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WHY IS THE FBI SO **OBSESSED** WITH SEX?

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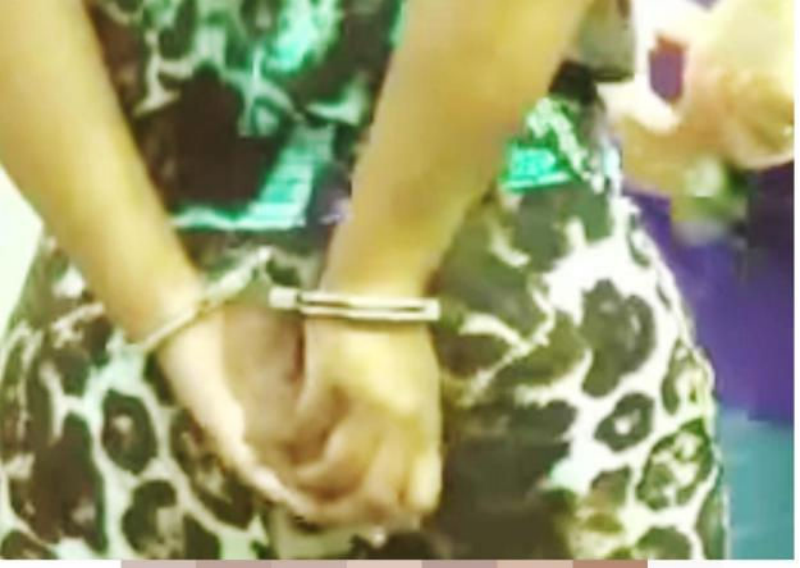

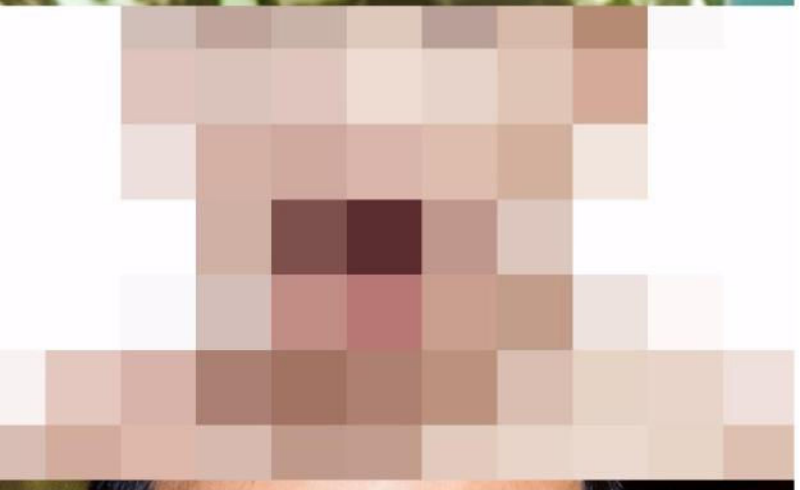

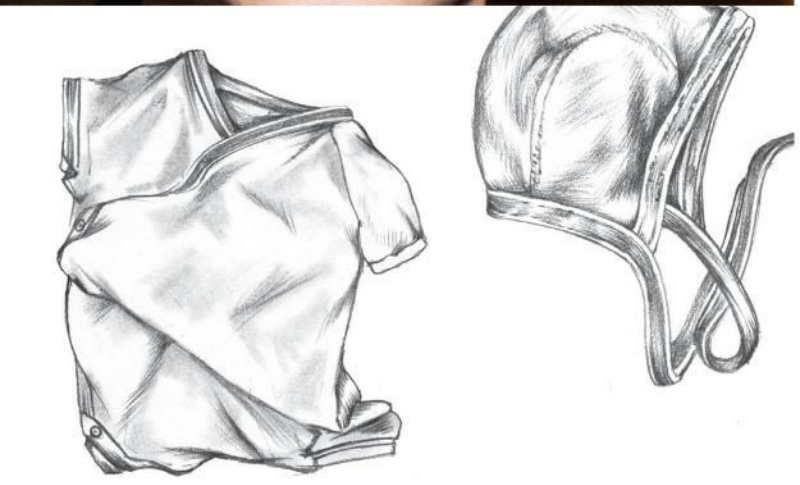

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Free Minds and Free Markets

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CULTURE

SAFE SEX, DANGEROUS STATE

KATHERINE MANGU-WARD

THE KIDS THESE days are incredibly lame. They barely do drugs. They hardly have sex. When they do finally get around to doing the deed, it's at much later ages than previous generations. They're responsible about birth control and disease prevention. They probably even make it home in time for curfew.

Skeptical? The Centers for Disease Control and Prevention report that the average age of self-reported virginity loss is now nearly 18 years old. The percentage of high school students who say they have had intercourse has been falling for two decades. Two-thirds of the students who are having sex say it's with a steady romantic partner. Eighty percent say they used contraception their first time, up from less than 50 percent in the '80s. They're also using more effective fertility-fighting methods than previous generations: IUDs, implants, and other forms of long-acting reversible birth control with lower failure rates have become much more popular, with use rising from 0.4 percent in 2005 to 7.1 percent by 2013. The rate of teen births fell 8 percent in 2015, capping off a 46 percent decrease since 2007. The rate of teenage abortion has also fallen sharply from its peak around 1990.

It seems like the combined efforts of America's adults to scare the bejesus out of kids about the dangers of the horizontal mambo while subsidizing the wazoo out of birth control have, in fact, paid off in fewer teens knocking boots.

But all of this responsible behavior has created a generation gap. The Boomer version of the birds and bees is on the verge of becoming worthless, and the GenX sex talk isn't far behind.

Coaching preschoolers as they carefully roll condoms onto bananas simply doesn't make sense as the exclusive focus of sex ed anymore. Jimmy hats are still

Illustration: Joanna Andreasson

a good idea, of course. But even as the physical act of sex becomes safer—at least as practiced by today's older, wiser, romantically involved, pharmacologically reinforced, temporarily sterile teens— the legal risk of many common sexual choices is skyrocketing.

LEAVING ASIDE THE fact that Generation Alpha will probably be conceived in the back seats (or the front seats!) of autonomous vehicles as they speed untended down the highway, there's really nothing new under the sun, and that includes sexting. Teenagers have managed to communicate intemperately about their desire to get it on—often right underneath the noses of their guardians—since at least imperial Japan; court ladies anxiously awaited morning-after haikus in one of the world's first novels, Murasaki Shikibu's 11th century *Tale of the Genji*.

The new danger doesn't spring from the fact that digital Romeos and Juliets are communicating about sex in a way that might generate a permanent record. In fact, by the time today's 15-year-olds run for office, youthful nudie pics will be a prerequisite for reassuring the American people that you're a normal human being, not a disqualification.

Instead, the serious threat is from meddling cops, bureaucrats, school officials, and other avatars of officialdom. The state has always had an unhealthy interest in sex—think Comstock laws, *Loving v. Virginia*, *Bowers v. Hardwick*—but as we increasingly infantilize teens and young adults while disregarding privacy protections that once shielded intimate communications, more "kids" are being caught in a legal dragnet that is purportedly designed to protect them.

Consider a case in Cañon City, Colorado. After following up on a call to a state bullying tipline in December, a public high school official uncovered widespread sexting. Rather than taking a moment to consider whether the common nature of the behavior suggested an appropriately proportionate remedy, the administrator decided to follow the letter of the law in Colorado (and many other states), in which the sender of a sexually suggestive selfie is both victim and perpetrator of the heinous crime of possessing and distributing child pornography.

Under Colorado law, producing or distributing sexually explicit images of a minor is a felony, punishable by four to 12 years in prison. Mere possession is still a felony, to the tune of 12 to 18 months in prison. That figure increases to two to six years in prison if the possessor has video or more than 20 still images.

"We're not out to hang every kid," Cañon City Police Capt. Jim Cox generously noted. But the department says it will leave as many as 100 kids in limbo for up to 30 days while it determines who is a victim in the eyes of the law and who will be sent into the justice system as a potential sex offender.

Thom LeDoux, the district attorney in charge of the case, told CNN that parents attempting to monitor their kids' behavior may themselves be implicated in a crime, essentially making what should be a routine checkup and conversation between parents and kids the subject of legal scrutiny: "For parents that may be having conversations with their children or reviewing cellphones as the superintendent recommended, they need to understand that continuing or ongoing possession of these materials does constitute a very serious crime for the adults and for the children."

The case, which has been chronicled by the Associated Press, *The New York Times*, and *Reason*'s own Jacob Sullum, is notable both for its scale and pure, unmixed absurdity. But this is just one recent example of a phenomenon that is growing more common every day.

College kids—legal adults who are surely the right age to be experimenting, looking for a partner (or many partners), and generally sowing their wild oats—are forced to operate within a shifting legal and moral landscape where an awkward moment freshman year can get them accused of rape, tossed out of school, or dumped onto a sex offender registry. This isn't a common occurrence—most drunken romantic missteps don't end with either party jailed, thank goodness—but it does happen.

In some cases, the increased attentions of officers of the law are unambiguously good. True sexual violence has historically been under-prosecuted. Not to put too fine a point on it, but proven rapists, violent pimps, and child molesters should obviously go to jail.

But we seem to have lost our willingness to draw lines between these violators—who have genuinely caused serious physical harm to other human beings—and people engaging in moderately to seriously unwise consensual behavior with other people capable of making their own decisions. Part of the trouble is that agents of the state, looking to expand their discretionary power and increase the severity of threatened punishments, have spent decades purposely blurring those lines. And these days the most enthusiastic cheerleaders for the sex police aren't on the conservative right but the progressive left, which seems increasingly intent on reducing the bodily autonomy and privacy it once championed.

TO BE HONEST, this issue of *Reason* is a bit of a boner killer. In the following pages, you'll find Senior Editor Jacob Sullum's account of the unconstitutional and wildly uneven legal treatment that accused consumers of child pornography experience (page 26). You'll see columnist Deirdre McCloskey's story of tangling with the unholy union between the psychiatric establishment and the carceral state during her gender transition (page 12). You'll read Elizabeth Nolan Brown's wide-ranging investigation into Operation Cross Country, a series of ongoing stings that purport to be searching out evil men who traffic children into sexual slavery but in fact amount to a war on people engaging in consensual commercial sex (page 16). Plus an item about rape in prison (page 11), and Free-Range Mom Lenore Skenazy on the late, lamented *Playboy* empire (page 6).

Sex is still fun. Don't let *Reason* put you off your game. But mixing sex and the state has never been a good idea.

KATHERINE MANGU-WARD is editor in chief of *Reason*.

WHEN *PLAYBOY* MADE IT BIG

LENORE SKENAZY

***PLAYBOY* MAGAZINE USED** to be the contraband men of all ages hid in their sock drawers. Now it might as well be another pair of socks.

It's hard to get excited by a nudie magazine anymore—especially one without any nudes. Since March 2016, *Playboy* no longer features naked ladies, which is kind of like Hershey's still selling almonds without the chocolate.

But props where props are due: It's unlikely we would be as blasé as we are today about sex, porn, and even women's lib if it weren't for Hugh Hefner and his crazy 1953 creation.

Hef was a frustrated cartoonist at the time, working in the *Esquire* subscription department because that was the closest he could get to the world of publishing. When his request for a $5 a week raise got turned down, he decided to strike out on his own. Somehow he pulled together $10,000 and prepared to launch a racy new magazine: *Stag*.

Fortunately for him, the name was already taken. So instead he called it *Playboy*. The first edition featured a centerfold (a word we wouldn't even have without him!) dubbed "Sweetheart of the Month." In the very next issue, the sweetheart was rechristened a "Playmate." As the author Julie Keller has mused, "There is a vast ideological gap between the words."

There sure is. The former harkened back to Mary Pickford, courtship, a-settin' on the velveteen settee. The latter is someone you play with. It's fun, but it's not forever.

Thus began the smashing of taboos.

The genius of *Playboy* was not that it published naked young ladies. There were other ways to get your grubby paws on those pictures even then. As *Time* noted in a cover story on Hefner at the height of his career—1972, when his magazine was selling 7 million copies a month—"He took the old-fashioned, shame-thumbed girlie magazine, stripped off the plain wrapper, added gloss, class and culture."

As its subscriber base grew, so did *Playboy*'s reputation as a purveyor of taste. It showcased some of the best writers around: Truman Capote, Kurt Vonnegut, Joyce Carol Oates. Its interviews were so candid and surprising that they often made news, as when Jimmy Carter admitted that he had "lusted in his heart" or Martin Luther King Jr. told interviewer Alex Haley about the first time he experienced racism.

So, yes, you really could read *Playboy* just for the articles. Then again, you could read *The New York Review of Books* for the same thing. Did you?

The writing not only provided gentlemen with an excuse to subscribe, it helped change the entire perception of nonmarital sex, from dark, dirty doings with prostitutes to a sophisticated pastime men pursued with willing women of their own class. This, of course, required willing women. And that required a revolution.

Hefner himself has said he was a feminist before it was cool. Exactly how feminist is a question for the gender studies classes. Sure, he "objectified" women's bodies. But he also supported birth control (he had to), premarital sex (ditto), and sexual pleasure for both partners (why not?). He got behind the Equal Rights Amendment, and he clearly believed in women in the workforce—he hired hundreds of them to be bunnies.

Ironically, one thing he did not seem to like was real, earthy sexiness. Peter Bloch, a former editor at *Penthouse*, recalls getting *Playboy* every month, "opening it up with great anticipation and always being disappointed. Because the girls were very cute, but they were photoshopped and in

PHOTO

"SIMPLY PUT, ANY policy proposal which drives up costs of Corona, tequila, or margaritas is a big-time bad idea. Mucho Sad."

—Sen. Lindsey Graham (R–S.C.), in a tweet responding to Donald Trump's proposed 20 percent tax on imports from Mexico

weird poses. Any woman I saw walking down the street seemed more sexy."

It's possible that's because Hefner wasn't really selling sex. He was selling lifestyle. The women were simply part of a modern man's lair, along with a wet bar and a hi-fi. That's why Hef made sure all the advertising was aspirational. Howard Lederer, then the magazine's ad director, told *Time* in 1972: "We create a euphoria and we want nothing to spoil it. We don't want a reader to suddenly come on an ad that says he has bad breath. We don't want him to be reminded of the fact, though it may be true, that he is going bald."

Martin Pazzani was a brand manager at Smirnoff Vodka back in *Playboy*'s heyday. "We spent tens of millions" on ads, he recalls. Today, he is CEO of Tears of Llorona, a premium Tequila company. He doesn't advertise in *Playboy*—in fact, he doesn't advertise in magazines at all.

That's part one of the one-two punch that knocked the wind out of *Playboy*. "The internet was a problem for just about every existing media enterprise," says Nat Ives, executive editor of *Advertising Age*. But of course, the internet provided more than just a new ad medium. It provided more porn than the Playmates could ever hope to. "*Playboy* changed the landscape, and then vice versa," as pop culture historian Robert Thompson puts it.

Today the bunny logo, once so titillating, looks like something from a '70s time capsule. It has aged as inexorably as Hefner himself. But because it's still one of the most recognizable brands on earth, publicist Richard Laermer came up with perhaps the best possible idea for it: Open a *Playboy* museum.

Do it in Vegas. Showcase the man, the mansion, the magazine. Trace their trajectory across the times they changed. Fill the gift shop with *Playboy* overstock—mugs, sunglasses, keychains. And in the café, who's serving the Heffacino?

Bunnies! Male, female, and gender-fluid. Just like that, *Playboy* goes from creaky to cheeky—a thing to be celebrated for its place in American history, not just its place in the sock drawer.

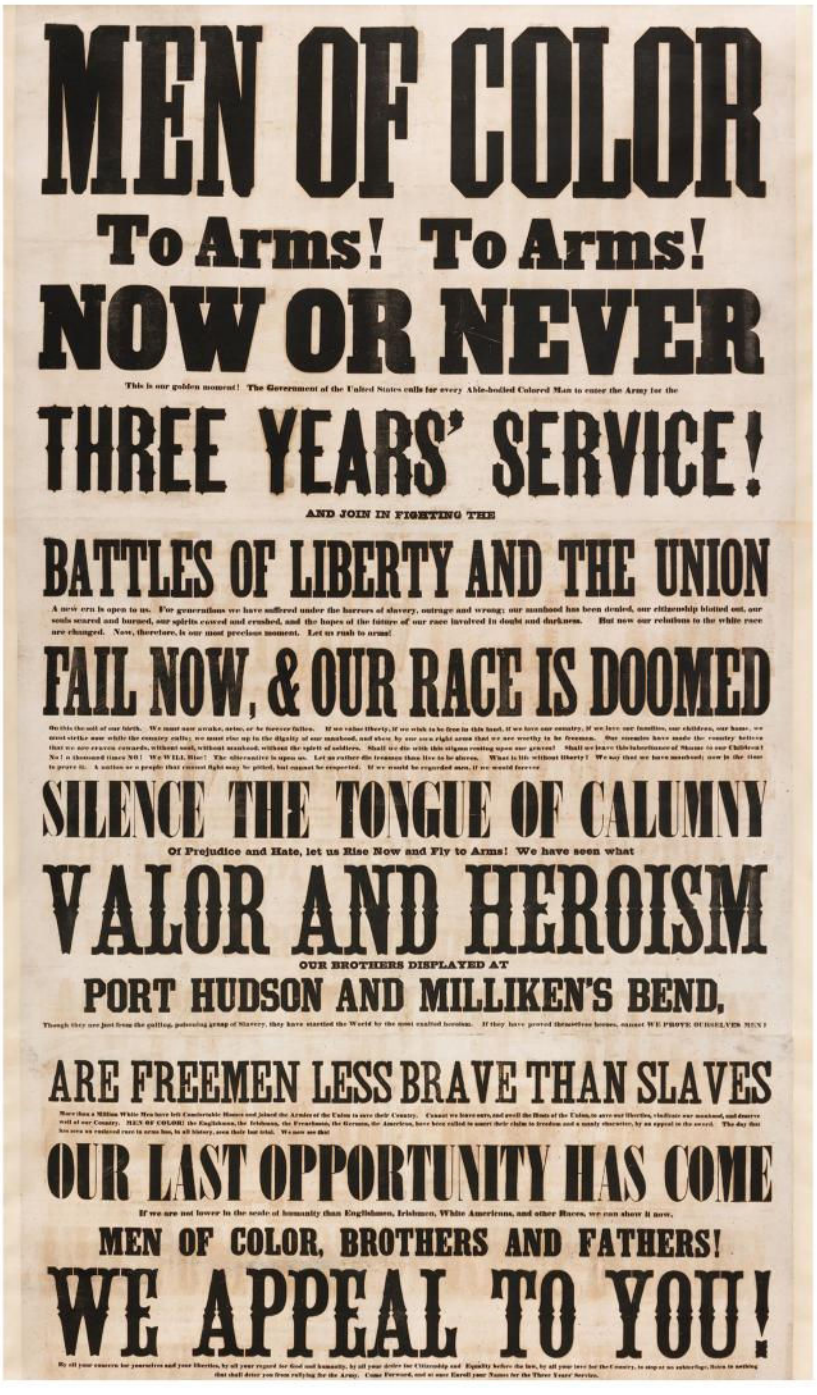
LENORE SKENAZY is a public speaker and the author of the book and blog *Free-Range Kids*.

