affirming that feigned incompetence determined by a diagnosis of malingering can be used as the basis for a two-level sentence enhancement under Federal Sentencing Guideline § 3C1.1, because of unreliable testing methods and insufficient notice requirements.

Part I of this Comment examines the process of calculating and assigning sentences to criminal defendants in federal court, including the application of the obstruction of justice enhancement. Part I further explains how competency evaluations are ordered and conducted, paying particular attention to malingering diagnoses. Part II explores *U.S. v. Nygren*. Part III discusses the limits of confidentiality and informed consent in the context of court-ordered competency evaluations and argues that insufficient notice should bar the use of evaluation results outside of a competency determination. Part IV discusses the main issues surrounding the reliability of evaluation results and details the dangers of using such inconsistent data

---

[8] *See, e.g.*, United States v. Young, 811 F.3d 592, 604–05 (2d Cir. 2016) (holding that the defendant did not possess the specific intent to obstruct justice for the obstruction of justice enhancement to apply).

[9] *See, e.g.*, *id.* (rejecting the trial court's obstruction of justice increase, finding that the defendant did not deliberately lie).

[10] *See generally Obstruction of Justice*, *supra* note 5.

[11] *See generally* Kathy Faulkner Yates, *Therapeutic Issues Associated with Confidentiality and Informed Consent in Forensic Evaluations*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 345, 349–52 (1994).

[12] 933 F.3d 76, 87–88 (1st Cir. 2019).

[13] *Id.* at 82, 88.

to support a sentence enhancement beyond the otherwise applicable guidelines for the charged crime.

I. Background

A. *Calculating Criminal Sentences Under the U.S. Sentencing Guidelines*

Federal sentencing begins with the calculation of the applicable sentencing range under the U.S. Sentencing Guidelines [hereinafter Guidelines].[14] Each federal crime is assigned to one of forty-three sentencing levels, depending on the severity of the crime, which will then fall within one of six sentencing length ranges.[15] Sentence length depends on the base offense level for the convicted crime and the extent of the individual's criminal history.[16] For example, a level fifteen offense carries a sentence range of eighteen to twenty-four months in prison for a first-time offender and from forty-one to fifty-one months for a defendant with an extensive criminal record.[17] Two levels higher, at offense level seventeen, the range for first time offenders is increased from twenty-four to thirty months and from fifty-one to sixty-three months for a defendant with substantial criminal history.[18]

Regardless of the offense for which an individual is convicted, the base sentence may be enhanced as a consequence of various aggravating factors including obstruction of justice.[19] If applicable, § 3C1.1 of the Guidelines provides for a two-level increase in offense level.[20] The impact of a two-level increase spans from a relatively small adjustment at the lowest base offense levels "to a difference of an additional sixty-eight months [in prison] at the highest levels."[21] The obstruction of justice enhancement is applicable if:

> (1) the defendant willfully obstructed or impeded, or attempted to

---

[14] CHARLES DOYLE, OBSTRUCTION OF JUSTICE: AN OVERVIEW OF SOME OF THE FEDERAL STATUTES THAT PROHIBIT INTERFERENCE WITH JUDICIAL, EXECUTIVE, OR LEGISLATIVE ACTIVITIES, CRS No. RL34303, at 81 (2014), https://perma.cc/XG5V-3MH2. *See generally* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5–7 (1988).

[15] DOYLE, *supra* note 14, at 82.

[16] *See* Breyer, *supra* note 14, at 6.

[17] FEDERAL SENTENCING: THE BASICS, U.S. SENTENCING COMM'N 42 (2018), https://perma.cc/GJR4-GKYA.

[18] *Id.*

[19] *See* DOYLE, *supra* note 14, at 81.

[20] DOYLE, *supra* note 14, at 81–82.

[21] DOYLE, *supra* note 14, at 82.

> obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.[22]

Obstructive conduct can vary widely in nature, degree of planning, and seriousness; thus, courts are given broad discretion in determining whether application of the enhancement is warranted.[23] It is imperative that courts exercise the utmost caution in making this determination as the enhancement is not meant to punish defendants for the exercise of a constitutional right, nor is it intended to penalize defendants for inaccurate testimony or statements resulting from confusion, mistake, or faulty memory that do not reflect a willful attempt to obstruct justice.[24]

To make its determination, a court compares a defendant's alleged obstructive conduct to the examples set forth in application notes four and five of the Guidelines.[25] Note four lists conduct to which the adjustment is intended to apply.[26] The list includes conduct that is considered to be seriously obstructive and deserving of additional deterrence beyond the general sentencing range.[27] For example, eligible conduct includes, but is not limited to: (1) threatening or otherwise unlawfully influencing a co-defendant, witness, or juror; (2) producing a false, altered, or counterfeit document or record during an official investigation or judicial proceeding; (3) destroying or concealing evidence that is material to an official investigation or judicial proceeding; or (4) providing materially false information to a judge or magistrate judge or law enforcement, or probation officer or pre-sentencing officer of the court.[28]

For comparison, note five sets forth examples of less serious conduct to which the enhancement is not meant to apply.[29] However, such conduct may result in a greater sentence within the otherwise applicable guideline range, or may be a factor in determining whether to reduce a defendant's sentence

---

[22] U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (U.S. SENTENCING COMM'N 2018).

