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WHEN PROSECUTORS ACT AS JUDGES: RACIAL DISPARITIES AND THE ABSENCE OF DUE PROCESS SAFEGUARDS IN THE JUVENILE TRANSFER DECISION

Funmi Anifowoshe Manning

ABSTRACT

The juvenile justice system was created and designed to be separate from the adult criminal justice system. Initially, the juvenile system was meant to be informal and to prescribe treatment for young offenders, rather than serve as an adjudicatory forum to punish them. However, with the changing demographics in the U.S. came a change in juvenile crime rates and society's perception of young people. Today, the parens patriae philosophy of the juvenile court system, where the state acts as a "parent-surrogate" and intervenes to protect children, is viewed as too weak and insufficient to handle certain juvenile offenders. A number of legislatures thus permit prosecutors to transfer juveniles to criminal courts with no standards to guide them nor judges to check their decisions. This transfer strips young people of the protections offered by juvenile courts, such as psychological treatment, rehabilitative services, and the privacy afforded by sealed records. Transfer practices are particularly problematic because a disproportionate number of these youths are minorities, and a large percentage of those transferred are charged with property offenses, not violent crimes. This Note advocates for the elimination of discretionary prosecutorial waiver statutes or, in the alternative, transparency and consistency in the review of waiver decisions.

WHEN PROSECUTORS ACT AS JUDGES: RACIAL DISPARITIES AND THE ABSENCE OF DUE PROCESS SAFEGUARDS IN THE JUVENILE TRANSFER DECISION

Funmi Anifowoshe Manning

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I. INTRODUCTION

"Too often, discussion in the legal academy and among practitioners and policymakers concentrates simply on the adjudication of guilt or innocence. Too easily ignored is the question of what comes next. Prisoners are shut away—out of sight, out of mind."[1] These are the words of former Supreme Court Justice Anthony Kennedy, lamenting on the conditions of prisons and correctional facilities, and the practice of isolating prisoners for 23 hours a day.[2] Unprompted, Justice Kennedy briefly highlighted the plight of Kalief Browder, a 16-year-old who was accused of stealing a backpack and spent three years of his adolescence in the juvenile ward of Rikers Prison in New York.[3]

Browder's story is a tragic one. Browder was a young, black teenager accused of a relatively minor crime. Browder was previously charged as an adult, convicted of grand larceny, and given a youthful offender status over a previous "joyride" incident.[4] As a result of that conviction, Browder was still on probation when he was accused of stealing a man's backpack and was detained on charges of robbery, grand larceny, and assault. Browder's family could not afford to pay the $3,000 bail, and Browder, *still* 16, was sent to Rikers. Browder, detained in a section of the prison with other juveniles, was often beaten by other inmates and guards, beatings he said that other inmates "endured much worse."[5] Although Browder's family thought he had grown stronger to combat the violence he faced, Browder also struggled with depression and isolation. Browder unsuccessfully attempted to hang himself while at Rikers. After three years, the charges against Browder were dropped because the District Attorney did not have enough evidence to bring a case. Tragically, two years after returning home and attempting to restore his life, Browder committed suicide.[6] Browder's story and anguish have revitalized the

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[1] Davis v. Ayala, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring).
[2] *Id.* at 2208–09.
[3] *Id.* at 2210; *see also* Jennifer Gonnerman, *Before the Law*, THE NEW YORKER (Sep. 24, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law/amp.
[4] Gonnerman, *supra* note 3.
[5] *Id.*
[6] Vanessa Romo, *New York City Reaches $3.3 Million Settlement with Kalief Browder's Family*, NPR (Jan. 25, 2019), https://www.npr.org/2019/01/25/688501884/new-york-city-reaches-3-3-million-settlement-with-kalief-browders-family.

movement for juvenile justice reform[7] and has brought juvenile justice issues to the forefront—unfortunately too late for Browder to benefit.[8]

The decision to charge Browder as an adult is not unique, and Browder's death should shine the spotlight on all states' juvenile justice systems and procedures—particularly, the mechanisms and statutes allowing youth offenders to be treated as adults. In Browder's case, New York legislation mandated that he be treated as an adult. But other states, with more clandestine mechanisms such as prosecutorial waiver (also called "direct file"), allow the executive branch to decide whether juveniles may be treated as adults and funnel them into the criminal justice system. In thirteen jurisdictions, state prosecutors have the absolute discretion to decide whether or not to transfer a youth offender to the criminal justice system via the direct file process.[9] Every day, black and brown boys and girls like Kalief Browder are transferred to the adult criminal justice system. In California, for example, "[i]n 2013, for every white teenager who experienced direct file, 2.4 Latino youth and 4.5 black youth faced the same situation. By 2014, 3.3 Latino youth and 11.3 black youth faced direct file for every white young person."[10]

The resulting series of events leading to Browder's tragic passing highlights one of the many problems of treating youth offenders as adults. The adult criminal justice system is insufficient to serve the wide array of needs of youths and adolescents, as evidenced by Browder's attempted suicide during his incarceration and his suicide ideation after his release. The elimination of direct file laws also

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[7] *See, e.g.*, Shabnam Javdani & Erin Godfrey, *A New Season for Youth Justice Reform*, HUFFINGTON POST (July 10, 2016), https://www.huffingtonpost.com/shabnam-javdani/a-new-season-for-youth-ju_b_10895542.html. *See also Sens. Lankford and Booker Introduce Bipartisan Bill to Ban Juvenile Solitary Confinement*, THE ADA NEWS (Feb. 9, 2017), https://www.theadanews.com/news/local_news/sens-lankford-and-booker-introduce-bipartisan-bill-to-ban-juvenile/article_98cf98c2-cc42-5cfd-a3e0-31919c65077e.html.

[8] *See* Romo, *supra* note 6. The death of young Mr. Browder incentivized legislators in the state of New York to pass reforms to the juvenile justice system. *Id.* One of these reforms was aimed at raising the age at which youth offenders can remain in the juvenile justice system, in contrast to previous legislation in New York, which allowed 16- and 17-year-old offenders to be treated as adults in the criminal justice system. *Raise the Age*, NEW YORK STATE, https://www.ny.gov/programs/raise-age-0 (last visited Nov. 20, 2018).

[9] *See infra* II.B(3); *see also See* Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx (last visited Sep. 16, 2020).

[10] Sarah Barr, *Several States Look to Keep Teenagers Out of Criminal Court*, JUVENILE JUSTICE INFORMATION EXCHANGE (June 23, 2016), https://jjie.org/2016/06/23/several-states-look-to-keep-teenagers-out-of-criminal-court/.

would stymie many of the disparities that continue to plague our juvenile and criminal justice systems. This Note will focus on the racial and social inequalities that arise when the executive branch grants prosecutors unfettered discretion and decision-making power about how to treat our youths.[11]

II. THE HISTORY OF THE JUVENILE JUSTICE SYSTEM

The creation of the juvenile court system in the United States was the result of many reform movements.[12] Initially, there was no separate system for youth accused of criminal violations.[13] The industrialization and increased immigration of individuals into the United States in the 19th century led to "overcrowding, disruption of family life, increase in vice and crime, and all the other destructive factors characteristic of rapid urbanizations."[14] The resulting "[t]ruancy and delinquency" led to a general concern about children and the "desire to rescue [them] and restore them to a healthful, useful life."[15] These concerns manifested into goals by progressive reformers to "diagnose and treat the problems underlying deviance,"[16] with the additional goals of tackling "inadequate housing, dysfunctional and broken families, dependency and neglect, poverty, crime and delinquency, and economic exploitation."[17] These goals led to the adoption of the doctrine of *parens patriae* in the burgeoning legal system, where the state acts as a "parent-surrogate" and intervenes to protect children.[18] These reforms led to the founding of many new institutions to protect children in the legal system, such as the New York City's House of Refuge in 1825, an institution created to separate

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[11] *See infra* Section III.
[12] *See* BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT 19–25 (2017); ELLEN MARRUS & IRENE MERKER ROSENBERG, CHILDREN AND JUVENILE JUSTICE 3–6 (2d ed. 2012).
[13] MARRUS & ROSENBERG, *supra* note 12, at 3. This was because under the common law system, "children under 7 years [old were presumed to be] incapable of felonious intent," and thus could not "be held criminally responsible" for their actions. *Id.* Similarly, children older than 7 but under 14 years of age were not held criminally responsible "unless [it was] shown [that they could] understand the consequences of [their] actions." *Id.*
[14] *Id.* at 4. *See also* Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or A Revolution That Failed?*, 34 N. KY. L. REV. 189, 191–92 (2007).
[15] MARRUS & ROSENBERG, *supra* note 12, at 4.
[16] *Id. See also* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 141–42 (1997).
[17] FELD, *supra* note 12, at 23.
[18] *Id.* at 24.

children from adult offenders and provide them with "corrective treatment rather than punishment."[19] Soon after, "[s]tate reform[s] and industrial schools" for children were established.[20]

Slowly, these reforms began to take hold in court systems all over the country.[21] In 1899, Illinois became the first jurisdiction, through its Juvenile Court Act, to establish a separate court specifically for children.[22] The advocates and reformers viewed juveniles as "innocent[,] albeit misguided children…[and] they believed children were less blame-worthy than were adults for criminal behavior and more amenable to change."[23] Thus, the *parens patriae* philosophy of the juvenile justice system was viewed as negating the need for due process in juvenile proceedings.[24] "Hearings were to be informal and nonpublic, records confidential, children detained apart from adults, [and] a probation staff appointed."[25] A lawyer and other formal procedures were viewed as unnecessary because "adversary tactics"[26] would not aide in the effectuation of a treatment plan and the best interests of a child.[27]

A. THE DEVELOPMENT OF DUE PROCESS AND PROCEDURAL SAFEGUARDS FOR JUVENILES

In the 1960s, the Supreme Court used the constitutional strategies of "incorporation, reinterpretation, and equal protection" to decide state criminal

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[19] MARRUS & ROSENBERG, *supra* note 12, at 4. *See also* Brice Hamack, *Go Directly to Jail, Do Not Pass Juvenile Court, Do Not Collect Due Process: Why Waiving Juveniles into Adult Court Without A Fitness Hearing Is A Denial of Their Basic Due Process Rights*, 14 WYO. L. REV. 775, 783–84 (2014).
[20] *See* MARRUS & ROSENBERG, *supra* note 12, at 4.
[21] *See* Feld, *supra* note 14, at 193–97.
[22] Hamack, *supra* note 19, at 783; MARRUS & ROSENBERG, *supra* note 12, at 5.
[23] *See* FELD, *supra* note 12, at 30.
[24] *See* Amanda NeMoyer, *Kent Revisited: Aligning Judicial Waiver Criteria with More Than Fifty Years of Social Science Research*, 42 VT. L. REV. 441, 443–46 (2018). The "ordinary trappings of the court-room" were considered superfluous in juvenile proceedings, including the right to counsel, a jury, and the application of the rules of evidence. *Id*. at 445.
[25] MARRUS & ROSENBERG, *supra* note 12, at 5; *see also* NeMoyer, *supra* note 24, at 445–46.
[26] MARRUS & ROSENBERG, *supra* note 12, at 5. Under this system, a "fatherly and sympathetic" judge would preside over juvenile proceedings and would "investigate, diagnose, and prescribe treatment, not … adjudicate guilt or fix blame." *Id.*
[27] *See* FELD, *supra* note 14, at 196.

procedure cases and extend constitutional rights to criminal defendants.[28] The Court then began expanding these procedural rights and safeguards to juveniles.[29]

1. *The Right to a Hearing When Faced with Judicial Transfer to Criminal Court*

Notably, in *Kent v. United States*, the Court held that a juvenile, when faced with a judicial waiver of the juvenile court's jurisdiction, was entitled to a hearing, a statement of reasons for the court's decision, and access by his or her counsel to social records or other similar reports.[30] Morris A. Kent, Jr., aged 16, was accused of breaking-and-entering, burglary, and rape after his fingerprints were found to match those on the crime scene.[31] For about one week, Kent was shuffled between police headquarters for interrogation and a children's institution, with no arraignment and no determination by a judge as to whether there was probable cause to detain him.[32] Kent's counsel filed a motion to allow the Juvenile Court to grant access to Kent's social services file.[33] He aimed to show that Kent was mentally ill and if given "adequate treatment in a hospital under the aegis of the Juvenile Court," he could be rehabilitated.[34] The Juvenile Court judge entered an order waiving jurisdiction and directing that Kent be held for trial.[35] The judge did this without conducting a hearing, conferring with Kent or his parents, nor reciting any findings of fact or reasons for the waiver.[36] Kent was tried in criminal court, found guilty, and sentenced to a total of 30 to 90 years in prison.[37]

The Supreme Court reasoned that although the District of Columbia statute gave courts discretion as to the weight of factual considerations, it did not confer upon the courts "a license for arbitrary procedure."[38] The Court emphatically stated that "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, [and] without a statement of reasons."[39] The Court noted that although the District's statute was rooted in a "social welfare philosophy," evidence showed that the children in these proceedings received "neither the protections accorded to

[28] *See* FELD, *supra* note 12, at 56–57.
[29] *Id.*
[30] Kent v. United States, 383 U.S. 541, 557, 560–62 (1966).
[31] *Id.* at 543.
[32] *Id.* at 544–45.
[33] *Id.* at 546.
[34] *Id.* at 544–45.
[35] *Id.* at 546.
[36] *Id.*
[37] *Id.* at 550.
[38] *Id.* at 553.
[39] *Id.* at 554.

adults nor the solicitous care and regenerative treatment postulated for children."[40] The Court held that the hearings provided to juveniles "must measure up to the essentials of due process and fair treatment."[41] In an appendix to the opinion, the Court enumerated specific standards which a juvenile court judge should weigh during the decision to waive or transfer jurisdiction to criminal court including: the seriousness of the offense, whether the offense was committed against persons or property, the merit of the complaint and the likelihood of an indictment, the maturity of the juvenile and his or her home life situation, the juvenile's record and court history, the ability to protect the public, and the likelihood of "reasonable rehabilitation" of the juvenile.[42]

Then, in *Breed v. Jones,* the Court held that the Double Jeopardy Clause was applicable to juvenile proceedings, regardless of their "civil" nature. Jones was 17 years old when he was charged in juvenile court with armed robbery.[43] Jones was first tried in juvenile court and found "unfit for treatment as a juvenile" and then was later transferred to and prosecuted as an adult in state court for the same crime.[44] The Court reasoned that "the risk to which the term jeopardy refers is that traditionally associated with 'actions intended to authorize criminal punishment to vindicate public justice,'" and given the magnitude of consequences resulting from juvenile hearings, "there is little to distinguish" it from criminal prosecution. [45] The Court held that a State must "determine whether it wants to treat a juvenile within the juvenile-court system *before*…a proceeding that may result in an adjudication that he has violated a criminal law and in a substantial deprivation of liberty, rather than subject him to the expense, delay, strain, and embarrassment of two such proceedings."[46]

In sum, *Kent* and *Breed* together establish that states that choose to provide transfer hearings must provide reasonable and legitimate procedures, including a proper hearing, sufficient notice to a juvenile's family and attorney, the right to legal assistance, and a statement of reasons for the decision to transfer to the juvenile.[47]

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[40] *Id.* at 554–57.
[41] *Id.* at 562.
[42] *See Id.* at 564–68. The Appendix to the Opinion cited Policy Memorandum No. 7, which listed criteria previously adopted by the D.C. Juvenile Court to govern waiver requests but had been abrogated by the time of the Court's decision. *Id.* at 546 n.4.
[43] Breed v. Jones, 421 U.S. 519, 521 (1975).
[44] *Id.* at 522–26.
[45] *Id.* at 529–31.
[46] *Id.* at 537–38 (emphasis added).
[47] *See* Marisa Slaten, Note, *Juvenile Transfers to Criminal Court: Whose Right Is It Anyway?*, 55 RUTGERS L. REV. 821, 829 (2003).