Sen. Lindsey Graham: phot by: Jason Bahr/Stringer/Getty

LAW

FREDERICK DOUGLASS HATED SOCIALISM

DAMON ROOT



IN NOVEMBER 1848, a socialist activist gave a speech at the 13th annual meeting of the Rhode Island Anti-Slavery Society. "Mr. Inglis" began his remarks well enough, reported the abolitionist leader Frederick Douglass, who was also there to give a speech that day, "but strangely enough went on in an effort to show that wages slavery is as bad as chattel slavery."

Douglass soon became infuriated with the socialist speaker. "The attempts to place holding property in the soil—on the same footing as holding property in man, was most lame and impotent," Douglass declared. "And the wonder is that anyone could listen with patience to such arrant nonsense."

Douglass heard a lot of arrant nonsense from American socialists. That's because, as the historian Carl Guarneri has explained, most antebellum socialists "were hostile or at least indifferent to the abolitionist appeal because they believed that it diverted attention from the serious problems facing northern workers with the onset of industrial capitalism." The true path forward, the socialists said, was the path of anti-capitalism.

But Douglass would have none of that. "To own the soil is no harm in itself," he maintained. "It is right that [man] should own it. It is his duty to possess it—and to possess it in that way in which its energies and properties can be made most useful to the human family—now and always."

Douglass favored the set of ideas that came to be known as classical liberalism. He stood for natural rights, racial equality, and economic liberty in a free labor system. At the very heart of his worldview was the principle of self-ownership. "You are a man, and so am I," Douglass told his former master. "In leaving you, I took nothing but what belonged to me, and in no way lessened your means for obtaining an *honest* living." Referring to his first paying job after his escape from bondage, Douglass wrote: "I was now my own master—a tremendous fact." This individualistic, market-oriented definition of liberty put Douglass squarely at odds with the socialist creed.

The abolitionist-turned-socialist John A. Collins offers a telling contrast. In the 1840s, Collins went on a fundraising trip to England on behalf of the Massachusetts Anti-Slavery Society. He returned home a devotee of the English socialist George Henry Evans.

The "right of individual ownership in the soil and its products," Collins declared, are "the great cause of causes, which makes man practically an enemy to his species." Collins now thought private property was the root of all evil.

He didn't remain much of an abolitionist after that. "At antislavery conventions," the historian John L. Thomas has noted, "Collins took a perfunctory part, scarcely concealing his impatience until

the end of the meeting when he could announce that a socialist meeting followed at which the real and vital questions of the day would be discussed."

Perhaps the most significant left-wing attacks on the abolitionists were found in the pages of the socialist journal *The Phalanx*. "The Abolition Party," complained an unsigned 1843 editorial, "seems to think that nothing else is false in our social organization, and that slavery is the only social evil to be extirpated." In fact, *The Phalanx* asserted, the "tyranny of capital" is the real problem, because capitalism "reduces [the working class] in time to a condition even worse than that of slaves. Under this system the Hired Laborer is worked to excess, beggared and degraded....The slave at least does not endure these evils, which 'Civilized' society inflicts on its *hirelings*."

When it came to attacking free labor, the socialists and the slaveholders adopted certain identical positions. For example, the South's leading pro-slavery intellectual, the writer George Fitzhugh, argued that free labor was "worse than slavery" because it meant that the capitalists were free to exploit the workers. The idea that "individuals and peoples prosper most when governed least," Fitzhugh wrote, was nothing but a lie: "It has been justly observed that under this system the rich are continually growing richer and the poor poorer." As for the pro-market writings of Adam Smith and others, Fitzhugh dismissed them as "every man for himself, and Devil take the hindmost."

Douglass, meanwhile, took a page from John Locke's notion of private property emerging when man mixes his labor with the natural world: "Is it not astonishing that, while we are plowing, planting, and reaping, using all kinds of mechanical tools, erecting houses," he marvelled, "we are called upon to prove that we are men!"

Having experienced slavery firsthand, Douglass had no doubt that free labor was infinitely superior to it.

Senior Editor DAMON ROOT is the author of *Overruled: The Long War for Control of the U.S. Supreme Court* (Palgrave Macmillan).

POLICY

THE COST OF CARRYING DEBT

PETER SUDERMAN

SOMETIME IN 2017, the total U.S. national debt will hit $20 trillion—more than the total gross domestic product (GDP) of the country in a year. That figure is projected to keep growing over time, thanks to rising annual deficits. Debt held by the public, a measure that counts all federal securities sold to individuals, corporations, and state and local governments, plus foreign investors, currently clocks in around $14 trillion. That figure is expected to hit $23 trillion in 2026.

There are risks to carrying a debt burden this big. It increases the nation's susceptibility to a fiscal crisis if interest rates rise, and it limits the sorts of projects government can take on in a constrained fiscal environment. The greater the debt, the greater these risks become.

One of the biggest drawbacks of a high debt load is the cost of paying interest, which is currently one of the largest spending categories in the U.S. budget. At $241 billion last year, debt service—which buys the country nothing except a continuation of its debt—is effectively a program unto itself.

Although today's unusually low interest rates aren't likely to return to historic norms anytime soon, they are expected to increase over the coming years. That means that interest payments will go up too. Indeed, according to a December report by the Committee for a Responsible Federal Budget, relying on data from the Congressional Budget Office and the Treasury, spending on interest payments will rise faster than any other program over the next decade, jumping 196 percent. In comparison, military spending, Social Security, and health care programs are expected to increase by 24, 77, and 78 percent, respectively.

That means that without policy changes, debt service payments will almost triple to $712 billion by 2026, and they will double as a share of the economy to 2.6 percent of GDP. Over the same time frame, about three-quarters of the expected increase in the budget deficit—the yearly gap between the government's spending and revenues—can be explained by the rising cost of those interest payments.

All of this depends on how interest rates change. They aren't expected to spike, but if they did, the consequences would be severe. If rates are even a single percentage point over projections, total debt will be $1.5 trillion higher over a decade.

Low interest rates ease the pain of carrying so much debt. But in the long run, somehow, the U.S. will end up paying for it.

PETER SUDERMAN is features editor at *Reason*.

ECONOMICS

WHY ARE MARKETS REJOICING AT TRUMP'S WIN?

The incoming president may not be good for the economy in the long run.

VERONIQUE DE RUGY

ON THE EVENING of November 8, 2016, as it became clear that assumptions about Hillary Clinton's certain electoral victory were wrong, investors began to squirm. Dow futures dropped by more than 700 points that night, and the liberal economist Paul Krugman wrote at *The New York Times* that "if the question is when markets will recover, a first-pass answer is never."

The next morning, however, the stock market completed a stunning reversal to end at a record high. What some have called a "Trump rally" has continued ever since, with the Dow Jones Industrial Average hovering just above the 20,000 mark at press time.

One explanation for Wall Street's seeming euphoria is that investors believe they're now less likely to see the continuation of tax hikes and micro-regulation desired by the Clinton campaign.

True, it's impossible to know what Donald Trump's win heralds on the policy front in the long term. But at least for now, the market appears to be betting that the new president will make good on campaign promises that businesses expect to be good for their bottom lines. The Republican sweep could pave the way, for instance, for a long overdue reform of the individual and corporate tax codes.

Right now, explains Cato Institute researcher Chris Edwards, corporations keep just $65 of every $100 in profits they earn, after taxes are taken out. "Trump is saying they will get to keep $85," he says. "If the profit stream increases by 30 percent ($85 vs. $65), so should the market value." After all, "in theory, stock valuations are the present value of future after-tax net profits to companies. So when you cut the tax rate on profits a lot, the [present value] of the net profits—the net cash—to the shareholders rises a lot."

The S&P Financials Index returned 16.75 percent from Election Day through year end, compared to 5.98 percent for the S&P as a whole. This suggests markets are bullish about the possibility that Trump will loosen Wall Street–specific regulations such as those in Dodd-Frank. Multinational companies may also have concluded they'll be allowed to repatriate some of their foreign cash holdings to the U.S. at a lower cost than they could have under Clinton.

None of which means the markets are right. Andrew Hofer, the head of Taxable Fixed Income at Brown Brothers Harriman & Co., thinks markets may be overcorrecting for a bout of pessimism that started in late 2015. "Now that we seem to have passed through that period without the sky falling, sentiment may be overshooting in the other direction," he says. "Trump's election has been the convenient foil on which the market can project its optimism. Market multiples have increased rapidly on the same slow positive change in fundamentals, but with little attention to the greater uncertainty this administration brings around global trade, interest rates, inflation, geopolitical risk, and institutional continuity."

In other words, there's plenty to be nervous about, too. "The market seems to be pricing in a lot of positive news, and we don't have a great deal of evidence to base that on," said Steve Major, the global head of fixed-income research at HSBC Holdings PLC, in a recent interview with *The Wall Street Journal*. While consumer confidence is at its highest level since 2007, the Federal Reserve's latest survey of current economic conditions—a document known as the Beige Book—offers little evidence that the election has had an impact on the actual economy.

Not surprisingly, many market observers don't expect the excitement to last. With nearly $20 trillion in national debt on the books, entitlement and pension crises on the horizon, and no plan to address any of that, it's difficult to see how Trump's tax cuts, if they materialize at all, can be sustained in the long run. And then there are the market risks that would come if Trump wages a trade war with China and Mexico.

Considering Republicans' terrible track record when it comes to fighting for concrete pro-market policies, I'd say protectionism, cronyism, higher spending, an ill-thought-out Obamacare repeal, and/or a scandal involving Trump's business empire seem far more likely than 5 percent economic growth and booming markets. Enjoy the high while it lasts. r

Contributing Editor VERONIQUE DE RUGY is a senior research fellow at the Mercatus Center at George Mason University.

Illustration: Joanna Andreasson

CIVIL LIBERTIES

TRUMP CAN HELP STOP PRISON RAPE

C.J. CIARAMELLA

DURING THE LAME duck session in December, Congress did something amazing: It actually passed a criminal justice bill. Tucked among the provisions of the bipartisan law were new state reporting requirements on prison rape. While that's great, there's a lot more that could be done if the federal government is serious about stopping this heinous crime.

Back in 2003, Republican Sen. Jeff Sessions worked across the aisle with Democrat Sen. Ted Kennedy to pass the Prison Rape Elimination Act (PREA). Evangelical Christians, led by Chuck Colson—the former Watergate conspirator who turned to prison ministry after his own stint on the inside—were instrumental in whipping GOP support. But the Justice Department didn't adopt national PREA standards until 2012. Four years after they went into effect, the Associated Press reported that only 12 states were in full compliance with them.

A nationwide inmate survey by the Bureau of Justice Statistics found that in 2011–12 an estimated 4 percent of state and federal prison inmates and 3.2 percent of jail inmates reported being sexually victimized by another inmate or a member of the staff. In 2013, Eli Lehrer wrote at *National Review* that "PREA has reasonably few real teeth and, as a result, truly awful prisons and jails can still get away with allowing rampant sexual abuse. Cultural attitudes towards prison rape, distressingly, haven't changed much."

One major requirement of the law is that juveniles and other vulnerable inmates be segregated from the general adult population. This is a logistical headache for prisons and jails, especially ones in states that can try juveniles as adults, and the official consequences for failure to comply are rather minor. Under PREA, states risk losing 5 percent of their federal prison grants for noncompliance. Governors of those states are required to submit letters to the Justice Department demonstrating how they are using federal funds to bring their prisons in line. County and local jails are, by and large, not covered by the law at all.

Sessions is now Donald Trump's pick for U.S. Attorney General. If confirmed, he'll have authority over the entire federal Bureau of Prisons system. Will he use his power to enforce the bill he co-sponsored?

Improving federal oversight of state prisons' efforts to stop rape, and strictly enforcing the current standards in federal prisons and immigrant detention centers, are two areas where the new administration and GOP-led Congress could make bipartisan, good-faith progress on criminal justice.

Liberals, conservatives, and libertarians all agree that prison rape is a gross violation of inmates' human dignity and an unacceptable stain on the U.S. justice system. Congress has already shown twice that the two parties can work together on it. It's time to give PREA teeth.

C.J. CIARAMELLA is a reporter at *Reason*.

SEX, SHRINKS, AND THE STATE

One woman's adventures in gender crossing and civil disobedience

DEIRDRE NANSEN MCCLOSKEY

We libertarians are pretty good at leaving strangers, even strange strangers, alone. But we might do well to take the law of love more seriously.

I'VE BEEN A woman since age 53, starting on Thanksgiving Day 1995.

The concept of gender transition has burrowed into our culture—recently in a surprisingly cheerful way, as in *Transparent*, the funny, award-winning TV series in which the only sane person is the man becoming a woman, or *Transamerica*, the sweet 2005 movie for which Felicity Huffman playing male-to-female got a Best Actress Oscar nomination.

But things weren't always so happy-go-lucky.

In northern Europe and its offshoots, starting with the birth of psychiatry in the late 19th century, governments came to have a deep interest in pushing people around in order to punish unconventional expressions of gender and unapproved sexual orientations. While you're binge-watching those modern uplifting trans tales, don't miss 2014's *The Imitation Game*. It's about the governmental ruination of Alan Turing, the gay man who saved Britain from German submarines and received chemical castration as a thank you.

The unrelenting terror of the 1950s ruined the queer and unprotected. Turing. State Department homosexuals. A dear friend of my family who taught at Harvard. But not Sen. Joe McCarthy's pal Roy Cohn and his boyfriends, of course.

I didn't get pushed around nearly as much as I might have. I got lucky, beginning my transition as a well-to-do tenured professor of economics in the United States just when that reign of gender-and-sexuality terror was beginning to relent.

But the state remained inappropriately, and sometimes violently, involved in the question of my gender. In 1995, standing in court in gentle Iowa to get my name changed from Donald, the judge had seen such requests before and saw no state interest in preventing it. When a month later I needed female documentation to travel without embarrassment to the Netherlands to teach for a year, I wept over the phone to a sympathetic official in the New Hampshire passport office, and she relented.

And in the fall of that same crazy year, I had $8,000 ready to throw at defense lawyers when my younger sister, along with a University of Chicago colleague, tried three times to have me committed for psychiatric observation. They succeeded twice, first in Iowa City and then in Chicago.

LET ME BE clear: If being trans is a psychiatric disorder, I've got it.

The libertarian psychiatrist Thomas Szasz, who chronicled my adventures in one of the last books he wrote before his death, fought to stop such "mental health" persecutions all his career, without much effect. In most states even now, if two people who don't know you from Adam (or Eve, for that matter) are willing to claim falsely, and without penalty, that they heard you threaten to kill yourself—or in my case, threaten to have a nose job—sheriff's deputies will escort you in handcuffs to the local locked ward for three to five days of observation.

What's worse, they might keep you there indefinitely, particularly if you let them drug you on admission. No kidding.

If you are accused of murder you at least have a chance of getting free sometime, especially if you are innocent. If you are accused of being crazy, the government can put you away forever on the say-so of one psychiatrist.

Bonus tip: If this does happen to you, do *not* tell a joke. The psychiatrist won't laugh. He'll write it down, alongside the notation "Shows little insight."

HOW, YOU MIGHT ask, did shrinks wind up in the business of helping busybodies and their government henchmen police gender expression?

The church inquisitors handed Joan of Arc to the English occupying army to burn at the stake, which the army for its own reasons was very willing to do. The charges were heresy ("Shows little insight") and especially her unwillingness to dress in women's clothing.

Psychiatrists took up the role of inquisitors with an unseemly enthusiasm. The *Diagnostic and Statistical Manual of Mental Disorders* (*DSM*) has grown notably thicker with every edition since its first in 1952, with more and more items added to the list of disorders. Homosexuality was removed from the *DSM-II* in 1974; gender identity disorder was added in the *DSM-III* in 1980. I suggest in the next edition that the psychiatrists add a diagnosis of "Unhealthy Obsession with Other People's Gender Expression."

Nowadays, the psychological establishment, and the even more authoritarian psychiatric establishment, frown on counseling people *against* transitioning. The unwieldy *DSM-5* says that only *gender dysphoria* is a disorder these days—it's a problem if your gender identity causes you discontent, but not if it misaligns with your chromosomes. That's good, because like the butching-up camps for gay boys that were so popular in the mid–20th century, bullying people into standard gender expression doesn't work. If your little girl keeps saying she wants to be a boy, maybe in freedom you ought to let her. After all, contrary to the myth on the lips of transphobes, it's reversible. If the new boy decides later to go back to girlhood, he can.

But psychiatrists remain the ever-vigilant guards at the gates of trans freedom. The mores of the profession are friendlier, but people like me remain at the mercy of the highly credentialed owners of fainting couches for favors like certificates of mental health, signatures on paperwork for medical procedures, and testimony before judges who approve gender changes on official documents.

And the state remains always alert against predatory locker room bogeymen (bogeywomen?), seeing sex wherever gender is mentioned, as the Texas Bathroom Bill of 2017 shows. I reckon the solons of the Lone Star State, who claim fiercely to admire free societies, are contemplating putting a genetic scientist equipped with an electron microscope and police powers outside every public bathroom.

A lot of people who think they love freedom balk at gender crossing. Conservatives who read my writing on the glories of free enterprise are often on board—even enthusiastic about reading such sentiments from a woman—right up until the moment that they learn my backstory.

My middle-aged son, who says he's a libertarian, has not spoken to me for 20 years because of my transition. I have three grandchildren I've never been allowed to meet. A neighbor of mine down the hall, a friend of my son and a well-known libertarian, won't break bread with me and won't talk with me about our common intellectual interests, or anything else. Otherwise he's pleasant. Lord save us from illiberal libertarians.

Still, if my son and my neighbor ever relent, I'll give them both a big hug and then we could settle in for a discussion on safe territory, like regulations on publishing or the inefficiencies of the coffee trade. I love my son. Oddly, I even love the grandchildren I will likely never know. We libertarians are pretty good at leaving strangers, even strange strangers, alone—even in a world where busybodies continue to call on agents of the state to meddle. But we might do well to take the law of love more seriously.