[23] *Id.*

[24] *See generally* Hark & Hark, *Federal Sentencing Enhancements for Obstruction,* PHILA-CRIMINAL-LAWYER.COM, https://perma.cc/EPV9-MGVM (last visited Nov. 4, 2021).

[25] *See* U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 cmt. nn. 4–5.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

under § 3E1.1 (Acceptance of Responsibility).[30] Such conduct includes, but is not limited to: (1) making false statements, not under oath, to law enforcement officers; (2) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation; or (3) lying to a probation or pretrial services officer about a defendant's drug use while on pretrial release.[31]

In addition to determining the nature of a defendant's conduct in comparison to the application notes, courts also consider recommendations made by a defendant's probation officer, oral arguments made at the sentencing hearing, and most notably, expert opinion.[32] If a court establishes by a preponderance of the evidence that a defendant's conduct was sufficiently obstructive, the enhancement may be applied.[33]

B. *Competency Hearings and Evaluations*

Conviction of a defendant who is mentally incompetent violates due process.[34] Under 18 U.S.C § 4241(a), a court must order a competency hearing if there is a reasonable belief that "the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."[35] A hearing may result from an order on a motion by the defendant, the attorney for the Government, or by the court, and may be made at any point throughout the adjudication process.[36] Pursuant to 18 U.S.C. § 4247(d), the defendant, represented by counsel, "shall have the opportunity to testify, to present evidence, to subpoena witnesses on his or her behalf, and to confront and cross-examine witnesses who appear at the hearing."[37] A defendant is competent to stand trial if the defendant is determined to have sufficient mental capacity to consult with a lawyer with a reasonable degree of rational understanding of the proceedings.[38] In

---

[30] *Id.*

[31] U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 cmt. n.5.

[32] *See id*. § 6A1.1.

[33] *See* United States v. Robertson, 946 F.3d 1168, 1171 (10th Cir. 2020).

[34] 1 U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL: 1–499 § 63 (2018) [hereinafter CRIMINAL RESOURCE MANUAL].

[35] 18 U.S.C. § 4241(a).

[36] CRIMINAL RESOURCE MANUAL, *supra* note 34.

[37] CRIMINAL RESOURCE MANUAL, *supra* note 34.

[38] CRIMINAL RESOURCE MANUAL, *supra* note 34.

practice, such determinations are based almost entirely on the recommendations of psychological or psychiatric evaluators.[39]

The court selects evaluators from a list of board-certified psychiatrists and licensed clinical psychologists maintained by the U.S. Attorney's Office.[40] There is no required method for administering competency evaluations.[41] However, evaluators will typically begin by reviewing all of a defendant's medical and criminal records to become familiar with a defendant's mental health history and pattern of criminal history, if applicable.[42] A sit-down interview is also typically conducted, which generally lasts from two to six hours.[43] During the interview, the evaluator asks questions pertaining to a defendant's memory of the incident, knowledge of the charges being brought, and the defendant's understanding of the court procedures and participants.[44] In addition to the record review and the in-person interview, examiners administer psychological testing.[45] Psychological testing may include: an IQ test to measure intellectual deficiencies, a neurological assessment to evaluate possible organic conditions, or diagnostic screening interviews to gather information about and detect a variety of possible symptoms and conditions, including malingering.[46]

Malingering "is the faking or intentional exaggerating of symptoms of psychiatric illness."[47] There is no single test or method that experts use to detect malingering.[48] Rather, testing measures range in "time required for administration, technique, format and theoretical approach."[49] However, studies suggest that across all measures, malingering test accuracy remains

---

[39] Patricia A. Zapf & Ronald Roesch, *Mental Competency Evaluations: Guidelines for Judges and Attorneys*, 37 CT. REV., no. 2, 2000, at 28, 29.

[40] CRIMINAL RESOURCE MANUAL, *supra* note 34, § 64.

[41] Zapf & Roesch, *supra* note 39, at 31.