2. *A Youth's Right to Due Process During Juvenile Proceedings*

The Court affirmed and further extended procedural rights for juveniles in *In Re Gault*.[48] *Gault* established the required due process rights that must be afforded to juveniles during juvenile court proceedings generally. [49] 15-year-old Gerald Gault was accused of making lewd statements via telephone to his neighbor.[50] He was arrested and detained with no notice given to his family[51], and after numerous hearings with many conflicting statements regarding Gault's involvement in the phone calls, Gault was committed to a "State Industrial School" until the age of 21.[52] The Court recognized that the "loose procedures, high-handed methods and crowded court calendars, either singly or in combination, all too often, have resulted in depriving some juveniles of fundamental rights that have resulted in a denial of due process."[53] The Court held that due process entitled juveniles to notice of their charges provided in time to have a "reasonable opportunity to prepare,"[54] the right to be represented by counsel,[55] the Fifth Amendment "privilege against self-incrimination" and involuntary confessions,[56] and the opportunity to cross-examine any accusers under oath.[57]

Finally, *In Re Winship*, the Court held that the standard of proof beyond a reasonable doubt was applicable to juvenile proceedings.[58] There, Samuel Winship, a 12-year old boy was convicted of stealing over $100 from a locker that he broke into.[59] He was ordered to be placed into a "training school" for six years until he turned 18.[60] The Court reversed, finding that throughout the Nation's history, a high standard for criminal cases and convictions has been expressed, and the Court, since as early as 1881, had presumed that the constitution required such a standard.[61] The Court concluded that the beyond a reasonable doubt standard was just as important as the procedural safeguards established in *Gault.*[62] Despite the progress in

[48] *See In Re* Gault, 387 U.S. 1 (1967); *see also* FELD, *supra* note 12, at 56–57.
[49] *See* Gault, 387 U.S. at 30–31.
[50] *Id.* at 4–6.
[51] *Id.* at 5.
[52] *Id.* at 6–9.
[53] *Id.* at 19.
[54] *Id.* at 33.
[55] *Id.* at 41.
[56] *Id.* at 55–56.
[57] *Id.* at 56–57.
[58] *In re Winship* 397 U.S. 358, 367 (1970).
[59] *Id.* at 359–60.
[60] *Id.* at 360.
[61] *Id.* at 361–62.
[62] *Id.* at 368.

constitutional safeguards for juveniles, some scholars have argued that the Court's endorsement led to the "convergence" of criminal law and juvenile courts.[63]

B. An Examination of Existing Juvenile Waiver Statutes

Today, every state and the District of Columbia has a separate juvenile court system. All states have statutory limits on the age of minority for juvenile court.[64] In nearly every state, 17 is the maximum age at which the juvenile court has jurisdiction over the individual,[65] while Georgia, Michigan, Missouri, Texas, and Wisconsin have a lower maximum set at age 16.[66] In addition, every jurisdiction has transfer laws, also called "waiver" or "removal" laws—that enable the removal of juveniles from the juvenile court's jurisdiction and subsequent transfer to criminal court.

There are generally three main distinct mechanisms to transfer juveniles to criminal courts: judicial waiver, legislative exclusion, and prosecutorial waiver, also known as "direct file." Nearly every state uses a combination of these mechanisms.[67] This Note will specifically focus on waiver and transfer provisions involving prosecutorial waiver.

1. *Judicial Waiver Transfer Mechanisms*

The oldest method by which juveniles may be transferred to criminal court is via judicial waiver laws.[68] Judicial waiver requires an individualized assessment of each juvenile before the child or adolescent is transferred to criminal court.[69] As a result of the *Kent* decision and the standards enumerated by that Court, most judicial waiver statutes require a "psychiatric and/or psychological evaluation" of

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[63] *See* FELD, *supra* note 12, at 64–67 (positing that *Gault*, *Winship*, and *Breed* "criminalized delinquency trials").
[64] *See* Teigen, *supra* note 9 (last visited Sep. 16, 2020).
[65] *Id.*
[66] *Id.*; *See also* Raise the Age, NEW YORK STATE, https://www.ny.gov/programs/raise-age-0 (last visited Nov. 20, 2018); *see also* What is Raise the Age?, RAISE THE AGE NORTH CAROLINA, https://raisetheagenc.org/raise-the-age/ (last visited Nov. 20, 2018) (New York and North Carolina, states that previously set the maximum age of juvenile court jurisdiction at age 15 have both passed "Raise the Age" laws to be phased into legislation over time. By 2019, both state laws will take into effect to raise the age of juvenile court jurisdiction to 18 years old).
[67] U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING (2011) [hereinafter STATE TRANSFER LAWS REPORT].
[68] *Id.* at 2.
[69] *See* Robert O. Dawson, *Judicial Waiver in Theory and Practice*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 45 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

the child and a standard of "charge seriousness . . . that must be met before waiver is permitted."[70] Although judicial waiver requires individual assessment of each juvenile, some state legislatures have amended judicial waiver laws to "encourage" efficient waiver decisions.[71] In sum, more than half of states have discretionary judicial waiver laws that allow juvenile court judges to waive jurisdiction over a defendant juvenile, generally on a motion by the prosecutor and after a hearing.[72] And still, several states have presumptive or mandatory judicial waiver statutes, that presume or require the transfer of juvenile offenders charged with certain crimes.[73]

2. *Legislative Exclusion Transfer Mechanisms*

Legislative or statutory exclusion allows legislatures to carve out exceptions in the juvenile court's jurisdiction for the commission of certain crimes, and these cases must be filed in criminal court in the first instance.[74] Twenty-nine states have statutory exclusion laws.[75] Unlike judicial waiver statutes, there is little to no individualized determination regarding a juvenile's status under legislative exclusion, and these exclusions are absolute.[76] These laws generally exclude more serious offenses from the juvenile court's jurisdiction, regardless of the age of the offender.[77] Juveniles may also be excluded under this form of waiver because of their age and prior offenses.[78] Legislatures have the power to exclude certain youths from the juvenile justice system and can "freely . . . define their jurisdiction" because the juvenile court system is a legislative creation.[79]

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[70] *Id.* at 52.
[71] *Id.* at 46.
[72] STATE TRANSFER LAWS REPORT, *supra* note 67, at 2; *see, e.g.*, IND. CODE ANN. § 31-30-3-1 (West 2018).
[73] STATE TRANSFER LAWS REPORT, *supra* note 67, at 3 (15 states each have presumptive and mandatory juvenile waiver laws).
[74] *Id.* at 2.
[75] *Id.* at 3.
[76] *See* Dawson, *supra* note 69, at 48.
[77] STATE TRANSFER LAWS REPORT, *supra* note 67, at 2.
[78] *See* Dawson, *supra* note 69, at 48.
[79] Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 83, 85 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

3. *Prosecutorial Discretion ("Direct File") Transfer Mechanisms*[80]

The final transfer mechanism is prosecutorial discretion, also known as "direct file."[81] It is called "direct file" because a prosecutor may directly file the youth's case in criminal court, rather than juvenile court, in the first instance. In the modern juvenile justice system, some states have enacted laws granting the juvenile court and criminal court concurrent jurisdiction over youths, and the prosecutor has the discretion to decide which forum to bring the case in.[82] Only thirteen jurisdictions currently utilize prosecutorial discretion laws: Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Louisiana, Michigan, Montana, Nebraska, Oklahoma, Virginia, and Wyoming.[83] In these states, the prosecutor's decision is two-fold. First, they must decide "whether probable cause exists to believe that the youth committed a particular offense," and second, if there is concurrent jurisdiction, the prosecutor must decide whether to charge the accused youth in juvenile court or criminal court.[84]

Similar to legislative exclusion, prosecutorial discretion laws allow little to no individualized assessment of the juvenile and prosecutors are not required to justify their decision on the record nor provide the juvenile with a hearing and a statement of the reasons.[85] In the overwhelming majority of states with prosecutorial discretion laws, there are no standards or criteria governing the prosecutor's decision over which forum to charge and try the juvenile.[86] And unlike the judicial waiver decision, where judges have access to social records and extenuating circumstances of a juvenile's home life, prosecutors do not have access to those records.[87]

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[80] "Prosecutorial discretion" or "prosecutorial waiver" will be used interchangeably with "direct file."

[81] U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 1, 7–8 (1998).

[82] STATE TRANSFER LAWS REPORT, *supra* note 67, at 2.

[83] *Id.* at 6; *see also* Teigen, *supra* note 9 (last visited Sep. 16, 2020).

[84] Feld, *supra* note 79, at 98.

[85] STATE TRANSFER LAWS REPORT, *supra* note 67, at 5 ("Even in those few states where statutes provide some general guidance to prosecutors, or at least require them to develop their own decision-making guidelines, there is no hearing, no evidentiary record, and no opportunity for defendants to test (or even to know) the basis for a prosecutor's decision to proceed in criminal court.").

[86] Feld, *supra* note 79, at 99; STATE TRANSFER LAWS REPORT, *supra* note 67, at 5.

[87] Feld, *supra* note 79, at 99.

4. *Trends*

Arguably, the most serious legal consequence for any young person is the decision made by a prosecutor to charge them as an adult. "When they get direct filed to adult [court], it's sort of this cruel wake-up call."[88] Some scholars have noted that in the 1980s to 1990s, legislators appeared to be in a frenzy—enacting new laws, nearly annually, to expand the various transfer mechanisms.[89] The new legislation included laws that "moved entire classes of young offenders" into the criminal justice system without oversight from juvenile court judges.[90] As a result, judicial oversight and authority in transfer decisions was significantly diminished, with non-judicial waiver decisions representing the mechanism by which most juveniles were transferred in the 1990s.[91] Today, nearly 85% of juveniles transferred to criminal court are transferred via non-judicial waiver mechanisms—legislative waiver and prosecutorial waiver.[92] These changes were fueled by the "Get Tough Era," that began in the 1970s.[93] The Get Tough Era is marked by the stereotyping of youth offenders as "super-predators" combined with predictions about soaring and spiraling youth crime rates led legislators to enact "get tough laws"—measures aimed to punish juveniles, rather than rehabilitate them.[94] These laws also permit or mandate the prosecution of certain classes of juvenile offenders in criminal court.[95]

III. PROBLEMS WITH THE "DIRECT FILE" SYSTEM

There are many problems with the direct file system. First, a youth is not entitled to a transfer hearing nor are they entitled to a weighing of individualized factors enumerated in *Kent*. This is because in direct file cases, the prosecutor exercises their discretion to directly-file the case in criminal court—the practical

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[88] *See* Renata Sago, *Charging Youths As Adults Can Be A 'Cruel Wake-Up Call.' Is There Another Way?*, NPR (Aug. 15, 2018), https://www.npr.org/2017/08/15/542609000/sentenced-to-adulthood-direct-file-laws-bypass-juvenile-justice-system (quoting attorney Jeff Ashton).
[89] *See* Jeffrey A. Butts & Ojmarrh Mitchell, *Brick by Brick: Dismantling the Border Between Juvenile and Adult Justice*, *in* OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, Boundary Changes in Criminal Justice Organizations 178 (2000).
[90] *Id.* at 178.
[91] *Id.*
[92] *See, e.g.*, JOLANTA JUSZKIEWICZ, PRETRIAL SERVICES RESOURCE CENTER, YOUTH CRIME/ADULT TIME: IS JUSTICE SERVED? 7 (2000).
[93] *See* FELD, *supra* note 12, at 105.
[94] *See* FELD, *supra* note 12, at 105–06.
[95] *See generally* STATE TRANSFER LAWS REPORT, *supra* note 67, at 2.

effect is that these cases are considered to have originated in criminal court and these youths become adults for all purposes.[96] Second, a prosecutor's decision to directly-file a youth in criminal court is made without a statement of reasons and is not reviewable by a court.[97] Third, it appears that because juvenile courts are a statutory creation, the creation or recognition of additional federal constitutional rights of youths in the juvenile justice and criminal justice system appears limited.[98]

Black and brown adolescents are facing a crisis in the criminal justice system. One study found that "nearly two-thirds of the juveniles detained pretrial were held in adult jails pending disposition of their cases," and a third of those detained in these adult jails were held among the "adult inmate population."[99] The study also showed that the high pretrial release rates, non-conviction, and probation rates of arrested and detained youths show that cases "filed in adult court in many instances may not be sufficiently serious or strong."[100] It would appear that states with direct file laws are "unnecessarily and inappropriately [sweeping youths] up into the adult criminal justice system."[101] The absence of statutory guidelines for prosecutors utilizing direct file leads to arbitrary decision-making and prosecutorial discretion in the transfer system results in disproportionately greater numbers of racial minorities being direct-filed into criminal court. Furthermore, the direct file system is not an effective punitive measure, does not actually deter crime rates, and results in worse outcomes for youths in adult jails and prisons.

A. ARBITRARY DECISION-MAKING

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[96] *Id.* at 5.

[97] *See United States v. Bland*, 472 F.2d 1329, 1335 (D.C. Cir. 1972); Barry C. Feld, *Juvenile Transfer*, 3 CRIMINOLOGY & PUB. POL'Y 599, 601 (2004). "It has similarly been accepted that a state prosecuting attorney has wide discretion in determining whether to prosecute and, if there is to be a prosecution, in deciding which of several possible charges to bring against an accused, including a capital charge, and whether to file charges directly in criminal court against a juvenile." 4 CRIMINAL PROCEDURE § 13.2(a) (4th ed.) (Nov. 2018) (internal quotations and citations omitted).

[98] *See, e.g.*, Hamack, *supra* note 19, at 808. Hamack argues that "under the Due Process Clause juveniles have a liberty interest in adjudication within the juvenile court system…[and] to adequately protect this liberty interest, the Due Process Clause demands a full fitness hearing before a juvenile is transferred to the adult criminal system--a hearing similar to those utilized in traditional judicial waiver schemes." *Id.* at 806. *See also United States v. Bland*, 472 F.2d 1329, 1335 (D.C. Cir. 1972), *cert. denied* 412 U.S. 909, where the Supreme Court refused to take up the issue of juvenile transfer hearings within the direct file prosecutorial waiver system.

[99] *See* JUSZKIEWICZ, *supra* note 92 at 62.

[100] *Id.*

[101] *Id.*

Prosecutorial waiver statutes generally vary by state. However, they provide little to no guidelines for prosecutors in their decision to transfer a juvenile to criminal court.[102] In Georgia, the prosecuting attorney may transfer a juvenile to criminal court if the youth is "alleged to have committed a delinquent act which would be considered a crime if tried in a superior court and for which an adult may be punished by loss of life, imprisonment for life without possibility of parole, or confinement for life in a penal institution."[103] In Arizona, the statute provides that "[i]f during the pendency of a criminal charge in any court of this state the court determines that the defendant is a juvenile who is subject to prosecution as an adult. . . on motion of the prosecutor the court shall transfer the case to the juvenile court."[104] And in Arkansas, the statute states that a prosecutor "may charge a juvenile in either the juvenile or criminal division of circuit court when a case involves a juvenile: (1) At least sixteen (16) years old when he or she engages in conduct that, if committed by an adult, would be any felony" or (2) any fourteen or fifteen year old accused of engaging in certain crimes.[105] In addition to the absence of guiding principles, a prosecutor's decision to transfer a juvenile to criminal court is not reviewable by a court.[106]

The absence of any guiding principles for prosecutorial waiver decisions increases the "dangers of arbitrary, capricious, and discriminatory dispositions inherent in unstructured decision-making."[107] Further, the separation of powers doctrine has long held courts at bay from interfering with the "free exercise of the discretionary powers" of prosecutors.[108] In the absence of a showing that a prosecutor deliberately considered unconstitutional factors, such as race, sex, or

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[102] For a nationwide summary of transfer laws, including judicial waiver, statutory exclusion, and prosecutorial discretion laws (direct file), *see* ACLU.org (2014), https://www.aclu.org/sites/default/files/assets/2014_03_19_hrw_amicus_appendix_state_transfer_laws.pdf.

[103] *See* GA. CODE ANN. § 15-11-560 (West 2019).

[104] *See* ARIZ. REV. STAT. § 8-302(B).

[105] *See* ARK. CODE ANN. § 9-27-318(c) (2018) (part (c) still current and valid).

[106] *See, e.g.*, Feld, *supra* note 97, at 601.

[107] *Cf.* Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281, 284 (1991) (noting that the standard enumerated in *Kent* to guide judges during transfer decisions ensured "some degree of equitability to the transfer process.")

[108] *See, e.g.*, *Bland*, 472 F.2d at 1335 (quoting *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965)).

religion, differential treatment of the accused by the prosecutor does not necessarily warrant judicial review.[109]

> Arbitrary, unsystematic decision-making…sometimes results in disparate treatment of similarly situated victims and defendants. That prosecutors do not intend to cause racial disparities does not excuse them from responsibility for the harmful effects of their decisions.[110]

Additionally, the Department of Justice's Office of Justice Programs ("OJP") notes that although juvenile courts provide data about delinquency proceedings to the National Center for Juvenile Justice, there is no national information database on decisions waived or originating in criminal court as a result of legislative waiver or prosecutorial discretion.[111] As a result, some data on the transfer or waiver practice of prosecutors in juvenile justice cases is largely missing.[112] For example, data collected from the 75 largest counties in the United States, showed that less than 25% of juvenile cases were transferred to criminal court via judicial waiver.[113] This means that nearly 80% of juveniles are transferred from juvenile court to criminal court in those counties without the individualized determination and judicial hearing that *Kent* envisioned.[114]

The absence of comprehensive available data and the increasing frequency of transfer via direct file is problematic given the many serious consequences that follow when a juvenile is transferred to adult court.[115] For example, a teenager convicted of robbery with a firearm would face a minimum sentence of three years in California's juvenile detention facility, while the same act would carry a minimum sentence of twelve years for an adult.[116] The transfer decision causes the charged juvenile to lose the "shield from publicity, protection against extended pre-trial detention and post-conviction incarceration with adults, and a guarantee that

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[109] *See id.* at 1336 (citing *Oyler v. Boles*, 368 U.S. 448 (1962)).