In the dedication of the book I wrote about my experiences in 1999, *Crossing: A Memoir*, I listed all the women who had offered cheerful support over the fraught years of transition, starting with my beloved wife of three decades. The women performed small and great acts of grace, from a sweet note or luncheon to protecting me from violent psychiatrists. Two hundred and forty names.

It's been decades now, and mostly the news is good. When things get better, it's mainly through ethical change in the conversation of the society, the same way we got economic freedom two centuries ago. The kids pioneer the shift. Grandchildren of people my age are often comfortable with having gay friends or being gender-queer in, of all things, middle school. Sometimes even the football team and the cheerleading squad are cool with it.

I go to my lovely women's group at church. We laugh, and we gently help in each other's lives. I'm now quite close with that same younger sister who tried to have me committed long ago. We smilingly discuss whether I constitute my mother's youngest daughter or her oldest.

IN TRUTH, I don't recommend gender crossing unless you have a sense of humor and are lucky enough be surrounded by similarly genial people.

In 1995, as I stood in his outer office, my dean at the University of Iowa wondered aloud why macho Donald McCloskey was sporting faux-diamond studs in both ears. "You want to know?" I asked. He brought me into his inner office, and I told him. When he put his jaw back into his head, he launched into a standup routine. As a dean, he said, "Oh, that's *great* for our affirmative action program! Up one, down another!" As an economist, "I pay you a lot. Now I can cut your salary to *70 cents on the dollar*!" As a libertarian, "Good gracious! I was afraid you were going to confess to converting to *socialism*!"

Never socialism. That would be crazy. r

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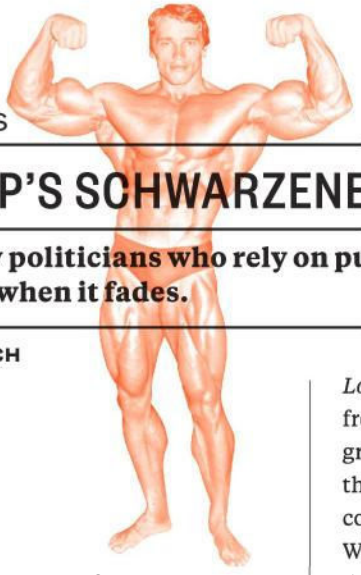
TRUMP'S SCHWARZENEGGER PROBLEM

Celebrity politicians who rely on public affection can come unglued when it fades.

MATT WELCH

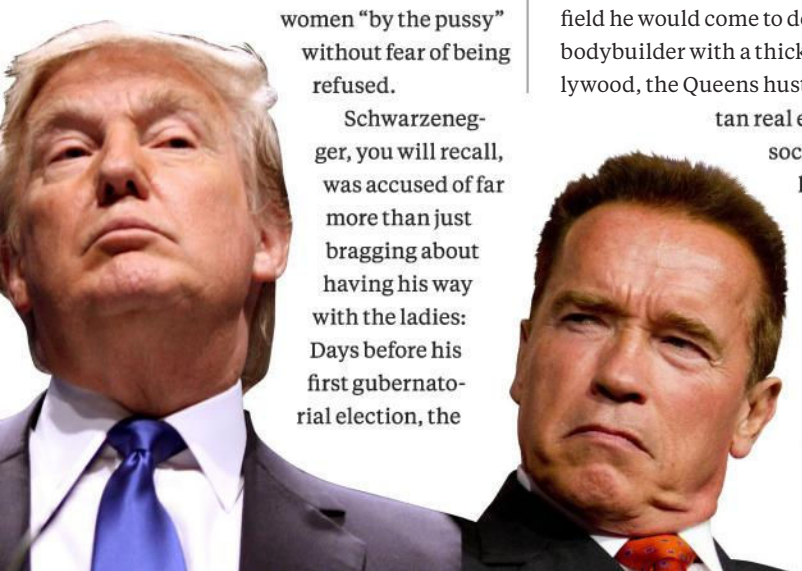


JANUARY MARKED THE first time in American history that a president-elect launched a Twitter feud with his celebrity replacement on a reality TV show.

"Wow, the ratings are in and Arnold Schwarzenegger got 'swamped' (or destroyed) by comparison to the ratings machine, DJT," Donald Trump tweeted after the 2017 debut of *Celebrity Apprentice*, the show he long hosted before obtaining new employment. "So much for being a movie star...But who cares, he supported Kasich & Hillary."

Schwarzenegger, who governed California from 2003 until 2010, had indeed backed Ohio Gov. John Kasich in the GOP primaries, and then anti-endorsed Trump in the general election for a reason dripping with irony: groping allegations.

"For the first time since I became a citizen in 1983, I will not vote for the Republican candidate for President," the former Mr. Universe said in a statement last October, the day after a tape emerged of Donald Trump bragging about how his celebrity status allowed him to "grab" women "by the pussy" without fear of being refused.



Schwarzenegger, you will recall, was accused of far more than just bragging about having his way with the ladies: Days before his first gubernatorial election, the *Los Angeles Times* published testimonies from a half-dozen women that he had groped and humiliated them, accusations that prompted the actor to apologize and concede that he had "behaved badly." Within hours of the Terminator's self-distancing from the GOP nominee, Trump supporters were circulating images of Arnold pawing the nether regions of a babe on his lap.

Still, anyone who has watched the classic documentary *Pumping Iron* could have predicted that Schwarzenegger would find a clever way to respond to Trump's *Celebrity Apprentice* taunts. Sure enough: "There's nothing more important than the people's work, @realDonaldTrump," the new host tweeted out. "I wish you the best of luck and I hope you'll work for ALL of the American people as aggressively as you worked for your ratings."

Get to the chopper!

In any B-grade action movie, this is the part where the antagonist says, "We are not so different, you and I." For in fact Trump and Schwarzenegger have even more in common than hosting the same television show, taking the same unusual career path from celebrity to executive office, and surviving the same type of sexual allegations.

Each man was a rank outsider in the field he would come to dominate: the bodybuilder with a thick accent in Hollywood, the Queens hustler in Manhattan real estate and high society. Each would live their lives surrounded by liberal Democrats, including sometimes at home. And each exceeded skeptics' expectations at nearly every step, in large part due to a conscious cultivation of consumer fan bases.

It's that last commonality, as applied to politics, that provides the cautionary tale. For Schwarzenegger's connection to and reliance on "the people" ended up derailing his governorship, and Trump is already exhibiting signs that popular affection may be his Achilles heel as well.

It's hard to remember now, but the California governor came into office quoting Milton Friedman and vowing to "blow up the boxes" in Sacramento. He hoped to use his populist appeal to route around the Democratic legislature. In November 2005, he called a special election to vote on eight propositions that would have reduced the power of public sector unions (à la Wisconsin Gov. Scott Walker half a decade later), capped public spending, and more. After an intense and expensive campaign—including one year of the governor being dogged at each and every public appearance by union protestors, while his popularity plummeted—all eight propositions failed.

The people had spoken. *Hasta la vista*, Uncle Milton.

From then on, as *Los Angeles* magazine would later put it, "Schwarzenegger lurched 180 degrees to his left." Bullet-train boondoggles, state-run stem-cell institutes, tax increases, emissions ratchets, mandatory sexual harassment training—it was Democratic wish-list time. The governator left the state with roughly the same godawful fiscal mess he had promised to clean up.

Trump has already demonstrated a reality-bending obsession with popularity since becoming president. His press secretary's first act was to berate journalists for not believing the administration's bogus claims about the size of the audience at the inauguration. Within days the president was vowing to investigate his own groundless claim that as many as 5 million people voted illegally last November.

And if his popularity continues to dive? Stick around!

Editor at Large MATT WELCH is co-author, with Nick Gillespie, of *The Declaration of Independents: How Libertarian Politics Can Fix What's Wrong with America* (PublicAffairs).

Schwarzenegger: Neon Tommy/Creative Commons (below) Wikipedia (above)
Trump: Gage Skidmore, Wikimedia

GUNS

REVISITING RESTRICTIONS ON THE RIGHT TO BEAR ARMS

BRIAN DOHERTY

YOU CAN'T LEGALLY own a gun if you have been convicted of most felonies with a potential sentence of more than one year of imprisonment (or, if it's a misdemeanor, more than two years). Federal law, at 922(g)(1) of the U.S. Code, makes that clear. But some offenders who were banned from possessing firearms have succeeded in getting lower courts and a federal appeals court to agree that the statute can, in certain applications, violate people's Second Amendment rights.

In January, the federal government applied for certiorari to the Supreme Court in *Binderup v. Holder*, which consolidates two such cases.

One of the plaintiffs is Daniel Binderup, who had a consensual but illegal sexual relationship with a 17-year-old in 1998. He was sentenced to probation for three years under a misdemeanor conviction. The federal government believes this bars him from legal gun ownership forever, as it was a crime for which he could have been (though he wasn't) given over two years' incarceration.

The other plaintiff is Julio Suarez, who was found with a gun in his car in Maryland without a carry license. He was given 180 days of prison in a suspended sentence, plus a fine and probation.

Attorney Alan Gura, who won two previous Supreme Court cases for Second Amendment rights—*Heller* in 2008 and *McDonald* in 2010—is one of Binderup's lawyers. At issue, he says, is whether 922(g)(1) should cover people whose crimes present no evidence of danger to the public, now that gun ownership has been recognized by the *Heller* decision as an individual constitutional right.

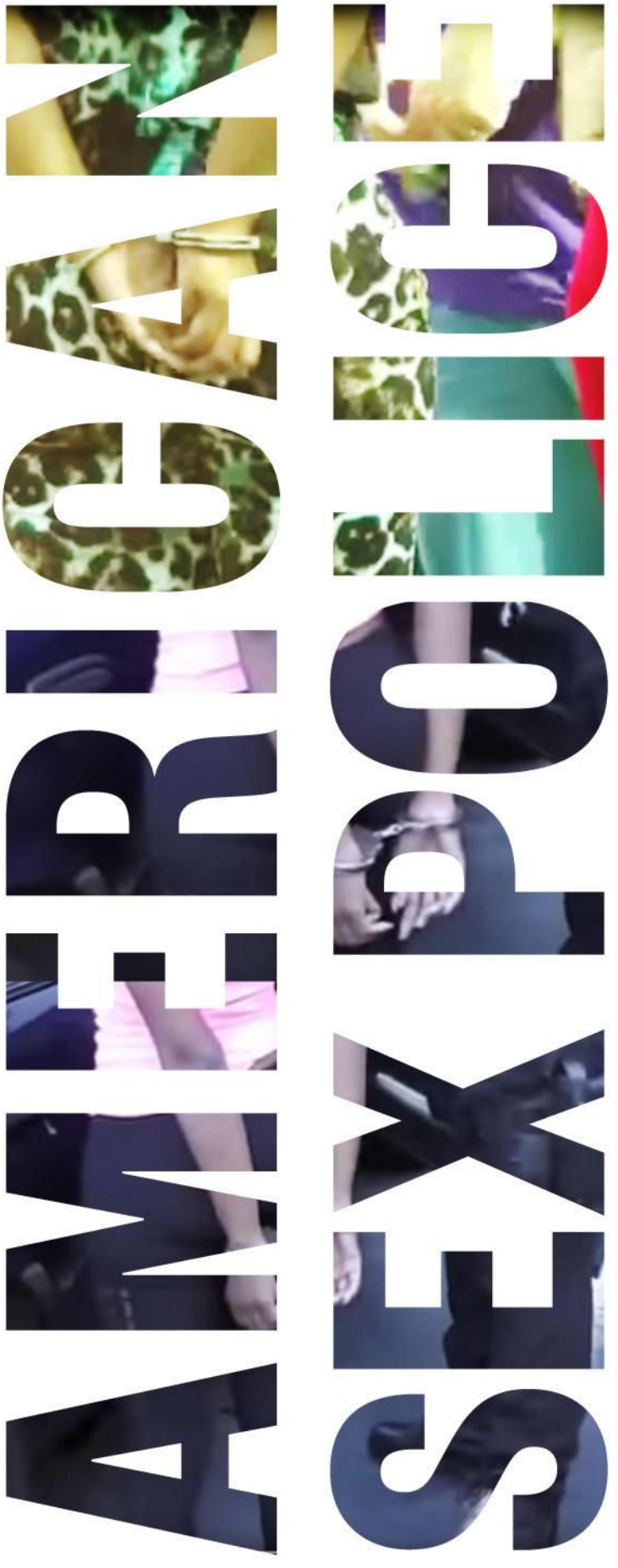
One of the court filings from Binderup's legal team sums up the relevant issue well: "*not one word* of the Government's brief discusses the critical issue in this as-applied Second Amendment challenge: whether Daniel Binderup's possession of firearms would be in any way dangerous."

In a complicated September 2016 decision, an *en banc* panel of the 3rd Circuit Court of Appeals declared that Binderup's and Suarez's convictions "were not serious enough to strip them of their Second Amendment rights." Reasons given included that the offenses were nonviolent and earned light sentences.

The government hopes the Supreme Court will reconsider, and its certiorari petition spells out what's at stake from its perspective: "Section 922(g)(1) is by far the most frequently applied...firearms disqualification, forming the basis for thousands of criminal prosecutions and tens of thousands of firearm-purchase denials each year."

Gura already has other 922(g)(1) challenges in process and indicates many more could be waiting in the wings.

BRIAN DOHERTY is a senior editor at *Reason* and the author of *Gun Control on Trial: Inside the Supreme Court Battle Over the Second Amendment* (Cato).



WITH SWEEPING TRAFFICKING STINGS, THE FBI RETURNS TO ITS ROOTS AS THE NATION'S VICE SQUAD.

ELIZABETH NOLAN BROWN

IN AN UNREMARKABLE hotel room, a team of officers watches the footage streaming from a hidden camera next door. A middle-aged man is making arrangements to pay a young woman for sex. Once she agrees, the squad will rush in, shouting instructions, their bulletproof vests bulging with firearms and emblazoned with POLICE or FBI. The woman—or is she a girl?—will have her hands tied behind her back and her phone confiscated. She will sit on the bed, partially undressed, as a team of men search her room, pawing through her underwear drawer and toiletry bags, seizing any cash they find. She will eventually be fingerprinted, interrogated, and taken into police custody.

Welcome to Operation Cross Country, the U.S. government's huge, intrusive, and utterly ineffective effort to fight child sex trafficking.

Variations on the scene above play out again and again in sensationalized montages of footage from the stings, which the FBI has been proudly posting to YouTube since Operation Cross Country launched in 2008. The vignettes are unsettling. In one scene, someone can be heard crying in the background as the camera pans past her stuff—Skittles, electric toothbrush, makeup—and settles on cops counting stacks of money. Other clips follow officers tailing people in tight dresses and stiletto heels or scouring printouts of escort ads from hotel beds. Shot after shot show authorities handcuffing young people, mostly women and girls, and parading them down dim hallways, thick gloved hands gripping skinny arms on either side, or pushing them up against cop cars, the camera lingering on cuffed wrists clasped tightly over baggy jeans or long, bare legs.

The latest iteration of the initiative—Operation Cross Country X—took place across 103 U.S. cities from October 13 to 16. According to the FBI, it involved the efforts of 74 federally led Human Trafficking Task Forces, comprised of officers from 55 FBI field offices and more than 400 federal, state, and local law-enforcement agencies. These included city and suburban police departments, county sheriff's offices, state police and investigative bureaus, juvenile detention departments, drug enforcement units, and an impressive array of federal entities: Homeland Security Investigations, Immigration and Customs Enforcement (ICE), the U.S. Marshals Service, the Drug Enforcement Administration (DEA), Customs and Border Protection, the Internal Revenue Service (IRS), the Coast Guard Investigative Service, the State Department, myriad U.S. Attorney's Offices, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives. They were aided by the National Center for Missing and Exploited Children and local nonprofits that had recently received federal grants.

According to an FBI press release, this mighty group conducted "sting operations in hotels, casinos, truck stops, and other areas frequented by pimps, prostitutes, and their customers." The focus: "recovering underage victims of prostitution," or, as FBI Director James Comey put it, offering sexually exploited children a "lifeline" from a "virtual prison."

Overall, the operation identified 82 "children" engaged in prostitution, an average of about 0.88 per city, or one for every five agencies participating. All were teenagers—mostly 16- and 17-year-olds—and a number of cities where they were found made no simultaneous pimping or sex trafficking arrests. To the feds, anyone under 18 who trades sex acts for money is defined as a victim of sex trafficking, regardless of whether they have experienced abduction, violence, restraint, or threats.

In the end, only five men stand accused of federal crimes—with only two accused of crimes against actual minors. None of these suspects was part of anything even remotely resembling an organized criminal enterprise.

In the four months following Operation Cross Country X, U.S. prosecutors announced federal indictments against a Missouri man accused of driving an 18-year-old sex worker across state lines and a pair of cousins whose initially consensual pimping of three adult women (including one of the defendants' girlfriends) had turned abusive.

Two others were brought up on federal charges for sex trafficking of children, though both were cases of what might be called *statutory sex trafficking*, with no force, fraud, or coercion alleged by any parties. In one, a Kansas man is accused of earning "at least $100" for driving a 17-year-old girl to three prostitution appointments, which she arranged. In the other, a Texas man is accused of facilitating the prostitution of a 15-year-old whose fake ID said she was age 19. Police say the girl, a frequent runaway from state protective services, obtained the false identification before meeting her "trafficker," who claims he didn't know her real age.

Altogether, these numbers suggest a strikingly lackluster outcome for a federal crusade to save children from "modern slavery" (as so many in the Justice Department routinely call

it) and to bring their perpetrators to justice, particularly when you consider the manpower and money mobilized, the breadth of the effort, and the supposed magnitude of the underage sex trafficking problem.

VICE SQUAD

VIEWED FROM ANOTHER perspective, however, the latest Operation Cross Country was a blockbuster success. As a coordinated nationwide vice sting aimed at rounding up sex workers and their customers, there's no denying the results.

In Utah and Montana, 17 law enforcement units (including Homeland Security and the U.S. Marshals Service) joined together for three days to arrest or cite seven women for prostitution, arrest one man for violating a protective order against one of these women, arrest three women on outstanding warrants, and identify one teenager engaging in prostitution. In Mississippi, the FBI's Jackson office partnered with five local agencies and the state Bureau of Investigation, Department of Corrections, and Attorney General's Office to arrest five people for pimping, 22 people for prostitution, and one person for narcotics possession; no juveniles were identified. North Carolina's efforts involved 18 agencies in three counties, yielding the identification of one minor and the arrest of one person on a gun charge.

"St. Louis has the largest, most robust Task Force in the country," Daniel Netemeyer, the FBI's St. Louis crimes-against-children SWAT coordinator, says in an email. But this iteration of Operation Cross Country, he admits, "did not generate any arrests or recoveries." In Phoenix, the FBI "recovered one minor and arrested 11 adults on unrelated charges," says bureau spokeswoman Jill McCabe.

