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Articles

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Letter from the Editor

Andrew Park, The Criminal Law Practitioner

Dear Readers,

We thank you for your continued interest in the Criminal Law Practitioner. With each issue, we strive to publish pieces that are not only exclusively focused on the arena of criminal law, but that engage with fascinating subject matter and prompt thought-provoking discussion.

As the only student-run criminal law publication at the American University Washington College of Law, this is the culmination of an extraordinary amount of work by a talented and dedicated staff. I am both proud and fortunate to have the opportunity to work with them. I would like to thank our featured authors, Melissa Respeto, Dennis P. Chapman, and Karly Newcomb for their incredible pieces.

If you are interested in more of the Criminal Law Practitioner's publications, please find us at https://www.crimlawpractitioner.org/ for our past issues as well as our staff's weekly blog on the latest issues in criminal law.

As Covid-19 hits the one-year mark of its existence in many of our lives, we hope that you and your families remain safe and in good health. Recent events in this country have shaken us to our core and have further illuminated the vast inequities that built and continue to drive our criminal legal system. And while the national conversation has been awakened this year, we must not forget that our efforts do not end with one victory or several. We hope you continue to join us in striving for justice.

Black Lives Matter.

Sincerely,

Andrew Park
Editor-in-Chief
The Criminal Law Practitioner, Vol. XI

Dedication by Melissa Respeto

I would first like to thank my family, including my late grandfather Angel Respeto, and my fiancé for their undying love and support during the past three years. They more than anyone know that this journey has not been an easy one, but it is only because of their love and support that any accomplishment was made possible. I would especially like to thank my Father, Jorge Respeto, who served as the inspiration for this piece and who, like many American's in this country, was stripped of some the most invaluable constitutional rights afforded to the people, all because of a non-violent offense. The collateral consequences non-violent convicted felons face at the hands of the criminal justice system goes far beyond the disposition of any given case, and it continues to affect their daily lives, including that of their family. This article is dedicated to those fighting to regain their basic constitutional freedoms from a system that stripped them away on nothing more than a technicality.

Guilty By Association: Why Non-Violent Convicted Felons Should Not Be Placed in the Same Category as Violent Convicted Felons

MELISSA RESPETO*

I. Introduction

Florida Statute § 790.23 prohibits the issuance of a concealed weapons license, as well as the purchase and possession of a gun by a person who has been convicted of a felony punishable by imprisonment for a term exceeding one year.[1] The statute makes no mention or distinction as to those who have been convicted of a violent felony from those who have been convicted of a non-violent felony.[2] Further, the statute is silent as to the types of felonies the statute is meant to apply to while prohibiting the possession of guns by those convicted of any type of felony.[3]

Montana Const., art. II § 28, takes a restorative approach to convicted felons and civil liberties, allowing the individual to have their civil rights automatically restored at the end of their prison term or probationary period.[4] In contrast, Florida does not take a restorative approach; all civil rights are lost upon conviction of any felony, and the restoration of those rights is only granted upon application and approval for clemency after an eight-year period.[5]

This Comment will examine the current Florida legislation that prohibits a non-violent convicted felon from purchasing and possessing a firearm, and the lack of clear distinguishing

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1 *See* Fla. Stat. § 790.23 (last visited Nov. 27, 2019) ("It is unlawful for any person to own or to have in his or her care, custody, possession, or control any firearm, ammunition, or electric weapon or device, or to carry a concealed weapon, including a tear gas gun or chemical weapon or device, if that person has been convicted of a felony in the courts of this state."); *see also The Florida Senate* (2019), https://m.flsenate.gov/Statutes/790.23.

2 *See* Fla. Stat. § 790.23, *supra* note 1 (observing that the statute is overinclusive as to the words "convicted" and "felon."); *see also* State v. Snyder, 673 So. 2d 9, 10 (Fla. 1996) (holding that an individual is considered convicted for purposes of Fla. Stat. § 790.23 at the point that they are found guilty of a felony.).

3 *See* Fla. Stat. § 790.23, *supra* note 1 (demonstrating the statute is silent to the specific felony convictions it is meant to apply to.); *see also The Florida Senate, supra* note 1.

4 *See* Mont. Const. art. II, § 28 ("Full rights are restored by termination of state supervision for any offense against the state."); *see also* Mont. Code. Ann. § 45-18-801(2); *Montana Restoration of Rights, Pardon, Expungement & Sealing*, RESTORATION OF RTS. PROJECT (June 30, 2019), https://ccresourcecenter.org/state-restoration-profiles/montana-restoration-of-rights-pardon-expungement-sealing/ (explaining that a felony offender's full rights are automatically restored upon termination of state supervision for any offense against the state.).

5 *See* Keith Evans, *Florida Gun Laws for Felons*, LEGAL BEAGLE (Dec. 19, 2018), https://legalbeagle.com/6461767-florida-gun-laws-felons.html (explaining a convicted felon has an opportunity to have their rights reinstated through an application process for clemency); *see also Florida Restoration of Rights, Pardon, Expungement & Sealing,* RESTORATION OF RTS. PROJECT (Aug. 30, 2019), http://ccresourcecenter.org/state-restoration-profiles/florida-restoration-of-rights-pardon-expungement-sealing/ ("Any felony conviction punishable by a term exceeding one year results in a state bar against owning or possessing a firearm.").

factors between a violent convicted felon and a non-violent convicted felon.[6] Part II of this Comment analyzes the constitutional right to bear arms under the Second Amendment, the legislative intent behind Florida Statute § 790.23, how Montana Const. Art. II § 28 contrasts the Florida statute, and the difference between a violent felony and a non-violent felony.[7]

Part III discusses how the courts have distinguished between a violent felon and a non-violent felon when determining who is eligible for automatic restoration of rights.[8]

Additionally, this Comment will analyze the legislative support the restoration of non-violent felon civil rights has received in Florida in the past, how the restoration of a non-violent felon's constitutional right to bear arms plays into current gun violence concerns, and societal impacts on non-violent convicted felons in the United States.[9] Part IV of this Comment will focus on the proposed solutions to the issue of disenfranchisement of non-violent convicted felons in Florida with respect to their Second Amendment right to bear arms.[10] Part V of this Comment concludes by discussing how Florida Statute § 790.23 could and should reflect a more restorative approach as that of Montana Constitution Art II § 28.[11]

II. Background

The Second Amendment of the United States Constitution states, "[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[12] The operative clause of the Second Amendment emphasizes the individual's protection in the ownership, possession, and transportation of firearms.[13]

Florida Statute § 790.23 was created with the "inten[t] to protect the public by preventing the possession of firearms by persons who, because of their past conduct, have demonstrated their unfitness to be entrusted with such dangerous instrumentalities."[14] Montana Constitution Art. II § 28, in contrast, was created with the rights of the convicted in mind, where their "[f]ull rights are restored by termination of state supervision for any offense against the state."[15] A convicted felon is "someone who has been convicted of a felony" and is precisely the type of person the Florida statute is meant to prohibit from possessing a firearm.[16]

A violent convicted felon is one who has been charged with a crime classified as *malum in se*—an act that violates the "moral, public, or natural principles of society."[17] A violent felony is one

6 *See infra* Part II–III.
7 *See infra* Part II.
8 *See infra* Part III.
9 *See infra* Part III.
10 *See infra* Part IV.
11 *See infra* Part V.
12 *See* U.S. Const. amend. II.; *see also Bearing Arms Second Amendment,* CORNELL L. SCH. LEGAL INFO. INST. (last visited Nov. 27, 2019), https://www.law.cornell.edu/constitution-conan/amendment-2 ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.").
13 *See* U.S. Const. amend. II.; *see also Bearing Arms Second Amendment, supra* note 12 (explaining the distinction between the prefatory clause and the operative clause of the second amendment); *see also D.C. v. Heller*, 554 U.S. 570, (2008).
14 *See Snyder*, 673 So. 2d at 10 (explaining that the purpose of Fla. Stat. § 790.23 is to protect society by preventing persons who have been convicted of felonies from possessing firearms.); *see also* Nelson v. State, 195 So. 2d 853, 855 (Fla. 1967) ("the purpose of the act being to protect the public by preventing the possession of firearms by persons convicted of certain crimes or who are fugitives from justice.").
15 Mont. Const. art. II, § 28(2).
16 *See* Meaghan Ringwelski, *What is the Definition of a Convicted Felon?*, LEGAL BEAGLE, https://legalbeagle.com/5067779-definition-convicted-felon.html ("A convicted felon is, by definition, someone who has been convicted of a felony."); *see also Felon*, *Black's Law Dictionary* (5th ed. 2016) ("someone who has been convicted of a felony.").
17 *See* 16 Fla. Jur. 2d *Criminal Law*—Substantive Principles/Offenses § 4 (last visited Nov. 27, 2019) ("Acts which are mala in se are those which are inherently wrong, such as murder, rape, arson, burglary, larceny, and breaches of the peace."); *see also* Tawlonnda Sewell, *Mala In Se Crimes*, LEGAL MATCH (Apr.

that involves the use of threat or force against another which can result in death or serious bodily injury, and it is a definition that has continuously developed over the years.[18] These crimes include, *inter alia*, murder, rape, robbery, and burglary.[19]

In contrast, a nonviolent felony is a "victimless crime": a crime that does not involve direct physical injury or death to another person.[20] These non-violent felonies often consist of white-collar crimes, bribery, embezzlement, larceny, theft, or drug related crimes.[21] Non-violent crimes, although also punishable by more than a year of imprisonment, are frequently prosecuted less harshly than violent crimes, often resulting in fines, probation, or a shorter jail sentence.[22]

III. Discussion

A. *Distinguishing Between a Violent and Non-Violent Felon*

On July 16, 2014, in the case of *Van Der Hule v. Holder,* the United States Court of Appeals for the Ninth Circuit issued an opinion that addressed whether 18 U.S.C. § 922(g) prohibits a convicted felon from "possess[ing] in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce" on a federal level, if Montana law restores the felons' right to possess a firearm but refuses to issue a concealed weapons license based on the nature of the prior convictions.[23] The Court held *Van Der Hule* "[was] barred by federal law from possessing a firearm and that

30, 2018, 8:20 PM), https://www.legalmatch.com/law-library/article/mala-in-se-crimes.html (listing those crimes that fall within the definition of malum in se crimes.).

18 *See* Ken LaMance, *What is a Violent Felony?*, LEGAL MATCH (May 11, 2018, 12:16 PM), https://www.legalmatch.com/law-library/article/what-is-a-violent-felony.html (defining a violent felony as one that involves the use of threat or force against the person of another that may result in injury or death.); *see also* Robert Barnes, *Supreme Court Continues to Define What Constitutes a "Violent Felony,"* WASHINGTON POST (June 9, 2011), https://www.washingtonpost.com/politics/supreme-court-continues-to-define-what-constitutes-a-violent-felony/2011/06/09/AG9O3oNH_story.html ("Under the ACCA, when punishable by prison terms of more than one year, burglary, arson, extortion and crimes that involve the use of explosives are considered violent felonies. But under the act's 'residual' provision, so is unspecified conduct that 'presents a serious potential risk of physical injury to another.'").

19 *See* LaMance, *supra* note 18 (listing examples of violent felonies.); *see also* Jeffrey Meldon, *Classification of Crimes in Florida*, MELDON LAW (last visited Nov. 27, 2019), https://www.meldonlaw.com/library/classification-of-crimes-in-florida/ (stating "violent felony crimes are murder, rape, manslaughter, sexual assault, armed robbery, and other acts which inflict bodily injury.").

20 *See* LaMance, *supra* note 18 (describing a non-violent felony as one in which there is no victim to the crime and no physical harm to the person of another.); *see also Felony,* LEGAL DICTIONARY (Dec. 17, 2014), https://legaldictionary.net/felony/#ftoc-heading-5 (explaining that a non-violent felony is one that has nothing to do with violence but the harm is felt usually in a financial aspect.).

21 *See* Meldon, *supra* note 19 ("Felony crimes which are usually non-violent in nature are white collar crimes, such as tax evasion, embezzlement, identity theft and bribery, drug offenses, such as drug possession or conspiracy to distribute drugs, and other offenses, such as fraud, forgery, burglary or larceny."); *see also* Travis Peeler, *What are Non-Violent Felonies?,* LEGAL MATCH (May 11, 2018, 12:16 PM), https://www.legalmatch.com/law-library/article/what-are-non-violent-felonies.html (listing the common types of non-violent felonies).

22 *See* Peeler, *supra* note 21 (discussing the difference in prosecution between violent crimes and non-violent crimes.); *see also* Jose Rivera, *Non-Violent v. Violent Crimes*, LEGAL MATCH (Aug. 19, 2019, 8: 24 PM), https://www.legalmatch.com/law-library/article/non-violent-vs-violent-crimes.html (explaining that non-violent crimes are usually punishable by a fine or short jail sentence but that violent crimes usually carry a heavier sentence.).

23 *See Van Der Hule v. Holder*, 759 F.3d 1043, 1044–45 (9th Cir. 2014); *see also* 18 U.S.C. § 922(g) (last visited Nov. 27, 2019); Kathryn Haake, *Ruling: Montana Felons Can't Own Firearms After Serving Time, Probation,* BILLINGS GAZETTE (Aug. 1, 2014), https://billingsgazette.com/news/state-and-regional/montana/ruling-montana-felons-can-t-own-firearms-after-serving-time/article_be0cbcb5-5a33-51d7-8c53-096a223a111d.html (explaining that Montana's restriction prohibiting a convicted felon from possessing a concealed weapons permit was enough to restrict Van Der Hule from purchasing a weapon on a State and Federal level.).

such ban [did] not violate his Second Amendment rights."[24]

In their consideration of this issue, the Court recognized that pursuant to 18 U.S.C. § 921(a)(20), the unless clause, "[a]ny conviction which…a person has been pardoned or has had civil rights restored shall not be considered a conviction…*unless* such pardon…or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."[25] A three-step procedure was followed in this case to determine whether a state conviction was invalidated for purposes of the federal felon-in-possession statute.[26] The court used state law to determine if the defendant had a conviction or not; whether the conviction was expunged, pardoned, set-aside, or rights restored; and whether that pardon, expungement, or restoration of civil rights prohibited the defendant from shipping, transporting, possessing or receiving firearms and, if so, the conviction would stand.[27]

Although the Montana Constitution restores a convicted felon's civil rights upon their completed prison term or probationary period, Montana Code Annotated § 45-8-321 provides the privilege may be denied if the individual has been convicted of a crime that includes an element of violence.[28] In this case, although Van Der Hule's rights had been restored per the Montana Constitution, he was ineligible to obtain a firearm or concealed weapons license due to the nature of his convictions.[29] This section of the Montana Code Annotated highlights a clear distinction between violent convicted felons, like Van Der Hule—who was convicted of multiple counts of sexual assault—and a non-violent felon who may have their rights automatically restored per the Montana Constitution.[30]

[24] *See Van Der Hule,* 759 F.3d at 1045 ("We hold that Van Der Hule is barred by federal law from possessing a firearm and that such ban does not violate his Second Amendment rights."); *see also* Haake, *supra* note 23 (stating that the decision of the US Court of Appeals for the Ninth Circuit was that Van Der Hule was forbidden to receive or possess a firearm under federal law and that this ban did not violate his Second Amendment rights.).

[25] *See Van Der Hule*, 759 F.3d at 1046; *see also* 18 U.S.C. § 921(a)(20) (emphasis added).

[26] *See Van Der Hule*, 759 F.3d at 1046 ("We follow a three-step procedure for determining whether a state conviction is invalidated for purposes of the federal felon-in-possession statute."); *see also* United States v. Valerio, 441 F.3d 837, 840 (9th Cir. 2006) (explaining that the court follows a particular set of steps to determine whether a state conviction has been invalidated for purposes of the felon in possession statute).

[27] *See Van Der Hule*, 759 F.3d at 1046 (listing the steps used by the court that were required to make a determination on whether or not the state conviction was invalidated); *see also Valerio*, 441 F.3d at 840 (demonstrating the path the court took in this case to make a determination on the defendant's conviction for purposes of the felon in possession statute).

[28] *See* Mont. Code Ann. § 45-8-321(1)(c)(ii) (explaining that an applicant may be denied a permit to carry a concealed weapon if the crime includes an element of violence); *see also Montana Code Annotated,* MONTANA LEGISLATIVE SERVICES (last visited Nov. 27, 2019), https://leg.mt.gov/bills/mca/45/8/45-8-321.htm ("this privilege may not be denied an applicant unless the applicant . . . subject to the provisions of subsection (6), has been convicted in any state or federal court of . . . a crime that includes as an element of the crime an act, attempted act, or threat of intentional homicide, serious bodily harm, unlawful restraint, sexual abuse, or sexual intercourse or contact without consent.").

[29] *See Van Der Hule*, 759 F.3d at 1045 ("In July 2003, Van Der Hule attempted to purchase a firearm from a firearms dealer, who held a federal firearms license, in Montana. The dealer began the National Instant Criminal Background Check System ("NICS") process, and the NICS examiner who processed the background check concluded Van Der Hule's prior convictions precluded him from receiving a Montana concealed weapons permit, and therefore he was also prohibited under federal law from possessing or receiving any firearm."); Haake*, supra* note 23 (explaining that Van Der Hule who was convicted of four counts of rape and one count of sexual assault was ineligible to own a gun in Montana despite having his rights restored.).

[30] *See Van Der Hule,* 759 F.3d at 1045 ("In December 1983, Frank Van Der Hule pled guilty to sexual assault and four counts of sexual intercourse without consent in Montana. He was sentenced to 25 years' imprisonment and completed his sentence in 1996."); *see also* Mont. Code Ann. § 45-8-321(1)(c)(ii); *Montana Code Annotated,* MONTANA LEGIS. SERV. (last visited Nov. 27, 2019), https://leg.mt.gov/bills/mca/45/8/45-8-321.htm (explaining that the privilege of obtaining a permit to carry a concealed weapon may not be denied to the applicant unless the crime committed by them includes an element of threat of intentional homicide, serious bodily harm,

The distinction delineated in the Montana Code Annotated § 45-8-321 is overlooked in Florida Statute § 790.23, and, as a result, a non-violent convicted felon's civil rights are affected.[31] Jorge Respeto, a United States citizen and Florida resident, voiced his frustration with the vague law, stating that "there should be a difference between a person who commits a crime with a mindset to cause harm, and someone who gets caught breaking the law but has no intent to harm; one should not equate with the other."[32] Those convicted of a non-violent felony who want to exercise their Second Amendment right to bear arms for protection purposes are denied that right despite that they did not serve any prison time, were given a fine, or were simply placed on probation.[33]

The United States Court of Appeals for the Seventh Circuit in *Hatfield v. Barr*, stated there was no way to know if a non-violent offender will be a "law abiding, responsible citizen," but also recognized that, statistically, non-violent offenders are less likely to commit crimes in the future than violent offenders.[34]

B. *Legislative Support*

The Court referenced 18 U.S.C. § 925(c), stating Congress has withheld funds to implement this statute; however, the creation of the statute stated otherwise:

> A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General for relief…and the Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety.

This is an indication of Congress' legislative intent to provide such persons with an opportunity to have their rights restored through a good faith showing of a lack of wrongdoing.[35]

unlawful restraint, sexual abuse, or sexual intercourse without consent.).

31 Fla. Stat. § 790.23, *supra* note 1 (highlighting that, unlike the Montana Code Annotated § 45-8-321, Florida Statute § 790.23 does not make any mention of a distinction between violent felons and non-violent felons.).

32 Telephone Interview with Jorge Respeto, Non-Violent Felon (Oct. 9, 2019); *see Miami-Dade County Criminal Justice Online System,* MIAMI-DADE CLERK OF CTS. (last visited Nov. 27, 2019), https://www2.miami-dadeclerk.com/cjis/CaseSearch.aspx. (Mr. Respeto is the author's father and an inspiration for this piece).

33 *See* Ilya Shapiro & Matthew Larosiere, *Nonviolent Felons Shouldn't Lose Their Second Amendment Rights,* CATO INST., https://www.cato.org/blog/nonviolent-felons-shouldnt-lose-their-second-amendment-rights (stating that stripping Hatfield of his second amendment right is excessive as he did not serve any days in prison time and has not run into trouble with the law since 1989 when he tampered with his employment records to obtain federal benefits.); *see also* Hatfield v. Barr, 925 F.3d 950, 951 (7th Cir. 2019) (holding that 18 U.S.C § 922(g)(1) can be applied to a felon convicted of fraud such as Hatfield, despite the actual punishment was less than a year.).

34 *Hatfield*, 925 F.3d at 952 ("A study recently released by the Sentencing Commission found that 64% of felons who committed violent crimes are arrested for renewed criminality following release, while only 40% of those convicted of nonviolent offenses are caught committing crimes in the future.").

35 *See* Hatfield, 925 F.3d at 952 ("it is not possible to declare that any particular felon could be entrusted with firearms. This may be why Congress withdrew funding from the § 925(c) program."); *see also* 18 U.S.C. § 925(c) ("A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.").

Although the Court in *Hatfield* disagrees as to Congress' ability to distinguish between which convicted felons are likely to be repeat offenders and which are not, this is the very purpose behind the implementation of 18 U.S.C. § 925(c), as the legislature's intent is made clear in the language of the statute.[36] The statute outlines the requirement to be eligible for relief: a showing that the applicant's reputation and record reflect an unlikelihood that they would act in a manner dangerous to the public.[37] This requirement is illustrative of Congress' ability to distinguish between those convicted felons who would pose a threat to the public, and those convicted felons who would not, as it would be on a case by case basis.[38]

Despite this distinction, the Court in *Hatfield* reversed the lower district court's ruling that the government had failed to establish the Second Amendment categorically did not protect non-violent felons, that there was a strong public-interest for banning non-violent felons who received no prison time from owning a gun, and a showing of a nexus between Congress' purpose in keeping guns away from those labeled as irresponsible and dangerous, and 18 U.S.C. § 922(g)(1) which bans non-violent felons from owning guns.[39] This opinion was issued June 2019, and it reflected the country's general attitude toward non-violent felons and firearms.[40]

Florida representatives, however, have displayed an interest in this approach in the past. Former Florida Representative Cord Byrd introduced House Bill 903 on December 6, 2017, which proposed a similar course of action as outlined in 18 U.S.C § 925(c).[41] This bill would have allowed a person convicted of a felony to petition the circuit court, in the county in which they reside, for relief to have their civil rights reinstated.[42] The bill described similar requirements as those listed in 18 U.S.C.

[36] *See Hatfield*, 925 F.3d at 952 ("If we could know reliably who will be 'law-abiding, responsible citizens' despite felony convictions, the Supreme Court might include them among those protected by the Second Amendment."); *see also* 18 U.S.C. § 925(c) (demonstrating that the Attorney General has discretion to grant relief to those felons whose record and reputation show they are unlikely to pose a threat to society.).

[37] 18 U.S.C. § 925(c) (outlining the requirement necessary to qualify for relief and reinstatement of civil rights by the Attorney General.).

[38] *See id.* (pointing out a clear way to determine what felons are a threat and which are not a threat to the public).

[39] *See Hatfield*, 925 F.3d at 953 (reversing the district court's ruling in Hatfield v. Sessions.); *see also* Hatfield v. Sessions, 322 F. Supp. 3d 885 (S.D. Ill. 2018) (holding that 18 U.S.C. § 922(g)(1) is an unconstitutional violation of *Hatfield's* Second Amendment right as a non-violent felon who received no prison time.).

[40] *See* David G. Savage, *Trump Administration Asks Supreme Court to Reject 2nd Amendment Claim by Men Who Lost Gun Rights Over Nonviolent Crimes,* L.A. TIMES (May 25, 2017, 3:00 AM), https://www.latimes.com/politics/la-na-pol-court-guns-trump-20170525-story.html (reporting on the Trump administrations urgency for the Supreme Court to reject a Second Amendment claim to restore two nonviolent felons rights to bear arms.); *see also* Andrew Chung, *U.S. Top Court Deals Setback to Gun Control Advocates on Felon Ban,* REUTERS (June 26, 2017, 9:53 AM), https://www.reuters.com/article/us-usa-court-guns-felons/u-s-top-court-deals-setback-to-gun-control-advocates-on-felon-ban-idUSKBN19H1KZ (indicating that the Trump administration has appealed a ruling by the U.S. Circuit Court of Appeals for the Third Circuit regarding a nonviolent felons restoration of their right to bear arms).

[41] *See* Andrew Pantazi, *New Florida Bill Could Help Those With Convictions Restore Voting and Gun Rights*, FLA TIMES-UNION (Dec. 1, 2017, 1:02 PM), https://www.jacksonville.com/news/metro/2017-12-01/new-florida-bill-could-help-those-convictions-restore-voting-and-gun-rights (discussing a Florida bill filed by Rep. Cord Byrd that would allow those felons who completed their prison and probation sentences to petition a judge to have their civil rights restored.); *see also* NBC 6, *New Bill Would Allow Florida Felons to Own Guns*, NBC MIAMI (Dec. 12, 2017, 5:31 PM), https://www.nbcmiami.com/news/local/New-Bill-Would-Allow-Florida-Felons-to-Own-Guns-463741893.html (reporting on House Bill 903, filed December 2017, that would make it possible for convicted felon to have their voting and gun rights reinstated).

[42] *See* An Act Relating to Restoration of Rights, H.B. 903, 2018 Sess. (Fla. 2018) ; *see also* Garrett Pelican, *Bill Would Give Florida Felons Second Chance at Owning Guns,* WINK NEWS (Dec. 12, 2017, 8:14 PM), https://www.winknews.com/2017/12/12/bill-give-florida-felons-second-chance-owning-guns/ (explaining that under proposed House Bill 903 felons would be able to petition the circuit court once a year and give judges a say as to whether or not to reinstate the felon's rights).

§ 925(c) and Mont. Const., art. II § 28, such as the demonstration of facts presented on behalf of the petitioner that supported their fitness for relief, completion of court imposed sanctions, a law-abiding life since the completion of the court imposed sanction, the basis for their conviction, and that granting the petitioner relief would not be contrary to public safety.[43]

Further, a similar bill was filed by Florida Senator Tom Lee on January 5, 2018, which would have authorized persons convicted of felonies to petition a court for relief.[44] Although the bill required a seven-year waiting period, it specified that the option to petition a court for restoration of civil rights would not apply to a habitually-offending felon, a person convicted of a violent felony, or a person convicted of a sexual crime.[45] Although the Florida House of Representatives Criminal Justice Subcommittee did not accept either bill, the bills' proposal serves as an indication that the restoration of rights for non-violent felons is a matter of public interest in Florida.[46] The fact that Senate Bill 1654 clearly distinguished between a non-violent felon and a violent felon lends support to the conclusion that it is possible for Florida Statute § 790.23 to be amended to reflect this distinction, separating one class of persons from the other through their criminal history, crime's severity, crime's type, and time served.[47]

Despite Florida legislators arguing non-violent felons should have their civil rights reinstated, including the right to own and possess a firearm, Florida itself continues to be a step behind the majority of the nation.[48] As many as thirty-five states, including Montana, offer some form of automatic restoration of civil rights and recognize "no public purpose is served by denying fundamental rights to people who have served their time."[49] In contrast to the rest of the nation, Florida disenfranchises felons for life, and, as recently as 2018, has "continue[d] to [completely] disenfranchise more than 1.5 million residents . . . making it tougher for them

[43] *See* 18 U.S.C. § 925(c) (requiring convicted felons apply to the Attorney General and demonstrate that their record and reputation is one that relief is warranted and would not be contrary to public safety); *see also* H.B. 903, *supra* note 42 §§ 3(2)(b), 3(4) (outlining the specific requirements that would be necessary for a felon to demonstrate in order to petition to have their rights reinstated); Mont. Const., art. II § 28 (allowing convicted felon to have their rights restored upon completion of their prison sentence or probationary period imposed by the State.).

[44] Florida Senate: SB 1654 (2018), https://www.flsenate.gov/Session/Bill/2018/1654/BillText/Filed/HTML.

[45] *See An Act Relating to Restoration of Rights, S.B 1654, 2018 Sess. (Fla. 2018)* (proposing a bill that would authorize a person convicted of a felony to petition a certain court for relief, excluding those who are convicted of a violent felony, habitual offenders, or those convicted of a sex crime); *see also Editorial: Florida's Chance to Make it Easier to Restore Civil Rights*, TAMPA BAY TIMES (Jan. 11, 2018), https://www.tampabay.com/opinion/editorials/Editorial-Florida-s-chance-to-make-it-easier-to-restore-civil-rights_164344010/ [hereinafter *Florida's Chance to Make It Easier to Restore Civil Rights*] (clarifying that the bill would allow felons who have completed their sentence to petition a judge seven years after the completion of that sentence).

[46] *See* H.B. 903, *supra* note 42 (listing the history of the bill which indicates that on March 10, 2018 the bill was indefinitely postponed and withdrawn from consideration, dying in Criminal Justice Subcommittee.); *see also* S.B. 1654, *supra* note 44 (listing the history of the bill which indicates that on March 10, 2018 the bill was indefinitely postponed and withdrawn from consideration, dying in Criminal Justice.).

[47] S.B. 1654, *supra* note 44.

[48] *See Editorial: Florida's Chance to Make it Easier to Restore Civil Rights, supra* note 44 (comparing Florida's approach to the automatic restoration of felon civil rights with that of other states); *see also Number of People by State Who Cannot Vote Due to a Felony Conviction,* PROCON (last updated on Oct. 4, 2017, 10:57 AM), https://felonvoting.procon.org/view.resource.php?resourceID=000287 [hereinafter *Number of People by State Who Cannot Vote*] (noting that Florida has the highest rate of disenfranchisement in the United States).

[49] *See Florida's Chance to Make it Easier to Restore Civil Rights, supra* note 44; *see also* Shayanne Gal & Grace Panetta, *Floridians with Felony Convictions Are Now Beginning to Register to Vote After the State Restored Voting Rights to 1.5 Million Felons*, BUS. INSIDER (Jan. 8, 2019, 12:04 PM), https://www.businessinsider.com/felony-disenfranchisement-states-florida-amendment-4-voting-rights-2018-11 (indicating that unlike most other states, Florida denies felons several of their civil rights upon their conviction of a felony regardless of the nature of the crime).

to be productive citizens" in society, and denying a felon their "right to vote . . . the right to serve on a jury of their peers, run for office, own a firearm, or obtain a professional license — unless they receive clemency from the governor."[50]

In February 2018, U.S. District Court Judge for the Northern District of Florida, Mark Walker ruled that Florida, "strips the right to vote from every man and woman who commits a felony," and routinely violated the constitutional rights of its people with the system it has in place for clemency.[51] Although the case before Judge Walker pertained to voter rights, an application for clemency to reinstate any civil right can take nearly a decade to go through, as Florida has a backlog of several thousand cases.[52] This backlog is largely caused by the Governor and his Cabinet meeting as a clemency board as little as four times a year and hearing fewer than one hundred cases each time.[53]

C. *Gun Violence and Societal Concerns*

The Trump administration has voiced objections to non-violent felons' possession of firearms. The Trump administration has previously appealed a decision by the United States Court of Appeals for the Third Circuit that would allow two Philadelphia men, who were convicted of a non-violent crime over twenty years ago, to challenge the ban on their Second Amendment right to bear arms.[54] The Trump administration asked the United States Supreme Court to reject the Second Amendment claim, "calling it a threat to public safety."[55] The Trump Administration's reaction has been noted as being contrary to President Trump's campaign promises as he vowed to protect the Second Amendment

[50] *See Florida's Chance to Make it Easier to Restore Civil Rights, supra* note 44; *see also* Gal & Panetta, *supra* note 48 ("Florida, which disenfranchised felons for life, a staggering 1.5 million voting-age residents . . . could not vote due to a previous felony conviction."); *Number of People by State Who Cannot Vote, supra* note 47 (recognizing that Florida had the highest rate of felony disenfranchisement in 2016).

[51] *See* Mark Schlakman, *Column: Some Facts and Figures You Might Not Know About Civil Rights Restoration in Florida*, TAMPA BAY TIMES (Apr. 19, 2018), https://www.tampabay.com/opinion/columns/Column-Some-facts-and-figures-you-might-not-know-about-civil-rights-restoration-in-Florida_167477194/ (discussing a US District Court Judge's ruling on Florida's clemency process and its unconstitutionality); *see also* Steve Bousquet & David Smiley, *Judge Strikes Down Florida's System for Restoring Felons' Voting Rights,* TAMPA BAY TIMES (Feb. 3, 2018), https://www.tampabay.com/florida-politics/buzz/2018/02/01/federal-judge-strikes-down-floridas-system-for-restoring-felon-voting-rights/.

[52] *See* Bousquet & Smiley, *supra* note 50 (discussing the lengthy clemency process in the state of Florida); *see also Clemency,* FLA. RTS RESTORATION COAL. (last visited Nov. 27, 2019), https://floridarrc.com/clemency/ ("The entire process is complicated and takes years. Even then, since the decision rests in the sole discretion of . . . politicians [and] there is no guarantee that an individual's rights will be restored.")

[53] *See Clemency, supra* note 51 ("Only the Governor and his cabinet, sitting as the Board of Executive Clemency, have the power to restore civil rights"); *see also* Bousquet & Smiley, *supra* note 50 ("[Governor] Scott and the Cabinet, meeting as a clemency board, consider cases four times a year, and usually fewer than 100 cases each time. It can take a decade or longer for a case to be heard, and at present the state has a backlog of more than 10,000 cases"); Kira Lerner, *This Florida Woman Had to Travel 10 Hours by Bus to Have her Voting Rights Restored,* THINKPROGRESS (Sept. 11, 2018, 1:06 PM), thinkprogress.org/florida-clemency-board-voting-692f993d-c8c5 (explaining that under Governor Scott the clemency panel convened only four times a year for hearings to consider whether an individual should be granted a pardon, to have their firearm rights restored, and to restore basic civil rights for ex-felons who waited at least seven years after the completion of their sentencing).

[54] *See* Savage, *supra* note 40 (reporting that the Trump administration has pushed to prevent the Supreme Court from entertaining a Second Amendment claim to restore gun rights for nonviolent felons); *see also* Chung, *supra* note 40 (explaining that the Trump administration has opposed the Second Amendment challenge to restore non-violent felon rights, contrary to his repeated campaign assurances that he would protect the right for the people to own guns under the Second Amendment.).

[55] *See* Chung, *supra* note 40 ("The Trump administration had appealed last year's ruling by the Philadelphia-based 3rd [Circuit Court of Appeals], calling it a threat to public safety"); *see also* Andrew Chung, *Supreme Court Rejects Trump Administration's Appeal of Felon Gun Ownership Ruling*, HUFFPOST (June 26, 2017, 9:55 AM), (reporting that the lower court's ruling allowed individuals to challenge the ban on their gun rights and the Trump administration sees this as a threat to public safety).

right to bear arms.[56] This did not seemingly include non-violent felons. Since his election to office, President Trump has changed his stance on an individual's constitutional right to own a firearm, particularly if the individual has been convicted of a crime.[57]

In 2012, the Middle District of Florida ranked among the top five districts where the most people were convicted as felons in possession of a firearm under 18 U.S.C. § 922(g).[58] Although the majority of persons convicted as felons in possession of a firearm were classified between Category III-VI in conviction severity, a total of twenty-one percent of those convicted fell within Category I and II, with criminal history points falling between zero and three, an indication of lower level, misdemeanor, or non-violent offenses.[59] Further, possession and use of a firearm during the commission of a crime is predominantly an issue when it comes to violent offenders in comparison to those who commit non-violent felonies.[60]

A survey taken in 2016 by the U.S. Department of Justice Bureau of Justice Statistics using data collected through the Survey of Prison Inmates, indicated that the percentage of felons who were in possession of or used a firearm during the commission of the offense for which they were serving time were consistently at a higher rate for those who committed a violent offense than those who did not.[61] The results of this survey indicated that "[a]mong prisoners who possessed a firearm during a violent offense, a large majority of both state (81%) and federal (73%) prisoners used the firearm during the offense, far more than the percentages for non-violent offenders (25% state, 13% federal)."[62] Given the growing concern among American citizens regarding gun violence and its predominance in our country, this data is a representation of how it is possible to distinguish between those who are likely to be a "threat to public safety" and those who will not be.[63]

Further, research supports the contention that convicted felons who have their civil rights automatically restored upon completion of their sentence or probationary period are less likely to

[56] *See* Savage, *supra* note 40 (highlighting the contradictory nature of the Trump administration's appeal with respect to promises made during President Trump's campaign where he vowed to protect gun-ownership rights); *see also President Trump and Gun Rights Restoration*, WIPE REC. (Feb. 22, 2019), https://wiperecord.com/president-trump-and-gun-rights-restoration/#gref (noting that the President Trump has exhibited shifting views with respect to the Second Amendment and gun-ownership rights).