[110] *See* Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 210 (2007).

[111] STATE TRANSFER LAWS REPORT, *supra* note 67, at 12. OJP found that of the states with prosecutorial discretion laws, only one state publicly reported the number of cases filed in criminal court, while four other states merely reported an "undifferentiated total of all criminally prosecuted cases." *Id.* at 15.

[112] *Id.* at 10–12. The dearth of data makes it difficult to "assess the workings, effectiveness, and overall impact of these laws." *Id.* at 15.

[113] *Id.* at 12.

[114] *See id.* at 12.

[115] *See* Bishop & Frazier, *supra* note 107, at 283.

[116] Jennifer Taylor, Note, *California's Proposition 21: A Case of Juvenile Injustice*, 75 S. CAL. L. REV. 983, 991 (2002).

confinement will not extend beyond the age of majority."[117] In more than half the states, a youth that has been previously prosecuted and convicted as an adult is rendered "an adult forever."[118] The media may also have a coercive effect on a prosecutor's decision to transfer a juvenile to criminal court—a prosecutor, whose supervisor is politically elected, may feel pressure to waive a juvenile in order to appease the public and ease political pressure.[119]

1. *Lessons to be Learned from Florida and Its Prosecutorial Waiver Laws*

There are important lessons to be learned on the pitfalls of the "opaque and unlimited discretion"[120] of prosecutorial waiver decisions from one of the largest states utilizing prosecutorial discretion: Florida. Florida enacted its prosecutorial waiver statute in 1979 and amended it in 1981 to give prosecutors unlimited discretion to transfer 16 and 17-year old juvenile offenders.[121] In Florida, prosecutors were able to transfer a juvenile without a hearing, statement of reasons explaining the transfer decision, counsel for the juvenile, or a showing of amenability or resistance to treatment.[122] Transfer data from the years 1986 and 1987 showed 50,289 and 57,298 delinquency filings in total.[123] The percentage of those filings transferred to criminal court were 6.41 and 7.35, respectively.[124] However, of the percentage transferred from juvenile court to criminal court, 88% were transferred via prosecutorial discretion in both years.[125] Scholars noted that this overwhelming increase in the amount of juvenile cases transferred via direct file were followed by declines in indictment and judicial waiver—citing a 12% decline in judicial waiver in the year 1987.[126]

Interviews conducted in Florida with prosecutors after the enactment of the waiver legislation helped explain the following immense rise in prosecutorial waiver decisions. Nearly all Florida prosecutors that responded to an interview request were pleased with the law because they viewed the increase in their discretionary power as a positive one.[127] Half of the prosecutors surveyed "wished

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[117] *See* Bishop & Frazier, *supra* note 107, at 283.
[118] STATE TRANSFER LAWS REPORT, *supra* note 67, at 7.
[119] *See* Taylor, *supra* note 116, at 994.
[120] *See generally* HUMAN RIGHTS WATCH, BRANDED FOR LIFE 40–78 (2014).
[121] Bishop & Frazier, *supra* note 107, at 287 (citing FLA. STAT. ANN. § 39.02(5)(c) (West 1988); FLA. STAT. ANN. § 39.04(2)(e)(4) (West 1988)). Florida's current prosecutorial waiver and direct file laws are codified in FLA. STAT. ANN. § 985.557 (West 2019).
[122] Bishop & Frazier, *supra* note 107, at 287–288.
[123] *Id.* at 288 (referring to Table 1).
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.* at 289.

the change [in the law] had been even more far reaching,"[128] while some expressed reservations about the "considerable potential for abuse" or worried that "less ethical" prosecutors would unnecessarily transfer cases.[129]

What is perhaps most disconcerting is that the personal philosophies of prosecutors regarding juvenile justice did not align with their transfer decisions.[130] Half the survey respondents believed that juveniles should be transferred to criminal court only as a last resort, yet "many of them transferred as high a proportion of cases as those prosecutors reporting a more punitive stance. Virtually every prosecutor, *regardless of [their] orientation toward juvenile justice*, reported having increased the transfer of juveniles to criminal court following the 1981 change in the law."[131] One reason cited by prosecutors for waiver decisions, even when they believed prosecutorial waiver should only be a method of last resort, is that they viewed Florida's juvenile treatment and rehabilitative programs as insufficient, and believed juveniles would not and could not be rehabilitated in such a system.[132] As a result, Florida prosecutors felt that the juvenile justice system could serve no rehabilitative purpose and they felt forced to transfer juveniles to the criminal justice system much sooner.[133]

Further, in Florida, the prosecutorial waiver decisions appeared "largely attributable to differences in bureaucratic practices, rather than [] differences in the seriousness or perceived prosecutorial merit of cases."[134] A study of two midsized counties revealed that charged juveniles were at different levels of risk for being direct filed merely because of the "idiosyncrasies" of the prosecutors' offices.[135] In the smaller county, many cases failed to proceed to criminal court merely because the prosecutors in the criminal division of the county office failed to act timely, and their cases were unable to be prosecuted "for violation of speedy trial rules."[136] While in the larger county, this problem was not present because the chief of the juvenile division "personally filed bills of information" in criminal court, and transfers were only halted if an attorney from the criminal division intervened.[137]

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[128] *Id.*
[129] *Id.* at 290.
[130] *See id.* (characterizing philosophies of juvenile justice under "a "pure" just deserts model, a "modified" just deserts model (i.e., one that ties together just deserts with some utilitarian goal such as deterrence), and a traditional rehabilitative model of juvenile justice.") (internal quotations omitted).
[131] *Id.* at 292 (emphasis added).
[132] *See id.* at 292–293.
[133] *See id.*
[134] *Id.* at 294.
[135] *Id.* at 295.
[136] *Id.* at 294–295.
[137] *Id.* at 295.

Although the public and policymakers may believe that prosecutors act with care to select dangerous groups of offenders to transfer to criminal court, this was not the reality in Florida. Only 29% of direct file transfers were considered "dangerous."[138] About half, 55%, instead were charged with property offenses, including unarmed burglary, while 11% involved felony drug charges, and 5% involved misdemeanors.[139] Further, 23% of the juveniles transferred by prosecutors were first-time offenders, 58% had only received probation or a court-ordered sanction, and only 35% of the transferred juveniles had previously been committed to a juvenile program.[140] Decades later, another study confirmed that the apparent arbitrariness of waiver decisions still persists. Data from 2008-2013 shows that Florida youths "are prosecuted in adult court approximately as often for property crimes as they are for violent felonies."[141] Additionally, the study showed that nearly half of direct-filed youths were actually categorized as "low or moderate risk to re-offend," and less than a third of direct-filed youths were categorized as "high risk."[142] In sum, the findings from the Florida study showed that juveniles transferred via direct file "were not unequivocally dangerous."[143]

2. *Similar Lessons to be Learned from California*

These problems are not unique to Florida, and the same issues of arbitrariness are applicable to other states utilizing prosecutorial waiver. Researchers analyzed information collected by the California Department of Justice regarding the use of direct file.[144] The study found that despite a 55% drop in the rate of serious juvenile felony arrests – arrests that are eligible for direct file – district attorneys in California are increasing their use of direct file.[145] California saw a 23% increase in direct filings per capita in 2014 than in 2003.[146] Even more alarming, from 2012 to 2014, over 80% of juvenile cases were transferred to the criminal justice system

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[138] *Id.*
[139] *Id.*
[140] *Id.* at 296.
[141] *See* HUMAN RIGHTS WATCH, *supra* note 120, at 27.
[142] *See id.*, at 28.
[143] *See* Bishop & Frazier, *supra* note 107, at 296.
[144] *See* LAURA RIDOLFI, WASHBURN & GUZMAN, THE PROSECUTION OF YOUTH AS ADULTS: A COUNTY-LEVEL ANALYSIS OF PROSECUTORIAL DIRECT FILE IN CALIFORNIA AND ITS DISPARATE IMPACT ON YOUTH OF COLOR 3 (2015), http://www.burnsinstitute.org/wp-content/uploads/2016/06/Ending-Adult-Prosecution_FINAL.pdf.
[145] *Id.* at 4.
[146] *Id.*

via direct file.[147] Only about 20% of cases during this time period were transferred by a judge.[148]

California also saw county-level variations in the use of prosecutorial discretion, which led to a system of "justice-by-geography" for juveniles.[149] In 2014, 14 of California's 58 counties "relied on direct file *at the complete exclusion* of judicial transfer hearings."[150] Twenty-five counties reported no prosecutorial waiver cases nor judicial transfer hearings in the same year.[151] Further, the study showed that counties with the highest rates of direct file were more inclined to transfer 14- and 15-year-old juveniles to the criminal justice system than counties with lower rates of direct file.[152] Counties with fewer instances of direct file per youth population had prosecutorial waiver cases involving 14- and 15-year-olds 2% and 8% of the time, respectively; while counties with greater instances of prosecutorial waiver had cases involving 14- and 15-year-olds 4% and 13% of the time, respectively.[153] Yet, counties with the greatest rates of direct file "did not have discernably higher rates of serious youth arrest."[154] For example, juveniles living in and arrested in Yuba County were 34 times more likely to be transferred to criminal court via prosecutorial waiver than juveniles in San Diego County – even though Yuba and San Diego County had identical rates of youth arrests per population (256 serious felony arrests per 100,000 of the youth population).[155] These differences appear to be a result of the "system of justice-by-geography" mentioned earlier.[156] Factors such as the "age, race, and location of a young person" impacted and increased the likelihood that a prosecutor would waive or directly file their case in criminal court.[157] The ease of prosecutorial discretion, combined with California prosecutors increasing reliance on this mechanism, impacted young minority youth in the state more than their white counterparts.[158]

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[147] *Id.* (see Figure 2).
[148] *Id.* (see Figure 2).
[149] *Id.* at 5.
[150] *Id.* (emphasis added).
[151] *Id.* at 6. (see "Note" near the bottom of the page explaining that "Alpine, Amador, Calaveras, Colusa, Del Norte, El Dorado, Glenn, Humboldt, Imperial, Inyo, Lake, Lassen, Mariposa, Modoc, Mono, Plumas, San Benito, San Francisco, San Mateo, Sierra, Siskiyou, Tehama, Trinity, Tuolumne, and Yolo counties reported no direct file or transfer hearing in 2014").
[152] *Id.* at 9.
[153] *Id.* (see Figure 7).
[154] *Id.* at 10.
[155] *Id.* (see Figure 8).
[156] *Id.* at 15. (see Figure 8).
[157] *Id.*
[158] *Id.*

B. DISPROPORTIONATE IMPACT ON MINORITIES

Unchecked prosecutorial discretion in the waiver system further exacerbates the existing racial problems in our juvenile and criminal justice system. These racial disparities in the transfer decision and the overrepresentation of youth in the justice system are not merely the result of youths of color committing more crimes.[159] The overrepresentation of minority youth could be due to a variety of factors that begin even prior to the decision to transfer them to criminal court. Minority youth are more often and more likely to be charged with murder, and murder charges significantly affect whether a juvenile will be transferred from juvenile jurisdiction to criminal court.[160] Even still, there are indirect racial effects in a youth's offense history tied to different jurisdictions' decisions to police and monitor certain neighborhoods, many of which are minority-majority populations.[161]

Youth of color are significantly overrepresented in the youth who are direct filed to criminal court. A survey of 75 largest counties in the United States revealed that 96% of the defendants transferred to criminal courts were male; and of all transfers, over 62% were black or African American, 16.2% were Hispanic or Latino, and only 19.9% were white.[162] In sum, studies of transfer decisions consistently show that certain racial groups are more impacted than others, that offense seriousness may not be a determinative factor in prosecutorial waiver as legislators had previously envisioned, and that geography and prosecutorial practices lead to different outcomes for even similarly situated youth within the same state. Additionally, the DOJ found that in the 75 largest counties in the United States, roughly 75% of youths appeared in criminal court via nonjudicial

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[159] *Id.*; NAT'L COUNCIL ON CRIME & DELINQ., AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 1 (2007). "It is not clear whether this overrepresentation is the result of differential police policies and practices (targeting patrols in certain low-income neighborhoods, policies requiring immediate release to biological parents, group arrest procedures); location of offenses (African American youth using or selling drugs on street corners, White youth using or selling drugs in homes); different behavior by youth of color (whether they commit more crimes than White youth); different reactions of victims to offenses committed by White and youth of color (whether White victims of crimes disproportionately perceive the offenders to be youth of color); or racial bias within the justice system. In a meta-analysis of studies on race and the juvenile justice system, researchers found that about two thirds of the studies of disproportionate minority confinement showed negative 'race effects' at one stage or another of the juvenile justice process." *Id.*

[160] *See* Jeffrey Fagan, Martin Frost & T. Scott Vivona, *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259, 276 (1987).

[161] *Id.*

[162] STATE TRANSFER LAWS REPORT, *supra* note 67, at 12.

mechanisms, and in those counties, black youth represented 62.2% of transferred juveniles, and Hispanic youth represented 16.2% of transferred juveniles—despite their relative population size generally.[163]

Florida, again, is evidence of the problems with prosecutorial discretion in the juvenile justice system as it relates to racial disparities. One study showed that although black males represented 27.2% of youths arrested and processed by the Florida Department of Justice, they accounted for 51.4% of transfers to the criminal justice system.[164] In contrast, white males represented 28% of youths arrested and processed, yet they account for 24.4% of transfers to adult criminal court.[165] Transfer rates for black and white youths for murder and property crimes appeared similar.[166] However, transfer rates for black and white youths for violent offenses, excluding murder, diverged.[167] The study found that 13.3% of black youths were transferred to criminal court while only 7.4% of white youths were transferred after an arrest for similar violent offenses.[168] In every single judicial circuit in Florida, black youths were transferred to criminal court after an arrest for a violent felony at higher rates than their white youth counterparts.[169] Similar disparities existed for black and white youth transfer rates for drug felony offenses—in one circuit, 8.8% of white youth arrested were transferred to criminal court, while 30.1% of black youth were transferred for a similar offense.[170]

Likewise, data collected from 2003 to 2014 showed that in California, youth of color are 70% of the state's 14- to17-year-old population, yet they represent 90% of the youth transferred to criminal court via prosecutorial waiver.[171] Latino and black juveniles in the state were 3.3 times and 11.3 times more likely than white juveniles to be direct filed.[172] In nine counties, including Los Angeles and Santa Barbara, black juveniles were direct filed to criminal court, but in these same counties, there were no white juveniles reported as direct filed.[173] In twelve counties, including Los Angeles, Santa Barbara, and Santa Cruz, a number of Latino juveniles were direct filed, but there were no white juveniles direct filed.[174] Data continues to show that black juveniles are transferred to the criminal justice

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[163] *Id.*
[164] *See* HUMAN RIGHTS WATCH, *supra* note 120, at 29.
[165] *Id.*
[166] *Id.* at 29–30.
[167] *Id.* at 30.
[168] *Id.*
[169] *Id.* (see Figure 4).
[170] *Id.* at 31 (see Figure 5).
[171] RIDOLFI, WASHBURN & GUZMAN, *supra* note 144, at 11.
[172] *Id.*
[173] *Id.* at 13 (see Figure 12).
[174] *Id.* at 14 (see Figure 14).

system in numbers in excess of the proportion they represent in the general population and are further overrepresented in the number of cases in the juvenile justice system.[175] More specifically, being "[b]lack and older or charged with a felony increased the likelihood of transfer to adult court when compared to all other youth."[176]

These findings were further confirmed in a study of juvenile cases in major cities and counties around the country. Although black youths accounted for 57% of all the charges filed, they were overrepresented in drug and public order charges.[177] Black youths also accounted for 85% of drug charges and 74% of public order charges.[178] For black youth, nearly 90% of those charged with violent offenses or drug offenses had their juvenile status determined by the prosecutor or by statutory exclusion, not by the judicial waiver and hearing mechanism.[179]

C. Worse Outcomes for Juveniles and Little Deterrent on Crime

Several assumptions are made in the juvenile transfer decision. One such assumption is that juvenile courts are incapable or insufficient to handle the seriousness of the crime committed or the juvenile in question, and the juvenile would be more appropriately punished by the criminal court system.[180] By using direct file, prosecutors aim to deter future crime by transferring a juvenile to criminal court, which metes out harsher sentences in comparison to the juvenile court system.[181] Prosecutors also use direct file to send a signal to other potential juvenile offenders about the severity of punishments awaiting them.[182]

