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REVIEW

*A journal of
legal theory
and practice
“to the end
that human
rights shall
be more
sacred than
property
interests.”*

—Preamble, NLG
Constitution



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editor's preface

On April 11, 1993, inmates at the Southern Ohio Correctional Facility in Lucasville, Ohio, desperate and enraged by degrading conditions and the relentless petty indignities of prison life, rose up and seized control of the institution. Convicts from rival gangs crossed social, religious, and racial divides to unite in solidarity against their common antagonists. For ten days the tables were turned.

In "Let Lucasville Uprising Prisoners Tell Their Own Stories!" renowned social justice advocates Staughton and Alice Lynd recount the fury and aggression with which police and prosecutors punished the insurrectionists. They chronicle the brutal injustices and legal shenanigans that followed the revolt. For years afterward, the state severely constricted media access to the inmates to prevent their side of this life-or-death story from becoming known. There are lessons yet to be learned from Lucasville. A meaningful public accounting, with an eye toward reform and respect for human rights, is long overdue. The Lynds argue that it should begin by listening, finally, to the prisoners who decided to fight back.

The Obama administration prosecuted government employees who leaked classified national security information under the Espionage Act more aggressively than any of its predecessors. Donald Trump's contempt for the general concept of how a free press functions in a democratic society—calling adversarial media "fake news" and the "enemy of the people"¹—has become a routine applause line during his stump speeches. His hostility for government employees who leak to journalists, in particular, seems to know no bounds. He has tweeted that they are "traitors and cowards, and we will find out who they are."² Referring specifically to those who divulge national security information, he has threatened that "[t]he spotlight has finally been put on the low-life leakers! They will be caught!"³ In "Freedom for the Whistleblowers: Why Prosecuting Whistleblowers Raises First Amendment Concerns," Catherine Taylor explains that current law not only fails to adequately protect sources

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Staughton & Alice Lynd

LET LUCASVILLE UPRISING PRISONERS TELL THEIR OWN STORIES!

Introduction

The eleven-day rebellion at the Southern Ohio Correctional Facility (SOCF) in Lucasville, Ohio, began on April 11 and ended on April 21, 1993. Extensive prosecutions followed the negotiated surrender. According to the authorities, there were fifty trials in ten counties, forty-seven guilty findings or guilty pleas, two not-guilty findings, and one hung jury.¹

Five prisoners were sentenced to death: Siddique Abdullah Hasan, Keith LaMar, Jason Robb, George Skatzes, and James Were. Their cases are still being litigated. All except Skatzes are held, not on Death Row at the Chillicothe Correctional Institution, but in the highest level of security at the super-maximum security prison, the Ohio State Penitentiary (OSP) in Youngstown.

A second, larger group of participants in the Lucasville events, while not sentenced to death, are in various Ohio prisons, serving what may amount to a lifetime behind bars for offenses such as assaulting or kidnapping a correctional officer.

There has been only limited media attention to the experience of prisoners who took part in the Lucasville uprising compared, say, to their counterparts in the rebellion at Attica, New York in 1971. Some of the reasons for this disparity appear to be:

1. The events at Lucasville took place at the same time as the siege and occupation of the Branch Davidian compound in Texas, which dominated headlines even in Ohio.
2. Ten men—nine prisoners and one correctional officer—were killed at Lucasville, while more than forty were killed at Attica.
3. All the deaths at Lucasville were caused by prisoners. All the deaths at Attica that occurred during the retaking of D Yard by security forces were caused by bullet wounds, and only the forces of the state had guns.
4. The responsibility of the authorities for the Attica fatalities came to light only after officials up to and including Governor Nelson Rockefeller had initially blamed the deaths of hostage officers on the prisoners.

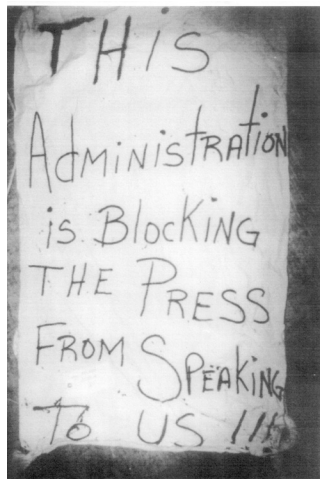
Staughton and Alice Lynd are prominent activists and have been involved in numerous causes, including the civil rights movement, the anti-war movement, workers' rights, and prisoners' rights. They have worked with the ACLU of Ohio as volunteer attorneys for over 20 years.

This discovery caused enormous controversy, in which the state government was on the defensive.

But this assessment leaves out one other major difference between the two prison rebellions.

At Attica, state prison director Russell Oswald “agreed to the prisoners’ request that the media be allowed into [the occupied] D Yard so that the world could hear what they were trying to accomplish in this protest.” When he returned to D Yard the first evening for a second round of negotiations, Oswald was accompanied by “two newsmen from *The New York Times* and the *Buffalo Evening News*, as well as a handful of local reporters. This group was then joined by some national broadcast and print reporters—from NBC, UPI, and ABC.” From that moment on, writes Heather Ann Thompson, “Attica entered history. For the first time ever, Americans could get an inside look at a prison rebellion and watch it unfold.”²

At Lucasville, by contrast, media access was repeatedly demanded by the prisoners and repeatedly denied by the authorities. Prisoner George Skatzes went out on the yard adjoining the occupied cell block on the first full day of the rebellion and stated through a megaphone that the prisoners had “tried desperately, desperately, desperately to get in contact with the news media.” Skatzes continued: “We have been stopped by this administration. They think they can confine this incident within the walls of this prison, like no other part of the world can hear this.”³ When the authorities cut off electricity to the occupied cell block the prisoners hung sheets out of the windows, on one of which they wrote: “This Administration Is Blocking The Press From Speaking To Us.”



The efforts of the Lucasville authorities to inhibit meaningful communication between the many reporters present at the prison and the insurgent prisoners bordered on the ridiculous.⁴

In fact, a panel of Ohio media representatives convened by the Ohio governor “found a strong predisposition on the part of state officials, including public information officers, not to release information during the Lucasville emergency even when there was no operational reason not to release it.”⁵

Not only did the authorities inhibit media contact during the uprising, they rigidly followed the same policy until summer 2017. In their answer to

a complaint filed in a lawsuit by a number of prisoners and reporters, the authorities repeatedly admitted

that they and their predecessors have consistently denied all members of the press face-to-face media access to any prisoner convicted of crimes committed during the April 1993 Lucasville riot⁶

The Court ruled that face-to-face media access cannot be denied based upon the anticipated content of the interview, nor because of the possible impact on victims or their families. In mid-July 2017, the Ohio Department of Rehabilitation and Correction modified its media policies accordingly.⁷ This action for the first time opened up access to at least some of the surviving prisoner protagonists by newspaper, radio, and TV reporters.

Below, we have attempted to describe some of the questions that media representatives may wish to ask surviving participants and others well acquainted with the Lucasville events, grouping together questions relating to a similar topic.

Strategies of the prisoners and of the state

1. What were the prisoners trying to achieve?

Prisoners at Lucasville learned that the warden, Arthur Tate, Jr., had decided that beginning Monday, April 12, 1993, every prisoner at SOCF would be injected with a compound containing phenol to test for tuberculosis. Muslim prisoners believed that phenol was a form of alcohol, forbidden by their religion. A Muslim prisoner, Reginald Williams, testified that “we were going to barricade ourselves in L-6 until we can get someone from Columbus to discuss” alternative means of testing for tuberculosis.⁸ In October 1985, a brief occupation of the disciplinary cellblock at SOCF in which no one was hurt had successfully aired prisoner complaints.

2. What was the strategy of the state?

Sergeant Howard Hudson of the Ohio State Highway Patrol, who was a member of the state’s negotiation team during the eleven days and its principal investigator after the surrender, testified that “[t]he basic principle in these situations . . . is to buy time, to maintain a dialogue between the authorities and the hostage taker . . . because the more time that goes on the greater the chances for a peaceful resolution to the situation.”⁹ To increase pressure on the prisoners, the state cut off water and electricity in the occupied cellblock on April 12.

3. What effect did Tessa Unwin’s April 14 statement about the negotiations have on the prisoners?

On the morning of Wednesday, April 14, a public information officer named Tessa Unwin met with representatives of the media. The reporters asked Unwin about messages written on sheets that prisoners had hung from windows in the occupied cellblock that threatened to kill a guard. She

answered, according to a tape of her remarks: “It’s a standard threat. . . . It’s not a new thing. They’ve been threatening things like this from the beginning.”¹⁰ Remarkably, the union of correctional officers at SOCF stated in its own assessment: “When an official DR&C spokesperson publicly discounted the media threats as bluffing, the inmates were almost forced to kill or maim a hostage to maintain or regain their perceived bargaining strength.”¹¹

Prosecutorial misconduct I: Targeting the leaders

1. Did the authorities conduct an impartial investigation without bias against individuals or groups?

Point No. 2 of the 21-point surrender agreement that brought the Lucasville uprising to an end stated: “Administrative discipline and criminal proceedings will be fairly and impartially administered without bias against individuals or groups.”¹²

In dialogue with injured prisoners housed in the prison infirmary after the surrender, correctional officers made clear who they wanted to convict. As Emanuel “Buddy” Newell lay recovering from wounds inflicted by the insurgent prisoners, on one occasion he was surrounded by a group including Lieutenant James Root, chief investigator Howard Hudson, and troopers Randy McGough and Cary Sayers. According to Newell, “These officers said, ‘We want Skatzes. We want Lavelle. We want Hasan.’ They also said, ‘We know they were leaders. We want to burn their ass. We want to put them in the electric chair for murdering Officer Vallandingham.’”¹³

Prisoner Johnny Fryman had a similar experience. During the first minutes of the disturbance he had almost been killed by other prisoners. In the SOCF infirmary two members of the Ohio State Highway Patrol questioned him.

They made it clear they wanted the leaders. They wanted to prosecute Hasan, George Skatzes, Lavelle, Jason Robb, and another Muslim whose name I don’t remember. They had not yet begun their investigation but they knew they wanted those leaders. I joked with them and said, “You basically don’t care what I say as long as it’s against these guys.” They said, “Yeah, that’s it.”¹⁴

2. Having found a leader prepared to turn state’s evidence, did the prosecution deliberately contrive a case against other supposed leaders?

ODRC Director Wilkinson and his colleague Stickrath put it this way:

[T]he key to winning convictions was eroding the loyalty and fear inmates felt toward their gangs. . . . Thirteen months into the investigation, a primary riot provocateur agreed to talk about Officer Vallandingham’s death. . . . His testimony led to death sentences for riot leaders Carlos Sanders [Hasan], Jason Robb, George Skatzes, and James Were.¹⁵

The only “riot leader” who fits this description is Anthony Lavelle.

Prosecutorial misconduct II: The role of Anthony Lavelle

1. What persuaded Lavelle to turn state's evidence?

The evidence suggests a deliberate scheme of misrepresentation by the prosecution. According to a letter from Skatzes to his counsel, Attorney Jeffry Kelleher, and a letter from Lavelle to Jason Robb that is an exhibit in Robb's case, what happened was the following:

Hasan, Lavelle, and Skatzes were housed in adjacent single cells in the "North Hole" at Chillicothe Correctional Institution. Skatzes was told he had an attorney visit and left his cell in the company of correctional officers. When he arrived at the designated location for the meeting, he learned that he did not have an attorney visit; instead, the prosecution wanted to try one last time to persuade him to cooperate with them. Skatzes politely said No and turned to return to his cell. The representatives of the prosecution told him that would not be allowed. Skatzes protested, stressing that he would be regarded as a snitch if he did not return. The prosecutors were obdurate. Skatzes was housed elsewhere for the next few days. Meanwhile, Lavelle wrote to Robb:

Jason:

I am forced to write you and relate a few things to you that have happened down here lately.

With much sadness I will give you the raw deal, your brother George has done a vanishing act on us. Last Friday, the OSP [Ohio State Patrol] came down to see him. . . . Now to be short and simple, he failed to return that day and today they came and packed up his property which leads me to one conclusion that he has chosen to be a cop. . . .

Lavelle ¹⁶

2. Why did the prosecution not pursue Anthony Lavelle as the prisoner who selected and supervised the prisoners who actually killed Officer Vallandingham?

There is overwhelming evidence that Lavelle, the prisoner the prosecution persuaded to become a witness for the state, was also the person responsible for the death of Officer Robert Vallandingham. It was Lavelle who began to put together a death squad on April 14. It was Lavelle who directed members of the Black Gangster Disciples to kill the officer in the L6 shower on April 15. It was Lavelle who confessed to prisoners Roy Donald and Leroy Elmore that it was he who had directed Vallandingham's murder, and whom James Were knocked down for implementing this fateful decision without authorization from the prisoners' decision-making committee.¹⁷

But Lavelle could not be the fall guy. The prosecution needed him as their star witness. The fact that the prosecution's star witness was also the man who planned and directed the killing of Officer Vallandingham led to the fundamental hypocrisy of the Lucasville prosecutions.

From the point of view of the prosecutors, it didn't matter who the state chose to execute for murdering a guard, as long as they executed somebody.¹⁸ Prosecutors used Ohio's law on complicity,¹⁹ holding that anyone present at the scene of a homicide who assists in any way is as guilty as the person who pulls the trigger. They argued that any prisoner who was present at the meeting on the morning of April 15, at which it was decided to kill a hostage correctional officer, deserved the death penalty.

The problem with this theory was that *the prisoners at the meeting did not decide to kill anyone*. The prosecution relied on a tape recording known as "Tunnel Tape 61." It does not contain a decision to kill a guard. Rather, the decision was that George Skatzes should get back on the phone and ask for water and electricity to be restored in the occupied cellblock, and that the police were to be removed from the tunnels. If, and only if, the authorities refused these demands would there be further discussion and a decision as to whether to kill a hostage. A second meeting to make that decision would be held in the afternoon.

The prosecutors' insistence that a guard's murder had been decided was supported only by oral testimony from the state's stable of prisoner informants. It required casting Skatzes, who in fact had negotiated a first step toward peaceful settlement, and who alone cautioned the group about the hazards of killing a guard, as a murderer. It required overlooking the fact that Lavelle, disgusted with the alleged cowardice of representatives from the Muslims and the Aryan Brotherhood, had stormed out of the morning meeting and proceeded to mobilize his *ad hoc* death squad.

Finally, there is the shocking fact that the prosecution concedes that it does not know who did the actual killing. Documentary filmmaker Derrick Jones interviewed Daniel Hogan, who prosecuted Robb and Skatzes and is now a state court judge. Hogan told Jones on tape: "I don't know that we will ever know who hands-on killed the corrections officer, Vallandingham."²⁰

Prosecutorial misconduct III: Judicial proceedings

1. Did the prosecutors violate accepted standards for prosecutorial conduct at all stages of the judicial proceedings?

a. Grand jury testimony by prosecutors not present at the events described.

The indictments that sought the death penalty for Lucasville insurgents were issued by the prosecution on July 29, 1994. Howard Hudson, chief investigator for the prosecution, testified as follows:

Q. Did any inmate testify before the Scioto County grand jury, sir?

A. No, sir. There were nine separate grand jury sessions. All testimony at that time was provided in summary form by myself and several of the investigators working the case.²¹

Thus, the supposed facts relevant to the indictments were selected, written up, and presented to the grand jury solely by Sergeant Howard Hudson and other prosecution investigators who were not present when the alleged events took place.

This is a questionable practice. In 2011 the Ohio Supreme Court created a Joint Task Force to Review the Administration of Ohio's Death Penalty. The Task Force published its findings in April 2014. Task Force Recommendation No. 38 was: "Require the prosecutor to present to the grand jury available exculpatory evidence of which the prosecutor is aware." The recommendation was adopted by a Task Force vote of 10–9 but the legislature has not acted on it.

Failure to present to the grand jury witnesses who were present at the events necessary for indictment is not technically unlawful. Rule 101(C) (2) of the Ohio Rules of Evidence provides that "proceedings before grand juries" are not subject to the state's general rules of evidence, including the prohibition of hearsay. However, recommendation by a representative panel that prosecutors should be required to present to the grand jury exculpatory evidence shows a recognition within the profession of the one-sidedness of current grand jury practice.

Moreover, at trial hearsay prohibitions do indeed apply. In the Lucasville litigation prosecutors repeatedly sought to lay their own interpretations before trial juries in the guise of simply summarizing commonly known facts. Thus, in the first of the trials, in which the defendant Jason Robb was sentenced to death, counsel for the state sought to present "summary testimony" by Howard Hudson. When the questions and answers turned from matters like the layout of the prison to facts concerning what happened, counsel for Robb objected, the objection was sustained, and the witness was instructed "not to give testimony that some other witness can testify to."²²

b. Discovery

Under the familiar *Brady* rule, statements relevant to the guilt or innocence of an accused must be made available to his or her counsel.²³

Keith LaMar's constitutional right to a fair trial was violated when the prosecutor withheld transcripts or summaries of interviews with forty-three prisoners who witnessed the homicides for which LaMar was later convicted. Also, the forty-three names did not include the names of five prisoners who subsequently became prosecution witnesses at LaMar's trial.



Jason Robb made this drawing after he and four other participants were transferred in May 1998 from Lucasville to the supermaximum security prison in Youngstown, Ohio.

Four of the Lucasville capital defendants were charged primarily with complicity in the murder of Officer Vallandingham on April 15. Keith LaMar, however, was charged with involvement in murders on April 11 and April 13. Although the federal court belatedly ordered that LaMar be provided with the same discovery as his four colleagues, that discovery was of no use to him and the prosecution refused to join his counsel in asking the court to order discovery for LaMar relevant to the particular homicides for which he was indicted.²⁴

c. Prisoner informant testimony

The unreliability of prisoner informant testimony is generally recognized, and very little evidence of any other kind was available in the Lucasville cases. Testimony by prisoner informants, especially informants who receive something of value (such as a letter to the Parole Board, transfer to a lower-security prison, or grant of immunity from charges) in exchange for their testimony, is inherently unreliable. It is particularly unreliable when, as in the Lucasville cases, there was no physical evidence that linked any suspect to any weapon or any suspect to any victim.²⁵ Accordingly, the prosecution resorted to the use of “snitch” testimony.

So-called accomplice testimony was defended by Prosecutor Hogan in the trial of George Skatzes. It is true, he conceded, that the state cut a deal with Anthony Lavelle. Mr. Skatzes had an opportunity to do so and

chose not to take it. Had Mr. Skatzes taken it . . . Mr. Skatzes would be up there on the witness stand testifying and Mr. Lavelle would be sitting over there . . . [T]he State is going to have to cut deals with people who have seen things, who have done things.²⁶

However, long ago the United States Supreme Court declared that such accomplice testimony “ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses.”²⁷ Ohio seeks to guard against the perjury of accomplices by requiring the judge to give the following instruction to the jury:

The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.²⁸

The only kind of witness testimony in the Lucasville cases that was clearly objective was that of the medical examiners who gave testimony based on their autopsies. But when the medical examiner testified that there was no evidence that prisoners had placed a weight bar over Officer Vallandingham’s throat, and rocked back and forth on it until the officer was dead, the state nonetheless continued to offer prisoner witnesses who claimed to have seen that very thing.²⁹

In recognition of the unreliability of informant testimony, the House of Delegates of the American Bar Association resolved on February 14, 2005, that the ABA “urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by assuring that no prosecution should occur based solely on uncorroborated jailhouse informant testimony.”^{29,30}

Because there was no objective corroborating evidence linking any suspect to any victim during the Lucasville uprising, Ohio should follow the example of the State of New York after Attica, and vacate the indictments of those men who have already served a quarter of a century for their offenses, real or imagined, during the Lucasville events.

Prosecutorial misconduct IV: Perjured testimony

1. How did perjured testimony affect some individual defendants?

a. Derek Cannon

Derek Cannon was identified by the authorities as a member of the so-called “death squad” responsible for murdering several supposed snitches during the first afternoon of the uprising. He was convicted of aggravated murder by a Cincinnati court and he was sentenced to life in prison consecutive to any terms already serving.