[42] *See* Mark Walker, *How Court-Ordered Competency Evaluations Work*, ARGUS LEADER (Nov. 14, 2015, 6:26 PM CT), https://perma.cc/Y7UF-98MB.

[43] *Id.*

[44] *Id.*

[45] *See* Michael Welner, *Competency to Stand Trial, Proceed Pro Se, Plea, Receive Sentencing*, FORENSIC PANEL, https://perma.cc/SX5U-QHPM (last visited Nov. 4, 2021).

[46] *See id.*

[47] *Id.*

[48] Melanie R. Farkas et al., *Do Tests of Malingering Concur? Concordance Among Malingering Measures*, 24 BEHAV. SCI. & L. 659, 660 (2006).

[49] *Id.*

a major obstacle in psychology and law.[50] Though comparing results of multiple testing instruments may help to offset some level of inaccuracy, experts still question whether clinicians have any real ability to detect malingering at all.[51] Despite such challenges, courts rely upon expert diagnoses of malingering to make competency and sentencing determinations.[52] The Third, Fifth, Ninth, and now the First Circuit (in *U.S. v. Nygren*), have held that a malingering diagnosis establishes, by a preponderance of the evidence, that a defendant has intentionally obstructed justice and is thus eligible for enhancement under § 3C1.1.[53]

II. Court's Opinion

A. *Factual Background and Procedural History*

In September 2015, Steven Nygren was arrested and charged with sixty-three counts of bank fraud, one count of use of an unauthorized device, and one count of tax evasion.[54] The following April, Nygren suffered a stroke which caused "profound deficits" affecting his cognition and memory.[55] On August 25, 2016, Nygren appeared before a magistrate judge for initial presentment.[56] The magistrate judge deferred the proceedings until October 24, 2016, in light of the defendant's medical condition.[57] At his postponed arraignment, Nygren pleaded not guilty to all counts.[58]

Two weeks later, Nygren filed a motion for a competency hearing pursuant to 18 U.S.C. § 4241(a)-(c).[59] With his motion, Nygren included a "letter from [his] treating neurologist and a forensic competency report prepared by a retained expert."[60] After he reviewed the defendant's medical

---

[50] *Id.*

[51] *See* John Parry & Eric Y. Drogin, *Malingering Addendum*, 25 MENTAL & PHYSICAL DISABILITY L. REP. 716, 716–17 (2001).

[52] *See, e.g.*, United States v. Nygren, 933 F.3d 76, 81 (1st Cir. 2019); United States v. Bonnett, 872 F.3d 1045, 1046 (9th Cir. 2017); United States v. Batista, 483 F.3d 193, 197 (3rd Cir. 2007); United States v. Greer, 158 F.3d 228, 239 (5th Cir. 1998).

[53] *See, e.g.*, *Nygren*, 933 F.3d at 82; *Bonnet*, 872 F.3d at 1047; *Batista*, 483 F.3d at 197; *Greer*, 158 F.3d at 240–41.

[54] *Nygren*, 933 F.3d at 80.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Nygren*, 933 F.3d at 80.

records, Nygren's retained expert concluded that he was not legally competent to stand trial.[61] The government objected to the motion for a competency hearing, citing Nygren's problematic performance on the test of memory malingering ("TOMM") and the validity indicator profile ("VIP"), which are used to detect malingering and valid versus invalid responses, respectively.[62] The court overruled the government's objection to the defendant's motion for a competency hearing and ordered that the defendant continue rehabilitation and submit to a second competency evaluation at a government facility.[63]

In February and March, an evaluator at the Bureau of Prisons ("BOP") conducted the second competency evaluation.[64] The BOP evaluator first administered the Minnesota Multiphasic Personality Inventory ("MMPI") before repeating the TOMM and VIP.[65] According to the evaluator, Nygren failed all three tests designed to detect malingering and concluded that Nygren was competent to stand trial.[66] Nygren's own expert conducted a re-evaluation and concurred in the BOP examiner's judgment.[67] However, Nygren's expert did not join in the BOP evaluator's conclusion that malingering was the only explanation for Nygren's test results.[68]

In light of the BOP examiner's results, Nygren's probation officer "recommended a two-level enhancement for obstruction of justice" reasoning that the defendant "intentional[ly] under[performed] . . . on objective testing as part of his evaluations in an effort . . . to avoid legal culpability."[69]

On May 25, 2018, the district court convened a disposition hearing, at which each side presented expert testimony.[70] Ultimately, the court found that the government proved by a preponderance of the evidence that the defendant had attempted to obstruct justice by deliberately feigning incompetence "in order to skew the justice system in his favor."[71] The applicable guideline sentencing range, calculated with an enhancement for

---

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Nygren*, 933 F.3d at 80.