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[175] *See* Michael J. Leiber & Jennifer H. Peck, *Race in Juvenile Justice and Sentencing Policy: An Overview of Research and Policy Recommendations*, 31 LAW & INEQ. 331, 357 (2013).
[176] *Id.* at 358.
[177] *See* JUSZKIEWICZ, *supra* note 92, at 19.
[178] *Id.*
[179] *Id.* at 31–32.
[180] *See, e.g.*, Lonn Lanza-Kaduce, Charles E. Frazier & Donna M. Bishop, *Juvenile Transfers in Florida: The Worst of the Worst?*, 10 U. FLA. J.L. & PUB. POL'Y 277, 277–78 (1999) ("From the beginning, transfer to criminal court was regarded as necessary to remove serious and violent offenders who were thought to be too dangerous or too intractable for the juvenile justice system.").
[181] *See* Benjamin Steiner & Emily Wright, *Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance?*, 96 J. CRIM. L. & CRIMINOLOGY 1451, 1455 (2006).
[182] *Id.*

However, many studies show that transfers may lead to *increased* rates of recidivism and may not deter crime.[183] One study specifically focused on how transfer to criminal court affected the recidivism rates of juveniles in the long term, including the probability of rearrests, the time of the first rearrest, and the frequency of subsequent arrests.[184] The study showed that transferred juveniles and non-transferred juveniles were equally as likely to be rearrested in the long run.[185] The decision to transfer youths to criminal court only seemed to deter or reduce recidivism for juveniles transferred as a result of property offenses.[186] In contrast to their non-transferred peers, "more transferred property felons avoided rearrest on release."[187] Yet, the average number of rearrests were higher for those juveniles transferred into criminal court than their non-transferred counterparts, and, on average, transferred juveniles were rearrested in a shorter period than their non-transferred peers.[188] This was true even when the researchers controlled for the type and seriousness of the offense.[189] Both in the short-term and long-term, "[t]ransfer was more likely to aggravate recidivism than to stem it."[190]

Another empirical study examined the effects of prosecutorial waiver on juvenile arrest rates in comparison with carefully selected control states without direct file laws and with a similar size, location, and percentage of youth population.[191] Although arrest data is an imperfect predictor, arrest data is useful because it provides age-specific data on crimes.[192] Nonetheless, the findings of this study showed that after the enactment of prosecutorial waiver laws, the majority of states did not see a decrease in juvenile crime rates.[193] Nine states remained unaffected after the laws went into effect, while two states, Arkansas and Montana,

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[183] *See, e.g.*, *id.* at 1455; Lawrence Winner et al., *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term*, 43 CRIME & DELINQ. 548, 555–56 (1997).
[184] *See* Winner et al., *supra* note 183, at 549–50.
[185] *Id.* at 557.
[186] *Id.* at 557–58. Researchers were unable to theoretically explain this finding this given the "loose" and vague label of "property felon." *Id.* at 560.
[187] *Id.* at 558.
[188] *Id.* at 556.
[189] *Id.* at 556.
[190] *Id.* at 558–59.
[191] *See* Steiner & Wright, *supra* note 181, at 1460–62. The study excluded several states from its analyses due to the inability to find a sufficient control state or because the state enacted its prosecutorial discretion laws in a time period that would have introduced a "history effect" to the statistical analysis. *Id.* at 1461.
[192] *Id.* at 1462–63.
[193] *Id.* at 1464.

actually experienced an increase in their arrest rates for violent juvenile crimes.[194] Further, "no state experienced a lower juvenile homicide/manslaughter rate after their direct file waiver law went into effect."[195] The findings show that prosecutorial discretion statutes have had little to no deterrent effect on violent juvenile crimes—indeed, in some states, the opposite has happened— and there has been an increase in arrest rates.[196]

Although youths should face the consequences of their actions, the criminal court system appears insufficient to truly rehabilitate juveniles or deter them from criminal activity. Research consistently shows that there are "negative consequences of criminal sanctions for children," and decisions to transfer juveniles to criminal court are "counterproductive."[197] Youths transferred to the criminal justice system are imprisoned longer than non-transferred youth, and as a result, "the conditions often associated with extended detention—separation from loved ones, crowding, and solitary confinement—may increase the risk of suicidal behavior among transferred youth."[198]

There may be one major reason why waiver decisions have no impact on juvenile crime rates. Many psychologists, scholars, and even the Supreme Court,[199] acknowledge that due to the neurological and developmental stage of juveniles, they hold extraordinarily different perceptions of risk than adults do.[200] Juvenile decisions are "influenced more heavily by the potential rewards of their choices rather than by the potential risks involved, as well as the short-term, rather than long-term, consequences of their actions."[201] Meaning that a developing teenager is unlikely to be deterred by the possibility of more punitive measures because they

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[194] *Id.*
[195] *Id.* at 1467–68.
[196] *Id.* at 1467. That juvenile crime rates have continued to decrease *nationally* is not as a result of prosecutorial waiver or the threat of increased punitive measures for juveniles. *See id.* at 1467. Instead, the findings suggest that other extraneous factors play a role. *Id.* at 1468.
[197] *See* Winner et al., *supra* note 183, at 559, 561.
[198] *See* WASHBURN ET AL., DEP'T OF JUSTICE, DETAINED YOUTH PROCESSED IN JUVENILE AND ADULT COURT: PSYCHIATRIC DISORDERS AND MENTAL HEALTH NEEDS 3 (Sep. 2015).
[199] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569 (2005). The Court agreed that "as any parent knows and as the scientific and sociological studies…confirm, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young." *Id.* (internal quotations omitted).
[200] *See* Steiner & Wright, *supra* note 181, at 1469; *see generally* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 156–72 (1997).
[201] *See* Steiner & Wright, *supra* note 181, at 1469.

may be incapable of adequately weighing the risks of their actions in comparison to the relative reward they perceive from their potential actions.[202] In sum, the possibility of transfer to criminal court or increased punitive measures are unlikely to sway juveniles from committing "the most serious of illegal acts."[203]

In addition to increased rates of recidivism for transferred juveniles, social science research also continues to show that transfer decisions have a detrimental effect on juvenile offenders. These detrimental effects include a lack of access to social and mental welfare services available in juvenile court and violence juvenile offenders face while incarcerated with adults. Often, juveniles transferred to criminal court are detained in adult jails.[204] Many juveniles transferred to and incarcerated in adult prisons attempt suicide, and the suicide rate is eight times higher for juveniles in these facilities than for juveniles in juvenile detention facilities.[205] A number of factors contribute to the suicide rate for juveniles incarcerated in adult prisons, including a lack of access to rehabilitative services, sexual abuse by inmates and even prison officials, and physical attacks and abuse, due to their smaller size and youth, by other inmates.[206]

Moreover, a juvenile's experience while incarcerated may be a significant factor that leads to increased recidivism.[207] Juveniles incarcerated with adults often turn to violence as a way to survive their time—further exacerbating the troubling transfer decision when a juvenile may be raised "with some of the most hardened criminals"[208] as opposed to being given the opportunity to experience some rehabilitative treatment in the juvenile court system.

Scholars continue to point to studies that show that juvenile crime has not significantly increased and is not on the rise.[209] Nearly sixty percent of the juveniles

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[202] *Id.*
[203] *Id.*
[204] *See* Leiber & Peck, *supra* note 175, at 360; *see also* Mark Soler, *Missed Opportunity: Waiver, Race, Data, and Policy Reform*, 71 LA. L. REV. 17, 21–22 (2010) ("Many black youth waived to adult court were held in adult jails. About half of black youth prosecuted in adult court were released pretrial. Of those who were not released, almost two-thirds (65.4%) were held in adult jails. The rest were held in juvenile facilities.").
[205] *See* Eric K. Klein, *Dennis the Menace or Billy the Kid: An Analysis in the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 405 (1998) (citing H.R. Rep. No. 105-86, at 74).
[206] *Id.* at 404–05.
[207] *See* BARRY HOLMAN & JASON ZEIDENBERG, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 4 (2006).
[208] *See* Klein, *supra* note 205, at 405 (citing Richard Lacayo, *When Kids Go Bad*, TIME, Sept. 19, 1994, at 60).
[209] *See* Robert E. Jr. Shepherd, *Juvenile Justice*, 10 CRIM. JUST. 39, 39 (1995).

referred to juvenile court are single offenders who do not have persistent or frequent contact with the juvenile court system.[210] And, even for juvenile offenders who are serious or frequent offenders of the law, the prevalence of "serious violence" decreases significantly after they reach adulthood.[211] For the aforementioned reasons, state legislators should look to alternate means, not direct file, if they wish to effectively punish and rehabilitate juvenile offenders.

IV. POTENTIAL SOLUTIONS

Prosecutorial waiver decisions implicate the due process rights of juveniles and subvert the intent and aim of the Court's decision in *Kent*[212]—a youth's first appearance is in criminal court because that is where the prosecutor chose to bring the case, not because a neutral arbiter determined that the youth was better suited in criminal court or could not be rehabilitated. Yet, challenges to direct file laws have nearly always failed.[213] The judiciary's immense deference to a prosecutor's discretion, in charging and in bring forth a case, is difficult to square within the juvenile justice area because states with prosecutorial waiver laws appear to have enacted them exactly *because of* such judicial deference.

The District of Columbia, for example, enacted its prosecutorial discretion statute "[b]ecause of the great increase in the number of serious felonies committed by juveniles *and because of the substantial difficulties in transferring juvenile offenders charged with serious felonies to the jurisdiction of the adult court under present law*."[214] Given the political nature of prosecutors, the deference granted would appear unwarranted. And further, because a prosecutor's decision to transfer youths into the criminal justice system is unreviewable by the judicial branch, juveniles are subject to another injustice. State legislatures—when confronted with the evidence posed above—should move towards eliminating or restraining direct file or prosecutorial waiver in juvenile waiver decisions.

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[210] *Id.*

[211] *Id.*

[212] *See, e.g.*, Hamack, *supra* note 18; Rachel Jacobs, *Waiving Goodbye to Due Process: The Juvenile Waiver System*, 19 CARDOZO J.L. & GENDER 989 (2013).

[213] *See, e.g.*, United States v. Bland, 472 F.2d 1329, 1336–38 (D.C. Cir. 1972) (reasoning prosecutors are officers of the executive branch and exercise discretion as to whether to prosecute, therefore as a result of separations of powers and absent "suspect factors" like race or religion, courts are not to "interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions").

[214] *Id.* at 1341 (emphasis in original) (quoting H. REP. 91-907, 91st Cong., 2d Sess., at 50 (1970)).

A. ELIMINATION OF DIRECT FILE STATUTES

The current direct file system is one riddled with abuse, as a result of the absence of judicial review, and the influence of external factors, such as implicit biases and political pressure.

The reasons for a judicial check of prosecutors' discretion are stronger than for such a check of other administrative discretion that is now traditionally reviewable. Important interests are at stake. Abuses are common. The questions involved are appropriate for judicial determination. And much injustice could be corrected.[215]

Combined with a system of "justice-by-geography," youths that are direct filed are denied the individualized determination and the opportunity for rehabilitation envisioned by the creators of the juvenile justice system. The seriousness of the offense committed should play a role in the decision to use prosecutorial discretion, instead, data shows that the "age, race, and location of a young person" impacts whether or not they will be treated as a juvenile or waived into criminal court.[216]

The juvenile justice system and public safety—unless and until appropriate standards are developed for prosecutorial waiver decisions—would be better served by the elimination of direct file laws. Several states have recently repealed their direct file laws—including California and Vermont. These decisions can serve as legislative acknowledgments that the harms of direct file greatly outweigh any added value. Further, as stated above, the youths transferred into the criminal justice system are not serious or high-level offenders. Direct file statutes are superfluous and repealing these statutes would not create unsafe communities, because most serious offenders are already captured by legislative exclusion statutes and judicial waiver mechanisms.

1. *Legislative History from California and Vermont Support the Choice to Repeal Direct File Statutes*

In California, citizens voted to enact Proposition 57, which requires, in relevant part, "a judge, not a prosecutor, to decide whether juveniles should be tried in adult court."[217] Although the main focus of Proposition 57 was California's overcrowded prison system, the State acknowledged that youth crime was decreasing, yet the state's prosecutors continue to increase the number of youths charged as adults.[218]

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[215] *See* United States v. Bland, 472 F.2d 1329, 1329 (D.C. Cir. 1972)., *cert. denied* 412 U.S. 909 (Douglas, J., dissenting) (internal quotations omitted).

[216] *See* RIDOLFI, WASHBURN & GUZMAN, *supra* note 144, at 15.

[217] CAL. SEC'Y OF STATE, *Text of Proposed Law*, *Proposition 57*, available athttp://vig.cdn.sos.ca.gov/2016/general/en/pdf/text-proposed-laws.pdf.

[218] Navnit Bhandal & Tessa Nevarez, *Proposition 57: Criminal Sentence. Parole. Juvenile Criminal Proceedings and Sentencing. "The Public Safety and Rehabilitation Act of 2016"*. 15 (May 2016),

The Center on Juvenile and Criminal Justice strongly advocated for the passage of Proposition 57, arguing that transfer decisions should only be made by judges "after careful consideration." Other proponents of the law also argued that juvenile judges were better qualified to assess youths in the system and were more likely to be neutral parties, unlike prosecutors.[219] Despite arguments presented in opposition of Proposition 57's scope as it applied to adult offenders,[220] most agreed with the law as it related to juvenile justice reform. In 2016, Proposition 57 successfully passed by a vote of 64% to 35%, effectively repealing California's direct file laws.[221]

Similarly, in 2016, the Vermont legislature enacted statutes to override and greatly limit their previous prosecutorial discretion laws.[222] Now, in Vermont, nearly all juvenile cases must begin in juvenile court.[223] Prosecutors must file a motion, and there must be a hearing and judicial approval before waiving or transferring certain juveniles into criminal court.[224] However, the statute still mandates the waiver of juveniles accused of one of twelve serious felony offenses enumerated.[225] Still, Vermont is an example of successful juvenile justice reform in the prosecutorial discretion area. The state, while mulling over its direct file laws, even considered treating as juveniles all offenders under the age of 21, excluding

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http://www.mcgeorge.edu/Documents/Publications/prop57_CIR2016.pdf (citing Frankie Guzman, Laura Ridolfi, & Maureen Washburn, *The Prosecution of Youth as Adults: A County-Level*
Analysis of Prosecutorial Direct File in California and its Disparate Impact on Youth of Color, YOUTHLAW.ORG (June 2016), *available at* http://youthlaw.org/wp-content/uploads/2016/06/The-Prosecution-of-Youth-as-Adults.pdf).

[219] *Id.* at 16 (citing Frankie Guzman, Laura Ridolfi, & Maureen Washburn, *The Prosecution of Youth as Adults: A County-Level Analysis of Prosecutorial Direct File in California and its Disparate Impact on Youth of Color*, YOUTHLAW.ORG (June 2016), *available at* http://youthlaw.org/wp content/uploads/2016/06/The-Prosecution-of-Youth-as-Adults.pdf).

[220] *Id.* at 16–18.

[221] *See* The New York Times, *California Proposition 57*, N.Y. TIMES (Aug. 1, 2017), *available at* https://www.nytimes.com/elections/2016/results/california-ballot-measure-57-sentencing-parole-reform.

[222] *See* VERMONT ACT NO. 153, H.95, (2016) *summary available at* https://legislature.vermont.gov/Documents/2016/Docs/ACTS/ACT153/ACT153%20Act%20Summary.pdf.

[223] *See* VT. STAT. ANN. tit. 33, § 5201(d) (West 2020).

[224] *Id.* § 5204(a).

[225] *Id.* § 5204(a)(1)–(12).

those offenders charged with major felonies, as a result of data collected across several social service agencies.[226]

The key takeaway from the legislation enacted by California and Vermont is that rational legislatures are beginning to recognize that although some juveniles should be subject to adult penalties within the criminal justice system, prosecutorial waiver decisions are not the best way to accomplish this goal. Justice is better served by a fair and individualized process that allows a better-placed and neutral party, a judge, to determine the amenability to treatment and the jurisdiction of the charged youth.

2. *Constitutional Challenges*

One state constitution challenge has prevailed, and others may prevail in the future. The Supreme Court of Utah in *State v. Mohi* declared that the state's direct file laws were unconstitutional.[227] Under one of Utah's constitutional provisions, similar to the Equal Protection Clause, "[f]or a law to be constitutional under [the provision], it is not enough that it be uniform on its face. What is critical is that the *operation* of the law be uniform. A law does not operate uniformly if 'persons similarly situated' are not 'treated similarly.'"[228] First, the Utah court concluded that the direct file statute created a class of juveniles that remained in juvenile court jurisdiction while also creating a class of "like-accused juveniles" that are "singled out by prosecutors to be tried as adults."[229] Second, the court concluded that youths were indeed treated "nonuniformly" under the Utah statute, noting that "[j]uveniles against whom indictments or informations are filed are statutorily indistinguishable from those who remain in juvenile jurisdiction" except for the decision to charge one set of juveniles as adults.[230] The court found that this amounted to unequal

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[226] *See generally* VERMONT AGENCY OF HUMAN SERVICES, YOUTHFUL OFFENDERS REPORT (2016).