[57] *See President Trump and Gun Rights Restoration*, *supra* note 55;*see also* Chung, *supra* note 54 (reporting that the Supreme Court rejected an appeal from the Trump administration, which clearly exhibited their stance on a lower court's ruling that would loosen the prohibition on felon gun possession).

[58] *Quick Facts on Felons in Possession of a Firearm*, U.S. SENT'G COMM'N (2008-2012), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Felon_in_Possession_of_a_Firearm.pdf (providing statistics for the top five districts in the United States with the highest number of convicted felons in possession of a firearm in 2012, with the Middle District of Florida coming in third).

[59] *See 2018 Guidelines Manual*, U.S. SENT'G COMM'N (last updated 2018), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/CHAPTER_4.pdf; *see also 2016 U.S. Sentencing Guidelines Manual*, U.S. SENT'G COMM'N (last updated 2016), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/Sentencing_Table.pdf.

[60] Mariel Alpher, Ph.D. & Lauren Glaze, *Source and Use of Firearms Involved in Crimes: Survey of Prison Inmates, 2016,* U.S. DEPT. OF JUST. BUREAU OF JUST. STAT. 4 (Jan. 2019), https://www.bjs.gov/content/pub/pdf/suficspi16.pdf ("State and federal prisoners serving time for a violent offense were much more likely to have possessed a firearm during the offense (29% state, 36% federal) than prisoners serving time for a property (5% state, 3% federal) or drug (8% state, 12% federal) offense.")

[61] *See id.* at 5 (concluding that violent felons are more likely to possess and use a firearm in the commission of a crime than non-violent felons).

[62] *Id.* at 5. (drawing a clear distinction, statistically, of the likelihood of violent offenders using a firearm to commit an offense as opposed to a non-violent felon.).

[63] *See* Alper & Glaze, *supra* note 59, at 5 (depicting a difference between violent offender behavior and non-violent offender behavior.); *see also* Chung, *supra* note 40 (emphasizing that the Trump administration considered the restoration of non-violent convicted felons gun rights a "threat to public safety.").

commit an offense in the future.[64] The rationale is that those who have had their rights restored are more likely to become trusting of the government and the criminal justice system.[65] This is because an individual who is disenfranchised is directly excluded from the democratic process, which in turn creates "a psychological stigma and a rational belief that the system is non-inclusive"; this stigma rings true for roughly 3.1 million people around the country.[66] Both convicted felons and society benefit from an individuals' ease of reintegration into society after release from incarceration, as this is a factor in decreasing the likelihood of recidivism.[67] Recidivism is a fundamental concept in criminal justice, which is measured by a person's criminal acts, and their relapse into criminal behavior through "rearrest, conviction or [their] return to prison without a new sentence during a three-year period" following their release from prison.[68]

The concept of the automatic restoration of rights is not foreign to Florida; former Governor Charlie Christ advocated for the full restoration of ex-felon rights after the completion of their sentencing and probationary periods, with the exception of violent offenders and sexual offenders, which ultimately "resulted in over 154,000 ex-felons regaining their rights."[69]

64 *See* James Call, *Study Shows Ex-Cons Benefit from Rights Restoration,* WFSU PUB. MEDIA (last visited on Nov. 27, 2019), https://news.wfsu.org/post/study-shows-ex-cons-benefit-rights-restoration (reporting that a study conducted by the Florida Parole Commission showed that ex-felons who had their rights automatically restored were less likely to commit new crimes.); *see also* David M. Reutter, *Florida Reports Indicate Restoration of Civil Rights Reduces Recidivism,* PRISON LEGAL NEWS (Aug. 15, 2012), https://www.prisonlegalnews.org/news/2012/aug/15/florida-reports-indicate-restoration-of-civil-rights-reduces-recidivism/ (discussing two reports by the Florida Parole Commission that supported the contention that ex-felons recidivism rate is lowered when their rights are restored.); Reggie Garcia, *Amendment 4 Will Save Taxpayer Money and Give Felons a Second Chance,* TALLAHASSEE DEMOCRAT (Sept. 18, 2018), https://www.tallahassee.com/story/opinion/2018/09/18/florida-amendment-4-save-money-give-felons-chance-opinion/1343670002/ (pointing out that data from the Florida Commission on Offender Review indicates that felons who regain their civil rights are less likely to commit crimes in the future.).

65 *See* Victoria Shineman, *Florida Restores Voting Rights to 1.5 Million Citizens, Which Might Also Decrease Crime,* TCPALM (Nov. 8, 2018), https://www.tcpalm.com/story/opinion/contributors/2018/11/08/restoring-felons-voting-rights-might-also-decrease-crime/1925398002/ (discussing results from a Virginia study on ex-offenders who have had their rights restored and how they become more trusting of the government and the criminal justice system after their civil rights restoration.); *see also* Victoria Shineman, *Restoring Rights, Restoring Trust: Evidence That Reversing Felony Disenfranchisement Penalties Increases Both Trust and Cooperation with Government,* SSRN, 8, (last modified Feb. 27, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3272694 (explaining that the distrust in the government by felons stems from the disenfranchisement of the individual through their disconnection from the democratic when denied civil rights.).

66 *See* Shineman, *Florida Restores Voting Rights to 1.5 Million Citizens, Which Might Also Decrease Crime, supra* note 64, at 8 ("A disenfranchised citizen is deliberately disconnected from the democratic process, creating both a psychological stigma and a rational belief that the system is non-inclusive and non-responsive."); *see also* Jean Chung, *Felony Disenfranchisement: A Primer*, THE SENT'G PROJECT, 2 (Updated December 2019), https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/ (highlighting that roughly 3.1 million people are disenfranchised even after the completion of their sentence because of their state's laws.).

67 *See* Carl Amritt, *Voting Rights Restoration Fact Sheet,* ROOSEVELT INST. (2016), https://rooseveltinstitute.org/voting-rights-restoration-fact-sheet/ (reporting that felons who are given an opportunity to reintegrate themselves into society through the restoration of their civil rights are less likely to commit crimes in the future.); *see also* Shineman, *Florida Restors Voting Rights to 1.5 Million Citizens, Which Might Also Decrease Crime*, *supra* note 64 (supporting the contention that the ease of felon reintegration into society through the restoration of their rights can decrease their tendency to commit additional crimes.).

68 *See Recidivism,* NAT'L INST. OF JUST. (last visited on Nov. 27, 2019), https://nij.ojp.gov/topics/corrections/recidivism (defining recidivism); *see also Recidivism Law and Legal Definition,* U.S. LEGAL (last visited on Nov. 27, 2019), https://definitions.uslegal.com/r/recidivism/ ("Recidivism is a tendency to lapse into a previous pattern of behavior, especially a pattern of criminal habits.").

69 *See* Reutter, *supra* note 63 (discussing former Governor Charlie Crist's approach to ex-felons and his belief that it is their right to have their civil rights restored upon completion of their sentence or probationary period.); *see also* Charlie Crist, *Charlie Crist: Restore Rights to Florida Felons; They've Paid Debt to Society,* ORLANDO SENTINEL (June 13, 2017), https://www.orlandosentinel.com/opinion/os-ed-charlie-crist-restore-felon-rights-in-florida-front-burner-20170613-story.html ("In

This approach also mirrored Montana's current restorative approach in their Constitution regarding the rights of the convicted, which focuses on criminal laws being based on public safety, restitution for victims, prevention, and reformation, as opposed to only prevention and reformation.[70]

On April 5, 2007, Governor Crist and his Cabinet made significant changes to the Rules of Executive Clemency and expanded the percentage of convicted felons eligible to have their rights restored.[71] Although Charlie Christ is not the first to advocate this position, as former Florida Governor Askew took a similar approach, he has made it clear that non-violent convicted felons who have completed their sentences have paid their societal debt and should have their rights restored.[72]

Under the old Rules of Executive Clemency, only 26% of convicted felons were eligible to have their rights restored, depending on their criminal history, without the need for a formal hearing.[73] In contrast, the rules implemented in 2007 provided for roughly 80% of those convicted felons who are eligible to have their rights automatically restored if they were considered "Level 1."[74] Per the Florida Advisory Committee, a Level 1 offender is an individual considered to be a non-violent convicted felon who has completed all terms of their sentence, made any required payment of restitution to victims, and are free of pending charges.[75] Those who

2007, following in the footsteps of Governor Reubin Askew's attempts to fully implement automatic restoration of non-violent civil rights, I attempted to end the shameful practice of delaying or outright ignoring requests for restoration of civil rights."); Amy Sherman, *Dan Gelber Says Charlie Crist Got Automatic Restoration of Felon Rights for 1st Time in Florida History,* PolitiFact (Dec. 12, 2013), https://www.politifact.com/florida/statements/2013/dec/12/dan-gelber/dan-gelber-says-charlie-crist-got-approved-automat/ (pointing out that under Governor Crist, there were more than 150,000 restoration of non-violent convicted felons rights.).

70 *See* Mont. Const. art II § 28 (focusing on the rights of the convicted and a reformative approach); *see also Montana Criminal Law Basis, C-33 (1998),* Ballotpedia (last updated on Nov. 3, 1998), https://ballotpedia.org/Montana_Criminal_Law_Basis,_C-33_(1998) (amending the Montana Constitution to provide that criminal laws should be based on principles of public safety, restitution for victims, prevention, and reformation, rather than only prevention and reformation.).

71 *See* Chairman David, *Chairman's Message,* Fla. Parole Comm'n, 5 (Dec. 31, 2007), https://www.fcor.state.fl.us/docs/reports/FCORannualreport200607.pdf ("On April 5, 2007, Governor Crist and the Cabinet, acting as the Board of Executive Clemency, made significant changes to the Rules of Executive Clemency. These changes greatly expanded the number of ex-felons eligible to have their civil rights restored (RCR)."); *see also* Elena M. Flom, *Ex-Felon Voting Rights in Florida: Revised Rules of Executive Clemency That Automatically Restore Civil Rights to Level-1 Offenders is the Right Policy,* Fla. Advisory Comm. of the U.S. Comm'n on C.R., 20 (Aug. 2008), https://www.usccr.gov/pubs/docs/EX-FelonVRFL.pdf (acknowledging the revision of the Rules of Executive Clemency by the Clemency Board that allowed for automatic restoration of civil rights and voting rights to most felons.).

72 *See* Crist, *supra* note 68 (urging that the right thing to do is restore the civil rights of ex-felons who have paid their debt to society and not pile on additional debts.); *see also* Sherman, *supra* note 68 ("[A]s Governor[,] he convinced the Cabinet to approve the automatic restoration of felon rights for non-violent offenders for the first time since Gov. Reubin Askew implemented a similar reform in 1975 (since reversed by Governor Scott).").

73 David, *supra* note 70 at 23 (recognizing that prior to Governor Crist's changes to the Rules of Executive Clemency, approximately 26% of ex-felons were eligible to have their rights restored based on the crime committed.).

74 *See* David, *supra* note 70 at 23 (contrasting the rate of eligibility for felon right restoration under the old rules of executive clemency to the new rules in which there was an expansion in the rate of up to 80%.); *see also* Flom, *supra* note 70 at 21 (pointing out that only about 6,500 people out of 200,000 who lost their right to vote between 1995-2005 due to their convicted felon status were able to have their rights restored by the Clemency Board under the old rules.).

75 *See FIEC Voting Restoration Amendment 14-01,* Off. of Econ. & Demographic Res. (last visited Nov. 27, 2019), http://edr.state.fl.us/Content/constitutional-amendments/2018Ballot/VRANotebook1_10-5-16.pdf (describing a Level 1 offender as an individual who has no violent offenses and procedurally can have their rights restored without a hearing.); *see also* David, *supra* note 70 at 45 (explaining that Level 1 offenders who have completed their sentences and paid their debt to society would be eligible for automatic approval if they were convicted of less serious offenses.); *see also* Bryan Miller & Joseph Spillane, *Governing the Restoration of Civil Rights for Ex-Felons: An Evaluation of the Executive Clemency Board in Florida,*" Contemp. Just. Rev. Aug. 8, 2012, 1, 3, available at http://www.researchgate.net/publication/263729991 (describing a Level 1 offender as an individual who has no violent offenses

were eligible as Level 1 offenders by the Parole Commission would have "an executive order automatically […] issued that grants a restoration of civil rights," which consists of the Florida Parole Commission approving the individual and sending the approval information to the Executive Clemency Board for the Governor and his Cabinet to provide an "automatic" approval signature.[76]

Governor Crist implemented this process for automatic restoration of convicted felons' rights because he believed that, having paid their debt, a convicted felons' return to society should be one of dignity, honor, and success, and the restoration of their civil rights was where their second chance began.[77] Although the process for the restoration of firearm rights for convicted felons was handled separately from the automatic restoration of felon rights to vote, hold office, and obtain certain licenses, through Governor Crist's efforts, Florida was beginning to head in the right direction in its stance on non-violent convicted felons civil rights.[78]

In 2011, however, Governor Rick Scott ended the automatic restoration of civil rights for convicted felons who qualified and replaced it with a five-year minimum waiting period.[79] Arguably, this waiting period has served its purpose under Governor Scott as only 2,488 applications for restoration were granted during his time in office, as opposed to Governor Crist who, apart from instituting automatic restoration, restored roughly 155,315 felons' rights between 2007 and 2011.[80] Apart from Governor Scott's clemency practices being scrutinized by a federal court, they have also caused extensive financial repercussions.[81]

and procedurally can have their rights restored without a hearing.); *see also* David, *supra* note 70 at 45 (explaining that Level 1 offenders who have completed their sentences and paid their debt to society would be eligible for automatic approval if they were convicted of less serious offenses).

76 *See* David, *supra* note 70 at 32 (clarifying that convicted felons who qualify as Level 1 offenders would be eligible for automatic restoration of rights without a hearing under Governor Crist's new Rules of Executive Clemency.); *see also* Flom, *supra* note 70 at 21 ("For those individuals granted Level-1 status by the Parole Commission […], an executive order is automatically issued that grants a restoration of civil rights signed by the Clemency Board without the need for a hearing.").

77 *See* Crist, *supra* note 68 (expressing that an ex-felon who has paid their debt to society should have an equal opportunity to return to society in a dignified, honorable, and successful manner.); *see also* Sherman, *supra* note 68 (noting that Governor Crist believed that a non-violent felon should be given a meaningful way to re-enter society.); *Governor Charlie Crist's Clemency Board Notes on the Restoration of Felon Civil Rights, 2007,* FLA. MEMORY ST. LIBR. & ARCHIVES OF FLA, https://www.floridamemory.com/exhibits/floridahighlights/crist/ ("Dignity, justice, honor; at what point does the punished have the right to a simple chance to come back to society.").

78 *See* Schlakman, *supra* note 50 (highlighting that 155,000 people regained their rights during the four years Governor Crist was in office but that the right to own and carry a firearm was reviewed separately.); *see also* Flom, *supra* note 70 at 21 (supporting ex-felon voting rights in Florida as the right policy and unanimously supporting the revised Rules of Executive Clemency.).

79 *See* Perry E. Thurston, Jr., *In Appealing Civil Rights for Ex-Felons, Scott is Determined to Suppress the Vote*, MIAMI HERALD (Apr. 11, 2018), https://www.miamiherald.com/opinion/op-ed/article208637899.html ("In 2011, [Governor] Scott [. . .] changed the procedures by eliminating the automatic restoration of voting rights and replaced it with a minimum five-year waiting period before individuals could start the application process."); *see also* Sascha Cordner, *Why Securing Both Gov., Attorney General Wins Could be Big for Florida Democrats,* WFSU PUB. MEDIA (Sept. 5, 2014), https://news.wfsu.org/post/why-securing-both-gov-attorney-general-wins-could-be-big-florida-democrats (stating that in 2011 Governor Scott and his Cabinet reversed a decision made during Governor Crist's time in office to automatically restore convicted felons rights.); Lerner, *supra* note 52 (recognizing that upon taking office in 2011, Governor Scott made it significantly harder for Florida's convicted felons to have their rights restored by initiating long waiting periods.).

80 *See* Thurston, Jr., *supra* note 78 (acknowledging the difference in the number of right restorations that were granted between 2007 and 2011 when Governor Crist was in office (155,315) to the low number of applications (2,488) that were granted under Governor Scott's time in office.); *see also* Mary Ellen Klas, *Price Tag for Restricting Felons' Rights After Prison Put at More Than $365 Million a Year,* MIAMI HERALD (May 21, 2018), https://www.miamiherald.com/news/politics-government/election/article211408754.html (emphasizing that the rate of rights restoration under Governor Scott was low throughout his time in office.).

81 *See* Mark Lane, *Lane: Court Blasts State's Arbitrary Clemency System,* THE DAYTONA BEACH NEWS-J. (Feb. 3, 2018), https://www.news-journalonline.com/news/20180203/lane-

As a result of Governor Scott's decision to end the automatic restoration of felon's rights, Florida experienced roughly $365 million worth of economic damage stemming from court and prison costs, an increase in the recidivism rate, and the lost opportunity to create around 3,800 new jobs.[82] When non-violent convicted felons are deprived of their civil rights, recidivism rates go up because it makes finding a job more difficult, and that, in turn, leads the individual into a vicious circle of a life of crime.[83] In contrast, after the implementation of Governor Crist's restoration policy, Florida saw the average two-year recidivism rate for those who had their rights restored lower to 12.4%.[84] This paled in comparison to the rate of 33% that was reported before Governor Crist's restoration policy was implemented.[85]

Since then, Florida, the state with the "highest rate of felon disenfranchisement[,] overturned the longstanding practice" and on November of 2018, obtained a majority vote to enact Amendment 4 to the Florida Constitution, reinstating 1.5 million non-violent felons' right to vote.[86] Amendment 4, like the Montana Const. Art. II § 28, "allows people with felony convictions who have served out the full terms of their prison sentence, probation, and parole, to exercise their right to vote."[87] This is a shining example of the progress Florida has made throughout the years and can continue to make with respect to non-violent felon civil rights, as well as an indicator that the State is ready to recognize the bifurcation of the word "felon,"

court-blasts-states-arbitrary-clemency-system (reporting that a U.S. District judge issued a strongly worded ruling describing Florida's clemency practices as unconstitutional and "crushingly restrictive."); *see also* Schlakman, *supra* note 50 (discussing a U.S. District Court judge's ruling on the constitutionality of Florida's clemency proceedings.); Klas, *supra* note 79 (highlighting that after seven years of restricting felon right restoration, Florida is experiencing an economic impact.).

82 *See* Klas, *supra* note 79 (explaining that Florida lost roughly $365 million dollars a year in economic impact since Governor Scott voted out the automatic restoration of convicted felon rights.); *see also* Garcia, *supra* note 63 (emphasizing that by restoring felon civil rights, the reduction in recidivism will generate a positive economic impact of $365 million.).

83 *See* Mansfield Frazier, *A Solution to Recidivism: Let Ex-Offenders Vote,* THE CRIME REP. (Aug. 9, 2011), https://thecrimereport.org/2011/08/09/2011-08-a-solution-to-recidivism-let-ex-offenders-vote/ (noting that allowing ex-felons to fully participate in society will reduce the recidivism rates and allow them to participate in society.)' *see also* Klas, *supra* note 79 (focusing on when offenders are unable to get their rights restored, it affects their ability to find a job which in turn leads them into a vicious circle of a life of crime.).

84 *See* Klas, *supra* note 79 (describing the difference between recidivism rates of those who do not have their rights reinstated to those that did after Governor Crist's policy implementation.); *see also* Chung, *supra* note 65 ("In one study, among individuals who had been arrested previously, 27 percent of non-voters were rearrested, compared with 12 percent of voters.").

85 *See* Klas, *supra* note 79 (contrasting the 33% rate of recidivism prior to the implementation of Governor Crist's restoration policy.); *see also* Call, *supra* note 63 (finding that during the period from 2007 to 2011 where Governor Crist's policy was in place the recidivism rate for felons who had their rights restored dropped by two thirds.).

86 *See* Gal & Panetta, *supra* note 45 ("on Election Day, the state with the highest rate of felon disenfranchisement overturned the longstanding practice, and Florida residents with felony convictions are now beginning to register to vote."); *see also* German Lopez, *Florida Votes to Restore Ex-Felon Voting Rights with Amendment 4,* Vox (Nov. 7, 2018 1:15 PM), https://www.vox.com/policy-and-politics/2018/11/6/18052374/florida-amendment-4-felon-voting-rights-results ("Florida voters during Tuesday's midterm elections approved Amendment 4, automatically restoring voting rights in the state for people previously convicted of felonies. Florida's Amendment 4 restores voting rights for people in the state convicted of felonies as long as they have completed their sentences, although anyone convicted of murder or felony sex offenses would be excluded.").

87 *See* The Florida Constitution, *Article VI Suffrage and Elections,* ONLINE SUNSHINE (last visited Nov. 27, 2019), http://www.leg.state.fl.us/Statutes/index.cfm?Mode=Constitution&Submenu=3&Tab=statutes&CFID=60551033&CFTOKEN=ac6c32bf0b105799-3FB17405-A0C4-A0EA-8ED6C9821BA84BB4#A6S04 ("any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation."); *see also* Nadege Green, *Here's How Amendment 4 Would Impact Floridians With Felony Convictions,* WLRN (Nov. 1, 2018), https://www.wlrn.org/post/heres-how-amendment-4-would-impact-floridians-felony-convictions (explaining that Amendment 4 automatically restores the right of a non-violent felon to vote.).

rather than categorizing non-violent convicted felons and violent convicted felons together.[88]

IV. Solution

Florida's disenfranchisement of convicted felons has economic repercussions both on the State level and on an individual level.[89] Amending Florida Statute § 790.23 or the Florida Constitution to reflect a more restorative approach as delineated in the Montana Const. Art. II § 28 would not only follow in the footsteps of action already taken by Florida in the past and presently through Amendment 4 to the Florida Constitution but would ensure that convicted felons are reintegrated into society with a guarantee of the restoration of their basic constitutional rights.[90]

Florida Statute § 790.23 currently groups non-violent and violent felons into one category without considering the differences between one type of felon and the other, including the nature of the crime committed and the difference in punishments received.[91] The new statute should specifically state that an individual charged with a felony that includes an element of violence is exempt from possessing a firearm or being issued a concealed weapons license, as the Court noted was appropriate in *Van Der Hule* but provide for the restoration of non-violent convicted felons rights upon completion of their sentence or probationary period and restitution paid to the State.[92]

The amendment of the statute should adopt the language found in Florida Const. Art. VI § 4 wherein it states that "any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation," with the exception of "person[s] convicted of murder or felony sexual offense[s]," with respect to a non-violent convicted felons right to possess a firearm.[93] Florida has already recognized that non-violent convicted felons should be restored of their civil rights with respect to voting, and this restoration should extend to also provide for the automatic restoration of non-violent convicted felons rights to possess a firearm under the same rationale being that ex-felons should not be considered "second class citizens" in society.[94]

88 *See* Mont. Const. art. II, § 28 ("Full rights are restored by termination of state supervision for any offense against the state."); *see also* Gal & Panetta, *supra* note 45.

89 *See* Klas, *supra* note 79 (exhibiting the high costs on the Florida economy produced by the vote to remove automatic restoration of right for convicted felons); *see also* Garcia, *supra* note 63 (analyzing the effect felon disenfranchisement has on the economy.).

90 See Gal & Panetta, *supra* note 45 ("on Election Day, the state with the highest rate of felon disenfranchisement overturned the longstanding practice, and Florida residents with felony convictions are now beginning to register to vote."); *see also* Lopez, *supra* note 85 ("Florida voters during Tuesday's midterm elections approved Amendment 4, automatically restoring voting rights in the state for people previously convicted of felonies. Florida's Amendment 4 restores voting rights for people in the state convicted of felonies as long as they have completed their sentences, although anyone convicted of murder or felony sex offenses would be excluded.").

91 See Fla. Stat. § 790.23, supra note 1 (observing that the statute is overinclusive as to the words "convicted" and "felon."); see also *Snyder*, 673 So. 2d at 10 (holding that an individual is considered convicted for purposes of Fla. Stat. § 790.23 at the point that they are found guilty of a felony.).

92 *See Van Der Hule*, 759 F.3d at 1045 ("In December 1983, Frank Van Der Hule pled guilty to sexual assault and four counts of sexual intercourse without consent in Montana. He was sentenced to 25 years' imprisonment and completed his sentence in 1996."); *see also* Mont. Code Ann. § 45-8-321(1)(c)(ii); Montana Code Annotated, *supra* note 4 (explaining that the privilege of obtaining a permit to carry a concealed weapon may not be denied to the applicant unless the crime committed by them includes an element of threat of intentional homicide, serious bodily harm, unlawful restraint, sexual abuse, or sexual intercourse without consent.)

93 *See* The Florida Constitution, *supra* note 86 ("any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation."); *see also* Green, *supra* note 86 (explaining that Amendment 4 automatically restores the right of a non-violent felon to vote.).

94 *See* Lopez, *supra* note 85 ("Florida voters during Tuesday's midterm elections approved Amendment 4, automatically restoring voting rights in the state for people previously convicted of felonies. Florida's Amendment 4 restores voting

V. Conclusion

Florida Statute § 790.23 lacks distinction between a non-violent convicted felon and a violent convicted felon.[95] The Statute should be amended to represent a more current America and the trend towards recognizing non-violent convicted felons as part of society.[96] A way to do this is to adopt a more restorative approach like Montana Constitution Art. II § 28.[97] The ability for a non-violent convicted felon to have their rights automatically restored has significant benefits including a lowered recidivism rate and a more productive economy.[98] It would also make the reintegration of non-violent convicted felons into society easier by making all their civil rights available to them, making it less likely they commit crimes in the future.[99] The State of Florida has exhibited its ability to make a change towards a less disenfranchised society by adding Amendment 4 to the Florida Constitution which allowed non-violent convicted felons to vote, and it should extend the same respect to the Second Amendment right to bear arms.[100] In sum, non-violent convicted felons should be afforded the same constitutional protections as everyone else in society by the State of Florida, and this includes the right to keep and bear arms.[101]

rights for people in the state convicted of felonies as long as they have completed their sentences, although anyone convicted of murder or felony sex offenses would be excluded."); *see also* Alejandro De La Garza, *'Our Voice Will Count.' Former Felon Praises Florida Passing Amendment 4, Which Will Restore Voting Rights to 1.4 Million People*, TIME (Nov. 7, 2018), https://time.com/5447051/florida-amendment-4-felon-voting/ ("We will no longer have second class citizens.").

95 *See* Fla. Stat. § 790.23, *supra* note 1 (observing that the statute is overinclusive as to the words "convicted" and "felon."); *see also* Snyder, 673 So. 2d at 10 (holding that an individual is considered convicted for purposes of Fla. Stat. § 790.23 at the point that they are found guilty of a felony.).

96 *See* Crist, *supra* note 68 (expressing that an ex-felon who has paid their debt to society should have an equal opportunity to return to society in a dignified, honorable, and successful manner.); *see also* Sherman, *supra* note 68 (noting that Governor Crist believed that a non-violent felon should be given a meaningful way to re-enter society.);

97 *See* Mont. Const. art. II, § 28 ("Full rights are restored by termination of state supervision for any offense against the state."); *see also* Mont. Code. Ann. § 45-18-801(2); Montana Restoration of Rights, *supra* note 4 (explaining that a felony offenders full rights are automatically restored upon termination of state supervision for any offense against the state.).

98 *See* Klas, *supra* note 79 (explaining that Florida lost roughly $365 million dollars a year in economic impact since Governor Scott voted out the automatic restoration of convicted felon rights.); *see also* Garcia, *supra* note 63 (emphasizing that by restoring felon civil rights, the reduction in recidivism will generate a positive economic impact of $365 million.).

99 *See* Amritt, *supra* note 66 (reporting that convicted felons who are given an opportunity to reintegrate themselves into society through the restoration of their civil rights are less likely to commit crimes in the future.); *see also* Shineman, *supra* note 64 (supporting the contention that the ease of convicted felon reintegration into society through the restoration of their rights can decrease their tendency to commit additional crimes.).

100 Lopez, *supra* note 85 ("Florida voters during Tuesday's midterm elections approved Amendment 4, automatically restoring voting rights in the state for people previously convicted of felonies. Florida's Amendment 4 restores voting rights for people in the state convicted of felonies as long as they have completed their sentences, although anyone convicted of murder or felony sex offenses would be excluded.").

101 *See* Editorial: Florida's Chance to Make it Easier to Restore Civil Rights, *supra* note 44 (comparing the state of Florida with the rest of the country with regards to the automatic restoration of felon civil rights.); *see also* Number of People by State Who Cannot Vote Due to a Felony Conviction, PROCON (last updated on Oct. 4, 2017, 10:57 AM), https://felonvoting.procon.org/view.resource.php?resourceID=000287 (comparing Florida's disenfranchisement rate to that of other states in 2016.).

Task Force Raptor: Failure of Military Justice

By Dennis P. Chapman

Introduction

In the Parable of the Tares, Jesus relates the story of a farmer whose wheat field an enemy has sown with tares. When the seed germinates, his servants ask him whether they should go into the field and pull the tares up. To this, the master answers

> "[n]ay; lest while ye gather up the tares, ye root up also the wheat with them. Let both grow together until the harvest: and in the time of harvest I will say to the reapers, Gather ye together first the tares, and bind them in bundles to burn them: but gather the wheat into my barn."[1]

Christ's parable is theological, describing the course of the future, in which saints and sinners are allowed to live together in the world, side-by-side, until the end of time, when the saints will go to their reward, and sinners to judgment. But it also fairly describes the operation of any fair and equitable system of justice; under such a system, the state does not charge out among the populace, seeking to distinguish, preemptively, between saint and sinner, upon the basis of the potential for criminality; rather, it leaves every person in peace, until their lives bear evil fruit in the form of criminal conduct; only then is the criminal tare pulled up from the field.

In most instances, our criminal justice system functions along these lines, implicitly accepting the validity of Blackstone's Ratio, which posits that it is "[b]etter that ten guilty persons escape, than that one innocent suffer."[2] In their zeal to expose and punish the guilty, however, authorities occasionally forget Blackstone and adopt, even if unwittingly, an approach closer to that of Thomas Danforth in *The Crucible*, that "I should hang ten thousand that dared to rise against the law, and an ocean of salt tears could not melt the resolution of the statutes."[3] At times, such overwrought zeal has driven authorities to the extreme of knowingly detaining thousands of innocent people as a preventive measure against speculative future wrongdoing by unknown persons who might not even exist, as in the notorious internment of Japanese Americans during the Second World War.[4] More commonly, such excessive zeal manifests itself in entrapment stings wherein law enforcement officers "'test the virtue' of a wide range of targets"[5] in the hopes of smoking out unknown evildoers from among the public, often goading otherwise innocent people into compromising themselves in the process, thus creating the very crimes they seek to suppress.

The military justice system is no more immune to such problems than are its civilian counterparts. In fact, one of the largest criminal investigations in the history of the U.S. Army—its investigation into a referral program known as the Guard Recruiting Assistance Program (G-RAP)[6]—was marred by an overzealous quest in which Army investigators grew so single-

[1] Matthew 13:24-30 (King James).

[2] Alexander Volokh, *N Guilty Men*, 146 Univ. Pa. L. Rev. 173 (1997) (quoting 4 William Blackstone, Commentaries at *352).

[3] Arthur Miller, *The Crucible*, 81 (Acting Edition, 1954).

[4] *See generally* Korematsu v. United States, 323 U.S. 214 (1944).

[5] People v. Butler, 502 N.W.2d 333 at 338 (Mich. App. 1993).

[6] Tom Vanden Brook, *Recruiting fraud, kickback scandal rocks Army,* USA Today, Feb 3, 2014, at https://www.usatoday.com/story/news/nation/2014/02/03/army-national-guard-bogus-bonus-payments-iraq-afghanistan/5182717/.

minded in their pursuit of wrongdoing that they became blind to exculpatory evidence and willing to pronounce Soldiers guilty of fraud on evidence so thin that one might reasonably question whether they had implicitly adopted a presumption of guilt as their basic operating assumption. Stung by critical media reports and subjected to withering political fire, a panicked U.S. Army responded to isolated reports of fraud in the G-RAP program by activating a massive investigatory structure under the Army's Criminal Investigation Command (CID), manned by Reserve Component investigators activated for this specific mission. Rather than focus its efforts on instances of clear fraud, this provisional investigative entity—dubbed Task Force Raptor—proceeded to ignore the wise counsel of our proverbial farmer by scrutinizing nearly the entire population of Soldiers that participated in G-RAP—more than 100,000 people. The results were predictable: While instances of genuine fraud were uncovered and prosecuted, this was only accomplished at the cost of trampling under foot thousands of ordinary soldiers, stigmatizing entirely innocent conduct as fraudulent, upending lives, damaging careers, and ruining finances in the process.

It is this last that is the focus of this paper—the pain visited upon innocent men and women of the Army National Guard and other components as the high price paid for the relatively few convictions for genuine fraud in the program that were obtained. Part I provides an overview of the Guard Recruiting Assistant Program itself. Part II addresses the findings of the Army audits that uncovered the problems in the G-RAP program, both fraud and otherwise. Part III introduces Task Force Raptor's response: Part III-A focuses on G-RAP's program rules and how they shaped the criminal inquiry, while Part III-B discusses the shortcomings of human memory as it impacted Task Force Raptor's findings; with Part IV, this paper turns to its primary focus, the plight of thousands of Soldiers accused of fraud and related misconduct by Task Force Raptor investigators but never charged: Part IV-A addresses the Army's system of Titling Soldiers under investigation—the principal source of the misery inflicted upon many innocent G-RAP participants; Part IV-B discussed the history and purpose of Titling; Parts IV-C and IV-D discuss the risks inherent in the "credible information standard"—the evidentiary standard under which the decision to Title a Soldier is made; and Part IV-E discusses the impact of having been Titled on G-RAP participants. Part V discusses policy considerations militating against deeming most G-RAP participants as culpable for any errors that they may have made during the course of their participation in the program, using the criminal law doctrines of Entrapment and Mistake of Law as a prism through which to examine the treatment of the Soldiers by the Government. Part VI considers the impact of Unlawful Command Influence upon the G-RAP probe; and finally, Part VII offers a few concluding remarks.

I. The Guard Recruiting Assistance Program

The terrorist attacks of September 11th, 2001 triggered a substantial increase in military deployments, with large numbers of Active Duty and Reserve Component personnel deployed in support of Operation Nobel Eagle (security force operations in the United States) and Operation Enduring Freedom (combat operations in Afghanistan).[7] The U.S.-led invasion of Iraq in 2003 greatly intensified the demands being made on U.S. forces, with "the Army components … deploying the largest numbers of personnel to the military operations in Iraq and Afghanistan."[8]

According to an analysis by the Defense Science Board,

[7] Cong. Budget Off., *Recruiting, Retention, and Future Levels of Military Personnel*, XI, (2006).
[8] *Id.*

> "Over 575,000 National Guard and reserve members [had] been mobilized since September 11, 2001 (as of May 31, 2007) in support of the attacks of September 11 (Operation Noble Eagle), operations in Afghanistan (Operation Enduring Freedom), and operations in Iraq (Operation Iraqi Freedom). After September 11, 75,835 members were mobilized at the height of operations in Afghanistan. At the close of major combat operations in Afghanistan, troop levels began to decline, only to spike to more than 213,000 troops when the United States invaded Iraq."[9]

By 2005 the Army was feeling the strain, struggling to maintain assigned strength[10] at the same time as it was "attempting to increase its personnel levels and its number of combat brigades."[11] The Army's Reserve Components—the Army National Guard and the Army Reserve—were not spared. The "Army National Guard and U.S. Army Reserve were below their congressionally approved end strengths by 16,823 and 15,995, respectively"[12] at this time. The Army National Guard fell short of recruiting goals by at least 13 percent every year from 2003 to 2005; to address this, it set an unusually high goal of 70,000 enlistments for 2006, and bolstered its complement of full time recruiters "from 3,915 at the end of 2004 to 4,955 by the end of 2005, or an average of 4,400 for those two years,"[13] achieving 90% of its recruiting goal—63,000 Soldiers—by August of that year.[14] But hiring more recruiters was not by itself sufficient to achieve this result; "increases in other resources and incentives" was also required.[15] One such resource and incentive program, launched with the express purpose of helping the Army National Guard achieve this 70,000 recruit goal, was the Guard Recruiting Assistance Program (G-RAP).[16]

Modelled on civilian contract recruiting,[17] G-RAP "leveraged Soldiers, Families, and military retirees to identify… potential candidates for enlistment."[18] As described by the National Guard Association of the United States (NGAUS),

> "Soldiers in the Army National Guard (ARNG) were uniquely situated in their communities to identify potential quality recruits among fellow students, coworkers, etc. This was an advantage that full-time recruiters did not have. From a budgetary standpoint, the cost of incentive payments to these soldier-recruiters was much less than the overhead costs of supporting full-time recruiters. In time, it was thought possible, to reassign some of the full-time recruiters to other duties, even to combat readiness."[19]

Under G-RAP, eligible individuals would become part-time contractors known

9 Off. of the Under Sec'y of Def. for Acquisition, Tech. and Logistics, *Defense Science Board Task Force on Deployment of Members of the Guard and Reserve in the Global War on Terrorism*, 6 (2007).