[67] *Id.* at 81.

[68] *Id.* at 83.

[69] *Id.* at 81.

[70] *Id.*

[71] *Id.*

obstruction of justice was 87 to 108 months.[72] The district court sentenced Nygren to a ninety-five-month incarcerate term on each of the sixty-three counts of bank fraud and a sixty-month incarcerate term for the remaining two counts.[73]

B. *U.S. Court of Appeals' Holding*

The question on appeal was whether the district court's use of feigned incompetence as a foundation for an obstruction of justice sentence enhancement was adequate to support an offense-level increase under § 3C1.1 of the Guidelines.[74] The Appeals Court addressed this case as a question of first impression.

The Appeals Court did not revisit the district court's factual findings with regard to Nygren's competence.[75] Despite testimony from the defendant's expert, who concluded that a diagnosis of malingering was not certain, the district court relied on testimony from the BOP expert.[76] The Appeals Court stated that if "there are two plausible views of the record, the sentencing court's choice between them cannot be clearly erroneous," and upheld the district court's factual finding.[77]

Based on that finding the Appeals Court held that "it is a common-sense proposition that 'a defendant who feigns incompetency misrepresents his psychiatric condition to his examiners, intending that they will believe him and convey their inaccurate impressions to the court.'"[78] After an analysis of the Guidelines, the Court concluded that the "type of conduct involved in feigning incompetency closely resembles several of the listed examples of obstructive conduct."[79] Specifically, the Court found that the defendant's conduct was more like providing materially false information to a probation officer than to a law enforcement officer.[80]

The Court rejected the defendant's arguments that he lacked the requisite intent to obstruct justice, that his conduct did not significantly obstruct or impede the proceedings, and that his conduct did not amount to

---

[72] *Nygren*, 933 F.3d at 82.

[73] *Id.*

[74] *Id.* at 79.

[75] *See id.*

[76] *See id.* at 83.

[77] *Id.*

[78] *Nygren*, 933 F.3d at 82 (quoting United States v. Greer, 158 F.3d 228, 237 (5th Cir. 1998)).

[79] *Id.* at 85.

[80] *Id.*

a material falsehood.[81] Instead, the court concluded that such conduct is serious as it threatens to undermine legitimate protections, has the potential to allow evasion of justice, and may significantly disrupt the administration of justice.[82]

ANALYSIS

III. A Court Ordered Competency Evaluation Should Not be Used for Any Other Purpose Unless the Defendant is Adequately Warned

A. *Limits of Confidentiality and Informed Consent Under Federal Law*

The existence of privilege in federal proceedings is governed by federal law.[83] Federal law generally recognizes a psychotherapist-patient privilege; however, a party asserting privilege must show three elements: (1) an expectation of confidentiality (2) between a licensed psychotherapist and patient (3) in the course of diagnosis or treatment.[84] The First Circuit has, in the past, been reluctant to attach patient privilege to court-ordered psychiatric interviews, viewing privilege as an obstacle to fact-finding.[85] Federal rules of evidence governing privilege in federal courts empower federal courts to develop rules of privilege on a case-by-case basis.[86] However, the authority of federal courts to create new privileges and to develop existing privileges is narrow in scope and is meant to be exercised only after careful consideration of a strong showing of a need for the privilege.[87] The First Circuit has not yet been convinced of a need for patient privilege in court-ordered evaluations, reasoning that by definition there can be no expectation of confidentiality because the purpose of the assessment is to convey information to the court to aid in a competency determination.[88]

---

[81] *Id.* at 86 (defining "material" as "evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination").

[82] *Id.* at 85.

[83] United States v. Gillock, 445 U.S. 360, 368 (1980); *see also,* FED. R. EVID. 501.

[84] United States v. Whitney, No. 05-40005-FDS, 2006 WL 2927531, at *2 (D. Mass. Aug. 11, 2006).

[85] *See, e.g.*, *id.* at *4.

[86] *Gillock,* 445 U.S. at 367. *See generally* FED. R. EVID. 501.

[87] *See* United States v. Pineda-Mateo, 905 F.3d 13, 21 (1st Cir. 2018) ("[P]rivilege should only apply in a particular case if it 'promotes sufficiently important interests to outweigh the need for probative evidence.'") (quoting Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990)).

[88] Yates, *supra* note 11, at 347–48.