[227] State v. Mohi, 901 P.2d 991, 1004 (Utah 1995) (referring to UTAH CODE ANN. § 78–3a–25).

[228] *Id.* at 997 (emphasis original) (quoting Lee v. Gaufin, 867 P.2d 572, 577 (Utah 1993) (quoting Malan v. Lewis, 693 P.2d 661, 669 (Utah 1984))).

[229] *Id.* at 997–98.

[230] *Id.* at 998 ("[T]he statute permits two identically situated juveniles, even co-conspirators or co-participants in the same crime, to face radically different penalties and consequences without any statutory guidelines for distinguishing between them."). The non-uniformity at issue was the result of the prosecutor's decision to direct file certain youths in criminal court but allow similarly situated youths to remain in juvenile court. In this case, the decision to direct file the named-plaintiff may have been the result of the charges against him, recklessly causing a death with a firearm, but may have also been influenced by local community outrage and allegations of gang activity, *see* Amy Donaldson, *Mohi Blames Triad Center Killing on 'Stupidity,'* DESERET NEWS (Sep. 3,

treatment under Utah law.[231] Finally, the Utah court invalidated the statute because it found that although the legislature had a legitimate purpose in promoting "public safety and individual accountability"[232] and achieving justice in order to serve the best interests of children, the statute was not "reasonable in relation" to the legislature's purpose.[233] Because the statute did not "require the prosecutor to have any reason, legitimate or otherwise, to support his or her decision of who stays in juvenile jurisdiction and who does not," it could not withstand scrutiny.[234]

In relevant part, the Court also acknowledged that "[s]uch unguided discretion opens the door to abuse without any criteria for review or for insuring evenhanded decision making."[235] The absence of a check in such a system means that there is no barrier "to prevent such acts as a prosecutor's singling out members of certain unpopular groups for harsher treatment in the adult system while protecting equally culpable juveniles to whom a particular prosecutor may feel some cultural loyalty or for whom there may be broader public sympathy"[236] This summary is exactly the system we are faced with today. The Utah Supreme Court held that "[l]egitimacy of a goal cannot justify an arbitrary means," and "[l]egitimacy in the purpose of the statute cannot make up for a deficiency" in the design of direct file statutes.[237] Other cases based on state constitutional provisions may prevail.[238]

B. Data Collection

The decision to eliminate prosecutorial waiver statutes is likely to be a politically unpopular one. Recognizing the difficulties of repealing legislation, there are additional or alternative ways that prosecutors can counter the disparities in the waiver system.

An alternate solution to the arbitrariness of direct file would be to maintain data and records to create a fairer system. This process could ameliorate many of the

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1996), https://www.deseretnews.com/article/511184/mohi-blames-triad-center-killing-on-stupidity.html.

[231] *Id.*

[232] Utah Code Ann. § 78–3a–25, (7).

[233] State v. Mohi, 901 P.2d 991, 998–99 (Utah 1995).

[234] *Id.* at 999.

[235] *Id.* at 1002.

[236] *Id.*

[237] *Id.* at 999.

[238] *See, e.g.*, Rostyslav Shiller, *Fundamental Unfairness of the Discretionary Direct File Process in Florida: The Need for a Return to Juvenile Court Waiver Hearings*, 6 WHITTIER J. CHILD & FAM. ADVOC. 13, 33–46 (2006) (arguing that Florida's discretionary direct file statute violates the state's non-delegation and due process doctrines).

problems prevalent in discretionary waiver decisions, but it would not resolve all the issues. Although incomplete data exists on the number of juveniles transferred via prosecutorial waiver in the relevant jurisdictions using such a method, the data collected shows that the rates of prosecutorial discretion vary significantly across states and across prosecutors' offices.[239] A juvenile may be more likely to be waived into criminal court by prosecutors in one county in Arkansas, for example, than in another county within the same state. This is likely due to an individual prosecutor's proclivities and the mission of each district attorney's office.[240] By collecting data and keeping records, state prosecutors can collaborate to form a more effective and fair justice system. Tracking waiver decisions may allow prosecutors' offices to recognize racial disparities and inconsistent decision-making in their charging decisions, especially in the states that currently maintain no such database for direct file decisions.[241] This would maintain the discretion that prosecutors already have but would constrain them to meet a series of guidelines based on historical data and the standard practice of other counties in the region. Following historical practice and creating internal office guidelines for filing juvenile cases in criminal court could reduce the "justice-by-geography" system present in many states utilizing direct file. A simple, yet effective, best practice within the existing framework of prosecutorial discretion laws would be to have prosecutors state their reasons, in writing, for their decisions to transfer a youth into the criminal justice system. Although prosecutorial waiver decisions cannot be reviewed by a court, this may help with the appeals process when a final decision is rendered and internally could allow prosecutors to track their decisions and develop criteria.

One scholar proposes that in order to move toward a path of "structured decision making," communities should form local committees within their jurisdictions made up of "prosecutors, probation officers, experts in developmental psychology,

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[239] *Compare, e.g.*, HUMAN RIGHTS WATCH, *supra* note 120, at 41 (Prosecutors in Florida's 8th Circuit State Attorney's Office decide whether to direct file by considering "the age of the child, the nature of the crime, and the child's record" and the "the juvenile division chief state attorney consults with the chief assistant state attorney, who has the final say in direct file decisions") with *Id.* at 41 (Prosecutors in Florida's 17th Circuit State Attorney's Office file a "'notice of intent to review for direct file' in cases where the charge is a violent crime against a person or the defendant has an 'extremely long record' or is about to turn 18").
See generally STATE TRANSFER LAWS REPORT, *supra* note 67, at 10–19.
[240] *See* Bishop & Frazier, *supra* note 107, at 299.
[241] *See* STATE TRANSFER LAWS REPORT, *supra* note 67, at 15.

school officials, and other community stakeholders."[242] In order for these standards to benefit juveniles effectively, "prosecutors should routinely evaluate and revise prosecution standards to correct for evidence of racially disparate outcomes."[243] Prosecutors who recognize disparities within the referral system, for example, that "youth of color are routinely referred from one or more schools for drug use, disorderly conduct, or other low- to midlevel offenses," can decline to charge these youths as adults or prosecute these youths at all and instead encourage "community leaders to identify responses to adolescent offending that do not impose the stigma and collateral consequences" of the court system.[244] This recognition could also lead prosecutors to the conclusion not to charge juveniles as adults except for only the most serious offenses, despite having the authority to do otherwise, thus "set[ting] the standard for juvenile court intake" that "over time may significantly influence patterns of arrest and referral."[245] State prosecutors, however, are political figures and must answer to community members. To prevent accusations from community members that they are "ignor[ing] or underenforc[ing] criminal laws in communities of color, prosecutors must communicate the rationale for their charging decisions and actively engage the community, legislators, and school leaders in developing alternatives to prosecution."[246]

CONCLUSION

When the juvenile justice system was created, its original aim was to diagnose and treat deviant youths. Eventually, as the racial makeup of the country changed, many began to fear the "other," and youth of color were no longer considered young in the eyes of the public. State legislators have transformed the juvenile justice system to an entirely punitive model, with no opportunity for rehabilitation. In a number of jurisdictions, prosecutors are given unfettered discretion to treat certain youth offenders as adults, with no guidance about how to make such a determination. The result of such discretion is a system where young, racial minorities who engage in criminal activity are disproportionately treated as adults under the law and are "direct filed" to criminal court, instead of having their cases brought in juvenile court. The decision regarding jurisdiction of these youths is not

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[242] *See* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform,* 98 CORNELL L. REV. 383, 436-37 (2013).
[243] *Id.* at 443.
[244] *Id.* at 430.
[245] *Id.*
[246] *Id.*at 430–31.

subject to judicial review and results in the over-penalization of black and brown adolescents.

The direct file system is clandestine, inconsistent, and ineffective. Justice is better served with the elimination of the direct file system. Legislative exclusion laws already capture violent and repeat offenders. Unless state legislatures enumerate specific standards that state prosecutors can follow before transferring youths to the criminal justice system, data will continue to show that transfer decisions disparately affect minority youths and do not effectively deter crime. In the alternative, unless prosecutors recognize the troubling statistics within their respective jurisdictions, these issues will continue. With the recognition of the disparate impact of direct file decisions, prosecutors' offices should aim to enact inter- and intra-office measures to maintain consistency and transparency in their decisions about which youths to direct file and in order combat the implicit biases always present in unrestrained decision-making.

DIGITAL DUE PROCESS: THE GOVERNMENT'S UNFAIR ADVANTAGE UNDER THE STORED COMMUNICATIONS ACT

Brendan Sasso[*]

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INTRODUCTION

A private Instagram photo could be the crucial piece of evidence that would exonerate a person on trial for murder. Yet federal law generally prohibits Instagram from providing that photo to the defendant—even if it could prevent a wrongful conviction. If, however, the photo helps prove the defendant's guilt, the prosecution could compel Instagram to turn it over. Congress should fix this imbalance between prosecutors and defendants.

That federal law, the Stored Communications Act (SCA), protects valuable privacy interests by generally prohibiting online services from disclosing content to private parties without the user's consent.[1] It makes sense to prohibit companies from selling private communications to the highest bidder, but the law should weigh a user's privacy interests against a defendant's right to a fair trial. Currently, the law not only allows online providers to ignore subpoenas from everyone except the government, it exposes the providers to serious liability if they divulge user communications in response to legal process.[2]

The law strikes a balance between privacy and law enforcement by allowing the government to compel the production of electronic records following an appropriate showing to a judge.[3] Congress should amend the SCA to provide a similar mechanism to allow criminal defendants to get access to relevant materials when necessary. While civil litigation doesn't raise the same constitutional concerns as a criminal prosecution, the law should also allow civil litigants to compel service providers to produce electronic records in appropriate circumstances. By blocking access to this evidence, the SCA is undermining the core purpose of litigation: finding the truth.

In practice, both criminal defendants and civil litigants often obtain electronic records in other ways. If the prosecution possesses material evidence that's favorable to the defendant, including electronic records, it must disclose that evidence to the defense.[4] Both criminal defendants and civil litigants can subpoena individuals or organizations directly to compel the production of materials under their control. So often the most practical way to obtain social media records is to subpoena the user, instead of the social media company. But what if the user is dead, missing, unwilling to

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[1] 18 U.S.C. § 2702.
[2] *Id.* § 2707.
[3] *Id.* § 2703(d).
[4] Brady v. Maryland, 373 U.S. 83, 87 (1963).

cooperate, located abroad, or has forgotten the account password? Or what if the photo or video has disappeared (such as a Snapchat Snap or an Instagram Story), but the company still has a copy on its servers? In those cases, the only way to obtain the evidence might be from the social media company. The fact that civil litigants and criminal defendants rarely need to obtain evidence from providers is not a reason to ignore the problem; rather, it means a narrow legislative fix could address the issue without disrupting discovery procedures in the vast majority of cases and without imposing an unmanageable burden on the technology companies.

For several years, Congress has been debating reforms to the SCA, which is part of the Electronic Communications Privacy Act (ECPA). There is broad support[5] for updating the law, which was enacted in 1986, before the creation of the modern Internet.[6] The House unanimously approved ECPA reform legislation in 2016 and 2017, but the effort stalled in the Senate both times.[7] Those bills, however, would have done nothing to help criminal defendants or civil litigants access evidence, instead focusing only on reining in government surveillance. Congress is likely to try again to update ECPA. This time, lawmakers should also address the imbalance between the government and private parties.

Courts have considered numerous attempts by defendants in recent years to evade the SCA's bar on disclosure. None of these cases, however, suggest promising ways to address the SCA's imbalance. For example, some defendants have asked courts to order users to "consent" to the disclosure of their electronic records.[8] Besides the strained interpretation of "consent," this approach would not help in most cases where the SCA prevents disclosure: when the user is unwilling or unable to comply. If a court could order a user to "consent" to disclosure, then in most cases, the party could have just subpoenaed the user directly. Other defendants have challenged the constitutionality of the SCA, arguing it violates their due process rights by

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[5] *See e.g.*, *Brennan Center, along with 52 technology and civil liberties groups, urges Congress to pass the Email Privacy Act*, BRENNAN CENTER (July 13, 2018), https://www.brennancenter.org/analysis/brennan-center-along-52-technology-and-civil-liberties-groups-urges-congress-pass-email.

[6] The World Wide Web was invented in 1989. Tim Berners-Lee, *The World Wide Web Turns 30. Where Does It Go From Here?* WIRED (March 11, 2019), https://www.wired.com/story/tim-berners-lee-world-wide-web-anniversary/.

[7] Sean D. Carberry, *House passes email privacy act, again*, FED. COMPUTER WK. (Feb. 7, 2017) https://fcw.com/articles/2017/02/07/ecpa-passes-house-again.aspx.

[8] *See* Negro v. Superior Court, 230 Cal. App. 4th 879, 883-84 (2014).

preventing them from obtaining the evidence they need to defend themselves.[9] Those challenges, however, have been mostly unsuccessful. The California Supreme Court recently heard arguments over whether trial courts could order prosecutors to obtain warrants on behalf of defendants.[10] But there are serious questions over whether this approach would violate the separation of powers or the Fourth Amendment. Given the limited ability of courts to fix the imbalance of the SCA, it falls to Congress to act.

Part I of this article reviews the history and text of the SCA. Part II examines court decisions interpreting the SCA, including the California Supreme Court's recent decisions in *Facebook, Inc. v. Superior Court (Hunter)*[11] and *Facebook, Inc. v. Superior Court (Touchstone)*.[12] I argue that these cases show courts are poorly equipped to fix the SCA. Part III proposes an amendment to the SCA that would allow criminal defendants and civil litigants to access digital evidence from providers when necessary, while balancing the user's interest in privacy.

I. OVERVIEW OF THE SCA

A. LEGISLATIVE HISTORY

Although ECPA is widely considered outdated now, when it was enacted more than 30 years ago, it was an ambitious attempt to keep pace with changing technology. The legislation, which passed both the House and Senate by voice votes,[13] won support from law enforcement, privacy advocates, and industry groups at the time.[14] The legislation was largely spurred by a 1985 report from the now-defunct Office of Technology Assessment, which warned that new technologies were outstripping the

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[9] *See* Facebook, Inc. v. Wint, 199 A.3d 625, 633 (D.C. 2019).
[10] *See* Facebook v. S.C. (Touchstone), 408 P.3d 406 (Cal. 2018) (granting petition for review).
[11] 4 Cal. 5th 1245 (2018).
[12] 10 Cal. 5th 329 (2020).
[13] Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, https://www.congress.gov/bill/99th-congress/house-bill/4952/actions.
[14] 132 CONG. REC. H4039-01, 1986 WL 776505 (daily ed. June 23, 1986) (statement of Rep. Kastenmeier) (stating that ECPA "enjoys the strong support of the business community, consumer groups, civil liberties organizations and the administration").

existing statutory privacy framework.[15] The main goal of ECPA was to update the Wiretap Act,[16] also known as Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which had made it a federal crime for a private person to tap into a phone line and had created a legal regime for authorized wiretapping by the government. The Wiretap Act was itself a response to Supreme Court decisions finding that warrantless electronic surveillance could violate the Fourth Amendment.[17]

A key problem with the Wiretap Act was that it only covered "aural acquisition" of an oral or wire communication, so it did not apply to the new computer-based communications systems that were emerging in the 1980s.[18] "Today, Americans have at their fingertips a broad array of telecommunications and computer technology, including electronic mail, voice mail, electronic bulletin boards, computer storage, cellular telephones, video teleconferencing, and computer-to-computer links," Sen. Patrick Leahy, a Vermont Democrat and sponsor of ECPA, said on the Senate floor in 1986.[19] "Unfortunately, most people who use these new forms of technology are not aware that the law regarding the privacy and security of such communications is in tatters."[20] Leahy explained that ECPA was designed to "provide a reasonable level of federal privacy protection to these new forms of communication."[21]

An important difference between computers and telephones is that computers store information, while traditional phone lines only transmit it. Since Congress only had landline telephones in mind when it wrote the Wiretap Act, the law only protected communications while they were in transit. Therefore, when Congress enacted ECPA, it created a parallel privacy regime for stored electronic communications. "It does little good to prohibit the unauthorized interception of information while it is being transmitted, if

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[15] OFFICE OF TECH. ASSESSMENT, ELECTRONIC SURVEILLANCE AND CIVIL LIBERTIES (1985), https://ota.fas.org/reports/8509.pdf.
[16] 132 CONG. REC. H4039-01, *supra* note 14 ("This bill provides a much-needed updating of the Federal wiretapping law.").
[17] Thomas I. Sheridan III, *Electronic Intelligence Gathering and the Omnibus Crime Control and Safe Streets Act of 1968*, 44 FORDHAM L. REV., 331, 331–32 (1975) (explaining that Congress was responding to Katz v. United States, 389 U.S. 347 (1967) and Berger v. New York, 388 U.S. 41 (1967)).
[18] OFFICE OF TECH. ASSESSMENT, *supra* note 15.
[19] 132 CONG. REC. S14441-04, 1986 WL 786307 (daily ed. October 1, 1986) (statement of Sen. Leahy).
[20] *Id.*
[21] *Id.*

similar protection is not afforded to the information while it is being stored for later forwarding," Leahy said at the time.[22] This new legal regime was enacted as the Stored Communications Act, which was included as Title II of ECPA.