Oregon authorities conducted operations in Portland, Eugene, and Salem, where they made a big deal about raiding a strip club under suspicion of harboring underage prostitution. No juveniles were identified and no one was arrested from the raid. Ultimately, one minor was recovered in Portland and 20 adults were arrested for prostitution.

In the San Francisco Bay Area, an effort spanning six counties and 29 agencies yielded just 14 people identified as "pimps/associates," three people identified as adult trafficking victims, and six minors. Authorities also arrested 135 people for prostitution and 79 for solicitation. In addition, 63 "johns" were texted by a police "cyber patrol" when they responded to an online "escort" ad, and $10,000 in cash and 11 guns were seized.

Virtually everywhere, adult sex worker arrests vastly outpaced all other types of arrests, and far exceeded actual sex trafficking finds. FBI video from this year's operation includes footage of a command center where federal agents watch real-time updates from police departments around the country, keeping a running tally of minors identified and adults arrested. On the single night in October shown in the highlight reel, 28 juveniles—nearly 90 percent of whom were 16 or 17, plus two 15-year-olds and one 13-year-old—were identified. Seventy-eight people identified as "pimps" or their associates were arrested. And 329 adults were arrested for prostitution.

Since 2010, the FBI has stopped publicizing the numbers of sex workers arrested or total number of arrests. But communicating with field office representatives and scouring local news stories provided some idea of the magnitude. Tallying these figures reveals around 550 people, mostly women, were arrested or cited on prostitution charges as part of Operation Cross Country X. At least 175 people, mostly men, were arrested for solicitation of prostitution. And dozens of others were arrested for outstanding warrants, drug possession, unlawful possession of a firearm, driving on a suspended license, parole violations, outstanding court fees, or other low-level charges.

The real numbers are likely much larger, as there was no information made available to the public about prostitution arrests for 19 out of the 55 FBI jurisdictions, even in places where FBI reports vaguely noted that "local arrests" had been made. But even as an undercount, the prostitution arrest data shows that more than six times more sex workers were arrested in these stings than juveniles were identified. More than twice as many sex workers were arrested as those accused of being pimps or traffickers.

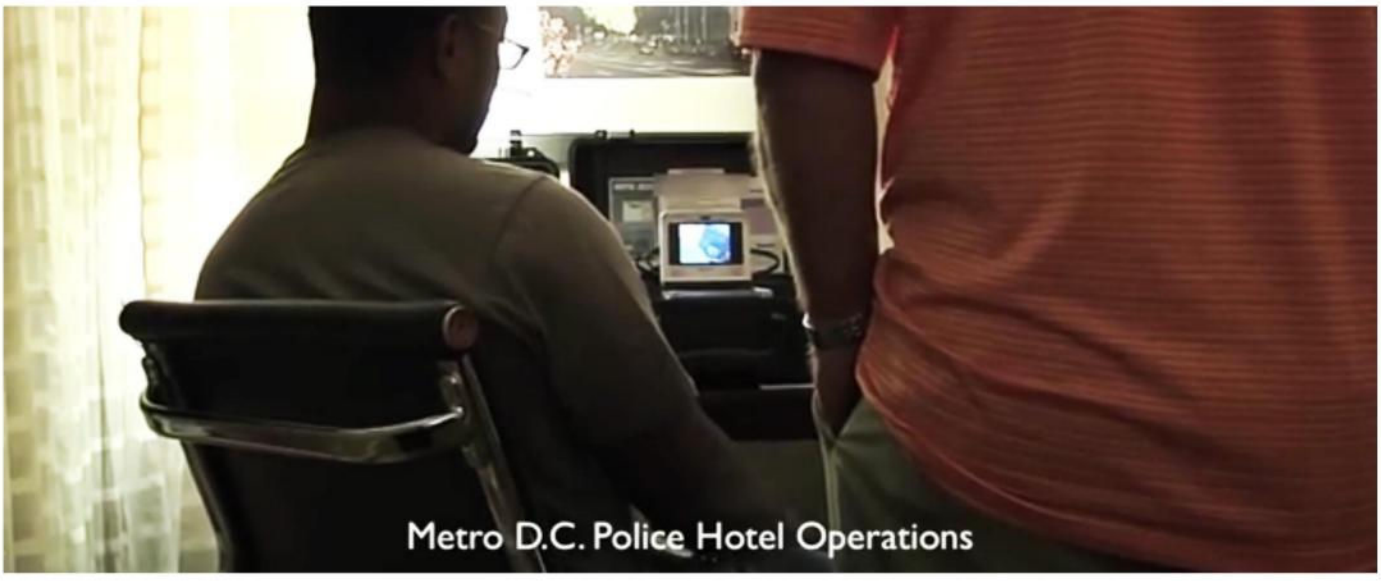
It's also misleading to draw a bright line between sex workers and "pimps." To the FBI, "pimp means anyone performing a managerial role, even if no minors, force, coercion, or fraud are involved and even when the person in the managerial role is herself a sex worker," as Katherine Koster, communications director for the Sex Workers Outreach Project, explained last year.

There's little evidence that Operation Cross Country is helping trafficking victims in a significant way, but there is ample indication that it's making lots of people worse off—not just men and women choosing to engage in consensual commercial sex, but teens who meet the FBI's definition of "victims" as well.

WHITE SLAVE TRAFFIC

NONE OF THIS is new territory for the FBI, which owes its rise to a mandate that it police private sexual activities. By monitoring and prosecuting prostitution in 21st century America, the agency is returning to its Progressive Era roots.

The surveillance of morally suspicious women and the war on commercial sex were what took the FBI—then known as the Bureau of Investigation—from a fledgling East Coast–centric operation to a force with outposts, agents, and authority across America. With the Mann Act of 1910, also known as the White Slave Traffic Act, the bureau became responsible for ensuring no



one transported women or girls across state lines for prostitution or "any other immoral purposes."

"The White Slave Traffic Act fell well within the Progressive Era's legal reform agenda dedicated to protecting innocent young women from sexual exploitation," notes Jessica R. Pliley in 2014's *Policing Sexuality: The Mann Act and the Making of the FBI*, "but it had the added effect of federalizing this 'protection.'" Before the Mann Act, the Bureau's "sphere of activity centered on the mid-Atlantic states on the Eastern Seaboard." To effectively enforce the new law, the agency "had to establish itself throughout the country, setting up field offices and local representatives in each state."

This was an era of intense concern about prostitution in America and, more specifically, fear that the U.S. was harboring a vibrant trade in young, white sex slaves. The hysteria over this supposed "white slave trade" sprang less from any evidence of rampant sex trafficking than from anxiety over increasing urbanization and mobility, shifting social mores, women flocking to the industrial workforce, and immigrants allegedly importing their "depraved" or "perverted" ways to U.S. shores. In that atmosphere, Anti-Vice Commissions sprang up in 43 U.S. cities from 1910 through 1917. These commissions—composed of municipal leaders, social reformers, academics, feminists, philanthropists, and others—were tasked with studying the causes and prevalence of prostitution and finding ways to stop it. Around this same time, the Bureau of Investigation established more than 300 "White Slavery Squads" around America. These were in charge of registering the residents of red light districts and monitoring their movements and activities.

"In the course of registering all the prostitutes in a given city, Bureau agents frequently encountered women whom they suspected of being in the country illegally," writes Gretchen Soderlund in *Sex Trafficking, Scandal, and the Transformation of Journalism, 1885–1917*. Thus, bureau agents often worked closely with federal immigration officials, who were busy enforcing the Immigration Act of 1910. That law allowed for the deportation of any immigrant involved in prostitution, no matter how long he or she had been in the country (previously, only those prostituting within three years of arrival could be kicked out).

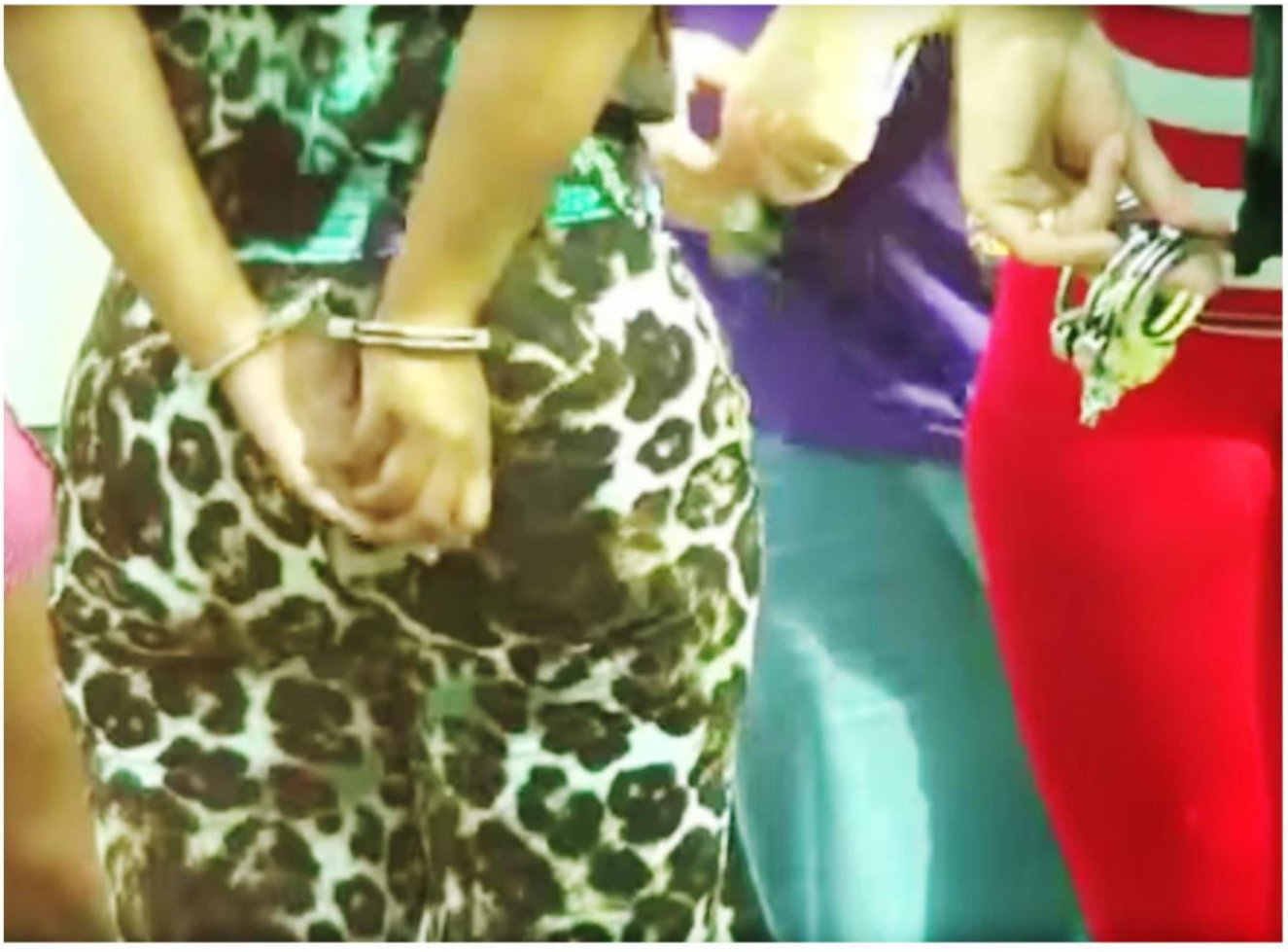
While the feds originally stuck to prostitution cases when enforcing the Mann Act, this enforcement was uneven. A Department of Justice circular from 1917 advises federal agents and district attorneys to pursue Mann Act cases involving "previously chaste, or very young women or girls," and "married women (with young children.)" Cases where women proved less than 100 percent pure virgin victims were often ignored, or sometimes turned back around on the women. The U.S. Supreme Court affirmed in 1915 (in the case *United States v. Holte*) that women could be indicted as conspirators in their own immoral transportation.

"Many African American women and men were accused of trafficking during the white slavery scare and became pawns of the criminal justice system," notes Soderlund.

The Mann Act also provided a useful pretext for harassing interracial couples and others suspected of transgressing social or political norms. The most well-known case is that of boxer Jack Johnson, whose high-profile relationships with white women didn't sit well with many. Johnson was arrested in 1912 for driving an alleged sex worker across state lines and, when the charge didn't stick, arrested again a month later. Although the incidents took place before the Mann Act's passage, an all-white jury in the post–Mann Act era found Johnson guilty.

Eventually, the feds decided that the act's "for any other immoral purposes" clause gave them license to target adulterers, criminal seducers, fornicators, homosexuals, and other sexual "deviants." In a survey of bureau field offices in 1929,

Screenshots from FBIs Operation Cross Country



respondents all said that Mann Act cases made up the largest portion of their caseloads, and many investigations were initiated by individuals—"namely, wives of subjects who have been deserted or husbands of victims who have left with another individual." Parents seeking recourse against cads who had seduced their daughters were also common.

Between 1921 and 1936, the FBI investigated 47,500 Mann Act cases, according to J. Edgar Hoover. Yet these investigations resulted in just 6,335 convictions—a success rate of about 13 percent. "The fact that only a small percentage of the tens of thousands of cases investigated by the Bureau ever advanced to U.S. Attorneys offices speaks volumes about how the law was enforced and the growth of the criminal justice state," writes Pliley. "The Bureau used its investigative powers to informally discipline a wide range of sexual behaviors. The 'shadow of the law'—threats of potential legal action—became a powerful facet of FBI growth and action."

Pliley points out that "historians of the FBI typically emphasize the Bureau's role in domestic political policing of ideological and racial minorities." But this "overlooks how central policing of sexuality was to the development of the FBI as a national agency with the capacity to conduct such political surveillance."

SUSPECT STATISTICS

THE PROGRESSIVE ERA'S efforts to squelch prostitution—the anti-vice commissions, the "white slavery squads," the cozy relationship between federal detectives, immigration officials, and local police—have now morphed into Department of Justice (DOJ) Human Trafficking Task Forces, wherein agents of the FBI, ICE, and Homeland Security work with local cops, social reformers, charities, and politicians. Since 2004, the DOJ has led and funded hundreds of such task forces, to the tune of $22.7 million (for 16 task forces) in 2015 and $15.8 million (for 11 task forces) in 2016. (Note that these price tags don't include the costs incurred by the FBI and other cooperating federal agencies; that the DOJ also funds myriad other anti-trafficking efforts; and that a slew of other federal agencies also fund anti-human-trafficking groups.)

These task forces make up the backbone of Operation Cross

Screenshots from FBIs Operation Cross Country

Country and similarly federalized sex stings. They have been central to prostitution and sex worker arrests around the nation, under the stated theory that this will eventually lead them to victimized girls or criminal sex trafficking rings.

Federal officials routinely insist that child sex trafficking is an American epidemic, with domestic victims numbering in the hundreds of thousands. Yet for all the nationwide intensity and effort, neither the DOJ trafficking task forces nor other federal agencies on the trafficking beat have yielded evidence of anything like a problem on that scale.

To be sure, the crime statistics for any offense do not represent the total instances of that crime. But they should give us a reasonable jumping-off point for estimating the scope of such offenses overall. This is a non-controversial statement in most crime areas—if there were verified reports of two child abductions, 200 homicides, and 2,000 burglaries recorded in a given city each year, you would probably be skeptical if someone tried to tell you the city actually experienced more than 3,000 kidnappings, 300,000 homicides, and three million burglaries annually. The nature of illegal activity is that it is hidden, but discrepancies of that magnitude defy belief. Where are all the victims of those unsolved crimes? Where are their friends and family members demanding justice?

Yet with sex trafficking statistics, people often lose this perspective. A recent report conducted by the Institute on Domestic Violence & Sexual Assault at the University of Texas and the nonprofit Allies Against Slavery (with funding from Texas' Office of the Governor) estimated more than 70,000 youths are trafficked annually in Texas. Yet the state had, over a seven-year period, opened just 737 human trafficking investigations, convicted just 85 suspects, and identified just 320 minors involved in prostitution. At the national level, a debunked but still oft-repeated statistic says that 300,000 U.S. kids are "at risk" of human trafficking each year. Yet between late 2009 and late 2015, investigations from DOJ-funded anti-trafficking task forces identified just 1,052 minor victims—about 175 per year—according to the 2017 *National Strategy to Combat Trafficking*.

The Attorney General's *2015 Assessment of U.S. Government Activities to Combat Trafficking in Persons*, presented in June 2016, states that the FBI's Violent Crimes Against Children Section (VCACS)—which handles all domestic minor sex trafficking cases—opened 538 investigations in Fiscal Year 2015, leading to 2,253 arrests and 363 convictions on federal, state, or local charges (not necessarily human trafficking charges). From late 2010 to late 2015, VCACS and its partners arrested more than 10,600 people in the course of domestic minor sex trafficking investigations, securing just 1,810 convictions (on any federal, state, or local charges) over this same time period.

As for Immigration and Customs Enforcement, its agents participated in 91 task forces and opened 1,034 human trafficking cases of their own in 2015, leading to the arrest of more than 1,400 people. But just 51 people were convicted on federal sex trafficking charges in 2015 as a result of ICE investigations.