Mr. Cannon’s record was reviewed in 2005 by Colin Starger, then a staff attorney for the New York City office of the Innocence Project. Since that office offers representation only in cases involving DNA, Starger could not serve Cannon as his lawyer. However, he sent a detailed request for help for Cannon to a number of like-minded organizations.³¹

Derek Cannon was indicted and convicted for taking part in the murder of a prisoner named Darrell Depina. However, after the defense rested, the prosecution called Dwayne Buckley as a rebuttal witness. Buckley testified that he had been a porter in the jail where Cannon was confined during his trial and that Cannon had confessed not only that he murdered the inmate, but that Cannon also tortured and murdered the hostage officer several days later. This informant was the last witness at Cannon’s trial.

However, Derek Cannon could not have been present in L-block on April 15 when the officer was killed. Contemporaneous records show that Cannon was taken off the recreation yard during the early hours of April 12, and was transferred to the Lebanon Correctional Institution a few days later. What is more, Dwayne Buckley has since recanted his testimony.³²

Cannon’s trial counsel Joseph Hale states that the judge, after speaking to jurors, told him that Buckley’s testimony had “impressed a lot of the jury as to what kind of person Cannon was.” Attorney Starger’s memorandum

pointed out that no state or federal court, in reviewing the case on appeal, had even mentioned Buckley.

b. Keith LaMar

Withheld from Keith LaMar was testimony to the effect that it was not LaMar but a prisoner named Stacey Gordon who led and supervised the murderous work of the death squad in L6. In the related case of Timothy Grinnell, prisoners Prentice Jackson and Leroy Elmore testified that prisoner Stacey Gordon entered L6 at the head of the death squad and ordered the prisoners operating the L6 console to open the doors of the cells where prisoners suspected of being snitches were confined.³³

Stacey Gordon took a plea agreement on September 8, 1994. On that day, Gordon answered the following questions by Prosecutor Tolbert:

Q. Do you know Keith Lamore?

A. No. . . .

Q. Did you see Keith Lamore in the L-6 block in the early hours of the riot at Lucasville?

A. No. . . .³⁴

Yet when LaMar went to trial in the summer of 1995, Stacey Gordon was a leading prosecution witness against him.

c. George Skatzes and Aaron Jefferson

In December 1995, George Skatzes was found guilty of being the principal offender in the death of prisoner David Sommers. The medical examiner, Dr. Leo Buerger, testified that Sommers had been killed by a single, massive blow to the head, struck by a blunt instrument such as a baseball bat.³⁵ (A bloody baseball bat, found across the corridor from the area where Sommers was murdered, was later destroyed by order of the chief Lucasville prosecutor.)

On March 21, 1996, prisoner Aaron Jefferson, in a separate trial, was found guilty of committing the same murder. Once more, Dr. Buerger testified. Again he insisted that the cause of death was one single massive blow to the head. Asked whether the fatal injury could have been the result of multiple blows, the doctor told the jury that all the skull fractures were the result of “just that one blow.”³⁶

Thus two men were found guilty of striking a single lethal blow. In closing argument in the trial of Skatzes, Prosecutor Hogan asked the jury to think “about David Sommers . . . the one where Skatzes wielded a bat and literally beat the brains out of this man’s head.”³⁷

And in the later trial of Jefferson, Prosecutor Crowe told the jury:

If there was only one blow to the head of David Sommers, the strongest evidence you have [is that] this is the individual. I won’t call him a human—this is the

individual that administered that blow.... If there was only one blow, he's the one that gave it. He's the one that hit him like a steer going through the stockyard, the executioner with the pick axe, trying to put the pick through the brain.³⁸

George Skatzes was sentenced to death, and Aaron Jefferson was sentenced to life in prison, each for administering the one fatal blow that killed David Sommers.

d. Siddique Abdullah Hasan and James Were

The prosecution faced a challenge in pinning any of the homicides on the Muslim imam, Siddique Abdullah Hasan. A prisoner informer named Roger Snodgrass testified that Hasan had chaired the meeting at which it was allegedly decided to kill a guard.³⁹ But investigator Hudson testified in the first trial of James Were that it was unclear whether Hasan had even been present at that meeting, which had been chaired by another Muslim named Stanley Cummings.⁴⁰

Yet from the standpoint of the authorities, if they were to use the post-surrender trials to convict the men who the authorities believed to have been the leaders of the uprising, Hasan, who they thought had planned the rebellion, could not be left out. Accordingly, the prosecution deliberately promoted a narrative of Vallandingham's murder that it knew from the outset to be false.

It happened as follows.⁴¹ In an attempt to be released from prison in return for snitching, three prisoners—Kenneth Law, Stacey Gordon, and Sherman Sims—concocted a story that pinned the murder of Officer Vallandingham on two men the three knew that the state wished to convict: Hasan, the current imam, and his predecessor in that role, James Were.

According to this story, a little after 10 a.m. on the morning of April 15, Officer Vallandingham, bound and blindfolded, was brought to the shower room on the lower tier of L6. Hasan told Were that he was leaving L6 and if Were did not receive a phone call from Hasan within the next ten minutes, he was "to take care of his business." Hasan then left L6. A few minutes later, according to the story, Were instructed two other prisoners to proceed. They supposedly did so, rocking back and forth on a weight bar placed on Vallandingham's neck to make sure they had killed him.

After jointly creating this false account of Officer Vallandingham's death, Sims and Law experienced what Law describes in a 2000 affidavit as "a falling out." Sims changed his original telling of the murder narrative to name Law as one of the hands-on killers.

In the summer of 1995, the authorities put Law on trial for his actions as described by Sims. The jury found Law guilty of kidnapping but deadlocked on the more serious charge of homicide.

The prosecutors still had no solid evidence that Hasan was complicit in the murder of the officer. Accordingly, they confronted Law with the demand that he agree to be a witness against Were and Hasan. In return for Law's testimony, prosecutors agreed to present to the jury the false narrative Law, Gordon and Sims had originally told the authorities, with no implication that Law himself was guilty of any wrongdoing. The prosecutor would tell the Were and Hasan juries that they should not doubt Law's testimony because Law was simply repeating the statement he had made to the prosecution together with Gordon and Sims.

With extraordinary candor the prosecutor gave Law the opportunity to witness to the truth, of course at the risk that he would himself be sentenced to death. The question and answer went like this:

Q. [Y]ou're here today to testify in the case of State of Ohio versus Hasan, is that correct?

A. Yes.

Q. Now was there an agreement in regards to what you were supposed to testify to?

A. The truth of the statement that I originally made.

Q. Okay. You made a statement to the State Patrol at some time prior, is that correct?

A. That is correct.

Q. And you're supposed to tell us basically what you told us in that statement, is that correct?

A. That's the truth.

Q. And what's to happen if you don't testify consistently to the statements you've already made to the State Patrol?

A. The original charge can be reinstated with the death specifications.⁴²

The heart of the prosecutors' problem was that they could not reveal that their critical witness, Anthony Lavelle, was also the man responsible for killing a correctional officer. As Law recounted the events, "At one point, I revealed to them that Anthony Lavelle had killed Vallandingham. The prosecutor told me that my story would have to change, because Lavelle was a State witness."⁴³

Conclusion: Convict race

Why should journalists be interested in this sordid story of self-interest, betrayal of trust, and indiscriminate violence?

Because for a time, prisoners in rebellion overcame the deep-seated racial prejudice with which the Lucasville prison was saturated. Ohio deliberately built its maximum security prison in a rural area where there appear to have been no African-American residents, with the result that 85 percent of the

correctional officers at Lucasville were white, whereas the prisoners, drawn from Ohio's inner cities, were 57 percent African American.⁴⁴

Two of the slogans painted on the prison walls during the uprising at Lucasville were "Convict Unity" and "Convict Race."

George Skatzes and Jason Robb were members of the Aryan Brotherhood when the Lucasville uprising took place. African Americans Hasan and Were were also among the representatives that negotiated or made decisions on behalf of the approximately 400 prisoners in L block. Hasan and Were were Sunni Muslims.

These men dealt with racism by seeking to overcome it. Slogans painted on the walls of the occupied cellblock said "Black and white together," "Whites and blacks together," "Black and white unity." Skatzes, finally able to speak to the media on the evening of April 15, declared in a radio address that was carried at least as far north as Mansfield:

We are oppressed people, we have come together as one. We are brothers. . . . We are a unit here. They try to make this a racial issue. It is not a racial issue. Black and white alike have joined hands in SOCF and become one strong unit.⁴⁵



Jason Robb addressed the issue of race in his unsworn statement to the jury before sentencing. Jason had grown up in predominantly white neighborhoods where he had little contact with blacks, he told the jury. Now he was in a prison community where most prisoners were black. At Lucasville he worked with blacks and, as he did so, "got to talking" with them.

Jason worked as a plumber and got to know a black electrician.

This guy's showing me how to do electric work and I'm showing him how to do things and basically we're teaching each other how to do work and he was a pretty militant black guy." "[I]t surprised me that me and him could talk. . . . And he explained to me his beliefs. . . . And that kind of surprised me that he would be open with me like that. . . . So I explained to him how I felt. And we . . . built a respect between us. . . ."⁴⁶

One of the many journalists to whom the New York prison system offered access to its embattled prisoners while the Attica uprising was going on was Tom Wicker of *The New York Times*. Wicker, a Southerner, became deeply involved. After the massacre on the last day of the uprising, he wrote a book about it called *A Time to Die*. Wicker's discussion included the following:

Could he be seeing in D-yard, Wicker wondered, that class interest might overcome racial animosities? Was it possible that the dregs of the earth, in a citadel of the damned, somehow in the desperation of human need had cast

aside all the ancient and encumbering trappings of racism to find in degradation the humanity they knew at last they shared?⁴⁷

Another important question is whether what happened at Attica and Lucasville brought about permanent improvements in the lives of the imprisoned. Ms. Thompson concludes that in the immediate aftermath of Attica, the horror of that tragedy “spark[ed] some serious reforms of the American criminal justice system.” Attica also “reflected, and helped to fuel, a historically unprecedented backlash against all efforts to humanize prison conditions in America.” By the early 1990s, Thompson writes, “conditions at Attica were worse than they had ever been.”⁴⁸

Something similar appears to have happened after Lucasville. At the time of the uprising Ohio had reinstated the death penalty but had not executed anyone again after decades of disuse. In a matter of weeks following the negotiated settlement of the Lucasville upheaval, about 25,000 persons signed a petition calling for the revised statute “to be applied,” and directing that signed petitions were to be returned to Death Penalty, P.O. Box 1761, Portsmouth, Ohio.

A prisoner who was at Lucasville in 1993, and again more recently, reports that

virtually all of the positive changes in conditions at SOCF are the result of changes that have been implemented statewide. . . . Other improvements at SOCF, such as wheelchair-accessible cells, were mandated by the ADA and first implemented at lower-security prisons before finally being constructed at SOCF. . . . The most significant changes at SOCF as a result of the 1993 riot involve security, aimed at providing security for staff at the cost of dehumanizing inmates. . . . The “conditions” of real importance to inmates—recreation, commissary, jobs, vocational schools—have all been reduced or eliminated since the riot. . . . [T]he library . . . is a SMALL fraction of what it used to be, probably 25%, if that much. It’s a disgrace.

Our plea is that we should begin analysis and action with the perceptions of prisoners themselves. If there are institutional barriers that prevent prisoners from sharing their insights and experience with those outside the walls, we must confront and overcome them.

NOTES

1. Reginald A. Wilkinson & Thomas J. Stickrath, *After the Storm: Anatomy of a Riot’s Aftermath*, CORRECTIONS MANAGEMENT QUARTERLY, 1997, at 21. See Transcript of Record at 1139, *State v. Law*, Case No. B-9409511 (Hamilton Cnty. Ct. of C.P. 1995) (according to the testimony of chief investigator Howard Hudson, as of August 1995, 50 prisoners had been indicted, and there were 37 convictions resulting from 24 plea bargains and 13 trials).
2. HEATHER ANN THOMPSON, BLOOD IN THE WATER: THE ATTICA PRISON UPRISING OF 1971 AND ITS LEGACY 76-77 (2016).
3. A D Jones Film, *The Great Incarcerator*, Part 2: The Shadow of Lucasville, YOUTUBE (June 28, 2017), <https://www.youtube.com/watch?v=YqVslMz1UaA> [hereinafter *The Shadow of Lucasville*].

4. See Bruce Porter, *The Lucasville Follies: A Prison Riot Brings Out the Worst in the Press*, COLUMBIA JOURNALISM REV., May-June 1994.
5. LUCASVILLE MEDIA TASK FORCE, LUCASVILLE MEDIA TASK FORCE REPORT 1 (1994).
6. Answer at ¶¶ 19, 20, 25, 27, 28, 37, 38, 39, 44, 45, 48, 49, 51, 52, 54, 60, 62, 69, Hanrahan v. Mohr, Case No. 2:13-cv-1212 (S.D. Ohio 2017).
7. See OHIO DEPT. OF REHAB. AND CORR., Media Policy, No. 01-COM-09 (2017); OHIO DEPT. OF REHAB. AND CORR., Media Policy—Death Row and Executions, No. 01-COM-13 (2017).
8. Transcript of Record at 2129, State v. Sanders, Case Nos. B-953105 and C-960253 (Hamilton Cnty. Ct. of C.P. 1996) [hereinafter State v. Sanders].
9. *Id.* at 2719, 2721.
10. Transcript of Record at 1045-46, State v. Robb, Case No. 94-CR-10-5658 (Franklin Cnty. Ct. of C.P. 1995) [hereinafter State v. Robb].
11. Ohio Civil Service Employees Association, *Report and Recommendations*, AFSCME LOCAL 11, Aug. 1993, at 71.
12. STAUGHTON LYND, LUCASVILLE: THE UNTOLD STORY OF A PRISON UPRISING 65-66 (2d ed. 2011) (as it appears in a copy of the 21-Point Agreement signed by Warden Arthur Tate, Jr. on Apr. 18, 1993).
13. *Id.* at 74 (quoting the Affidavit of Emanuel “Buddy” Newell, dated Dec. 30, 1998).
14. *Id.* (quoting the Affidavit of John L. Fryman, dated June 17, 1998).
15. Wilkinson & Stickrath, *supra* note 1.
16. State v. Robb, *supra* note 10, at Def.’s Ex. 8 (excerpted from Anthony Lavelle to Jason Robb on Apr. 7, 1994).
17. See LYND, *supra* note 12, at 47-62.
18. See *The Shadow of Lucasville*, *supra* note 3, at minutes 47:54-48:08 (Daniel Hogan, who prosecuted Jason Robb and George Skatzes, states “[e]ventually you get to the point where you have to decide whether we’re going to do something or we’re going to do nothing. And, in this instance, I think doing nothing was not a choice. Something had to be done.”).
19. OHIO REV. CODE § 2923.03 (2017).
20. *The Shadow of Lucasville*, *supra* note 3, at minutes 42:17-42:25. See also *The Shadow of Lucasville*, *supra* note 3, at minutes 34:25-34:27 (Daniel Hogan states, “I don’t know. And I don’t think we’ll ever know.”).
21. Transcript of Record at 650, State v. Jefferson, Case No. 95-CR-3922 (Montgomery Cnty. Ct. of C.P. 1996) [hereinafter State v. Jefferson].
22. State v. Robb, *supra* note 10, at 405.
23. Brady v. Maryland, 373 U.S. 83 (1963). In Banks v. Dretke, 540 U.S. 668, 695-96 (2004) (The State argued that even when the prosecution had concealed evidence, the prisoner had the burden of discovery so long as the “potential existence” of that evidence might have been detected. The Supreme Court rejected that argument: “A rule thus declaring ‘prosecutor may hide, defendant must seek’ is not tenable in a system constitutionally bound to accord defendants due process.”).
24. See Robb v. Ishee, Case No. 2:02-cv-535 (S.D. Ohio June 26, 2017) (“The Court will not entertain or authorize any request by LaMar’s counsel for any discovery above and beyond whatever counsel for Robb, and/or Were, and/or Hasan choose to share with LaMar’s counsel. Nor will the Court order counsel for Respondent to do anything in the way of furnishing or facilitating any discovery. . . .”).
25. Transcript of Record at 1913, State v. Skatzes, Case Nos. 94-CR-2890, 94-CR-2891 (Montgomery Cnty. Ct. of C.P. 1996) (referencing the testimony by lead investigator Howard Hudson) [hereinafter State v. Skatzes].
26. *Id.* at 5751, 6101.
27. *Crawford v. United States*, 212 U.S. 183, 204 (1909).
28. OHIO REV. CODE § 2923.03(D) (2017).

29. See Staughton Lynd, Napue *Nightmares: Perjured Testimony in Trials Following the 1993 Lucasville, Ohio Prison Uprising*, 36 CAP. U. L. REV. 559, 611-12 (2008) (sources cited therein) [hereinafter Napue *Nightmares*].
30. See AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES 8 (2005), available at https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am05115a.authcheckdam.pdf.
31. Memorandum from Attorney Colin Starger, N.Y. Innocence Project, “Derek Cannon: A Compelling Non-DNA-Based Innocence Claim” (Dec. 22, 2005) (on file with author).
32. A Listing of Inmate[s] Recovered from the yard shows Derek Cannon as having been removed from the yard on April 12, 1993, and his name does not appear on any of the lists of prisoners removed from L-block on the night of April 21, 1993. Buckley recanted his entire testimony in 2017. Def.’s Motion for Leave to File a New Trial Motion and Memorandum in Support at Def.’s Ex. A, State v. Cannon, Case No. B-9507633 (Hamilton Cnty. Ct. of C.P. 1995).
33. See Transcript of Record at 476-78, State v. Grinnell, Case No. 94-CR-11-6418 (Franklin Cnty. Ct. of C.P. 1995) (referencing testimony of Prentice Jackson); see also *id.* at 521-23 (referencing testimony of Leroy Elmore).
34. See Transcript of Record, State v. Gordon, Case No. 94-CR-153 (Scioto Cnty. Ct. of C.P. 1994) (quoting from the statement of Stacey Gordon on Sept. 8, 1994. This statement was not produced in discovery before LaMar’s trial and was brought to the attention of LaMar’s counsel years later).
35. State v. Skatzes, *supra* note 25, at 3292-95 (referencing testimony by Dr. Leo Buerger).
36. State v. Jefferson, *supra* note 21, at 267-68, 275, 283.
37. State v. Skatzes, *supra* note 25, at 6108.
38. State v. Jefferson, *supra* note 21, at 656-57.
39. State v. Sanders, *supra* note 8, at 2513.
40. Transcript of Record at 1037, 1046, State v. Were, Case No. B-958499 (Hamilton Cnty. Ct. of C.P. 1995).
41. See Napue *Nightmares*, *supra* note 29, at 604-11 (for a detailed, fully-footnoted account of this complex series of events).
42. State v. Sanders, *supra* note 8, at 2301-02.
43. State v. Skatzes, *supra* note 25, at Post-Conviction Ex. 27 (referencing Affidavit of Kenneth Law at paragraphs 11, 13).
44. LYND, *supra* note 12, at 135 and sources cited therein.
45. State v. Skatzes, *supra* note 25, at Ex. 309A. For a fuller discussion of race in the Lucasville uprising, see LYND, *supra* note 12, at 133-49.
46. State v. Robb, *supra* note 10, at 5486-87.
47. TOM WICKER, A TIME TO DIE: THE ATTICA PRISON REVOLT 238 (Quadrangle 1975).
48. THOMPSON, *supra* note 2, at 558, 561, 567.