B. The Text of the SCA

The SCA is notoriously convoluted and difficult to understand.[23] The authors wanted to craft a regime that could adapt to new technologies,[24] but the terms they used in 1986 do not map easily on to modern technologies. The SCA covers two types of services: "electronic communications services" (ECS) and "remote computing services" (RCS). An ECS is "any service which provides to users thereof the ability to send or receive wire or electronic communications."[25] An RCS is "the provision to the public of computer storage or processing services by means of an electronic communications system."[26] A single provider can act as an ECS in some contexts, an RCS in other contexts, and neither in still other contexts.[27] As Professor Orin Kerr explains, "[T]he key is the provider's role with respect to a particular copy of a particular communication, rather than the provider's status in the abstract." [28] In general, the law provides the highest level of protection to the "contents of communications,"[29] such as emails, social media posts, and photos. Non-content records, such as email addresses and log-in timestamps, get less protection.

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[22] *Id.*

[23] *See* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1208 (2004) ("Courts, legislators, and even legal scholars have had a very hard time making sense of the SCA. The statute is dense and confusing, and few cases exist explaining how the statute works.")

[24] *See* 132 CONG. REC. S7987-04, 1986 WL 776264 (daily ed. June 19, 1986) (statement of Sen. Mathias) ("While the bill retains a few distinctions between the treatment of conventional telephone conversations and transmissions by other media, these differences appear reasonable and do not seriously detract from the principle of adapting the law to the technology of the present and future, rather than the past.").

[25] 18 U.S.C. § 2510(15) (2002).

[26] 18 U.S.C. § 2711(2) (2016).

[27] Kerr, *supra* note 23, at 1215-16.

[28] *Id.*

[29] *See, e.g.*, 18 U.S.C. § 2703 (2016).

ECS records are generally only protected when they are in "electronic storage."[30]Confusingly, this term does not have its ordinary modern meaning. Instead, the statute provides two definitions for "electronic storage": 1) "temporary, intermediate storage" that is "incidental" to the transmission of a communication; and 2) storage for "backup protection" of a communication.[31] These definitions have baffled courts, with some holding the term only covers emails up until the point they have been opened, and others holding it covers all emails, regardless of whether they have been opened or not.[32] Even if a communication is not in "electronic storage," it might still qualify as an RCS record, which receives much (although not all) of the same protection. These details can be crucial in individual cases. But on a broad level, the SCA indisputably covers a vast amount of the digital information we produce on a daily basis.

Much of the recent debate over the SCA has focused on Section 2703, which allows the government to compel the disclosure of electronic records. Under Section 2703(d), the government can obtain a court order to require the production of certain electronic records (including content) if it has "specific and articulable facts showing that there are reasonable grounds to believe" that the targeted records are "relevant and material to an ongoing criminal investigation."[33] Notably, this standard is lower than the probable cause requirement of a warrant, which has made the provision fiercely controversial. Privacy advocates argue that digital information deserves the same warrant protection as paper documents in a person's home.[34] The SCA does require a warrant for ECS communications that have been in electronic storage for 180 days or less,[35] but that time distinction makes little sense in an era when people often keep emails and other digital records indefinitely.

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[30] *See, e.g.*, 18 U.S.C. § 2702(a)(1) (2018).
[31] 18 U.S.C. 2510(17) (2002).
[32] *See e.g.,* Hately v. Watts, 917 F.3d 770, 773 (4th Cir. 2019) (reversing the district court and holding that previously opened emails are in "electronic storage"); Vista Mktg., LLC v. Burkett, 812 F.3d 954, 976 (11th Cir. 2016) ("[C]onsiderable disagreement exists over whether, and if so, under what conditions, opened email transmissions may qualify as being held in 'electronic storage.'").
[33] 18 U.S.C. § 2703(d) (2016).
[34] *See e.g.*, Chris Calabrese, *Broad Support for the ECPA Modernization Act*, CTR. FOR DEMOCRACY AND TECH. (July 27, 2017), https://cdt.org/is thi/broad-support-for-the-ecpa-modernization-act/.
[35] 18 U.S.C. § 2703(a) (2016).

Some landmark rulings have found that the Fourth Amendment requires stronger safeguards than the text of Section 2703. In *United States v. Warshak*, the Sixth Circuit held the government needs a warrant to obtain any email communications.[36] In *Carpenter v. United States*, the Supreme Court held the government needs a warrant to access seven days or more of historical cell tower location records.[37] In practice, the major online providers now only produce emails and other content in response to a warrant from law enforcement.[38]

Much less public attention has been paid to Section 2702, which covers situations in which providers may voluntarily disclose electronic records. Providers may freely divulge non-content records to any entity other than the government.[39] Providers may divulge any records to a government agency only if the agency follows the procedures for compelled disclosure or if there is a dangerous emergency.[40] Most importantly for the purposes of this article, both ECS and RCS providers to the public may only knowingly divulge the contents of communications to private parties in certain limited situations, primarily if the user consents,[41] or if the disclosure is "necessarily incident to the rendition of the service or the protection of the rights or property of the provider of that service."[42] There is no general exception for disclosures made in response to valid legal process. Violations of the SCA can result in hefty

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[36] 631 F.3d 266, 288 (6th Cir. 2010).
[37] 138 S. Ct. 2206, 2217 (2018).
[38] *See, e.g.*, *Information for Law Enforcement Authorities*, FACEBOOK https://www.facebook.com/safety/groups/law/guidelines/ ("A search warrant . . . is required to compel the disclosure of the stored contents of any account."); *Legal process for user data requests FAQs*, GOOGLE, https://support.google.com/transparencyreport/answer/7381738 ("Google requires an ECPA search warrant for contents of Gmail and other services based on the Fourth Amendment to the U.S. Constitution."); *Law Enforcement Requests Report*, MICROSOFT, https://www.microsoft.com/en-us/corporate-responsibility/lerr ("[W]e . . . only disclose content to law enforcement in response to a warrant (or its local equivalent).").
[39] 18 U.S.C. § 2702(c)(6) (2018) (covering all "information… not including the contents of communications").
[40] 18 U.S.C. §§ 2702(a)(3), (c)(1), (c)(4) (2018).
[41] 18 U.S.C. §§ 2702(b)(3) (2018).
[42] 18 U.S.C. § 2702(b)(5) (2018).

civil penalties for the providers.[43] Thus, without the consent of the user, it is essentially impossible for anyone but the government to obtain stored electronic content from providers.

There is no indication in the legislative record that lawmakers considered how the SCA would hamper criminal defendants or civil litigants.[44] This oversight is perhaps understandable given that lawmakers primarily saw the SCA as part of an update of the Wiretap Act, which does not authorize wiretaps by anyone but the government. Real-time interception of private phone conversations is a powerful surveillance tool, and there is no compelling reason to expand that technique beyond the situations when it is currently authorized for government investigations.

But over the last thirty years, it has become increasingly routine for stored electronic records to be used as evidence. In just the first half of 2020, Facebook received 51,121 government requests for user data in the United States,[45] and Google received 81,785 requests.[46] Verizon received 128,552 government requests over the same time period.[47] So while the government increasingly relies on digital content to secure convictions, criminal defendants and civil litigants are often shocked to learn that these companies simply refuse their requests outright. "When [internet service providers] inform civil litigants and criminal defendants, as they must, that federal law precludes them from disclosing the communications without the consent of

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[43] *See* 18 U.S.C. § 2707 (2002) (providing that a successful plaintiff is entitled to actual damages or at least $1,000, as well as attorney's fees. If the violation is willful or intentional, the court may assess punitive damages.).

[44] *See generally* H.R. Rep. No. 99-647 (1986); S. Rep. No. 99-541 (1986); Marc J. Zwillinger, Christian S. Genetski, *Criminal Discovery of Internet Communications Under the Stored Communications Act: It's Not A Level Playing Field*, 97 J. CRIM. L. & CRIMINOLOGY 569, 594 (2007) ("[N]othing in the legislative history suggests that Congress contemplated, much less intended, this result. Given the focus on the Fourth Amendment, Congress appears simply to have overlooked the potential concerns of non-state actors seeking compulsory access to information held by ISPs.").

[45] *Requests for User Data*, FACEBOOK, https://transparency.facebook.com/government-data-requests/country/US/.

[46] *Requests for User Information*, GOOGLE, https://transparencyreport.google.com/user-data/overview.

[47] *United States Report*, VERIZON, https://www.verizon.com/about/portal/transparency-report/us-report/. (This figure includes not only SCA requests for text messages, but also wiretaps, pen registers, and trap and trace orders for call records.).

the author or recipient, they invariably meet resistance and are sometimes forced to litigate these issues," Marc Zwillinger, a data privacy attorney, testified in a House Judiciary Committee hearing in 2010.[48] "Even judges are astounded that they have not been given the power, under any circumstances, to require the production of email content by an ISP in a civil case."[49]

II. COURTS FAIL TO FIX THE SCA

A. THE SCA EXPLICITLY BARS DISCLOSURE

Courts have repeatedly rejected attempts by civil litigants to subpoena providers for digital content. In *O'Grady v. Superior Court*, two online news outlets had published stories about a new rumored Apple product.[50] Apple sent subpoenas to the outlets' email providers to obtain evidence of trade secret theft. Apple argued that production of the emails was "necessarily incident . . . to the protection of the rights or property" of the email provider under Section 2702(b)(5), but the California Court of Appeal held that this reasoning was circular.[51] Apple was assuming the validity of the subpoenas in arguing that noncompliance could expose the email providers to sanctions. The court also rejected Apple's argument that the SCA contained an implicit exception for civil discovery.[52] The language of the statute, the court wrote, "clearly prohibits any disclosure of stored email other than as authorized by enumerated exceptions . . . [B]y enacting a number of quite particular exceptions to the rule of non-disclosure, Congress demonstrated that it knew quite well how to make exceptions to that rule."[53]

In *Viacom Int'l Inc. v. YouTube Inc.*, the entertainment studio sued Google for inducing copyright infringement and demanded access to private YouTube videos.[54] A U.S. district court in New York blocked that request, ruling that the SCA prohibited Google from disclosing private user videos and that the law "contains no exception for disclosure of such

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[48] Hearing on the Electronic Communications Privacy Act and the Revolution in Cloud Computing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. (2010) (testimony of Marc J. Zwillinger), 2010 WL 3722741.
[49] *Id.*
[50] O'Grady v. Superior Court, 139 Cal. App. 4th 1423, 1431 (2006).
[51] *Id.* at 1441.
[52] *Id.*
[53] *Id.* at 1443.
[54] Viacom International, Inc. v. Youtube, Inc., 253 F.R.D., 256 (S.D.N.Y. 2008).

communications pursuant to civil discovery requests."[55] In *Crispin v. Christian Audigier, Inc.*, a U.S. district court in California held that the SCA extends to social media, quashing subpoenas to Facebook and MySpace for private messages.[56]

Criminal defendants have not fared much better. In 2015, the Second Circuit held that the "SCA does not, on its face, permit a defendant to obtain" electronic content from providers.[57] A U.S. district court in New York similarly concluded in 2017 that the SCA "does not permit a defendant in a criminal case to subpoena the content of a Facebook or Instagram account,"[58] and a Tennessee state appellate court ruled in 2017 that "defendants cannot obtain . . . witnesses' electronic communications directly from the social media providers."[59]

In 2008, a federal public defender's office argued it was a "governmental entity" entitled to compelled disclosure under Section 2703.[60] This argument didn't get far. A U.S. district court in Ohio concluded the SCA was clearly designed to empower law enforcement agencies, not defendants.[61] The court also held that a federal public defender's office is part of the judicial branch, and is therefore not a "governmental entity," which the statute defines as "a department or agency of the United States or any state or political subdivision thereof."[62]

B. The Consent Exception

The most commonly cited exception to the SCA's prohibition on disclosure is "lawful consent" by the sender, recipient, or subscriber under Section 2702(b)(3).[63] Some courts have grappled with how far "consent" can be stretched. In a probate case, for example, the Massachusetts Supreme Judicial Court held in 2017 that the brother of a decedent could consent to

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[55] *Id.* at 264.
[56] Crispin v. Christian Audigier, Inc.,717 F. Supp. 2d 965, 991 (C.D. Cal. 2010).
[57] *United States v. Pierce*, 785 F.3d 832, 842 (2d Cir. 2015).
[58] *United States v. Nix*, 251 F. Supp. 3d 555, 559 (W.D.N.Y. 2017).
[59] State v. Johnson, 538 S.W.3d 32, 70 (Tenn. Crim. App. 2017).
[60] United States v. Amawi, 552 F. Supp. 2d 679, 680 (N.D. Ohio 2008).
[61] *Id.*
[62] *Id.* (citing 18 U.S.C. § 2711(4) (2018)).
[63] 18 U.S.C. § 2702(b)(3) (2018) (allowing for the disclosure of content "with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service").

disclosure of the decedent's Yahoo emails.[64] The U.S. Supreme Court denied Yahoo's petition to review the decision.[65]

In *Flagg v. City of Detroit*, a U.S. district court discussed the possibility that it could order the defendant city to "consent" to the disclosure of text messages under the SCA.[66] The facts of *Flagg* are particularly dramatic. Tamara Greene was an exotic dancer who was shot and killed in 2003, a few months after she allegedly danced at a party with then-Mayor Kwame Kilpatrick.[67] Greene's family sued the City of Detroit, alleging that Kilpatrick and other top officials derailed the investigation into her murder and covered up evidence. The family subpoenaed SkyTel, which provided text message services to city employees and which maintained back-up text records that the employees no longer possessed themselves.

The court in *Flagg* rejected the city's argument that the text messages were off-limits from discovery. Detroit, the court found, had "both the ability and the obligation" to consent under the SCA to the production of the text messages.[68] But uneasy with a lack of case law on the issue, the court decided it was "best to avoid this question" and instead encouraged the plaintiff family to "reformulate" its subpoena as a request for production to the city.[69] The judge instructed the city to then forward the discovery request to SkyTel for production of the messages.[70] Similarly, in 2008, a U.S. district court in Virginia blocked subpoenas served on AOL, but suggested in a footnote that the district court in Mississippi, which was overseeing the underlying insurance litigation, "could order the [non-party witnesses] to consent to AOL's disclosing the contents of their e-mails under the pain of sanctions."[71]

A California Court of Appeal went further in 2014, ruling that judicially-coerced consent can constitute "lawful consent" under the SCA.[72] In that case, a boat manufacturer, Navalimpianti, wanted access to email records of

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[64] Ajemian v. Yahoo!, Inc., 84 N.E.3d, 766 (Mass. 2017).
[65] Oath Holdings, Inc. v. Ajemian, 138 S. Ct. 1327 (2018).
[66] Flagg v. City of Detroit, 252 F.R.D. 346, 366 (E.D. Mich. 2008).
[67] Elisha Anderson, *Unsolved slaying of stripper Tamara Greene gets national audience in podcast*, DETROIT FREE PRESS (Feb. 7, 2019), https://www.freep.com/story/news/local/michigan/detroit/2019/02/07/tamara-greene-crimetown-podcast-detroit/2789295002/.
[68] *Flagg*, 252 F.R.D. at 359.
[69] *Id.* at 366.
[70] *Id.*
[71] In re Subpoena Duces Tecum to AOL, LLC, 550 F. Supp. 2d 606, 613 n.5 (E.D. Va. 2008).
[72] Negro v. Superior Court, 230 Cal. App. 4th 879, 897 (2014).

a former employee it was suing in Florida state court for breaches of duty. The Florida court ordered the former employee, Matteo Negro, to consent to the disclosure of his email records.[73] Facing court sanctions, Negro emailed Google to consent, but continued his efforts in California to block the release of the emails. The California Court of Appeal acknowledged that, in some circumstances, "consent" implies a "voluntary agreement," but held that, for purposes of the SCA, Negro had lawfully authorized disclosure. Negro, the court held, had a choice between facilitating discovery or risking court sanctions in Florida. "He seeks to have the best of both worlds by complying with the court's order while denying that his decision to do so should be given legal effect," the court wrote. "We reject this contention and hold that the consent expressly given by him pursuant to court order constituted 'lawful consent' under the SCA."[74]

Allowing courts to order parties and witnesses to "consent" could be a way to work around the SCA in some situations. Alternatively, courts could just order users to produce the digital records. The users could then either download the records themselves or ask the electronic provider for the records, as the City of Detroit did in *Flagg*. This solution would avoid the oxymoronic concept of "coerced consent." But neither approach helps when the account holder is dead, missing, located abroad, or willing to endure court sanctions to keep the records hidden.