10 Cong. Budget Off., supra note 7.

11 *Id.* at iv.

12 Memorandum from Joseph P. Mizzoni, Principal Deputy Auditor General, *Army Audit Agency for the Recruiting Assistance Program Task Force on Audit of Recruiting Assistance Programs—Reserve Components*, (https://www.hsgac.senate.gov/imo/media/doc/A-2012-0115-IEF%20Audit%20of%20Recruiting%20Assistance%20Programs-Reserve%20Components_Redacted.pdf).

13 Cong. Budget Off., supra note 7 at xiii (explaining how the number of full time recruiters was further increased to 5,100 by fiscal year 2007); *See also* U.S. Army Audit Agency, Contracts for the Guard Recruiting Assistance Program, Audit Report: A-2013-0128-MTH 1 3(2013).

14 Cong. Budget Off., supra note 7 at xiii.

15 *Id.*

16 Nat'l Guard Recruiting Assistance Program. *What is G-RAP?*, G-RAP One Sheets V1.5, at 1 (n.d.).

17 Mizzoni, supra note 12 at 5.

18 Mizzoni, supra note 12 at 5.

19 Nat'l Guard Ass'n of the U.S., *The G-RAP Program: The Investigations and an Injection of Reality*, 1 (n.d.).

as "Recruiting Assistants" (RA) who would "cultivate quality potential Soldiers (PS) from within their individual sphere(s) of influence," and then bring these potential soldiers together with a full-time ARNG recruiter.[20] "The triad of RRNCO [Army National Guard Recruiters], RA, and potential Soldier [would] then work closely together to process the potential Soldier and move them towards accession [enlistment]."[21] As originally envisioned, the Recruiting Assistant's spheres of influence consisted of facets of his or her life outside of the Army National Guard—work, school, church, family, social and recreational activities, and acquaintances.[22] As the program progressed, Recruiting Assistants were encouraged to embark upon more advanced recruitment enterprises in which they would actively market the Army National Guard to persons not previously known to them in other contexts. G-RAP was initially launched as a pilot program, first in five states, with another 14 coming on line by the end of January 2006;[23] it was expanded to the rest of the country the next month, in February 2006.[24]

The Army National Guard did not operate the G-RAP program directly. Instead, it contracted with Document and Packaging Brokers, Inc.—commonly known as Docupak—to administer the program.[25] The Recruiting Assistants would enter into contracts with Docupak as 1099 contractors. Generally, Recruiting Assistants would be paid $1,000 upon a Prospective Soldier's execution of an enlistment contract, and a second $1,000 upon the Prospective Soldier's shipping to Basic Training, for a total of $2,000;[26] for some specialties, the total payment could be as high as $7,500.[27] The Recruiting Assistant would be paid by Docupak for these accessions; Docupak received a $345 payment from the Government for each enlistment.[28]

As a recruiting incentive program, G-RAP was a smashing success, producing over 80,000 enlistments by the endof December, 2008,[29] with approximately 109,000 active Recruiting Assistants referring as many as 139,000 enlistments over the life the program[30] —an astonishing 39.7% of the Congressionally-authorized 350,000 Soldier Army National Guard end strength as of 2005.[31] Even one of the most implacable critics of the program was forced to admit that "[i]n an important way, the program worked. The National Guard paid over $300 million for more than 130,000 enlistments, and began meeting its recruiting goals … During the G-RAP program years, almost 40% of National Guard recruits enlisted through G-RAP."[32] So impressive was GRAP's performance that the U.S. Army Reserve implemented its own version of the program from 2007—2012, and the Active Component (the Regular Army) implemented the program itself from 2008—2009,[33] both promoting their programs—AR-RAP and A-RAP, respectively—in their recruiting promotional materials.[34] The

20 *Nat'l* Guard Recruiting Assistance Program, supra note 16
21 *Id.*
22 *Id.* at 5.
23 *Id.* at 6.
24 Cong. Budget Off., supra note 1 at 10; *see also*, The Hon. Pete Geren & Gen. George W. Casey Jr., *A Statement on the Posture of the United States Army* 2008 (Feb. 26, 2008).
25 Mizzoni, supra note 12, enclosure 1 6.
26 Nat'l Guard Recruiting Assistance Program, supra note 16.
27 Mizzoni, supra note 12 at enclosure 1 7.
28 Mizzoni, supra note 12 at 1; *see also* Dept. of William Allen Stewart, *Remsburg v. Docupak*, 24:19-25.
29 U.S. Army Audit Agency, Contracts for the Guard Recruiting Assistance Program, Audit Report: A-2013-0128-MTH 13 (2013).
30 G-RAP Timeline, *Defend Our Protectors*, http://www.defendourprotectors.com/about/g-rap-timeline/ (last visited Nov. 15, 2020).
31 U.S. Army Audit Agency, *supra* note 29 at 3; *see also* Nat'l Guard Ass'n of the U.S., supra note 19
32 Memorandum from Subcomm. on Fin. and Contracting Oversight Majority Staff to Members of the Subcomm. on Fin. and Contracting Oversight U.S. Senate (February 3rd, 2014).
33 Nat'l Guard Ass'n of the U.S., *supra* note 19
34 *See* 70th RRC Strength Management Team, *AR-RAP News*, Issue IV (June 2008); *see also* Fonda Bock, *Future Soldier Cashes in on A-RAP*, 60.7 *Recruiter Journal* 18, 18-19, United States Army Recruiting Command (July 2008).

Air National Guard also participated in G-RAP,[35] though largely avoiding the controversy that dogged the Army's use of the program.[36]

Despite G-RAP's resounding success in generating enlistments for the Army National Guard, problems began to appear when in 2007 Docupak began referring instances of suspected fraud to U.S. Army Criminal Investigation Division (CID);[37] in response to these complaints, CID asked the United States Army Audit Agency to audit G-RAP and its sister programs in 2011.[38] Worse was to come. Although G-RAP had been already been suspended on January 23rd, 2012[39] and formally terminated on February 1st, 2012,[40] "[b]eginning in March 2012, the program came under intense scrutiny in the media … From a leaked Army Audit Agency document, the *Washington Post* reported on March 13, 2012, that $92 million in bonuses was allegedly paid to recruiters who were not eligible for the payments and that more than a quarter of the $339 million in bonuses given over the past six years may have been fraudulent"[41] (emphasis in original). This negative media attention drew Congressional scrutiny in the form of an investigation led by then Missouri Senator Claire McCaskill, Chair of the Senate Committee on Homeland Security and Governmental Affairs' Subcommittee on Financial and Contracting Oversight.[42]

II. The Audit Findings and the Response

In 2011, CID asked the Army Audit Agency (AAA) to review G-RAP.[43] The resulting reports subjected National Guard Bureau (NGB) to scathing criticism for its handling of the program, including charges of insufficient "[a]cquisition planning" and "[a]dministration of contract actions," as well as inadequate "[o]versight of the [Docupak's] performance."[44] AAA found that

> NGB should have solicited offers for a new contract for G-RAP in 2005, but instead inappropriately used an existing contract. As a result, NGB paid about $9.3 million for fees that weren't included in or authorized by the contract. Then, in 2007, the NGB awarded a sole-source contract to continue the program because it didn't allow enough time to compete [for] a new contract. The solicitation and evaluation of proposals for the new contract gave an unfair advantage to the incumbent, who was subsequently awarded the contract. Further, contracting officer's representatives didn't perform sufficient oversight of the contracts and task orders and the contractor didn't notify contracting personnel when it identified potentially fraudulent activity by its subcontractors.[45]

AAA also found that "705 recruiters (601 Army National Guard and 104 Army Reserve [the latter participating in AR-RAP]) were affiliated with potentially fraudulent Recruiting Assistance Program payments" deemed to be a "high risk

35 H. Steven Blum, *Transforming the Guard to an Operational Force*, 43 Joint Forces Quarterly 13, 17 (4th Quarter 2006).

36 *See generally* Remsberg v. Docupak, No. 12-CV-41, 2013 WL 704657(N.D. W.Va. Feb. 27, 2013).

37 Mizzoni, *supra* note 12 at 2.

38 *Id.*

39 U.S. Army Audit Agency, Audit Report A-2013-0128-MTH, *Contracts for the Guard Recruiting Assistance Program*, at 5 (2013).

40 Mizoni, supra note 12 at 4.

41 Nat'l Guard Ass'n of the U.S., *supra* note 19 at 2.

42 *Id.*

43 Mizzoni, *supra* note 12 at 3.

44 U.S. Army Audit Agency, *supra* note 29, at n.p (providing a summary of "Results").

45 Id.

for fraud."[46] Another "551 recruiters (444 Army National Guard and 107 Army Reserve) were affiliated with suspicious Recruiting Assistance Program payments" deemed to constitute a "medium risk of fraud."[47] Finally, AAA found that "2,022 recruiter assistants received payments that potentially violated program rules," including 611 that "were affiliated with potentially fraudulent or suspicious Recruiting Assistance Program payments," which AAA considered to be at "low risk for fraud."[48]

III. The TF RAPTOR Investigation: Pulling Up the Wheat with the Tares

Both the Army and Congress were understandably concerned at the Army Audit Agency's findings and, quite properly, directed that corrective action be taken. This action began on February 9, 2012 when Secretary of the Army John H. McHugh issued a sweeping directive on the G-RAP program.[49] In it, he directed U.S. Army Criminal Investigation Command (CID) to, *inter alia*, "initiate a criminal investigation into any case identified by the AAG [AAA] … as having a 'high' or 'medium' risk of fraud."[50] CID formed Task Force (TF) Raptor to investigate G-RAP in 2012, in response to Secretary McHugh's directive.[51] Secretary McHugh further directed the Chief, National Guard Bureau (CNGB) to initiate "an investigation into any [NGB/State ARNG] USAR personnel identified by the AAG [AAA] . . . as having a 'low' risk of fraud, mindful of the requirement to refer evidence of criminality to CID."[52] Assistant Secretary of the Army Thomas Lamont issued his own directive on the subject on May 15, 2012,[53] and Lieutenant General William E. Ingram, Jr., Director of the Army National Guard, issued the implementing instructions for the National Guard state-level investigations on June 1, 2012.[54]

The Army Audit Agency identified 3,278 instances of potential fraud, in categories of low, medium and high risk.[55] In a letter dated November 26, 2018 to this author, National Guard Bureau stated that "TF Raptor identified 3,226 ARNG Soldiers that required further review. Of those, the TF determined 1,542 case to be unfounded, meaning there was potential the allegations was baseless or did not occur . . . . Of the remaining 1,684 Soldiers investigated, the TF determined their cases were founded, meaning the Army found probable cause that the individual violated the law."[56] In the same letter, National Guard Bureau letter noted that the CID would furnish the case report information for favorable screening purposes (i.e. promotions and background investigations for security clearances) only if the TF Raptor deemed the allegations of fraud to be "founded.[57]

These statements as to the number of Soldiers investigated and the assurances as to which Soldiers' personnel actions would be affected by the outcome of the investigation almost certainly understate the true extent of the Task Force Raptor investigation and the number of

46 Memorandum from Joseph P. Mizzoni, Principal Deputy Auditor General, U.S. Army Audit Agency on Recruiting Assistance Program Task Force (June 4, 2012).
47 Id.
48 Id.
49 Memorandum from John M. McHugh, Secretary of the Army (Feb. 9, 2012).
50 Id.
51 Letter from Donna Warren, Chief, Congressional Inquiries, Nat'l Guard Bureau, to Dennis Chapman (Nov. 26, 2018) (on file with author).
52 *Supra* note 49, at 6.
53 Memorandum from Thomas R. Lamont, Assistant Sec'y of the Army for Manpower and Reserve Aff.'s, to Chief, Nat'l Guard Bureau (May 15, 2012).
54 Memorandum from Lieutenant General William E. Ingram, Jr., Director, Army Nat'l Guard, to the Adjutants General of all States, Puerto Rico, the U.S. Virgin Islands, Guam, and the Commanding General of the District of Columbia (June 1, 2012).
55 Mizzoni, supra note 46, at 3.
56 National Guard Bureau, supra note 51.
57 Id.

Soldiers—including innocent Soldiers—whose lives were affected thereby.

Task Force Raptor's investigation seems to have gone off the rails almost from the start, beginning with a scope of investigation that was grossly overbroad. "The majority of RAP fraud involved Army recruiters[,]"[58] as evinced by the fact that AAA found a larger percentage of ARNG full time recruiters were associated with potentially fraudulent transactions—1045 out of 4,995 authorized, or 21%—than Recruiting Assistants. By contrast, the AAA audits identified 2,022 Recruiting Assistants that received potentially fraudulent payments—a mere 2% of the 109,000 Recruiting Assistants that participated in the program, with most of those transactions deemed to pose a low risk of fraud. It was clear early on that most of the fraud associated with the G-RAP program was perpetrated by a comparatively small group of individuals in unusual circumstances. As one Congressional source noted,

> The majority of RAP fraud involved Army recruiters. As designed, G-RAP specifically prohibited recruiters from registering as recruiting assistants or receiving payments because recruiting new enlistees was already part of the recruiters' regular duties, and under the RAP programs, a recruiter's role was simply to process the enlistees that recruiting assistants referred to them. However, many recruiters found ways to obtain RAP payments. For example, one scheme involved two recruiters who coerced a subordinate into registering as a recruiting assistant. The recruiters provided the recruiting assistant all the names of the recruits who were coming through their doors, and the recruiters then split the incentive money with the recruiting assistant. Other recruiters simply registered an unwitting person as a recruiting assistant, then substituted their own bank account for the direct deposit incentive payments. Other RAP fraud involved recruiting assistants. Often, the prohibited conduct was using a nominee's personal information without their consent. For example, a school principal or guidance counselor would register as a recruiting assistant and enter large numbers of their students as nominees without their permission. Some recruiters also simply ignored the registration prohibition and just registered themselves as recruiting assistants.[59]

It should have been clear early in the investigation that the problem with fraud in Recruiting Assistance Programs lay with a comparative few individuals associated with special characteristics and circumstances, largely recruiters. Instead of starting with the presumption of innocence and focusing its inquiry on those G-RAP participants associated with such indicators, the Army seemingly proceeded on the assumption that every G-RAP participant was potentially guilty of fraud until it was proven otherwise. As late as February 2014, Lieutenant General (LTG) William T. Grisoli, Director of the Army Staff, let the mask slip while testifying to Congress that "*basically, we have 100,000 individuals that could be held accountable* and trying to figure out the high-and the medium-and the low-risk, so we did not waste our time on the low-risk cases and we went after the high-and the medium-risk."[60] But, LTG Grisoli's assurance

[58] Memorandum from the Subcommittee on Financial and Contracting Oversight Majority Staff to Members of the Subcommittee on Financial and Contracting Oversight on Hearing: Fraud and Abuse in Army Recruiting Contracts (Feb. 4, 2014).

[59] *Id.*

[60] Fraud and Abuse in Army Recruiting Contracting: Hearing Before the Subcommittee on Financial and Contract-

that Task Force Raptor was focusing on high and medium risk cases appears dubious. By the time of his testimony, CID had already reviewed 86,000 G-RAP participants—nearly79% of the total.[61] CID had been investigating G-RAP cases since 2011 and the program as a whole for two years when LTG Grisoli made this statement; given his stated prioritization of "High" and "Medium" risk cases, it is likely that most or all of the serious instances of fraud had been detected by that point; yet, Task Force Raptor continued its investigation for years longer, not concluding its work until July 2017.[62] It must be assumed, therefore, that every Soldier that participated in G-RAP was investigated to one degree or another over their participation in the program.

To an observer unfamiliar with Army investigative and personnel administration policies and procedures, such diligence may seem laudable, but sadly, the reverse is true. The Army's position that all 109,000 G-RAP participants, as well as thousands of recruiters, required screening for potential fraud injected a poisonous presumption of guilt into the investigation, exposing untold numbers of innocent Soldiers to needless disruption of their careers and erroneous accusations of wrongdoing. As Congressman Mike Coffman wrote to then-CID Commanding General Major General Mark S. Inch in August 2016,

> To be sure, multiple audits and reviews of G-RAP have uncovered evidence of fraud, abuse, or mismanagement, and any service member committing criminal misconduct must be held accountable. However, I am concerned that innocent service members have inadvertently become targets of lengthy and disruptive investigations, or worse, have erroneously accepted administrative punishment or plea-bargain agreements simply to avoid unpredictable and time-consuming civilian or military justice proceedings.[63]

As late as May 2017, the Enlisted Association of the National Guard of the United States (EANGUS) complained that

> The program was shut down in 2012. While we acknowledge that some fraud occurred, we believe those who acted fraudulently have been identified, duly prosecuted, and punished. Furthermore, we believe those still under investigation are unfairly being targeted and that the result of the investigation has ruined lives, careers, marriages, and credit; indeed, some have opted for suicide to end the relentless harassment.[64]

No one disputes that the Task Force Raptor's investigation into the G-RAP program led to the exposure and conviction of true wrongdoers. Tragically, however, in its zeal to uncover and punish wrongdoers, Task Force Raptor severely harassed an unknown number of innocent soldiers, damaging their careers, compelling them to incur thousands of dollars in legal expenses fending off the Government's attacks, and inflicting upon them untold mental anguish.

ing Oversight, Committee on Homeland Security and Governmental Affairs (2014) (testimony of Lieutenant General William T. Grisoli, Director of the Army Staff) (emphasis added).

61 Nat'l Guard Ass'n of the U.S., *The G-RAP Program: The Investigations and an Injection of Reality* 4.

62 Acting Secretary of the Army Robert M. Speer, Letter to Represented Mike Coffman, July 19th, 2017. *See also* Rowan Scarborough, *Army finishes 5-year investigation, but National Guard troops' careers still left in limbo*, WASH. TIMES (Aug. 30, 2017), https://www.washingtontimes.com/news/2017/aug/30/army-finishes-investigation-of-national-guard-recr.

63 Letter from Mike Coffman, U.S. Representative, to Major General Mark S. Inch, U.S. Army Criminal Investigation Command (Aug. 26, 2016).

64 Letter from the U.S. Enlisted Ass'n of the Nat'l Guard, to Senator Lindsey Graham and Senator Patrick Leahy, (May 10, 2017).

The Army has acknowledged as much, if only implicitly. In endorsing the promotion of officers whose promotions have been delayed due to their participation in G-RAP, former Secretary of the Army Mark Esper recently wrote that "like many others, [Officer X] was involved in G-RAP, a program with unclear guidance that changed several times over the years. The circumstances surrounding G-RAP are too unclear to prove known malice and blame on [Officer X]."[65] In a similar vein, National Guard Bureau recently informed this writer that "an information paper has been drafted to inform all of the Soldiers with founded allegations of the appeals process and the procedures to request an amendment of their CID records."[66] I was provided a copy of this paper.[67] As modest as these steps are, they are nonetheless remarkable for an institution not known for admitting error or tolerating any risk to its own reputation. Only the consciousness of real and palpable injustice could have prompted even as slight an admission of the possibility of error as these modest steps.

Task Force Raptor's investigation resulted in error and injustice in an unknown, though substantial, number of cases. These errors can be traced to a number of distinct but interrelated causes, including an undue willingness to find fraud, even absent clear evidence of fraudulent intent; a propensity to draw unwarranted inferences from the faded memories, or lack of thereof, of witnesses; an undue credulousness regarding testimony adverse to the subject of the investigation, together with a lack of interest in finding or crediting exculpatory evidence; rigidly construing all arguable program errors or inconsistencies identified in the investigation as fraud, without considering other plausible alternatives; and poor investigatory techniques.

In many cases, Task Force Raptor made findings of probable cause on the basis of weak and inconclusive evidence produced by a perfunctory inquiry; in nearly all of them, Task Force Raptor found probable cause without any positive evidence whatsoever of fraudulent intent on the part of the soldier under investigation. In these cases, investigators and their legal advisors generally based their conclusion that a crime had been committed upon one of two factors: (1) that one or more Prospective Soldiers recruited by the Recruiting Assistance claimed not to remember having received assistance from that RA in the recruitment process; or (2) upon a finding by the investigator that the Recruiting Assistant failed to follow G-RAP program rules in some respect. In other words, most subjects of the Task Force Raptor investigation "fall into the category of either not following the rules—or being paid for nominating soldiers who do not remember the name of their RA, eight to ten years later."[68]

A. *G-RAP Program Rules and the Task Force Raptor Investigation.*

As one activist has incisively noted, "Army Criminal Investigation Division (CID) consider[ed] it fraud if Recruiting Assistants simply did not follow the guidelines."[69] This extremely problematic position resulted in untold mischief, not least of which because a mere violation of program rules cannot, by itself, constitute fraud, much less a crime.

CID generally investigates potential violations of the Uniform Code of Military Justice (UCMJ). Only Soldiers on active duty pursuant to Title 10 of the U.S. Code are subject

[65] From a 2019 Action Memo for Secretary of Defense by Secretary of the Army Marc Esper following review of an officer's file by a Promotion Review Board (PRB), endorsing retention of the officer on the promotion list.

[66] National Guard Bureau, *supra* note 51.

[67] National Guard Bureau, Office of Legislative Liaison, letter to author, dated January 10th, 2019; and ARNG-HRH-I, Information Paper, "Guard Recruiting Assistance Program (G-RAP) Appeals Procedures," 16 August 2019.

[68] G-RAP FAQs, *Defend Our Protectors*, http://www.defendourprotectors.com/about/g-rap-faqs./, November 30th, 2019.

[69] Id.

to the UCMJ.[70] ARNG Soldiers participating in G-RAP, however, did not do so while on Active Duty orders; they did so either between drills while not on any form of military duty, or while on Full Time National Guard Duty (FTGND) pursuant to Title 32, U.S. Code.[71] As such their conduct in relation to G-RAP was not subject to the UCMJ. Any criminal conduct by ARNG Soldiers not on duty or on duty under FTNGD orders is adjudicated pursuant to State military codes (in rare instances) or Federal or state criminal law (in the vast majority of cases).[72] For this reason, the offenses alleged in G-RAP cases were violations of Federal criminal statutes rather than the UCMJ. Offenses typically charged include 18 U.S. Code § 641, Theft of Public Money; 18 U.S. Code § 1343, Wire Fraud; 18 U.S. Code § 1028, Identify Theft; 18 U.S. Code § 1028A, Aggravated Identity Theft; and 18 U.S. Code § 371, Conspiracy.

All of these are specific intent crimes; to secure a conviction on these offenses, it is not sufficient for the Government simply to prove that the accused violated G-RAP program rules or misused someone else's personal information in the course of earning their commissions: rather, the government must prove that a defendant acted **knowingly and willfully with the intent to defraud** the Government. For example, to prove a violation of 18 U.S. Code § 641, "the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law."[73] In other words, he must have intentionally done the forbidden deed, and known that it was illegal when he did it. To establish a violation of 18 U.S. Code § 1343, one must have knowingly and willfully participated in a scheme to defraud.[74] 18 U.S. Code § 1028 has a similar scienter requirement.[75] 18 U.S. Code § 1028A is a sentencing enhancement provision that mandates addition of "two years' imprisonment to the offender's underlying sentence" when that offender "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" in the course of one of a number of predicate offenses,[76] and it has its own scienter requirement. Interpreting this provision in

> Flores-Figueroa v. United States, the U.S. Supreme Court noted that "[a]ll parties agree that the provision applies only where the offender knows that he is transferring, possessing, or using something. And the Government

[70] Active duty retirees can also be recalled to Active Duty for Court-Martial, but this is rarely done except for instances of retirees living overseas near U.S. military installations. See United States v. Larrabee, 78 M.J. 107 (C.A.A.F. 2018), cert. denied, 139 S. Ct. 1164 (2019).

[71] Full Time National Guard Duty (FTNGD) is one of two forms of Active Service pursuant to 10 U.S. Code § 101(d)(3), the other being active duty. Active Duty is defined as "full-time duty in the active military service of the United States." 10 U.S. Code § 101(d)(1). While full-time National Guard duty is "means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory," 10 U.S. Code § 101(d)(5). Both active duty and full-time National Guard duty are creditable for purposes of active duty pay and allowances, benefits, and regular (active duty) retirement; however, only Soldiers on Active Duty are subject to the UCMJ. The distinction between Active Service and Active Duty is necessary due to Article I, Section 8, Clause 16 of the United States Constitution, which empowers Congress to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States," but "reserv[es] to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. CONST. art I, § 8, cl. 16.

[72] However, ARNG Soldiers in any status are subject to administrative sanctions for misconduct pursuant to Federal law, Department of Defense Instructions, and Army Regulations, as appropriate.

[73] United States. v. May, 625 F.2d 186, 190 n.2 (8th Cir. 1980). *See also Morissette v. United States*, 72 S.Ct. 240, 242 n.2 (1952).

[74] *See, e.g.*, U.S. v. Cassiere, 4 F.3d 1006 (1st Cir. 1993).

[75] *See* United States v. Jaensch, 665 F.3d 83 (4th Cir. 2011).

[76] *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1888 (2009) (quoting 18 U.S. Code § 1028A(a)(1)).

> reluctantly concedes that the offender likely must know that he is transferring, possessing, or using that something . . . without lawful authority."[77]
>
> The Court went on to observe that
>
> [I]n *Liparota v. United States,* this Court interpreted a federal food stamp statute that said, 'whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards *in any manner not authorized by [law]*' is subject to imprisonment. The question was whether the word 'knowingly' applied to the phrase 'in any manner not authorized by [law].' The Court held that it did, despite the legal cliché 'ignorance of the law is no excuse'[78]

The Supreme Court has held that "the [standard] presumption in favor of a scienter requirement should apply to each of the statutory elements which criminalize otherwise innocent conduct."[79] Any other rule would "ma[d]e crimes of [many] unwitting, inadvertent and unintended" acts.[80] This presumption of in favor of scienter is of decisive importance in G-RAP cases. Most G-RAP participants were junior officers, NCOs, and enlisted Soldiers with little or no understanding of recruiting practices when they signed up to participate as Recruiting Assistants. Docupak provided these soldiers with only perfunctory training on the program rules consisting of a few online slides and quizzes, and they never gave copies of the program rules themselves to the Recruiting Assistants. Docupak made frequent rule changes over the life of the program, and they made little or no effort to keep Recruiting Assistants apprised of rule changes as they went along. Even if Docupak had consistently provided Recruiting Assistants with a copy of the program rules, these rules were so poorly organized and written, so ambiguous, so contradictory, and changed so often that such a reference would have been of little use to the Recruiting Assistants in any case. Furthermore, Recruiting Assistants received little or no guidance, supervision, or support from Docupak on staying within program guidelines, and some received none from the full-time ARNG recruiters with whom they worked either.

The case of Remsburg v. Docupak illustrates the inadequacy of Docupak's documentation and dissemination of program rules. In that case, Docupak had terminated Recruiting Assistant David Remsburg on suspicion of violating program rules by claiming credit for West Virginia Air National Guard recruits that had previously initiated contact with Air National Guard recruiters on their own, and withheld funds from Remsburg that he claimed to have earned. Remsburg responded by filing suit against Docupak under the West Virginia Wage Payment and Collection Act.[81] In the course of the litigation, it was revealed that while Docupak provided Remsburg with a "New Hire Kit contain[ing] two polo shirts that said 'Guard Recruiting Assistant' and 200 starter business cards," it never provided him with an employee handbook.[82]

Docupak designated one of its supervisors, William Allan Stewart, to testify on its behalf at deposition on November 7, 2012.[83] Mr. Stewart was the Docupak supervisor that "approved removing Mr. Remsburg" as a Recruiting Assistant.[84] Mr. Stewart testified that he gave

[77] *Id.* at 1889.
[78] *Id.* at 1891.
[79] United States v. X-Citement Video, Inc., 115 S.Ct. 464, 469 (1994) (citing Morissette v. United States, 72 S.Ct. 240, 248 (1952)).
[80] Morissette v. United States, 72 S.Ct. 240, 254 (1952).
[81] Remsberg v. Docupak, No. 12-CV-41, 2013 WL 704657, at *1 (N.D. W.Va. Feb. 27, 2013).
[82] Id. at *2.
[83] Deposition of William Allan Stewart, *see also* Remsburg v. Docupak, No. 12-CV-41, 2013 WL 704657 (N.D. W.Va. Feb. 27, 2013).
[84] Id. at 20:9-11.

Mr. Remsburg neither notice of the reasons for his termination nor opportunity to rebut, on the ground that Remsburg was an "at-will"[85] contractor, that such notice was "[n]ot required,"[86] and that providing an opportunity to rebut was "not normal practice."[87] According to Stewart, "if there's a perceived perception of impropriety, [Docupak would] end the account [sic]."[88] In Remsburg's case, the "perceived … impropriety" was Remsburg's alleged failure to acquire "personal and private" information about his recruiting prospects directly from the potential recruits.[89]

When pressed on the basis for this determination, Stewart—a supervisor with firing authority who had been with Docupak with knowledge of how G-RAP operated from its inception[90] —could provide almost no details about the actual content of Docupak's G-RAP program rules. When asked what personal information Remsburg was supposed to have provided to Docupak, Stewart, could not answer confidently. He replied:

> "If I may, the name, the Social Security number—and again, **this is coming off my memory**—the name, the Social Security number; the address. What I'm providing to you is all the information that's required for a nomination, **as best of my knowledge**. The—**I'm pretty sure** the height and weight was in there. Basically, the general information required to submit the individual --input the individual as a nominee into our system"[91] (emphasis added).

When pressed as to what rules, exactly, Remsburg had violated as a Recruiting Assistant, Stewart's reply was vague at best, as shown in the following exchange:[92]

> "Q. Okay. So, in terms of Mr. Remsberg, what specific rule of the G-RAP program did Mr. Remsberg violate, in Docupak's estimation?
>
> A. [Stewart] Do you want one specific rule, sir?
>
> Q. Well, if there are more than one, I'd like to talk about all of them, but -- I'd like to see the rule and which one he violated.
>
> A. The guideline? It centers around the origin of the nomination.
>
> Q. Which specific rule should I look at to see what—
>
> A. How you met -- how and where you most a noming.
>
> Q. Where is that rule?
>
> A. When you say "rule," I'm saying "guidelines."
>
> Q. Where is that guideline?
>
> A. I'm going to assume it's in the training, sir.
>
> Q. Is there some guideline that says the details—
>
> A. That you—
>
> Q. Specifically about how and where and what you met?
>
> A. No, to input the data—the information as to how you met the individual.
>
> Q. Does the guideline specify the level of detail required?

[85] Id. at 20:20-21.
[86] *Id.* at 20:17.
[87] *Id.* at 21:4.
[88] *Id. at* 21:4.
[89] *Id.* at 90:1.
[90] *Id.* at 56:20.
[91] *Id.* at 90:11.
[92] *Id.* at 64-66.

A. I don't—don't quote me on the exact verbiage; obviously, I'm not looking at it in front of me. But I know it mentions how you met the potential airman.

Q. How much detail is required to be provided in how you met the potential airman?

A. I think it's self—in my opinion, it's self-explanatory.

Q. So would you agree with me that there's no detail provided—or no explanation provided as to the level of detail required as to how an RA met a potential airman?

A. I think the level of detail required is there need to be specifics as to how you met the individual."

For a person's conduct to be deemed fraudulent, that person "must have had notice that the conduct [was] proscribed in order to have [had] the specific intent required for the … crime."[93] When asked about Docupak's online training for its Recruiting Assistants, Stewart characterized the purpose of that training as intended to give them "general guidelines,"[94] implying that such training was something less than comprehensive. He himself was unable to recall the specifics of the program rules with any detail at all. He admitted that while Docupak provided Recruiting Assistants with logo-bearing polo shirts and business cards,[95] Docupak did not provide them with an employee handbook.[96] In short, Docupak fell far short of providing its Recruiting Assistants the training and information they needed to stay within program rules; as such, it is hardly just to impute fraudulent intent to them merely on the strength of failing to adhere to those rules.

Docupak's rules were presumably intended to protect Recruiting Assistants and prevent confusion. Unfortunately, these "rules" were poorly written, poorly organized, unclear, and frequently changed. When they did change Docupak failed to disseminate the changes and or to ensure that Recruiting Assistants were aware of the changes and understood them. In fact, Docupak's formulation and dissemination of G-RAP program rules was so dilatory and negligent that the rules served more as a stumbling block and a snare for well-intentioned but poorly informed Recruiting Assistants than as credible management controls, creating more problems than they solved.

Docupak issued five different versions of the Rules over the life of the program. The first version was in effect from December 2005 through October 2007;[97] the next was in force from November 2007 through August 2009;[98] the third ran from September 2009 through December 2010;[99] the fourth iteration was in effect from January—November 2011;[100] and the final version was in effect from December 2011 through termination of the program.[101] These rules were so confusing and changed so often that in 2013 CID agent Special Agent (SA) Julie A. Thurlow performed a survey of the G-RAP Rules, resulting in a 20-page synopsis summarizing each version of the Rules as they evolved over time; SA Thurlow's report documented at 59 rule changes and additions over the life of the program.[102] Even something as basic as program eligibility was

93 *United States v. Gilliam*, 975 F.2d 1050, 1056 (4th Cir.1992) (internal citations omitted).

94 Deposition of William Allen Stewart, *Remsburg v. Docupak*, (2013) (No. 3:12-cv-00041-GMG-JES), page 60.

95 *Id.* at 34:8.

96 Remsberg v. Docupak , No. 12-CV-41, 2013 WL 704657 (N.D. W.Va. Feb 27, 2013).

97 *G-RAP Overview*, December 2005.

98 *G-RAP V2 Training Modules*, November 2007.

99 *G-RAP Overview*, September 2009.

100 *G-RAP Recruiting Assistant Training Modules*, January 2011.

101 *G-RAP Recruiting Assistant Training Modules*, December 2011.

102 SA Julie A. Thurlow, *Review of Documents (G-RAP Training)*, Raptor Task Force, US Army Criminal Investigation Com-

unstable and constantly fluctuating. Eligibility for A-RAP—the Active Army version of the program—remained unchanged throughout the short life of that version of the program.[103] Eligibility for AR-RAP—the Army Reserve version of the program—likewise remained largely stable, with one important exception: Active Guard & Reserve (AGR) officers were initially eligible to participate in AR-RAP in June 2007, but not thereafter, creating the danger that officers initially participating may have continued to do so, not knowing that they were no longer eligible. As for the primary Recruiting Assistance Program—G-RAP—its eligibility rules were less stable. Eligibility was limited to drilling ARNG Soldiers and retirees until January 2009, when the program was opened to enlisted AGR personnel, enlisted Soldiers on Active Duty for Operational Support (ADOS), and Military Technicians.[104] Eligibility reverted back to drilling Guardsman and retirees only in February 2009, with enlisted AGR and ADOS Soldiers being reinstated for eligibility in May 2009 until the end of the program, and mobilized enlisted Soldiers being eligible from May 2009 through January 2011.[105] The problem is that these dates do not track with the dates upon which new versions of the G-RAP Rules were created, giving rise to the concern that Docupak or the Army National Guard may have been making rule changes on a rolling basis but only incorporating them into the formal "Rules" only sporadically. Given that neither the base Rules nor the changes were reliability distributed to the field, this portended a major stumbling block for program participants.