Thus, a lack of privilege is implied.[89] Accordingly, there is no requirement that a defendant be given explicit notice of how interactions with the clinician and the evaluation results may be used by the court.[90] Due to the important role that psychiatric competency and other related evaluations play in the judicial truth-seeking process, it would be impractical to advocate for a blanket privilege to attach to such court-ordered communications.[91] However, affording no protections to defendants can result in dire consequences.[92]

In *Estelle v. Smith,* for example, the Fifth Circuit addressed the ability of psychiatrists to accurately evaluate patients and make predictions about future behavior with information derived from just one evaluation.[93] At trial, the expert's testimony, which stated that the defendant was a sociopath who felt no remorse and was a threat to society, functioned as the sole basis for sentencing the defendant to the death penalty.[94] On a writ of habeas corpus, the U.S. District Court for the Northern District of Texas vacated the defendant's capital sentence.[95] The court's decision rested on the fact that neither the defendant nor his counsel were warned that information learned at the time of the competency examination might be used as a basis for testimony against the defendant at the sentencing stage.[96] The American Psychiatric Association echoed the court's concern and filed an *amicus curiae* brief that clearly implied the need for the defendant to understand how the information gleaned from his examination would be used in court and of the need for informed consent by the defendant.[97] *Estelle v. Smith* is an example of the most egregious misuse of forensic evaluations and the extreme

---

[89] Yates, *supra* note 11, at 347–48.

[90] *See* FED. R. EVID. 501.

[91] Susan Berney-Key, Note, *The Scope of the Physician-Patient Privilege in Criminal Actions: A New Balancing Test:* People v. Florendo, *92 Il. 2d 155, 447 N.E.2d 282 (1983),* 64 NEB. L. REV. 772, 780 (1985).

[92] *See, e.g.*, Estelle v. Smith, 451 U.S. 454 (1981) (sentencing defendant to the death penalty based on psychologist testimony that defendant was a sociopath and would commit violent acts in the future).

[93] *Id.* at 472; *see, e.g.*, United States v. Nygren, 933 F.3d 76, 80 (1st Cir. 2019) (completing only three tests designed solely to detect malingering, the BOP examiner prematurely terminated the competency evaluation and made a determination).

[94] *See Estelle,* 451 U.S. at 466.

[95] *Id.* at 454.

[96] *Id.*

[97] *Id.* at 461, 470–71.

consequences that can flow from a defendant's uninformed participation.[98]

However, the use of information gleaned in the course of participation in a competency evaluation at sentencing resulting in a two-level sentence increase is similarly jarring.[99] A defendant's informed consent should be required before information gathered at competency evaluations is disseminated at the sentencing stage regardless of the resulting punishment.[100] A defendant cannot provide informed consent unless the defendant understands how information can be used in a judicial proceeding and the limits of confidentiality associated with statements made in the course of the evaluation.[101] On that logic, several courts have required a warning prior to commencing a forensic examination, including Massachusetts courts.[102] Massachusetts provides a good example of a variation of the suggested notice model.[103]

B. *The Massachusetts Model of Presumed Privilege Absent Informed Consent*

1. The Benefits of the Massachusetts *Lamb* Warning and How It Falls Short

In Massachusetts, a court appointed clinician is required to give the defendant a *Lamb* warning prior to conducting a competency evaluation.[104] A *Lamb* warning is sometimes referred to as the "psychiatric equivalent of a *Miranda* warning."[105] The warning must state that an individual's participation in the evaluation is voluntary and may be terminated at any time, that any communications made during the course of the evaluation will not be privileged, and that such communications will be disclosed in court proceedings.[106] The warning is not valid unless the individual, after

---

[98] Brief Amicus Curiae for the American Psychiatric Association at 8, Estelle v. Smith, 451 U.S. 454 (1981) (No. 79-1127) [hereinafter APA Amicus Brief].

[99] *See generally* DOYLE, *supra* note 14.

[100] *See generally* Commonwealth v. Harris, 468 Mass. 429 (2014).

[101] *See id.*

[102] Yates, *supra* note 11, at 348; *see, e.g.,* United States v. Byers, 740 F.2d 1104 (1984) (appealing the use of evaluation results in the capital sentencing phase without warning).

[103] *See generally Guide on the Disclosure of Confidential Information: Appendix B,* MASS.GOV, https://perma.cc/D72G-HY8V (last visited Nov. 4, 2021).

[104] *See* Commonwealth v. Lamb, 365 Mass. 265 (1974); *All Things Considered: The* Lamb *Warning,* (Nat'l Pub. Radio broadcast Jan. 10, 2002) (audio at https://perma.cc/7U37-86WB).

[105] *All Things Considered: The* Lamb *Warning*, *supra* note 104.