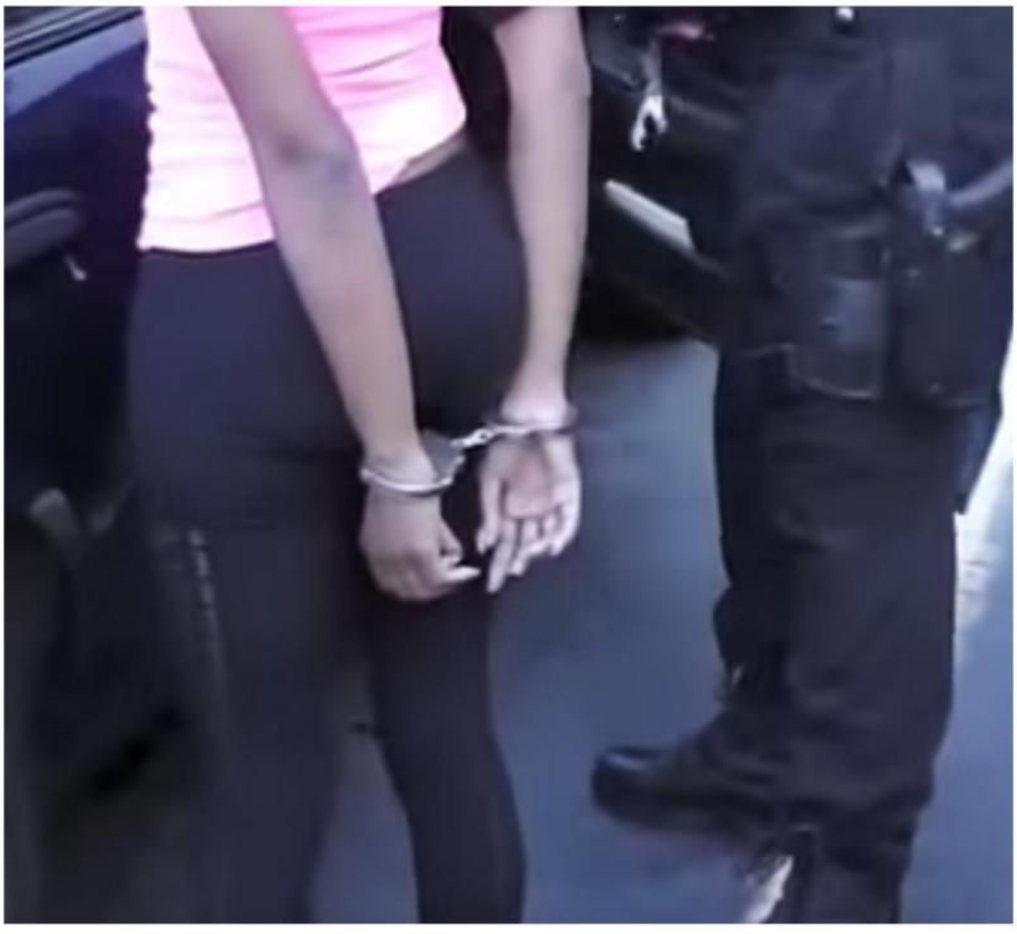
Federal officials insist child sex trafficking is an American epidemic, with domestic victims numbering in the hundreds of thousands. None of the stings have yielded evidence of anything like a problem on that scale.

THE INNOCENCE LOST NATIONAL INITIATIVE

OPERATION CROSS COUNTRY is part of the Innocence Lost National Initiative, born in 2003 to—in the DOJ's words—"address the growing problem" of underage prostitution. Five years later, the Innocence Lost Initiative began branding—and intensifying—its commercial-sex stings under the banner of Operation Cross Country.

Today's Operation Cross Country borrows its name from a crackdown on a different vice. From 2003 through 2007, that was the name given to a series of federal anti-drug stings conducted by the Drug Enforcement Administration, ICE, the IRS, and state and local police. The new Operation Cross Country worked on a similar model, bringing together federal, state, and local law enforcement in an ostensible effort to target trafficking rings through a series of old-fashioned prostitution stings.

From the beginning, Innocence Lost and Operation Cross Country were pitched as ways to target internet-enabled prostitution, organized criminal networks, and the worst forms of sexual slavery. "We are faced with the increasing use of social network sites and other advances in technology to carry out these crimes and facilitate these criminal enterprises," then–



FBI Director Robert Mueller declared in 2003. At a 2008 press conference about the first Operation Cross Country, NCMEC President and CEO Ernie Allen asserted that "child trafficking for the purpose of prostitution is organized criminal activity using kids as commodities for sale and trade. These kids are victims. They lack the ability to walk away. This is 21st century slavery."

For the first Operation Cross Country, the FBI spearheaded sex stings in 16 cities from June 18 to June 23, 2008, joined by some 350 law enforcement officials from 50 different agencies. Posing as clients both on the streets and on Craigslist, undercover officers identified 21 teenagers who were engaging in prostitution, arrested 290 people on prostitution charges, and arrested 55 people it described as "pimps" or "traffickers."

Soon thereafter, 92 agencies conducted stings in 29 cities as part of Operation Cross Country II (OCC II), which took place over three days in October 2008. This time, 47 teenagers were found and 518 people were arrested for prostitution, 41 people were arrested on miscellaneous charges, and 73 people were arrested for crimes such as pimping, promoting prostitution, aiding and abetting prostitution, or human trafficking.

The next several operations were similar, albeit ever-expanding. Thirty-six cities and 1,599 officers were a part of OCC IV in October 2009. Forty cities and 2,100 officers partook in OCC V in November 2010. OCC VI, in June 2012, involved 8,500 law enforcement personnel.

Yet even with these expansions in the operation's scope, the returns were minimal. Fifty-two minors were found in the fourth operation, 69 in the fifth, and 79 in the sixth. In 2014, 168 minors were identified—the largest number to date—representing about three times more than were found in OCC II. But the 2014 effort also took place in about three times as many cities. Ultimately, each Operation Cross Country has yielded a recovery rate of between 0.88 (in 2016) and 1.73 (in 2010) minors per city.

John Pistole, deputy director of the FBI from October 2004 through May 2010, has testified to Congress that only about 25 percent of the teens encountered in such efforts were forced or threatened into prostitution. When there were "pimps" or "sex traffickers" involved, their networks were small and "finite" and mostly involved a few friends or relatives operating in one or a handful of cities. Nothing that could be honestly described as a "trafficking ring" was found.

Screenshots from FBIs Operation Cross Country

STATUTORY SEX TRAFFICKING

ON OCTOBER 17, 2016, the FBI announced the results of the tenth Operation Cross Country. Across the country, they said, 239 "pimps and other individuals" had been apprehended. Officials did not provide more details about what these other individuals had done wrong.

News reports and arrest records fill in more of the story. While a small percentage were arrested on suspicion of state-level trafficking offenses, the bulk of Operation Cross Country arrests that turned up in public records searches involved violations of local statutes against pimping, pandering, aiding and abetting prostitution, promoting prostitution, procuring a person for prostitution, or the like—offenses that target activity involving adults, not minors, and that don't require the presence of any violence, fraud, or coercion.

Intentionally or not, the FBI makes it seem as if most Operation Cross Country arrests are directly related to child sex trafficking. But this is misleading: At least seven jurisdictions reported recovering at least one "child," sometimes several, but made no pimping or trafficking arrests. And another seven jurisdictions reported pimping or trafficking arrests but identified no juveniles.

At least 15 "child sex trafficking" arrests made during Operation Cross Country X involved neither any juveniles nor any attempts to traffick them. That's because anyone who solicits paid sex from someone under age 18 is considered a sex trafficker under U.S. law, and it doesn't matter if the minor is a real person or a character created by the cops. For such stings, police post ads as if they're adult escorts and, after arranging appointments with would-be customers, "admit" that they're only 16 or 17 years old. If the "john" still shows up, he's arrested, booked on charges such as sex trafficking or traveling in furtherance of having sex with a minor, and added to the FBI's tally of "pimps."

Police argue that these are men who wanted to have sex with children and would've found a way to do so—thus, the stings help stop future abuse of minors. But as with similar FBI operations in the realms of terrorism and drug dealing, it's not at all clear that these crimes would've been committed anyway. The ads the "traffickers" first respond to feature photos and descriptions of adult women, and the "children" they ultimately agree to meet are, in their minds, teenagers well past puberty and, in many instances, past the age of sexual consent in their states. These men may be guilty of flawed judgment or questionable morals, but they're not pedophiles, not pimps, and certainly not traffickers.

A lot of the FBI's "pimps" this round—including many women—were arrested simply for posting a prostitution ad online or driving someone else to an appointment. Several sex workers in Virginia seem to have been charged as brothel owners (under the sepia-toned charge of "keeping a bawdy place") merely for using their own apartments to meet with clients. Those arrested for prostitution were often charged for other offenses too, including possession of small amounts of marijuana, driving without a license, and trying to evade arrest.

The FBI describes these teens as "children" being "rescued." But the "child victims" are often arrested and jailed themselves, either for prostitution or for charges like loitering.

In a few states, such as Arkansas, nearly all the prostitution charges were accompanied by a felony charge for "possessing the instrument of a crime" or something similar. The felonious criminal instrument? A cellphone or laptop. Prostitution is just a misdemeanor, but the government tacked on felony charges because the sex worker communicated with potential clients using email or texts.

Clients, too, were subject to Operation Cross Country stings. The 2016 efforts yielded at least 175 arrests for simple solicitation. If we combine these with the hundreds of prostitution arrests, we find that the number of people arrested for attempting to engage in consensual commercial sexual activity with another adult is almost eight times bigger than the number of juveniles identified.

Further research turns up roughly eight defendants arrested on state-level trafficking charges in cases involving an actual underage victim. There was a Wisconsin mother accused of trafficking her daughters, ages 16 and 17; a younger brother, who was not being trafficked, was also counted among child-rescue totals. A Florida man and his girlfriend were accused of facilitating (without force) a 16-year-old's prostitution in Tampa. Tyrell Moss, 32, and Jada Boyd, 19, were accused of facilitating the prostitution of a 17-year-old girl in Cleveland, and Abel Paredes, 25, was accused of driving a 16-year-old to a prostitution date in California. An unidentified man and women were also arrested in conjunction with a 17-year-old girl in San Jose.

In addition, 25-year-old Charles Quinn was arrested under a recent Louisiana law against "human trafficking someone under age 21." The law allows for 18-, 19-, and 20-year-olds to be treated

like children, rather than adults, in prostitution prosecutions, so anyone who assists them can be charged with sex trafficking even when no force, fraud, or coercion are at play. Allegations of none of those thing were made in this case, and Quinn's "victim," an 18-year-old girl, was also arrested for prostitution.

'ABDUCTED INNOCENTS' RARELY SEEN

TWO OF THE men indicted on federal trafficking charges, cousins Calvin Miller and Henry Dailey, are accused of behavior that's certainly abusive: pimping out three adult women they kept in line via threats, intimidation, monitoring their phone activity, and even sexual assault. The women told police they initially consented to both prostitution and their arrangements with Miller and Dailey but were now only sticking around out of fear that the cousins would find and hurt them otherwise. It's a situation that few would deny deserves attention from law enforcement. But city police and state prisons have long sufficed for investigating and punishing this sort of crime. Why do local pimps with a violent streak suddenly require the full force of the federal criminal justice system?

The only federal defendant to be convicted so far is Irick Oneal, found guilty of sex trafficking after driving a 15-year-old runaway to a hotel in Odessa, Texas. A detective posing as a customer had arranged to meet the girl there after seeing her, posing as an adult, in an escort ad online. Once the girl "agreed to engage in deviant sexual intercourse with the undercover agent for a fee," cops swarmed in and eventually discovered that she was underage, according to an affidavit from FBI Special Agent Laura A. Field.

The girl, who had a fake ID saying she was 19, "refused to answer any questions about who she was working for," the affidavit states. "She has been in [Child Protective Services, or] CPS custody for approximately three years, but she keeps running away. Throughout the night, the minor victim made several comments about wanting to be on her own, wanting to run away from CPS, and hurting/killing herself if she went...back to CPS." Police nonetheless returned her to CPS and counted her among the tally of children they rescued that week.

Oneal was found waiting in the hotel parking lot and has been in law enforcement custody ever since. The affidavit says he admitted the girl was working with him and his girlfriend, who had posted the ad, but said they did not know her true age. In January 2017, Oneal was found guilty by a federal jury of one count of sex trafficking a child. He faces a possible sentence of life in federal prison.

The other federal charge for sex trafficking a minor is against John Dickerson. On October 15, around 6 p.m., Dickerson dropped a 17-year-old girl off at a motel room so she could meet someone—unbeknownst to them, an undercover cop—for an appointment. Police listening in "heard the female state she would do vaginal sex, but not anal or kissing, for $200" and "at that point, the take-down signal was given," according to the criminal complaint against Dickerson. "As law enforcement entered the room, the black female was instructed to place her hands behind her back so that restraints be [*sic*] placed on her wrists....She was wearing a white Oklahoma sweatshirt, with no pants on."

Police searching the vicinity found Dickerson, who later admitted to transporting the 17-year-old "to a hotel twice and a house once, within the past few weeks," the complaint notes. Dickerson "admitted [that he] had received $100 or more." He was charged with one count of child sex trafficking.

The FBI describes these teenagers and others as "children" they "rescued." But it's a strange sort of rescue. Sometimes, "child victims" are arrested and jailed themselves, either for prostitution or for charges like loitering. There were an estimated 1,130 youth arrests for prostitution in 2009, according to a 2016 report commissioned by the Justice Department; 55 percent of those arrested were black and 35 percent white. In addition, 4,399 young adults between the ages of 18 and 24 were arrested that year in the 26 states for which data was available.

Arrest for these young people doesn't just mean detention and court fees but a potential criminal record that could bar them from being eligible for certain shelters and social services, or from having a fair shot at jobs, scholarships, loans, leases, and other opportunities in the future.

Even when not arrested, they're subjected to a barrage of armed men bursting into their rooms, handcuffed, coerced into cooperating with law enforcement, and detained at jails or juvenile detention centers until they can be returned to families or foster homes, turned over to child protective services, or placed in some sort of shelter.

The "victims' service advocates" on hand to help them are generally members of law enforcement themselves, usually from the FBI or U.S. Attorney's Offices. They're looking to help, sure, but also to get information that will help their colleagues build a case. And the "services" provided to "rescued" teens are frequently banal or just useless—bags of socks and snacks, "case management" from faith-based charities with missionary motives, referrals to shelters that are full or youth programs that don't accept kids with criminal backgrounds.

In *Evaluation of Services for Domestic Minor Victims of Trafficking*, a DOJ-funded report prepared by RTI International and published in 2015, researchers studied three nonprofit recipients of federal grants for serving juvenile sex trafficking victims (the Salvation Army, the Streetwork Project at Safe Horizon, and Standing Against Global Exploitation Everywhere). Looking at the 201 youth served by these groups over a 3.5-year period, the researchers discovered serious gaps between what these

organizations offered and what real-life kids needed. And the use of the word "kids" here is debatable—the median age in the cohort was 17.

The "narrative of 'abducted innocents' was rarely seen," they note, and "force was rarely identified by young people as precipitating initial engagement in sex trades." Rather, "the common thread was of young people engaged in sex trades as the least-bad solution to meeting fundamental needs for safety, shelter, social connection, and love." Furthermore, "sex trade engagement was never the only problem in these young people's lives and often not their most critical problem."

Mental health issues were common, as was past or current neglect and abuse from parents or guardians—many had run away because of it. Somewhere between half and three-quarters of the minors were enrolled in school. Around a third to a half were already part of state child protective services, and many had been in the juvenile justice system too.

Both systems frequently failed to "recognize trafficking among their clients, or did not consider it as falling within their responsibility to address," the researchers note. "At the same time, legal provisions enacted to protect minors, such as required parental notification by shelters, frequently represented barriers to service, particularly for youth whose families do not protect or provide for them." Children and teens also reported apprehension about talking to police and "experienced violence from law enforcement and in detention."

The report urged police to "stop arresting minors engaged in prostitution" and stop "using arrest to 'encourage' service use, or housing them in jails rather than settings appropriate for crime victims." But the researchers also note resistance to such recommendations. As one public defender asked them, "How else do you get [juveniles] services but lock them up and force them to engage in services?"

MANN ACT IN ACTION

FEDERAL PROSECUTORS STILL make routine use of the century-old Mann Act today. In fact, three of the five people facing federal charges as a result of the latest Operation Cross Country stand accused of violating the law. Two of these defendants—the cousins—were also charged with sex trafficking by force, fraud, or coercion, but the third, 26-year-old Derrick Horne, stands accused of nothing more than "enticing an 18-year-old woman across state lines for prostitution," according to a DOJ press release.

Horne met the 18-year-old, "Leia," through an app called Hot or Not a few weeks prior to his run-in with the FBI. They were both living in Kansas City, which straddles the Kansas/Missouri state line. Horne arranged to help Leia get into prostitution, with him placing ads and serving as a bodyguard for a portion of the proceeds. Leia later told police that her first client paid $170, of which she kept $90 and Horne kept $80.

On the night of October 15, an undercover cop answered Leia's online ad and they agreed to meet at his hotel room for half an hour. To get to the hotel, Horne drove Leia from the Missouri side of the city to the Kansas side. Once Leia agreed to have sex with the undercover officer for $150, both she and Horne were arrested. It's not clear whether she was ultimately charged with prostitution. Horne, however, now faces up to 20 years in federal prison and a $250,000 fine for violating the Mann Act.

Horne was also charged for possessing a firearm; as someone with a previous felony drug conviction, he is banned from owning them entirely. In a request that Horne not be released on bail pending trial, prosecutors cited the fact that he had the gun and "made statements to a witness indicating he may harm third persons, specifically, 'johns' who might harm women for whom defendant was pimping." A willingness to protect vulnerable young women from violence is apparently a major strike against him in the state's eyes.

EVEN ONE CHILD

ADVOCATES OF OPERATION Cross Country often justify the stings by saying that "if it saves even one child, it's worth it." That ignores tremendous opportunity costs. The vast array of resources—money, manpower, time—that go into Operation Cross Country come from a limited pool. Authorities are routinely taking money set aside to stop child sexual exploitation and using it to find and punish adults, many just a few years past childhood themselves, for private sexual activities. It's tough for anyone to defend this type of siphoning, let alone those who claim to be the most concerned about helping kids.

Focusing on the few children who might be saved by such stings overlooks the harms the enforcers are doing to many other children and adults. Remember, the FBI has admitted that the majority of "trafficked teens" are not being forced into selling sex, and many have no pimp or trafficker. They don't need to be freed from captivity or pried away from a bad guy's control. For most of the minors identified, "rescue" means—at best—being returned to the places they tried to escape.

At a bare minimum, turning Operation Cross Country into a legitimate framework for combatting sex trafficking would require ceasing the massive, multifaceted national vice sting that the feds have grown to rely on for funding and good publicity. But with very few people authentically being helped and a hefty price tag per arrest, perhaps the program simply isn't worth saving.

ELIZABETH NOLAN BROWN is an associate editor at *Reason*.

SEX AND KIDS

THE UNJUST, IRRATIONAL, AND UNCONSTITUTIONAL CONSEQUENCES OF PEDOPHILIA PANIC

JACOB SULLUM

"SOUNDS LIKE YOU ENJOY SEX WITH KIDS,"

a reader tweeted at me after seeing a blog post I wrote about former Subway pitchman Jared Fogle. It was 2015, and Fogle had just signed a plea agreement in which he admitted to looking at child pornography and having sex with two 16-year-old prostitutes. "You also look like [a] pervert," the reader added.

That's the sort of response you can expect if you write about the broad category known as "sex offenders" and suggest that not all of them are the same or that some of them are punished too severely. In this case, I had noted that the decision to prosecute Fogle under federal law, which had been justified by factors that had little or nothing to do with the gravity of his offenses, had a dramatic impact on the penalty he was likely to receive.

Fogle ultimately was sentenced to nearly 16 years in prison, a penalty that was upheld by a federal appeals court in June. Had he been prosecuted under state law for the same actions, his sentence could have been as short as six months (the minimum penalty for possessing child pornography in Indiana, where Fogle lived) or as long as four years (the maximum penalty for an adult 21 or older who has sex with a 16-year-old in New York, where Fogle met the prostitutes).