While several versions of these program rules were styled "Training Modules" and SA Thurlow styled them "G-RAP Training," this is a misnomer, for these Rules were never used by Docupak for training purposes, nor widely distributed among recruiters or Recruiting Assistants—in fact, it is doubtful whether the vast majority of G-RAP participants ever knew they existed at all. In reality, Recruiting Assistant training consisted of nothing more than a series of online dialog boxes that applicants would read and click through, with periodic "quizzes" along the consisting of further dialog boxes containing with "Yes" or "No" questions or multiple choice questions with radio buttons. Once the prospective Recruiting Assistant had completed this brief online course of instruction, they were enrolled in the program. They were never given a copy of the underlying program rules, and they had no further access to the online training course that they had completed upon enrollment. Thus, the only training most Recruiting Assistants ever received was informal, likely incomplete, and ephemeral.

Even if Recruiting Assistants had ready access to these Rules, it is by no means clear that the Rules would have been of great help to them. These Rules were nothing like the Army Regulations to which Recruiting Assistants would have been accustomed. Army Regulations are thorough and well-organized. They are broken down into discrete and separately enumerated chapters, paragraphs, and subparagraphs. They have detailed tables of contents directing readers to material at the paragraph level. They set forth the rules governing military personnel in clear, direct language. Docupak's G-RAP Rules, by contrast, conveyed a sense of informality, having the appearance of something just banged out on a word-processor. They are not paginated; bereft of chapter or paragraph numbers; and devoid of anything like an index or table of context. Key rules that Recruiting Assistants would later be accused of violating are contained in unlikely places under inappropriate headings.

mand (USACIDC), Quantico VA 22134, November 22nd, 2013.

[103] *Army RAP Eligibility*, Septem

[104] Reserve Component personnel paid as civil servants during the week who also participate as drilling Guard and Reserve personnel. In the Army National Guard, Military Technicians (MILTECHs) where their military uniforms and are referred to by their military ranks at all times, whether working in a Technician or drilling status.

[105] RA Eligibility by Status, 10 July 2012.

An example of the problematic way in which the G-RAP rules were formulated is the prohibition against the wear of military uniforms while performing Recruiting Assistant duties. All versions of the Rules contained some version of this statement: "Can I wear my uniform while I am doing RA Work? No. Your civilian contractor provides you with appropriate Guard wear (casual)."[106] Unfortunately, what sounds like a straightforward prohibition becomes ambiguous in light of what immediately follows: "You are never allowed to represent yourself as a Soldier working in a paid military status, nor should you portray yourself as a Recruiting and Retention NCO"[107] (a full time Recruiter). Thus, notwithstanding the initial categorical proscription against wearing the uniform during any contact with a prospective Soldier, the context indicates that it is the misrepresentation of one's status that Docupak actually meant to prohibit. This inference became stronger later. From November 2007, all versions of the rules cited "**[a]ctively** recruiting in uniform" (emphasis added) as an example conduct that could result in suspension or termination from G-RAP. Note the emphasized word—*actively*. "[this] word[]cannot be meaningless, else [it] would not have been used."[108] The Surplusage Canon provides that "[i]f possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored."[109] Thus, it would appear that Recruiting Assistants were allowed to engage recruiting functions while in uniform when wear of the uniform was incidental to the activity rather than integral to it. Philip Crane, President of Docupak throughout the G-RAP program, implicitly endorsed this interpretation in testimony in a state court criminal proceeding against Recruiting Assistant MSG Jerry Wilson in the District Court of Adams County, Colorado, in September 2015. Initially in his testimony, Crane testified categorically that Recruiting Assistants "[were] not" permitted to wear their uniforms,[110] and that such was "disallowed in the program."[111] But pressed, he conceded that the rule might not be so categorical after all:

> "Q. Would it be fair to say that an RA—well, an RA could not wear their uniform when they are contacting a potential nominee; is that fair?
>
> A. [Philip Crane] That is correct, with the exception of when some of the rules were altered slightly throughout the program.
>
> Q. Can you elaborate a little bit on that? What some of these rules—
>
> A. It was when the AGRs were allowed to participate briefly. And I don't recall how long they were allowed to participate. But if they were in a full-time AGR spot, they would have been in uniform."[112]

Implicit in Crane's testimony is the fact that AGR Soldiers must travel about, to and from their military duties, in uniform, and that therefore some carrying on of Recruiting Assistant functions while in uniform, incidental to such movements, was permissible. But every Recruiting Assistant would find themselves in this situation at some time or another—even traditional, drilling Soldiers generally travelled to their monthly drills in uniform. Yet CID

[106] *G-RAP Overview*, December 2005 and *G-RAP V2 Training Modules*, November 2007 contain this exact language; later versions contain a slightly modified version.

[107] All versions of the Rules contain this language.

[108] Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 174 (2012) (quoting *United States v. Butler*, 297 U.S. 1, 65 (1936)).

[109] *Id.*

[110] Transcript of Testimony of Philip Crane at 78-10, *People v. Wilson*, No. 14CR327 (September 1, 2015) .

[111] *Id.* at 9:12.

[112] *Id.* at 138:4.

investigators and Army adjudicators have been known to interpret the uniform rule categorically, declaring Recruiting Assistants guilty of fraud for being in uniform during any interactions with prospective Soldiers.

The uniform rule is but one example of the pitfalls that awaited Soldiers participating in G-RAP. And great these pitfalls were, as Task Force Raptor investigators tended to view any even arguable deviation from G-RAP's "murky rules"[113]—as understood by them—not as attributable to ignorance or honest error, but as conclusive proof, in and of themselves, of fraud on the part of the Recruiting Assistant receiving the payment, irrespective of whether the Recruiting Assistant willfully broke the rules or was even aware of the rule at all.

It is true that "[f]raudulent intent may be inferred from the totality of the circumstances and need not be proven by direct evidence,"[114] as can the existence of a "conspiratorial agreement."[115] But Task Force Raptor investigators went well beyond drawing reasonable inference about fraudulent intent from the totality of the circumstances; TF Raptor effectively excised the scienter element from the crimes charged altogether. But as the prolific Judge Richard Posner learned to his cost, excision of a required element of the offense is simply not permissible. Posner was a well-known and oft-published circuit judge on the U.S. 7th Circuit Court of Appeals. "Posner believe[d] appellate judges should have trial experience, and sitting by designation as a trial judge is a good way to get that experience."[116] Toward that end, he sat by designation as trial judge in the trial of Enkhchimeg Ulziibayar "Eni" Edwards on charges of witness tampering.[117] Edwards was charged with violating 18 U.S. Code § 1512(b)(3), "which imposes criminal penalties on a person who "knowingly … **corruptly** persuades another person, or attempts to do so … with intent to … hinder, delay, or prevent the communication to a law enforcement officer … of information relating to the commission or possible commission of a Federal offense"[118] (emphasis added). Rejecting the pattern jury instructions used in the 7th Circuit for this charge, Posner excised the word "corruptly" from his own proposed jury instructions, *sua sponte*,[119] proposing instead the formulation "[t]he defendant attempted to persuade another person to interfere with the government's investigation or prosecution of illegal activity, without justification for interfering," where "'[w]ithout justification' was meant to convey the meaning of 'corruptly.'"[120] He ultimately omitted even the "without justification" formulation at the insistence of the Government, which had objected that "no justification for such an interference had been suggested."[121] Posner mocked Defense counsel's objection to removal of the word "corruptly," arrogantly suggesting that "leaving out the word would not harm the defense, 'unless you're counting on obscurantism in leading [the jury] to acquit.'"[122] In the end, Posner's jury instructions had the effect of depicting the charge against Edwards as a strict liability offense, in which the Defendant's intentions are irrelevant, which it categorically is not. Edwards appealed and, in what must have

[113] Rowen Scarborough, *Army National Guard Recruitment Fraud Case Rests on Murky Rules*, The Washington Examiner (May 22, 2017), https://www.washingtontimes.com/news/2017/may/22/army-national-guard-recruitment-fraud-case-rests-o/.

[114] U.S. v. Ham, 998 F.2d 1247, 1254 (4th Cir. 1993).

[115] U.S. v. Cassiere, 4 F.3d 1006, 1015 (1st Cir. 1993) (quoting *U.S. v. Boylan*, 898 F.2d 230 (1st Cir. 1990)).

[116] Debra Cassens Weiss, *Posner rejects pattern jury instruction while sitting as trial judge and gets reversed*, ABA Journal (Aug. 28 2017), http://www.abajournal.com/news/article/posner_rejects_pattern_jury_instruction_while_sitting_as_trial_judge_and_ge.

[117] *Id.*

[118] United States v. Edwards, 869 F.3d 490 (7th Cir. 2017).

[119] Weiss, *supra* note 116.

[120] United States v. Edwards, 184 F.Supp.3d 635, 643 (N.D. Ill. 2016).

[121] *Id.*

[122] Weiss, *supra* note 116.

been a humiliating rebuke for Posner, his own Circuit reversed, holding that

> "The instructions given at trial failed to include the corruption element. They could have allowed the jury to convict Edwards of engaging in conduct that… did not constitute corrupt persuasion and therefore did not amount to criminal witness tampering."[123]

As the Court observed,

> "certain forms of interference with an investigation are not inherently malign. Consider, for instance… a mother who suggests to her son that he invoke his right against compelled self-incrimination, or a wife who persuades her husband not to disclose marital confidences. Nor is it necessarily corrupt for an attorney to persuade a client with intent to ... cause that client to withhold documents from the Government."[124,125]

By the same token, a Recruiting Assistant's failure to follow program rules in the course of recruiting a prospective Soldier can only be deemed a criminal offense if the Recruiting Assistant *knew* he was breaking the rules and did so intentionally for the purpose of committing fraud. While such a deviation, absent fraudulent intent, might constitute a breach of his contract with Docupak, it would not constitute a violation of the criminal law. In fact, many of the rules violations alleged by AAA or Task Force Raptor likely fail even to reach the level of a *material* breach of contract actionable in a civil suit.[126]

The G-RAP program rules were created by Docupak—a privately owned enterprise—to govern the activities of Recruiting Assistants as 1099 contractors of Docupak. They cannot, therefore, be said to constitute military orders. Nonetheless, they may be considered analogous to regulations issued by military authority, and the treatment of regulations under military law is illuminating as to the fundamental unfairness of stigmatizing Recruiting Assistants as having committed fraud based upon purported technical violations of G-RAP program rules. Under military law, violation of an order or regulation may be prosecuted irrespective of the defendant's knowledge thereof if it "be general in application;"[127] but where an order is not generally applicable to everyone in the command, the charge of violation of a lawful order requires both allegation and proof that the defendant knew of the order.[128] G-RAP program rules can hardly be said to be of general applicability to all ARNG Soldiers, and it is clear that not all the Soldiers to whom those rules did apply—those working as Recruiting Assistants—knew about all of these rules. Thus many of the charges leveled against Recruiting Assistants by Task Force Raptor investigators could not have survived in a military law context.

[123] Edwards, *supra* note 118 at 493.

[124] *Id*. at 498 (quoting *Arthur Andersen LLP v. United States*, 544 U.S. 696, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005)).

[125] For an analogous ruling in military law, see *United States v. Fleig*, 16 C.M.A. 444, 445 16 USCMA 444, 37 C.M.R. 64 (1966) (stating "A specification is required to allege every essential element of the offense charged, or it is fatally defective. It need not aver the elements expressly, but it must at least do so by necessary implication" (internal citations omitted)). Posner's jury instructions, as actually issued, failed to allege the scienter requirement either expressly or implicitly.

[126] A material breach is "a failure to do something that is so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract." *Mathews v. PHH Mortg. Corp*., Supreme Court of Virginia, 724, 732 S.E.2d 196 (2012) (quoting *Countryside Orthopaedics, P.C. v. Peyton*, 261 Va. 142 (2001) and *Horton v. Horton*, 254 Va. 111 (1997)). A Recruiting Assistant merely speaking to a potential recruit while wearing uniform, without more, would hardly have defeated any "essential purpose" of the Recruiting Assistant's contract with Docupak.

[127] *United States v. Koepke*, 18 C.M.A. 100, 102 18 USCMA 100, 39 C.M.R. 100 (1969).

[128] *Id* at 103.

B. *Human Memory, Tunnel Vision, and Other Investigative Errors.*

As galling as Task Force Raptor's treatment of technical violation of G-RAP rules was, the great bulk of injustice caused by this investigation actually stems from the unduly credulous treatment of the ancient memories of the Prospective Soldiers recruited under G-RAP. Task Force Raptor investigators often interviewed these Prospective Soldiers years after their last contact with their Recruiting Assistants. Naturally, memories faded during the passage of time between the recruitment and the interviews by investigators, resulting in memory gaps, errors, and inconsistencies among the testimony of the various witnesses. Task Force Raptor investigators seemed never to have taken into consideration the basic frailty of human memory in evaluating this testimony. Rather they often uncritically accepted such testimony when adverse to the Recruiting Assistant, treating inconsistencies and omissions almost as attributable only to fraud. But this assumption is plainly unwarranted. The Army itself is well aware of the fragility of human memory and of the hazards of relying upon it overmuch as evidence; its own authority on criminal investigations, FM 3-19.13, *Law Enforcement Investigations*, has said as much:

> "Although testimonial evidence can be the most beneficial evidence in many investigations, it is also the least reliable form of evidence. It does require investigators to maintain a greater level of objectivity and skill than many other forms of evidence identification, collection, and preservation. There are several factors that contribute to the lesser degree of reliability in testimonial evidence. Some of these factors are the fragility of human memory and the fact that people have the ability and, on occasion, the inclination to lie. The observations or perceptions of others may conflict due to the fact that people observe a single event from various vantage points. Although peoples' observations are factually accurate, they may be skewed by perception."[129]

The fragility and unreliability of human memory has been shown to be a key factor in the tragic phenomenon on wrongful convictions of innocent persons. Mark A. Godsey, director of the Ohio Innocence Project, has written about the problem of human memory and allegations of crime. Mr. Godsey is a former career federal prosecutor who was strongly skeptical of claims that innocent persons had been convicted of crimes, until entering academia and encountering the Innocence Movement there. Mr. Godsey addresses the problem of faulty memory, and its role in sustaining unjust accusations and convictions, in his book *Blind Justice*:

> "ENCODING, STORAGE, AND RETRIEVAL
>
> In general, memory involves three stages: encoding, storage, and retrieval. Encoding occurs when the witness experiences the event. But, given limitations in our cognitive abilities, we simply cannot encode everything that we take in during an event, no matter how important the event is to us. Rather, "we integrate fragments of a new experience into memory by combining it with what we already know or what we are expecting in a situation," as one memory expert has noted. In other words, the mind encodes some of the new information, but provides shortcuts for the rest, supplying information from previous memories or filling in the blanks with our assumptions. For example, if you go to a child's birthday

[129] Department of the Army, FM 3-19.13, *Law Enforcement Investigations* (2005) at 2-4.

party, you probably will not encode what the birthday cake looked like unless for some reason the appearance of the cake was particularly important to you. Instead, you may combine the image of the cake with preexisting memories of children's birthday cakes and save the fresh encoding space in your brain for something that mattered most to you, like where the cake was purchased if the taste was particularly delicious, or the fact that your ex showed up at the party unexpectedly. The less important details surrounding the event, such as who else was at the party or the color of the balloons, may not have been encoded but combined with some previous memory or a bias as to who you expected or assumed would be at the party, or what you think balloons at a child's birthday party are supposed to look like. In one sense, therefore, the brain helps us by not forcing us to encode everything that we encounter, allowing us to borrow from past memories and our expectations to create shortcuts. But, in another sense, the brain cheats us by creating inaccurate memories about many of the details we experience in everyday life. Sometimes details may seem minor or trivial when we experience them, like whether a person we barely know named Dave was at the birthday party, and thus we do not encode them cleanly. But this same fact can become very important later when we suddenly realize that our testimony as to whether Dave was present or not at the birthday party could mean the difference between whether he is convicted or acquitted of the murder of his wife, which occurred at the same time as the party. We may feel that we have a strong memory as to whether or not Dave was present, but in reality, unless our brain encoded that information correctly on that day, we cannot know if the memory is accurate."[130]

This phenomenon was illustrated by the statement to this author by an Army civilian paralegal about a G-RAP investigation referred to his command for review:

> "While [the subject of the other G-RAP investigation] was a company commander in the … battalion, [he] was accused of having previously committed misconduct relating to his participation in the ARNG G-RAP program … [The paralegal] related that when the case file came in for review, the people in the office discussed it among themselves, and the question they asked themselves was, in essence, **who remembers the recruiter who put them in the Army? [The paralegal] said that none of them did, and they all concluded that if they didn't remember their recruiter, how were they going to remember somebody else who they met with outside the recruiting office**? It did not seem credible to them"[131] (emphasis added).

Aggravating the undue weight given to old and uncorroborated memories was the fact that over the course of the investigation, Task Force Raptor investigators seem to have fallen victim to the ever present danger of tunnel vision, "a single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably color the evaluation of information received and one's conduct in response to the information."[132] "Tunnel vision distorts

[130] Mark Godey, *Blind Justice: A Former Prosecutor Exposes the Psychology and Politics of Wrongful Convictions*, 125-126 (University of California Press 2017).

[131] Interview conducted with Army paralegal, by the author.

[132] Federal/Provincial/Territorial Heads of Prosecutions Committee, *The Path to Preventing Wrongful Convictions*, at 43 (2011) (quoting Kaufman, 1 Morin Inquiry Report 479).

the perception of evidence"[133] "as police and prosecutors assigned to a case interact without critically assessing the evidence or testing the investigative theory."[134]

If there were any doubt that such distortion is a ubiquitous hazard in law enforcement, we need look no further than the recently released and long anticipated U.S. Department of Justice report on the beginnings of "Crossfire Hurricane," the investigation into interference by the Russian Federation in the 2016 U.S. Presidential election. Writing about the conduct of the Federal Bureau of Investigation—the preeminent law enforce agency, not only in the United States, but probably in the world—Department of Justice Inspector General Michael E. Horowitz wrote that

> "we concluded that case agents … did not give appropriate attention to facts that cut against probable cause, and that as the investigation progressed and more information tended to undermine or weaken the assertions in the FISA applications, the agents … did not reassess the information supporting probable cause."[135]

IG Horowitz could just as well have been describing the work of Task Force Raptor. Nor is this a uniquely American problem. Referring to the notorious 1959 wrongful conviction of Steven Murray Truscott in Ontario, Canada,[136] Canadian journalist and barrister Gary Botting described what he called "the classic Truscott scenario: once the police and Crown start barking up the wrong tree, it is often next to impossible to redirect their attention to other nearby trees where the true perpetrators may be hiding."[137] Also, as Botting further observed, "[p]olice and the prosecution are all too eager to wrap up a case as quickly as possible, becoming convinced of the guilt of a suspect who simply was in the wrong place at the wrong time, or was the last known contact of the victim."[138]

These phenomena are evident in Task Force Raptor's work. As the inquiry wore on, investigators streamlined their interrogation of witnesses by adopting a standardized form created by the aforementioned SA Julie Thurlow. This "Thurlow form" was customized for the G-RAP investigation upon which the investigator would annotate information provided by witnesses and served, in effect, as script for their interviews. It contained a series of questions, some yes or no, inquiring into whether the witness knew about G-RAP, whether anyone had helped them join the ARNG, whether they knew that person as a Recruiting Assistant, etc. These documents are often the only original record of these interviews, and they were often filled out in the most skeletal fashion. The manner in which TF Raptor investigators reacted to the minimal information recorded in these forms speaks volumes about their predisposition. For example, in some cases on the Thurlow Forms the answers indicate that the witness *did* receive assistance from the target of the investigation in enlisting in the ARNG, but witness would say that they did not know what the Recruiting Assistance Program (RAP) was or that they did not know the target as a Recruiting Assistant. Often, instead of interpreting the witness's testimony as indicating that the RA did perform his duties as Recruiting Assistant by helping the witness to join ARNG, but that

[133] *Id.* at 43.

[134] *Id.* at 43 (quoting Keith A. Findley & Michael S. Scott, *The Multiple Dimensions Of Tunnel Vision in Criminal Cases*, 291 Wis. L. Rev. 327-330 (2006).

[135] Office of the Inspector General, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation*, U.S. Department of Justice, at 413 (2019)

[136] *See Truscott (Re)*, 2007 ONCA 575; *Reference Re: Steven Murray Truscott*, [1967] S.C.R. 309. *See also;* Isabel Le Bourdais, *The Trial of Steven Truscott*, J.B. Lippincott Company, (1966) (providing an early, comprehensive treatment of the Truscott case).

[137] Gary Botting, *Wrongful Conviction in Canada*, at 25 (LexisNexis 2010).

[138] *Id.* at 9.

the witness simply did not remember the details of the G-RAP program, the investigator would ignore the testimony establishing that the subject did assist the witness in joining the ARNG, and instead seize upon the witness's denial that they knew about G-RAP or knew that the subject was a Recruiting Assistant as evidence that the subject had committed fraud. Task Force Raptor investigators would also effectively ignore the testimony of persons who did remember G-RAP and *did* remember the subject has having helped them as a Recruiting Assistant. If even one or two of the Prospective Soldiers did not remember the subject's assistance or did not remember it having been given within the context of G-RAP, investigators would conclude that the Recruiting Assistant had committed fraud, even if a much larger number provided testimony indicating that the subject had been performing his Recruiting Assistant duties diligently.

Task Force Raptor was manned, to a large extent, by investigators called up from the Army Reserve for the specific purpose of investigating G-RAP cases; as such, funds had to be specially earmarked to fund the pay and allowances of these investigators, as well as Task Force Raptor's operating costs. This funding stream was neither unlimited nor permanent, and the rush to conclude their work before the expiration of their funding shows. As the investigation progressed, Task Force Raptor investigators seemed to have narrowed the focus of their interviews to the Prospective Soldiers recruited by the Recruiting Assistants under investigation only, and no one else. At least in Task Force Raptor's later stages, investigators often made no effort to either corroborate the testimony of the Prospective Soldiers or to invalidate it. In some cases, Task Force Raptor investigators never even contacted the full time recruiters with whom the Recruiting Assistants worked to verify either the claims of the Recruiting Assistants themselves or of Task Force Raptor's other witnesses. This is an egregious error, for while the Prospective Soldier has only one experience with his Recruiting Assistant—his own enlistment—the full time recruiters with whom the Recruiting Assistants worked encountered these RAs multiple times and were in a much better position to evaluate the honesty and reliability of the Recruiting Assistants being investigated; in fact, full time recruiters were at the center of some of the G-RAP cases that were prosecuted. Yet as the investigation reached its later stages, Task Force Raptor investigators omitted this crucial step. This was a tragic omission, as in some cases the testimony of these recruiters was firmly exculpatory, including in cases where the investigators concluded that the Recruiting Assistant had committed fraud.

"Tunnel vision at its worst may lead the police and prosecutors to 'cheat' by deliberately withholding evidence that might be helpful to the defense. The police may well regard certain evidence in their possession as irrelevant and therefore not worth disclosing …"[139] The insidious impact of this phenomenon on Task Force Raptor's work becomes unavoidably obvious as the testimony of its witnesses is more closely examined. In many instances, the Thurlow Form documenting a given witness interview would record an unequivocal denial of the witness having received any assistance from the Recruiting Assistant in joining the ARNG. However when these witnesses or others who knew them were re-interviewed by the Recruiting Assistant's defense team, a completely different picture would emerge. In some cases the witness would provide information on re-interview establishing without doubt that the Recruiting Assistant had helped that witness in attempting to join the ARNG; in other cases where CID had characterized a witness as having denied receiving such assistance, on re-interview the witness would reject that characterization and testify instead that they simply did not remember whether or not they received such assistance, or even admit it was possible that the Recruiting Assistant had helped

[139] *Id.* at 11.

them. In other cases defense interviews produced information that clearly discredited the witness' prior testimony to CID, such as indicators of the witness being mentally ill, or having strong motive to lie about the Recruiting Assistant. The Task Force Raptor report on their investigation of the case would be completely bereft of any such nuance or exculpatory information.

IV. TF Raptor's Unseen Victims: Soldiers Titled but not Charged

Task Force Raptor investigators made probable cause findings in numerous cases where no charges were ever brought. In some cases, charges were not preferred on the pretext of the statute of limitations having expired; in other cases the subject's chain of command simply did not find Task Force Raptor's evidence persuasive, which is hardly surprising given the weakness of the evidence in many instances. Unlike in civil life, however, a decision not to proceed with the case does not end the matter for a Soldier. For a Soldier, merely having once been the subject of a criminal investigation by CID, even absent prosecution, can profoundly disrupt his life and severely damage his career. This reason is a process, unique to the Armed Forces, called *Titling*.

A. *What is "Titling"?*

At its simplest, a Soldier is "Titled" when a CID investigator places his name in the subject line of an open criminal investigation; but the Titling a Soldier is a far more significant event than this implies, for Titling triggers the Soldier's indexing in Army CID's database and, much more importantly, in the Defense Central Index of Investigations, or DCII. The information cataloged in the DCII is available to and used by the Armed Services for purposes well beyond the scope of law enforcement, from security clearance adjudications to screening the moral qualifications of officers selected for command or promotion.

DoDI 5505.07, *Titling and Indexing Subjects of Criminal Investigations in the Department of Defense*, January 27, 2012, provided at paragraph 4(3) that "[t]itling and indexing in the DCII shall be done as soon as the investigation determines that credible information exists that the subject committed a criminal offense."[140] It further defined "credible information" as "[i]nformation disclosed or obtained by a criminal investigator that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to lead a trained criminal investigator to presume that the fact or facts in question are true."[141] The current version of DoDI 5505.07, dated February 28th, 2018, contains an identical definition of "credible information" and substantially similar rules regarding Titling;[142] it further states that "[o]nce the subject of a criminal investigation is indexed in the DCII, the information will remain in the DCII, even if the subject is found not guilty of the offense under investigation, unless there is mistaken identity or it is later determined no credible information existed at the time of titling and indexing."[143]

B. *History and Purpose of Titling*

The Titling process can be traced to at least February 1966, when the Department of Defense established the DCII, pursuant to a Secretary of Defense memorandum dated December 3rd, 1965, implementing Title 5, United States Code, § 301.[144] The purpose of Titling is "to ensure

[140] U.S. Dept. of Def., Instruction 5505.07, *Titling and Indexing Subjects of Criminal Investigations in the Department of Defense* (January 27, 2012), at 2.

[141] *Id.* at 4. U.S. Dept. of Def., Instruction 5505.07, *Titling and Indexing Subjects of Criminal Investigations in the Department of Defense* (February 28, 2018).

[142] *Id.* at 3.

[143] U.S. Dept. of Def., IG No. 91FBD013, *Review of Titling and Indexing Procedures Utilized by the Defense Criminal Investigation Organization,* (May 1991) at 3.

[144] *Id.* at 1.

that information contained in the report can be retrieved at some future point in time for law enforcement and security purposes."[145]

Prior to 1992, Army CID used a Probable Cause standard in making Titling decisions, while other Defense criminal investigative organizations used a variety of lower standards for Titling individuals. In 1991, "[t]he House Armed Services Committee (HASC) conducted a review of the military criminal investigative organization (MICOs)."[146] In its report on that review, the HASC recommended, not only that all MICOs adopt a uniform standard for Titling, but further that they adopt the Probable Cause standard for Titling then used by Army CID.[147]

DoD acted on the HASC's recommendation to establish a uniform standard for Titling, but it defied the HASC's request that said uniform standard be the Probable Cause standard employed by the Army. Instead, DoD established the Credible Information standard in place today, on the ground that the Probable Cause standard for Titling "is not effective for law enforcement and investigative purposes,"[148] largely because "[t]here may be too great a time delay between the time when a file is preliminarily reported to the DCII by the CID, and the time when it is finally reported in a retrievable manner following a final determination of probable cause."[149]

C. *The "Credible Information Standard" is a Dangerous Tool that Must be Used in a Careful and Restrained Manner*

It should be self-evident to any objective observer that associating the names of Soldiers with unproven—and in many cases unfounded—criminal allegations in a searchable database accessible to thousands of individuals across numerous organizations, where said information remains accessible for decades, creates a grave risk to the rights, reputations, and careers of those Soldiers.

It cannot be denied that Titling individuals on a "Credible Information" standard creates substantial investigatory and security benefits. "Titling based on credible information and subsequent indexing in the DCII is necessary so that information can be retrieved in the future for law enforcement and security purposes."[150] It is not my purpose here to challenge the "Credible Information" standard or to deny its benefits. However, using such a low bar as "Credible Information" for the indexing of subjects in the DCII virtually guarantees that the names of innocent persons will be entered into this database. This would create an inherent risk of injustice under any circumstances, but the manner in which Titling is used in the United States Army not only fails to provide safeguards against the deleterious effects of Titling individuals, but it actually aggravates those effects and creates injustice every day. In part this stems from the definition and anomalous nature of the "Credible Information" standard itself:

> "'Credible information' is an evidentiary determination peculiar to the titling area. Unlike probable cause, with a long history of judicial interpretation, 'credible information' means nothing to attorneys, who are tasked to assist investigators in the determination of whether it exists in a particular case. Trial counsel might find it a standard that is impossible to measure."[151]

[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.* at 13.
[149] *Id.* at 14.
[150] Major Patricia A. Ham, *The CID Titling Process—Founded or Unfounded?*, The Army Lawyer, DA PAM 27-50-309 (August 1998) at 13.
[151] *Id*

D. *The Use and Abuse of Titling in the United States Army*

By far the greatest threat to the rights of innocent Soldiers who find themselves Titled is the broad array of uses—beyond investigatory and security purposes—to which the information in DCSS is put, and the vast number of people and entities which have access to that data. In pushing for the Credible Information standard, The Department of Defense Inspector General (DoDIG) asserted the limited purposes for which Titling is intended. According to the DODIG report,

> "The report of investigation is merely the repository for all those facts tending to approve or disprove the allegation, gathered through observation, interviews, and examination of documentary and physical evidence, obtained during the course of a thorough investigation. **The fact that an individual was the subject or otherwise titled during the course of an investigation should not connote guilt or innocence, nor should that fact carry with it any stigma upon which responsible individuals would initiate any inappropriate administrative action** … The primary purpose for titling an individual as the subject of a criminal report of investigation is to ensure that the information contained in the report can be retrieved at some future point I time, **for law enforcement and security purposes**"[152] (emphasis added).

Unfortunately, the information found in the DCII and in the records of the U.S. Army Crime Records Center is used for *much more* than "law enforcement and security purposes."

This data is systematically used in promotion decisions by the military and by myriad other actors in Government and in the private sector. This was forthrightly stated by the Fort Benning Office of the Staff Judge Advocate Legal Assistance Office as recently as 2018:

> "Q. Can Titling affect military AND civilian careers?
>
> A. Yes. The information contained in these databases may be used for a variety of purposes such as: making civilian employment decisions, military assignment decisions, such as battalion and brigade commander assignments, military promotion decisions and security determinations More than 27 agencies have access to the DCII and it receives approximately 35,000 requests for information a day. This information is retrievable from DCII and CRC for 40 years."[153]

The danger posed by the Army's expansive use of DCII data for purposes other than investigation and security has long been known to the Army and, in fact, the Army raised strong objections based upon this danger at the time DoDIG proposed implementing the Credible Information standard DoD-wide. MG John L. Fugh, Judge Advocate General of the Army at the time the Credible Information standard was adopted, vigorously asserted the dangers of adopting that standard. He said:

> "The Military is a unique society for which there is no civilian counterpart. I'm therefore concerned about the 'Big Brother' aspects of the DCII. Many

[152] Dept. of Def., *supra* note 143 at 3.

[153] *I've Been 'TITLED!—What Does that Mean and How Can I Fix It?,* Office of the Staff Judge Advocate Legal Assistance Office, (June 2018).

> of us have access to that system, and the information is used for personnel decision including security clearances, promotions, assignments, schooling, and even off-duty employment."[154]

The Army also raised objections to the key premise of DODIG's recommendation for adopting the Credible Information Standard—the claim that "titling and indexing are administrative functions, 'a [mere] indication[] of the historical fact that, at some point, a person became the focus of a criminal investigation.'"[155] The Army objected that

> "[t]hat concept is acceptable only if the fact of titling is not to be used for any other purpose than as a record of investigative activity and there is no negative connotation associated with being titled. **Army experience is that being titled and indexed does carry a very negative connotation**" (emphasis added).[156]

The Army's criticism went further, arguing that while the Credible Information standard may pose little risk when used only for security and criminal investigatory purposes,

> "where the outputs from the system are widely accessible to agencies or officials other than criminal or security agencies or personnel . . . and where that output is used directly to support agency actions or determinations other than subsequent criminal or security investigations, then the standard recommended by the DOD IG is grossly unfair."[157]

And DCII data is widely accessed for a variety of purposes unrelated to criminal investigation and security matters. MAJ Patricia A. Ham addressed this in 1998, and access to and use of DCII data can only be more widespread now:

> "Access to information in the DCII is widespread. The DCII receives an average of 35,000 requests per day. Twenty-seven agencies are authorized access and input to the DCII, with a total of 1179 terminals. An additional 129 terminals have "read only" capability. A working group was recently established to examine whether access should be extended to an even greater number of agencies. The information retrieved may be used to determine promotions, to make employment decisions, to assist in assignment decisions, to make security determinations, and to assist criminal investigators in subsequent investigations."[158]

The Credible Information standard for Titling continued to receive scrutiny and criticism even after the 1991 DODIG Report and subsequent adoption of the standard DOD wide. In 1993, the Advisory Board on the Investigative Capability of the Department of Defense was formed; it published its *Report of the Advisory Board on*

[154] Ham, *supra* note 150 at 10 (quoting Memorandum from MG John L. Fugh, The Judge Advocate General, U.S. Army, to Derek Vander Schaff, DOD IG, subject: Comments to Proposed DOD Instruction 5505.07 (1992)).

[155] Ham, *supra* note 150 at 10 (quoting Drafting Memorandum from MG John C. Heldstab, Director of Operations, Readiness, and Mobilization, DAMO-ODL, to Assistant Secretary of the Army (Manpower and Reserve Affairs), subject: DOD Instruction 5505XA, Tilting and Indexing of Subjects of Criminal Investigations in the Department of Defense, ACTION MEMORANDUM (undated)).

[156] Ham, *supra* note 150 at 10.

[157] *Id.* at 10 (quoting Draft Memorandum from MG John C. Heldstab, Director of Operations, Readiness, and Mobilization, DAMO-ODL, to Assistant Secretary of the Army (Manpower and Reserve Affairs), subject: DOD Instruction 5505XA, Tilting and Indexing of Subjects of Criminal Investigations in the Department of Defense, ACTION MEMORANDUM (undated)).