Catherine Taylor

**FREEDOM OF THE WHISTLEBLOWERS:
WHY PROSECUTING GOVERNMENT
LEAKERS UNDER THE ESPIONAGE ACT
RAISES FIRST AMENDMENT CONCERNS**

Introduction

In 2013, an employee of a defense contractor at the National Security Agency (“NSA”) provided journalists with top-secret agency documents.¹ This led to revelations about widespread Internet and phone surveillance by the NSA of both domestic and foreign targets, including tens of millions of Americans and thirty-five world leaders.² On June 5, 2013, *The Guardian* published the first article based on these leaks.³ *The Guardian*, as well as *The Washington Post*, would go on to win the 2014 Pulitzer Prize for Public Service for their reporting on this surveillance.⁴ In describing why *The Guardian* won, the Pulitzer Prize website states, “For its revelation of widespread secret surveillance by the National Security Agency, helping through aggressive reporting to spark a debate about the relationship between the government and the public over issues of security and privacy.”⁵ The government employee, on the other hand, would not meet with such praise. Federal prosecutors filed a criminal complaint against Edward Snowden.⁶ He was charged with three felonies, including two under the Espionage Act of 1917.⁷ One charge specifically fell under § 793(d) of the Act, which states:⁸

Whoever, *lawfully having possession of*, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note *relating to the national defense*, or information *relating to the national defense* which information *the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation*, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it . . . Shall be fined under this title or imprisoned not more than ten years, or both (*emphasis added*).⁹

Section 793(e) of the Act also contains a provision pertaining to individuals having *unauthorized possession* of the documents set out above, and its text

Catherine Taylor earned her J.D. from Chicago-Kent College of Law in 2017 and she is currently licensed to practice law in Illinois. Catherine thanks her friends and family for helping her in the writing process. She thanks Professor Steven Heyman for his guidance on her first few drafts. The views expressed in this article do not reflect the views of her employer.

almost perfectly mirrors the language of § 793(d).¹⁰ So, since the government brought charges against Edward Snowden under § 793(d), is it fair to say that the government may also bring charges against Pulitzer-Prize winning newspaper *The Guardian*, or its journalists and editors, under § 793(e) of the Act? After all, *The Guardian* had unauthorized possession of documents that, according to the government, related to national defense.

While the Supreme Court has never concluded whether applying § 793(e) to the press would violate the First Amendment, a member of the press has still never successfully been prosecuted for publishing classified government information. This is likely because (1) national security has never genuinely been at a serious risk, as required under the Act, and (2) there are strong policy reasons for safeguarding the press from such charges. A free press plays a vital role in our democracy, and convicting the press under the Espionage Act could potentially chill speech critical to public discourse. Convicting a government employee who discloses classified, national security information to the press raises these same First Amendment concerns. Consequently, such a person ought to be protected from prosecution.

Part I of this article will analyze the relationship between the First Amendment and the press, particularly with respect to the press's publication of national security information. It will first seek to define the press, before analyzing case law involving the publication of a source's unlawfully obtained information. It will then consider why the press has never been prosecuted under the Espionage Act. Part II will discuss the relationship between the First Amendment and whistleblowers within the context of national security. Like Part I, it will begin by defining the term "whistleblower" before analyzing relevant case law. This part will conclude by considering possible protections for whistleblowers. Part III will compare any identified First Amendment protections of the press to those of whistleblowers, and finally, this article will argue that Congress should pass legislation to protect the rights of whistleblowers who, under certain circumstances, leak classified national security information to the press.

I. The First Amendment and the press

In order to make a proper comparison between the First Amendment protections of the press and First Amendment protections of whistleblowers, it is important to understand what the press actually is. *Black's Law Dictionary* defines "press" as "[t]he news media; print and broadcast news organizations collectively."¹¹ Therefore, the press may include newspapers, books, magazines, and even television networks.¹² Although the Supreme Court has never decided whether a particular litigant was part of the "press," "[t]he Court on other occasions has mentioned 'publishers and broadcasters,' 'the

media,' 'editorial judgment,' 'editorial control,' 'journalistic discretion,' and 'newsgathering' as possible objects of protection."¹³

The definition of "the press" has evolved greatly over time, and due to advancements in technology and changes in the media industry, it continues to evolve.¹⁴ Scholars have often looked to a functional definition, defining members of the press by analyzing what that potential member does rather than looking at who that potential member is.¹⁵ For example, some argue that journalism identifies the proper function of the press, a point which the Supreme Court has seemingly endorsed.¹⁶ Looking at dictionary definitions, Merriam-Webster provides an unhelpful and circular definition, defining a "journalist" as "a person engaged in journalism."¹⁷ Likewise, "journalism" is defined as "the collection and editing of news for presentation through the media."¹⁸ It is a daunting task to thoroughly define the "press," and some have argued for a narrow definition.¹⁹ Nevertheless, the general purpose of the press is to provide information to the public, and courts have treated traditional newspapers, like *The Washington Post*, as undisputed parts of the press.²⁰

A. The press and national security

Under the First Amendment, neither freedom of speech nor freedom of the press is absolute; "[f]reedom of speech thus does not comprehend the right to speak on any subject at any time."²¹ The Supreme Court has explained that the First Amendment does not protect (1) language intended to incite, provoke, and encourage resistance to the United States in times of war,²² or (2) language that incites or produces imminent lawless action.²³ Moreover, under the First Amendment, the press does not have a constitutional right of special access to information not available to the public generally.²⁴ Importantly, the Supreme Court has also contended that, in the interest of securing news or otherwise, the First Amendment does not confer "a license on either the reporter or his news sources to violate valid criminal laws."²⁵ As stated by the Court, "[a]lthough stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news."²⁶

While the Supreme Court has never actually held that the United States could prosecute the press for publishing classified information relating to national security, it considered the question in *New York Times Co. v. United States*.²⁷

1. *New York Times Co. v. U.S.* and its concurring opinions

In this case, the government sought to enjoin *The New York Times* and *The Washington Post* from publishing the contents of a classified study.²⁸ In a short *per curiam* opinion, the Supreme Court held that the government had not met its burden of showing justification for imposing a prior restraint of expression.²⁹ The Justices on the Court were split in their analyses, with

Justices Black, Brennan, Douglas, Stewart, White, and Marshall each filing separate concurring opinions, and Chief Justice Burger and Justices Harlan and Blackmun each filing separate dissenting opinions.³⁰ In their various opinions, a few Justices considered whether the government could punish the publication of information that had been obtained unlawfully, specifically questioning whether the government could charge the press under § 793(e) of the Espionage Act.³¹

It is important to highlight that there are two main issues involving the application of § 793(e) to the press: a statutory issue and a constitutional one. The former involves looking to the language of § 793(e) and the legislative history of the Act as a whole, and asking whether or not § 793(e) *could* apply to the press.³² If it can apply, the second question deals with the constitutional issue: does the application of this provision to the press violate the First Amendment? For the purposes of this article, I will largely focus on the constitutional arguments presented by the Justices, and thereby assume that the answer to the first question is yes.

In his concurring opinion, Justice Black, joined by Justice Douglas, took the strongest stance in favor of First Amendment protection.³³ According to Justice Black, “every moment’s continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment.”³⁴ Black wrote that enjoining the publication of news “would make a shambles of the First Amendment.”³⁵

To support his opinion, Justice Black cited the origin story of the Bill of Rights.³⁶ Black noted that, before the enactment of the Bill of Rights, James Madison proposed what became the First Amendment in three parts, one of which stated: “[t]he people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.”³⁷ According to Justice Black, the Bill of Rights “changed the original Constitution into a new charter under which no branch of government could abridge the people’s freedoms of press, speech, religion, and assembly.”³⁸

In response to the argument that the general powers of the government delineated in the original Constitution could be interpreted to limit guarantees in the Bill of Rights, Justice Black responded, “I can imagine no greater perversion of history.”³⁹ He argued that the history and text of the First Amendment demonstrate that the press “must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.”⁴⁰ Justice Black argued that, through the First Amendment, the framers of the First Amendment gave protection to the press in order for it to fulfill its vital democratic role—“to serve the governed, not the governors.”⁴¹ “The Government’s power to censor the press was abolished so that the press would remain forever free

to censure the Government. The press was protected so that it could bare the secrets of government and inform the people.”⁴² Justice Black believed that *The New York Times* and *The Washington Post* should “be commended” for serving this purpose.⁴³

Justice Black also disagreed with the notion that Congress could make laws enjoining publication of current news in the name of “national security.”⁴⁴ According to him, holding that the President has “inherent power” to halt the publication of news would “wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make ‘secure.’”⁴⁵ Justice Black further stated that the term “national security” is broad and vague and “[t]he guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.”⁴⁶

Although he joined in Justice Black’s opinion, Justice Douglas wrote separately as well.⁴⁷ Douglas stated that there was “no room for governmental restraint on the press.”⁴⁸ In his opinion, he concluded that § 793(e) of the Espionage Act could not apply to the press⁴⁹ and asserted that “[s]ecrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be ‘uninhibited, robust, and wide-open’ debate.”⁵⁰

Justice Brennan also wrote separately to emphasize that “the First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by these cases.”⁵¹ He explained that Court precedent shows that there is a “single, extremely narrow class of cases” in which the ban on prior judicial restraint may be overcome, and those cases occur only when the Nation is at war.⁵² Justice Brennan asserted that the government presented no evidence suggesting that the publications would cause an event like the “nuclear holocaust.”⁵³ “Thus,” he wrote, “only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.”⁵⁴

In sum, the opinions of Justices Black, Douglas, and Brennan indicate that there is a constitutional problem in applying § 793(e) to the press. The opinions of Chief Justice Burger and Justices White, Stewart, and Blackmun, on the other hand, suggest the contrary.

Justice White wrote that newspapers would not necessarily be immune from criminal action, regardless of whether a ban on the publication of sensitive documents was terminated.⁵⁵ He noted that the government could have successfully proceeded another way, arguing that during the enactment of the

Espionage Act, some members of Congress had “little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed.”⁵⁶ Justice White stated that the Criminal Code contained many provisions relevant to the present situation (e.g., § 797, which makes it a crime to publish certain photos or drawings of military installations), and “the newspapers are presumably now on full notice of the position of the United States and must face the consequences if they publish.”⁵⁷ He expressed that he would have “no difficulty” in sustaining convictions.⁵⁸ Likewise, Justice White was open to the possibility of prosecuting members of the press under § 793(e), highlighting the broad definition of “national defense.”⁵⁹

In a related opinion, Justice Stewart asserted that

[i]n the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.⁶⁰

Because of this, Justice Stewart argued, “a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.”⁶¹ That being said, Justice Stewart noted that an effective national defense requires confidentiality, and frequently, absolute secrecy.⁶² Importantly, he joined Justice White’s opinion.⁶³

Chief Justice Burger and Justice Blackmun also agreed with Justice White’s opinion “with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense.”⁶⁴ Therefore, four Justices implied that the application of § 793(e) to the press would pass constitutional muster. It’s worth mentioning that Justice Marshall considered § 793(e), but his opinion remained arguably neutral, meaning he did not take a definitive stance in either direction.⁶⁵ Likewise, Justice Harlan remained silent on the issue.⁶⁶ Therefore, the majority of the Court left open the possibility that newspapers could be prosecuted under the Espionage Act.

2. Additional case law

Although the Supreme Court left open the question of whether the government could prosecute the press for publishing unlawfully obtained classified government information, the Court has ruled that when information is *lawfully* obtained, the state may not punish the publication of that information unless necessary to further a substantial interest.⁶⁷

In *Smith v. Daily Mail Publishing Co.*, the Court reviewed a West Virginia statute making it a crime for a newspaper to publish, without the written approval of the juvenile court, the name of any youth charged as a juvenile

offender.⁶⁸ Through talking to witnesses, the police, and an assistant prosecuting attorney, the respondent newspapers obtained the name of a juvenile alleged to have shot a classmate, which the papers eventually published in their articles.⁶⁹ The respondents alleged that the statute violated the First and Fourteenth Amendments of the U.S. Constitution as well as the State's Constitution.⁷⁰ They argued that, since the statute requires court approval prior to publication, it was a "prior restraint" on speech; therefore, it bore "a 'heavy presumption' against its constitutional validity" which the State's interest in the anonymity of a juvenile offender could not overcome.⁷¹ The petitioners, the prosecuting attorney, and the Circuit Judges of Kanawha County, West Virginia, did not dispute that the statute operated as a prior restraint, but instead argued that the law was still constitutional because of a great state interest in protecting the identity of juveniles.⁷²

The Court first asserted, "[w]hether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity."⁷³ The Court ultimately concluded that it did not have to decide whether the statute operated as a prior restraint since the statute could not satisfy the constitutional standards defined in *Landmark Communications, Inc.*⁷⁴

Next, the Court contended that "[a] free press cannot be made to rely solely upon the sufferance of government to supply it with information," and held "[i]f the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here."⁷⁵ "Our recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards."⁷⁶ Noting that its holding was narrow, the Court determined that (1) the State's interest in the statute was insufficient to criminalize the newspapers' conduct, and (2) the statute did not accomplish its stated purpose because it did not restrict electronic media.⁷⁷ Ultimately, the Court held that the West Virginia statute abridged freedom of the press.⁷⁸

Although not in the context of classified government documents affecting national security, the Supreme Court has also protected the press's right to publish *unlawfully* obtained information, so long as the press obtained the information lawfully.⁷⁹ In *Bartnicki v. Vopper*, the Court held that "the repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue" was protected.⁸⁰ At issue in the case was a conversation between a teacher's union chief negotiator and the union's president regarding contentious collective-bargaining negotiations between the union and school board, which had been intercepted and recorded by an unknown individual.⁸¹ The tape of the conversation was then put in the

mailbox of the head of a local taxpayers' association, who sent it to a radio host, and other members of the media.⁸² After the parties settled the dispute, a radio host played the call on his talk show and soon after, another station broadcasted the tape.⁸³

The respondents, the radio host, and the head of a local taxpayers' organization, were criminally charged under 18 U.S.C. § 2511(1)(c), and its Pennsylvania counterpart, which makes it an offense for any person to intentionally disclose to another "the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection."⁸⁴ Because the interception was intentional, and therefore unlawful—a fact the respondents "had a reason to know"—the disclosure of the conversation violated the statutes; however, the question as to whether the application of the statutes violated the First Amendment still remained.⁸⁵

The Supreme Court first noted that the respondents played no part in the illegal interception of the conversation, nor did they learn the identity of the person who taped it.⁸⁶ The Court also noted that the respondents obtained access to the tape lawfully and, importantly, the subject matter of the conversation was a matter of public concern.⁸⁷ The Court further explained that (1) enforcing the provision implicated the core purposes of the First Amendment because it imposed sanctions on publishing truthful information of public concern, and (2) publishing matters of public importance outweighed individual privacy concerns.⁸⁸ Finally, the Court concluded that the negotiations between the union and school board were "unquestionably a matter of public concern, and respondents were clearly engaged in debate about that concern."⁸⁹ Therefore, the Court held that the respondents' conduct was worthy of constitutional protection.⁹⁰

Lower courts have further considered the question posed in *New York Times Co.*⁹¹ In *U.S. v. Rosen*, the government charged the employees of the American Israel Public Affairs Committee (AIPAC), a pro-Israel lobbyist organization, with violating 18 U.S.C. § 793 of the Espionage Act for conspiring to transmit information relating to the national defense to those not entitled to receive it.⁹² The defendants included AIPAC's Director of Foreign Policy Issues, who "was primarily engaged in lobbying officials of the executive branch with policy-making authority over issues of interest to AIPAC."⁹³ He did not have security clearance during the time of the alleged conspiracy.⁹⁴ Another defendant was AIPAC's Senior Middle East Analyst, and he had never held a security clearance.⁹⁵ Yet another alleged co-conspirator worked on the Iran desk in the Office of the Secretary of the Department of Defense, and he held a top-secret security clearance.⁹⁶

The indictment alleged that, in furtherance of their lobbying activities, the defendants fostered relationships with government officials who had access to sensitive government information, which they ultimately obtained and transmitted to persons not otherwise entitled to receive it, such as members of the media and foreign government officials.⁹⁷ For example, one of the defendants had allegedly told an unnamed foreign official that he had “picked up an extremely sensitive piece of intelligence” concerning terrorist activities in Central Asia, which he described as “codeword protected intelligence.”⁹⁸ The defendant relayed this information to the official, and both parties continued the discussion a few weeks later.⁹⁹ Moreover, the second defendant told the same official that he had obtained a “secret FBI, classified FBI report” relating to the Khobar Towers bombing from three different sources, including a member of the United States government, and later told the foreign official that he had interested a member of the media in the report.¹⁰⁰

About a year and a half later, the defendants met with a US government official who had access to classified information relating to U.S. strategy pertaining to a certain Middle Eastern country.¹⁰¹ After the meeting, one of the defendants allegedly conversed with a member of the media, where he disclosed classified information relating to the U.S. government’s deliberations on its strategy towards the Middle Eastern country.¹⁰² Over the next few years, defendants continued to procure and disclose classified information relating to national defense to AIPAC staff, foreign officials, and journalists.¹⁰³ At one point, one of the defendants even created a document from the appendix of a U.S. draft internal policy document, which he faxed to another defendant’s AIPAC office.¹⁰⁴

The defendants argued that § 793 (1) violated the Due Process Clause of the Fifth Amendment for being unconstitutionally vague, (2) abridged their First Amendment right to free speech and right to petition the government, and (3) was facially overbroad.¹⁰⁵ The defendants also argued that the court should avoid constitutional questions by “interpreting the statute as applying only to the transmission of tangible items, *i.e.*, documents, tapes, discs, maps and the like.”¹⁰⁶ In addressing the First Amendment arguments,¹⁰⁷ the District Court rejected the government’s proposed categorical rule that espionage statutes can never violate the First Amendment,¹⁰⁸ stating: “[i]n the broadest terms, the conduct at issue—collecting information about United States’ foreign policy and discussing that information with government officials (both United States and foreign), journalists, and other participants in the foreign policy establishment—is at the core of the First Amendment’s guarantees.”¹⁰⁹ The court then concluded that the application of § 793 to individuals who, in an attempt to influence United States foreign policy, transfer the Government’s national defense secrets to those not entitled to

receive them, still receives First Amendment scrutiny.¹¹⁰ “So, too, the mere invocation of ‘national security’ or ‘government secrecy’ does not foreclose a First Amendment inquiry.”¹¹¹

To determine whether the government’s interest prevailed over the First Amendment, the court began with an assessment of the competing societal interests at stake.¹¹² In the present case, the defendants were accused of disclosing government information that could threaten the security of the nation, and it was “‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”¹¹³ The court delineated the difference between § 793(d) and § 793(e) and concluded that the former applied to individuals with access to information by virtue of their official position who “are often bound by contractual agreements whereby they agree not to disclose classified information.”¹¹⁴ Such individuals are in a position of trust with the government.¹¹⁵ On the other hand, § 793(e) applies to people “who have no employment or contractual relationship with the government, and therefore have not exploited a relationship of trust to obtain the national defense information they are charged with disclosing.”¹¹⁶

With respect to the first category, the court stated that the Constitution permits prosecution “for the disclosure of information relating to the national defense when that person knew that the information is the type which could be used to threaten the nation’s security, and that person acted in bad faith, *i.e.*, with reason to believe the disclosure could harm the United States or aid a foreign government.”¹¹⁷ “Indeed, the relevant precedent teaches that the Constitution permits even more drastic restraints on the free speech rights of this class of persons.”¹¹⁸ The court contended that “government employees’ speech can be subjected to prior restraints where the government is seeking to protect its legitimate national security interests,” and “Congress may constitutionally subject to criminal prosecution anyone who exploits a position of trust to obtain and disclose NDI to one not entitled to receive it.”¹¹⁹

With respect to the second category, the court determined that “the government can punish those outside of the government for the unauthorized receipt and deliberate retransmission of information relating to the national defense.”¹²⁰ Citing the opinions in *New York Times Co.*, the court noted that punishing persons beyond governmental trust (*i.e.*, persons in the second category) is constitutional, but only when national security is genuinely at risk.¹²¹ The court also cited the concurring opinions in *U.S. v. Morison*, a case that will be analyzed more thoroughly in Part II of this article. According to the District Court in *Rosen*, the *Morison* concurrences argued that juries in espionage cases should have an instruction limiting “information relating to the national defense” to information “potentially damaging to the United States or... useful to an enemy of the United States.”¹²² Without this limitation,

the District Court posited, “the statute could be used to punish a newspaper for publishing a classified document that simply recounts official misconduct in awarding defense contracts.”¹²³ Such a prosecution would violate the First Amendment.¹²⁴ Therefore, the court concluded that (1) “information relating to the national defense, whether tangible or intangible, must necessarily be information which if disclosed, is potentially harmful to the United States, and the defendant must know that disclosure of the information is potentially harmful to the United States,”¹²⁵ and (2) § 793(e) did not violate the defendants’ First Amendment rights.¹²⁶ However, the court also suggested that Congress may need to thoroughly review and revise the provisions of the Espionage Act to reflect societal changes as well as “contemporary views about the appropriate balance between our nation’s security and our citizens’ ability to engage in public debate about the United States’ conduct in the society of nations.”¹²⁷

Although the court in *Rosen* considered the Speech Clause, as opposed to the Press Clause, which is examined in Part II of this article, it is worth noting here that the court considered both §§ 793(d) and (e) of the Espionage Act, the latter of which would apply to the press. Moreover, the court specifically stated that a statute punishing a newspaper for publishing a classified document “simply recount[ing] official misconduct in awarding defense contracts” would violate the First Amendment.¹²⁸ The court emphasized the importance of considering whether or not the disclosure of the national defense information would be harmful to the United States, which is instructive for future cases.¹²⁹

There is still no Supreme Court precedent directly answering the question of whether the government could prosecute the press for disclosing unlawfully obtained national security information, although Supreme Court and lower court case law seem to suggest that prosecution is possible. But, even if prosecution were permissible, courts have made it clear that the national security interest underlying such a case must be very strong, “since state action to punish the publication of truthful information seldom can satisfy constitutional standards.”¹³⁰

It is also worth noting that, throughout these cases, there seems to be a reoccurring theme of public discourse. Even Justice Stewart in *New York Times Co.*, where he implied that prosecuting the press was possible, indicated that an informed and critical public opinion protects the values of a democratic government.¹³¹ Justice Stewart stated that a free press serves the basic purpose of the First Amendment, and without a free press, there cannot be enlightened people.¹³² This sentiment was continued in *Smith* and *Bartnicki* as well, where the Supreme Court reiterated the importance of free speech and a free press to the public.¹³³ *Rosen* similarly balances societal interests with national security, noting that even seemingly clear-cut cases deserve First Amendment

scrutiny.¹³⁴ Hence, the government remains reluctant to prosecute the press, and courts resist upholding convictions against journalists.