C. Defendants Challenge the SCA's Constitutionality

Because a person's liberty is at stake, a criminal prosecution implicates constitutional rights that civil litigation does not. In *Brady v. Maryland*, the Supreme Court famously held that due process requires the prosecution to provide any "favorable" evidence in its possession to a defendant if the evidence is material to either guilt or punishment.[75] So if the government has already used its SCA powers to obtain emails, social media posts, text messages, or other digital content that could help the defendant, it must provide those records to the defendant. But often, the defense will want to pursue theories the government never examined. The prosecution, for example, might not have requested email records that suggest a key government witness is lying or private Instagram photos that point to someone else as the true culprit. If evidence is not yet in the government's

[73] *Id.* at 883.
[74] *Id*. at 899.
[75] 373 U.S. 83, 87 (1963).

possession, the prosecution has no *Brady* obligation to go find it and provide it to the defense.[76]

Frustrated by the SCA's total statutory prohibition on disclosure, defendants have turned to constitutional challenges, arguing the SCA violates their rights under the Fourteenth Amendment's Due Process Clause, the Sixth Amendment's Compulsory Process Clause, and the Sixth Amendment's Confrontation Clause.[77] These arguments do not have much support under current U.S. Supreme Court precedent. The Court has ruled there is no general constitutional right to discovery in criminal cases.[78]

In *Pennsylvania v. Ritchie*, the Court held that a defendant accused of child abuse had a due process right to obtain records from a state protective service agency.[79] A plurality of the justices, however, concluded that the Confrontation Clause protects "a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination"—not a "constitutionally compelled rule of pretrial discovery."[80] A majority of the Court held that the Compulsory Process Clause does not protect any rights that are not already protected by the Due Process Clause.[81]

The Supreme Court has explained that due process is "in essence, the right to a fair opportunity to defend against the State's accusations."[82]

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[76] *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) (holding that prosecutors have a duty to learn of favorable evidence known to the police and others "acting on the government's behalf," but not that prosecutors must search for evidence outside of the government's control).

[77] *See e.g.*, Opening Brief on the Merits for Real Parties Lee Sullivan and Derrick Hunter at 9, Facebook, Inc. v. Superior Court, 2016 WL 284305 (Cal. No. S230051) (filed Jan. 15, 2016). The Confrontation Clause protects a defendant's right "to be confronted with the witnesses against him," while the Compulsory Process Clause protects a defendant's right "to have compulsory process for obtaining witnesses in his favor."

[78] Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

[79] 480 U.S. 39, 58 (1987).

[80] *Id.* at 52 (emphasis in original). *But see* Davis v. Alaska, 415 U.S. 308, 319 (1974) (holding that the Confrontation Clause protects a defendant's right to question a key prosecution witness about his juvenile record, notwithstanding a state law making juvenile records inadmissible in court).

[81] *Id.* at 56 ("Although we conclude that compulsory process provides no *greater* protections in this area than those afforded by due process, we need not decide today whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment.").

[82] Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

Criminal prosecutions must comport with "prevailing notions of fundamental fairness," and criminal defendants must have a "meaningful opportunity to present a complete defense."[83] But the Court has also emphasized that the "right to present relevant evidence is not unlimited" and may "bow to accommodate other legitimate interests in the criminal trial process."[84] The Due Process Clause "does speak to the balance of forces between the accused and his accuser," but it "has little to say regarding the amount of discovery which the parties must be afforded."[85]

Faced with this uncertain Supreme Court case law, lower courts have been reluctant to endorse constitutional challenges to the SCA. In *Facebook, Inc. v. Wint*, the District of Columbia Court of Appeals (Washington D.C.'s equivalent of a state supreme court) quashed subpoenas for social media content served by a defendant accused of murder.[86] The defendant had argued that, under the doctrine of constitutional avoidance,[87] the court should construe the SCA to allow criminal defendant subpoenas for content. But the court held the SCA was "unambiguous" in blocking the subpoenas and that the defendant had failed to establish any "serious constitutional doubt" about the law.[88] The defendant, the court noted, could subpoena users with access to the content instead of subpoenaing Facebook directly. He was not entitled to subpoena Facebook just because it would be "the easiest method for obtaining covered communications, and that other approaches are cumbersome, time-consuming, and more likely to be ineffective."[89] The court concluded that by channeling subpoenas to users instead of providers, the SCA "increases the chances that affected individuals can assert claims of privilege or other rights of privacy before covered communications are disclosed to criminal defendants in response to subpoenas."[90]

[83] *California v. Trombetta,* 467 U.S. 479, 485 (1984).
[84] United States v. Scheffer, 523 U.S. 303, 308 (1998).
[85] Wardius v. Oregon, 412 U.S. 470, 474 (1973).
[86] Facebook, Inc. v. Wint, 199 A.3d 625, 627 (D.C. 2019).
[87] *Id.* at 633 ("The doctrine of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.").
[88] *Id.*
[89] *Id.*
[90] *Id.* at 631.

D. *FACEBOOK, INC. V. SUPERIOR COURT* (HUNTER)

The California Supreme Court considered a challenge to the SCA in 2018, but it ultimately ducked the difficult constitutional questions. In that case, *Facebook, Inc. v. Superior Court (Hunter)*, two defendants, Derrick Hunter and Lee Sullivan, were charged with murder and attempted murder in a drive-by-shooting in San Francisco.[91] A key government witness was expected to be Renesha Lee, the alleged driver of the car and Sullivan's ex-girlfriend. The defendants' attorneys argued that, in order to present a complete defense, they needed access to the content of Renesha Lee's social media accounts, as well as the social media content of the deceased victim, Joaquin Rice, Jr.[92] They argued that Lee's accounts would reveal her motives to lie on the stand.[93] Rice's accounts, they argued, could include exculpatory evidence and would help the attorneys cross-examine the police detective over whether the shooting was gang-related.[94] The attorneys could not get the records directly from the witnesses because Rice was dead and Lee had invoked her Fifth Amendment rights.[95] The attorneys subpoenaed Facebook, Twitter, and Instagram, but the companies all moved to quash, arguing that disclosure would violate the SCA.[96] The trial court ordered the social media companies to comply, but the state appellate court reversed.[97]

A year after the California Supreme Court first agreed to hear the case, the court signaled it was looking for a way for the defendants to get access to at least some of the digital evidence without having to hold the SCA unconstitutional.[98] The justices asked for supplemental briefing on whether the law prohibits providers from disclosing material that is already accessible to the general public.[99] In response, the defendants argued that social media

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[91] *Hunter*, 4 Cal. 5th at 1248.
[92] *Id.* at 1254.
[93] *Id.* at 1257.
[94] *Id.* at 1256.
[95] Opening Brief on the Merits for Real Parties Lee Sullivan and Derrick Hunter at 5, Facebook, Inc. v. Superior Court (Hunter), 2016 WL 284305 (Cal. No. S230051) (filed Jan. 15, 2016). Witnesses can only lawfully invoke the Fifth Amendment to avoid document production in limited circumstances. The Supreme Court has held that the Fifth Amendment only applies to the production of documents if the act of producing them would reveal something new about their existence or location. United States v. Hubbell, 530 U.S. 27, 45 (2000).
[96] *Hunter*, 4 Cal. 5th at 1249.
[97] *Id.*
[98] *Id.* at 1250.
[99] *Id.*

posts that are available to a large group of "friends" or "followers" are essentially public, and the user has therefore consented to disclosure under SCA Section 2702(b)(3).[100] Those posts are often accessible to hundreds or thousands of people, the defendants argued, and the user therefore has no reasonable expectation of privacy in the content.[101] The social media companies conceded that users have consented to the disclosure of posts configured to be public, but they argued that any posts with narrower privacy settings are off-limits from disclosure under the SCA.[102]

The California Supreme Court concluded that the concession by the social media companies was "well taken" in light of the statutory language and legislative history.[103] The court cited the House report on ECPA, which explained:

> [I]mplied consent might be inferred from the very nature of the electronic transaction. For example, a subscriber who places a communication on a computer 'electronic bulletin board,' with a reasonable basis for knowing that such communications are freely made available to the public, should be considered to have given consent to the disclosure or use of the communication.[104]

The court ruled therefore that all of the Facebook, Instagram, and Twitter posts configured to be public fell under the consent exception of Section 2702(b)(3). The court rejected the defendants' argument though that the witnesses had consented to the disclosure of posts available to their friends or followers. That kind of privacy setting indicates the users' intent *not* to make their communications available to everyone. The court found, "The legislative history suggests that Congress intended to exclude from the scope of the lawful consent exception communications configured by the user to be accessible to only specified recipients."[105]

The social media companies argued that they nevertheless retained discretion over whether or not to disclose any content. Section 2702(b) states that a provider "may divulge" the contents of a communication that falls under one of the listed exceptions. Therefore, the providers reasoned, the law permits but does not require disclosure of public communications. The

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[100] Opening Brief, *supra* note 95, at 7.
[101] *Id.*
[102] *Id.*
[103] *Hunter*, 4 Cal. 5th at 1250.
[104] *Id.* at 1268 (quoting H.R. Rep. No. 99-647, at 66 (1986)).
[105] *Id.* at 1278.

California Supreme Court rejected this argument, concluding that the providers cannot "defy an otherwise proper criminal subpoena seeking public communications."[106] The court held that if a user consents, the provider "may" disclose content. However, if a user consents *and* the provider receives an otherwise valid subpoena, the provider must disclose the content.

By focusing on public communications, the California Supreme Court provided little useful guidance on the vast majority of records that actually matter in a criminal prosecution. If content is public, it is, by definition, already available to the defense. A defense investigator could presumably take the stand, testify to viewing an Instagram photo, and the defense could move the photo into evidence. It is possible juries might find a certification by Instagram itself more trustworthy, but the difference seems marginal. What the defense really wanted in *Hunter* was access to non-public communications that could suggest the defendants were not guilty. Although both sides had urged the California Supreme Court to answer the constitutional questions, the court concluded "it proper at this point to address only the statutory issues, and not the constitutional claims."[107]

On remand, the trial court was not nearly as hesitant about addressing the constitutional issues and ordered the social media companies to comply with the subpoenas. The social media companies again refused, but this time, the California Supreme Court declined to review their appeal.[108] The companies still refused to comply, and the trial judge held them in contempt, accusing them of "misusing their immense resources to manipulate the judicial system in a manner that deprives two indigent young men facing life sentences of their constitutional right to defend themselves at trial."[109] The companies paid the fine, and the case went to trial without the evidence.[110] Sullivan was convicted on all counts; Hunter was acquitted.[111] The U.S. Supreme Court denied the companies' petition to review the fines.[112]

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[106] *Id.* at 1250.
[107] *Id.* at 1275.
[108] Application to Extend the Time to File a Petition for a Writ of Certiorari at 5, Facebook, Inc., et al., Applicants v. Superior Court of San Francisco County (19A609) (filed Nov. 26, 2019).
[109] *Id.* at Exhibit C.
[110] Brief for Respondents at 5-6, *Facebook, Inc. v. Superior Court*, 2020 1875764 (U.S.) (filed April 9, 2020).
[111] *Id.* at 5.
[112] Facebook, Inc. v. Superior Court of California, San Francisco County, 140 S.Ct. 2761 (Mem) (May 18, 2020), 2020 WL 2515495.

Even the California Supreme Court's narrow holding in *Hunter* on public communications has complications. For example, the court left open the question of whether consent under the SCA is revocable. Could a witness change her privacy settings to prevent a social media company from disclosing her records? Do the providers have the technical capability to keep track of the privacy settings on a single piece of content over time? Which point in time matters for purposes of determining consent under the SCA? The California Supreme Court acknowledged these issues, but declined to decide them.[113]

One implication of *Hunter* is that litigants may be able to compel providers to turn over non-content records, even without user consent. Section 2702(c) states that providers "may divulge" non-content records "to any person other than a governmental entity."[114] The reasoning of *Hunter* suggests that if a provider "may divulge" records without a subpoena, then it must divulge them with one. This interpretation would seem to demand much broader compliance with subpoenas than the technology companies are currently providing. On a help page for litigants, Facebook advises that it "may" provide "basic subscriber information,"[115] which is a sub-category of non-content records that can include names, lengths of service, email addresses, recent logins, and IP addresses. The company only provides this information if it "is indispensable to the case, and not within a party's possession upon personal service of a valid subpoena or court order and after notice to affected account holders."[116] Additionally, Facebook only responds to federal or California subpoenas, and those subpoenas must identify the accounts by URL or Facebook user ID.[117] These restrictions appear to be Facebook's own discretionary guidelines. If the "may" in Section 2702(c) is really a "must" when coupled with a subpoena, then it would seem Facebook would have no choice but to provide all non-content records (not just basic subscriber information), regardless of whether the information was "indispensable" to a case or which jurisdiction the subpoena was from.

Other courts, however, have concluded that the SCA grants providers total discretion over whether to comply with subpoenas by private parties. A federal magistrate judge in California quashed a subpoena for Facebook content in 2012 and wrote that "[u]nder the plain language of Section 2702,

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[113] *Hunter*, 4 Cal. 5th at 1289.
[114] *Id.* at 1265-66.
[115] Law Enforcement & Third-Party Matters, FACEBOOK, https://www.facebook.com/help/privacy/lawenforcement.
[116] *Id.*
[117] *Id.*

while consent may ***permit*** production by a provider, it may not ***require*** such a production."[118] Similarly, a U.S. district court in Virginia quashed a subpoena for Google email account content in 2017.[119] "Based upon the plain language of the SCA, service providers such as Google are not required to disclose communications covered by the Act, even when the relevant consent is properly given," the court wrote.[120] "Instead, the SCA vests service providers with discretionary authority to disclose once consent is properly given . . . Therefore, under the SCA a criminal defendant cannot couple user consent and a court ordered subpoena to compel disclosure from a service provider."[121]

E. *FACEBOOK, INC. V. SUPERIOR COURT* (TOUCHSTONE)

Just two years after *Hunter*, the California Supreme Court grappled with the SCA again in *Facebook, Inc. v. Superior Court of San Diego Cty. (Touchstone)*. [122] Once again though, the court avoided answering any of the difficult questions surrounding the law.

In August 2016, Lance Touchstone shot his sister's boyfriend, Jeffrey Renteria, three times.[123] Touchstone argues the shooting was in self-defense.[124] According to Touchstone, Renteria had previously threatened to harm Touchstone and his sister, so when Renteria burst through the front door of Touchstone's sister's San Diego home and lunged at them, Touchstone immediately pulled out his handgun and began firing.[125] Renteria survived, and Touchstone was charged with attempted murder.[126] Touchstone's attorney subpoenaed Facebook for Renteria's private posts and messages, arguing they were relevant to the self-defense claim and to impeach Renteria's credibility if (as expected) he took the stand.[127] Facebook filed a motion to quash, which the trial court denied.[128] The California Court of

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[118] In re Facebook, Inc., 923 F. Supp. 2d 1204, 1206 (N.D. Cal. 2012) (emphasis in original).
[119] United States v. Wenk, 319 F. Supp. 3d 828, 829 (E.D. Va. 2017).
[120] *Id.*
[121] *Id.*
[122] 10 Cal. 5th 329 (2020).
[123] *Id.* at 339-340.
[124] *Id.* at 341.
[125] *Id.* at 340-41.
[126] *Id.* at 336.
[127] *Id.* at 338.
[128] *Id.* at 337.

Appeal reversed, concluding that the SCA expressly prohibits Facebook from divulging the contents of the communications and that Touchstone's constitutional challenges to the SCA lacked merit.[129]

In accepting the case for review, the California Supreme Court outlined the five issues it wanted the parties to address:

> 1. Can the trial court order the witness, on pain of sanctions, to a) comply with a subpoena for Facebook records, or b) "consent" to disclosure by Facebook?
> 2. Would a court order under either 1(a) or 1(b) be valid under the SCA?
> 3. If such orders would be improper during pretrial proceedings, would they be proper after an appropriate showing at trial?
> 4. Would such an order at trial be valid under the SCA?
> 5. Can the court order the prosecution to issue a search warrant for the Facebook material at issue?[130]

The first four questions address the SCA's consent exception. In *Negro*, a California appellate court had held that courts can order account holders to "consent" to the disclosure of their communications,[131] but the California Supreme Court has not weighed in on the issue.