[158] *Id.* at 11.

the Investigative Capability of the Department of Defense in 1994.[159] This report was harshly critical of the Credible Information standard for Titling. The Advisory Board acknowledged the DCII as a "necessary tool for effective law enforcement in DOD."[160] But it also found that

> "the current number of organizations, and thus individuals, with access to the DCII troubling, especially in light of the credible information standard for titling and the sheer number … of individuals whose identities appear in the system."[161] The Advisory Board further found that "access to closed criminal investigation indices by other than DCIO personnel may create an unacceptable risk for individuals listed as subjects in the system. DoD Instruction 5505.7 contains the restriction that [j]udicial or adverse administrative actions shall not be taken solely on the basis of the fact that a person has been titled in an investigation Although this provision acknowledges the potential for misuse of the DCII and attempts to prevent certain decisions from being made exclusively on the existence of titling information in the criminal investigation index, we are concerned that regulatory requirements may not provide sufficient protection. A hypothetical illustrates the concern. A DCIO receives what is perceived at first to be credible information that an individual has committed an offense and thus titles and indexes the subject in the DCII. This information later is deemed not credible, but the individual remains titled and in the DCII. Thus, five years later when an agency with access to the DCII conducts a search of the system on two candidates for the same critical position, the one individual is identified as the subject of a criminal investigation and the other is not. Now, at this point, the agency should request the case file from the relevant DCIO and read that no credible information was ultimately developed. As a practical matter, however, the agency is pressed for time and makes a decision to employ the individual without the DCII criminal investigation record."[162]

> "[M]any investigators and trial counsel who assist them do not understand the difference between titling an individual, founding an offense, and substantiating an offense. If there is such confusion among those who regularly deal with the system, what can be expected of commanders, promotions boards, and other entities that have access to titling information? The risk of misunderstanding and hence, misuse, is almost certain."[163]

E. *Impact of Titling on G-RAP Participants*

Notwithstanding National Guard Bureau's claims to the contrary, the Titling process has negatively impacted untold thousands of innocent Soldiers that participated in G-RAP. National Guard Bureau's claim that only 3,226 Soldiers were investigated in relation to G-RAP seems dubious,[164] not least given the testimony of Army officials cited above indicating that all 109,000 Recruiting Assistants were being screened for fraud. It becomes even more dubious in light of the letter sent to the Secretary

[159] *Id.*
[160] 1 Rep. of the Advisory Bd. on the Investigative Capability of the Dept. of Def. 1, at 44 (1994).
[161] *Id.* at 45.
[162] *Id.*
[163] Ham, *supra* note 150, at 13.
[164] *Supra* note 51.

of the Army by Colorado Representative Mike Coffman on September 18th, 2018.[165] In that letter, Rep. Coffman asked the Army to identify not only how many cases were investigated and "founded," but how many Soldiers were Titled; in how many cases probable cause was found; how many security clearance determinations were triggered by the G-RAP investigation; and how many officers had been subjected to promotion delays due to G-RAP.[166] So far as I am aware, the Army has never answered Rep. Coffman's questions, casting doubt upon the proposition that the extent of the damage done to the Recruiting Assistants was as limited as National Guard Bureau's optimistic assessment would indicate.[167]

National Guard Bureau's assurance that only in those cases where the allegations were "founded" would the investigation be considered in subsequent personnel actions is plainly false. As noted above, the allegations against a Soldier need not be founded to trigger indexing in the DCII; in fact, the investigation need not even find probable cause: A Soldier listed as the subject of a criminal investigation, and thus permanently indexed in the DCII, upon an initial finding that the Credible Information standard is met, even if the Soldier is ultimately exonerated outright. This fact alone gives rise to concern that far more than 1,684 Soldiers[168] have had their careers adversely impacted by Task Force Raptor's investigation, and that this damage will continue. This concern is all the greater considering the poor quality of Task Force Raptor's investigation into many G-RAP participants. It becomes greater still given that, based upon the G-RAP cases that I have examined, it is clear that TF Raptor Investigators were prone to find probable cause in G-RAP cases on the basis of evidence so flimsy that it would likely not even have satisfied the Credible Information standard in other cases not related to G-RAP.

National Guard Bureau's position is also plainly inconsistent with Army policy. Any CID-related "past adverse or 'Titled' event [or] any open/ongoing law enforcement investigation or report" identified during Post Board Screening can trigger referral of an officer to a Promotion Review Board (PRB) or a Command Review Board, and result in the delay or denial of promotion or removal from the Command select list, as can an "any possible connection to a major adverse news headline."[169] This is a far, far lower standard than the allegation being "founded."

Soldiers Titled by CID in G-RAP related cases have faced referral to Promotion Review Boards and delay of promotion; referral to Boards of Inquiry for possible separation from Active Duty; suspension of security clearances; loss of civilian employment; debarment from Federal contracts; and impediments to securing employment in law enforcement. Once employed in law enforcement, the presence of a probable cause determination by CID in the DCII, however weakly founded, creates a *Brady* issue impinging upon his usefulness as a witness for the prosecutions in the cases he investigates.[170] In fact, in many cases innocent Soldiers caught up in Task Force Raptor's face multiple problems caused by being Titled, one after the other.

Soldiers confronted with these adverse proceedings find themselves faced with severe damage to their careers, thousands of dollars in legal fees rebutting the allegations in defense of their careers, or both. In contemplating the potential for injustice to such Soldiers, it must be remembered that Task Force Raptor focused its efforts during the early phase of its work on the most severe instances alleged fraud. This

[165] Letter from Representative Mike Coffman, 6th District, Colorado to Secretary of the Army Mark Esper, (September 18, 2018).
[166] *Id.*
[167] *Supra* note 51.
[168] *Supra* note 51.
[169] Army Human Res. Command, *Frequently Asked Questions for Promotion and Command Review Boards*, TAGD-OPSA, (February 2019) at 3.
[170] *See generally,* Brady v. Maryland, 373 U.S. 83 (1963).

means that those instances of genuine fraud and malfeasance were likely adjudicated early in the investigation, leaving until later the weaker instances where the Government would have had difficulty proving their allegations. This latter group included many cases where CID made findings of probable cause upon the flimsiest of bases and, if the cases I have examined are any indication, almost certainly includes many, many instances of innocent Soldiers wrongly accused of fraud by CID.

It is likely that many of these innocent Soldiers saw their careers damaged or ruined in part because of their own faith in the Army itself. In my experience, the first impulse of a Soldier under investigation is to talk to the investigator in the belief that the matter can be easily sorted out—a naïve faith that can prove fatal even for innocent persons, as shown by Professor James Duane:

> "Consider the tragic case of Ronald Cotton. He spent more than ten years in a North Carolina prison for a pair of rapes he did not commit … When he first learned that police were looking for him, he foolishly did what most innocent people do under these circumstances: he went down to the police station to meet with them, answer their questions, and attempt to clear things up."[171]

Mr. Cotton was fortunate in that he was eventually exonerated by DNA evidence and freed.[172] For the innocent victims of Task Force Raptor, however, no scientific magic bullet can clear them.

Soldiers attempting to clear up unjust accusations of fraud by CID encounter another stumbling block as well. Many Soldiers, faced with some adverse proceeding triggered by having been Titled assume, at least implicitly, that the matter stems from a misunderstanding that can be resolved by a rebuttal correcting the record. Often, Soldiers provide such rebuttals only to have their effort broken on the rocks of the presumption of regularity. "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."[173] Under this doctrine, once an official action has been finalized, the burden of proof to overturn it shifts from the Army to the Soldier, who "must prove 'clearly and convincingly' that the 'presumption of regularity' in the preparation of administrative records should not apply, and that '[a]ction is warranted to correct a material error, inaccuracy, or injustice."[174] What's more, the Soldier must carry this heavy burden even where Government faced only a minimal Credible Information, Probable Cause, or Preponderance of the Evidence standard in the underlying action.

Proving official error by clear and convincing evidence is a heavy lift. Most people do not have the skills to meet this burden on their own, and require the assistance of attorneys, investigators, and perhaps even a polygraph examiner if they are to have a reasonable chance—but by no means a guarantee—of success, all of which is both costly and time consuming.

V. Public Policy Considerations Against the Culpability of G-RAP Participants

The appropriate legal defense in most G-RAP cases will be insufficiency of the evidence—a straightforward argument that the Government

[171] James Duane, *You have the Right to Remain Innocent* 49 (Little A, 2016).
[172] *Id.*
[173] Hoorwitz v. Resor, 329 F. Supp. 1050 (D. Conn. 1970) (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1 (1926)).
[174] Albino v. United States, 78 F. Supp. 3d 148, 164 (D. D.C. 2015).

has failed to prove one or more elements of the offense beyond a reasonable doubt.[175] In most of the cases that I have examined, Task Force Raptor's evidence fails at the very least to meet the scienter requirement—that is, the evidence fails to prove beyond a reasonable doubt the Soldier knowingly acted wrongfully for the purpose of acquiring funds that he was not entitled to. Other defenses have been advanced, however. These include expiration of the statute of limitations;[176] the Posse Comitatus Act;[177] violation of defendant's due process rights by excessive pre-indictment delay;[178] alleged *Brady* violations;[179] and guilty plea not being freely and intelligently given.[180]

Another defense that has been pleaded is that the Recruiting Assistants charged are not culpable because, by participating in G-RAP, they were following the orders of their commanders; at least three reported cases have noted this defense. In *United States v. Aponte-Garcia*, the court noted that the defendant had argued that "criminal liability for recruitment-related conduct cannot attach to soldiers following orders to recruit," but did not further address the argument.[181] In *United States v. Costas-Torres*, the court noted that while the defendant "alleges he cannot be held liable for any recruitment-related crimes he committed while following orders of a superior officer or public official," he did "not cite[] any legal authority in support of the argument he relie[d] on,"[182] concluding that "[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones."[183]

In *United States v. Colon* the court observed that "the fact that [the Defendant] was ordered to implement and promote the National Guard Recruiting Assistance Program does not provide a defense for committing theft, fraud, and identity theft while implementing the program."[184] In this, the court was indubitably correct, for implicit in the orders implementing G-RAP—as with all lawful military orders—is the understanding that the orders will be implemented lawfully. Additionally, participation in G-RAP as a Recruiting Assistant was voluntary, so that a superior orders argument would likely be inapposite in most cases.

Steeped in the memory of the Nuremburg Trials and similar tribunals, not to mention influences from the popular culture such as the film *A Few Good Men*,[185] many people—perhaps most—assume that superior orders is *never* a valid defense to a criminal charge. That the majority of the public accepts such a categorical conclusion is a vindication of Alexander Pope's famous exhortation that "[a] little learning is a dangerous

[175] See, e.g., United States v. Osborne, 886 F.3d 604, 607 (6th Cir. 2018); United States v. Davis (5th Cir., 2016); United States v. Ngirarois, 2016 U.S. Dist. LEXIS 139641, *1; United States v. Renfro, 2016 U.S. Dist. LEXIS 191056, *3 (5th Cir., 2016).

[176] United States v. Meléndez-González, 892 F.3d 9 (1st Cir., 2018*); United States v. Jucutan*, 756 Fed. Appx. 691 (9th Cir. 2018)(unpublished); United States v. Aponte-Garcia, 2016 U.S. Dist. LEXIS 176106, *3 (D. P.R., 2016); United States v. Colon-Colon, 2016 U.S. Dist. LEXIS 66131, *2 (D. P.R., 2016); United States v. Constantino, 2015 U.S. Dist. LEXIS 140586, *1 (D. Guam, 2015); United States v. Ngirarois, 2016 U.S. Dist. LEXIS 139641, *1 (D. Guam, 2016); United States v. Reppart, Case No. 4:15 CR 189 (Dist. Ct. N. Dist. Ohio E. Dist., Oct. 22, 2015); and United States v. Rivera-Rodriguez, 2016 U.S. Dist. LEXIS 94864, *1-2(D. P.R., 2016).

[177] United States v. Alvarado, No. 13-4064 JCH, at 6 (D. N.M., Feb. 9, 2015).

[178] *See* United States v. Aponte-Garcia, 2016 U.S. Dist. LEXIS 176106, *3 (D. P.R., 2016); United States v. Colon, *supra* note 176 ; United States v. Ngirarois, 2016 U.S. Dist. LEXIS 139641, *1 (D. Guam, 2016); United States v. Nishiie, 421 F. Supp. 3d 958, 961 (D. Haw. 2019).

[179] United States v. Costas-Torres, 255 F. Supp. 3d 322, 325 (D. P.R., 2017).

[180] United States v. Renfro, 2016 U.S. Dist. LEXIS 191056, *20-1 (5th Cir., 2016).

[181] United States v. Costas-Torres, 255 F. Supp. 3d 322, 325 (D. P.R., 2017).

[182] United States v. Zannino, 895 F.2d 1, 52 (1st Cir. 1990).

[183] United States v. Colon-Colon, 2016 U.S. Dist. LEXIS 66131, *2 (D. P.R., 2016).

[184] *United States v. Colon* (D. P.R., 2016).

[185] *A Few Good Men* (Castle Rock Entertainment and Columbia Pictures 1992).

thing[;] Drink deep, or taste not the Pierian spring."[186] In reality, the extent to which superior orders constitutes a valid defense is a fact-based determination; where the superior has ordered his subordinates to take action that is illegal, immoral or unethical on its face, that the defendant acted under orders will ***not*** be exculpatory; on the other hand, where the conduct ordered is not facially prohibited or such that the subordinate cannot reasonably be expected to have known that it was prohibited, then the defense of superior orders may be effective. Thus, a plea of superior orders might be no defense; it might be an imperfect defense; or it might be a complete defense—all dependent upon the facts of the case. In rejecting the defendant's superior orders the *Colon* court noted the defendant "provide[d] no evidence that his superiors ordered him to commit any of these crimes. **Therefore**, Defendant['s] following orders argument fails"[187] (emphasis added). By implication, if the defendant had produced such evidence, it is conceivable that the outcome may have been different.

The superior orders defense was unsuccessful in these cases, but in raising it, these defendants evinced an instinctive awareness of the injustice of holding citizens criminally liable for conduct instigated, authorized, or otherwise encouraged by the state—considerations highly germane to the circumstances of the G-RAP program. American criminal law acknowledges this injustice and recognizes certain defenses intended to mitigate it—defenses that may not be technically available to defendants under the peculiar circumstances of the G-RAP fiasco, but whose underlying public policy bases are strongly implicated by the Army's conduct and which cast significant doubt on the fairness and equity of the Army's treatment of G-RAP participants. Two such defenses that come immediately to mind are *Entrapment* and *Mistake of Law*.

[186] Alexander Pope, *An Essay on Criticism*, pt. II (1711).

[187] United States v. Colon-Colon, 2016 U.S. Dist. LEXIS 66131, *10 (D. P.R., 2016).

A. *Entrapment*

In a highly influential concurring opinion, Justice Roberts defined entrapment as "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."[188] Two elements are necessary for a successful Entrapment defense: First, the Government must have induced the defendant to commit the crime, and second, defendant must not have been independently predisposed to committing such a crime before first contact with the government agent that induced him to commit it.[189] "A predisposed defendant is one who is ready and willing to commit an offense apart from government encouragement,"[190] and who "was disposed to commit the criminal act prior to first being approached by Government agents."[191] A defendant's assertion that he committed no crime at all does not preclude his successfully pleading Entrapment: a defendant is free to "deny one or more elements of the crime" and still argue that he has been unlawfully entrapped.[192]

Ordinarily, permissible police subterfuge becomes entrapment where it "overstep[s] the line between setting a trap for the 'unwary innocent' and the 'unwary criminal,'"[193] in which the police become "involved in the manufacture as opposed to the detection of crime" in order to "randomly test the virtue of individuals."[194] This was not the

[188] Sorrells v. United States, 287 U.S. 435, 454 (1932) (Roberts, J., concurring).

[189] Mathews v. United States, 485 U.S. 58 (1988).

[190] United States v. Gabriel, 810 F.2d 627 (7th Cir.1987).

[191] Jacobson v. United States, 503 U.S. 540, 547 (1992)

[192] Mathews, *supra* note 189.

[193] Jacobson v. United States, 503 U.S. 540, 543 (1992), quoting *Sherman v. United States*, 356 U.S. 369 (1958).

[194] *R. v. Mack* [1988] 2 S.C.R. (Supreme Court of Canada), also cited as *Queen v. Mack*. Although a Canadian case, *R. v. Mack* is useful for American practitioners in that it provides succinct but comprehensive summary of the U.S. Supreme Court jurisprudence on the Entrapment Defense as it stood at that time.

case with respect to the G-RAP or the Task Force Raptor investigation: for all its shortcomings, the leadership of the Army National Guard and the Docupak company launched G-RAP as a good faith effort to address the Army National Guard's severe recruiting challenges of that time, and not as a cover for some criminal enterprise, and Task Force Raptor played no role in enticing Recruiting Assistants take any G-RAP-related actions, lawful or otherwise. As such, G-RAP is not the sort of case in which Entrapment would ordinarily be put forward as a defense.

Nonetheless, the essential elements for an Entrapment defense are present in the G-RAP matter: The Army National Guard marketed G-RAP aggressively in order to induce as many Soldiers as possible join the program—the vast majority of whom had no work experience in recruiting and would never have participated in any such recruiting effort but for the ARNG's intensive marketing and strong financial inducements. But the Army National Guard and the other components did more than offer financial inducements—they pressed the G-RAP program vigorously. G-RAP was promoted heavily in service publications;[195] Guard members were regaled with images of Recruiting Assistants ceremoniously receiving oversized checks from Docupak like a Publisher's Sweepstakes advertisement;[196] they were told that their "Circle of Influence [was] unlimited" for recruiting purposes;[197] and Recruiting Assistants were urged to

> "[t]alk to anyone who will listen about the Army Reserve. Don't judge a book by its cover. Never assume that a person is 'Not Qualified' at a first-glance look. Even if this person turns out to be not qualified, he or she may know someone who is qualified."[198]

They were encouraged to "[b]e creative at selling,"[199] and given tips like that of one recruiter who "told how he used to put his business card into the credit card pay slot at gas stations when he was a recruiter. It may tick off some people but others will call and want to talk about joining;"[200] they were advised to take such enterprising steps as "[b]uy[ing] advertising space in [their] local newspaper," or to "[m]ake up a flier [and] go to the colleges find the veteran's education office [and] ask if they'll allow you to post an AR-RAP flier."[201] They were offered military paraphernalia such as branded clothing, backpacks and business cards.[202] Senior officers urged Soldiers and Airman to "take the time to join the Guard Recruiting Assistant Program (G-RAP);" admonished them that "every Soldier/Airman is a recruiter," and told them that "with G-RAP, now [they could] learn to become a Recruiter Assistant" and "get paid as [they] train to help others and earn money for every recruit you assist in joining the Guard."[203]

[195] For example, see 70th RRC Management Team, *AR-RAP News*, "Tips for Recruiting Assistants," Issue IV, June 2008.

[196] For example, see *The Iowa Militiaman*, Summer 2006, at 8-9; "G-RAP Recruiter Receives Check," 32.2 *Guardlife: The Magazine of the New Jersey National Guard* 4 (May 2006); *see also* Fonda Bock, *Future Soldier Cashes in on A-RAP*, 60.7 *Recruiter Journal* 18, 18-19, United States Army Recruiting Command at 18 (July 2008). 18.

[197] "Air National Guard Recruiting Assistant Program," nd, np., attached as an exhibit at Deposition of William Allen Stewart, *Remsburg v. Docupak*, Case 3:12-cv-00041-GMG-JES, Document 38-5, Filed 12/11/12, pages 155—161.

[198] 70th RRC Management Team, *Tips for Recruiting Assistants, AR-RAP News Issue IV* (June 2008).

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] Id.

[203] Maj. Gen. Glenn K. Reith, Adjutant General, New Jersey National Guard, *TAG's Message—You, the Recruiter,* Guardlife: The Magazine of the New Jersey National Guard, at 4 (May 2006); *See also* Maj. Gen. Raymond F. Rees, Adjutant General, Oregon National Guard, *Personnel readiness a top priority for ORNG. Soldiers, Airman rewarded for recruiting efforts through G-RAP and 2-STAR*; The Oregon Sentinel, at 2 (2006); *New tool provides leads, enriches, empowers*, The Iowa Militiaman, at 8 (2006); Sgt. Chad D. Nelson, *G-RAP continues to provide Soldiers an active role in the recruiting process,* The Iowa Militiaman, at 6-7 (2008).

G-RAP was emphasized to such a degree that it became a fixture throughout the National Guard in realms far beyond recruiting. LTG H. Stephen Blum, then Chief, National Guard Bureau, touted the program in in *Joint Forces Quarterly*,[204] as did LTG Clyde Vaughn, Director of the Army National Guard, in *Army* magazine.[205] G-RAP was noted in the *Army Posture Statement* for at least the years 2007 and 2009,[206] and the ARNG *Posture Statement* in 2010;[207] it was publicized in the Army's *Stand-To* newsletter;[208] and it was cited in several U.S. Army War College Research Projects on operational readiness for the Army National Guard,[209] as well as *Military Review*, the flagship publication of the U.S. Army Combined Arms Center at Fort Leavenworth, Kansas.[210] The National Guard's commitment to G-RAP was so comprehensive that the program was even briefed at a 2007 conference on *wheeled vehicles*,[211] and its impact so widespread that the program was mentioned by the Mississippi Supreme Court in the matter of a disbarred attorney's petition for reinstatement of his law license.[212]

Having so aggressively pushed its Soldiers to participate in G-RAP, the Army National Guard then set them up for failure by establishing confusing, poorly disseminated rules; shoddy and ineffectual management controls; inadequate means to record and confirm which Recruiting Assistant referred which Prospective Soldier; and then provided them with only the most perfunctory of training—training the brevity of which appears to have been "a feature, not bug," as attested to by Iowa Army National Guard Staff Sergeant Howard Johnson, who boasted that "it only took him **35 minutes to complete the online training** [and that] [o]nce that was done, he was ready to begin prospecting" for Prospective Soldiers as a G-RAP Recruiting Assistant (emphasis added).[213]

By such means the Army National Guard induced approximately 109,000 Soldiers to take on recruiting functions that they never would have done otherwise, to the great benefit of the ARNG recruiting program. Then, when problems with the program emerged, the Army cut these Soldiers loose—men and women who had stepped forward to execute the program the Army National Guard promoted—allowing thousands of them to unjustly bear the consequences of the Army's errors. It is this that makes the doctrine of Entrapment relevant to the G-RAP debacle.

A "fundamental rule of public policy"[214] underlies the Entrapment doctrine. "[T]he integrity of the criminal justice system demands the rule,"[215] because "[p]ublic confidence in the fair and honorable administration of justice, upon

[204] H. Steven Blum, *Transforming the Guard to an Operational Force*, Joint Forces Quarterly, Issue 43 at 17 (4th Quarter 2006).

[205] Clyde A. Vaughn, *Army National Guard: An Integral Part of Army Strong*, Army, at 135-137 (October 2007).

[206] Hon. Francis J. Harvey and Gen. Peter J. Schoomaker, *A Statement of the Posture of the United States Army*, at Q2 (2007) (Addendum Q, *Additional Information on Army Related Topics*); and Hon. Pete Geren and GEN George Casey, *A Statement of the Posture of the United States Army,* at 15 (2009) (Addendum A, *Information Papers*).

[207] Gen. Craig R. McKinley, *National Guard Posture Statement 2010: America's Indispensable Force*, at 8, 15 (2010).

[208] Guard—Recruiting Assistance Program, *Stand-To* (2008).

[209] For example, see Mark J. Michie, *Synchronizing Army National Guard Readiness with ARFORGEN*, USAWC Strategy Research Project, 2007, page 5; Donald Dellinger, *Manning, the Foundation of an Operational National Guard, USACW Civilian Research Project*, 2010, pages 17 -19; Cornelius J. Kehone, *Transforming the Guard: Construct and Challenges for Operational Reserve*, USAWC Strategy Research Project, 2007, page 8; and Michael J. Woods, *Transforming the US-ARNG: Challenges in Implementing the ARFORGEN Model*, USARWC Strategy Research Project, 2009, page 23 and notes 53 and 59.

[210] Paul C. Hastings, Thomas M. Zubik, Eric K. Little, *Bringing Order to the Brigade Reset*, Military Review, at 27 fig. 4 (2011).

[211] *2007 Tactical Wheeled Vehicle Conference—"Sustaining the Current Force—Improving the Future Force,"* 4—6 February 2007, "G-RAP and the Path to 350," as of 30 JAN 07.

[212] His petition was denied for reasons unrelated to G-RAP. See Stewart v. Miss. Bar, 84 So.3d 9, 19 (Miss. 2011).

[213] *New Tool Provides Leads, Enriches, Empowers*, The Iowa Militiaman, at 9 (Summer 2006).

[214] Sorrells v. United States, 287 U.S. 435, 457 (1932) (Roberts, J., concurring.).

[215] *Queen v. Mack*, *supra* note 194, at 921.

which ultimately depends the rule of law, is the transcending value at stake."[216] Justice Roberts set forth the proper response to such "prostitution of the criminal law" thus

> [t]he violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention. Quite properly it may discharge the prisoner upon a writ of habeas corpus. Equally well may it quash the indictment or entertain and try a plea in bar. But its powers do not end there. Proof of entrapment, at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty.[217]

Given the unusual procedural posture and factual matrix of G-RAP, it is doubtful as to whether a criminal court would take cognizance of an Entrapment Defense if raised by a G-RAP defendant. Nonetheless, the policy concerns underpinning the defense are indisputably implicated: The Government induced tens of thousands of Soldiers to embark upon a poorly conceived and sloppily executed recruiting enterprise that they never would have entertained but for the Government's extravagant financial blandishments and its relentless marketing campaign designed to cajole them into doing so. One commentator has observed that

> [o]ne of the most common patterns seen in 'objectively' improper inducements is repeated requests, with the police typically increasing the stakes each time (in terms of reward or attempts to play on sympathy). If someone successfully resisted numerous escalating requests, it is difficult to say he was truly predisposed.[218]

TF Raptor's work may not precisely align with this description, but it comes uncomfortably close—so close that many of the Recruiting Assistants that have endured criminal and administrative sanctions and investigations can fairly be said to have been entrapped and unjustly punished as a matter of equity even if not at law.

B. *Mistake of Law*

Many will be inclined to reflexively dismiss the plight of Recruiting Assistants who unknowingly broke G-RAP program rules, on the familiar ground that it was their duty to know the rules and follow them. But such a knee-jerk response is unwarranted, not least because some of these alleged "violations" were transgressions only in the minds of the investigators. But this is hardly the only reason for skepticism about the culpability of Recruiting Assistants accused of violating program rules. In fact, the law recognizes a number of situations in which ignorance of the law *really is* an excuse. One such is the leeway that the courts allow law enforcements officers in the 4th Amendment context for mistaken, but reasonable, interpretations of the law. As the Virginia Court of Appeals recently noted, "'[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection,'"[219] where "[a] court tasked with

[216] Sherman v. United States, 356 U.S. 369, 380 (1957) (Frankfurter, J., concurring); *see also* Robert M. Bloom, *Judicial Integrity: A Call for its Re-Emergence in the Adjudication of Criminal Cases,* 84 Nw. J. of Crim. L. & Criminology 462, 499 (1993)

[217] *Sorrells v. United States*, 287 U.S. 435, 457 (1932), at 457 (Roberts, J., separate opinion).

[218] Andrew Carlon, Note, *Entrapment, Punishment, and the Sadistic State*, 93 VA. L. REV. 1081, 1094 (2007).

[219] Jones v. Commonwealth, 836 S.E.2d 710, 713 (Va. App. 2019) (quoting Heien v. North Carolina, 574 U.S. 54 (2014)).

deciding whether an officer's mistake of law can support a seizure thus faces a straightforward question of statutory construction. If the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake" and evidence seized improperly as a result will not be suppressed.[220]

Ambiguity in a law can also redound to the benefit of a criminal defendant. Because "[v]ague laws invite arbitrary power . . . the most basic of due process's customary protections is the demand of fair notice,"[221] so that where a law fails to give "ordinary people . . . fair notice of the conduct it punishes,"[222] it is unconstitutionally vague and therefore void. Vagueness is certainly a real and pressing concern in G-RAP cases, given that the program rules were shot through with imprecise language, contradictory provisions, and directives subsequently interpreted as prescriptive but that were drafted in such a manner as to render them amendable to being interpreted as suggestions or recommendations. Of greater concern, however, are the types of considerations raised by the Mistake of Law doctrine. Under this doctrine "the criminal statute under which the defendant is being prosecuted cannot constitutionally be applied to the defendant without violating due process of law, where government officials have misled the defendant into believing that his conduct was not prohibited."[223] Such a defense

> is available if the defendant proves: 1) that he was assured that the conduct giving rise to the conviction was lawful; 2) that the assurance was given by a 'government official,' i.e., "a public officer or body charged by law with responsibility for defining permissible conduct with respect to the offense at issue"; and 3) that, based on the totality of the circumstances, reliance upon the advice was reasonable and in good faith.[224]

As with the Entrapment Defense, it is unclear whether a Mistake of Law Defense would be a viable defense given the peculiar circumstances of the G-RAP investigation. But it is clear that, as with the Entrapment Defense, the public policy considerations underlying the Mistake of Law Defense are strongly implicated in the G-RAP matter.

Military recruiting is a complex and highly regulated activity. In the Army National Guard, Recruiting and Retention NCOs have their own Military Occupational Specialty (MOS)—79T. The Soldier's Manual for this MOS is a 295-page document.[225] Qualifications for the award of this MOS are rigorous: Soldiers must be NCO rank (Sergeant E-5 or higher); they must successfully complete the five-week long ARNG Non-Career Recruiter Course (805B-SQI-4) at the Army National Guard's Strength Maintenance Training Center (SMTC),[226] hosted by the National Guard Professional Education Center (NG-PEC) at Camp Robinson, Arkansas; they must have successfully completed 18 months service as a full-time ARNG recruiter; as well as meeting other requirements.[227] The SMTC

[220] Heien v. North Carolina, 574 U.S. 54, 70 (2014) (Kagan, J. concurring).

[221] Sessions v. Dimaya, 138 S. Ct. 1204, 1223, 1225 (2018) (Gorsuch, J., concurring).

[222] *Id.*, at 1228 (quoting Johnson v. United States, 576 U. S. 591 (2015)).

[223] Miller v. Commonwealth, 492 S.E.2d 482, 487 (Va. Ct. App. 1997) (quoting Jeffrey F. Ghent, Annotation, *Criminal Law: "Official Statement" Mistake of Law Defense*, 89 A.L.R.4th 1026 (1991)).

[224] Branch v. Commonwealth, 593 S.E.2d 835, 837 (Va. Ct. App. 2004).

[225] Department of the Army, STP 12-79T25-SM-TG, *SOLDIER'S MANUAL AND TRAINER'S GUIDE FOR MOS 79T SKILL LEVELS 4/5 RECRUITING AND RETENTION NCO (Army National Guard)* (Apr. 2004).

[226] *See* 805B-SQ14 NON-CAREER RECRUITER, STRENGTH MAINT. TRAINING CTR., https://smtc.dodlive.mil/courses/805b-sq14-non-career-recruiter/ (last visited Jan. 3, 2020).

[227] ARNG Strength Maintenance Operational Memo (SMOM) 18-026, Assignment and Reclassification Requirements for 79T Recruiting and Retention NCO (Amended 26 Janu-

offers at least 12 courses in addition to course 805B-SQ14 mentioned above,[228] including courses on Military Entrance Processing Station (MEPS) counseling;[229] recruiting-related automation systems;[230] officer recruiting;[231] pre-command courses for recruiting battalion and company commanders;[232] personnel retention;[233] and others.

Given the complexity and challenges of military recruiting, as evinced by the extensive regulations and training programs noted above, it is self-evident that the short, 35-minute online training course provided by Docupak was simply not adequate to prepare Recruiting Assistants to perform their duties, so that it was envisioned that "[t]he triad of RRNCO, RA, and potential Soldier [would] work closely together to process the potential Soldier and move them towards accession."[234] Recruiting Assistants had a right to look to the full-time recruiters, ARNG publications, and other authorities to for guidance on how to perform their duties, and had a right to rely upon such guidance, whether given explicitly or implied by the acquiescence of these authorities in the Recruiting Assistant's actions. Where Recruiting Assistants emulated conduct celebrated in military publications, or where it was reasonably apparent that full-time recruiters and others were aware how the Recruiting Assistant was conducting himself and made no objection, then the Recruiting Assistant should have been deemed to be justified in taking the Recruiter's instructions to the RA or his acquiescence in the RA's actions that are not facially immoral, unethical, or illegal—as "assur[ance] that the conduct . . . was lawful,"[235] given the authoritative training received by those full-time Recruiters and the Recruiter's overall responsibility for the execution of the recruiting program.

VI. G-RAP and the "Mortal Enemy of Military Justice"—Unlawful Command Influence

The harm caused to large numbers of innocent Soldiers in the course of Task Force Raptor's G-RAP investigation is a serious concern in itself, but it is also illustrative of the wider problems inherent in the administration of law and order in the military context. Some of the problems that tainted the G-RAP investigation—problems like tunnel vision, undue faith in eye witness testimony, and obstinate belief in the guilt of defendants even in the face of strong exculpatory evidence[236]—are ubiquitous risks inherent in

ary 2018), ARNG Strength Maintenance Division (Jan. 26, 2018).

228 *See* Course Catalog, Strength Maint. Training Ctr, https://smtc.dodlive.mil/2015/06/18/smtc-course-catalog/ (last visited Jan. 3, 2020).

229 *Id.*, 805B-ASIV7 ARNG MEPS Guidance Counselor.

230 *Id.*; 805B-F16 (NG) ARNG Recruiting and Retention Automation NCO.

231 *Id.*; 805B-F17 (NG) ARNG Officer Strength Manager (OSM) Course.

232 *Id.*; 805B-F21 ARNG Recruiting Pre-Command [battalion] and 805B-F31 ARNG Recruiting Company Pre-Command.

233 *Id.*; 805B-F24 ARNG Unit Retention NCO Course.

234 *How does G-RAP work?*, G-RAP Rules.

235 Branch v. Commonwealth, 593 S.E.2d 835, 837 (Va. Ct. App. 2004).

236 A noteworthy example of this problem in the G-RAP context is the case of MSG Wilson, a Colorado Army National Guard Soldier charged with G-RAP related fraud, mentioned above. When Federal prosecutors declined to prosecute, CID took Wilson to state prosecutors and convinced them to prosecute. In a humiliating defeat for both CID and the state prosecutors, a Colorado jury acquitted MSG Wilson outright on all counts. But, as CBS News' *60 Minutes* observed, that "is not always good enough for the Army:" challenged on Wilson's acquittal, then-Director of the Army Staff Lt. Gen. Gary Cheek responded that "[w]e have our Army values that we're part of. So if you are found not guilty in a court of law, that really simply means-- that you are not guilty of a crime but you have done something unethical within the military for which you could receive an administrative action." In other words, *just because you're not guilty doesn't mean you're not guilty*. David Martin, *Backlash from Army's Largest Criminal Investigation*, CBS NEWS (May 22, 2016), https://www.cbsnews.com/news/60-minutes-backlash-from-army-largest-criminal-investigation/. *See also* Dennis Chapman, *LTG Cheek: Just Because You're Not Guilty Doesn't Mean You're Note*

all law enforcement contexts. But owing to the unique nature of the Armed Forces, the military justice system carries its own special challenges beyond those common in other law enforcement contexts. One of those dangers is "the mortal enemy of military justice,"[237] Unlawful Command Influence (UCI)—particularly UCI emanating from political interference in the administration of military justice.

Like other people, senior military officers loathe controversy, dread criticism, and crave public approval. Unlike most people, however, the assignments and promotions of senior military officers require Senate confirmation. This renders these officers particularly vulnerable to pressure to make charging and adjudicatory decisions consistent with the desires of powerful politicians. As one observer has noted,

> [b]etween public statements, media attention, and congressional action (both enacted and proposed), commanders can read the writing on the wall—and that writing says to obtain convictions. It becomes safer to simply refer charges in nearly all cases, even if doing so is objectively imprudent.[238]

In recent years this phenomenon has played out mostly publicly in the context of the problem of military sex assault. In that context, one expert noted

> "the need to obtain 'high prosecution and conviction rates has never been higher for a convening authority' and that UCI occurs because convening authorities have "pressure to demonstrate progress on all the metrics.' In an interview regarding UCI with two army brigade commanders who requested to remain anonymous, one stated that if a sexual assault or sexual harassment case comes across his desk, even if he thinks it is not a good case, he feels he should send it forward, err on the side of the victim, and hope that justice is served in the end. He stated that there is 'indirect UCI from the top right now.' The second brigade commander contended that the hard part is when he is told by someone that there is no case, but everyone looks to him to make the decision, and he will be scrutinized for not seeming to take the matter seriously enough if he does not opt for a court-martial. He stated that there is a lot of indirect pressure, and his concern is that a statistic will show that he did not send enough cases forward, that his name will be out there as 'someone who doesn't get it,' and that if he does not believe the victim, then he is further victimizing her. These commanders' comments and their request to remain anonymous show that UCI is a problem at ranks below the GCMCA, as commanders are fearful to make the unpopular decision to not refer a sexual assault case when they truly believe referral is not appropriate."[239]

By no means is the problem of politically motivated UCI limited to sex assault cases; however, in fact, such political intervention greatly aggravated the scope of injustice inflicted by the Task Force Raptor investigation. Senator McCaskill herself noted that G-RAP program abuse had "the potential to become a stain on

Guilty, LINKEDIN (May 24, 2016), https://www.linkedin.com/pulse/ltg-cheek-just-because-youre-guilty-doesnt-mean-dennis-chapman/.

237 United States v. Thomas, 22 M.J. 388, 393—94 (C.M.A. 1986).

238 Greg Rustico, Note, *Overcoming Overcorrection: Toward Holistic Military Justice Reform*, 102 VA. L. REV. 2027, 2046 (2016).