B. Why hasn't the government prosecuted the press?

Although some court opinions suggest that the government can prosecute the press without violating the First Amendment, neither a journalist nor newspaper has ever been successfully prosecuted for the publication of classified information. This is likely for two reasons: (1) national security has never been genuinely at risk,¹³⁵ and (2) there are strong policy reasons for safeguarding the press. The right to publish is “central to the First Amendment and the basic existence of constitutional democracy.”

As private and public aggregations of power burgeon in size and the pressures for conformity necessarily mount, there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation, and criticism, if we are to preserve our constitutional tradition of maximizing freedom of choice by encouraging diversity of expression.¹³⁶

Since a free press plays a vital and transparent role in American society, prosecuting a journalist or news organization could potentially leave the First Amendment in a state of shock, creating ambiguity in the law and, more importantly, chilling speech critical to public discourse.¹³⁷

The very idea of a free press, of course, is being challenged and may be legally redefined as a result of the Trump administration. During his Senate confirmation hearings, Attorney General Jeff Sessions responded to a question regarding “whether he would abide by current Justice Department regulations that make it difficult to subpoena or prosecute reporters, and whether he would pledge not to ‘put reporters in jail for doing their job,’” with a non-committal answer.¹³⁸ He mentioned that while there is deference to the news media, the media “could be a mechanism through which unlawful intelligence is obtained.”¹³⁹ In light of Sessions’s answer, the following questions arise:

- (1) Does the First Amendment protect whistleblowers from prosecution under the Espionage Act when disclosing classified information relating to national security to the press, unless national security is at a genuine risk?
- (2) Should the same, broad First Amendment arguments made to protect the press from prosecution be extended to whistleblowers whose disclosures serve the public interest?

II. Whistleblowers and the First Amendment

According to *Black’s Law Dictionary*, a “whistleblower” is “[a]n employee who reports employer wrongdoing to a governmental or law-enforcement agency.”¹⁴⁰ A prior edition of Black’s defined a “whistle blower” as “[a]n employee who refuses to engage in and/or reports illegal or wrongful activities of his employer or fellow employees,” which notably does not include the “to

a government or law-enforcement agency” limitation.¹⁴¹

In the Whistleblower Protection Act (WPA) of 1989, a whistleblower is defined as an employee who “reasonably believes [government conduct] evidences (i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”¹⁴² Importantly, the protections of the WPA do not extend to an employee whose disclosure is either (1) specifically prohibited by law, or (2) “specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.”¹⁴³ Furthermore, qualifying as a whistleblower under the WPA does not necessarily safeguard a person from criminal prosecution.¹⁴⁴ The WPA also excludes most intelligence agencies—such as the FBI, CIA, and NSA—from its protection.¹⁴⁵ Additionally, “[t]o make a whistleblower claim under the WPA, a petitioner must first exhaust his administrative remedies and make a non-frivolous allegation of an adverse personnel action based on a protected disclosure.”¹⁴⁶ Therefore, a government employee of the NSA who leaks classified national security information to the press would not be protected by the WPA and, more fundamentally, would not be categorized as a “whistleblower” under it.¹⁴⁷

Because whistleblowers should receive expanded protection for certain disclosures of classified national security information under federal law, this article will rely on the colloquial usage of “whistleblower,” which defines the term more broadly. Thus, a whistleblower will refer to “an employee who makes a public disclosure of an employer’s or other employee’s corruption or wrongdoing.”¹⁴⁸

A. Whistleblowers and national security

Whistleblowers are typically government employees, and the Supreme Court has ruled that “[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”¹⁴⁹

When working in an intelligence agency, government employees with access to classified information are in a high position of trust with the government.¹⁵⁰ In *Snepp v. United States*, Snepp published a book about certain CIA activities in South Vietnam based on his experiences as a CIA agent.¹⁵¹ Snepp did not submit the book to the agency for prepublication review, which was an express condition of his employment with the CIA.¹⁵² The government argued that this condition was an “integral part” of his “concurrent undertaking ‘not to disclose any classified information relating to the Agency without proper authorization.’”¹⁵³ Snepp sought to prevent the CIA from enforcing the agreement, and he also argued that punitive damages were an inappropriate

remedy for the breach of his promise to submit all writings about the agency for prepublication review.¹⁵⁴

The Court first stated that Snepp's employment "involved an extremely high degree of trust."¹⁵⁵ The first sentence of the signed agreement acknowledged this trust relationship, and after signing, Snepp was "assigned to various positions of trust" and had "frequent access to classified information, including information regarding intelligence sources and methods," which served as the basis for his book.¹⁵⁶ Moreover, since Snepp violated the employment agreement by not submitting his material for prepublication, "he exposed the classified information with which he had been entrusted."¹⁵⁷ In order to violate the employment agreement, the Court ruled that Snepp's book did not have to contain classified information.¹⁵⁸ Rather, it ruled that Snepp's failure to submit his work for prepublication undermined the CIA's ability to perform its statutory duties.¹⁵⁹

Similarly, when an employee in a high position of trust with the government impedes American intelligence operations by stealing classified information and delivering it to the press, that employee may be prosecuted under the Espionage Act.¹⁶⁰ In *United States v. Morison*, the defendant appealed his conviction, which included a conviction for violating two provisions of the Espionage Act based on his "unauthorized transmittal of certain satellite secured photographs of Soviet naval preparations to 'one not entitled to receive them' (count 1) and the obtaining of unauthorized possession of secret intelligence reports and the retaining of them without delivering them to 'one entitled to receive' them (count 3)."¹⁶¹

In *Morison*, the defendant was employed at the Naval Intelligence Support Center at Suitland, Maryland.¹⁶² By the nature of his position, the defendant had been given a security clearance of "Top Secret-Sensitive Compartmented Information" and, in connection with his security clearance, had signed a Non-Disclosure Agreement.¹⁶³ Prior to his criminal conduct, the defendant had been doing off-duty work for *Jane's Fighting Ships*, "an annual English publication which provided current information on naval operations internationally," and began providing information to its affiliate publication, *Jane's Defence Weekly*.¹⁶⁴ His arrangement with *Jane's* had been submitted to and approved by the Navy on condition that the defendant did not supply any classified information on the Navy or extract unclassified data on any subject and forward it to *Jane's*.¹⁶⁵

Despite the defendant's agreement with the Navy, he began to correspond with the editor-in-chief of *Jane's* regarding full-time employment and ultimately met with him.¹⁶⁶ The editor-in-chief expressed interest in securing details on an explosion at a Naval Base, and the defendant responded that the explosion "was a much larger subject than even they had thought and there

was a lot more behind it.”¹⁶⁷ The defendant also said that he could provide material on the explosion if *Jane’s* was interested, and ultimately sent “about three typed pages of material background.”¹⁶⁸ Soon thereafter, the defendant also sent “two other items on further explosions that had occurred at the site on different dates and also a mention of one particular explosion in East Germany.”¹⁶⁹

After he sent the above materials, the defendant saw photographs—stamped “Secret” and with a “Warning Notice: Intelligence Sources or Methods Involved” imprinted on the borders—on the desk of another employee in the vaulted area where the defendant worked.¹⁷⁰ These photos depicted a Soviet aircraft carrier under construction in a Black Sea naval shipyard produced by a KH-11 reconnaissance satellite photographing machine.¹⁷¹ The defendant took the photos, removed any notices of confidentiality and secrecy, and mailed them to the editor-in-chief of *Jane’s Defence Weekly*, who published the photographs and made the pictures available to other news agencies.¹⁷²

With respect to his convictions under § 793(d) and (e) of the Espionage Act, the defendant argued that these subsections should only apply to conduct represented “in classic spying and espionage activity” by persons who transmitted “national security secrets to agents of foreign governments with intent to injure the United States.”¹⁷³ He asserted that he did not engage in “classic spying” because he leaked the documents to the press, instead of transmitting them to a foreign government.¹⁷⁴ The Fourth Circuit disagreed, concluding that a literal construction of the Espionage Act applied to the defendant’s conduct, and no exceptional conditions required it to depart from that construction.¹⁷⁵ The court also concluded that the legislative history of the Espionage Act did not support the defendant’s construction.¹⁷⁶

Importantly, the Fourth Circuit considered the legislative history in relation to the First Amendment and noted that it was silent as to whether Congress intended § 793(d) and (e) “to exempt from its application the transmittal of secret military information by a defendant to the press or a representative of the press.”¹⁷⁷ The court also noted that there was “little or no discussion of the First Amendment in the legislative record *directly* relating to sections 793(d) and (e) in this connection.”¹⁷⁸ In support of this conclusion, the court cited to Professor Rabban, who had concluded that the focus of First Amendment discussion during the enactment of the Espionage Act was

‘[a] provision of the bill that would have allowed the President to censor the press [which] dominated congressional discussion and was eventually eliminated by the conference committee’ but ‘[i]ronically, the section of the bill that ultimately provided the basis for most of the prosecutions [which included section 793(d), subsection (e) not being added until the 1950 revision] hardly received any attention’ in that discussion.¹⁷⁹

Thus, there was “no evidence whatsoever” that “Congress intended to exempt from the coverage of § 793(d) national defense information by a governmental employee . . . simply because he transmitted it to a representative of the press.”¹⁸⁰

Finally, the court noted that this was not a prior restraint case, but a case where a military intelligence employee had signed a letter of agreement with the Navy, purloined photos marked as “Secret” from Navy intelligence files, and “willfully” transmitted them to “one not entitled to receive it.”¹⁸¹ Thus, the court held that the First Amendment did not offer relief to the defendant merely because the transmittal was to a representative of the press.¹⁸² According to the court:

[I]t seems beyond controversy that a recreant intelligence department employee who had abstracted from the government files secret intelligence information and had xf transmitted or given it to one “not entitled to receive it” as did the defendant in this case, is not entitled to invoke the First Amendment as a shield to immunize his act of thievery.” To permit the thief thus to misuse the Amendment would be to prostitute the salutary purposes of the First Amendment.¹⁸³

Consequently, the court found that Congress could validly prohibit a government employee in possession of secret military intelligence material from transmitting that material to the press under the First Amendment.¹⁸⁴

Notably, the court echoed the government’s argument that the defendant was not exposing corruption or wrongdoing, but was focused on transferring the photos for personal gain.¹⁸⁵ The defendant, Morison, would likely disagree with that characterization.¹⁸⁶ Nevertheless, the takeaway from *Morison* is that there is no protection for a government employee who discloses classified information to the press simply because the disclosure was made to the press. Moreover, while Morison was charged and successfully convicted, *Jane’s Defence Weekly* is still a running publication.¹⁸⁷

D. The inadequacy of existing protections

As stated in *Rosen*, government employees are held in a position of trust and, therefore, the Constitution permits greater restraints on their free speech rights.¹⁸⁸ This diminished protection under the First Amendment is likely why the government isn’t as shy about prosecuting government employees as it is the press. Between 1945 and 2014, the government used the Espionage Act eleven times to prosecute government workers who shared classified information with journalists.¹⁸⁹ Seven of those prosecutions occurred under Barack Obama’s presidency, although two were inherited from President George W. Bush’s Department of Justice.¹⁹⁰

Other administrations have used different tactics to penalize leakers, such as employing administrative sanctions and penalties.¹⁹¹ Due to personal privacy protections, these sanctions and penalties are difficult to track.¹⁹² Arguably, however, there is recourse for government employees seeking to

report government wrongdoing. While the whistleblowers discussed in this paper are not protected under the Whistleblower Protection Act, employees may still find solace in President Obama's Presidential Policy Directive 19 or the Intelligence Community Whistleblower Protection Act.¹⁹³

Although his administration prosecuted more leakers than any other administration, President Obama issued Presidential Policy Directive 19 (PPD-19) in 2012.¹⁹⁴ He sought to protect intelligence community employees with access to classified information from retaliation for reporting waste, fraud, and abuse.¹⁹⁵ However, as Edward Snowden argued, PPD-19 falls short because it may not apply to contractors.¹⁹⁶ Section B of PPD-19 prohibits retaliation against whistleblowers by taking away the whistleblowing employee's access to classified information.¹⁹⁷ The word "employee" is not defined in the directive, and Section A, which also seeks to protect whistleblowing employees, does not appear to cover contractors.¹⁹⁸ Therefore, a contractor like Edward Snowden—who is not an employee—would not be protected.¹⁹⁹ Moreover, presidential directives can be abolished without Congressional approval, rendering PPD-19 subject to nullification.²⁰⁰

Likewise, the Intelligence Community Whistleblower Protection Act (ICWPA) of 1998 may not provide much protection to whistleblowers.²⁰¹ ICWPA was designed to provide "a secure means for employees to report to Congress allegations regarding classified information."²⁰² However, ICWPA does not protect employees from retaliation by their respective agencies.²⁰³ Under ICWPA, whistleblowing employees must report to their agency Inspector General (IG), who, upon finding that the allegations are credible, forwards the complaint to the agency head.²⁰⁴ The agency head then decides how to proceed.²⁰⁵ This is problematic when the allegation involves the employee's superiors.²⁰⁶

Alternatively, if the IG does not find the employee's complaint credible, the employee may submit the information to Congress.²⁰⁷ Because the Act doesn't protect against retaliation, whistleblowers may be afraid to approach Congress.²⁰⁸ Further, there are a vast number of hurdles to overcome before alleging classified wrongdoing before Congress, and as indicated by Edward Snowden, officials might not take proper action to address the employee's concerns.²⁰⁹ This is why whistleblowers feel the need to go to the press.²¹⁰ For example, Thomas Drake, a senior executive at the NSA, followed every rule in the book when attempting to report waste and mismanagement at the NSA.²¹¹ Drake alerted his bosses, the NSA's Inspector General, the Defense Department's Inspector General, and the Congressional intelligence committees about alleged illegal activities.²¹² After the government failed to take his complaints seriously, Drake eventually contacted *The Baltimore Sun*.²¹³ He was indicted by a grand jury on several charges, including § 793(e) of the Espionage Act.²¹⁴

In sum, whistleblowers can raise a First Amendment defense. However, because they are in positions of trust with the government, this defense appears unlikely to succeed. In addition, the same zealous First Amendment arguments made by courts for protecting the press have not been made to the same degree for whistleblowers, even if the whistleblowers disclose information vital to public discourse. Adequate protection simply does not exist for whistleblowers under current federal laws.

III. The distinction between the press and whistleblowers

As demonstrated above, current precedent suggests that both the press and whistleblowers may be prosecuted under the Espionage Act for the publication and disclosure of classified, government documents relating to national security. While both the press and whistleblowers may use the First Amendment as a defense, the government and the courts are more reluctant to prosecute and convict the press because of potential First Amendment concerns. For example, prosecuting the press under the Espionage Act could chill the free press, an institution vital to our democracy. Furthermore, a free press “most vitally serves the basic purpose of the First Amendment,” and it keeps the electorate informed and engaged.²¹⁵ Courts don’t seem to share these same apprehensions when applying the Espionage Act to government employees who disclose classified information to the press. Newspapers get Pulitzers, while whistleblowers face prison.

As noted above, this article relies on the colloquial definition of a whistleblower, which is defined as an employee who publicly discloses an employer’s (or other employee’s) corruption or wrongdoing.²¹⁶ A journalist is a person engaged in journalism, and journalism is the collection and editing of news for presentation through the media.²¹⁷ But what is a whistleblower, if not someone who collects news (e.g., specific documents proving government corruption), for presentation through the media (e.g., a public disclosure)? It’s worth repeating that in his concurring opinion in *New York Times Co.*, Justice Black emphasized that the framers of the First Amendment protected the press so that it could serve the governed, not the governors.²¹⁸ He noted that the press was protected in order to “bare the secrets of government and inform the people.”²¹⁹

Government employees who disclose classified information to the press in order to expose government corruption and wrongdoing serve a similar function. The reports by *The Guardian* and *The Washington Post* may have “spark[ed] a debate about the relationship between the government and the public over issues of security and privacy,” but if it weren’t for Edward Snowden, there would have been no report.²²⁰ Moreover, whistleblowers, to some extent, exercise journalistic discretion, by considering which issues are relevant to the public and ultimately deciding which documents to disclose to the press.²²¹ While

some may argue that changes in the NSA have not been drastic enough since Snowden's disclosure, the government has taken steps to ensure more transparency within the intelligence community. For example, in 2014, President Obama implemented Presidential Policy Directive 28, which required the intelligence community to implement "appropriate safeguards" for the personal information of people caught up in the surveillance efforts.²²² For the first time, the personal information of non-citizens may only be kept by the government for five years unless there is a national security concern.²²³ Furthermore, Snowden disclosed that the NSA had monitored the phones of 35 world leaders, and since this disclosure some names have been removed from the list.²²⁴ Regardless of how one perceives the magnitude of these changes, or assigns Snowden credit for their implementation, there's no doubt that Snowden's disclosures had some impact on the public debate over surveillance.²²⁵

Whistleblowers inform the public, and as stated by Justice Stewart, an informed and critical public opinion protects the values of a democratic government.²²⁶ Since the right to publish is "central to the First Amendment and the basic existence of constitutional democracy," surely, in certain circumstances, there should be a right to provide the information to the press.²²⁷ "[I]f we are to preserve our constitutional tradition of maximizing freedom of choice by encouraging diversity of expression," we need to ensure the protection of expression.²²⁸

Conclusion

As suggested by the court in *Rosen*, Congress may need to thoroughly review and revise the provisions of the Espionage Act to reflect societal changes as well as "contemporary views about the appropriate balance between our nation's security and our citizens' ability to engage in public debate about the United States' conduct in the society of nations."²²⁹ There are many actions Congress can take to reflect these changes and adequately provide a safety net for government employees who wish to expose corruption within their respective agencies.

First, § 793(d) of the Espionage Act could be interpreted to apply only to individuals acting in bad faith, i.e., where an employee discloses classified information with the *purpose* to harm the United States or aid a foreign government.²³⁰ Such an amendment might discourage future whistleblower prosecutions. Congress could also amend the ICWPA to protect whistleblowers from employer retaliation. This may encourage government employees to follow procedure rather than go to straight to the press. Finally, Congress could enact new legislation that sets out a balancing test for whistleblowers seeking to disclose information to the press. For example, if, after exhausting all internal avenues, a government employee were to disclose classified information to the press exposing corruption, wrongdoing, or similar issues of public concern,

the employee should be protected from prosecution, provided the information does not put the United States at an *imminent* or *serious* national security risk—such as in wartime.²³¹ This new legislation would protect a narrow class of whistleblowers seeking to promote transparency in the government and serve the American people, while still allowing for prosecution for the disclosure of information that puts the country at a genuine risk.