[106] *Guide on the Disclosure of Confidential Information: Appendix B*, *supra* note 103.

receiving it, knowingly and voluntarily waives the privilege.[107] Notice is required because "such court-initiated interviews entail certain risks for the person to be examined."[108] Yet, because the *Lamb* warning only provides notice that the evaluation may be used in court proceedings generally, it is likely that a defendant will only anticipate use of privileged communications in the proceeding for which the evaluation was ordered—the competency hearing.[109]

2. Expanding the Massachusetts *Lamb* Warning

In *Commonwealth v. Harris,* the Supreme Judicial Court of Massachusetts addressed the use of competency evaluations for purposes other than competency determinations.[110] There, the results of the defendant's competency evaluation were used later at trial to determine the defendant's guilt on the offense charged.[111] The Court in that case noted that, while the defendant was warned that anything he stated in the interviews with the evaluator was not private or confidential, "he was not expressly informed (and was not required to be so expressly informed) that his statements could be used against him in a proceeding . . . to determine his guilt on the offense charged."[112] The Court, troubled by the absence of such a specific warning, observed that "[a] person suffering from a mental condition, even if found competent to stand trial, may not be able to make the inference that statements that are no longer private or confidential could be used outside a hearing on the issue of competency and in a proceeding to determine guilt."[113] Accordingly, the *Harris* Court held that "in cases going forward, a defendant should be specifically informed, when given the *Lamb* warnings, that the results of, and content of the report of, a competency evaluation may be used against him at trial."[114] The *Harris* Court's holding should be extended to all forms of forensic assessments, such as malingering, at all stages of judicial proceedings, including sentencing.[115]

---

[107] *Guide on the Disclosure of Confidential Information: Appendix B*, *supra* note 103.

[108] *Lamb*, 365 Mass. at 269.

[109] Commonwealth v. Harris, 468 Mass. 429, 451 (2018); *Guide on the Disclosure of Confidential Information: Appendix B*, *supra* note 103.

[110] *Harris*, 468 Mass. at 452.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *See generally id.*

C. *Specific Notice Should Be Extended to Malingering Evaluations for Use at the Sentencing Stage*

A defendant should be specifically informed how information gathered in the course of a competency hearing can affect him or her at sentencing.[116] Absent comprehensive notice of the potential uses of evaluation results, "[a] person suffering from a mental condition may not otherwise fully comprehend the significance of the use to which the examination may be put."[117] Put simply, a defendant may not be aware that such information could result in a two level increase in sentence.[118] In order to adequately satisfy the notice requirement, with regard to use at sentencing, the required warning should be sufficiently specific.[119] Without any notice, a competency evaluator's scope of influence seems narrowly confined to the competency hearing.[120] Given a *Lamb* warning, the evaluator's scope of influence broadens, but the extent and nature of the evaluator's influence remains ambiguous.[121] This ambiguity should be clarified by requiring that the warning include notice of the specific sentencing implications of speaking to an evaluator and participating in competency testing.[122] However, it may be challenging to determine what such notice should sound like given that the enhancement provisions are themselves broadly construed.[123] As explained earlier in this Comment, courts determine the appropriateness of the obstruction of justice enhancement by comparing applicable facts to the conduct set forth in notes four and five of the commentary.[124] The examples in these notes detail how interactions with probation officers, judges, magistrate judges, and law enforcement officers can affect the statute's application.[125] The distinction between these officials is often the difference

---

[116] *See* Yates, *supra* note 11, at 362.

[117] *Harris,* 468 Mass. at 452.

[118] *See id.*

[119] *See* Yates, *supra* note 11, at 362–63.

[120] *See Harris,* 468 Mass. at 452–53 (explaining that a defendant is not likely to anticipate how evaluation results and related interactions will be used against him outside of determining competence to stand trial).

[121] U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (U.S. SENTENCING COMM'N 2018) (failing to adequately instruct courts on how to treat competency evaluators for the purpose of establishing applicability of the enhancement).

[122] *See generally* Yates, *supra* note 11, at 363.

[123] *See supra* Part II(A).

[124] U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 cmt. nn. 4–5.

[125] *Id.*

between eligibility for a sentence enhancement and ineligibility.[126]

For example, in *Nygren,* the Court likened the role of a court-appointed competency evaluator to that of a probation or law enforcement officer, in order to apply the enhancement.[127] However, there are fundamental problems with that comparison.[128] One major distinction is how the public perceives the two professionals in their official capacities.[129] In general, there is a level of comfort in talking to a psychologist or psychiatrist that does not exist when interacting with a law enforcement officer.[130] The public willingness to engage with an evaluator is likely due to a presumption of privilege, which of course does not legally exist in this context.[131] Clearly the comparison between a law enforcement officer and a psychiatrist is not an obvious one; thus, a defendant cannot be expected to anticipate the consequences of evaluation participation.[132] Therefore, defendants should be specifically informed that intentionally misleading a competency evaluator may be considered obstruction of justice, eligible for application of § 3C1.1.[133] The risk of a potential sixty-four month sentence increase is too great to allow the broad guidelines of the sentence enhancement commentary to govern application.[134] Instead, defendants must receive timely, specific notice of the potential consequences their participation in an exam, and even their conversations with an evaluator, can have at sentencing in order to make an informed decision about whether to participate.[135]