239 Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV 129, 149 (2014) (quoting Professor Elizabeth Hillman and two anonymous Army brigade commanders).

thousands of recruiters and National Guard members who do their jobs so well and so honorably."[240] Regrettably, this would prove a self-fulfilling prophesy, due in no small part to Senator McCaskill's own previous interventions into the military justice system, which left no doubt that she would punish any senior officer that handled a criminal case in a manner not to her satisfaction. A few months earlier, in the spring of 2013, McCaskill blocked the appointment of Lt. Gen. Susan Helms to the position of Vice Commander of the U.S. Air Force Space Command.[241] Helms, a former astronaut with five space flights to her credit,[242] incurred McCaskill's ire by overturning the sex assault conviction of an Air Force Captain at Vandenberg Air Force Base in February 2012; Helms took the action because as the approving authority she did not believe that the charges had been proven beyond a reasonable doubt.[243] Although "Helms found him guilty of the lesser offense of committing an indecent act"[244] and he "was punished and dismissed from the U.S. Air Force,"[245] McCaskill was not mollified; her appointment blocked, Lt. Gen. Helms applied for retirement after 33 years of service.[246] The destruction of Lt. Gen. Helms' career was not the first such action by Senator McCaskill in the months preceding her committee's hearing on G-RAP. Another involved the 2013 case of Air Force Lt. Col. James Wilkerson, who had been convicted at Court Martial of aggravated sexual assault after being accused of groping a sleeping houseguest at his home, and being sentenced to forfeiture of all pay and allowances, dismissal, and confinement for one year.[247]

On February 26th, 2013 Lt. Gen. Craig A. Franklin, Commander, Third U.S. Air Force, overturned the conviction and returned Lt. Col. Wilkerson to full duty.[248] Outraged, Senator McCaskill lashed out at Lt. Gen. Franklin. Characterizing his decision as "ignorance, at best, and malfeasance, at worst," McCaskill urged Secretary of the Air Force Michael Donley to "undertake an immediate review of his conduct and consider removing him from his leadership position."[249] Lt. Gen. Franklin responded with a vigorous and detailed four-page rebuttal of McCaskill's charge. Characterizing the Wilkerson case as "the most difficult court case that I have ever faced as a convening authority," he then set forth a very detailed and comprehensive 18-point recitation of the reasons for his decision. Asserting that while "it would have been exceedingly less volatile for the Air Force and for me professionally, to have simply approved the finding of guilty[,] [t]his would have been an act of cowardice on my part and a breach of my integrity."[250] Lt. Gen. Franklin concluded that "after my lengthy review and

[240] *Fraud and Abuse in Army Recruiting Contracts: Senate Hearing 1132-377, Before the Subcomm. on Fin. Contracting and Oversight of the Comm. on Homeland Sec. & Gov't Affs.*, 113th Cong. 2 (2014) (statement of Senator Claire McCaskill).

[241] Bill Lambrecht, *McCaskill blocks astronaut's promotion in drive to curb sexual assaults*, St. Louis Post-Dispatch (May 7, 2013), https://www.stltoday.com/news/local/govt-and-politics/mccaskill-blocks-astronaut-s-promotion-in-drive-to-curb-sexual/article_4a706ed3-27a7-5c48-81e0-fbbd5a1397bd.html.

[242] Erik Gregersen, *Susan Helms: American Astronaut and Air Force Officer*, Encyclopedia Britannica, https://www.britannica.com/biography/Susan-Helms (last visited Jan. 4, 2020).

[243] Jason Rhian, *Lt. Gen. Helms Departs Vandenberg Amid Controversy After Promotion Blocked*, Spaceflight Insider (Feb. 11, 2014), https://www.spaceflightinsider.com/space-centers/vafb/lt-gen-helms-departs-vandenberg-blocked-promotion-amid-controversy/.

[244] David Alexander, *Female U.S. general who overturned sex-assault ruling to retire*, Reuters (Nov. 8, 2013), https://fr.reuters.com/article/us-usa-defense-sexualassault-idUKBRE9A800A20131109.

[245] Rhian, *supra* note 243.

[246] Rhian, *supra* note 243.

[247] Nancy Montgomery, *Senator asks AF leaders to consider firing general in Wilkerson case*, Stars & Stripes (Mar. 6, 2013), https://www.stripes.com/news/air-force/senator-asks-af-leaders-to-consider-firing-general-in-wilkerson-case-1.210700.

[248] Letter from Lt. Gen. Craig A. Franklin to Michael B. Donley, Sec'y of the Air Force (March 12, 2013).

[249] Montgomery, *supra* note 247.

[250] Franklin, *supra* note 248.

deliberation of the evidence, I had reasonable doubt as to Lt Col Wilkerson's guilt," and that therefore his "court-martial action to disapprove findings and to dismiss the charges was the right, the just, and the only thing to do."[251] Lt. Gen. Franklin lost his battle with Senator McCaskill. In December 2013, the Air Force removed a sex assault case from his jurisdiction and referred it to another officer for review when Franklin declined to prefer charges following an Article 32 hearing,[252] and Franklin ultimately retired as a Major General due to insufficient time in grade as a Lieutenant General.[253]

None of this could have been lost upon the senior Army leaders facing Senator McCaskill before her committee in February 2014. Not one to rely on subtlety, however, McCaskill made her expectations of the Army clear when on February 27th 2014, she sent the Secretary of the Army a sprawling six-page letter demanding a vast amount of data. Among the items requested was information about "the Army's efforts to ensure that those who were responsible for detecting and preventing fraud, but failed to do so, are held accountable."[254] Further requested was "[t]he identity of the official(s) responsible for the [certain] decisions or duties, and any adverse action taken, if any, to hold these individuals accountable for those decisions or that performance,"[255] and "[a] list of tools and actions the Army has to hold individuals accountable who cannot or will not be prosecuted, and the number of times each has been used."[256]

In light of Senator McCaskill's prior interventions into military disciplinary matters, it is inconceivable that her zeal to hold Army National Guard Soldiers "accountable" for the failures of the G-RAP program would have failed to have a profound impact upon how the Army perceived G-RAP participants, how it approached its investigation of them, how it has treated G-RAP participants to date, and that this impact adversely affected many innocent Soldiers.

VII. Conclusion

As one commentator has noted, "a climate has developed in the military justice system that is decidedly antidefendant."[257] The risk of anti-defendant bias is present in any system of adjudicating crimes or infractions, but that risk is particularly pronounced in the military context. In the civilian criminal justice system, the prosecution, the defense, the court, the jury, and the police are all separate entities that are to some degree autonomous; but the military justice system is a vertically integrated structure in which all of the participants—even, in many cases, the defense counsel—are members of the same overarching organization, and many of whom are even answerable to the same chain of command. As concerning as this arrangement is from the perspective of the presumption of innocence, it is aggravated even further by the fact that the structure depends upon political actors with agendas and priorities all their own for its budget and operating authorities; even worse, from the perspective of the defendant, is the fact that leaders at the apex of this structure—the senior leaders making charging and disciplinary decisions—are themselves dependent upon these very same political actors for their own promotion and advancement. As a result, the system of military discipline and justice is at risk of influence, manipulation, and interference in

[251] Franklin, *supra* note 248.

[252] Nancy Montgomery, *Air Force removes Lt. Gen. Franklin from sexual assault case*, STARS & STRIPES (Dec. 18, 2013), https://www.stripes.com/news/air-force-removes-lt-gen-franklin-from-sexual-assault-case-1.258268.

[253] Nancy Montgomery, *Franklin will retire as a two-star, officials say*, STARS & STRIPES (Jan. 9, 2014), https://www.stripes.com/news/franklin-will-retire-as-a-two-star-officials-say-1261202.

[254] Letter from Senator Claire McCaskill to John M. McHugh, Sec'y of the Army (Feb. 27, 2014).

[255] *Id.*

[256] *Id.*

[257] Rustico, *supra* note 238, at 2073.

the service of interests and agendas far removed from the basic function maintaining good order and discipline within the force that the military justice system serves. In the great bulk of instances, the gravitational pull of these external interests distorts the trajectory of the system in ways detrimental to the rights of defendants. This occurred in Task Force Raptor's G-RAP investigation.

When extrinsic political actors exerting influence over the military determine that their agendas or the interests of their constituents are best advanced by demanding convictions or "accountability" for defendants in particular cases or categories of cases, Commanders "[respond] to the incentives the system has constructed to motivate them."[258] The impact on the integrity of the military justice system can be profoundly destructive. Left unchecked, it can produce what one commentator has characterized as "a state run amok,"[259] a system that "has decided that, since its unique function is the power to punish, it must pursue punishment as an intrinsic good, independent of desert . . . transforming itself into a 'punishment machine.'"[260]

Under the goading of zealous political actors, the Army's investigatory machinery did run amok in its investigation of G-RAP. That a number of G-RAP participants did abuse the program and commit fraud, is not, and cannot be, denied; but in its single minded zeal to find and punish these Soldiers, the Army damaged the careers, finances and reputation of hundreds or even thousands of innocent and loyal Soldiers—men and women who, collectively, made a great and successful effort to solve the Army National Guard's manpower shortage at a critical juncture in the Army's history.

[258] Carlon, *supra* note 218, at 1117.
[259] Carlon, *supra* note 218, at 1118.
[260] Carlon, *supra* note 218, at 1118.

Defying "*Do No Harm*": Doctors Are Fueling the Opioid Crisis with Limited Criminal Repercussions

KARLY NEWCOMB[1]

I. Introduction

> "They knew it was being abused, but nothing is ever spoken. I weighed about 90 pounds. I was so sick, and my blood pressure was so low it was bottoming out. I was having seizures. My physical health just deteriorated. I mean, it's obvious if you walk in, you can tell if someone is an active crackhead or actively abusing pills."
>
> "They're making money. Do you know how much money these doctors are making? They're seeing like – say they see like 45 patients in a day, which I know they see more than that. They're getting $150 just for the visit, plus if they have a pharmacy there, then they can pull money off the pills. They're making $20,000 or $30,000 in a day. They don't want to stop that, and if they stopped all the junkies, then they're not going to have any customers."[2]

Between 2006 and 2014, physicians dispensed of 2.17 billion prescriptions across the United States.[3] Each prescription can include up to ninety pills. In West Virginia alone, over 1.1 billion prescription pain pills were imported during this time frame.[4] That amounts to over seventy-six pills a year for each West Virginian. With pills entering this state, and others, at such staggering rates, it is all but certain that massive overprescribing plays a critical role in this crisis.[5] In fact, some suggest that doctors are nothing more than "illegal drug dealers…in a fancy office."[6]

Consider Dwight Bailey, a former doctor who operated Ridgewood Health Care Clinic

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[2] Khary K. Rigg, et al., *Prescription Drug Abuse & Diversion: Role of the Pain Clinic*, 40(3) J. DRUG ISSUES 681, 685 (2010).

[3] *U.S. Prescribing Rate Maps*, CDC, https://www.cdc.gov/drugoverdose/maps/rxrate-maps.html (last visited Apr. 12, 2020).

[4] *Drilling into the DEA's pain pill database*, Wash. Post: The Opioid Files, https://www.washingtonpost.com/graphics/2019/investigations/dea-pain-pill-database/?itid=lk_inline_manual_9 (last updated Jan. 17, 2020).

[5] It is important to note that most doctors are not illegally prescribing opioids to their patients. In fact, the vast majority of them follow proper prescribing practices religiously. This paper advocates the position that high prescriptions rates are undoubtedly connected to doctors who are illegally prescribing opioids and contributing to this crisis. This minority, however slim, are causing serious societal harms to vulnerable communities that they serve.

[6] Press Release, U.S. Att'y's Off., S.D. Ga., Georgia Physician Sentenced To 100 Months in Prison, Fined For Role in Fueling Opioid Crisis (Sept. 18, 2018) https://www.justice.gov/usao-sdga/pr/georgia-physician-sentenced-100-months-prison-fined-role-fueling-opioid-crisis.

in Lebanon, Virginia.[7] Bailey "continually wrote prescriptions for opiates, benzodiazepines, and sleeping pills to patients who were misusing, abusing, and diverting those controlled substances."[8] As a result of his disregard for the health and safety of his patients, he netted $750,000 in a single year of business.[9] Bailey was ultimately sentenced to almost thirteen years in federal prison.[10] According to Assistant United States Attorney Daniel P. Bubar, the United States Attorney's Office for the Western District of Virginia intended for "this lengthy sentence [to] send a strong message that the [federal government] will work tirelessly to prosecute those in healthcare who perpetuate the opioid epidemic by illegally diverting medication to harm their patients and damage the community."[11]

With billions of prescription pain pills lingering in vulnerable communities at the hands of doctors such as Bailey each year, one would expect federal prosecutors to aggressively prosecute these "illicit drug dealers in fancy offices". This logic, however, has not carried the day. Many blame and direct subsequent legal efforts towards pharmaceutical and drug manufacturing companies.[12] However, this paper suggests that there is more than enough blame to go around.

This paper tracks the judicial and prosecutorial response to doctors who illegally prescribe opioids in geographic areas most significantly affected by the opioid crisis. The paper will be divided into three parts, the first being this introduction. Part II will discuss the historical context of the opioid crisis, including its origins in the national spotlight, a snapshot of the crisis today, and an overview of the legal response to the crisis as a whole. It will also identify the paper's focus areas, which were determined by identifying the states with the highest rate of opioid-related deaths, highest rates of opioid prescribing, and other related factors. One would expect higher numbers of doctor-related prosecutions in states where the opioid crisis has been felt most severely. Notably, that is not always the case.[13] Part III will compare these affected areas based on their current judicial and prosecutorial response and identify the federal districts where more significant response to localized challenges would be expected. Lastly, Part IV will discuss potential reasons for inadequate prosecutorial responses, including perspectives by current federal prosecutors who have extensively worked on this crisis.

II. Background: What is the Opioid Crisis?

Discussing the public health crises in the United States in 2020 without addressing the opioid crisis is inconceivable. Our nation has grappled with drug, and more specifically opioid, use and addiction for much longer than national media sources and public health organizations would indicate.[14] In fact, many pundits deduce

7 Press Release, U.S. Att'y's Off., W.D. Va., Lebanon Doctor Sentenced on Federal Drug Distribution Charges (Feb. 7, 2019) https://www.justice.gov/usao-wdva/pr/lebanon-doctor-sentenced-federal-drug-distribution-charges.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 Courtney Hessler, *Hearing in Opioid Cases Set in Charleston*, CHARLESTON GAZETTE-MAIL (Jan. 19, 2020), https://www.wvgazettemail.com/news/legal_affairs/hearing-in-opioid-cases-set-in-charleston/article_744235a3-370b-5196-8fba-24d85ef447a3.html#.XiYbvKBVny1.twitter.

13 The vast majority of these cases were brought by United State Attorney's Offices, as opposed to their state counterparts. Telephone Interview with Jennifer Kolman, Assistant United States Attorney, U.S. Att'y's Off., E.D. Tenn. (Feb. 3, 2020). The reasons for this include the sheer amount of time and resources necessary to prosecute each case.

14 *See* Abdullah Shihipar, *The Opioid Crisis Isn't White*, N.Y. TIMES (Feb. 26, 2019), https://www.nytimes.com/2019/02/26/opinion/opioid-crisis-drug-users.html.

that the nation's current attention and concern with this crisis are predominantly due to its effect on white families in addition to families of color.[15]

A. *Historical Origins*

Our nation's current crisis can be directly traced to drug manufacturing companies' actions and the greater medical field in the 1990's.[16] In the name of higher sales and increased profits, pharmaceutical companies began encouraging doctors to increase their prescription of painkillers, assuring medical communities, that there was little risk that patients would become addicted to them.[17] According to the Center for Disease Control and Prevention (CDC), the "amount of prescription opioids sold to pharmacies, hospitals, and doctors' offices nearly quadrupled from 1999 to 2012".[18] Notably, there is no evidence to suggest a legitimate medical purpose for this increase, as there was no overall change in patients' level of pain reported during this period.[19]

As doctors began to prescribe prescription opioids in larger quantities, the medical community quickly determined that these drugs were, in fact, highly addictive, as widespread diversion and misuse of the medications became rampant.[20] This trend steadily continued through the next decade; in 2010, the number of opioids prescribed was enough to provide every American adult with five milligrams of an opioid drug every four hours for a month.[21] Consequently, some studies reported that eighty percent of heroin users first misused prescription painkillers, a recognized gateway drug to illicit opioids.[22]

According to the CDC, nearly half of all opioid-related deaths involve a prescription, and in 2013, providers wrote nearly 250 million opioid prescriptions.[23] Although leaders of governmental, medical, and other pertinent communities have taken action, the toll on American families persists. In 2017, nearly 50,000 Americans died from an opioid overdose.[24] In that same year, the National Institutes of Health (NIH) estimated that "1.7 million people in the United States suffered from substances abuse disorders related to prescription opioid pain relievers".[25] Moreover, opioid overdoses increased by seventy percent between July 2016 and September 2017 in the Midwestern region of the United States, signaling that previously implemented measures have been futile.[26] If the current trend continues, 650,000 lives could be lost over the next decade.[27]

[15] Helena Hansen & Julie Netherland, *Is the Prescription Opioid Epidemic a White Problem?,* AM. J. PUB. HEALTH 2127, 2128 (2016); Martha Bebinger, *Opioid Addiction Drug Going Mostly To Whites, Even As Black Death Rate Rises*, NPR (May 8, 2019), https://www.npr.org/sections/health-shots/2019/05/08/721447601/addiction-medicine-mostly-prescribed-to-whites-even-as-opioid-deaths-rose-in-bla.

[16] *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE, NIH, https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis (last revised Feb. 2020).

[17] *Id.*; What *is the U.S. Opioid Epidemic?*, U.S. DEP'T HEALTH & HUMAN SERV., https://www.hhs.gov/opioids/about-the-epidemic/index.html (last accessed Apr. 12, 2020).

[18] Julie A. Warren, *Defining the Opioid Crisis and the Limited Role of the Criminal Justice System Resolving It,* 48 U. MEM. L. REV. 1205 (2014); *see also Understanding the Epidemic,* CDC, *https://www.cdc.gov/drugoverdose/epidemic/index.html*(last accessed Apr. 12, 2020).

[19] Alyssa M. McClure, *Illegitimate Overprescription: How Burrage v. United States is Hindering Punishment of Physicians and Bolstering the Opioid Epidemic*, 93 NOTRE DAME L. REV. 1747, 1751 (2018).

[20] *Id.*

[21] Carson Schneider, *Redefining What it Means to "Furnish Items in Excess of a Patient's Needs": A Federal Tool to Guide Physician Prescribing Behavior and Combat the Opioid Crisis*, 90 U. COLO. L. REV. 1157, 1960 (2019).

[22] Anne C. Hazlett, *Rural America and the Opioid Crisis: Dimension, Impact, and Response*, 23 DRAKE J. AGRIC. L. 45, 46 (2018)

[23] Alyssa M. McClure at 1750–51, *supra* note 19.

[24] *Opioid Overdose Crisis, supra* note 16.

[25] *Id.*

[26] *Id.*

[27] Alyssa M. McClure at 1750–51, *supra* note 19.

B. *Overview of Historical and Current Legal Responses*

As the opioid crisis has taken its full form, many actors have taken center stage, including federal and state governments, scientists, medical treatment experts and advocates, and members of the legal profession. Legislatures have passed laws both at the state and federal levels. The criminal justice system's role in addressing the crisis is a more complex issue. As is the case with addressing any societal problem, the first question is what role the criminal justice system plays in the solution. Responses will vary from punitive to rehabilitative, to a combination.[28] For many, a crucial goal of the criminal justice system is to punish those who encouraged and exacerbated the spread with their actions, which consequently serves as a deterrent for similar actors still engaging in harmful behavior. However, its complexity makes it difficult to discern who is legally or morally culpable. In a system with finite resources, which groups should prosecutors target, and in what order?

For some, any using opioid drugs without proper medicinal purpose should be disciplined.[29] Although this was common perspective during the "War of Drugs" era, it has often been refuted for using finite resources to punish addicts for their behavior rather than focusing on the actors fueling those addictions.[30]

Additionally, some experts view doctors as a crucial piece of the puzzle.[31] As the only relevant party with an affirmative duty to provide care, doctors who continue to illegitimately prescribe opioid drugs for financial gain are fundamentally betraying their Hippocratic Oath. Others focus on the pharmacists' role in this crisis; why not pursue those who turn a blind eye and repeatedly fill the prescriptions of addicts?[32]

Finally, others place most of the blame on pharmaceutical distribution and manufacturing companies, which have primarily been responsible for giving access to, and encouraging doctors to push the influx of drugs into our communities.[33] The American criminal justice system has struggled to find an appropriate way to balance the culpability among the relevant actors, and subsequently, has failed to make meaningful progress in holding each of them responsible.

C. *Harmful Effects on Rural Communities*

The impact of the opioid crisis, though vast, has not been evenly felt throughout the country. Researchers, by some estimates, have found that almost fifty percent of rural adults and seventy-four percent of farmers have been directly affected by the opioid crisis.[34] Addiction and drug-related deaths have viciously swept through countless rural communities, as the death rate for working-class white Americans without a college degree has risen by twenty-two percent since 1999.[35] Although drug-related deaths have been increasing at alarming rates in cities for numerous

[28] Mike C. Materni, *Criminal Punishment and the Pursuit of Justice*, 2 BR. J. AM. LEG. STUDIES 263, 266, 289 (2013).

[29] *See, e.g.,* Ed Gogek, *To Treat Addiction, We'll Still Need Jail Time,* Newsweek (Nov. 10, 2015), https://www.newsweek.com/treat-drug-addiction-well-still-need-jail-time-392635.

[30] *See* Svante Myrick & Alan Webber, *'War on Drugs' Doesn't Tackle the Drug Problem*, The Hill (Jan. 22, 2019) https://thehill.com/opinion/healthcare/426458-war-on-drugs-doesnt-tackle-the-drug-problem.

[31] Schneider, *supra* note 21.

[32] *See, e.g.,* Press Release, U.S. Att'y's Off., S.D. Ga., Pooler pharmacy, pharmacist to pay up to $2.2 million for dispensing illegitimate prescriptions (Apr. 7, 2020), https://www.justice.gov/usao-sdga/pr/pooler-pharmacy-pharmacist-pay-22-million-dispensing-illegitimate-prescriptions.

[33] Nathan Yerby, DEA *Database Shows Generic Drug Manufacturers Contributed Most to the Opioid Epidemic*, Addiction Center (Aug. 14, 2019), https://www.addictioncenter.com/news/2019/08/generic-drug-manufacturers-opioid-epidemic/.

[34] Hazlett, *supra* at 45.

[35] *Id.* at 47.

decades without much news media attention,[36] a 2017 C.D.C. report stated that the rate of spread in rural areas is now far outpacing the rest of the nation.[37]

The region of the country most affected by the opioid crisis is often called the "opioid belt". It has "more than 90 counties stretching southwest from Webster County, W. Va., through southern Virginia and ending in Monroe County, Ky."[38] These counties are primarily rural communities that have experienced the highest per capita death rates from opioid in the entire country.[39] From 2006 through 2012, death rates in the opioid belt were 4.5 times the national average.[40]

Rural communities are more susceptible to substance, and more specifically opioid, abuse for several reasons.[41] First, they have an older population on average than urban areas, which correlates with higher numbers of individuals with medical conditions.[42] Second, a more significant proportion of the workforce in rural communities hold jobs that involve physical labor.[43] As a result, individuals are more likely to take painkiller than those in white-collar settings.[44] Finally, once overcome with addiction, rural areas will often lack adequate medical and treatment facilities in comparison to their urban counterparts.[45]

To compare those areas most harshly affected by the opioid crisis to their respective prosecutorial responses (through the number of doctors being prosecuted for illegal drug distribution), I used a regularly updated Washington Post article covering annual Drug Enforcement Administration (DEA) reports, which details the influx rates of pills into each state.[46] The article includes an interactive map that displays the number of pills distributed per person, per year in each county.[47] Although these reports only document prescription pill influxes between the years of 2006 and 2014, prosecutions based on prescribing behavior during time would logically follow in subsequent years. This would allow prosecutors to collect evidence and build their cases before bringing charges.[48]

From this map, I compiled a list of counties by state that contained over seventy-five pills distributed per person, per year.[49] This list identified the respective federal districts that cover these areas, to consider each prosecutorial response. The federal districts with the most significant influx of drugs largely track along the opioid belt. Specifically, the districts of interest include: the Eastern and Western Districts of Oklahoma, the Eastern and Western Districts of Kentucky, the Eastern and Western Districts of Virginia, the Northern District of Georgia, and

36 Julie Netherland & Helena B. Hansen, *The War on Drugs That Wasn't: Wasted Whiteness, "Dirty Doctors," and Race in Media Coverage of Prescription Opioid Misuse*, Cult Med Psychiatry (December 1, 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5121004/.

37 Hazlett, *supra* at 47; *see also* Sari Horwitz et al., Opioid Death Rates Sourced in Communities Where Pain Pills Flowed, WASH. POST (July 17, 2019), https://www.washingtonpost.com/investigations/opioid-death-rates-soared-in-communities-where-pain-pills-flowed/2019/07/17/f3595da4-a8a4-11e9-a3a6-ab670962db05_story.html.

38 *See* Sari Horwitz et al., Opioid Death Rates Sourced in Communities Where Pain Pills Flowed, WASH. POST (July 17, 2019).

39 *Id.*

40 Hazlett, *supra* at 48

41 *Id.*

42 *Id.*

43 *Id.*

44 Hazlett, *supra* at 48-49

45 *Id.*

46 *Drilling into the DEA's pain pill database, supra* note 4.

47 *Id.*

48 *See* Press Release, U.S. Att'y's Off., N.D. Ala., *Huntsville Pill Mill Doctor Pleads Guilty to Illegal Prescribing and Health Care Fraud* (Oct. 27, 2016) (reporting that Dr. Shelinder Aggarwal was sentenced to 15 years in prison for illegally prescribing opioids. He ultimately pleaded guilty in 2016 to facts taking place between 2011 and 2013). https://www.justice.gov/usao-ndal/pr/huntsville-pill-mill-doctor-pleads-guilty-illegal-prescribing-and-health-care-fraud.

49 List on File with the Author. There were 199 counties that met this threshold in total. Seventy-five was the median rate on *Drilling into the DEA's pain pill database's interactive map legend. See Drilling into the DEA's pain pill database, supra* note 4.

the Northern District of Alabama. A discussion on the current prosecutorial responses from these states, in terms of the number of prosecutions of doctors for illegal opioid distribution per district, follows below.

III. Current Trends in the Prosecutions of Doctors in Relation to the Opioid Crisis

Between 2006 and 2012, there was a steady increase in the national opioid prescription rate from 72.4 prescriptions per 100 persons to 81.3 prescriptions, respectively.[50] The overall number of opioid prescription written during these years jumped from 215,917,663 in 2006 to 255,207954, totaling an increase in almost 40 million.[51] These facts, as stated above, must be contrasted with the sobering reality that there was no overall change in the level of pain reported by American patients during this period.[52] Thus, as the opioid-related deaths resulting from doctor overprescribing continued to surge, the criminal prosecution of doctors would seemingly follow suit. Unfortunately, that was not the case.

Although the national opioid prescription rate has declined,[53] with over ten percent of counties in the United States containing enough opioid prescription for each person to have one per year, it is quite clear that the prosecutorial response is not only lacking,[54] but serves as little deterrence for doctors choosing to engage in this unlawful prescribing behavior. This part of the article addresses how doctors are being prosecuted concerning the opioid crisis and how the current judicial and prosecutorial responses vary across the country. More specifically, I will discuss the hardest-hit areas (see above) by the opioid crisis, as well as those areas that in comparison to their opioid influx and drug-related death rates, have prosecuted a relatively high number of doctors.

A. *Methodology*

For this paper, I measured the prosecutorial responses of various federal districts by searching their respective "News" database for each conviction press release and tallied the number of doctors convicted in each district.[55]

B. *The CSA's Physician Exception*

This section discusses the process by which the criminal justice system can disincentivize doctors from illegal prescribing opioids. The difficulties associated with this process will be discussed in Part IV. The Controlled Substances Act (CSA) 21 U.S.C. § 801 et. seq., provides that controlled substances may only be distributed lawfully be registered handlers.[56] Practitioners, however, are exempted under the CSA and are permitted to "distribute, dispense, conduct research with respect to [and] administer… a controlled substance" so long as it is done "in the course of professional practice."[57] The term

50 *U.S. Prescribing Rate Maps*, *supra* note 3.
51 *Id.*
52 McClure, *supra* at 1751.
53 *U.S. Prescribing Rate Maps*, *supra* note 2
54 In fairness, the DEA has reported a "steady rise in successful criminal prosecutions of physicians, from just fifteen convictions in 2003 to forty-three in 2008". *See* McClure, *supra* at 1748.
55 This paper includes all doctors convicted in each district between 2015 and 2020. This was conducted by tracking each doctor's case through various press releases and including them in my data only if they were convicted in 2015. For example, if a doctor were charged or indicted in 2014, but not convicted in 2015, that doctor would be included. Also, if a doctor were arrested, charged, or indicted, but the database did not contain a subsequent press release indicating a conviction, that doctor would not be included. Although this list likely includes most doctors prosecuted during these years, there may be doctors that the searching process failed to capture. For an example of a News database, *see* generally *News*, U.S. ATT'Y'S OFF., S.D. W.VA., https://www.justice.gov/usao-ndwv/pr?keys=doctor+&items_per_page=50 (last accessed Apr. 10, 2020).
56 21 U.S.C. § 801 et. seq. (1970).
57 *Id.*

practitioner includes physicians.[58] The CSA only requires individuals who "prescribe or dispense" controlled substances in Schedules II through V to register with the DEA.[59]

The criminal justice system's "check" on physician behavior is achieved by 21 U.S.C. § 841.[60] To be clear, as is the case with most criminal offenses, in order to prosecute a doctor for violating the CSA, the government will have to prove that the doctor: (1) knowingly; (2) without legitimate medical purpose; (3) prescribed controlled substances outside the course of professional practice.[61] However, what constitutes both "a legitimate medical purpose" and "the usual course of professional practice" based on existing caselaw hardly gives its readers a sufficient understanding of these standards' meanings. Some examples of improper professional practice include writing excessive prescriptions and issuing prescriptions without first examining the patient.[62] Additionally, "intent" is difficult to prove when numerous actors play a role in a medical office's improper business dealings.

C. *Focus Areas with Little Prosecutorial Response*

i. West Virginia

West Virginia, frequently dubbed the "epicenter" of the opioid crisis, consistently ranks high on the list of states with the highest rates of overdoses.[63] In 2015, there were 41.5 deaths per 100,000 people living in the states.[64] A large aspect of the problem in West Virginia, similar to other states in the opioid belt, is the sheer number of pills brought into the states and subsequently prescribed by doctors each year. In 2017, West Virginia doctors wrote 81.3 opioid prescription for every 100 persons, significantly more that than national average rate of 58.7 prescriptions.[65] Moreover, according to the DEA report of pill distribution, there are thirteen counties spanning across the entire state that average over seventy-five pills per person, per year.[66] With these sobering statistics, one would anticipate aggressive action from the United States Attorney of both the Northern and Southern Districts of West Virginia. That, however, has not been the case.

Between 2015 and 2020, both the Northern District and Southern District of West Virginia convicted only twelve doctors in total for prescribing opioid in violation of the CSA.[67]

58 *Id.*
59 *Id.*
60 *Id.* § 841.
61 *See* United States v. Moore, 423 U.S. 122 (1975).
62 McClure *supra* note 16.
63 R. Merino et al., *The Opioid Epidemic in West Virginia*, 32 HEALTH CARE MANAG. 187 (2019).
64 *Id.*
65 *West Virginia Opioid Summary*, NAT'L INST. ON DRUG ABUSE, NIH (last revised Mar. 2019), https://www.drugabuse.gov/opioid-summaries-by-state/west-virginia-opioid-summary.
66 *See Drilling into the DEA's pain pill database, supra* note 4.
67 *See* Press Release, U.S. Att'y's Off., N.D. W.Va., Former Marion County physician admits to drug charge (Mar. 6, 2020) https://www.justice.gov/usao-ndwv/pr/former-marion-county-physician-admits-drug-charge; Press Release, U.S. Att'y's Off., S.D. W.Va., HOPE Clinic Physician Pleads Guilty to Drug Crime (Feb. 3, 2020) https://www.justice.gov/usao-sdwv/pr/hope-clinic-physician-pleads-guilty-drug-crime; Press Release, U.S. Att'y's Off., N.D. W.Va., Pennsylvania physician sentenced for drug charge (Jan. 31, 2020) https://www.justice.gov/usao-ndwv/pr/pennsylvania-physician-sentenced-drug-charge; Press Release, U.S. Att'ys Off., S.D. W.Va., Doctor of Osteopathic Medicine Sentenced for Drug Distribution (Oct. 23, 2019) https://www.justice.gov/usao-sdwv/pr/doctor-osteopathic-medicine-sentenced-drug-distribution; Press Release, U.S. Att'ys Off., S.D. W.Va., Former Parkersburg Physician Pleads Guilty for His Role in Hope Clinic Conspiracy (Oct. 3, 2019) https://www.justice.gov/usao-sdwv/pr/former-parkersburg-physician-pleads-guilty-his-role-hope-clinic-conspiracy; Press Release, U.S. Att'y's Off., N.D. W.Va., West Virginia physician sentenced for illegal opioid distribution to patients (Sept. 3, 2019) https://www.justice.gov/usao-ndwv/pr/west-virginia-physician-sentenced-illegal-opioid-distribution-patients; Press Release, U.S. Att'ys Off., S.D. W.Va., Charleston

Of these twelve prosecutions, seven of them occurred in the past year and a half.[68] Although this is a positive sign moving forward, it still raises questions regarding the lack of prosecutorial responses during the early years of clear and rampant over prescription.

In addition to those doctors prosecuted specifically for distribution under the statute, the two districts prosecuted six doctors for various crimes, ranging from using communication devices to commit a felony to instates travel in aid of a racketeering enterprise.[69] The underlying facts of these cases indicate that the primary purpose for pursuing these doctors was their involvement in improperly distributing opioids.[70] This further exemplifies the difficulty of prosecuting doctors

Doctor Pleads Guilty to Illegal Distribution of Methadone (Aug. 24, 2019) https://www.justice.gov/usao-sdwv/pr/charleston-doctor-pleads-guilty-illegal-distribution-methadone-0; Press Release, U.S. Att'y's Off., N.D. W.Va., Ohio physician sentenced to nearly five years for fraudulently distributing controlled substances (Sept. 17, 2018) https://www.justice.gov/usao-ndwv/pr/ohio-physician-sentenced-nearly-five-years-fraudulently-distributing-controlled; Press Release, U.S. Att'ys Off., S.D. W.Va., Beckley area physician sentenced to 20 years in federal prison for oxycodone crime (Aug, 23, 2017) https://www.justice.gov/usao-sdwv/pr/beckley-area-physician-sentenced-20-years-federal-prison-oxycodone-crime; Press Release, U.S. Att'y's Off., N.D. W.Va., Martinsburg doctor pleads guilty to illegal distribution of alprazolam and lorazepam (Feb. 27, 2017) https://www.justice.gov/usao-ndwv/pr/martinsburg-doctor-pleads-guilty-illegal-distribution-alprazolam-and-lorazepam; Press Release, U.S. Att'ys Off., S.D. W.Va., Beckley doctor sentenced to eight years in prison for Federal drug crime and health care fraud (Apr. 27, 2016) https://www.justice.gov/usao-sdwv/pr/beckley-doctor-sentenced-eight-years-prison-federal-drug-crime-and-health-care-fraud; Press Release, U.S. Att'y's Off., N.D. W.Va., Bridgeport, WV doctor sentenced to 5 years for unlawful prescribing practices (May 12, 2015) https://www.justice.gov/usao-ndwv/pr/bridgeport-wv-doctor-sentenced-5-years-unlawful-prescribing-practices; *see also* Phone Interview with Sarah Wagner, Assistant United States Attorney, U.S. Att'y's Off., N.D.W.V. (Feb. 6, 2020).