The arbitrariness of Fogle's punishment should trouble anyone who thinks fairness, consistency, and proportionality are essential to a criminal justice system worthy of the name. But the conjunction of two fraught topics—children and sex—makes it hard for people to think clearly about such matters. The fear and disgust triggered by this subject help explain why laws dealing with sex offenses involving minors frequently lead to bizarre results, including wildly disproportionate sentences, punishment disguised as regulation or treatment, and penalties for committing unintentional crimes, recording your own legal behavior, or looking at pictures of nonexistent children.

HIDDEN CAMERAS

UNLIKE RUSSELL TAYLOR, who ran Fogle's charitable foundation, Fogle was not accused of producing child pornography. He was instead charged with looking at photographs and video of "minors as young as approximately 13-14 years" who were "secretly filmed in Taylor's current and former residences."

According to the government's statement of charges, Taylor produced that material "using multiple hidden cameras concealed in clock radios positioned so that they would capture the minors changing clothes, showering, bathing, or engaging in other activities." He also gave Fogle a thumb drive containing "commercial child pornography" featuring minors as young as 6. Fogle "on one occasion" showed this material to "another person." That became the basis for a distribution charge, which was dropped as part of Fogle's plea agreement. Fogle's lawyers say that incident involved "one individual with whom [he] was then involved romantically, and it occurred in the confines of a locked hotel room."

The voyeuristic material that Taylor produced did not involve sexual abuse of children. According to the charges, the guests caught on Taylor's cameras "did not know that they were being secretly filmed." Taylor's actions, which earned him a 27-year prison sentence, were obviously an outrageous invasion of privacy and breach of trust, and Fogle bears responsibility, at the very least, for allowing the secret recordings to continue by failing to report him. (Taylor, seeking leniency, claimed Fogle had actually encouraged him to install the cameras.) But what Taylor did is not the same as forcing children to engage in sexual activity, and what Fogle did is even further removed from such abuse.

Under federal law, however, looking at child pornography can be punished as severely as sexually assaulting a child. Receiving child pornography, which could mean viewing a single image, triggers a mandatory minimum sentence of five years. The maximum penalty for receiving or distributing child pornography is 20 years, and federal sentencing guidelines recommend stiff enhancements based on factors that are very common in these cases, such as using a computer, possessing more than 600 images (with each video counted as 75 images), and trading images for something of value, including other images.

In exchange for Fogle's guilty plea, prosecutors agreed to ask for a sentence of no more than 151 months. His lawyers argued that 60 months, the mandatory minimum, would be more appropriate. Rather than settle on a number somewhere between those two suggestions, U.S. District Judge Tanya Walton Pratt sentenced Fogle to 188 months—almost 16 years—for looking at the pictures Taylor provided. That prison term was not only longer than the government had sought; it was longer than the upper end of the range recommended by federal sentencing guidelines. Last June the U.S. Court of Appeals for the 7th Circuit upheld Fogle's sentence, which means he will spend at least 13 years behind bars, even allowing for "good time credit" based on his behavior in prison.

If Fogle had been prosecuted under Indiana law for possession of child pornography, he would have faced a minimum sentence of six months and a maximum sentence of three years. Even assuming he would have received the maximum penalty, the decision to prosecute him under federal law effectively quintupled his sentence. Yet the official reason for prosecuting him

under federal law—that the images he viewed were produced using equipment "manufactured outside the State of Indiana"—does not make his actions (or his inaction) any worse.

LIFE FOR LOOKING

AS A RESULT of congressional edicts, the average sentence in federal child pornography cases that do not involve production rose from 54 months in 2004 to 95 months in 2010, according to a 2012 report from the U.S. Sentencing Commission (USSC). Many federal judges have rebelled against what they perceive as patently unjust sentences for such offenses. In 2005 the Supreme Court ruled that federal sentencing guidelines (as opposed to mandatory minimums set by statute) are merely advisory, freeing judges to depart from them in the interest of justice. After that decision, according to the 2012 USSC report, "the rate of non-production cases in which sentences were imposed within the applicable guideline range steadily fell from its high point in fiscal year 2004, at 83.2 percent of cases, to 40.0 percent of cases in fiscal year 2010, and to 32.7 percent of cases in fiscal year 2011."

In 2016, Jack B. Weinstein, a federal judge in Brooklyn, was called upon to sentence a 53-year-old father of five who had pleaded guilty to possessing two dozen photos and videos showing children in sexual situations. The defendant—identified only by his initials, R.V.—told NBC News he came across the images that led to his arrest while looking at adult pornography. "I just got caught up in it," he said. "It's not like I woke up and said, 'Listen, let me look at this stuff.' It kept popping up every time I was downloading." He added that "I feel very remorseful," and "it's something that will never happen again." NBC reported that "the man also had 'sexual' chats with underage girls online, but there was no evidence he sought physical contact with minors." A psychiatrist testified that R.V. did not pose a threat to his own kids or other children.

The sentencing guidelines recommended a prison term of six and a half to eight years. Instead, Weinstein sentenced R.V. to time served (five days), a fine, and seven years of supervised release. "The applicable structure does not adequately balance the need to protect the public, and juveniles in particular, against the need to avoid excessive punishment, with resulting unnecessary cost to defendants' families and the community, and the needless destruction of defendants' lives," Weinstein wrote in a 98-page explanation of his reasons for departing so dramatically from the guidelines. "Removing R.V. from his family will not further the interests of justice; it will cause serious harm to his young children by depriving them of a loving father and role model, and will strip R.V. of the opportunity to heal through continued sustained treatment and the support of his close family."

Judges are not alone in questioning the propriety of federal sentences for viewing and sharing child pornography. In a 2015 case, James Gwin, a federal judge in Cleveland, asked jurors what sentence they considered appropriate for a man they had convicted of possessing and distributing child pornography. The defendant was caught with 1,500 images, and he was charged with distribution because he also had peer-to-peer file sharing software. The mandatory minimum was five years, prosecutors wanted 20, and federal sentencing guidelines recommended 27. On average, the jurors recommended a prison term of 14 months, less than a quarter of the shortest sentence allowed by law.

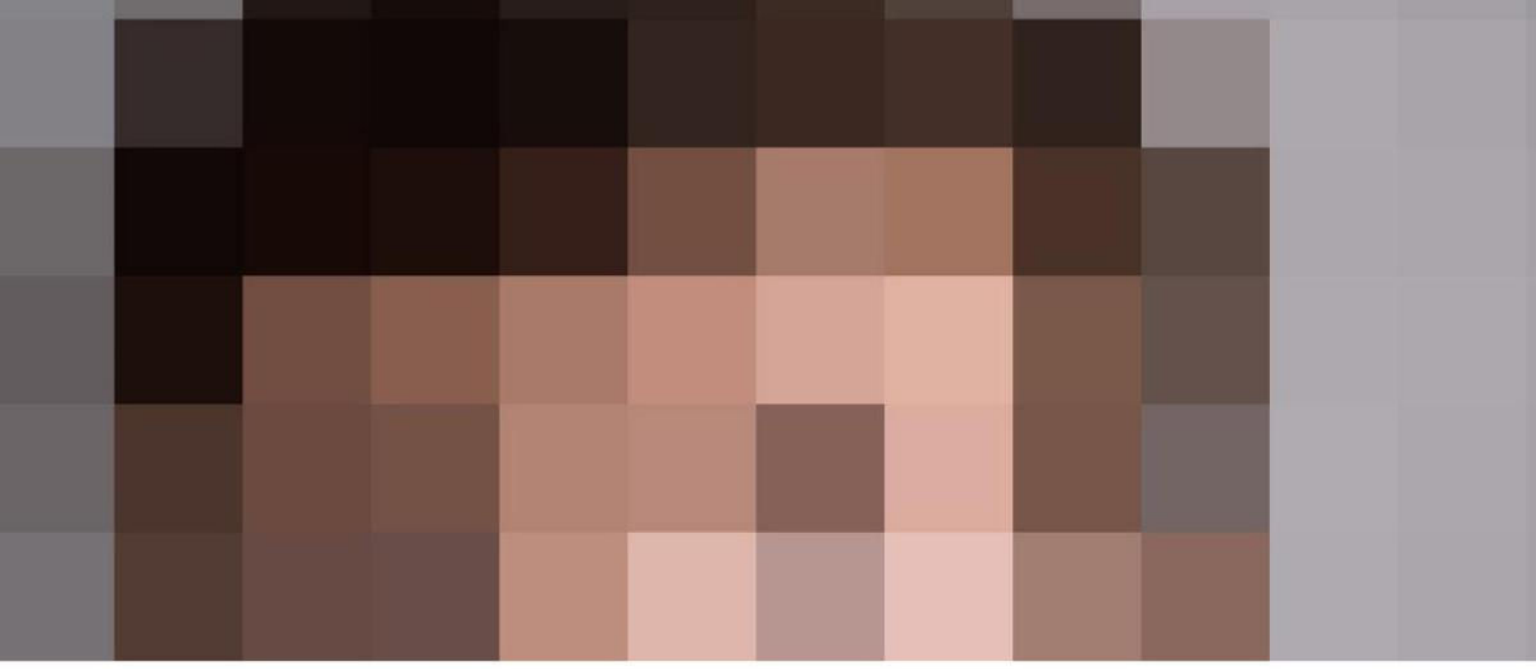
Although state penalties for looking at child pornography are often lighter than federal penalties, they can also be more severe. In 2011, a Florida judge imposed a sentence of life without the possibility of parole on Daniel Enrique Guevara Vilca, a 26-year-old with no criminal record who was caught with 454 child pornography images on his computer. "Had Mr. Vilca actually molested a child," *The New York Times* noted, "he might well have received a lighter sentence."

AMY'S ORDEAL

SOMETHING HAS GONE terribly wrong with our criminal justice system when the same offense can be punished by five days in jail or by life in prison, depending on the whims of legislators and judges. One reason it is so hard to figure out an appropriate punishment for looking at child pornography is that it's not exactly clear why looking at child pornography is treated as a crime in the first place.

The First Amendment ordinarily protects people from punishment for the literature they read or the pictures they view, even if a jury might consider the material obscene. When the Supreme Court upheld a state law criminalizing mere possession of child pornography in the 1990 case *Osborne v. Ohio,* its main rationale was that the government "hopes to destroy a market for the exploitative use of children." In other words, punishing consumers is justified because their demand drives production, which requires the sexual abuse of children. Now that people who look at child pornography typically obtain it online for free, that argument carries much less weight, and another rationale mentioned by the Supreme Court has come to the fore: "The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come."

The Court reiterated that point in *Ashcroft v. Free Speech Coalition*, the 2002 case in which it overturned a ban on "virtual" child pornography—i.e., depictions of underage sexual activity that do not involve any actual children. "As a permanent record of a child's abuse, the continued circulation [of actual



child pornography] itself would harm the child who had participated," the Court said. "Like a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being."

Lower federal courts have elaborated on that theme, positing that children are revictimized every time images of their sexual abuse are transferred or viewed. In 2001, the U.S. Court of Appeals for the 7th Circuit—the same court that upheld Jared Fogle's sentence—declared that "the possession, receipt and shipping of child pornography directly victimizes the children portrayed by violating their right to privacy, and in particular violating their individual interest in avoiding the disclosure of personal matters." The Adam Walsh Child Protection and Safety Act, which Congress passed in 2006, likewise declares that "every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse."

It is surely true that the dissemination of child pornography compounds the harm caused by its production. Consider the case of "Amy," who at the ages of 8 and 9 was repeatedly raped by her uncle, who recorded his crimes and distributed the images. New York attorney James R. Marsh, who helped Amy pursue a federal restitution claim, and University of Utah law professor Paul Cassell, who represented her when her case reached the Supreme Court, described her experience in a 2015 *Ohio State Journal of Criminal Law* article.

"By the end of her treatment in 1999," Cassell and Marsh write, "Amy was—as reflected in her therapist's notes—'back to normal' and engaged in age-appropriate activities such as dance lessons. Sadly, eight years later, Amy's condition drastically deteriorated when she discovered that her child sex abuse images are widely traded on the Internet." According to her psychologist, the distribution of her uncle's pictures has had a "long lasting and life changing impact on her." The psychologist explained that "Amy's awareness of these pictures [and] knowledge of new defendants being arrested become ongoing triggers to her." As Amy put it, "Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again."

Notwithstanding the reality of Amy's ongoing suffering, allocating responsibility for it among the thousands of people who have seen the pictures is no simple matter, as the Supreme Court discovered when it took up her case in 2014. Amy's lawyers put the past and future cost of her sexual abuse, including lifelong psychotherapy, an interrupted college education, and reduced earning capacity, at $3.4 million, some of which was attributed to her knowledge that images of her uncle's crimes against her are circulating on the internet. Under a federal law that requires a defendant to pay his victim "the full amount of the victim's losses," Amy sought all $3.4 million from Doyle Paroline, who in 2008 was caught with a collection of child pornography that included two pictures of Amy.

Paroline's lawyer argued that he owed her nothing because downloading the pictures her uncle took was not the proximate cause of her suffering. The Obama administration said judges should assess restitution on a case-by-case basis. Another possible approach: If you divide $3.4 million by the estimated 70,000 people who have seen photographs or videos of the crimes committed by Amy's uncle, the result is less than $50.

None of these solutions is very satisfying. Once images of sexual abuse have been viewed 1,000 times, Justice Samuel Alito wondered aloud during oral argument, is it even theoretically possible to assess the damage caused by the 1,001st viewing? In the end, the Supreme Court ruled that a defendant owes restitution "only to the extent the defendant's offense proximately caused a victim's losses." Hence a court "should order

Illustration: Joanna Andreasson

LOOKING AT A SINGLE IMAGE CAN TRIGGER A FIVE-YEAR MANDATORY MINIMUM SENTENCE.

restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses." Applying that logic to child pornography cases, the Court conceded, "is not without its difficulties"—quite an understatement.

If figuring out the damage that Paroline did by looking at images of Amy is essentially impossible, deciding what criminal penalty he deserves is at least as challenging. He pleaded guilty to possession of child pornography and received a two-year sentence. But the same actions—looking at images on the internet—also made him guilty of "receiving" child pornography, which carries a mandatory minimum sentence of five years (a fact that helps explain why Paroline pleaded guilty). Because Jared Fogle pleaded guilty to receiving child pornography, he was subject to the five-year mandatory minimum, and in the end he got a sentence nearly eight times as long as Paroline's. In fact, Fogle's sentence was about 50 percent longer than the one Amy's uncle received, even though her uncle repeatedly raped a prepubescent girl, while Fogle did not assault anyone.

THE FBI DISTRIBUTES CHILD PORNOGRAPHY

IT MAKES NO sense to treat possession of child pornography more harshly than violent crimes—more harshly even than actual sexual abuse of children—unless you believe that serious harm is inflicted every time someone looks at the image of a child's sexual abuse. In that case, a large enough collection of images could equal or even surpass the harm done by a single child rape, so that it could be just to impose a life sentence on someone who has done nothing but look at pictures.

Federal law enforcement officials claim to believe something like that, but it's pretty clear they don't. If they did, they would never condone the tactics that the FBI uses in child pornography cases, which include distributing it to catch people who look at it.

In a 2002 *New York University Law Review* article, Howard Anglin argued that victims of child pornographers have legal grounds to sue FBI agents who mail images of them to targets of undercover investigations. "If, as courts have held, the children depicted in child pornography are victimized anew each time it changes hands, this practice inflicts further injuries on the children portrayed in the images," wrote Anglin, at the time an NYU law student and now executive director of the Canadian Constitution Foundation. "The practice of distributing child pornography in undercover operations exposes federal agents to potential civil liability and undermines the integrity of the criminal justice system."

That argument did not deter the FBI from continuing to distribute child pornography. In 2015, after arresting the operator of The Playpen, a "dark web" source of child pornography, the bureau took over the site and operated it for two weeks. During that time, about 100,000 people visited the site, accessing at least 48,000 photos, 200 videos, and 13,000 links. The FBI not only allowed continued access to The Playpen; it seems to have made the site more popular by making it faster and more accessible. The FBI's version attracted some 50,000 visitors per week, up from 11,000 before the government takeover.

That operation resulted in criminal charges against about 200 people, mostly for receiving or possessing child pornography. But to achieve those results, the FBI became a major distributor of child pornography, thereby committing a more serious crime than the people it arrested. Federal prosecutors brought cases that, by their own lights, required agents to victimize children thousands of times. Each time the FBI distributed an image, it committed a federal crime that is punishable by a mandatory minimum sentence of five years and a maximum sentence of 20 years. If such actions merit criminal punishment because they are inherently harmful, there is no logical reason the federal agents who ran The Playpen should escape the penalties they sought to impose on the people who visited the site.

FELONIOUS CARTOONS

ANOTHER REASON TO doubt the official justification for punishing possession of child pornography is 18 USC 1466A, which makes it a crime to produce, distribute, or possess "obscene visual representations of the sexual abuse of children." That law covers "a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting" that "depicts a minor engaging in sexually explicit conduct," provided the image qualifies as obscene. Notably, "it is not a required element of any offense under this section that the minor depicted actually exist." The penalties

are nevertheless the same as the penalties for producing, distributing, or possessing actual child pornography.

This law is a rejiggered version of the ban on virtual child pornography that the Supreme Court overturned in *Free Speech Coalition v. Ashcroft*. Since the Court has said obscenity is not protected by the First Amendment, Congress narrowed the ban by limiting it to material that meets the legal test for obscenity, meaning it appeals to prurient interests, depicts sexual conduct in a patently offensive way, and "lacks serious literary, artistic, political, or scientific value." But the new ban is still constitutionally problematic because the Court also has said that mere possession of obscene material cannot be punished without violating the First Amendment right to "receive information and ideas" and the sphere of privacy protected by the 14th Amendment.

Federal prosecutors seem to be getting around that problem by resolving cases involving possession of virtual child pornography through plea agreements in which the defendant gives up his right to challenge the law. In a 2010 Ohio case, a former middle school teacher named Steven Kutzner pleaded guilty to possessing "obscene visual representations of the sexual abuse of children," including cartoons featuring characters from *The Simpsons*. As part of the plea agreement, Kutzner waived his right to challenge the constitutionality of the possession charge.

Jim Peters, an assistant U.S. attorney who worked on the case, says Kutzner agreed to the deal to avoid prosecution for receiving the cartoons, which would have triggered a five-year mandatory minimum sentence. Peters adds that Kutzner's computer also contained traces of actual child pornography that Kutzner claimed he downloaded by accident and deleted. Prosecutors decided not to bring charges based on those images because they were downloaded before federal law was changed to criminalize accessing child pornography with the intent to view it. In 2011, Kutzner was sentenced to 15 months in federal prison followed by three years of post-release supervision.