The last question raises the possibility that courts could use the investigative powers of prosecutors to obtain material on behalf of defendants. Such a maneuver would seemingly equalize the powers of prosecutors and defendants, allowing defendants to access evidence through the compelled disclosure provisions of Section 2703. This approach, however, could have serious constitutional problems. In its brief to the court, the San Diego County District Attorney argued that, by unilaterally ordering a warrant, a court would violate the separation of powers doctrine embedded in the California Constitution.[132] The executive branch, not the judiciary, conducts criminal investigations and prosecutions, the district attorney argued.[133] Judges cannot act as their own affiants for a warrant, the district

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[129] Facebook, Inc. v. Superior Court, 15 Cal. App. 5th 729, 748 (Cal. App. 4 Dist., 2017).
[130] Facebook v. S.C. (Touchstone), 408 P.3d 406 (Cal. 2018) (granting petition for review).
[131] 230 Cal. App. 4th at 899.
[132] San Diego County District Attorney Intervenor Brief at 20, *Facebook, Inc. v. Superior Court (Touchstone)*, 2018 WL 4035631 (Cal.) (filed July 25, 2018).
[133] *Id.* at 20-21.

attorney insisted, warning, "The People's power to exercise discretion would be completely removed."[134]

The district attorney also argued that state law and the U.S. Constitution do not allow warrants just to obtain exculpatory materials.[135] Warrants can only issue upon a showing of probable cause and to gather evidence that a crime has occurred or is about to occur.[136] There is no Fourth Amendment exception for evidence that might be helpful to a defendant's case.

Ultimately, the California Supreme Court did not answer any of these questions. After reviewing the record, the court concluded the case was not an "appropriate vehicle" to resolve these issues.[137] Regardless of whether the SCA bars disclosure, the court questioned whether the subpoena was even supported by "good cause."[138] In particular, the court concluded that the evidence presented at a preliminary hearing called into question the plausibility of the self-defense theory and suggested the privacy interests outweighed the defendant's need for the evidence.[139] The California Supreme Court remanded the case to the trial court, instructing it to apply a seven-factor test to decide whether there was good cause for the subpoena.[140]

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[134] *Id.* at 21.
[135] *Id.* at 17.
[136] *Id.* at 21.
[137] *Touchstone*, 10 Cal. 5th at 337.
[138] *Id.* at 343-44 (citing Pitchess v. Superior Court 11 Cal.3d 531, 535 (Ca. 1974)).
[139] *Id.* at 341.
[140] *Id.* at 345-47. The court called these factors the *Alhambra* factors, citing *City of Alhambra v. Superior Court*, 205 Cal. App. 3d 1118, 1134 (Ct. App. 1988). The seven factors are:

> 1. "Has the defendant carried his burden of showing a 'plausible justification' for acquiring documents from a third party by presenting specific facts demonstrating that the subpoenaed documents are admissible or might lead to admissible evidence that will reasonably assist the defendant in preparing his defense?"
> 2. "Is the sought material adequately described and not overly broad?"
> 3. "Is the material reasonably available to the entity from which it is sought (and not readily available to the defendant from other sources)?"
> 4. "Would production of the requested materials violate a third party's confidentiality or privacy rights or intrude upon any protected governmental interest?"
> 5. "Is defendant's request timely?"
> 6. "Would the time required to produce the requested information necessitate an unreasonable delay of defendant's trial?"

This decision does not settle any of the most pressing questions about the scope of the SCA. It doesn't matter if a defendant can meet the seven-factor test for good cause if the SCA still bars the disclosure of the evidence. The California Supreme Court has now had two opportunities in recent years to address the SCA, and it has dodged difficult decisions both times. Other courts do not appear any more eager to dive into the fray. Thus, it increasingly appears that Congress, not the courts, must fix the SCA's imbalance.

III. LEGISLATIVE PROPOSAL

Congress should empower non-state actors to obtain court orders compelling service providers to produce electronic records if:

1. The content is not reasonably available from other sources;
2. There is a fair probability that the order will produce relevant information;
3. The subscriber and the service provider are given notice and an opportunity to object; and
4. The requesting party reimburses the service provider for the costs of production.[141]

Additionally, Congress should clarify that traditional limits on discovery still apply. This proposal would largely put criminal defendants and civil litigants on equal footing with the government, while balancing other interests. Like government access under Section 2703 (and unlike a routine subpoena), this proposal would require judicial approval before the production of any records. It would also make the rules for the digital world more closely resemble those for the physical one. If a relevant record is

7. "Would production of the records containing the requested information place an unreasonable burden on the third party?"

[141] *See generally* Marc J. Zwillinger, Christian S. Genetski, *Criminal Discovery of Internet Communications Under the Stored Communications Act: It's Not A Level Playing Field*, 97 J. CRIM L. & CRIMINOLOGY 569, 570 (2007) (proposing an amendment to the SCA that would allow the production of content if "the requesting party can demonstrate that the requested information is relevant and material to the ongoing litigation and is unavailable from other sources, and both the subscriber or customer whose materials are sought and the service provider from whom the materials will be produced are provided reasonable notice and the opportunity to be heard."). The most significant difference in my proposal is the addition of the requirement that there must be a "fair probability" of discovering relevant information.

locked in a storage unit, for example, a litigant can force the storage locker owner to provide access.[142]

By requiring litigants to show that the material is unavailable from other sources, the amendment would avoid opening the floodgates to legal demands on service providers. The law should still prefer that users handle most requests themselves because they are better positioned than service providers to screen for privileged materials and raise appropriate objections. It would be infeasible for Google, for example, to sift through a user's emails to decide which ones might be covered by attorney-client privilege. Google should only produce those emails itself if the user is unavailable.

It is, of course, impossible to prove with certainty that no additional efforts could produce the material from another source. This proposal therefore would only require a showing that the material is not "reasonably available" from a source other than the service provider. If the user is missing, the litigant could obtain the material after making reasonable efforts to locate him or her. This rule is reminiscent of the requirement that law enforcement must exhaust other investigative techniques before receiving authorization for a wiretap.[143]

The "fair probability" requirement is meant to resemble the probable cause requirement for a warrant.[144] Probable cause is a term used only in the law enforcement context. But an amendment to the SCA should not make it easier for criminal defendants or private litigants to access content than it is for law enforcement. After the *Warshak* decision in 2010, the government generally now needs a warrant to compel providers to produce content. Like the process for obtaining a warrant, this proposal would require the requesting party to demonstrate to a judge there is a reasonable basis to believe an account contains relevant material. A mere hunch or conjecture would not be enough. This requirement would limit abusive fishing expeditions with a low

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[142] *See* Jeffrey Paul DeSousa, *Self-Storage Units and Cloud Computing: Conceptual and Practical Problems with the Stored Communications Act and Its Bar on ISP Disclosures to Private Litigants*, 102 GEO. L.J. 247, 257 (2013).

[143] 18 U.S.C § 2518(1)(c) (among other requirements to obtain a wiretap, the government must provide "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.")

[144] *See e.g.*, Illinois v. Gates, 462 U.S. 213, 238 (1983) (explaining that, to find probable cause, the job of a judge "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.").

probability of producing anything of value to a case. Omitting this requirement would leave reform legislation vulnerable to criticism from law enforcement that it would give criminal defendants stronger surveillance powers than the government—a criticism that could derail the legislation.

Congress should make clear that traditional limits on discovery still apply. The Federal Rules of Civil Procedure already require that discovery be "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[145] Federal courts can issue protective orders for "good cause" in civil cases to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[146] The Federal Rules of Criminal Procedure allow courts to block subpoenas if compliance would be "unreasonable or oppressive."[147] State courts place similar limits on discovery.[148] For example, the seven-factor test for good cause that the California Supreme Court articulated in *Touchstone* includes protections for the privacy of third parties[149] and would still apply to subpoenas under an updated SCA.

Courts could thus invoke these restrictions to deny requests that would invade deeply personal information with little benefit to a case or to control who has access to particularly sensitive records. Courts could also narrow requests seeking unnecessarily voluminous records. These existing discovery procedures are more lenient for criminal defendants, who are fighting to preserve their freedom, than they are for civil litigants, who are generally seeking money. Civil litigants in federal court must show that a discovery request is "proportional to the needs of the case," so a court would be unlikely to order a wireless carrier, for example, to disclose months of geolocation data in a low-value civil dispute.

The proposal would give service providers and subscribers an opportunity to object to production requests. These objections could be based on the restrictions already discussed. Providers or subscribers could argue that a

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[145] FED. R. CIV. P. 26(b)(1).
[146] FED. R. CIV. P. 26(c)(1).
[147] FED. R. CRIM. P. 17(c)(2).
[148] *See, e.g.*, CAL. CODE CIV. P. § 2017.020(a) ("The court shall limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence.").
[149] *See Touchstone*, 10 Cal. 5th at 346.

litigant has failed to show a "fair probability" that an account will contain relevant evidence or that a litigant has not tried hard enough to obtain the material from other sources. They could also cite the traditional discovery limitations. This objection process would help ensure judges fully consider the privacy interests at stake and not just the litigant's desire for the information. Although the providers could still file motions to quash without this provision, the subscribers themselves might not otherwise have a chance to be heard.

The cost reimbursement provision mirrors payments the law already requires the government to make.[150] This requirement would minimize the burden on the service providers and would deter litigants from filing unnecessary or unreasonable requests. Parties would have an incentive to keep their requests narrow and manageable, and to not waste the time of technology company employees. The government should cover the costs for indigent criminal defendants.

Privacy advocates and technology companies might demand stronger privacy safeguards. They might argue, for example, that litigants should have to show that the material would be "indispensable" to the case, not just relevant. This is the standard Facebook currently uses in deciding whether to cooperate with subpoenas for non-content records.[151] This requirement would set the bar too high though. Law enforcement does not need to prove evidence is indispensable to get a warrant. Civil litigants and criminal defendants do not need to make such a high showing if they are subpoenaing the exact same materials directly from account holders. Additionally, it would be difficult for judges to guess just how important the material might be to a case before it is produced. If the material's expected relevance is truly minimal, and if production would be severely embarrassing or burdensome, courts could rely on the traditional discovery rules to deny the request. But allowing discovery only if the material is "indispensable," regardless of the level of privacy at stake, would tip the scales too far in favor of secrecy.

Given the gridlock in Congress, any particular bill is generally unlikely to pass. SCA reform might be an exception. In 2016 and 2017, the House unanimously passed the Email Privacy Act, which would amend the SCA to require the government to obtain a warrant to access emails and other digital content. In this era of intense partisanship, the House can't even rename a

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[150] *See* 18 U.S.C § 2706.
[151] FACEBOOK, *supra* note 115.

post office without dissent,[152] so the unanimous votes for ECPA reform were no small feat. Nevertheless, the Senate never voted on the bill. In 2018, the House attached the Email Privacy Act to the National Defense Authorization Act, an annual must-pass bill.[153] The Senate stripped out the language before approving the defense bill.

A key reason the Email Privacy Act has failed in the Senate is the opposition of the Securities and Exchange Commission (SEC). At a 2015 Senate hearing, Andrew Ceresney, the then-director of the SEC's Division of Enforcement, explained that because the SEC is a civil law enforcement agency, it cannot obtain criminal warrants. Therefore, he argued, requiring warrants to obtain digital content would hamstring the agency's ability to enforce the law. Ceresney warned, "[T]he SEC and other civil law enforcement agencies would be denied the ability to obtain critical evidence, including potentially inculpatory electronic communications from ISPs, even in instances where a subscriber deleted his emails, related hardware was lost or damaged, or the subscriber fled to another jurisdiction."[154] In her farewell speech as SEC chairwoman, Mary Jo White highlighted her efforts to block the Email Privacy Act, saying that while she supports updating the SCA, the legislation would put "innocent victims and our capital markets at risk."[155]

Of course, the SEC's complaint is that the Email Privacy Act would put the agency in the exact same position that every criminal defendant and private litigant is already in. The SEC could still subpoena targets of its investigations directly.[156] Rather than creating a special carve-out for the

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[152] *See* Naomi Lim, *7 GOP Lawmakers Buck Renaming Post Office After Dead Democrat*, WASHINGTON EXAMINER (April 3, 2019), https://www.washingtonexaminer.com/news/7-gop-lawmakers-buck-renaming-post-office-after-dead-democrat.

[153] Chris Calabrese, *Congress Has a Chance to Get It Right on Email Privacy*, CENTER FOR DEMOCRACY AND TECHNOLOGY (July 10, 2018), https://cdt.org/blog/congress-has-a-chance-to-get-it-right-on-email-privacy/.

[154] Andrew Ceresney, *Testimony on Updating the Electronic Communications Privacy Act: Before the Senate Judiciary Comm.*, SEC. AND EXCH. COMM'N (Sept. 16, 2015) https://www.sec.gov/news/testimony/testimony-electronic-communications-privacy-act.html.

[155] Mary Jo White, *A New Model for SEC Enforcement: Producing Bold and Unrelenting Results*, SEC. AND EXCH. COMM'N (Nov. 18, 2016), https://www.sec.gov/news/speech/chair-white-speech-new-york-university-111816.html.

[156] In fact, following the Sixth Circuit's decision in *Warshak*, all government agencies, including the SEC, arguably need a warrant to obtain content from

SEC, Congress should enact a holistic amendment to the SCA for all entities that are not criminal law enforcement agencies. So, by creating an avenue for agencies like the SEC to get digital content from providers, this proposal could help appease the opposition that has so far stymied ECPA reform. Lawmakers reluctant to empower criminal defendants may be more willing to support the bill if it also helps civil law enforcement agencies.

CONCLUSION

If Congress fails to update the SCA, state and federal courts will continue to strain to find ways to limit the unfairness inflicted on defendants by the statute's plain language. These workarounds all have drawbacks, however. Allowing subpoenas for public social media posts, as the California Supreme Court did in *Hunter*, does little to actually help defendants uncover exculpatory material. Courts could order account holders to "consent" to the disclosure of content, but this approach requires a tortured interpretation of "consent" and is useless unless the account holders are able and willing to comply with court orders. In most of those situations, the defendants could have just subpoenaed the account holders directly.

It might be tempting for courts to order prosecutors to issue warrants, but this approach raises serious constitutional questions. If a prosecutor does not believe there is probable cause to search an email account, could a judge order a prosecutor to apply for a warrant anyway? Would such an order violate the separation of powers or the Fourth Amendment? It seems unlikely that many judges would be comfortable commandeering the warrant process to help a defendant gather evidence. If a prosecutor has probable cause, she could always choose to apply for a search warrant that could be beneficial to a defendant (for example, to investigate an alternate suspect). The job of a prosecutor, after all, is to seek justice, not just a conviction.[157] Given the adversarial nature of criminal litigation, however, that is not much comfort to many criminal defendants.

Courts have been reluctant to declare the SCA unconstitutional. Maybe that will change. One day, the Supreme Court could hold the SCA's total ban

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providers. In 2015, White said the SEC was not subpoenaing email providers, but she wanted to maintain the authority anyway. Dustin Volz, *SEC Reveals It Doesn't Use Email Snooping Power It Defends*, NEXTGOV (April 16, 2015), https://www.nextgov.com/cio-briefing/2015/04/sec-reveals-it-doesnt-use-email-snooping-power-it-defends/110341/.

[157] *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTORIAL FUNCTION § 3-1.2(b) (AM. BAR ASS'N 4th Ed. 2017).

on defendant subpoenas to service providers violates the Due Process Clause. Courts, however, are poorly positioned to craft detailed discovery procedures that balance competing interests. Courts on their own would presumably not require defendants to show there is a "fair probability" that an account contains relevant material. The courts are also unlikely to do anything to help civil litigants. The SCA is a creation of Congress, not the courts, so it should be Congress that fixes the unintended consequences of this more than three-decade-old law.

It is true that a criminal prosecution is not a symmetrical proceeding. The prosecution has disadvantages, such as needing to prove its case beyond a reasonable doubt, needing a unanimous jury verdict, and the inability to compel the defendant's testimony. The prosecution also has advantages, such as access to law enforcement powers and investigative tools. "Where accuser and accused have inherently different roles, with entirely different powers and rights, equalization is not a sound principle on which to extend any particular procedural device," the Second Circuit wrote.[158]

While total equalization might not be necessary, defendants should have the power to obtain the evidence they need to adequately defend themselves. No person should be locked in prison while files proving their innocence sit on a company's servers. This article's proposed amendment to the SCA would presumably not affect most cases, but when it would matter, it could mean the difference between freedom and incarceration. Civil litigants should also have access to the evidence they need to vindicate their rights. As online services continue to store more information about our daily lives, the importance of digital evidence will only grow. Congress should therefore enact this proposed amendment to the SCA to protect the rights of criminal defendants and civil litigants.

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[158] United States v. Turkish, 623 F.2d 769, 774-75 (2d Cir. 1980).