IV. A Malingering Diagnosis Should not be the Basis for an Obstruction of Justice Enhancement Absent Alternative Evidence of Intent

The obstruction-of-justice enhancement is premised on the theory "that 'a defendant who commits a crime and then . . . [makes] an unlawful attempt

---

126 *See id.* (comparing the applicability of the enhancement depending on whether the defendant misled a judge, magistrate judge, or a law enforcement officer).

127 United States v. Nygren, 933 F.3d. 76, 84 (1st Cir. 2019).

128 *See* Harry Cheadle, *A Law Professor Explains Why You Should Never Talk to Police*, VICE (Sept. 20, 2016, 2:55 PM), https://perma.cc/3XA7-MN2A.

129 *See generally* Steven R. Smith, *Medical and Psychotherapy Privileges and Confidentiality: On Giving with One Hand and Removing with the Other*, 75 KY. L.J. 473 (1987).

130 *Id.*

131 FED. R. EVID. 501.

132 *See generally* Smith, *supra* note 129, at 547–48.

133 *See* Commonwealth v. Harris, 468 Mass. 429, 448 (2014).

134 *See* DOYLE, *supra* note 14, at 82.

135 *Harris*, 468 Mass. at 452.

to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy' the criminal justice process."[136] Accordingly, the purpose of the enhancement is properly served only where a defendant's actions were both intentional and willful.[137] Willfulness, in this context, has been defined by various courts as a "specific intent to obstruct justice."[138] As such, acts that merely create the appearance of incompetency, absent specific intent, are necessarily excluded from eligibility for the two-level enhancement.[139] In the context of feigned incompetence arising from a malingering diagnosis, the analysis is a rather dubious one given that a defendant's competence and thus ability to act knowingly to influence legal outcomes, let alone understand them, is in question.[140]

For the purposes of establishing competency, conclusions drawn by the expert psychologists and psychiatrists are not often disputed.[141] Though a defendant has a right to present evidence at a competency hearing, the evaluator's report is often dispositive in making the ultimate competency determination.[142] Accordingly, it is extremely important that the expert's findings are reliable, consistent, and accurate.[143] Unfortunately, accuracy, particularly in regard to diagnosing malingering, is a challenge recognized by the scientific community.[144] Professors of Psychology Patricia Zapf and Ronald Roesch lamented that there is no true way to assess the validity of competency determinations.[145] Comparing results from multiple testing measures may, in theory, offset limitations of a single test, but in practice is not always the case.[146]

A 2006 study entitled *Do Tests of Malingering Concur? Concordance Among Malingering Measures* was conducted to assess the accuracy and concurrence of malingering test measures.[147] The results of the study indicated that while

---

[136] United States v. Emery, 991 F.2d 907, 912 (1st Cir. 1993) (quoting United States v. Dunnigan, 507 U.S. 87, 97 (1993)).

[137] U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (U.S. SENTENCING COMM'N 2018).

[138] United States v. Brown, 321 F.3d 347, 351 (2nd Cir. 2003).

[139] *See* U.S. SENTENCING GUIDELINES MANUAL § 3C1.1.

[140] *See* CRIMINAL RESOURCE MANUAL, *supra* note 34.

[141] *See* Zapf & Roesch, *supra* note 39, at 29.

[142] *See* Zapf & Roesch, *supra* note 39, at 29.

[143] APA Amicus Brief, *supra* note 98, at 8.

[144] *Speedy Trial*, *supra* note 51, at 716.

[145] Zapf & Roesch, *supra* note 39, at 34.

[146] *See* Farkas et al., *supra* note 48, at 669.