As evidenced by the 2014 Pulitzer Prizes, implied by case law, and shown by the prosecution of government employees, the First Amendment appears to protect the press more than its sources. Both the press and whistleblowers, as colloquially understood, play a central role in our democracy, and criminalizing disclosures of certain classified information by either raises considerable First Amendment concerns. Consequently, both the press and whistleblowers deserve substantial protection from prosecution under the Espionage Act of 1917, and steps should be taken by Congress to ensure such protection.

NOTES

1. See Luke Harding, *How Edward Snowden Went From Loyal NSA Contractor to Whistleblower*, GUARDIAN (Feb. 1, 2014, 6:00 AM), <https://www.theguardian.com/world/2014/feb/01/edward-snowden-intelligence-leak-nsa-contractor-extract>; see also *Edward Snowden: Leaks that Exposed US Spy Programme*, BBC NEWS (Jan. 17, 2014), <http://www.bbc.com/news/world-us-canada-23123964>.
2. See *id.*
3. See *Verizon Forced to Hand Over Telephone Data—Full Court Ruling*, GUARDIAN (June 5, 2013, 11:40 PM), <https://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order>.
4. See *2014 Pulitzer Prizes: Journalism*, THE PULITZER PRIZES, <http://www.pulitzer.org/prize-winners-by-year/2014> (last visited May 12, 2017).
5. *Id.*
6. Peter Finn & Sari Horwitz, *U.S. Charges Snowden with Espionage*, WASH. POST (June 21, 2013), https://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc_story.html?utm_term=.9255a0bcb58e.
7. Scott Shane, *Ex-Contractor Is Charged in Leaks on N.S.A. Surveillance*, N.Y. TIMES (June 21, 2013), <http://www.nytimes.com/2013/06/22/us/snowden-espionage-act.html>.
8. See Vanessa Dennis & Elizabeth Shell, *11 ‘Leakers’ Charged With Espionage*, PBS NEWSHOUR (July 12, 2013), <http://www.pbs.org/newshour/spc/multimedia/espionage/>.
9. 18 U.S.C. § 793(d) (2016).
10. 18 U.S.C. § 793(e) (2016).
11. BLACK’S LAW DICTIONARY (10th ed. 2014).
12. David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 436 (2002) (referencing a 1974 speech by Justice Stewart).
13. *Id.*
14. See *id.* at 450-51 (“What history shows is that journalism has changed, conceptions of press have changed, and judicial (and perhaps popular) enthusiasm for protecting the press has waxed and waned. Whatever ‘press’ might mean today will necessarily be quite different from what it meant to the Framers, and probably from what it has meant at other times since then.”).
15. Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1054 (2011).

16. See Anderson, *supra* note 12, at 447-48 (“[E]ven an originalist might conclude that the Press Clause should be interpreted to protect whatever constitutionally important function the eighteenth-century press served, and they might conclude that today that function is served by journalism. That seems to be what the Supreme Court has done.”). However, Anderson highlights the potential issues with defining “press” as journalism by function. *Id.* at 446-82. “The issue here is not whether history proves that press means journalism, but whether journalism might provide a satisfactory—if changing—conception of press. It can do so only if journalism can be distinguished from other types of information businesses.” *Id.* at 451.
17. *Journalist*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/journalist> (last visited May 12, 2017).
18. *Journalism*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/journalism> (last visited May 12, 2017).
19. See West, *supra* note 15, at 1056.
20. See, e.g., *Mills v. Alabama*, 384 U.S. 214 (1966) (holding that a state law interpreted to criminally punish an editor for the publication of a newspaper editorial that urged people to vote a particular way on election day violated freedom of the press). “The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press.” *Id.* at 219; see also Anderson, *supra* note 12, at 436 (“The cases in which the [Supreme] Court seems to rely on the Press Clause have involved newspapers or magazines whose status as press was unquestioned.”); but see *id.* at 441 (discussing media convergence and stating newspapers may no longer be a “self-contained species of press”). Anderson also notes that while independence is paramount to journalism, various factors, such as financial demands, audience interests, influence of advertisers, and editors’ self-interests, may affect journalistic independence of traditional newspapers. See *id.* at 453-66.
21. *Am. Comm’ns Assn. v. Douds*, 339 U.S. 382, 394 (1950).
22. See *Abrams v. United States*, 250 U.S. 616 (1919).
23. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).
24. See *Brandenburg v. Hayes*, 408 U.S. 665, 684 (1972) (holding that it is neither a violation of free speech nor free press to require a newsman to appear and testify before a grand jury). “If there is no First Amendment privilege to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation, then it is a fortiori true that there is no privilege to refuse to appear before such a grand jury until the Government demonstrates some ‘compelling need’ for a newsman’s testimony.” *Id.* at 708. The First Amendment does not protect citizens from disclosing information that they received in confidence to a grand jury. *Id.* at 682.
25. *Id.* at 691.
26. *Id.*; see *id.* at 691-92 (“The [First] Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons.”).
27. *New York Times Co. v. United States*, 403 U.S. 713 (1971).
28. *Id.* at 714.
29. *Id.*
30. *Id.* at 714-63.
31. See *id.* at 733-40.
32. See *id.* at 721 (“Thus, it is apparent that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act.”).
33. See *id.* at 714-20.

34. *New York Times Co.*, 403 U.S. at 715.
35. *Id.*
36. *See id.*
37. *Id.* at 716 (citing 1 ANNALS OF CONG. 434).
38. *Id.*
39. *Id.*
40. *Id.* at 717.
41. *New York Times Co.*, 403 U.S. at 717.
42. *Id.*
43. *Id.*
44. *Id.* at 718.
45. *Id.* at 719.
46. *Id.*
47. *See New York Times Co.*, 403 U.S. at 720.
48. *Id.*
49. *Id.* at 721–22.
50. *Id.* at 724.
51. *Id.* at 725.
52. *Id.* at 726.
53. *New York Times Co.*, 403 U.S. at 726.
54. *Id.* at 726–27.
55. *See id.* at 733.
56. *Id.* at 734.
57. *Id.* at 735–36.
58. *Id.* at 737.
59. *New York Times Co.*, 403 U.S. at 737–40 (citing *Gorin v. United States*, 312 U.S. 19 (1941) and stating that national defense information is “obviously not limited to that threatening ‘grave and irreparable’ injury to the United States” *Id.* at 740.).
60. *Id.* at 728.
61. *Id.*
62. *See id.*
63. *See id.* at 730.
64. *New York Times Co.*, 403 U.S. at 752.
65. *Id.* at 745.
66. *See id.* at 752–59.
67. *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 104 (1979).
68. *Id.* at 98–99.
69. *Id.* at 99.
70. *Id.* at 100.
71. *Id.* at 100–01.
72. *Id.*
73. *Smith*, 443 U.S. at 101–02.
74. *Id.* at 102. In *Landmark*, the Court considered whether the state interests served by the confidentiality of Virginia Judicial Inquiry and Review Commission proceedings were “sufficient to justify the encroachment on First Amendment guarantees,” where the statute in question imposed criminal sanctions on the defendant for publishing an article that 1) reported on a pending inquiry by the Virginia Judicial Inquiry and Review Commission and 2) identified the state judge whose conduct was being investigated. 435 U.S. 829, 841–42 (1978). The Court stated, “neither the Commonwealth’s interest in protecting the

reputation of its judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech at issue here, even on the assumption that criminal sanctions do in fact enhance the guarantee of confidentiality.” *Id.* at 841. “[T]he publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth’s interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom.” *Id.* at 838.

75. *Smith*, 443 U.S. at 102-04 (quoting *Landmark*, 435 U.S. at 838, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975) and *Oklahoma Publ’g Co. v. District Court*, 430 U.S. 308, 355 (1977)).
76. *Id.* at 102.
77. *Id.* at 104–05.
78. *Id.* at 106.
79. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).
80. *Id.* at 517–18.
81. *Id.* at 518.
82. *Id.* at 519.
83. *Id.*
84. *Id.* at 525; 18 U.S.C. § 2511(1)(c).
85. *Bartnicki*, 532 U.S. at 525. It should be noted that this case was seemingly analyzed under the Speech Clause as opposed to the Press Clause. *See id.* at 529 (“Accordingly, we consider whether, given the facts of these cases, the interests served by § 2511(1)(c) can justify its restrictions on speech.”) (emphasis added).
86. *Id.*
87. *Id.*
88. *Id.* at 534-35. “We think it clear that parallel reasoning requires the conclusion that a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.” *Id.* at 535.
89. *Id.* at 535.
90. *Id.*; but *see id.* at 540 (Breyer, J., concurring) (“Thus, in finding a constitutional privilege to publish unlawfully intercepted conversations of the kind here at issue, the Court does not create a ‘public interest’ exception that swallows up the statutes’ privacy-protecting general rule. Rather, it finds constitutional protection for publication of intercepted information of a special kind. *Here, the speakers’ legitimate privacy expectations are unusually low, and the public interest in defeating those expectations is unusually high.*”) (emphasis added).
91. *See United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006), *amended*, WL 5049154 (2006), *aff’d*, 557 F.3d 192 (4th Cir. 2009) (affirming the district court’s evidentiary rulings challenged by the government).
92. *Id.* at 607-08.
93. *Id.* at 608.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Rosen*, 445 F. Supp. 2d at 608.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Rosen*, 445 F. Supp. 2d at 608–10.

104. *Id.* at 609.
105. *Id.* at 607. One defendant was additionally charged with aiding and abetting the transmission of such information as well, in violation of 18 U.S.C. § 793(d) (2016). *Id.*
106. *Id.* This is similar to the statutory issue discussed briefly in the *New York Times Co.* case. *See supra* note 32 and accompanying text.
107. *Id.* at 610.
108. *Id.* at 629–30.
109. *Rosen*, 445 F. Supp. 2d at 630.
110. *Id.*
111. *Id.*
112. *See id.* at 633.
113. *Id.* at 633–34. (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)). “Agee is as free to criticize the United States government as he was when he held a passport—always subject, of course, to express limits on certain rights by virtue of his contract with the government.” *Id.* at 636 (quoting *Haig*, 453 U.S. at 308).
114. *Rosen*, 445 F. Supp. 2d at 635.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Rosen*, 445 F. Supp. 2d at 636.
120. *Id.* at 637.
121. *Id.* at 639.
122. *See United States v. Morison*, 844 F.2d 1057, 1080-86 (4th Cir. 1988).
123. *Rosen*, 445 F. Supp. 2d at 639.
124. *Id.* at 640.
125. *Id.*
126. *Id.* at 641. The court also held that defendants’ overbreadth challenge of § 793 failed. *Id.* at 643.
127. *Id.* at 646.
128. *Id.* at 640.
129. *See id.*
130. *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 102 (1979).
131. *See New York Times Co. v. United States*, 403 U.S. 713, 728 (1971).
132. *Id.*
133. *See Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001) (stating that the subject matter was a matter of public concern).
134. *Rosen*, 445 F. Supp. 2d at 630.
135. Edward Snowden’s disclosures prompted a discussion of the potential risk to national security. In September 2016, the House Intelligence Committee issued an executive summary of its report on the Edward Snowden investigation, which noted that Snowden caused damage to national security. *See Steven Nelson, In Declassified Edward Snowden Report, Committee Walks Back Claims About ‘Intentional Lying,’* U.S. NEWS & WORLD REPORT (Dec. 22, 2016, 3:39 PM), <https://www.usnews.com/news/articles/2016-12-22/in-declassified-edward-snowden-report-committee-walks-back-claims-about-intentional-lying>. The summary asserted that Snowden was a “serial exaggerator and fabricator” and made claims about Snowden to support this theory; however, footnotes were added to the full report after the publication of the executive summary that acknowledged information contrary to some of these claims. *Id.* Moreover, the full report states that “the most recent DoD review identified 13 high-risk issues” related to the disclosures and notes that some

- of the information released, if procured by the Russian and Chinese governments, could put American troops “at greater risk in any future conflict.” *Review of the Unauthorized Disclosures of Former National Security Agency Contractor Edward Snowden*, U.S. HOUSE OF REPRESENTATIVES 1, 22 (2016), available at https://intelligence.house.gov/uploadedfiles/hpsci_snowden_review_declassified.pdf. While those claims may be true, it is important to note that most of the report is redacted, including 1) the 13 high-risk issues, 2) examples showing how “Snowden’s disclosures caused massive damage to national security,” and 3) the estimated cost to recover from the damage Snowden caused to SIGINT capabilities. *Id.* at 22-30. Therefore, it is difficult to gauge when national security is at a genuine risk.
136. *Branzburg v. Hayes*, 408 U.S. 665, 727 (1972).
137. See also Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 INDIANA L. J. 233, 278 (2008) (“Although the courts have not expressly addressed the constitutionality of prosecuting the press for publishing classified national security information . . . current First Amendment jurisprudence suggests some constitutional limitations on the government’s prosecutorial powers.”). In her article, Papandrea analyzes the cases set out herein, and ultimately argues that, in order for the government to prosecute a nongovernmental actor, such as the press, for disseminating national security information, the government should show that the actor intended to harm the United States or help a foreign nation. See *id.* at 278-305.
138. Peter Sterne, *Sessions ‘Not Sure’ Whether He Would Prosecute Journalists*, POLITICO (Jan. 10, 2017, 4:49 PM), <https://www.politico.com/blogs/on-media/2017/01/sessions-not-sure-whether-he-would-prosecute-journalists-233431>.
139. *Id.*
140. BLACK’S LAW DICTIONARY, *supra* note 11 (*emphasis added*). See also Lindsay B. Barnes, *The Changing Face of Espionage: Modern Times Call for Amending the Espionage Act*, 46 McGEORGE L. REV. 511, 522 (2014) (citing the definition for “whistleblower” as provided in Black’s Law Dictionary).
141. BLACK’S LAW DICTIONARY (6th ed. 1990).
142. See Barnes, *supra* note 140, at 522; 5 U.S.C. § 2302(b)(8)-(9) (2017) (citing 5 U.S.C. § 2302(b)(8)(A)(i)-(ii) (2016)). Through the “Whistleblower Protection Enhancement Act of 2012,” Congress made changes to chapter 23, which included, among other amendments, (1) changing “a violation” to “any violation” in (b)(8), and (2) expanding the individual right of action (IRA) right to include most reprisal claims under 5 U.S.C. § 2302(b)(9). Pub. L. No. 112-199 (2012). Signed into law by President Obama, this Act amended chapter 23 of title 5 “to clarify the disclosures of information protected from prohibited personnel practices, require a statement in non-disclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.” *Id.*; see also *Prohibited Personnel Practices: Our Process*, OCS.GOV, <https://osc.gov/Pages/ppp-ourprocess.aspx> (last visited Feb. 13, 2018).
143. See 5 U.S.C. § 2302(b)(8) (2016).
144. See 5 U.S.C. § 2302(b)(8)-(9) (2016).
145. See 5 U.S.C.A. § 2302(a)(2)(C)(ii) (2016); but see 5 U.S.C. § 2303 (2016) (setting out protections for FBI employees); see also “Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016,” Publ. L. No.114-302 (amending 5 U.S.C. § 2303 to expand protections for FBI employees).
146. *Kahn v. Dep’t of Justice*, 618 F.3d 1306, 1311 (Fed. Cir. 2010).
147. Instead, a person falling under § 793 of the Espionage Act would likely be categorized as a “leaker,” which has no legal definition. Barnes, *supra* note 140 at 521-25; see also Nick Gass, *White House: Snowden ‘Is Not a Whistleblower,’* POLITICO (Sept. 14, 2016), <http://www.politico.com/story/2016/09/edward-snowden-not-whistleblower-earnest-228163> (Josh Earnest states that Edward Snowden is not a whistleblower.).
148. *Whistleblower*, DICTIONARY.COM, <http://www.dictionary.com/browse/whistleblower> (last visited May 13, 2017).
149. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

150. *See* *Snepp v. United States*, 444 U.S. 507 (1980).
151. *Id.*
152. *Id.* at 507-08.
153. *Id.* at 508.
154. *Id.* at 507.
155. *Id.* at 510.
156. *Id.* at 511.
157. *Id.*
158. *Id.*
159. *Id.* at 512-13; (the Director of the CIA testified that this book and others like it have impeded American intelligence operations); *but see id.* at 518-19 (Stevens, J., dissenting) (Stevens disagreed with the imposition of a constructive trust, arguing that Snepp did not breach his duty to protect confidential information, but rather breached a contractual duty "imposed in aid of the basic duty to maintain confidentiality, to obtain prepublication clearance." "Like an ordinary employer, the CIA has a vital interest in protecting certain types of information; at the same time, the CIA employee has a countervailing interest in preserving a wide range of work opportunities (including work as an author) and in protecting his First Amendment rights. *The public interest lies in a proper accommodation that will preserve the intelligence mission of the Agency while not abridging the free flow of unclassified information.*" *Id.* at 520 (emphasis added)).
160. *See* *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988).
161. *Id.* at 1060.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Morison*, 844 F.2d at 1060-61.
167. *Id.* at 1061.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Morison*, 844 F.2d at 1063.
174. *Id.*
175. *Id.* at 1063-64. This is similar to the statutory issue discussed briefly in the *New York Times Co.* case. *See supra* note 32 and accompanying text.
176. *Morison*, 844 F.2d at 1064.
177. *Id.* at 1067.
178. *Id.*
179. *Id.* at 1067-68 (citing David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI.L.REV. 1205, 1218 (1983)).
180. *Id.* at 1068.
181. *Id.*
182. *Id.*
183. *Id.* at 1069-70.
184. *Morison*, 844 F.2d at 1070.
185. *Id.* at 1077. ("[T]he defendant in this case was not fired by zeal for public debate into his acts of larceny of government property; he was using the fruits of his theft to ingratiate

himself with one from whom he was seeking employment. It can be said that he was motivated not by patriotism and the public interest but by self-interest.”).