Two years later, Christjan Bee of Monett, Missouri, was sentenced to three years in federal prison for "possessing an obscene image of the sexual abuse of children." Federal prosecutors said the forbidden material was "a collection of electronic comics, entitled 'incest comics,'" that "contained multiple images of minors engaging in graphic sexual intercourse with adults and other minors." Like Kutzner, Bee pleaded guilty to avoid a receiving charge, waiving his right to challenge the ban on possession.

The fact that federal law treats virtual child pornography the same as the real thing suggests the essence of the crime is not the injury inflicted on actual children by looking at pictures of their abuse but the message communicated by such images. As the USSC noted in its 2012 report, an alternative rationale for criminalizing possession of child pornography is that these images "validate and normalize the sexual exploitation of children." It is debatable whether material like *Simpsons* porn and "incest comics" actually does that. In any case, the same argument would apply with even greater force to explicit advocacy of sex with minors, such as literature produced by the North American Man-Boy Love Association. As offensive as such speech may be to the vast majority of Americans, it is clearly protected by the First Amendment.

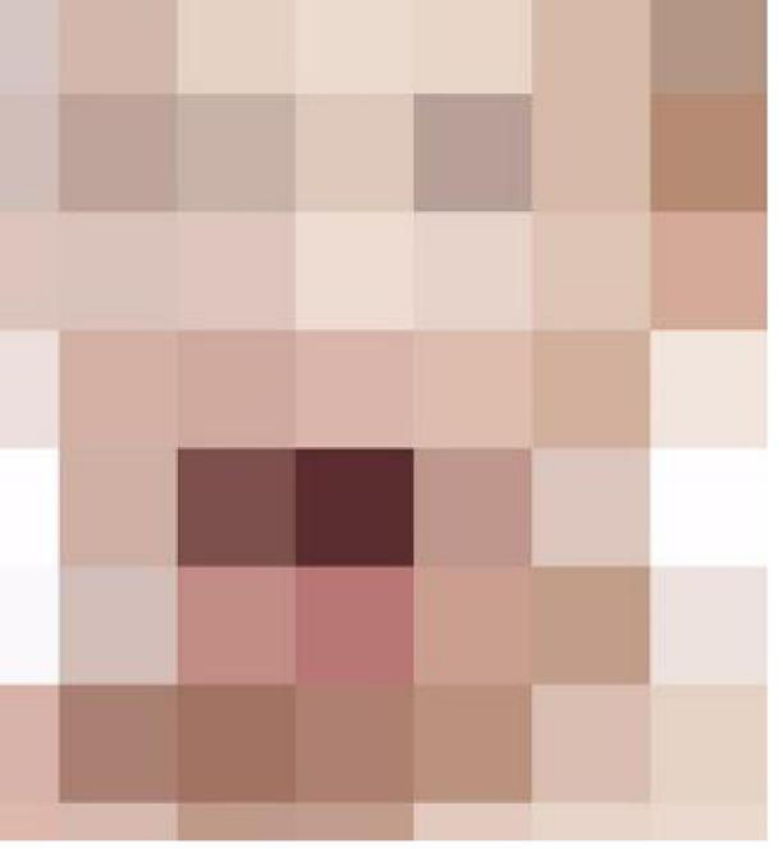
VICTIMS AS PREDATORS

THE INADEQUACY OF the child protection rationale is also clear in cases involving teenagers who use their cellphones to exchange sexually provocative pictures of themselves, thereby qualifying as both victims and perpetrators. In 2015, for example, Cormega Copening, a 17-year-old boy in North Carolina, was charged with sexually exploiting a minor, a felony punishable by up to eight years in prison, because of nude pictures he exchanged with his 17-year-old girlfriend.

Under North Carolina law (as under federal law), a "minor" for purposes of defining child pornography is anyone under 18. Hence Copening produced child pornography by *taking pictures of himself*. He could nevertheless be prosecuted as an adult for that crime. To make things even more confusing, the age of consent in North Carolina is 16, meaning that Copening could legally have consensual sex with his girlfriend. But if he (or she) made a video of that activity, even with the consent of both parties, it would be a felony punishable by years in prison plus lifelong registration as a sex offender.

The Copening case is not unique. In 2016, an Iowa prosecutor threatened to charge a 14-year-old girl with sexual exploitation of a minor for sending pictures of herself to her boyfriend. According to a federal lawsuit filed by her parents, one photo shows the girl "from the waist up, hair entirely covering her breasts and dressed in boy shorts." The other picture shows her "standing upright, clad in the same boy shorts and wearing a sports bra." These images do not seem to meet Iowa's definition of child pornography, since they do not show a minor engaged in "a prohibited sexual act," which includes prurient nudity only when it involves exposure of breasts, genitals, or buttocks. Even if the pictures qualified as child porn in Iowa, it defies logic to say a teenager can be guilty of sexually exploiting herself.

The case of Eric Rinehart underlines the counterintuitive consequences of treating pictures as a crime even when the actions they record are not. In 2006, Rinehart, a 34-year-old police officer in Middletown, Indiana, who was in the midst of a divorce, became sexually involved with two girls who were 16 and 17. Since the age of consent in Indiana is 16, it was legal for him to have sex with those girls. (Whether it was wise or appropriate is another question.) But because Rinehart also took pictures of the girls, he was convicted of producing child



pornography and sentenced to 15 years in federal prison. It did not matter that the girls consented to the pictures or that the images were never shared with anyone else.

Although Jared Fogle apparently did not record his sexual encounters with teenaged prostitutes in Manhattan, he broke state law by paying for sex and by having sex with the girls before they turned 17, the age of consent in New York. Under state law, he was therefore guilty of patronizing a prostitute, a Class A misdemeanor punishable by up to a year in jail, and rape in the third degree, a Class E felony punishable by probation or up to four years in prison. Instead, he was charged under federal law with traveling across state lines "for the purpose of engaging in any illicit sexual conduct," which is punishable by up to 30 years in prison.

Judge Pratt apparently considered that crime as serious as Fogle's viewing of child pornography, because she imposed exactly the same sentence for it: 188 months in prison. (Fortunately for Fogle, he is serving the two sentences concurrently.) Prosecutors emphasized that while the youngest prostitute Fogle hired was 16, he asked her about "access to minors as young as 14 years for purposes of commercial sex acts with him." In challenging his sentence, Fogle argued that he shouldn't be punished for something he thought about but never did.

UNINTENTIONAL CRIMES

WHILE FOGLE MAY have known how old the girls were, that is not always the case when adults have sex with teenagers. The difference between a 16-year-old and a 17-year-old (or a 15-year-old and a 16-year-old) may not be obvious, especially when the teenager claims to be older than she is. State laws nevertheless assume that someone who has sex with an underage adolescent should have known better. Generally speaking, "mistake of age" is no defense against a statutory rape charge. When it comes to sex with teens, people can break the law without realizing it—an exception to the rule that proof of *mens rea* (usually translated as "guilty mind") is required for a criminal conviction.

In 2016, a Minnesota appeals court cast doubt on that exception in a case involving a middle-aged man named Mark Moser who propositioned a girl on Facebook. She said she was 16 (the age of consent in Minnesota), but she was actually 14. Under state law, that subterfuge did not matter: Even if Moser thought she was 16, he was still guilty of soliciting sex with a minor, a felony punishable by up to three years in prison and 10 years on the state's sex offender registry. But the Minnesota Court of Appeals ruled that Moser had a due process right to raise a mistake-of-age defense.

"The child-solicitation statute imposes an unreasonable duty on defendants to ascertain the relevant facts," the appeals court said. "Where solicitation occurs solely over the Internet…it is extremely difficult to determine the age of the person solicited with any certainty." By contrast, the court said, "a defendant can reasonably be required to ascertain the age of a person the defendant meets in person." But as UCLA law professor Eugene Volokh pointed out in a blog post, that is not necessarily true: What if a girl "lied about her age, and perhaps even showed the defendant a credible-seeming fake ID"? Or what if the couple met in a context, such as a bar or a college fraternity party, where it might be reasonable to assume that everyone is old enough to consent to sex?

A mistake-of-age defense probably would not have helped Fogle even if one were available, since abiding by age-of-consent laws does not seem to have been a priority for him. Still, it's not clear that he qualifies as a pedophile—that is, someone who is sexually attracted to prepubescent children. Neither the girls he had sex with nor the ones he asked about were that young, and prosecutors say that while the minors in the pictures and videos recorded by Taylor ranged in age from 9 to 16, the youngest person in the images he shared with Fogle was 13 or 14. The images on the thumb drive that Taylor gave him included children "as young as approximately six years of age," but Fogle does not seem to have actively sought out such material.

The distinction between adolescents and prepubescent children is relevant to the seriousness of Fogle's crimes and to the sort of danger he poses. Even when people are physically ready for sex, they may not be psychologically ready, which is the rationale for age-of-consent laws. But as a press

Illustration: Joanna Andreasson

release about Fogle's case from the U.S. Attorney's Office for the Southern District of Indiana noted, "federal law provides strong punishment for engaging in commercial sex acts with minors under the age of 18 years," no matter what the age of consent is in the state where the sex acts occur. Whatever you think of these transactions, it is hard to see how the fact that they happened in New York rather than Indiana makes them worse. Yet if Fogle had paid for sex in his home state, where the age of consent is 16, instead of doing it in another state, it would have been a misdemeanor rather than a federal felony.

Leaving aside the issue of punishment, sexual attraction to prepubescent children suggests different precautions than sexual attraction to teenagers. Restrictions aimed at keeping potential predators away from kids, even if we assume they are otherwise justified, make little sense when applied to someone who has no sexual interest in young children. Yet Fogle will have to register as a sex offender for the rest of his life, subject to the same restrictions as a child molester. Such registries, which every state maintains, also include people guilty of crimes less serious than Fogle's, such as public urination, patronizing an adult prostitute, and consensual sex with a fellow teenager.

LEPER LISTS

ALTHOUGH SEX OFFENDER registries and the restrictions associated with them are supposedly intended to protect public safety, the evidence suggests they are mainly a way of imposing additional punishment on people who have already completed their sentences. The rationale for publicly accessible registries is that they will protect children by alerting parents to the presence of potential predators. But the Justice Department's National Crime Victimization Survey indicates that more than 90 percent of sexual offenses against children are committed not by strangers but by relatives, friends, or acquaintances. Furthermore, nearly 9 out of 10 sex offenses are committed by people who were not previously convicted of a crime that would have put their names in a registry. Justice Department data also indicate that sex offenders are much less likely to commit new crimes than commonly supposed—less likely, in fact, than most other kinds of offenders.

Not surprisingly, studies that try to measure the impact of registration laws find little evidence that they work as advertised. If anything, they seem to be counterproductive, probably because they make it harder for sex offenders to reintegrate into society by publicly identifying them as pariahs, limiting their job prospects, and restricting where they can live. In Michigan, for example, registrants are prohibited from living, working, or "loitering" within 1,000 feet of a school, regardless of whether their crimes involved children. A 2013 study funded by the Justice Department found those restrictions were associated with an *increase* in recidivism. A 2011 analysis in the *Journal of Law and Economics* likewise found evidence that publicly accessible registries have a perverse effect on recidivism.

If registries and residence restrictions do not actually make people safer, it's hard to justify them as public safety measures. Last August, a federal appeals court ruled that Michigan's Sex Offender Registration Act (SORA) imposes punishment in the guise of regulation, meaning it cannot be applied retroactively without violating the Constitution's ban on ex post facto laws.

In addition to the residence restrictions, the U.S. Court of Appeals for the 6th Circuit focused on the law's onerous reporting requirements and its classification system. SORA threatens registrants with prison if they fail to report, in person and immediately, changes such as new email addresses or newly borrowed cars. It also puts them in tiers that supposedly correspond to the danger they pose, but those categories are not based on individualized risk assessments. Although all of the plaintiffs in this case qualified for Tier III, supposedly the most dangerous category, one of them was convicted at age 18 of having consensual sex with his 14-year-old girlfriend, while another was convicted of "a non-sexual kidnapping offense arising out of a 1990 robbery of a McDonald's." The appeals court said the residence restrictions, reporting requirements, and arbitrary classification system distinguished SORA from the Alaska registry that the Supreme Court upheld in 2003, deeming it regulatory rather than punitive.

"SORA brands registrants as moral lepers solely on the basis of a prior conviction," the 6th Circuit said. "It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to school zone restrictions, they may not even live. It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information." The court concluded that "the punitive effects of these blanket restrictions…exceed even a generous assessment of their salutary effects."

Like registration and the burdens associated with it, the continued imprisonment of sex offenders who have completed their sentences bears a strong resemblance to punishment. Twenty states and the federal government have laws allowing indefinite "civil commitment" of certain sex offenders. The Supreme Court has upheld such laws on the pretext that what looks like punishment is actually "treatment" aimed at curing offenders who would otherwise pose an intolerable threat to public safety.

Taking the Court at its word, a federal judge ruled in 2015 that the Minnesota Sex Offender Program (MSOP), which was established in 1994, did not qualify for this loophole because none of its "patients" had ever been declared well enough for unconditional release. "The overwhelming evidence at trial

FBI TACTICS INCLUDE DISTRIBUTING CHILD PORNOGRAPHY TO CATCH PEOPLE WHO LOOK AT CHILD PORNOGRAPHY.

established that Minnesota's civil commitment scheme is a punitive system that segregates and indefinitely detains a class of potentially dangerous individuals without the safeguards of the criminal justice system," wrote U.S. District Judge Donovan Frank. "It is fundamental to our notions of a free society that we do not imprison citizens because we fear that they might commit a crime in the future....This strikes at the very heart of what it means to be a free society where liberty is a primary value of our heritage."

Criticizing Frank's decision, Minnesota Gov. Mark Dayton exposed the fallacy at the core of his state's program. "It's really impossible to predict whether or not [sex offenders] are at risk to reoffend," Dayton said. "So the more protection you can give to the public, as far as I'm concerned, given their history, is entirely warranted, and that's what this program does right now." Yet the law authorizing the program *requires* predictions about whether or not sex offenders "are at risk to reoffend"; if such predictions are "impossible," the whole law is a crock.

It gets worse. "I don't think any parent in Minnesota wants to subject their daughter or their son to a probability," Dayton said. "They want to make sure their government is doing absolutely everything conceivably possible to make it 100 percent safe to walk in the park or to or from school." So even if recidivism were predictable, Dayton would say that someone who is 99 percent guaranteed not to reoffend should nevertheless be locked up for the rest of his life. Just in case.

In January, a federal appeals court sided with Dayton, saying Judge Frank was mistaken in concluding that the MSOP violates detainees' substantive due process rights. The U.S. Court of Appeals for the 8th Circuit said Frank was wrong to think the MSOP impinges on a fundamental liberty interest—i.e., the right not to be locked in a cage for the rest of your life. After all, the 8th Circuit said, the Supreme Court "has never declared that persons who pose a significant danger to themselves or others possess a fundamental liberty interest in freedom from physical restraint."

The appeals court was unimpressed by the fact that the MSOP manifestly fails to accomplish what it purports to be doing: rendering sex offenders "no longer dangerous" by treating their statutorily defined mental conditions. Although "the Supreme Court has recognized a substantive due process right to reasonably safe custodial conditions," the 8th Circuit said, it has never recognized "a broader due process right to appropriate or effective or reasonable treatment of the illness or disability that triggered the patient's involuntary confinement."

The appeals court said Frank wrongly applied "strict scrutiny" to the MSOP when he should have taken a much more deferential approach. To decide whether Minnesota's law is unconstitutional on its face, it said, Frank should have asked whether it passes the "rational basis" test—a highly permissive standard that all but guarantees a challenged law will be upheld. The 8th Circuit said Frank also erred in ruling that Minnesota's law is unconstitutional as applied to the plaintiffs. To prevail on that claim, the court said, the plaintiffs had to show their confinement not only violates a fundamental right but "shocks the conscience," which is pretty hard to do for any kind of imprisonment this side of a Nazi concentration camp.

'DO WE NEED A WHOLE NEW CONSTITUTION?'

THE UPSHOT OF such judicial deference is that laws targeting sex offenders will be upheld as long as supporters of those laws claim to have good intentions. The so-called International Megan's Law (IML), enacted in 2016, shows how thin the justifications can be.

The IML requires that the State Department create "a visual designation affixed to a conspicuous location" on the passport of anyone listed in a registry for "a sex offense against a minor," to make sure they are properly scrutinized, shunned, and harassed wherever they might travel. It also authorizes notification of foreign officials about the travels of sex offenders who are no longer required to register.

The law is supposedly aimed at people who visit other countries to have sex with children, which seems to be a pretty rare crime. According to Justice Department data, about 10 Americans are convicted of "sexual crimes against minors in other countries" each year. As the IML itself notes, the State Department already had "authority to deny passports to individuals convicted of the crime of sex tourism involving minors." The provision requiring "unique passport identifiers" sweeps much more broadly, covering any registered sex offender who was convicted of a crime involving a minor, regardless of the details, when the crime occurred, or whether the offender poses an ongoing threat.

The Americans whose passports will brand them as international child molesters include people who committed their offenses as minors and even people who still are minors (as are more than a quarter of registered sex offenders). They include people who as teenagers had consensual sex with other teenagers. They include people convicted of misdemeanors. They include people who committed their crimes decades ago and have never reoffended. They include people convicted of sexting, streaking, or public urination. The IML treats all of these people as a menace to children everywhere.

Sex offenders are a heterogeneous group that includes many people who pose little or no threat to the public while omitting many people who are clearly more dangerous. It makes no sense to impose the same restrictions on all of them simply because their crimes had something to do with sex. "They have it set up now where Charles Manson is a nicer person than a sex offender," remarked a registered sex offender who was interviewed for the 2013 Justice Department–funded study of residence restrictions.

"You created a whole new population of people that you are not prepared to deal with at all," another sex offender observed in the same study. "If you are not going to remove them completely from society or off of the planet, just what the hell are you going to do with them after you create this leper colony?...I mean, do we still come up under the Constitution? Do we still have the same rights as other folks? Do we need a whole new constitution for us?"

Sex offenders are consigned to a kind of legal and social limbo that is neither fair nor prudent. They supposedly have paid their debts to society but are constantly obstructed in their efforts to rejoin it. Even when their crimes did not involve assaults of any kind, they are subject to burdens that murderers and other violent criminals escape.

A lawsuit challenging the IML argued that "individuals convicted of sex offenses constitute a discrete and insular minority that is uniquely subject to public and private discrimination, and whose rights are uniquely subject to unconstitutional deprivation by state action, including by state action that is motivated by malice, that is arbitrary and capricious, that bears no rational relationship to any legitimate government purpose, and that is not sufficiently tailored to serve a legitimate government purpose." All of that is true, but the same unreasoning prejudices that created this situation make it hard to change.