[147] Farkas et al., supra note 48, at 661.

there was some overlap, the test results overall were not highly consistent.[148] For example, the study examined two of the tests used by the expert in *Nygren's* case, including the TOMM and the VIP.[149] The results were such that where "individuals [were] classified as probable malingerers by [the] TOMM[,] [they] were not necessarily identified as [such] by other measures."[150] The study concluded that its findings might reflect either a "greater sensitivity of the TOMM to detecting subtle forms of malingering, or [instead] might indicate a tendency to over-classify malingering."[151] Furthermore, the study revealed that all of the evaluated test measures resulted in a percentage of indeterminate classifications, signifying what would have, in actual practice, been multiple misdiagnoses.[152]

According to Professors Zapf and Roesch, evaluators themselves, like the testing tools, often disagree on diagnoses.[153] Studies of diagnostic reliability have revealed that pairs of evaluators agree in approximately 80% of cases on the yes or no question of whether an individual is competent to stand trial.[154] However, at a granular level, considering an individual's particular deficiencies, the level of agreement among experts is far less remarkable.[155] "[E]xaminer agreement on specific psycholegal deficits (as opposed to overall competency) averaged only 25% across a series of competency domains."[156] To summarize that conclusion, examiners who agree that a defendant is competent to stand trial are generally not in agreement as to the qualifications for competency.[157] An example of a manifestation of these results can be found in *U.S. v. Nygren*.[158] Though both the BOP examiner and the defendant's examiner concurred in the general competency determination, the two evaluators disagreed on the nature of the deficiency or symptom that led to Nygren's failing test results on the

---

[148] *See* Farkas et al., *supra* note 48, at 669.

[149] *See generally* Farkas et al., *supra* note 48, at 669.

[150] Farkas et al., *supra* note 48, at 669.

[151] Farkas et al., *supra* note 48, at 669.

[152] *See* Farkas et al., *supra* note 48, at 669.

[153] Zapf & Roesch, *supra* note 39, at 30; *see* United States v. Nygren, 933 F.3d 76, 84 (1st Cir. 2019) (accepting the testimony of one expert over the other, despite disagreement with regards to the cause of the defendant's evaluation results).

[154] Zapf & Roesch, *supra* note 39, at 30.

[155] *See* Zapf & Roesch, *supra* note 39, at 30.

[156] Zapf & Roesch, *supra* note 39, at 30.

[157] Zapf & Roesch, *supra* note 39, at 30.

[158] 933 F.3d at 83.

TOMM and VIP.[159] The BOP cogently attributed Nygren's results to malingering, while the defendant's examiner cited other possible explanations for the results.[160] Consistency in determining a defendant's particular deficiency is key to accurately assigning blame on the basis of willful intent.[161] However, widely documented inconsistencies raise serious questions of reliability.[162]

Such inconsistency is particularly disturbing in cases in which competency evaluation results are the determinative factor in sentencing.[163] As it is well-documented that particular psychological testing has very low reliability, psychiatric testimony may actually distort the fact-finding process, if solely relied upon.[164] To the extent that there are important issues for a jury to consider, such as intent to feign incompetence in an effort to obstruct justice, the court should consider the totality of the circumstances—not just expert testimony.[165] In *U.S. v. Batista,* for example, the Court applied the obstruction of justice enhancement to the defendant's sentence, finding sufficient affirmative proof that the defendant intentionally feigned incompetence in an effort to obstruct justice based not only on his competency evaluation results, but also on the testimony of a federal agent who relayed that the defendant told his co-conspirator that he planned to feign mental illness to avoid trial.[166]

The risk of erroneous application of the obstruction of justice enhancement based on unreliable results is too great.[167] Accordingly, while courts may use an examiner's testimony and evaluation results to supplement a finding of intent to feign incompetence, the intent requirement should require additional proof to protect defendants and avoid misapplication of the obstruction of justice enhancement.[168]

---

159 *Id.*

160 *Id.*

161 *See* Zapf & Roesch, *supra* note 39, at 30.

162 Loren Pankratz & Laurence M. Binder, *Malingering on Intellectual and Neuropsychological Measures*, *in* CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION 223, 225 (Richard Rogers ed., 1997).

163 *See* James L. Knoll & Phillip J. Resnick, *Insanity Defense Evaluations: Toward a Model for Evidence-Based Practice*, 8 BRIEF TREATMENT & CRISIS INTERVENTION 92, 101–07 (2008).

164 *See* APA Amicus Brief, *supra* note 98, at 8.

165 *See, e.g.*, United States v. Batista, 483 F.3d 193, 197 (3rd Cir. 2007).

166 *Id.*

167 *See generally* Knoll & Resnick, *supra* note 163.

168 *See, e.g.*, *Batista*, 483 F.3d at 197.

CONCLUSION

The first issue of notice may be easily resolved by requiring a specific warning. However, even with notice, a defendant runs the risk of an evaluation test resulting in false positives for malingering or inaccurate reporting. Defendants may be so wary of risking self-incrimination or inadvertently giving answers that tend to suggest malingering that they will avoid exercising their right to move for a competency hearing at all. To avoid that chilling effect, the courts should not use feigned incompetence as the basis for an obstruction of justice enhancement. Rather, courts should implement stricter notice requirements and require alternate proof of intent to ensure appropriate application of the enhancement.