186. See Anthony Lewis, *Abroad at Home; The Pardons in Perspective*, N.Y. TIMES (Mar. 3, 2001), <https://www.nytimes.com/2001/03/03/opinion/abroad-at-home-the-pardons-in-perspective.html> (“Because he was concerned about growth of the Soviet Navy, he sent a satellite photograph of a new Soviet ship under construction to a defense magazine.”).
187. See *Jane’s Defence Weekly*, IHS MARKIT, <https://ihsmarkit.com/products/janes-defence-news-weekly.html> (last visited Mar. 20, 2018). President Bill Clinton eventually pardoned Morison. See Lewis, *supra* note 186.
188. *United States v. Rosen*, 445 F. Supp. 2d 602, 635 (E.D. Va. 2006).
189. Jon Greenberg, *CNN’s Tapper: Obama Has Used Espionage Act More Than All Previous Administrations*, PUNDITFACT (Jan. 10, 2014, 10:00 AM), <http://www.politifact.com/punditfact/statements/2014/jan/10/jake-tapper/cnns-tapper-obama-has-used-espionage-act-more-all/>.
190. *Id.*
191. *Id.*
192. *Id.*
193. See Glenn Kessler, *Edward Snowden’s Claim That He Had ‘No Proper Channels’ for Protection As a Whistleblower*, WASH. POST (Mar. 12, 2014), https://www.washingtonpost.com/news/fact-checker/wp/2014/03/12/edward-snowdens-claim-that-as-a-contractor-he-had-no-proper-channels-for-protection-as-a-whistleblower/?utm_term=.2f603228fb8e.
194. See OFFICE OF THE WHITE HOUSE PRESS SECRETARY, PRESIDENTIAL POLICY DIRECTIVE 19—PROTECTING WHISTLEBLOWERS WITH ACCESS TO CLASSIFIED INFORMATION (Oct. 12, 2012).
195. *Id.*
196. Kessler, *supra* note 193.
197. *Id.*
198. *Id.*
199. *Id.* The Intelligence Authorization Act for FY2014, Pub. L. No. 113-126 (2014), seemingly codifies and expands some of PPD-19’s protections; however, “protections extend only to employees of ‘covered intelligence community element[s],’ and therefore do not appear to apply to [Intelligence Community] contractors.” RODNEY M. PERRY, CONG. RESEARCH SERV., R43765, INTELLIGENCE WHISTLEBLOWER PROTECTIONS: IN BRIEF 7 (2014), <https://fas.org/sgp/crs/intel/R43765.pdf>.
200. See PERRY, *supra* note 199, at 6; see also *What is an Executive Order?*, AMERICAN BAR ASSOC’N, https://www.americanbar.org/publications/insights_on_law_and_society/17-fall-2016/what-is-an-executive-order.html (last visited May 19, 2018).
201. Intelligence Community Whistleblower Protection Act, Pub. L. No. 105-272 (1998); *Intelligence Community Whistleblower Protection Act (ICWPA): About the ICWPA*, DEP’T OF DEFENSE OFFICE OF INSPECTOR GENERAL, <http://www.dodhotline.dodig.mil/programs/whistleblower/icwpa.html> (last visited May 19, 2018).
202. *Intelligence Community Whistleblower Protection Act (ICWPA): About the ICWPA*, OFFICE OF INSPECTOR GENERAL: U.S. DEP’T. OF DEFENSE, <http://www.dodig.mil/programs/whistleblower/icwpa.html>.
203. See Daniel D’Isidoro, *Protecting Whistleblowers and Secrets in the Intelligence Community*, HARV. L. SCH.: NAT’L SECURITY J. (Sept. 29, 2014), <http://harvardnsj.org/2014/09/protecting-whistleblowers-and-secrets-in-the-intelligence-community/>; see also PERRY, *supra* note 199, at 2; Kessler, *supra* note 193.
204. See 50 U.S.C. § 3517(d)(5) (2015) (ICWPA provisions pertaining to CIA employees and contractors).
205. See *id.*; see also Mieke Eoyang, *Should Intelligence Whistleblowers Be Protected?*, THE ATLANTIC (Jan 23, 2016), <https://www.theatlantic.com/politics/archive/2016/01/should-intelligence-whistleblowers-be-protected/424872/>.
206. See *id.* Protections for whistleblowers outside the Intelligence Community are also lacking. For example, the Supreme Court recently held that, in order to qualify as a “whistleblower”

- under the Dodd-Frank Wall Street Reform and Consumer Protection Act, an individual must report a violation of the securities laws to the SEC; otherwise, the anti-retaliation provision of the Dodd-Frank act does not extend to said individual. *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 772-73 (2018).
207. *See* 50 U.S.C. § 3517(d)(5)(d)(i)-(ii) (2017) (to submit a complaint to Congress, the employee must still contact the agency head)..
 208. *See* Perry, *supra* note 199 at Summary (“However, intelligence whistleblowers could face retaliation from their employers for their disclosures, and the fear of such retaliation may deter whistleblowing.” *Id.* “None of these measures protect against retaliation or potential criminal liability arising from disclosures to media sources.” *Id.*).
 209. *See* Eoyang, *supra* note 205.
 210. *Id.*
 211. Kessler, *supra* note 193.
 212. D’Isidoro, *supra* note 203.
 213. *Id.*
 214. Dennis & Shell, *supra* note 8. Drake ultimately reached a plea agreement, where he only pled guilty to one count of exceeding the authorized use of a government computer and avoided prison time. *See* David Wise, *Leaks and the Law: The Story of Thomas Drake*, SMITHSONIAN MAG. (Aug. 2011), <https://www.smithsonianmag.com/history/leaks-and-the-law-the-story-of-thomas-drake-14796786/>.
 215. *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971).
 216. *See Whistleblower*, *supra* note 148.
 217. *See Journalist*, *supra* note 17.
 218. *New York Times Co.*, 403 U.S. at 717.
 219. *Id.* While Justice Black’s absolutism is not widely shared nor employed by the Supreme Court, his sentiment regarding the importance of the press to society has been echoed throughout most of the cases discussed in this paper. *See, e.g., Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97 (1979).
 220. *See 2014 Pulitzer Prizes*, *supra* note 4.
 221. *See* Anderson, *supra* note 12 (mentioning “journalistic discretion” as a possible object of protection under the Press Clause).
 222. Sarah Childress, *How the NSA Spying Programs Have Changed Since Snowden*, PBS (Feb. 9, 2015), <http://www.pbs.org/wgbh/frontline/article/how-the-nsa-spying-programs-have-changed-since-snowden/>.
 223. *Id.*
 224. *Id.*
 225. *See* Lori Grisham, *4 Things That Changed Since Snowden Leaks*, USA TODAY (Jun. 5, 2014, 9:13 AM), <https://www.usatoday.com/story/news/nation-now/2014/06/05/changes-since-snowden-leaks/9978561/>.
 226. *New York Times Co.*, 403 U.S. 713, 728 (1971).
 227. *Branzburg v. Hayes*, 408 U.S. 665, 727 (1972).
 228. *Id.*
 229. *United States v. Rosen*, 445 F. Supp. 2d 602, 646 (E.D. Va. 2006).
 230. *See* Papandrea, *supra* note 137, at 298. (“[C]ourts should require the government to prove not only that the publication of the information at issue caused immediate, serious, and direct harm to the national defense, but also that the offender intended to harm the United States or to aid a foreign country, or acted with reckless indifference to the same.”). Papandrea’s proposed “intent” standard “would permit liability based on ‘reckless indifference.’” *Id.* at 299.
 231. This legislation seemingly fits with Justice Brennan’s opinion in the *New York Times Co.* case. *See New York Times Co.*, 403 U.S. at 726.



David O'Connell

CIVIL ASSET FORFEITURE: LINING POCKETS AND RUINING LIVES

Introduction

In 2014, the federal government seized \$4.5 billion worth assets through civil asset forfeiture.¹ This amount equals about 116,589 four-year college degrees, 2,552 miles of new roads, thirteen new hospitals, or roughly four Big Macs for every American.² Whether the money is used to fund law enforcement or other government agencies, the authorities have a strong incentive to seize the assets of private citizens.

Civil asset forfeiture is the legal means the government employs to seize property that it suspects is associated with criminal activity. As its name suggests, civil asset forfeiture is a civil action.³ Law enforcement is not required to make an arrest before it can seize property.⁴ Approximately 56% of seizures are from property valued over \$1,000.⁵

In March 2017, Justice Clarence Thomas stated that a due process challenge to civil asset forfeiture would raise an “interesting question,” one which the Supreme Court is interested in answering.⁶ The majority of Americans oppose civil asset forfeiture as it is applied today.⁷

Civil asset forfeiture originated in western society as a function of customs law, but since the implementation of the modern war on drugs, its prevalence has escalated.⁸ A regime designed to incentivize the seizure of property for the state's own financial gain has led to grotesque abuses of power by law enforcement agencies.⁹

Section I of this article explains the history of civil asset forfeiture law, the policy justifications for its use, and how to reform its practice in the United States. Section II uses the laws of Missouri as an especially strict sample of how the civil asset forfeiture can work. Section III explains recent developments of civil asset forfeiture law at the federal and state level. The article concludes with a critique of the overall civil system and recommends reforms.

I. Legal background

A. History of civil asset forfeiture

Civil asset forfeiture, like most western jurisprudence, has Judeo-Christian roots.¹⁰ In this tradition asset forfeiture has been based on the theory that rights

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to property, usually livestock, had been compromised based upon involvement in a culpable action.¹¹ at 45th Street and Massachusetts Avenue NW Britain expanded asset forfeiture into customs law by passing the Navigation Act of 1651, authorizing the seizure of foreign ships upon entry into any port controlled by the British Empire.¹² This allowed the Britain to punish foreign citizens for maritime violations by seizing assets when it would have otherwise been impractical to obtain jurisdiction over the lawbreaker.¹³ In the early colonial era, the British Crown issued writs of assistance, which permitted its agents to seize whatever they deemed contraband.¹⁴ The Piracy Acts of 1819 in the U.S. permitted the seizure of maritime property upon a finding of probable cause that the ship was involved in piracy.¹⁵ The Supreme Court upheld the act and established that asset forfeiture proceedings can proceed *in rem* and are unrelated to the outcome of criminal proceedings.¹⁶

Historically, civil asset forfeiture was rare except for seizure of Confederate property after the civil war, during the prohibition era, and now with the war on drugs.¹⁷ When the Comprehensive Drug Abuse Prevention and Control Act of 1970 was passed, civil asset forfeiture was expanded to include illicit drugs and the means of producing and using those drugs.¹⁸ The Act was later amended to allow the forfeiture of the proceeds from drug sales.¹⁹ However, the law's high burden of proof meant that it was rarely used.²⁰ Congress would go on to pass the Comprehensive Crime Control Act of 1984, which introduced Federal Equitable Sharing²¹ and allowed law enforcement agencies to keep seized assets.²² Under this statute, the burden of proof was on the party whose assets were seized to show that their property was not related to criminal activity.²³ In 2000, Congress passed the Civil Asset Forfeiture Reform Act (CAFRA).²⁴ Under CAFRA, in civil asset forfeiture proceedings the government must establish "by a preponderance of the evidence that property is subject to forfeiture."²⁵ Though they often vary, each state has its own forfeiture process modeled after CAFRA.²⁶

B. Constitutional considerations

Civil asset forfeiture involves the taking of private property. Therefore, it must be evaluated under a procedural due process analysis. The central question in assessing its constitutional viability is determining what procedures would be fair to the property holder targeted by the government.²⁷ Courts answer this question by applying the *Mathews v. Eldridge* test,²⁸ which balances three-factors to evaluate the adequacy of procedure:²⁹ (1) the private interests at stake; (2) the risk of error in the procedure; and (3) the government interests at stake.³⁰

When applying *Mathews* to civil asset forfeiture, the Supreme Court has made a distinction between personal and real property.³¹ For personal property, the Court has placed few Fifth and Fourteenth Amendment Due Process

Clause protections³² and has consistently held that probable cause is all that is necessary to temporarily seize it under the Fourth Amendment.³³ In the civil forfeiture context, the seizure proceeding is *in rem* and, therefore, the notice to property holders facing civil asset forfeiture is minimal.³⁴ Further, the government is permitted to seize the personal property and retain it until the outcome of a proceeding.³⁵ In all other contexts, personal property is subject to the normal constitutional protections.³⁶ By contrast, when the government attempts to seize real property, the Fifth Amendment Due Process provision requires the heightened protections of notice and a reasonable opportunity to be heard.³⁷

C. Jurisdiction

Civil asset forfeiture jurisdiction can be either *in rem*³⁸ or *in personam*.³⁹ Civil *in personam* actions determine the civil liability and awards damages.⁴⁰ *In personam* jurisdiction requires that the court obtain personal jurisdiction over a defendant,⁴¹ which requires minimum contacts⁴² or actual presence within the jurisdiction.⁴³ In contrast “[a] judgment *in rem* affects the interests of all persons in designated property” and has nothing to do with personal liability.⁴⁴ In an *in rem* proceeding, the court asserts jurisdiction over property suspected of criminal involvement and takes actual or constructive possession of that property.⁴⁵ *In rem* jurisdiction only requires that the property be physically located within the court’s jurisdiction.⁴⁶

Because it’s easier to obtain jurisdiction over property than persons, law enforcement prefers to obtain *in rem* jurisdiction.⁴⁷ *In personam* jurisdiction is rarely asserted in federal or state asset forfeiture proceedings.⁴⁸

D. Theories of forfeiture

There are four modern theories of asset forfeiture: contraband, proceeds, facilitation, and enterprise forfeitures.⁴⁹ Contraband forfeiture consists of illegal narcotics, banned weapons, and counterfeiting tools.⁵⁰ Proceeds forfeiture consists of property that is lawful to possess but is derived from criminal activity—almost always money.⁵¹ Facilitation forfeiture involves property that is lawful to possess but that makes the commission of a crime easier.⁵² Enterprise forfeiture involves the government seizing business entities that are substantially related to criminal activity.⁵³

Under the contraband theory there is contraband *per se*, which is property that serves no lawful purpose and cannot be legally owned and there is derivative contraband, which is property that may have a lawful purpose but is used to facilitate a crime.⁵⁴ The contraband theory is predicated on the idea that one cannot have a property right in contraband because it cannot be legally possessed.⁵⁵ Although there are no due process considerations involved in seizing contraband *per se*, because no property rights can exist

in contraband,⁵⁶ when property subject to forfeiture is seized because it aids in the crime (the derivative contraband theory), government seizure is subject to procedural restrictions under the U.S. Constitution.⁵⁷

Under the proceeds theory, the government can seize funds that are “traceable to or used or intended to be used in illegal drug activities.”⁵⁸ This includes “interest, dividends, income, or property derived from the original transaction.”⁵⁹ That is, the government can seize money if there is probable cause to believe that the money is derived from or is intended to be used in a drug transaction.⁶⁰

The facilitation forfeiture theory can be divided into two sub-categories, instrumentality forfeitures and facilitation forfeitures.⁶¹ Instrumentality forfeitures are limited to property that is directly related to the offense and actually used in the commission of the offense.⁶² The facilitation theory of forfeiture applies when certain property makes the commission of a crime “less difficult.”⁶³ This means any property that is “used or intended to be used in any manner or part to commit or facilitate the commission of a violation” is forfeitable.⁶⁴

The final and most rarely used theory of civil asset forfeiture is the enterprise theory.⁶⁵ Seizures under this theory target interests in business organizations that may have been used in criminal activity.⁶⁶ The typical target of an enterprise forfeiture is a business organization used in money laundering.⁶⁷

E. Federal civil asset forfeiture statutes

In 2014, the federal government collected \$4.5 billion worth of forfeited assets.⁶⁸ There are numerous federal asset forfeiture statutes that allow civil asset forfeiture for a variety of crimes.⁶⁹ Some examples include when one fraudulently obtains assistance from the Supplemental Nutrition Assistance Program (SNAP);⁷⁰ facilitates animal fighting; transports an unlawful alien into the United States;⁷¹ fails to properly file export information;⁷² violates antitrust laws;⁷³ transports illegal oil;⁷⁴ possesses illegal gambling devices;⁷⁵ commits an archeological violation;⁷⁶ violates maritime fishing laws;⁷⁷ engages in criminal copyright infringement;⁷⁸ uses objects for counterfeiting currency;⁷⁹ smuggles;⁸⁰ possesses contraband explosives;⁸¹ possesses unlawful firearms;⁸² launders money that is used, obtained, or derived from criminal transactions;⁸³ possesses, creates, or distributes child pornography;⁸⁴ and when one possesses illegal controlled substances, and property derived from controlled substances.⁸⁵

The standard for the seizure of personal property in asset forfeiture is “probable cause.”⁸⁶ The Supreme Court said “[p]robable cause exists when the facts and circumstances within their (the officers’) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to

warrant a man of reasonable caution” to believe that a crime has occurred.⁸⁷ Probable cause is more than bare suspicion.⁸⁸ Civil asset forfeiture comprises a significant portion of the remedial and punitive aspects of our civil and criminal justice system.

F. Federal civil forfeiture procedure

Federal civil asset forfeiture consists of equitable sharing,⁸⁹ administrative forfeiture, and judicial forfeiture.⁹⁰

Equitable sharing is the legal means by which state governments may use federal asset forfeiture law.⁹¹ Equitable sharing occurs when there is either a cooperative investigation by state and federal authorities into a crime, or when a state government requests that a federal agency seize property through a state mechanism.⁹² When there is a joint investigation, federal law provides that a state or local law enforcement agency shall retain “a value that bears a reasonable relationship to the degree of direct participation” in the law enforcement activities.⁹³ However, even when a state government engages in 100 percent of the law enforcement activities, the federal government can still obtain 20 percent of the proceeds if the state government requests that the federal government adopt the asset forfeiture action.⁹⁴

Administrative and judicial forfeiture simply refer to the procedure by which the government seizes property.⁹⁵ Federal law permits the administrative forfeiture of improperly imported property and any personal property that can be forfeited under a contraband, proceeds, facilitation, or enterprise theory that does not exceed \$500,000 in value.⁹⁶ Notice must be given to anyone who may reasonably have an interest in the seized property, and interested persons must be given an opportunity to dispute the forfeiture.⁹⁷ If a claim is not filed, the property is forfeited.⁹⁸ If a claim is filed on time the process converts into a judicial proceeding.⁹⁹

Judicial proceedings are mandatory in real property actions,¹⁰⁰ actions involving personal property valued at over \$500,000,¹⁰¹ and contested administrative forfeitures.¹⁰² There is a statute mandating the time frame for filing a judicial action, unless the action is a contested administrative forfeiture.¹⁰³ The pleadings standards for a civil forfeiture action are the same for federal civil proceedings,¹⁰⁴ but the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture actions also apply.¹⁰⁵ The Supplemental Rules provide the procedure for giving notice in civil forfeiture actions.¹⁰⁶ Notice must be given to everyone with a foreseeable interest in the property.¹⁰⁷ Any party asserting a claim on the property in controversy has thirty days after service of notice to file their claim, and twenty days after the government filed their complaint to answer.¹⁰⁸ The government must establish that the property is subject to forfeiture by a preponderance of the evidence.¹⁰⁹

Someone claiming an interest in the property in controversy may assert an innocent owner affirmative defense by the preponderance of the evidence.¹¹⁰ An innocent owner must have almost no culpability in the underlying crime.¹¹¹

In either an administrative or judicial civil forfeiture action a claimant may file for remission or mitigation.¹¹² Remission or mitigation are administrative remedies that allow seizing parties to return property to the owner after the owner files a remission or mitigation petition.¹¹³ These remedies exist to provide an equitable alternative to expensive judicial proceedings.¹¹⁴ In an administrative proceeding, petitions for remission or mitigation should be filed with the seizing agency.¹¹⁵ In judicial proceedings, they are filed with the U.S. Attorney.¹¹⁶ Granting remission or mitigation is at the discretion of the relevant authority.¹¹⁷

G. State asset forfeiture overview

While some states have adopted asset forfeiture proceedings that protect property rights, most have not.¹¹⁸ In fact, forty states place the burden on the citizen to prove that their property was not involved in a crime.¹¹⁹ The other jurisdictions place the burden of proving the property is subject to forfeiture on the state either by a preponderance of the evidence or by clear and convincing evidence.¹²⁰ Most states give law enforcement a substantial share of the proceeds generated from asset forfeiture.¹²¹ Revenue generated from asset forfeiture has steadily increased from 2002 to 2015.¹²² Thus, in a majority of states asset forfeiture is easy for authorities and there is ample incentive to seize property.