[68] *See* Press Release, U.S. Att'y's Off., N.D. W.Va., Former Marion County physician admits to drug charge (Mar. 6, 2020) https://www.justice.gov/usao-ndwv/pr/former-marion-county-physician-admits-drug-charge; Press Release, U.S. Att'ys Off., S.D. W.Va., HOPE Clinic Physician Pleads Guilty to Drug Crime (Feb. 3, 2020) https://www.justice.gov/usao-sdwv/pr/hope-clinic-physician-pleads-guilty-drug-crime; Press Release, U.S. Att'y's Off., N.D. W.Va., Pennsylvania physician sentenced for drug charge (Jan. 31, 2020) https://www.justice.gov/usao-ndwv/pr/pennsylvania-physician-sentenced-drug-charge; Press Release, U.S. Att'ys Off., S.D. W.Va., Doctor of Osteopathic Medicine Sentenced for Drug Distribution (Oct. 23, 2019) https://www.justice.gov/usao-sdwv/pr/doctor-osteopathic-medicine-sentenced-drug-distribution; Press Release, U.S. Att'ys Off., S.D. W.Va., Former Parkersburg Physician Pleads Guilty for His Role in Hope Clinic Conspiracy (Oct. 3, 2019) https://www.justice.gov/usao-sdwv/pr/former-parkersburg-physician-pleads-guilty-his-role-hope-clinic-conspiracy; Press Release, U.S. Att'y's Off., N.D. W.Va., West Virginia physician sentenced for illegal opioid distribution to patients (Sept. 3, 2019) https://www.justice.gov/usao-ndwv/pr/west-virginia-physician-sentenced-illegal-opioid-distribution-patients; Press Release, U.S. Att'ys Off., S.D. W.Va., Charleston Doctor Pleads Guilty to Illegal Distribution of Methadone (Aug. 24, 2019) https://www.justice.gov/usao-sdwv/pr/charleston-doctor-pleads-guilty-illegal-distribution-methadone-0.

[69] *See* Press Release, U.S. Att'y's Off., N.D. W.Va., West Virginia physician sentenced for illegally distributing drugs (Jan 31, 2020) https://www.justice.gov/usao-ndwv/pr/west-virginia-physician-sentenced-illegally-distributing-drugs; Press Release, U.S. Att'ys Off., S.D. W.Va., HOPE Clinic Physician Pleads Guilty (Jan. 27, 2020) https://www.justice.gov/usao-sdwv/pr/hope-clinic-physician-pleads-guilty; Press Release, U.S. Att'ys Off., S.D. W.Va., HOPE Clinic Physician Sentenced for Money Laundering Conspiracy (Jan. 10, 2019) https://www.justice.gov/usao-sdwv/pr/hope-clinic-physician-sentenced-money-laundering-conspiracy; Press Release, U.S. Att'y's Off., N.D. W.Va., Martinsburg, WV doctor sentenced for unlawful distribution of prescription painkillers (June 28, 2016) https://www.justice.gov/usao-ndwv/pr/martinsburg-wv-doctor-sentenced-unlawful-distribution-prescription-painkillers; Press Release, U.S. Att'ys Off., S.D. W.Va., Charleston doctor pleads guilty to Federal crime involving dispensing fentanyl (Apr. 21, 2016) https://www.justice.gov/usao-sdwv/pr/charleston-doctor-pleads-guilty-federal-crime-involving-dispensing-fentanyl; Press Release, U.S. Att'ys Off., S.D. W.Va., Ohio Doctor Sentenced for two drug-related felonies (Jan. 12, 2015) https://www.justice.gov/usao-sdwv/pr/ohio-doctor-sentenced-two-drug-related-felonies.

[70] *Id.*

pursuant to the CSA when convicting these doctors of lesser, yet related crimes.

In a state with staggering pill influx and distribution statistics, coupled with recent studies indicating that twenty-five percent of rural Americans said drug addiction was their biggest concern for their community,[71] it is quite puzzling that the number of prosecutions for doctors has remained fairly low. Though the state is taking promising steps in the civil sector,[72] these steps will not have their intended effects unless its federal districts also hold overprescribing doctors accountable.

ii. Oklahoma

Based on the DEA's report, seven counties in Oklahoma consistently have over seventy-five pills per person per year.[73] In 2017, Oklahoma healthcare providers wrote an average of 88.1 prescriptions for every 100 persons.[74] Given the higher rate of prescribing than that of West Virginia,[75] Oklahoma federal districts should be scrutinizing the actions of doctors who are responsible for most of these prescriptions. Once again, that has not happened.

The Northern and Western Districts of Oklahoma have convicted only one and two doctors, respectively.[76] The Eastern Districts of Oklahoma have yet to prosecute a doctor in this capacity.[77] Similar to West Virginia, Oklahoma's legal efforts are primarily directed at the drug manufacturers and pharmaceutical industries.[78]

[71] Sydney Boles, *Rural Americans Increasingly Concerned About Opioid Addiction, Study Finds*, W.V. PUB. BROADCASTING (Jan. 10, 2020), https://www.wvpublic.org/post/rural-americans-increasingly-concerned-about-opioid-addiction-study-finds#stream/0.

[72] Press Release, DOJ, Off. Pub. Aff., Department of Justice Awards Nearly $38 Million to Reduce Crime, Improve Public Safety in West Virginia (Dec. 13, 2019) https://www.justice.gov/opa/pr/department-justice-awards-nearly-38-million-reduce-crime-improve-public-safety-west-virginia (The state has secured financial support to increase the accessibility of drug treatment in a variety of ways. The state was recently awarded a $8 million grant from the Department of Justice (DOJ) to "fight the opioid crisis") The general purpose of the funding is to "reduce crime and improve public safety," with substantial funding allocated to the West Virginia Law Enforcement Assisted Diversion (LEAD), which "steer[s] low-level drug offenders away from prosecution and into treatment", *See* Justice Department Awards nearly $38m . Additionally, the state has sought funding to promote widespread and effective treatment by gaining financial retribution from pharmaceutical companies. Recently, lawyers representing the state reached a $1.25 billion settlement with major actors in the pharmaceutical industry. Courtney Hessler, Talks to settle all WV opioid cases underway, Charleston Gazette-Mail (Mar. 1, 2020), https://www.wvgazettemail.com/news/talks-to-settle-all-wv-opioid-cases-underway/article_09de3ccd-97e5-5b84-a143-e13412b2f203.html. Though the actual breakdown of the settlement is still in consideration, the settlement award is projected to be divided "among the state and local governments, hospitals and other entities" to potentially reverse some of the harm these particular industries caused. *See Hessler*.

[73] *Drilling into the DEA's pain pill database, supra* note 4.

[74] *Oklahoma Opioid Summary*, NAT'L INST. ON DRUG ABUSE, NIH (last revised Mar. 2019), *https://www.drugabuse.gov/drug-topics/opioids/opioid-summaries-by-state/oklahoma-opioid-involved-deaths-related-harms*.

[75] *Compare West Virginia Opioid Summary*, NAT'L INST. ON DRUG ABUSE, NIH (last revised Mar. 2019), https://www.drugabuse.gov/opioid-summaries-by-state/west-virginia-opioid-summary *with Oklahoma Opioid Summary*, NAT'L INST. ON DRUG ABUSE, NIH (last revised Mar. 2019), https://www.drugabuse.gov/drug-topics/opioids/opioid-summaries-by-state/oklahoma-opioid-involved-deaths-related-harms.

[76] Press Release, U.S. Att'ys Off., E.D. Okla., Warr Acres Doctor Pleads Guilty to Drug and Identity-Theft Charges (Jan. 10, 2020) https://www.justice.gov/usao-wdok/pr/warr-acres-doctor-pleads-guilty-drug-and-identity-theft-charges; Press Release, U.S. Att'ys Off., N.D. Okla., Orthopedic Surgeon Sentenced for Opioid Prescription Conspiracies (Apr. 10, 2019) https://www.justice.gov/usao-ndok/pr/orthopedic-surgeon-sentenced-opioid-prescription-conspiracies; Press Release, U.S. Att'ys Off., E.D. Okla., Guymon Doctor Sentenced to Prison for Dispensing Opiates Without a Medical Purpose (Apr. 3, 2018) https://www.justice.gov/usao-wdok/pr/guymon-doctor-sentenced-prison-dispensing-opiates-without-medical-purpose.

[77] When searching the Eastern District of Oklahoma's News database, zero Press Releases regarding doctors prosecuted in this capacity appear. *https://www.oked.uscourts.gov/*.

[78] *See* Jan Hoffman, *Johnson & Johnson Ordered to Pay $572 Million in Landmark Opioid Trial*, N.Y. TIMES (Aug. 30, 2019), https://www.nytimes.com/2019/08/26/health/oklahoma-opioids-johnson-and-johnson.html (stating In 2019, a state district judge ordered Johnson & Johnson to pay the state $572 million after it "intentionally played down the

As previously noted, although these industries play a formative role in the shape and scope of the crisis, a holistic and effective approach must include an equally aggressive criminal justice response for these doctors.

iii. Tennessee

In 2012, there were more opioid prescriptions written in Tennessee than there were people living in the state.[79] In 2017, healthcare providers in Tennessee wrote 94.4 opioid prescriptions for every 100 persons.[80] The DEA's report on painkillers indicated that over thirty counties in the state that averaged more than seventy-five pills per person per year.[81] Given these statistics, it should not come as a surprise that in 2018, doctors wrote over six million prescriptions.[82] Unfortunately, the changing statistics indicate that although Tennessee has managed to decrease its opioid-related death rate, millions of opioids continue to enter the state each year.[83] The prosecutorial response towards the medical community has, similar to other states, been lackluster at best. Between 2015 and 2020, only eight doctors were convicted among the state's three federal districts.[84] The state received federal funding to help finance addiction prevention strategies and has engaged in a multi-district lawsuit against various opioid manufacturers.[85]

dangers and oversold the benefits of opioids") As of January 2020, the state has won more than $829 million from settlements or court orders with drug companies. However, much of the court ordered funds have not yet made their way to the state, as they are frozen in the appellate process. *Id.* In addition, in 2019, the DOJ awarded the state $4.5 million to be usewd towards "state-wide and western Oklahoma governmental bodies to address public safety issues relating to opioids." *See* Press Release, U.S. Att'y's Off., W.D. Okla., Justice Department Awards Millions to Fight Opioid Crisis in Western Oklahoma (Dec. 13, 2019), https://www.justice.gov/usao-wdok/pr/justice-department-awards-millions-fight-opioid-crisis-western-oklahoma. Although these funds will be crucial in mitigation and treatment efforts across the state, once again, a discussion of alterations to doctor behavior are nowhere to be found. *Id.*

79 Carson Schneider, *supra* note 19.

80 *See Tennessee Opioid Summary*, NAT'L INST. ON DRUG ABUSE, NIH (last revised Mar. 2019), https://www.drugabuse.gov/drug-topics/opioids/opioid-summaries-by-state/tennessee-opioid-involved-deaths-related-harms.

81 *Drilling into the DEA's pain pill database, supra* note 4.

82 *See Tennessee Faces of Opioids*, TENN. DEP'T OF HEALTH, https://www.tn.gov/tnfacesofopioids.html (last visited Apr. 12, 2020)

83 *See Tennessee Opioid Summary, supra* note 79.

84 *See* Press Release, U.S. Att'y's Off., W.D. Tenn., West Tennessee Psychiatrist Found Guilty of Unlawfully Distributing Opioids (Feb. 21, 2020) https://www.justice.gov/opa/pr/west-tennessee-psychiatrist-found-guilty-unlawfully-distributing-opioids; Press Release, U.S. Att'ys Off., M.D. Tenn., Former Tennessee Medical Doctor Pleads Guilty to Unlawfully Distributing Controlled Substances (Dec. 2, 2019) https://www.justice.gov/opa/pr/former-tennessee-medical-doctor-pleads-guilty-unlawfully-distributing-controlled-substances; Press Release, U.S. Att'ys Off., M.D. Tenn., Tennessee Emergency Medical Doctor Pleads Guilty to Unlawfully Distributing Controlled Substances (Nov. 25, 2019) https://www.justice.gov/opa/pr/tennessee-emergency-medical-doctor-pleads-guilty-unlawfully-distributing-controlled; Press Release, U.S. Att'ys Off., W.D. Tenn., Second Appalachian Region Prescription Opioid Strikeforce Takedown Results in Charges Against 13 Individuals, Including 11 Physicians (Sept. 24, 2019) https://www.justice.gov/opa/pr/second-appalachian-region-prescription-opioid-strike-force-takedown-results-charges-against-13; Press Release, U.S. Att'ys Off., E.D. Tenn., Chattanooga Pill Mill Operator Sentenced To 280 Years In Prison (Aug. 28, 2015) https://www.justice.gov/usao-edtn/pr/chattanooga-pill-mill-operator-sentenced-280-years-prison; Press Release, U.S. Att'ys Off., E.D. Tenn., Ihsaan Al-Amin Sentenced To 100 Month In Prison For Illegally Dispensing Controlled Substances (June 1, 2015) https://www.justice.gov/usao-edtn/pr/ihsaan-al-amin-sentenced-100-month-prison-illegally-dispensing-controlled-substances; Press Release, U.S. Att'y's Off., E.D. Tenn., Nine Medical Practitioners Indicted In Conspiracy To Distribute Controlled Pain Medication As Employees Of Breakthrough Pain Therapy Center In Maryville (Oct 16, 2014) https://www.justice.gov/usao-edtn/pr/nine-medical-practitioners-indicted-conspiracy-distribute-controlled-pain-medication.

85 In 2019, Tennessee received $46.7 million from the federal government to "help fight the opioid crisis". See Allison Collins, Tennessee to receive $46.7 million in federal funding tocombat opioid crisis, CHATTANOOGA TIMES FREE PRESS (Sept. 4, 2019), https://www.timesfreepress.com/news/breakingnews/story/2019/sep/04/tennessee-receive-467-million-federal-funding-combat-opioid-crisis/502783/. This funding will help finance opioid addiction prevention, treatment and recovery programs, as well as to help the state health

Although these actions are a crucial piece of any comprehensive solution, Tennessee must similarly intensify its prosecutorial efforts to deter doctors from continuing to engage in this unethical behavior.

D. *Focus Areas Showing Concerted Prosecutorial Effort*

Although the criminal justice responses from the previously states are quite minimal, some states have employed more comprehensive, and consequently, more successful and effective approaches.

i. Virginia

Communities within Virginia, particularly in the western part of the state, have greatly suffered throughout this crisis. Though health providers wrote opioid prescriptions at a rate below the national average in 2017,[86] the state had twenty-one counties with over seventy-five pills per person, per year.[87]

Collectively, the Eastern and Western Districts of Virginia have convicted fifteen doctors between 2015 and 2020.[88] In an effort to ramp up their opioid-related efforts, the Western District also joined the ARPO Strike Force in

department collect overdose data in real time. Id. Additionally, the state is still in the middle of a 2017 lawsuit filed by fourteen state prosecutors representing counties in Middle and Eastern Tennessee against a variety of opioid manufacturers. See Mike Christen, Tennessee DAs take state's opioid battle to courtroom, COLUMBIA DAILY HERALD (Dec. 29, 2019), https://www.columbiadailyherald.com/news/20191229/tennessee-das-take-state8217s--opioid-battle-to-courtroom.

86 *Virginia Opioid Summary*, NAT'L INST. ON DRUG ABUSE, NIH (last revised Mar. 2019), https://www.drugabuse.gov/opioid-summaries-by-state/virginia-opioid-summary.

87 *Drilling into the DEA's pain pill database, supra* note 4.

88 *See* Press Release, U.S. Att'ys Off., E.D. Va., Pain Doctor Sentenced to Prison for Illegally Prescribing Opiates (Feb. 24, 2020) https://www.justice.gov/usao-edva/pr/pain-doctor-sentenced-prison-illegally-prescribing-opiates; Press Release, U.S. Att'ys Off., W.D. Va., Norton Doctor Pleads Guilty to Illegally Prescribing Prescription Drugs (Dec. 20, 2019) https://www.justice.gov/usao-wdva/pr/norton-doctor-pleads-guilty-illegally-prescribing-prescription-drugs; Press Release, U.S. Att'ys Off., E.D. Va., Dentist Pleads Guilty to Running Oxycodone Conspiracy (May 9, 2019) https://www.justice.gov/usao-edva/pr/dentist-pleads-guilty-running-oxycodone-conspiracy; Press Release, U.S. Att'ys Off., W.D. Va., Virginia Doctor Convicted on 861 Federal Counts of Drug Distribution, Including Distribution Resulting in Death: Faces Mandatory Minimum of 20 Years in Federal Prison (May 9, 2019) https://www.justice.gov/usao-wdva/pr/virginia-doctor-convicted-861-federal-counts-drug-distribution-including-distribution; Press Release, U.S. Att'ys Off., E.D. Va., Former Doctor Sentenced to Prison for Illegal Sale of Opioids (Apr. 26, 2019) https://www.justice.gov/usao-edva/pr/former-doctor-sentenced-prison-illegal-sale-opioids; Press Release, U.S. Att'ys Off., W.D. Va., Former Blacksburg Doctor Sentenced on Federal Drug Charges (Feb. 13, 2019) https://www.justice.gov/usao-wdva/pr/former-blacksburg-doctor-sentenced-federal-drug-charges; Press Release, U.S. Att'ys Off., W.D. Va., Lebanon Doctor Sentenced on Federal Drug Distribution Charges (Feb. 7, 2019) https://www.justice.gov/usao-wdva/pr/lebanon-doctor-sentenced-federal-drug-distribution-charges; Press Release, U.S. Att'ys Off., W.D. Va., Coeburn Doctor Sentenced on Healthcare Fraud, Drug Charges (Mar. 19, 2018) https://www.justice.gov/usao-wdva/pr/coeburn-doctor-sentenced-healthcare-fraud-drug-charges; Press Release, U.S. Att'ys Off., E.D. Va., Doctor Sentenced to 30 Years for Oxycodone Distribution Conspiracy (Dec. 18, 2017) https://www.justice.gov/usao-edva/pr/doctor-sentenced-30-years-oxycodone-distribution-conspiracy; Press Release, U.S. Att'ys Off., W.D. Va., Norton Doctor Sentenced on Federal Drug Charge (Dec. 15, 2017) https://www.justice.gov/usao-wdva/pr/norton-doctor-sentenced-federal-drug-charge; Press Release, U.S. Att'ys Off., W.D. Va., Staunton Doctor Sentencing for Illegal Prescribing of Narcotics (Feb. 1, 2017) https://www.justice.gov/usao-wdva/pr/staunton-doctor-sentencing-illegal-prescribing-narcotics; Press Release, U.S. Att'y's Off., E.D. Va., Stafford Doctor Sentenced to Four Years in Prison for Distribution of Oxycodone and Health Care Fraud (June 26, 2015) https://www.justice.gov/usao-edva/pr/stafford-doctor-sentenced-four-years-prison-distribution-oxycodone-and-health-care; Press Release, U.S. Att'y's Off., E.D. Va., Arlington Doctor Sentenced to 15 Years in Prison in Oxycodone Conspiracy (Mar. 6, 2015) https://www.justice.gov/usao-edva/pr/press-release-6; Press Release, U.S. Att'y's Off., W.D. Va., Local Doctor Pleads Guilty to Child Porn, Prescription Drug Charges (Feb. 19, 2015) https://www.justice.gov/usao-wdva/pr/local-doctor-pleads-guilty-child-porn-prescription-drug-charges.

April of 2019.[89] The state's success stems, in part, from its multifaceted criminal justice approach.[90] According Thomas Cullen,

> "[T]he prosecutors in my office [are] focus[ed] on meaningful enforcement initiatives to staunch the flow of these deadly drugs and deter misuse. From targeting and dismantling major drug trafficking organizations that bring heroin and Fentanyl into our district, to prosecuting dope-peddling physicians and dealers who directly cause overdose deaths, we are committed to holding those most responsible accountable under federal law."[91]

In addition to focusing on the criminal justice aspect of the opioid crisis, Cullen says his office is also dedicated to "supporting meaningful prevention and recovery programs."[92] The district also houses one of the only federal drug treatment courts in the nation.[93] With its multidimensional approach at the forefront of criminal justice efforts, the state's response towards doctors has the potential for a true deterrent effect.

ii. Kentucky

Kentucky is employing a multi-faceted approach in curbing this epidemic as well. In 2017, Kentucky health care providers prescribed approximately 87 opioids for every 100 people statewide.[94] The state is consistently among the top ten states with the highest prescribing rates and subsequent opioid-related death rates. In addition, it is home to thirty-seven counties that average more than seventy-five pills per person per year.[95] However, through a concerted effort of lawmakers, public health organizations and the criminal justice system, Kentucky is on a path to recover (albeit slowly).

The most impressive aspect of Kentucky's approach has been its aggressive efforts to combat the illegal prescription of opioids throughout its federal districts. For example, Kentucky has convicted fourteen doctors between 2015 and 2020.[96] Kentucky's districts

89 "The mission of the ARPO Strike Force is to identify and investigate health care fraud schemes in the Appalachian region and surrounding areas, and to effectively and efficiently prosecute medical professionals and others involved in the illegal prescription and distribution of opioids." *See* Press Release, U.S. Dep't Justice, Off. Pub. Aff., Appalachian Regional Prescription Opioid (ARPO) Strike Force Takedown Results in Charges Against 60 Individuals, Including 53 Medical Professionals (Apr. 17, 2019), https://www.justice.gov/opa/pr/appalachian-regional-prescription-opioid-arpo-strike-force-takedown-results-charges-against; Robert Sorrell, Federal strike force combatting opioids expanding to Virginia, Bristol Herald Courier (Apr. 17, 2019), https://www.heraldcourier.com/news/federal-strike-force-combating-opioids-expanding-to-virginia/article_16151b62-4710-58a9-a505-7999a0a83d9f.html.

90 In 2019, the Western district was awarded 2.5 million in grants to fight the crisis. Press Release, U.S. Att'y's Off., W.D. Va., Justice Department Awards More than $333 Million to Fight Opioid Epidemic Across the U.S. (Dec. 16, 2019) https://www.justice.gov/usao-wdva/pr/justice-department-awards-more-333-million-fight-opioid-epidemic-across-us.

91 Thomas Cullen, *Cullen: Federal court hopes to be model for opioid cases*, ROANOKE TIMES (Dec. 5, 2018) , https://www.roanoke.com/opinion/commentary/cullen-federal-court-hopes-to-be-model-for-opioid-cases/article_81c199c3-d35d-5446-89eb-916c96a87f78.html.

92 *Id.*

93 *Id.*

94 *Kentucky Opioid Summary*, NAT'L INST. ON DRUG ABUSE, NIH (last revised Mar. 2019), https://www.drugabuse.gov/opioid-summaries-by-state/kentucky-opioid-summary

95 *Drilling into the DEA's pain pill database, supra* note 4.

96 *See* Press Release, U.S. Att'y's Off., W.D. Ky., Louisville Psychiatrist Pleads Guilty To Distributing Controlled Substances Without A Medical Purpose (Mar. 11, 2020) https://www.justice.gov/usao-wdky/pr/louisville-psychiatrist-pleads-guilty-distributing-controlled-substances-without; Press Release, U.S. Att'y's Off., E.D. Ky., Kentucky Physician Pleads Guilty to Unlawfully Distributing Opioids (Oct. 17, 2019) https://www.justice.gov/opa/pr/kentucky-physi-

have also recently joined the ARPO Strike Force.[97]

As stated before, Kentucky's physician-focused efforts have also come from the state legislature and the medical community.[98] By approaching this crisis through civil, regulatory, and criminal lenses, Kentucky is concurrently procuring funding for essential treatment programs, effectively reducing addictive behavior and holding malicious actors accountable.

cian-pleads-guilty-unlawfully-distributing-opioids; Press Release, U.S. Att'y's Off., E.D. Ky., Oak Ridge, Tennessee Doctor and Boca Raton, Florida Pain Clinic Owner Sentenced for Oxycodone Trafficking Conspiracy (Aug. 9, 2019) https://www.justice.gov/usao-edky/pr/oak-ridge-tennessee-doctor-and-boca-raton-florida-pain-clinic-owner-sentenced-oxycodone; Press Release, U.S. Att'y's Off., W.D. Ky., Clinton County Doctor Sentenced To 30 Months In Prison For Illegally Prescribing Opioids (July 29, 2019) https://www.justice.gov/usao-wdky/pr/clinton-county-doctor-sentenced-30-months-prison-illegally-prescribing-opioids; Press Release, U.S. Att'y's Off., W.D. Ky., Physician Sentenced To Federal Prison For Drug Trafficking (Aug. 10, 2018) https://www.justice.gov/usao-wdky/pr/physician-sentenced-federal-prison-drug-trafficking; Press Release, U.S. Att'y's Off., E.D. Ky., Grant County Doctor Sentenced To 151 Months For Drug Trafficking (July 26, 2018) https://www.justice.gov/usao-edky/pr/grant-county-doctor-sentenced-151-months-drug-trafficking; Press Release, U.S. Att'y's Off., E.D. Ky., Cincinnati Physician Sentenced to 60 Months for Illegal Distribution of Oxycodone Pills (Apr. 26, 2018) https://www.justice.gov/usao-edky/pr/cincinnati-physician-sentenced-60-months-illegal-distribution-oxycodone-pills; Press Release, U.S. Att'y's Off., W.D. Ky., Bowling Green Physician Guilty Of Conspiring To Unlawfully Distribute And Dispense Controlled Substances And Health Care Fraud (Feb. 5, 2018) https://www.justice.gov/usao-wdky/pr/bowling-green-physician-guilty-conspiring-unlawfully-distribute-and-dispense-controlled; Press Release, U.S. Att'y's Off., E.D. Ky., Hazard Physician And Wife Sentenced For Unlawful Distribution Of Prescription Opioids And Health Care Fraud (Sept. 29, 2017) https://www.justice.gov/usao-edky/pr/hazard-physician-and-wife-sentenced-unlawful-distribution-prescription-opioids-and; Press Release, U.S. Att'y's Off., W.D. Ky., Louisville Physician Sentenced To 48 Months In Prison For Unlawful Distribution Of Controlled Substances And Health Care Fraud (June 5, 2017) https://www.justice.gov/usao-wdky/pr/louisville-physician-sentenced-48-months-prison-unlawful-distribution-controlled; Press Release, U.S. Att'y's Off., W.D. Ky., Monroe County Physician Sentenced To One Year In Prison For Illegally Prescribing Pain Medications (Apr. 21, 2017) https://www.justice.gov/usao-wdky/pr/monroe-county-physician-sentenced-one-year-prison-illegally-prescribing-pain; Press Release, U.S. Att'y's Off., W.D. Ky., Cave City, Kentucky, Physician Sentenced To 18 Months In Prison For Illegally Dispensing Controlled Substances Outside Of His Professional Medical Practice And Health Care Fraud (Mar. 20, 2017) https://www.justice.gov/usao-wdky/pr/cave-city-kentucky-physician-sentenced-18-months-prison-illegally-dispensing-controlled; Press Release, U.S. Att'y's Off., W.D. Ky., Kentucky Anesthesiologist Sentenced to 100 Months for Unlawful Distribution of Controlled Substances, Health Care Fraud, Conspiracy and Money Laundering (May 12, 2016) https://www.justice.gov/opa/pr/kentucky-anesthesiologist-sentenced-100-months-unlawful-distribution-controlled-substances; Press Release, U.S. Att'y's Off., E.D. Ky., Former Georgia Doctor Admits to Unlawfully Prescribing Pain Medication to Thousands of Kentuckians (Oct. 9, 2015) https://www.justice.gov/usao-edky/pr/former-georgia-doctor-admits-unlawfully-prescribing-pain-medication-thousands.

[97] *See* Press Release, U.S. Att'y's Off., E.D. Ky., Justice Department's Criminal Division Creates Appalachian Regional Prescription Opioid Strike Force to Focus on Illegal Opioid Prescriptions (Oct 25, 2018) https://www.justice.gov/usao-edky/pr/justice-departments-criminal-divison-creates-appalachian-regional-prescription-opioid.

[98] For example, Leadership at Kentucky hospitals are seeking to "slash high-risk prescription opioid rates" by at least half. *See* Alex Acquisto, *'We're creating addicts.' How Kentucky doctors plan to slash opioid use at hospitals.*, ST. CLAIRE HEALTHCARE (Nov. 8, 2019) https://www.st-claire.org/news/releases/we-re-creating-addicts-how-kentucky-doctors-plan-to-slash-opioid-use-at-hospitals/. In addition, Kentucky hospitals, such as St. Claire Hospital, have stringent policies in place to severely limit the prescription of opioids to only the most urgent cases. *Id.* For example, St. Claire requires that if opioids are necessary, each patient must first be searched in the statewide controlled prescription monitoring database. *Id.* In addition, refills on opioids are not allowed. *Id.* The Kentucky General Assembly has also prioritized limiting prescriptions by passing House Bill 333, which places a three-day limit on opioid prescriptions for acute pain. *See* KY Gen Assemb. H.B. 333 (2017).

iii. Alabama

Though not commonly considered part of the opioid belt, the opioid crisis has caused considerable damage to communities in Northern Alabama. Alabama has eight counties that contain more than seventy-five pills per person, per year.[99] In 2017, Alabama health care providers wrote 107.2 opioid prescriptions for every 100 persons, totaling the highest prescription rate in the country.[100]

In combatting this crisis, the state has taken aggressive civil, criminal, and regulatory steps to address the issue.[101] Through the work of Alabama's civil prosecutors and administrative agencies, Alabama's federal criminal justice system has shown remarkable leadership in dealing with the opioid crisis.

Alabama's federal districts have convicted nineteen doctors between 2015 and 2020, affirmatively demonstrating the state's low tolerance for prescribing impropriety.[102] In the

[99] *Drilling into the DEA's pain pill database, supra* note 4.

[100] *Alabama Opioid Summary*, NAT'L INST. ON DRUG ABUSE, NIH (last revised Mar. 2019) https://www.drugabuse.gov/drugs-abuse/opioids/opioid-summaries-by-state/alabama-opioid-summary.

[101] For example, in 2019, the state was awarded $6.3 million from the federal government "to help fund community health centers in rural" areas. *See* Alex Torres-Perez, *$6.3 Million Grant to Fight Opioid Crisis in Alabama,* WAAY 31, ABC (Aug. 11, 2019), https://www.waaytv.com/content/news/63-million-grant-to-fight-opioid-crisis-in-Alabama-536218131.html. The funding will be allocated to schools to expand and improve access to mental health services and substance abuse treatment. *Id.* Alabama has also taken serious administrative efforts to address the particularly severe overprescribing issue. For example, in 2018, the Alabama Medicaid Agency (AMA) implemented a policy limiting opioid prescription lengths to seven days and a maximum of fifty morphine milligram equivalent per day on a claim. *See FACTSHEET: Alabama's Oversight of Opioid Prescribing and Monitoring of Opioid Use,* U.S. OFF. INSPECTOR GEN. 2 (Nov. 2019), https://oig.hhs.gov/oas/reports/region4/41900125_Factsheet.pdf. In addition, the Alabama State Board of Medical Examiners (ABME) requires doctors to "document the use of risk and abuse mitigation strategies in the patient's medical record" for each patient to which they have prescribed opioids. *Id.* at 3.

[102] *See* Press Release, U.S. Att'y's Off., S.D. Ala., Mobile Doctor Sentenced to Five Years Probation and Ordered to Pay Quarter Million Dollar Fine for Prescription Drug Offense (Mar. 11, 2020) https://www.justice.gov/usao-sdal/pr/mobile-doctor-sentenced-five-years-probation-and-ordered-pay-quarter-million-dollar; Press Release, U.S. Att'y's Off., N.D. Ala., Alabama Physician Pleads Guilty to Drug Distribution Charges for Prescription of Opioids (Jan. 31, 2020) https://www.justice.gov/opa/pr/alabama-physician-pleads-guilty-drug-distribution-charges-prescription-opioids; Press Release, U.S. Att'y's Off., M.D. Ala., Montgomery Doctor Convicted on Drug Distribution, Health Care Fraud, and Money Laundering Charges (Dec. 20, 2019) https://www.justice.gov/usao-mdal/pr/montgomery-doctor-convicted-drug-distribution-health-care-fraud-and-money-laundering; Press Release, U.S. Att'y's Off., N.D. Ala., Federal Jury Convicts Birmingham Doctor and Nurse for $7.8 Million Health Care Fraud, Unlawful Drug Distribution and Money Laundering (July 16, 2019) https://www.justice.gov/usao-ndal/pr/federal-jury-convicts-birmingham-doctor-and-nurse-78-million-health-care-fraud-unlawful; Press Release, U.S. Att'y's Off., N.D. Ala., Madison County Pill Mill Doctor Pleads Guilty to Illegally Dispensing Prescription Drugs (June 21, 2019) https://www.justice.gov/usao-ndal/pr/madison-county-pill-mill-doctor-pleads-guilty-illegally-dispensing-prescription-drugs; Press Release, U.S. Att'y's Off., N.D. Ala., Vestavia Hills Cardiologist Sentenced to 87 Months in Prison for Illegally Prescribing Opioids (May 7. 2019) https://www.justice.gov/usao-ndal/pr/vestavia-hills-cardiologist-sentenced-87-months-prison-illegally-prescribing-opioids; Press Release, U.S. Att'y's Off., M.D. Ala., Montgomery "Pill Mill" Doctor Receives a 145- Month Sentence for Drug Distribution, Health Care Fraud, and Money Laundering Offenses; "Pill Mill" Mental Health Counselor Pleads Guilty in Related Case (Aug. 24, 2018) https://www.justice.gov/usao-mdal/pr/montgomery-pill-mill-doctor-receives-145-month-sentence-drug-distribution-health-care; Press Release, U.S. Att'y's Off., M.D. Ala., Another Physician Pleads Guilty in the Montgomery "Pill Mill" Prosecution (June 12, 2018) https://www.justice.gov/usao-mdal/pr/another-physician-pleads-guilty-montgomery-pill-mill-prosecution; Press Release, U.S. Att'y's Off., S.D. Ala., Former Pain Management Doctor Receives 5 Years in Health Care Fraud Case, Ordered to Pay More Than 15 Million Dollars in Restitution (June 8, 2018) https://www.justice.gov/usao-sdal/pr/former-pain-management-doctor-receives-5-years-health-care-fraud-case-ordered-pay-more; Press Release, U.S. Att'y's Off., M.D. Ala., Physician, Nurse Practitioner, and Nurse Plead Guilty in Montgomery "Pill Mill" Case (May 15, 2018) https://www.justice.gov/usao-mdal/pr/physician-nurse-practitioner-and-nurse-plead-guilty-montgomery-pill-mill-case; Press Release, U.S. Att'y's Off., M.D. Ala., Another Montgomery "Pill Mill" Doctor Pleads Guilty to Drug Distribution and Money Laundering Charges (Dec. 11, 2017) https://www.justice.gov/usao-mdal/pr/another-montgomery-pill-mill-doctor-pleads-guilty-drug-distribution-and-money; Press Release, U.S. Att'y's Off., S.D. Ala., Dr. Couch and Dr. Ruan Sentenced to

Northern District of Alabama, combatting the opioid crisis is one of its Project Safe Neighborhood goals.[103] More specifically, the U.S. Attorney's office states that,

> "The U.S. Attorney's Office Anti-Opioid Initiative combats the opioid epidemic in Alabama by aggressively pursuing enforcement against drug dealers and developing community-based programs that support drug prevention and treatment opportunities for those affected by the opioid epidemic."[104]

Community outreach and treatment efforts, although helpful, will not prevent these dangerous drugs from getting into vulnerable communities in the first place. However, underperforming states should look to proactive states, such as Alabama, to implement similarly aggressive governmental measures to curb their medical communities' prescribing rates.

iv. Georgia

Georgia is home to ten counties holding more than seventy-five pills per person per year.[105] In 2017, Georgia health care providers wrote 70.9 opioid prescriptions for every 100 persons.[106] Also, the state's health care costs associated with prescription opioid misuse were estimated in 2007 alone, at $447 million.[107]

Georgia, similar to Alabama, is another example of an aggressive governmental response to overprescribing in addition to community outreach and treatment efforts.[108] The federal districts in Georgia have convicted seventeen doctors from 2015 through early 2020.[109]

240 and 252 Months In Federal Prison For Running Massive Pill Mill (May 26, 2017) https://www.justice.gov/usao-sdal/pr/dr-couch-and-dr-ruan-sentenced-240-and-252-months-federal-prison-running-massive-pill; Press Release, U.S. Att'y's Off., S.D. Ala., Dr. John Patrick Couch Sentenced to 240 Months (May 25, 2017) https://www.justice.gov/usao-sdal/pr/dr-john-patrick-couch-sentenced-240-months; Press Release, U.S. Att'y's Off., M.D. Ala., Phenix City "Pill Mill" Doctor Receives a Ten-Year Sentence for Participating in a Drug Distribution Conspiracy (May 10, 2017) https://www.justice.gov/usao-mdal/pr/phenix-city-pill-mill-doctor-receives-ten-year-sentence-participating-drug-distribution; Press Release, U.S. Att'y's Off., N.D. Ala., Huntsville Pill Mill Doctor Sentenced to 15 Years in Prison for Illegal Prescribing and Health Care Fraud (Feb. 7, 2017) https://www.justice.gov/usao-ndal/pr/huntsville-pill-mill-doctor-sentenced-15-years-prison-illegal-prescribing-and-health; Press Release, U.S. Att'y's Off., N.D. Ala., Jasper Pain Clinic Physician Sentenced to Nearly Three Years in Prison for Illegally Dispensing Narcotics (Apr. 8, 2016) https://www.justice.gov/usao-ndal/pr/jasper-pain-clinic-physician-sentenced-nearly-three-years-prison-illegally-dispensing; Press Release, U.S. Att'y's Off., M.D. Ala., "Pill Mill" Operators Plead Guilty to Drug Distribution and Money Laundering Charges (Mar. 4, 2016) https://www.justice.gov/usao-mdal/pr/pill-mill-operators-plead-guilty-drug-distribution-and-money-laundering-charges; Press Release, U.S. Att'y's Off., N.D. Ala., Jasper Pharmacist and a Pharmacy Technician Indicted for Conspiracy to Illegally Distribute Prescription Drugs (Dec. 29, 2015) https://www.justice.gov/usao-ndal/pr/jasper-pharmacist-and-pharmacy-technician-indicted-conspiracy-illegally-distribute; Press Release, U.S. Att'y's Off., N.D. Ala., Birmingham Physician Sentenced for Illegally Supplying Opioid Painkillers (Oct. 28, 2015) https://www.justice.gov/usao-ndal/pr/birmingham-physician-sentenced-illegally-supplying-opioid-painkillers.

[103] *Project Safe Neighborhoods*, U.S. Att'y's Off., N.D. Ala., https://www.justice.gov/usao-ndal/project-safe-neighborhoods (last accessed Apr. 12, 2020).

[104] *Id.*

[105] *Drilling into the DEA's pain pill database, supra* note 4.

[106] *Georgia Opioid Summary*, NAT'L INST. ON DRUG ABUSE, NIH (last revised Mar. 2019), https://www.drugabuse.gov/drugs-abuse/opioids/opioid-summaries-by-state/georgia-opioid-summary.

[107] Prescription Opioids and Heroin Epidemic in Georgia, GA. PREVENTION PROJECT, SUBSTANCE ABUSE RESEARCH ALLIANCE (2017), https://www.senate.ga.gov/sro/Documents/StudyCommRpts/OpioidsAppendix.pdf.

[108] The state has also focused its efforts towards procuring funding for addiction prevention and treatment. In 2019, Georgia was given $10.3 million to "expand access to medication-assisted treatment for opioid addiction and overdose". *See* Ellen Eldridge, *Georgia Gets $10.3 Million To Combat Opioid Crisis,* GPB RADIO NEWS, NPR (Apr. 24, 2019), https://www.gpbnews.org/post/georgia-gets-103-million-combat-opioid-crisis.

[109] *See* Press Release, U.S. Att'y's Off., N.D. Ga., Former Union General Hospital CEO and Blairsville doctor

Georgia's progress in combatting this crisis is undeniably linked to its strong stance regarding prescribing practices.

IV. Theories regarding Perceived Prosecutorial Deficiencies

In this part, I will discuss the underlying theories for what I call "perceived prosecutorial deficiencies." Why are large numbers of doctors not prosecuted in states and federal districts where rampant improper prescribing is all but certain? To answer this question, I interviewed several federal prosecutors working in offices falling within the opioid belt.[110] In addition, I looked to the expertise of legal scholars who have researched the greater criminal justice response to the opioid crisis as a whole.[111] I placed these explanations into three main groups: resource

convicted of illegally prescribing and obtaining more than 15,000 pain pills from pharmacies in three states (Oct. 30, 2019) https://www.justice.gov/usao-ndga/pr/former-union-general-hospital-ceo-and-blairsville-doctor-convicted-illegally; Press Release, U.S. Att'y's Off., S.D. Ga., Pill-mill doctor convicted on 16 counts of healthcare fraud, illegally dispensing drugs (Oct. 11, 2019) https://www.justice.gov/usao-sdga/pr/pill-mill-doctor-convicted-16-counts-healthcare-fraud-illegally-dispensing-drugs; Press Release, U.S. Att'y's Off., S.D. Ga., Doctor sentenced to prison for prescribing narcotics to non-patients (June 13, 2019) https://www.justice.gov/usao-sdga/pr/doctor-sentenced-prison-prescribing-narcotics-non-patients; Press Release, U.S. Att'y's Off., N.D. Ga., Jury finds podiatrist guilty of operating pill mill (May 9, 2019) https://www.justice.gov/usao-ndga/pr/jury-finds-podiatrist-guilty-operating-pill-mill; Press Release, U.S. Att'y's Off., M.D. Ga., Physician Sentenced For His Role In Prolific Georgia Pill Mills (Apr. 4, 2019) https://www.justice.gov/usao-mdga/pr/physician-sentenced-his-role-prolific-georgia-pill-mills; Press Release, U.S. Att'y's Off., N.D. Ga., Major Illegal Distributor of Prescription Painkillers Changes Plea to Guilty After Government Begins Presenting Evidence at Trial (Sept. 7, 2018) https://www.justice.gov/usao-wdpa/pr/major-illegal-distributor-prescription-painkillers-changes-plea-guilty-after-government; Press Release, U.S. Att'y's Off., N.D. Ga., Former Georgia medical examiner sentenced for opioid conspiracy (Aug. 30, 2018) https://www.justice.gov/usao-ndga/pr/former-georgia-medical-examiner-sentenced-opioid-conspiracy; Press Release, U.S. Att'y's Off., M.D. Ga., Doctors Found Guilty For Role In Valdosta And Columbus Pill Mills (June 14, 2018) https://www.justice.gov/usao-mdga/pr/doctors-found-guilty-role-valdosta-and-columbus-pill-mills; Press Release, U.S. Att'y's Off., S.D. Ga., Physician Pleads Guilty To Drug Distribution and Money Laundering Conspiracies (Mar. 26, 2018) https://www.justice.gov/usao-sdga/pr/physician-pleads-guilty-drug-distribution-and-money-laundering-conspiracies; Press Release, U.S. Att'y's Off., N.D. Ga., Two Doctors and Clinic Owners sentenced for operating Pill Mills in Metro Atlanta (June 26, 2017) https://www.justice.gov/usao-ndga/pr/two-doctors-and-clinic-owners-sentenced-operating-pill-mills-metro-atlanta; Press Release, U.S. Att'y's Off., S.D. Ga., Georgia Doctor Sentenced To Federal Prison in Pill Mill Case (Apr. 4, 2017) https://www.justice.gov/usao-sdga/pr/georgia-doctor-sentenced-federal-prison-pill-mill-case; Press Release, U.S. Att'y's Off., N.D. Ga., Physician and Owner of Atlanta Pain Clinic Sentenced for Illegally Prescribing Painkillers (Mar. 29, 2017) https://www.justice.gov/usao-ndga/pr/physician-and-owner-atlanta-pain-clinic-sentenced-illegally-prescribing-painkillers; Press Release, U.S. Att'y's Off., N.D. Ga., Anesthesiologist Sentenced for Illegally Prescribing Oxycodone and Other Prescription Painkillers (Feb. 23, 2017) https://www.justice.gov/usao-ndga/pr/anesthesiologist-sentenced-illegally-prescribing-oxycodone-and-other-prescription; Press Release, U.S. Att'y's Off., M.D. Ga., Fitzgerald Physician Pleads Guilty To Drug Charges (Nov. 1, 2016) https://www.justice.gov/usao-mdga/pr/fitzgerald-physician-pleads-guilty-drug-charges; Press Release, U.S. Att'y's Off., N.D. Ga., Six Defendants Sentenced to Prison for Operating a "Pill Mill" in Lilburn, Georgia (Jan. 22, 2016) https://www.justice.gov/usao-ndga/pr/six-defendants-sentenced-prison-operating-pill-mill-lilburn-georgia; Press Release, U.S. Att'y's Off., N.D. Ga., Former Heart Surgeon Convicted of Unlawfully Prescribing and Dispensing Oxycodone (Sept. 28, 2015) https://www.justice.gov/usao-ndga/pr/former-heart-surgeon-convicted-unlawfully-prescribing-and-dispensing-oxycodone.

[110] Though these interviewees remain largely confidential given their present posts as Assistant United States Attorneys at Districts within the opioid belt, notes from each interview are on file with the author. Interviewees include Jennifer Kolman (E.D. Tenn.), Sarah Wagner (N.D.W.V.), Roger West (E.D. Ky.), and Randy Ramseyer (W.D. Va.).

[111] *See, e.g.,* Adam Gershowitz, *Punishing Pill Mill Doctors: Sentencing Disparities in the Opioid Epidemic,* SSRN (Dec. 13, 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3503662.

constraints, difficulties in proving elements of the crime, and differing priorities.

A. Resource Constraints

The most common explanation plagues countless public health and criminal justice issues in America today: prosecutors do not have the required *resources* to pursue each and every doctor engaging in this behavior. Many of the interviewed prosecutors directly compared the resources available to prosecute doctors illegally prescribing opioids to prosecuting street dealers distributing heroin.[112] Some of the differences between them include: (1) overall time spent on each case, the number and type of experts needed to prove the case, (2) expertise by and the number of lawyers and investigators needed to review relevant documents, and (3) additional efforts necessary to convincingly present this case to a judge or jury.

This type of crime has been called a "hybrid of white-collar crime and drug dealing";[113] each of these crimes brings forward distinct challenges and burdens that the prosecution must satisfy in proving its case.[114] To further explain the efforts expended to prosecute a doctor in this capacity, I will walk through some of the steps that prosecutors must take in each of these cases.

First, in building a case, prosecutors must spend countless hours interviewing often reluctant patients and reviewing medical files and a pharmacy's distribution records. Because these doctors have the legal authority to prescribe opioids in this capacity, prosecutors will have to overcome this presumption by showing that the doctor (1) knowingly, (2) without a legitimate medical purpose; (3) prescribed controlled substances outside the course of professional practice.[115] In reviewing these medical records and interviewing patients, each prosecutor's office will need investigators who are well-versed in medical terminology, and are familiar with medical practices related to pain management.[116] Interviewing patients in the course of an improper drug distribution case brings its own challenges, as many of them require time-intensive assistance throughout the process.[117] Often times, witnesses in these cases are former patients of the doctors.[118] Moreover, these individuals are frequently still suffering from addiction; as is the case with any prosecution involving witnesses who have been involved in the illegal activity themselves, they are incredibly wary of law enforcement personnel.[119] Other witnesses on the road to recovery may nevertheless be unwilling to cooperate.[120] In the context of a case in West Virginia, an ideal witness refused to testify, as he did not want to relive his experiences with that particular doctor in court.[121]

This category of cases also requires additional expert witness testimony. In a traditional drug distribution case, typical expert witnesses include investigators familiar with common drug trafficking practices and lab analysts who can testify that the substances trafficked are indeed drugs.[122] In addition, these cases require medical experts to testify how the doctor's behavior compares to standard medical practices.[123] Specifically, prosecutors must find and compensate doctors

[112] Telephone Interviews with Assistant U.S. Att'y's (2020).
[113] Telephone Interview with Jennifer Kolman, *supra* note 110.
[114] *Id.*
[115] United States v. Moore, 423 U.S. 122, 124-25,142-43 (1975).
[116] Telephone Interviews with Assistant U.S.Att'y's, *supra* note 110.
[117] Telephone Interview with Sarah Wagner, Assistant United States Attorney, U.S. Att'y's Off., N.D.W.V. (Feb. 6, 2020).
[118] Telephone Interviews with Assistant United States Attorneys, *supra* note 110.
[119] Telephone Interview with Sarah Wagner, *supra* note 117.
[120] *Id.*
[121] *Id.*
[122] Telephone Interviews with Assistant United States Attorneys, *supra* note 110.
[123] *Id.*

for testifying that an indicted doctor prescribed the opioids both without a legitimate medical purpose and outside the course of professional practice.[124]

As a doctor's course of medical treatment can and should be different for each patient, incorporating their particular symptoms and circumstances, these medical experts will need to overcome the informal presumption that their opinions are not just post hoc differences in medical opinions.[125] Unless a doctor was running a full-fledged pill mill and the facts overwhelmingly suggested illegality, medical experts are unwilling to question another's professional opinion without being privy to the underlying facts and the patient-doctor medical history at the time the accused doctor wrote each prescription.[126]

Lastly, an additional resource-intensive piece of the process involves the amount of time and effort necessary to ensure both the judge and jury can grasp the information presented at trial.[127] As discussed above, these crimes can be more complicated than a typical drug distribution case. As such, prosecutors must spend more time walking the factfinder through the intricacies of the crime.[128] On average, these investigations, and subsequent trials can take between two to three years, from start to finish.[129]

B. *Difficulties Associated with Proving Elements of the Crime*

In addition to the complexity of presenting important facts to the factfinder, doctors' prosecution is equally arduous due to the particular elements of the crime that the government must prove. For example, prosecutors must show that the doctor prescribed opioids "outside the course of professional practice".[130] This particular standard was first recognized in *United States v. Moore*.[131] In Moore, the court considered a doctor who had prescribed large quantities of prescription medications to patients, regardless of their medical need, for a set price per prescription.[132] Even though this case presents a doctor working extensively outside the course of professional practice, it has given prosecutors little guidance in cases with nuanced factual circumstances. Consider the following questions: Under Moore, how thorough must a medical examination be before prescribing these medications? How high must the number of pills or the number of refills be to raise impropriety question? How should a doctor approach prescribing pills if they suspect a patient may be lying about the extent of their pain?

Besides the fuzziness found in the text of 21 U.S.C. §841, some federal prosecutors indicate that the difficulty in prosecuting doctors in this capacity can be attributed to a jury's reluctance to prosecute doctors entirely. According to Sarah Wagner, an Assistant United States Attorney for the Northern District of West Virginia, doctors are not viewed as the "bad guys" juries are accustomed to placing in jail.[133] Instead, the medical profession is generally seen as one of the most trusted occupations in society.[134] When placing a doctor on trial, prosecutors are asking jurors to question the legitimacy of those they are expected to trust.[135] In their everyday lives, Americans are implored to follow medical

[124] *Id.*
[125] *Id.*
[126] Telephone Interviews with Assistant United States Attorneys, *supra* note 110.
[127] *Id.*
[128] *Id.*
[129] Telephone Interview with Jennifer Kolman, *supra* note 110.
[130] 21 U.S.C. § 801 et. seq. (1970).
[131] United States v. Moore, 423 U.S. 122 (1975).
[132] *Id.*
[133] Telephone Interview with Sarah Wagner, *supra* note 117.
[134] Niall McCarthy, *America's Most & Least Trusted Professions,* FORBES (Jan. 11, 2019), https://www.forbes.com/sites/niallmccarthy/2019/01/11/americas-most-least-trusted-professions-infographic/#666078bb7e94
[135] Telephone Interview with Sarah Wagner, *supra* note 117.

professionals' advice and guidance. With this in mind, one can see how a prosecutor's duty in these types of cases may extend beyond proving each element beyond a reasonable doubt. In fact, it may depend on their ability to pierce a doctor's veil of trustworthiness and legitimacy.

C. *Differing Priorities*

Another reason for fewer prosecutions of doctors in this capacity stem from a difference in office priorities. Some United States Attorney's Offices dedicate entire teams, or particular lawyers, to the prosecution of these types of cases. For example, Roger West, an Assistant United States Attorney for the Eastern District of Kentucky, has been one of a few lawyers in his office assigned to these types of cases for the last fifteen years.[136]

Other offices spend their time and resources on other aspects of the opioid crisis, as discussed in Part II. For example, the Eastern District of Kentucky has focused its efforts on curbing heroin and fentanyl distribution.[137] This theory rests on the premise that there may not be as many doctors engaging in this practice anymore, as prescription drug users have switched to street opiates to feed their addictions at lower price tags. Though there is merit to this theory, the national prescribing rate data suggests that doctors across the United States are still overprescribing at alarming rates.[138]

Some offices have placed the blame and prioritized their subsequent legal efforts towards pharmaceutical and drug manufacturing companies.[139] A possible reason for this is the DEA's focus on prescribers, wholesale distributors, pharmacies, and pharmacists.[140] This agency frequently works with United States Attorney's Offices to prepare drug cases; thus, and consequently, many offices only prosecute cases in which they can rely on the DEA's guidance and assistance.[141]

Other offices have seemingly made the policy choice to prioritize doctor prosecutions, irrespective of their District's relatively low opioid prescription rates. For example, the Eastern District of Michigan and the Western District of Pennsylvania, have aggressively prosecuted these offenses, sentencing thirteen,[142] and fifteen

136 Telephone Interview with Roger West, Assistant United States Attorney, U.S. Att'y's Off., (Feb. 2, 2020).

137 *Id.*

138 *U.S. Prescribing Rate Maps, supra* note 2.

139 Courtney Hessler, *Hearing in Opioid Cases Set in Charleston*, CHARLESTON GAZETTE-MAIL (Jan. 19, 2020), https://www.wvgazettemail.com/news/legal_affairs/hearing-in-opioid-cases-set-in-charleston/article_744235a3-370b-5196-8fba-24d85ef447a3.html#.XiYbvKBVny1.twitter.

140 Francis B. Palumbo & Lindsay P. Holmes, *Culpability in the Opioid Crisis All Parties Must Remain Vigilant and Establish Best Practices to Address the Epidemic*, 21 J. HEALTH CARE COMPLIANCE 5, 8 (2019).

141 The prosecution of Dr. Jeanne Germeil highlights an example of United States Attorney's Office and DEA collaboration. *See, e.g.,* Press Release, U.S. Att'y's Off., S.D. Fl., South Florida Pain Management Doctor Sentenced to 17 ½ Years in Prison for Illegally Dispensing Opioid Drugs and Jumping Bond (Nov. 26, 2019) https://www.justice.gov/usao-sdfl/pr/south-florida-pain-management-doctor-sentenced-17-years-prison-illegally-dispensing.

142 *See* Press Release, U.S. Att'ys Off., E.D. Mich., Lathrup Village Doctor Pleaded Guilty to Diverting Prescription Pills and Committing Health Care Fraud (Sept. 30, 2019) https://www.justice.gov/usao-edmi/pr/lathrup-village-doctor-pleaded-guilty-diverting-prescription-pills-and-committing; Press Release, U.S. Att'ys Off., E.D. Mich., Livonia Doctor Sentenced to More Than Twelve Years for Conspiring With Others to Illegally Distribute Prescription Drugs (Apr. 17, 2019) https://www.justice.gov/usao-edmi/pr/livonia-doctor-sentenced-more-twelve-years-conspiring-others-illegally-distribute; Press Release, U.S. Att'ys Off., E.D. Mich., Former Doctor Sentenced to 75 Months in Prison for Illegally Prescribing Opiates and Committing Health Care Fraud (Feb. 6, 2018) https://www.justice.gov/usao-edmi/pr/former-doctor-sentenced-75-months-prison-illegally-prescribing-opiates-and-committing; Press Release, U.S. Att'ys Off., E.D. Mich., Oak Park Doctor Pleads Guilty To Unlawful Distribution Of Prescription Pills (Aug. 17, 2017) https://www.justice.gov/usao-edmi/pr/oak-park-doctor-pleads-guilty-unlawful-distribution-prescription-pills; Press Release, U.S. Att'ys Off., E.D. Mich., Former Doctor Sentenced to 23 Years in Prison for Distributing Prescription Drugs, Health Care Fraud

doctors,[143] respectively, in a five-year period. One possible explanation for this mismatch is that offices in high profile districts are more likely to

and Money Laundering (June 15, 2017) https://www.justice.gov/usao-edmi/pr/former-doctor-sentenced-23-years-prison-distributing-prescription-drugs-health-care; Press Release, U.S. Att'ys Off., E.D. Mich., Farmington Hills Doctor Sentenced to 19 Years in Prison for Distributing Prescription Drugs and Health Care Fraud (May 19, 2017) https://www.justice.gov/usao-edmi/pr/farmington-hills-doctor-sentenced-19-years-prison-distributing-prescription-drugs-and; Press Release, U.S. Att'ys Off., E.D. Mich., Two Physicians Found Guilty For Distributing Oxycodone (Mar. 22, 2017) https://www.justice.gov/usao-edmi/pr/two-physicians-found-guilty-distributing-oxycodone; Press Release, U.S. Att'ys Off., E.D. Mich., Detroit-Area Neurosurgeon Sentenced to 235 Months in Prison for Role in $2.8 Million Health Care Fraud Scheme (Jan. 10, 2017) https://www.justice.gov/usao-edmi/pr/detroit-area-neurosurgeon-sentenced-235-months-prison-role-28-million-health-care-fraud; Press Release, U.S. Att'ys Off., E.D. Mich., Detroit Doctor Sentenced for Unlawful Opioid Prescriptions (Sept. 20, 2016) https://www.justice.gov/usao-edmi/pr/detroit-doctor-sentenced-unlawful-opioid-prescriptions; Press Release, U.S. Att'ys Off., E.D. Mich., Doctor Sentenced to 84 Months In Prison for Distributing Prescription Drugs (Mar. 1, 2016) https://www.justice.gov/usao-edmi/pr/doctor-sentenced-84-months-prison-distributing-prescription-drugs; Press Release, U.S. Att'ys Off., E.D. Mich., Warren Doctor Sentenced For Unlawful Oxycodone Prescriptions and Health Care Fraud (Nov. 16, 2015) https://www.justice.gov/usao-edmi/pr/warren-doctor-sentenced-unlawful-oxycodone-prescriptions-and-health-care-fraud.

143 *See* Press Release, U.S. Att'ys Off., W.D. Pa., Judge Sends Former Greensburg Doctor to Prison for Illegally Distributing Opioids (Feb. 7, 2020) https://www.justice.gov/usao-wdpa/pr/judge-sends-former-greensburg-doctor-prison-illegally-distributing-opioids; Press Release, U.S. Att'ys Off., W.D. Pa., Greensburg Doctor Charged with Conspiring to Receive Kickbacks for Prescribing Fentanyl, and Then Causing Insurers to Pay for the Unlawful Prescriptions (Feb. 3, 2020) https://www.justice.gov/usao-wdpa/pr/greensburg-doctor-charged-conspiring-receive-kickbacks-prescribing-fentanyl-and-then; Press Release, U.S. Att'ys Off., W.D. Pa., Ex-Doctor Sentenced to More Than 11 Years' Imprisonment for His Role in Illegal Oxycodone Prescribing, Health Care Fraud, and Money Laundering Scheme and for Committing Social Security Fraud (Oct. 29, 2019) https://www.justice.gov/usao-wdpa/pr/ex-doctor-sentenced-more-11-years-imprisonment-his-role-illegal-oxycodone-prescribing; Press Release, U.S. Att'ys Off., W.D. Pa., Former Suboxone Clinic Doctor Sentenced for Illegal Prescribing and Health Care Fraud (Oct. 16, 2019) https://www.justice.gov/usao-wdpa/pr/former-suboxone-clinic-doctor-sentenced-illegal-prescribing-and-health-care-fraud; Press Release, U.S. Att'ys Off., W.D. Pa., New Castle Doctor Pleads Guilty to Illegally Prescribing and Distributing Oxycodone, Fentanyl, and Opana ER (Aug. 21, 2019) https://www.justice.gov/usao-wdpa/pr/new-castle-doctor-pleads-guilty-illegally-prescribing-and-distributing-oxycodone; Press Release, U.S. Att'ys Off., W.D. Pa., Contracted Physician, Operations Manager of Redirections Treatment Advocates Sentenced for Suboxone Distribution Scheme (July 17, 2019) https://www.justice.gov/usao-wdpa/pr/contracted-physician-operations-manager-redirections-treatment-advocates-sentenced; Press Release, U.S. Att'ys Off., W.D. Pa., Former Doctor Sentenced to Prison for Unlawfully Dispensing Vicodin and Defrauding the University of Pittsburgh Medical Center Health Plan (May 9, 2019) https://www.justice.gov/usao-wdpa/pr/former-doctor-sentenced-prison-unlawfully-dispensing-vicodin-and-defrauding-university; Press Release, U.S. Att'ys Off., W.D. Pa., 2nd SKS Associates Doctor Pleads Guilty to Unlawfully Dispensing Controlled Substances, Health Care Fraud (Nov. 19, 2018); https://www.justice.gov/usao-wdpa/pr/2nd-sks-associates-doctor-pleads-guilty-unlawfully-dispensing-controlled-substances; Press Release, U.S. Att'ys Off., W.D. Pa., Greensburg Physician Charged with Illegally Distributing Suboxone, Health Care Fraud (Sept. 28, 2018) https://www.justice.gov/usao-wdpa/pr/greensburg-physician-charged-illegally-distributing-suboxone-health -care-fraud; Press Release, U.S. Att'ys Off., W.D. Pa., Suboxone Clinic Doctor Pleads Guilty to Unlawfully Dispensing Controlled Substances, Health Care Fraud (Aug, 31, 2018) https://www.justice.gov/usao-wdpa/pr/suboxone-clinic-doctor-pleads-guilty-unlawfully-dispensing-controlled-substances-health; Press Release, U.S. Att'ys Off., W.D. Pa., Pittsburgh Physician Sentenced to 5 Years in Prison for Illegally Prescribing Drugs and Defrauding Health Care Companies (Mar. 13, 2018) https://www.justice.gov/usao-wdpa/pr/pittsburgh-physician-sentenced-5-years-prison-illegally-prescribing-drugs-and; Press Release, U.S. Att'ys Off., W.D. Pa., Pittsburgh Psychiatrist Pleads Guilty to Health Care Fraud, Illegally Distributing Oxycodone (Jan. 20, 2017) https://www.justice.gov/usao-wdpa/pr/pittsburgh-psychiatrist-pleads-guilty-health-care-fraud-illegally-distributing; Press Release, U.S. Att'ys Off., W.D. Pa., Physician Sentenced for Illegally Distributing Oxycodone (Jan. 12, 2017) https://www.justice.gov/usao-wdpa/pr/physician-sentenced-illegally-distributing -oxycodone; Press Release, U.S. Att'ys Off., W.D. Pa., Medical Doctor Pleads Guilty to Health Care Fraud, Illegally Distributing Drugs (Sept. 1, 2016) https://www.justice.gov/usao-wdpa/pr/medical-doctor-pleads-guilty-health-care-fraud-illegally-distributing-drugs; Press Release, U.S. Att'ys Off., W.D. Pa., Pain Doctor Sentenced to 6 Years in Prison for Overprescribing Controlled Substances (Feb. 23, 2016) https://www.justice.gov/usao-wdpa/pr/pain-doctor-sentenced-6-years-prison-overprescribing-controlled-substances.

prosecute politically popular cases than those in lesser-known districts. Under this theory, these offices are more inclined to open cases relating to "hot button" issues, such as the opioid crisis. This claim has merit, as many of the most well-known districts in the country have adamantly been prosecuting doctors in this capacity, regardless of whether those districts are considered hot spots for purposes of the opioid crisis. For example, although zero counties within the Southern District of New York or the Southern District of Florida have prescription rates of more than seventy-five pills per person, per year,[144] the districts have prosecuted a combined total of sixteen cases between 2015 and 2020.[145]

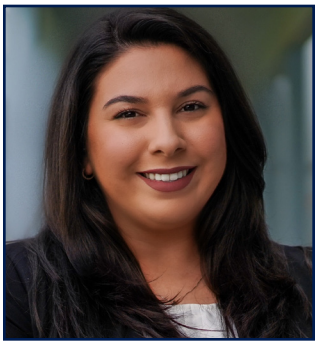
V. General Considerations

Though the criminal justice system's proper role in combatting the opioid crisis is quite complex, one aspect of the job is simple: decreasing the number of opioids prescribed and holding

[144] *Drilling into the DEA's pain pill database, supra* note 4.

[145] The U.S. Attorney's Office for the Southern District of New York has prosecuted 11 doctors. *See* Press Release, U.S. Att'ys Off., S.D.N.Y., Manhattan Doctor Pleads Guilty To The Illegal Distribution Of Oxycodone And Fentanyl Resulting In Patient's Overdose (Dec. 18, 2019) https://www.justice.gov/usao-sdny/pr/manhattan-doctor-pleads-guilty-illegal-distribution-oxycodone-and-fentanyl-resulting; Press Release, U.S. Att'ys Off., S.D.N.Y., Four Individuals Who Operated Queens Medical Clinic Convicted For Illegally Distributing Oxycodone (Oct. 25, 2019) https://www.justice.gov/usao-sdny/pr/four-individuals-who-operated-queens-medical-clinic-convicted-illegally-distributing; Press Release, U.S. Att'ys Off., S.D.N.Y., Staten Island Doctor Pleads Guilty To Illegally Distributing Oxycodone (Oct. 21, 2019) https://www.justice.gov/usao-sdny/pr/staten-island-doctor-pleads-guilty-illegally-distributing-oxycodone-1; Press Release, U.S. Att'ys Off., S.D.N.Y., Staten Island Doctor Pleads Guilty To Illegally Distributing Oxycodone (Oct. 4, 2019) https://www.justice.gov/usao-sdny/pr/staten-island-doctor-pleads-guilty-illegally-distributing-oxycodone; Press Release, U.S. Att'ys Off., S.D.N.Y., Doctor Who Operated Oxycodone And Fentanyl Diversion Scheme Sentenced To 5 Years In Prison (July 2, 2019) https://www.justice.gov/usao-sdny/pr/doctor-who-operated-oxycodone-and-fentanyl-diversion-scheme-sentenced-5-years-prison; Press Release, U.S. Att'ys Off., S.D.N.Y., Manhattan Doctor Pleads Guilty To Illegally Distributing Oxycodone And Other Drugs (May 2, 2019) https://www.justice.gov/usao-sdny/pr/manhattan-doctor-pleads-guilty-illegally-distributing-oxycodone-and-other-drugs; Press Release, U.S. Att'ys Off., S.D.N.Y., Doctor Convicted For Illegal Distribution Of Over 100,000 Oxycodone Pills (Dec. 6, 2018) https://www.justice.gov/usao-sdny/pr/doctor-convicted-illegal-distribution-over-100000-oxycodone-pills; Press Release, U.S. Att'ys Off., S.D.N.Y., Doctor Sentenced To More Than 9 Years In Prison For Selling Fentanyl That Resulted In Manhattan Man's Overdose Death (Mar. 22, 2018) https://www.justice.gov/usao-sdny/pr/doctor-sentenced-more-9-years-prison-selling-fentanyl-resulted-manhattan-man-s-overdose; Press Release, U.S. Att'ys Off., S.D.N.Y., Doctor Pleads Guilty In Manhattan Federal Court To Scheme To Illegally Distribute Oxycodone (Mar. 1, 2018) https://www.justice.gov/usao-sdny/pr/doctor-pleads-guilty-manhattan-federal-court-scheme-illegally-distribute-oxycodone; Press Release, U.S. Att'ys Off., S.D.N.Y., Former Doctor Sentenced In White Plains Federal Court To 18 Months In Prison For Selling Oxycodone Prescriptions (Nov. 18, 2016) https://www.justice.gov/usao-sdny/pr/former-doctor-sentenced-white-plains-federal-court-18-months-prison-selling-oxycodone; Press Release, U.S. Att'ys Off., S.D.N.Y., Manhattan U.S. Attorney Announces Conviction Of Local Doctor For Unlawfully Dispensing More Than 1.2 Million Oxycodone Pills (Mar. 17, 2016) https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney -announces-conviction-local-doctor-unlawfully-dispensing-more-12. The U.S. Attorney's Office for the Southern District of Florida has prosecuted 5 doctors. *See* Press Release, U.S. Att'ys Off., S.D. Fl., South Florida Doctor Sentenced to 8 Years in Prison for Conspiring to Illegally Distribute Oxycodone (Dec. 17, 2019) https://www.justice.gov/usao-sdfl/pr/south-florida-doctor-sentenced-8-years-prison-conspiring-illegally-distribute-oxycodone; Press Release, U.S. Att'ys Off., S.D. Fl., South Florida Pain Management Doctor Sentenced to 17 ½ Years in Prison for Illegally Dispensing Opioid Drugs and Jumping Bond (Nov. 26, 2019) https://www.justice.gov/usao-sdfl/pr/south-florida-pain-management-doctor-sentenced-17-years-prison-illegally-dispensing; Press Release, U.S. Att'ys Off., S.D. Fl., South Florida Doctor Sentenced to 78 Months in Prison for Participating in a Conspiracy to Illegally Dispense Opioids and Other Drugs (Sept. 7, 2019) https://www.justice.gov/usao-sdfl/pr/south-florida-doctor-sentenced-78-months-prison-participating-conspiracy-illegally; Press Release, U.S. Att'ys Off., S.D. Fl., Medical Director of Substance Abuse Treatment Facility Pleads Guilty to Unlawfully Distributing Opioids, Barbiturates, and Benzodiazepines (Oct. 18, 2018) https://www.justice.gov/usao-sdfl/pr/medical-director-substance-abuse-treatment-facility-pleads-guilty-unlawfully; Press Release, U.S. Att'ys Off., S.D. Fl., Miami-Based Physician Pleads Guilty For Role in Pain Pill Diversion and Medicare Fraud Scheme (July 13, 2017) https://www.justice.gov/usao-sdfl/pr/miami-based-physician-pleads-guilty-role-pain-pill-diversion-and-medicare-fraud-scheme.

those responsible for improper distribution accountable. Medical professionals are one of society's most trusted members; ensuring that they are disincentivized from profiting off of and proliferating the disease of addiction is vital to combat this epidemic. All data considered, our federal districts are failing to remove improper distribution of prescription opioids from their communities. After taking into account the multitude of difficulties associated with prosecuting doctors in this capacity, it is clear that our federal district do not have the resources in place to handle these cases, or at the very least, their leadership has not made these cases a priority among the various offices. As noted above, some offices have approached the opioid crisis as the serious public health and criminal justice emergency that it is by designating full teams and divisions to stomp out doctors engaging in this type of behavior. Offices not yet following suit, especially those located within the opioid belt, must consider the impact their inaction continues to play in allowing millions of prescriptions to fall into the hands of their most vulnerable. By bringing attention to this national prosecutorial deficiency, while acknowledging possible reasons for its occurrence, I hope that federal districts reevaluate their current priorities and resource allocations to create comprehensive plans that are as aggressive and multifaceted as the opioid crisis itself.



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Melissa Respeto is a 3L at St. Thomas University College of Law. Prior to law school she attended Florida International University, where she graduated Magna Cum Laude with a Bachelor of Arts in Psychology and a Minor in Criminal Justice. She has interned for the Honorable Judge Antonio Arzola at the Eleventh Judicial Circuit Court, and Judge Thomas Logue at the Third District Court of Appeal. Currently, she serves as a Senior Articles Editor for the St. Thomas Law Review, the VP of Competition for the St. Thomas Law Trial Team, and the VP of the St. Thomas Law FAWL Chapter. During the Fall 2019 semester, Melissa, along with her competition team, won the National Champion Award at the 2019 Florida National Trial Advocacy Tournament on behalf of the St. Thomas Trial Team. Upon graduation, she intends on starting her legal career practicing Criminal Law as a criminal defense attorney.

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Dennis P. Chapman is a retired U.S. Army colonel. He holds a Bachelor of Science degree from the United States Military Academy at West Point and a Juris Doctor from Thomas M. Cooley Law School. Among other assignments, Colonel (ret) Chapman served as an infantry officer with the U.S. Army's 10th Mountain Division during Operation *Restore Hope* in Somalia, and as head of a U.S. military advisory team with 3rd Brigade, 4th Division, Iraqi Army during Operation *Iraqi Freedom*. He currently practices law in Virginia.

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Karly Newcomb is a law student at William & Mary Law School. She serves as Editor-in-Chief of the *William & Mary Environmental Law and Policy Review*, Volume 45. She studied Environmental Studies and Public Policy at Franklin & Marshall College. She has externed for the U.S. Attorney's Office for the Eastern District of Virginia, and has served as a Research Assistant for Professor Adam Gershowitz, a criminal law and procedure professor at William & Mary Law School. Most recently, she worked as a Summer Associate at the U.S. Government Accountability Office. Her broad-ranging criminal interests include prosecutorial discretion, prosecutions in relation to the opioid crisis, and the intersection of environmental and criminal law.