H. Missouri civil asset forfeiture

Missouri's civil asset forfeiture law is stricter than federal asset forfeiture law,¹²³ primarily because it does not employ administrative asset forfeiture proceedings.¹²⁴ In Missouri, "all property of any kind" is subject to forfeiture if it is "used or intended to be used" in a criminal venture.¹²⁵ However, a party subject to forfeiture must have been convicted of a felony.¹²⁶ And, after the state files a petition to seize the property, notice must be given to person(s) who may have an interest in the property.¹²⁷

Any "net proceeds" taken through Missouri's civil asset forfeiture program go to Missouri schools,¹²⁸ though the Missouri government has used federal equitable sharing to avoid funding education.¹²⁹ Moreover, although Missouri law enforcement can obtain the proceeds of assets seized by requesting the federal government engage in equitable sharing, Missouri law is substantially more restrictive in regards to equitable sharing than other jurisdictions.¹³⁰ Transfer to a federal agency requires the prosecutor and the judge to agree that the transfer is proper and it reasonably appears that the alleged crime involves more than one state, involves a violation of federal law, and the vio-

lation is a felony under Missouri law.¹³¹ Missouri also has one of the strictest civil asset forfeiture timelines of any state.¹³²

II. Recent developments

A. Federal developments

CAFRA, enacted in 2000, is the most recent civil asset forfeiture statute passed by Congress.¹³³ Other civil asset forfeiture bills have been proposed since, but none have been enacted.¹³⁴ In 2015, the Obama administration's justice department discontinued federal equitable sharing because of a lack of funding.¹³⁵ The following year, equitable sharing was reintroduced.¹³⁶ More recently, the House of Representatives has voted to end adoptive forfeiture altogether.¹³⁷ This bill has been introduced in the Senate in the Homeland Security and Governmental Affairs committee, but as of this writing there has not been a vote.¹³⁸

In March 2017, the Supreme Court denied certiorari to a petition bringing a due process challenge to civil asset forfeiture procedures.¹³⁹ The reason for the denial was that the issue had not been properly preserved earlier in the case.¹⁴⁰ Justice Thomas issued a statement accompanying the denial of certiorari to the effect that he was skeptical that civil asset forfeiture could withstand due process scrutiny.¹⁴¹ He stated that historical jurisprudence on civil asset forfeiture was significantly narrower than it is today and that there is a lack of clarity on whether asset forfeiture has always been civil as opposed to criminal.¹⁴² Perhaps in response to this memo, the ACLU has filed a petition in an Arizona District Court challenging the constitutionality of its civil asset forfeiture laws.¹⁴³

B. State law developments

Due to a public outcry, some states have instituted civil asset forfeiture reform at the state level.¹⁴⁴ For example, New Mexico passed legislation that requires a criminal conviction prior to forfeiture.¹⁴⁵ Funds derived from asset forfeiture now go to a general fund and restrictions have been placed on law enforcement agencies seeking to use adoptive forfeiture.¹⁴⁶ Nebraska has adopted substantially similar legislation, but law enforcement agencies still get fifty percent of the proceeds from forfeited property.¹⁴⁷ Maryland has raised the evidentiary standard from a preponderance of the evidence to clear and convincing evidence.¹⁴⁸ Florida has increased the burden of proof to beyond a reasonable doubt.¹⁴⁹ The current trend in civil asset forfeiture law is to restrict the government's ability to seize property.¹⁵⁰

C. Examples of asset forfeitures application

There have been numerous cases of police abusing their power in civil asset forfeiture. For instance, a Tennessee man was pulled over during a routine traffic stop while carrying \$22,000 in cash.¹⁵¹ The man informed the police

officer that he was carrying the cash and gave the officer permission to search his car.¹⁵² Although he committed no crime and cooperated with the police, the officer seized the money because the owner “couldn’t prove [the money] was legitimate,” despite his claim that the money was going to be used to buy a car.¹⁵³ The police officer dismissively advised the owner not to carry so much cash (a lawful activity) because it is “safer.”¹⁵⁴ It took four years for the owner to get his money back.¹⁵⁵

In another case, law enforcement seized a property owners’ house because their son had been charged with dealing just \$40 worth of heroin.¹⁵⁶ This occurred despite the fact that the owners themselves had committed no crime.¹⁵⁷ In Teneha, Texas, law enforcement would routinely seize out-of-town drivers’ property and coerce them into signing over their property rights.¹⁵⁸ In another case, law enforcement seized a plant worker’s car, jailed him overnight, and “forced him to sign away his property, and then released him on the side of the road without a phone or money.”¹⁵⁹

Civil asset forfeiture, like most abuses of power, tends to disproportionately affect minorities and poor people.¹⁶⁰ In Los Angeles, a Latino businessman drove his taco truck home with \$10,000 dollars in cash in it.¹⁶¹ When he was stopped by law enforcement he disclosed that he was carrying the cash.¹⁶² The police officer seized the money although there was no evidence of criminal activity.¹⁶³ The businessman sought to challenge the seizure in state court, but he learned that the forfeiture action against his property had been transferred to a federal jurisdiction.¹⁶⁴ His attorney advised him not to seek to vindicate his rights against the federal government because asset forfeiture cases were more costly when the federal government was involved and challenging them often led to immigration investigations of relatives.¹⁶⁵ The businessman was never charged with a crime.¹⁶⁶ In another case, Joseph Rivers, a black man, was on a train to Los Angeles while carrying \$16,000 in cash.¹⁶⁷ Rivers and his family had saved enough money for him to pursue his dream in Hollywood.¹⁶⁸ A DEA agent stopped him on the train, searched his bag, and seized the money.¹⁶⁹ Rivers was the only black person in that part of the train and the only person the DEA searched.¹⁷⁰ Even though Rivers informed the DEA agent of his reasons for carrying the cash and was able to get family members on the phone to corroborate his story, the DEA agent took his money.¹⁷¹ Rivers was stuck on a train to Los Angeles with no means to support himself or get back home.¹⁷² He was never detained or charged with any crime.¹⁷³ These stories and others like them should give lawmakers and judges pause.

III. Discussion

A. Forfeiture law’s application

Civil asset forfeiture has often been criticized because it allows the government to take property from private citizens who may have not committed a

crime.¹⁷⁴ In 2015, law enforcement took more property from private citizens than criminal thieves did.¹⁷⁵ There is widespread dissatisfaction with the state of civil asset forfeiture law as it exists today.

It is often the case that there is no practicable remedy for this type of government infringement on property rights, either because the aggrieved party cannot afford to vindicate his or her rights or because it is not economically efficient to do so.¹⁷⁶ The introduction of remission and mitigation in federal proceedings were intended to alleviate some of the harshness of civil asset forfeiture.¹⁷⁷ However, this has not been successful in protecting property because remission and mitigation decisions are made at the discretion of law enforcement agencies.¹⁷⁸ Since law enforcement often gets to keep what it seizes and has a strong incentive to deny remission or mitigation, this reform ultimately does nothing to give the accused the power to protect their property rights, especially when the wealth they might have used to hire counsel has already been seized.¹⁷⁹ These perverse financial incentives for government agencies to seize property¹⁸⁰ continue to provide a selfish motive to abuse power and improperly seize property.¹⁸¹

Supreme Court precedent is mechanically applied to judicial review of forfeiture proceedings,¹⁸² even when impropriety is obvious to all but the Court.¹⁸³ Civil asset forfeiture law should depart from its mechanical and formalistic application and keep in step with the modern trend departing from formalism in favor of equity and justice. Judge Cardozo famously wrote in the 1920s that “[t]he law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today[.]”¹⁸⁴ but almost a century later civil asset forfeiture jurisprudence has yet to adapt to this old and sensible legal standard.

Although Missouri lawmakers have created relatively stringent restrictions on civil asset forfeiture,¹⁸⁵ it is still used arbitrarily, capriciously, and often with impermissibly discriminatory intent.¹⁸⁶ The Supreme Court has yet to hold civil asset forfeiture statutes unconstitutional,¹⁸⁷ despite the fact that it has a disparate impact on minorities¹⁸⁸ and deprives innocent individuals of property with no practicable remedy.¹⁸⁹ The Supreme Court should at long last hold that civil asset forfeiture statutes are unconstitutional.¹⁹⁰ State lawmakers should comply with equity, justice, and constitutional principles by creating asset forfeiture procedures that do not have prohibitively high costs.

B. Constitutional considerations

Civil asset forfeiture law began in the United States as a form of maritime customs law.¹⁹¹ A major reason that asset forfeiture was employed and upheld was that jurisdiction was difficult to obtain over ship owners who committed crimes at sea.¹⁹² The only practicable method of deterrence was to seize

the property used in the crime.¹⁹³ One can imagine how difficult it was for the post-colonial U.S. government to obtain jurisdiction over a Spaniard, for instance. In contrast, today property is often seized from people who are easy to locate or present during the seizure.¹⁹⁴ The policy considerations that existed shortly after the revolutionary war certainly justified the asset forfeiture procedure, but those who implemented it then could never have anticipated what we see today.¹⁹⁵

While the Supreme Court has held that the current procedures for the forfeiture of personal property are constitutional, in *Leonard v. Texas* Justice Thomas has indicated a new desire to hear due process challenges.¹⁹⁶ With the passage of time the state's interest in asset forfeiture has changed, as have the tests courts have used to measure its appropriateness.¹⁹⁷ Looking at the subject more broadly, all legal tests, even the so called "objective tests," such as the reasonable person test, are inherently subjective at some level.¹⁹⁸ Our justice system has dealt with this sort of subjectivity, which can imply a certain amount of arbitrariness, and has been able to adapt to account for it. We should not indulge myths about objectivity in the law, especially in an area as predatory and rife with abuse as this one. As public opinion changes, the Court has indicated that certain qualities of the law will and must change with it.¹⁹⁹ Change must occur in this area—and soon.

Since asset forfeiture involves the taking of property, due process is the main consideration in evaluating its constitutionality.²⁰⁰ The central question in a due process claim is "what process is due?"²⁰¹ The answer to this question is very fact-specific and involves balancing government and private interests.²⁰²

The Supreme Court set out the test for procedural due process in *Mathews v. Eldridge*.²⁰³ As noted, under this test the court weighs (1) the private interests at stake, (2) the risk of error in the procedure, and (3) the government interests at stake.²⁰⁴ This is necessarily a flexible test and should be applied in a manner that is consistent with a contemporary view of the cultural and legal landscape of our nation. In asset forfeiture, the Supreme Court has made a distinction between personal and real property and has made little of personal property rights in comparison to real property rights.²⁰⁵ However, this is not always a cogent distinction.

The first prong of the *Mathews* test considers the private interests at stake²⁰⁶—an individual's right to possess and enjoy their property free from government intrusion. The private interests at stake from forfeiture when personal property is involved are manifest. For example, if an Uber driver had his or her vehicle seized, the hardship might be even greater than losing a house. An Uber driver would simultaneously lose his or her livelihood and, for that reason, might be unable to pay for his or her housing. Also, if someone were in the process of purchasing real property with cash, and that cash was seized

by law enforcement, the risk of undue hardship in the forfeiture proceeding would be the same regardless of which legal category the property fell into. In some situations personal property seizures can create greater hardship than real property seizures. Private property interests should be considered at least as valuable as real property interests.

The second prong of the *Mathews* test is the risk of erroneous deprivation of property.²⁰⁷ There are numerous reasons why the risk of error in civil asset forfeiture is extremely high. Forfeitures are often the result of traffic stops or other innocuous activity.²⁰⁸ Even when an innocent owner has property that has no connection to a crime, the police can seize it based on probable cause,²⁰⁹ which is an easy standard to meet.²¹⁰ If the innocent owner has the money and economic incentive to contest the proceeding, he or she probably will be able to recover the property after some time. If the owner lacks the ability or economic incentive to go to court, then law enforcement will be able to obtain a default judgment and lawfully seize the property.²¹¹ Error is even more likely in states that require deprived property owners to prove their property was not involved in criminal activity, when states do not require criminal convictions, or where lower burdens of proof exist.²¹²

The next step in the risk of error analysis is evaluating the availability of alternative procedures.²¹³ There are many alternative procedures available. For example, replacing the probable cause requirement for continued government possession of property, mandating *sua sponte* judicial review of any seizure, requiring a warrant, creating heightened burdens of proof, requiring the appointment of counsel, or introducing low-cost administrative hearings are just a few options that would mitigate the risk of error.

The third prong of the *Mathews* test is the government interest at stake.²¹⁴ The government interests behind current asset forfeiture laws are deterring and punishing crime as well as obtaining funding.²¹⁵ Government interests in deterring crime can be substantially through the application of the criminal law. As for obtaining funding for the government, the traditional method of raising taxes, however politically unpopular, is always available.

Those who seek to justify asset forfeiture, as it is applied today, must resort to archaic and inapposite precedent.²¹⁶ Clearly, there are alternative procedures available that both satisfy the government interests and respect property rights. The Supreme Court should reconsider the constitutionality of forfeiture law under the *Mathews* test.²¹⁷

C. Alternatives

If the Court declines to hear a case that affords them the opportunity to add due process restrictions, state and federal legislators should craft comprehensive solutions to curb asset forfeiture abuse. Obvious solutions

include increasing the burden of proof to clear and convincing evidence and requiring a judicial determination before non-contraband property is seized. In addition, ending adoptive forfeiture, either through state or federal law, will go a long way toward limiting financial incentives for law enforcement to seize property. However, none of these solutions will address the prohibitive court costs that people face in asset forfeiture proceedings because a judicial hearing would still be required. Even if due process restrictions were increased, these costs remain prohibitively high.²¹⁸ Consequently, in addition to heightened due process requirements, civil asset forfeiture reform will require some novel measures.

South Africa has addressed a similar problem—to the general satisfaction of its citizens—by creating a quasi-judicial process for aggrieved employees.²¹⁹ In South Africa, employment disputes are common and when they arise most employees are not able to afford to litigate their disputes in court.²²⁰ The South African government created the Commission for Conciliation, Mediation and Arbitration (CCMA) to allow employees to overcome the prohibitive costs required to adjudicate their rights.²²¹ This has drastically increased access to justice. If the parties cannot agree on a settlement the employee can file a request with the CCMA and the parties will work to resolve their dispute in mediation.²²² If the parties cannot agree in mediation the proceeding turns into an arbitration that is appealable.²²³ The CCMA has a thirty-day deadline by which to resolve all disputes.²²⁴

The CCMA provides a framework for reform in asset forfeiture administrative proceedings. Mediation or arbitration satisfies due process requirements because it gives a claimant a meaningful opportunity to be heard in a meaningful manner, and it is not prohibitively costly. In addition, new administrative processes coupled with increased due process restrictions could adequately balance the government's interest in deterring crime with the personal property rights of citizens. Furthermore, by creating a process that most people can access, legislators would be decreasing the risk of the erroneous deprivation of property rights, legislators should consider adopting administrative procedures similar to South Africa's CCMA.

Conclusion

It is clear that civil asset forfeiture law as it is applied today does not serve justice. Any law that does not serve justice has no reason to exist. This is why civil asset forfeiture is probably one of the most universally reviled aspects of the current U.S. legal system.²²⁵ Despite the public outcry, there has been a lack of political will to address this issue because the widespread abuses stemming from its use disparately impact disempowered sectors of the population.²²⁶ Nevertheless, legislators at both the federal and state levels have made some progress in attempting to limit the government's ability to

unfairly seize property.²²⁷ The government should fulfill its duty to protect its most vulnerable citizens with meaningful reforms. In order to properly balance the interests of the government and property holders, creative solutions need to be enacted.

NOTES

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2. See Meg Wagner, *Here's What \$15 Billion Can Buy, Other Than President Trump's Border Wall*, NY DAILY NEWS (Jan. 26, 2017, 2:12 PM), <http://www.nydailynews.com/news/politics/15-billion-buys-trump-border-wall-article-1.2956462>.
3. See Adam Creppelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems It Creates*, 7 WAKE FOREST J.L. & POL'Y 315 (2017).
4. See *id.*
5. Monique Judge, *Civil Asset Forfeiture Seems to Target Poor Black and Brown People. Why Is That?*, THE ROOT (Aug. 11, 2016, 4:56 PM), <https://www.theroot.com/civil-asset-forfeiture-seems-to-target-poor-black-and-b-1797764673>.
6. Leonard v. Texas, 137 S. Ct. 847, 848, 850 (2017) (*cert. denied* but with additional statements from Thomas, J.).
7. See Radley Balko, *Jeff Sessions Supports States' Rights. Except When He Doesn't*, WASH. POST (July 18, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/07/18/jeff-sessions-supports-states-rights-except-when-he-doesnt/?utm_term=.91602dce05c8; *Asset Forfeiture Abuse*, ACLU, <https://www.aclu.org/issues/criminal-law-reform/reforming-police-practices/asset-forfeiture-abuse> (last visited Oct. 16, 2017).
8. Rachel L. Stuteville, *Reverse Robin Hood: The Tale of How Texas Law Enforcement Has Used Civil Asset Forfeiture to Take from Property Owners and Pad the Pockets of Local Government—the Righteous Hunt for Reform Is On*, 46 TEX. TECH L. REV. 1169, 1179 (2014).
9. Creppelle, *supra* note 3, at 332.
10. *Id.* at 317.
11. *Id.* For example, if a bull would gore somebody, then it would be stoned and its meat left uneaten. *Exodus* 21:28. The idea was that the animal was in some way evil, and people should not have any part in its wickedness. See *id.*
12. The Navigation Act, Scobell's Acts of Parliament, pt. ii, p. 176 (1651), available at <http://hammermanshistory.com/WP/wp-content/uploads/2011/08/The-Navigation-Act-1651-Primary-Source-Document.pdf>.
13. *Id.*
14. See Sarah Stillman, *Taken*, THE NEW YORKER (Aug. 12, 2013), <https://www.newyorker.com/magazine/2013/08/12/taken> (these writs of assistance are part of the justification for why the text of the Fifth Amendment forbids unreasonable seizure of property. *Id.*).
15. The Palmyra, 25 U.S. 1 (1827).
16. *Id.* at 15.
17. Creppelle, *supra* note 3, at 324.
18. *Id.*
19. *Id.* at 325.
20. *Id.* A violation and a lawful arrest, search, or seizure warrant was required in order to seize property. See Department of Justice Assets Forfeiture Fund Amendments Act of 1986, Pub. L. No. 99–570, § 1151–53, 100 Stat. 3207(b) (codified as amended at 18 U.S.C. § 981(b) (1986)).

21. Federal Equitable Sharing occurs when state and federal agencies jointly seize assets in a civil proceeding, generally the federal government keeps a percentage of the proceeds. *Dee R. Edgeworth* See ASSET FORFEITURE PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS 65-67 (*Dee R. Edgeworth* ed., 3d ed. 2014) [hereinafter ASSET FORFEITURE PRACTICE AND PROCEDURE].
22. *Crepelle*, *supra* note 3, at 325.
23. *Id.*
24. *Id.* at 326.
25. 18 U.S.C. § 982(c)(2) (2000). Notably, innocence is a complete defense in a civil asset forfeiture proceeding. *Crepelle*, *supra* note 3, at 326.
26. *Crepelle*, *supra* note 3, at 325.
27. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).
28. *Mathews v. Eldridge*, 424 U.S. 319 (1976).
29. *Id.*
30. *Id.* at 321.
31. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55–56 (1993).
32. See ASSET FORFEITURE PRACTICE AND PROCEDURE, *supra* note 21, at 57; see also *James Daniel Good Real Property*, 510 U.S. at 62.
33. *Boyd v. United States*, 116 U.S. 616, 640 (1886); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 702 (1965).
34. *James Daniel Good Real Property*, 510 U.S. at 44, 55–56 (holding that an *in rem* notice requirement can be met by posting notice on real property). In *in rem* proceedings, it is entirely possible that the property owner will have no notice of the seizure or the action against their property. See *Pennoyer v. Neff*, 95 U.S. 714 (1877).
35. *Republic National Bank of Miami v. United States*, 506 U.S. 80, 84-86 (1992).
36. See ASSET FORFEITURE PRACTICE AND PROCEDURE, *supra* note 21, at 7-10; see also *James Daniel Good Real Property*, 510 U.S. at 62.
37. *James Daniel Good Real Property*, 510 U.S. at 46.
38. *Republic National Bank of Miami*, 506 U.S. at 84.
39. ASSET FORFEITURE PRACTICE AND PROCEDURE, *supra* note 21, at 8.
40. *Id.*
41. See *Pennoyer v. Neff*, 95 U.S. 714 (1877).
42. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The minimum contacts standard applies to businesses when a company's presence is "continuous and systematic" and do not offend traditional notions of justice and fair play. *Id.* at 316-17.
43. *Burnham v. Superior Court of California*, 495 U.S. 604, 618 (1990).
44. *Shaffer v. Heitner*, 433 U.S. 186, 199 n.17 (1977) (quoting *Hanson v. Denckla* 357 U.S. 235, 246 n. 12 (1958)).
45. ASSET FORFEITURE PRACTICE AND PROCEDURE, *supra* note 21, at 7.
46. *Boyd v. United States*, 116 U.S. 616, 638 (1886).
47. ASSET FORFEITURE PRACTICE AND PROCEDURE, *supra* note 21, at 8-11.
48. *Id.* (New York is the only state that engages in civil proceedings exclusively through *in personam* jurisdiction.).
49. *Id.* at 11.
50. *Id.*
51. *Id.*
52. *Id.*
53. ASSET FORFEITURE PRACTICE AND PROCEDURE, *supra* note 21, at 11.

54. *Id.* at 12 (An example of derivative contraband would be a pipe that is used to smoke illegal drugs.).
55. *United States v. Jeffers*, 342 U.S. 48, 52-53 (1951).
56. *Id.*
57. *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1213 (10th Cir. 2001); ASSET FORFEITURE PRACTICE AND PROCEDURE, *supra* note 21, at 12.
58. *United States v. Premises Known as 3639-2nd St., N.E. Minneapolis, Minn.*, 869 F.2d 1093, 1097 (8th Cir. 1989).
59. ASSET FORFEITURE PRACTICE AND PROCEDURE, *supra* note 21, at 12 (citing *United States v. One 1980 Rolls Royce*, 905 F.2d 89, 91 (5th Cir. 1990)).
60. *Id.* at 12.
61. *Id.* at 13.
62. *Id.* (citing *United States v. Bajakajian*, 524 U.S. 321, 333 n.8 (1998)).
63. *Platt v. United States*, 163 F.2d 165, 166-67 (10th Cir. 1947).
64. ASSET FORFEITURE PRACTICE AND PROCEDURE, *supra* note 21, at 14 (quoting 21 U.S.C. § 881(a)(7)).
65. *Id.* at 16.
66. *Id.*
67. *Id.*
68. *CARPENTER II ET AL.*, *supra* note 1, at 6.
69. U.S. DEP'T OF JUSTICE, ASSET FORFEITURE AND MONEY LAUNDERING STATUTES (2015), available at <https://www.justice.gov/sites/default/files/criminal-afmls/legacy/2015/04/24/statutes2015.pdf>.
70. *See* 7 U.S.C. § 2024(b)(1), (e) (2014).
71. *See* 8 U.S.C. § 1324(a)(1)(A), (b)(1) (2005).
72. *See* 13 U.S.C. § 305(a) (2016).
73. *See* 15 U.S.C. § 6 (1890).
74. *See* 15 U.S.C. § 715f (1935).
75. *See* 24 U.S.C. § 1177 (1951).
76. *See* 17 U.S.C. § 470gg (1979).
77. *See* 16 U.S.C. § 916f (1970); 16 U.S.C. § 957 (2015).
78. *See* 17 U.S.C. § 506 (2008).
79. *See* 18 U.S.C. § 492 (2002).
80. *See* 18 U.S.C. § 545 (2006).
81. *See* 18 U.S.C. § 844(c) (2004).
82. *See* 18 U.S.C. § 924(d) (2006).
83. *See* 18 U.S.C. § 981 (2016).
84. *See* 18 U.S.C. § 2254 (2006).
85. *See* 21 U.S.C. § 881 (2002).
86. *Florida v. White*, 526 U.S. 559 (1999).
87. *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949).
88. *Id.* at 176.
89. Equitable sharing in asset forfeiture is the sharing of forfeited assets between government agencies. ASSET FORFEITURE PRACTICE AND PROCEDURE, *supra* note 21, at 8 (citing 21 U.S.C. § 881(e)(1)(A), (e)(3) (2002); 18 U.S.C. § 981(e)(2) (2016); 19 U.S.C. § 1616a (1930)).
90. ASSET FORFEITURE PRACTICE AND PROCEDURE, *supra* note 21, at 65-74.
91. *Id.*

92. *Id.* at 65-66.
93. 21 U.S.C. § 881(e)(3)(A) (2002).
94. U.S. DEP'T OF TREASURY, GUIDE TO EQUITABLE SHARING FOR FOREIGN COUNTRIES AND FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT AGENCIES 12 (2004); ASSET FORFEITURE PRACTICE AND PROCEDURE, *supra* note 21, at 66 (citing *State v. Gray*, 21 S.W.3d 847, 851 (Mo. Ct. App. 2000)).
95. ASSET FORFEITURE PRACTICE AND PROCEDURE, *supra* note 21, at 65, 74.
96. *See, e.g.*, 18 U.S.C. § 983 (2016); Monetary instruments, as defined by 31 U.S.C. § 5312(a) (3), are subject to seizure regardless of their value; 19 U.S.C. § 1607 (2016).
97. *See* 18 U.S.C. § 983 (2016); 19 U.S.C. § 1607 (2016); 19 U.S.C. § 1608 (1988).
98. *See* 18 U.S.C. § 983 (2016); 19 U.S.C. § 1609 (1988).
99. *See* 18 U.S.C. § 983(a)(3)(A) (2016); 19 U.S.C. § 1608 (1988).
100. *See* 18 U.S.C. § 985(a) (2000).
101. *See* 19 U.S.C. § 1607 (2016).
102. ASSET FORFEITURE PRACTICE AND PROCEDURE, *supra* note 21, at 74 (citing 19 U.S.C. §§ 1603-1604 (1988)).
103. *See id.* There is a ninety-day deadline for filing a claim in contested administrative actions. 18 U.S.C. § 983(a)(3)(A) (2016). If the government does not meet this deadline they are required to return the property without prejudice its right to maintain a further forfeiture action. § 983(a)(1)(F).
104. *See* *United State v. Aguilar*, 782 F.3d 1101, 1107 (9th Cir. 2015); *see also* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
105. *See* FED. R. CIV. P. SUPP. AMC G(1). In addition to the pleading standards set out in the Federal Rules of Civil Procedure, complaints for forfeiture actions must describe the property and state its location if it is tangible. *See* FED. R. CIV. P. SUPP. AMC G(2).
106. *See* FED. R. CIV. P. SUPP. AMC G(4). Notice must be published in a newspaper "generally circulated" in the district where the action was filed, where the property was seized, or where the property is located. *See* FED. R. CIV. P. SUPP. AMC G(4)(a)(iv). The notice must either be published once a week for three weeks or only once if notice was placed on the government forfeiture site for at least 30 consecutive days. *See* FED. R. CIV. P. SUPP. AMC G(4)(a)(iii).
107. *See* ASSET FORFEITURE PRACTICE AND PROCEDURE, *supra* note 21, at 74 (citing *Dusenbery v. United States*, 534 U.S. 161, 170 (2002)).
108. *See* 18 U.S.C. § 983(a)(4) (2016). A claim is a statement asserting one's interest in property, an answer is a responsive pleading document used in all civil proceedings. *See* § 983(a)(4) (A); *see also* FED. R. CIV. P. 7(a)(2).
109. *See* § 983(c)(1)-(2). If a facilitation theory of forfeiture is used then the government must also establish a "substantial connection between the property and the offense. *See* § 983(c) (3).
110. *See* § 983(d)(1).
111. *See* § 983(d). An innocent owner could not have known of the criminal conduct giving rise to the forfeiture or alternatively acted reasonably under the circumstances. *See* § 983(d) (2)(A)(i)-(ii). Acting reasonably requires notifying law enforcement of illegal activity and revoking permission to use property once illegal activity is discovered as long as it would not subject them to physical danger. *See* § 983(d)(2)(B)(i)-(ii). An innocent owner must either have a lawful interest in the property or have no reason to believe the property is involved in a crime. *See* § 983(d)(3).
112. *See* 18 U.S.C. § 981(d) (2016).
113. ASSET FORFEITURE PRACTICE AND PROCEDURE, *supra* note 21, at 71-73.
114. *Id.* at 71.
115. *Id.* at 74 (citing 28 C.F.R. § 9.3(a)).

116. *Id.* at 76 (citing 28 C.F.R. § 9.4(a)).
117. *See* 28 C.F.R. § 9.4(f)-(g) (2012). The agency is required to investigate the merits of the claim. § 9.4(f).
118. Crepelle, *supra* note 3, at 330–31.
119. Crepelle, *supra* note 3 at 330–31.
120. CARPENTER II ET AL., *supra* note 1, at 20.
121. *Id.* at 18.
122. *Id.* at 15.
123. *See generally* MO. ANN. STAT. § 513.607 (West 1986).
124. *Id.*
125. *Id.*
126. *See* Springfield v. Gee, 149 S.W.3d 609, 615 (Mo. Ct. App. 2004).
127. *See* § 513.607.7
128. Reorganized School Dist. No. 7 Lafayette County v. Douthit, 799 S.W.2d 591, 594 (Mo. 1990).
129. *See* Nick Sibilla, *Loophole Lets Missouri Cops Keep Millions in Forfeiture Funds (and Away from Schools)*, INSTITUTE FOR JUSTICE (Mar. 27, 2017), <http://ij.org/loophole-lets-missouri-cops-keep-millions-forfeiture-funds/>.
130. State v. Gray, 21 S.W.3d 847, 851 (Mo. Ct. App. 2000) (holding that a small police department can engage in equitable sharing because of a lack of resources).
131. *See, e.g.*, MO. ANN. STAT. § 513.647 (West 2017). *See also* State v. Sledd, 949 S.W.2d 643 (Mo. Ct. App. 1997).
132. *See* ASSET FORFEITURE PRACTICE AND PROCEDURE, *supra* note 21, at 79–82.
133. *Id.* at 68.
134. *See, e.g.*, H.R. 5212, 113th Cong. (2d Sess. 2014); *see also* H.R. 5212 (113th): *Civil Asset Forfeiture Reform Act of 2014*, GOVTRACK, <https://www.govtrack.us/congress/bills/113/hr5212> (last updated Oct. 9, 2014).
135. *See* Christopher Ingraham, *The Justice Department Just Shut Down a Huge Asset Forfeiture Program*, WASH. POST (Dec. 23, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/12/23/the-feds-just-shut-down-a-huge-program-that-lets-cops-take-your-stuff-and-keep-it/?utm_term=.601dab26a1d5.
136. *See id.*
137. *See* Ilya Somin, *House Votes to Curb Asset Forfeiture*, WASH. POST (Sep. 13, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/13/house-votes-to-curb-asset-forfeiture/?utm_term=.f9d065b47d57.
138. *See* S.126, 115th Cong. (2017), available at <https://www.congress.gov/bill/115th-congress/senate-bill/126/actions> (may be cited as the “Repeat ID Act of 2017”).
139. Leonard v. Texas, 137 S. Ct. 847 (2017) (*cert. denied* but with additional statements from Thomas, J.).
The petitioner focused on the preponderance of the evidence standard in its due process challenge to civil asset forfeiture. *Id.*
140. *Id.*
141. *Id.* at 849.
142. *Id.*
143. *See* Cox v. Voyles, et. al., ACLU, <https://www.aclu.org/cases/cox-v-voyles-et-al> (last updated Aug. 21, 2017).
144. *See* Jason Sneed, *An Overview of Recent State-Level Forfeiture Reforms*, THE HERITAGE FOUNDATION (Aug. 23, 2016) <http://www.heritage.org/crime-and-justice/report/overview-recent-state-level-forfeiture-reforms>.

145. *See id.*
146. *See id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *See id.*
151. Phil Williams, *Man Loses \$22,000 In New 'Policing For Profit' Case*, NEWS CHANNEL 5 (Jan. 17, 2016, 8:40 PM), <http://www.newschannel5.com/story/18241221/man-loses-22000-in-new-policing-for-profit-case>.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. Pamela Brown, *Parents' House Seized After Son's Drug Bust*, CNN (Sept. 8, 2014, 10:45 AM), <http://www.cnn.com/2014/09/03/us/philadelphia-drug-bust-house-seizure/index.html>.
157. *Id.*
158. *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (*cert. denied* but with additional statements from Thomas, J.).
159. *Id.*
160. *See* C.J. Ciaramella, *Poor and Minority Neighborhoods Bear the Brunt of Asset Forfeiture in Las Vegas*, REASON (Aug. 7, 2017, 2:45 PM) <https://reason.com/blog/2017/08/07/poor-and-minority-neighborhoods-bear-the>.
161. *Read the Stories of Civil Asset Forfeiture Victims*, ACLU (March 2016) <https://www.aclunc.org/article/read-stories-civil-asset-forfeiture-victims>.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *See* Joline Gutierrez Krueger, *DEA to Traveler: Thanks, I'll Take That cash*, ALBUQUERQUEJOURNAL, (Mar. 6, 2015 12:05 AM), <https://www.abqjournal.com/580107/dea-agents-seize-16000-from-aspiring-music-video-producer.html>.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *See* Christopher Ingraham, *The Feds Have Resumed A Controversial Program That Lets Cops Take Stuff and Keep It*, WASH. POST (Mar. 28, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/03/28/the-feds-have-resumed-a-controversial-program-that-lets-cops-take-stuff-and-keep-it/?utm_term=.adaa3c7ba213.
175. *See* Crepelle, *supra* note 3, at 315.
176. *See* C.J. Ciaramella, *Inside Mississippi's Asset Forfeiture Extortion Racket*, REASON (Jan. 5, 2017, 10:00 AM), <http://reason.com/blog/2017/01/05/inside-mississippis-asset-forfeiture-ext>. It can cost \$1,500 just to file with the court to contest an asset forfeiture. *Id.*
177. *See* Crepelle, *supra* note 3, at 71; 18 U.S.C. § 981(d) (2000).

178. See Crepelle, *supra* note 3, at 71.
179. See J. Ciaramelia, *Inside Mississippi's Asset Forfeiture Extortion Racket*, REASON, (Jan. 5, 2017) <http://reason.com/blog/2017/01/05/inside-mississippi-asset-forfeiture-ext>.
180. See CARPENTER II ET AL., *supra* note 1, at 6.
181. See *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55–56 (1993).
182. See *Bennis v. Michigan*, 516 U.S. 442, 454–56 (1996).
183. See CARPENTER II ET AL., *supra* note 1, at 6.
184. *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917).
185. See ASSET FORFEITURE PRACTICE AND PROCEDURE, *supra* note 21, at 79–82.
186. See Robert Patrick, *Ferguson Drops Charges Against Man After 5 Years; He Says They Cost Him His Job And Home*, STL TODAY (Sept. 13, 2017), http://www.stltoday.com/news/local/crime-and-courts/ferguson-drops-charges-against-man-after-years-he-says-they/article_45b6505b-9b5e-54ab-9075-4c4ae175b1b1.html. In this case police officers in Ferguson seized \$2,000 from a man who intended to use that money for tuition for his child's school. *Id.*
187. See, e.g., *Leonard v. Texas*, 137 S. Ct. 847 (2017) (cert. denied but with additional statements from Thomas, J.).
188. See Rebecca Vallas et al., *Forfeiting the American Dream*, CENTER FOR AMERICAN PROGRESS (April 1, 2016, 6:00 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2016/04/01/134495/forfeiting-the-american-dream/>.
189. See C.J. Ciaramelia, *Inside Mississippi's Asset Forfeiture Extortion Racket*, REASON, (Jan. 5, 2017, 10:00 AM) <http://reason.com/blog/2017/01/05/inside-mississippi-asset-forfeiture-ext>.
190. Civil asset forfeiture is not facially unconstitutional, but rather that the application of civil asset forfeiture law unconstitutionally infringes on the private property rights of citizens.
191. See *The Palmyra*, 25 U.S. 1, 10–11 (1827).
192. *Id.*
193. *Id.*
194. See Crepelle, *supra* note 3, at 71.
195. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015).
196. *Leonard v. Texas*, 137 S. Ct. 847 (2017) (cert. denied but with additional statements from Thomas, J.).
197. See Allison Morse, *Good Science, Bad Law: A "Multiple Balancing" Approach to Adjudication*, 46 S.D. L. REV. 410, 441 (2001).
198. See Christopher Jackson, *Reasonable Persons, Reasonable Circumstances*, 50 SAN DIEGO L. REV. 651, 653–55 (2013) (discussing that there is no objective way to measure what a "reasonable person" is because each person's concept of what is reasonable is different).
199. See *Gregg v. Georgia*, 428 U.S. 153, 171 (1976).
200. See *Connecticut v. Doebr*, 501 U.S. 1, 2 (1991).
201. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).
202. See *id.*
203. 424 U.S. 319, 321 (1976).
204. *Id.*
205. See, e.g., *United States v. James Daniel Good Real Property*, 510 U.S. 43, 46 (1993).
206. *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976).
207. *Id.*
208. See Crepelle, *supra* note 3, at 330–31.
209. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 702 (1965).
210. See Crepelle, *supra* note 3, at 328.

- 211. *See* FED. R. CIV. P. 55.
- 212. *See* Crepelle, *supra* note 3, at 330–31.
- 213. Mathews, 424 U.S. at 321.
- 214. *See id.*
- 215. *See* ASSET FORFEITURE PRACTICE AND PROCEDURE, *supra* note 21, at 65–66.
- 216. *See* Crepelle, *supra* note 3, at 315.
- 217. Mathews, 424 U.S. at 321.
- 218. *See* C.J. Ciaramelia, *Inside Mississippi's Asset Forfeiture Extortion Racket*, REASON, (Jan. 5, 2017, 10:00 AM) <http://reason.com/blog/2017/01/05/inside-mississippi-asset-forfeiture-ext> (it can cost \$1,500 just to file with the court to contest an asset forfeiture proceeding).
- 219. *See* *About Us*, CCMA, <https://www.ccma.org.za/About-Us> (last visited May 10, 2018); *see also* Labour Relations Act 66 of 1995 (S. Afr.).
- 220. *See id.*
- 221. *See id.*
- 222. *See id.*
- 223. *See id.*
- 224. *See id.*
- 225. *See* Balko, *supra* note 7.
- 226. *See id.*; *see also* Leonard v. Texas, 137 S. Ct. 847, 848(2017) (cert. denied, but with additional statements from Thomas, J.).
- 227. *See* Sneed, *supra* note 144. For more information and updates, visit nlg.org



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who share classified information on issues of vital public concern with journalists, it may even allow for the convictions of journalists themselves, the First Amendment notwithstanding. She argues that legislative action is needed to protect journalists and their sources. Given the current occupant of the White House's past statements and unabashedly authoritarian tendencies, such legislation can't be passed soon enough.

Civil asset forfeiture is the great money racket of our contemporary criminal justice system. The process often involves law enforcement agencies seizing property as contraband from criminal suspects who have yet to be convicted or even formally charged and converting that property to cash to replenish their own budgets. In many overpoliced and impoverished communities where anti-law enforcement sentiment is already high, this results in a circular problem of spurring aggressive policing that expropriates from the poor to finance future cycles of even more intense police aggression, poverty, and resentment.

Civil asset forfeiture mocks the Constitution's due process clauses, which require a presumption of innocence in criminal cases. It allows the government to target the property of criminal suspects as illegal contraband in civil actions where the rights of the accused are dramatically reduced and the government's evidentiary burden is much lower. In many cases, the government can successfully confiscate the property of individuals it cannot prove guilty of any crime. Even more perversely, the dispossessed often have to prove themselves innocent before they can reclaim what has been taken.

Civil asset forfeiture is a timeworn practice long favored by the government as a way of punishing suspected wrongdoers it finds too difficult to punish criminally. But it's never been used with the ubiquity and intensity we're seeing now. The War on Drugs, ramped up in the 1980s and revitalized by the current U.S. attorney general,⁴ has made confiscation without conviction common police practice.

In "Civil Asset Forfeiture: Lining Pockets and Ruining Lives," David O'Connell explores the history, constitutionality, and everyday impact of this uniquely menacing and overused police practice. He also provides practical suggestions for reform that courts and legislatures can adopt to curb its harmful effects.

—Nathan Goetting, editor-in-chief

1. David Jackson, *Trump Again Calls Media 'Enemy of the People'*, WASH. POST (Feb. 24, 2017, 10:54 AM), <https://www.usatoday.com/story/news/politics/2017/02/24/donald-trump-cpac-media-enemy-of-the-people/98347970/>.
2. Jordan Fabian, *Trump Blasts White House Leakers As 'Traitors'*, THE HILL (May 14, 2018, 4:57 PM), <http://thehill.com/homenews/administration/387642-trump-blasts-white-house-leakers-as-traitors>.
3. Jonathan Weisman, *Trump Denounces 'Low-Life Leakers,' Pledging to Hunt Them Down*, N.Y. TIMES (Feb. 16, 2017), <https://www.nytimes.com/2017/02/16/us/politics/trump-russia-leaks-twitter.html>.
4. Lois Beckett, *How Jeff Sessions and Donald Trump Have Restarted the War on Drugs*, GUARDIAN (Aug. 21, 2017), <https://www.theguardian.com/us-news/2017/aug/21/donald-trump-jeff-sessions-war-on-drugs>.

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