Dismissing the IML lawsuit last September, a federal judge in San Francisco said specially marked passports for sex offenders do not amount to retroactive punishment, because registration of sex offenders, no matter how far-reaching and life-crippling the consequences, is not punitive and therefore does not implicate the Ex Post Facto Clause. If registration is not a punishment, U.S. District Judge Phyllis Hamilton reasoned, sharing information from a registry with foreign officials surely cannot be, even if the upshot is that an American citizen cannot travel internationally and therefore cannot see his wife, do his job, attend to his business, or claim his inheritance in Iran without risking summary execution (all concerns raised by the plaintiffs).

Based on similar logic, Hamilton rejected the plaintiffs' due process claim, saying they got all the process they were due when they were convicted. In her view, the IML merely passes along information about those convictions to foreign authorities, who can do with it what they want. Why should the U.S. government be held responsible for the foreseeable consequences of branding American citizens as pariahs, perverts, and predators?

Hamilton also made short work of the plaintiffs' substantive due process and equal protection claims, saying they could not succeed because the IML easily satisfies the rational basis test. The only question under that standard, Hamilton explained, is "whether there is some conceivable rational purpose that Congress could have had in mind when it enacted the law." The IML is aimed at preventing "the commercial sexual exploitation of minors," which is a rational purpose. Whether the law actually serves that purpose is beyond the scope of rational basis review. So is the fairness and wisdom of including anyone convicted of "a sex offense against a minor," even if he never assaulted anyone and never demonstrated a propensity to visit other countries for the purpose of having sex with minors.

The passport and notification provisions apply decades after the offense, whether or not the offender currently poses a threat, and notification applies even to offenders who are no longer required to register. One of the plaintiffs, who "routinely travels to Europe and Asia for business purposes," was convicted 25 years ago. Another plaintiff, who committed a crime minor enough that he was sentenced only to probation and was initially told he would not have to register as a sex offender, will nevertheless have to carry a special passport. A third plaintiff had his 1998 conviction expunged, was reinstated as a lawyer, and is no longer listed in California's registry but is still covered by the IML's notification provision.

Stigmatizing these people as a threat to children everywhere for the rest of their lives may seem irrational, but that does not mean it fails the rational basis test. "Under rational basis review," Hamilton explained, "a law 'may be overinclusive, underinclusive, illogical, and unscientific and yet pass constitutional muster.'"

What's true of the IML is true of many laws targeting sex offenders: Even if they are poorly designed to achieve their ostensible goal, politicians say they will protect children, and that's rational enough for government work.

Senior Editor JACOB SULLUM is a nationally syndicated columnist.

THE SLANTS

The Band Who Must Not Be Named

Bassist Simon Tam talks about his band's Supreme Court fight to trademark its controversial name.

interview by MEREDITH BRAGG

SIMON TAM DIDN'T think it would be a big deal when he applied for trademark protection on the name of his band, The Slants. It was 2011, and the band—a dance-rock group whose members are all Asian-American—had been getting some buzz. A lawyer buddy told Tam he'd do the application, saying the process would take a couple hundred bucks and six months, tops.

"Things turned out a little bit different," Tam told *Reason* several years later, on the eve of Supreme Court oral arguments over his trademark case.

Since 1946, the federal Patent and Trademark Office (PTO) has been charged with blocking the registration of trademarks that "may disparage…persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." It was on those grounds that the agency denied Tam his trademark.

The San Diego–born musician, whose father was raised in the Hong Kong area and whose mother is from Taiwan, says the name of the band was a lighthearted (and hardly unprecedented) effort to reclaim an old anti-Asian slur. Their discography includes *Slants! Slants! Revolution* (2009), *The Yellow Album* (2012), and their latest, an E.P. titled *The Band Who Must Not Be Named*.

Since that initial PTO denial, the case has slowly, painfully worked its way through the legal system. Early on, an administrative review board conceded that the band's name was "an attempt not to disparage, but rather to wrest 'ownership' of the term from those who might use it with the intent to disparage," but rejected the claim anyway, finding that the usage was still "objectionable."

In 2015, a federal appeals court sided with Tam, noting that "the First Amendment protects even hurtful speech." As the majority explained, "whatever our personal feelings about the mark at issue here, or other disparaging marks, the First Amendment forbids government regulators to deny registration because they find speech likely to offend others." The PTO defended its decision by saying that Tam's speech wasn't being restricted—he can call the band whatever he likes, he simply can't have a trademark on that name. The PTO also argued trademarks are akin to government speech. But as noted in a brief filed on the band's behalf by the Cato Institute, Reason Foundation (the nonprofit that publishes this magazine), and others, that argument was pretty weak, considering that the list of currently registered trademarks "includes such hallowed brands as 'Capitalism Sucks Donkey Balls' and 'Take Yo Panties Off.'"

In January, shortly after Tam sat down with Reason TV's Meredith Bragg, the Supreme Court heard The Slants' case, now known as *Lee v. Tam*. The justices appeared skeptical of the government's argument, pushing back on the law's vagueness, its circular reasoning, and its uneven application, suggesting that the Court might overturn the 71-year-old rule standing between The Slants and their trademark.

***Reason*: Why did you form the band and how did you come up with the name?**

Tam: Back in about 2004 I had just moved to Portland, Oregon, and I dropped out of college to tour in a punk rock band. But during that time period I found myself missing home, my culture, my family and friends, and so I started importing a bunch of movies from Hong Kong. Around that time period someone said, "Hey, you should really check out this movie called *Kill Bill*." I missed it because I was on tour, so I bought it the day it came out [on video]. I'm watching this movie in my apartment and there is this really iconic scene. This woman named O-Ren Ishii, who walks into this restaurant with all these mafia members behind her—for most people this is just another trademark Quentin Tarantino scene, but for me it was like an epiphany. I just had to stop there, pause the film and thought, "Why is this, like, different for me?"

And then I realized it was the first time that I had ever seen an American-produced film that depicted Asians as cool, confident, and sexy. I was like, "Wow, the art form that I love—music—has the same issue." There are no Asian Americans on the cover of *Rolling Stone*, on the billboard charts, on *Spin*, and on MTV back when they used to play music videos. I thought, "Something's got to change." I wanted to not be the token guy in the band anymore. I wanted to start my own band and that way just kind of celebrate that culture, and that's when I got the idea of starting this Asian-American project.

I started asking people, "Hey, what is something that you think all Asians have in common? We're trying to think of a band name here." And they told me slanted eyes. And I thought this was really interesting. Number one, it's not true. But number two, we can use it to talk about our slant on life as people of color. And number three, it sounds like the kind of a band Debbie Harry would front. So I was like: This is perfect. And then we became The Slants.

Why was it important to trademark the name?

We had been touring for a while and we were already doing pretty well. We did a couple of national tours. NPR's *All Things Considered* did this story on us because we were busting into anime conventions and playing for this geek army. Around that time period, a friend of mine who is an attorney said, "Hey Simon, I really think you should get a trademark on your band name. It is really important for bands to do who are going to the next level." He said, "You know, let me handle it for you, it'll only be a couple hundred bucks and in about six months this whole thing will be over with."

“I should have the same rights as anybody else. Just because they happen to think that I am inappropriately using a word doesn’t mean they have the right to stomp out my business.”

Things turned out a little bit different. Almost a decade later, here I am fighting for this right. It is interesting because when people are talking about trademark rights, they keep saying things like, “Well, Mr. Tam can still use the name of the band if he wants.” But the reality is that it affects musicians more than they think. When you don’t have a trademark registration it is way more difficult to get a record label offer or licensing deals or other things that are critical for an up-and-coming music business.

The bottom line is that I should have the same rights as anybody else. Just because they happen to think that I am inappropriately using a word doesn’t mean they have the right to stomp out my business.

Did you think, when you came up with it, that the name was going to be provocative?

The name has never been provocative. I actually thought it was kind of funny. We can flip the slur around and do a positive, self-empowering kind of thing with the word. That being said, I have never been called a “slant” in my whole life. I’ve been called many other things. Asian Americans have been using the term *slant* for decades already. The biggest, or one of the biggest, film festivals in North America, as far as Asian-American films go, is called the Slant Film Festival. And there is *Slant* magazine. It is kind of this cool, hip thing in our communities. So I was like, “It’s no big deal.”

The U.S. patent office denied your trademark. Why?

When I first got the call for this I thought it was a practical joke. My attorney calls me and he says, “Hey Simon, we have a problem. The trademark office actually rejected your application.” And I said, “Did I fill something out incorrectly? Did I do something wrong?” He said, “No, no, all that is fine. They said your name is disparaging to persons of Asian descent.” And I took a second and said, “Well, do they know *we* are of Asian descent?” He said, “I think so.” And I was like, “I didn’t even know there was a law against this. What does it actually say?” He says, “Oh, that a substantial composite of the reference group has to find it disparaging.” So I said, “We just did this tour with 100 punk shows across America with Asian-American festivals. Who did they find who said it was disparaging?”

And he said, “Nobody. But they did cite urbandictionary.com, they found an old Wikipedia entry, and they showed a photograph of Miley Cyrus pulling her eyes back in a slant-eye gesture.” And I was like, “Are you serious?” He says, “I’m looking at Miley Cyrus right now.”

That’s messed up. So we decided to appeal. We thought they were completely off-base but we found out over the years, over and over again, they continued to use really questionable evidence just because they want to justify their decision even though they knew it was wrong.

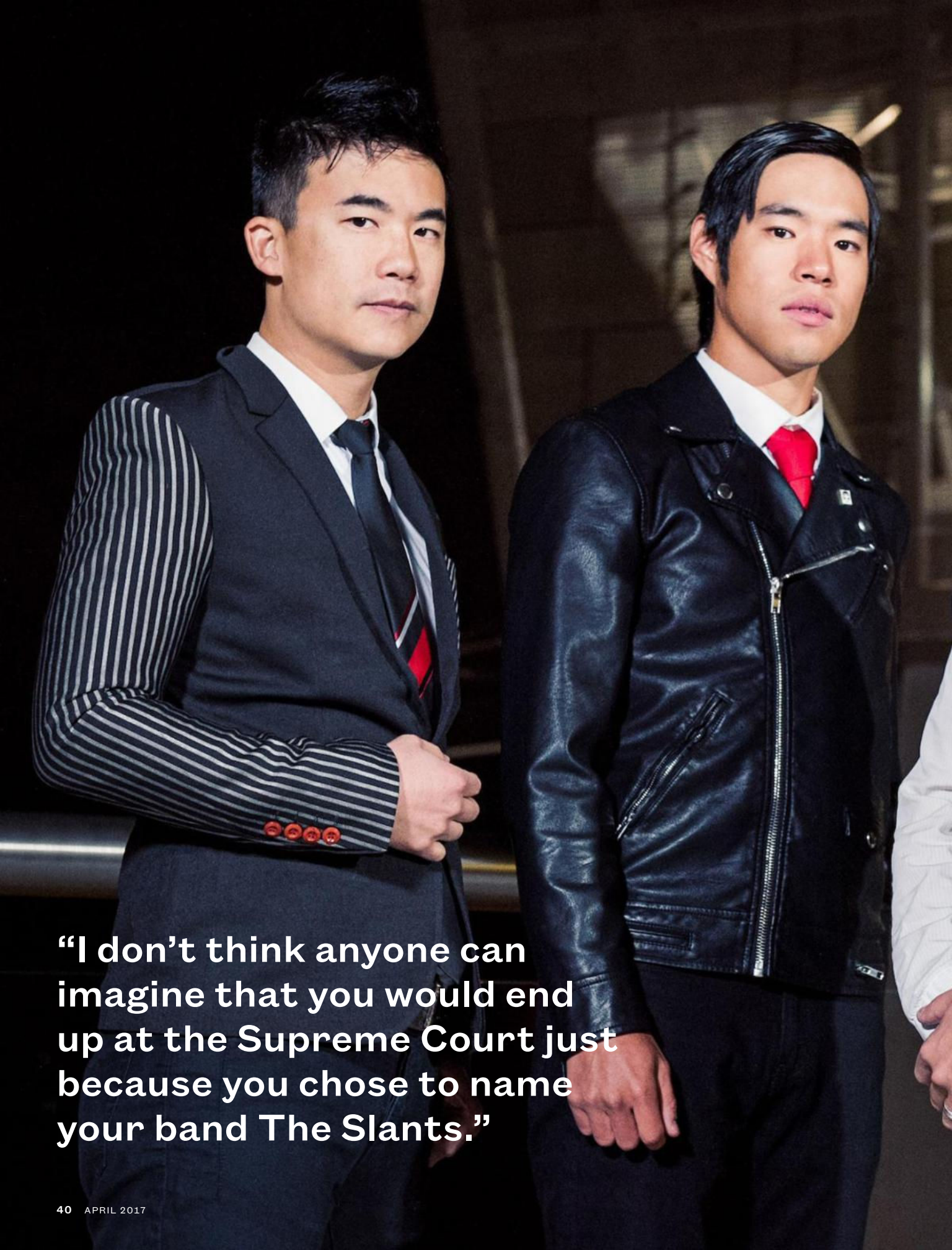
Did you think this fight would lead you to the United States Supreme Court?

I don’t think anyone can imagine that you would end up at the Supreme Court just because you chose to name your band The Slants. There are all kinds of other bands out there—the Dead Kennedys, the Sex Pistols—and those have never been an issue. NWA has a registered trademark. On the racism Richter scale, I would say The Slants is probably a 0.5 and the NWA is probably a 9 or a 10, yet they get it and we don’t. It’s not right for the government to choose winners and losers.

What have your fans thought of the case?

We’ve had this incredible outpouring of support over the years, not only of our own fans and community but also other people who have fought and lost against this law. There’s this incredible feminist hip-hop group out of Denver, Colorado,

previous page, photo: Sarah Giffrow



“I don’t think anyone can imagine that you would end up at the Supreme Court just because you chose to name your band The Slants.”

"The stakes are pretty high on a personal level, because if we lose...we just allowed the government more control over others' identities. That is frankly horrific."

called Harpoontang. There's this all-girl punk band in Seattle called Thunder Pussy. There was a Japanese restaurant who was denied a trademark registration because they named the restaurant Fuku, a Japanese word for luck, because the government said it looks too much like an obscenity. Ironically they allowed trademark registrations for French Connection UK or FCUK, which looks like the same obscenity. So it's all over the place.

It is incredibly frustrating when you can't predict. I went through all the steps outlined. I filled out all the applications. And more importantly, we paid all these fees, every single round. All of a sudden we are denied because of a misunderstanding. Even if we win at the Supreme Court—even if all eight justices say, "You know, The Slants were right all along"—we don't get any of our money back for those court fees and court printing or the legal fees that we had to encounter. We just get a trademark registration. Is that really justice?

Who gets to decide what's offensive?

I think offensiveness is up to the individual person. Cultures and language shift over time. If we registered The Slants 50 years ago, the government probably wouldn't have cared because they could care less about Asian Americans to begin with. If we did it 50 years from now maybe they won't care, especially if the makeup of the government changes. Frankly, that's bad law.

Your Supreme Court hearing is on Wednesday. If you lose, what does it mean for you and the band? If you win, what does that mean?

On a personal level, it would be devastating to see almost a decade of my life just thrown away because the government just doesn't get it. To know that the government can continue to use somebody's race or their sexuality against them. That's just terrible. To me the stakes are pretty high on a personal level, because if we lose we just sealed it that we just allowed the government more control over others' identities. That is frankly horrific.

That's why most people are on our side. People both on the far right as well as the far left understand that this is an issue that is not partisan. This is an issue that deeply affects Americans, because if this trademark law stands at the Supreme Court level, then copyright laws are in danger. All of a sudden the government can say, "Hey you know what? If it's OK to decide we don't like something and we can strip away the rights in this area, what's to say we can't do it in this area?" Patents can be in danger as well. It's a really dangerous notion when you give that amount of power over to censorship.

The Washington Redskins, who are fighting over a racially loaded trademark as well, filed an *amicus* brief in your case, right?

They did, yes. They actually filed multiple briefs over the years. One of them was that they wanted to try and usurp our case. They wanted to consolidate their case with ours and be the ones to argue before the Supreme Court. The Supreme Court swiftly denied that.

A number of media organizations have put forth the idea that there are strong parallels between your case and the trademark case that the Redskins are going through.

There are definitely a lot of similarities between our case and the Washington Redskins' case from a legal perspective, especially when you look at it from a First Amendment perspective. If this law is truly an abridgement of the First Amendment, that means we should have our rights just as they should have their rights, just like any group should be able to kind of name whatever they want as long as it fits the rules and procedures of the trademark office.

That being said, there's also a number of pretty big differences as well. Ours has to do with a trademark registration.

previous page, photo: Sarah Giffrow

Theirs has to do with a cancellation—Fifth Amendment versus First Amendment. That's pretty significant, because they've invested billions of dollars over multiple decades into their franchise and to build their brand, and so for the government to cancel that, it's like seizing their property investment. That's a pretty big deal from the perspective of anyone, because that means all of our trademark registrations are in danger. You may be on the good grace of the government now but who is to say 10 years from now, after you have invested your whole life savings, that they change their minds about you. So theoretically they can seize your property as well.

Then there's also the fact that *redskin* has an inherent meaning that for hundreds of years has referred to Native Americans, some might argue positively and some might argue negatively. *Slants* or especially *The Slants* has not. The reality is most people don't use the word *slant*. They use *slant-eye* if they want to use it derogatory, but even so it's pretty obscure, even in the '30s and '40s. Most people understand that *slant* means, like, a diagonal line or an angle or something like that. They do not necessarily associate that word with Asian Americans.

There are a couple of similarities and a couple of differences and I think the media loves to combine them because they like the headlines—they like short, concise thoughts about what it means—but they don't really like to unpack how complex it really is.

Why didn't you just change the name?

I'm extremely stubborn, I guess. For me, this whole fight has not been just about the band name and our right to access the trademark registration. When I found out what the government was doing and how they were doing it, how they were using it to suppress speech and how they were trying to take rights away from my own community, I decided that was not right. So all of a sudden it became about principle. When I believe they are violating the values of our country and violating my own values, I decided that had to be stopped, no matter the cost.

And it did come at a cost. I had to take second and third jobs to pay some of these legal fees. I'll never get back those seven years of my life in terms of the time spent hitting the ground doing work for this case. But at the end of the day, if we win, we don't just win the trademark registration for our band. We win rights for small business owners, nonprofits, other artists, people who have been slammed with this law themselves.

This interview has been edited for length, clarity, and style. For a video version, go to reason.com.

OBAMA FINALLY FINDS HIS CLEMENCY PEN

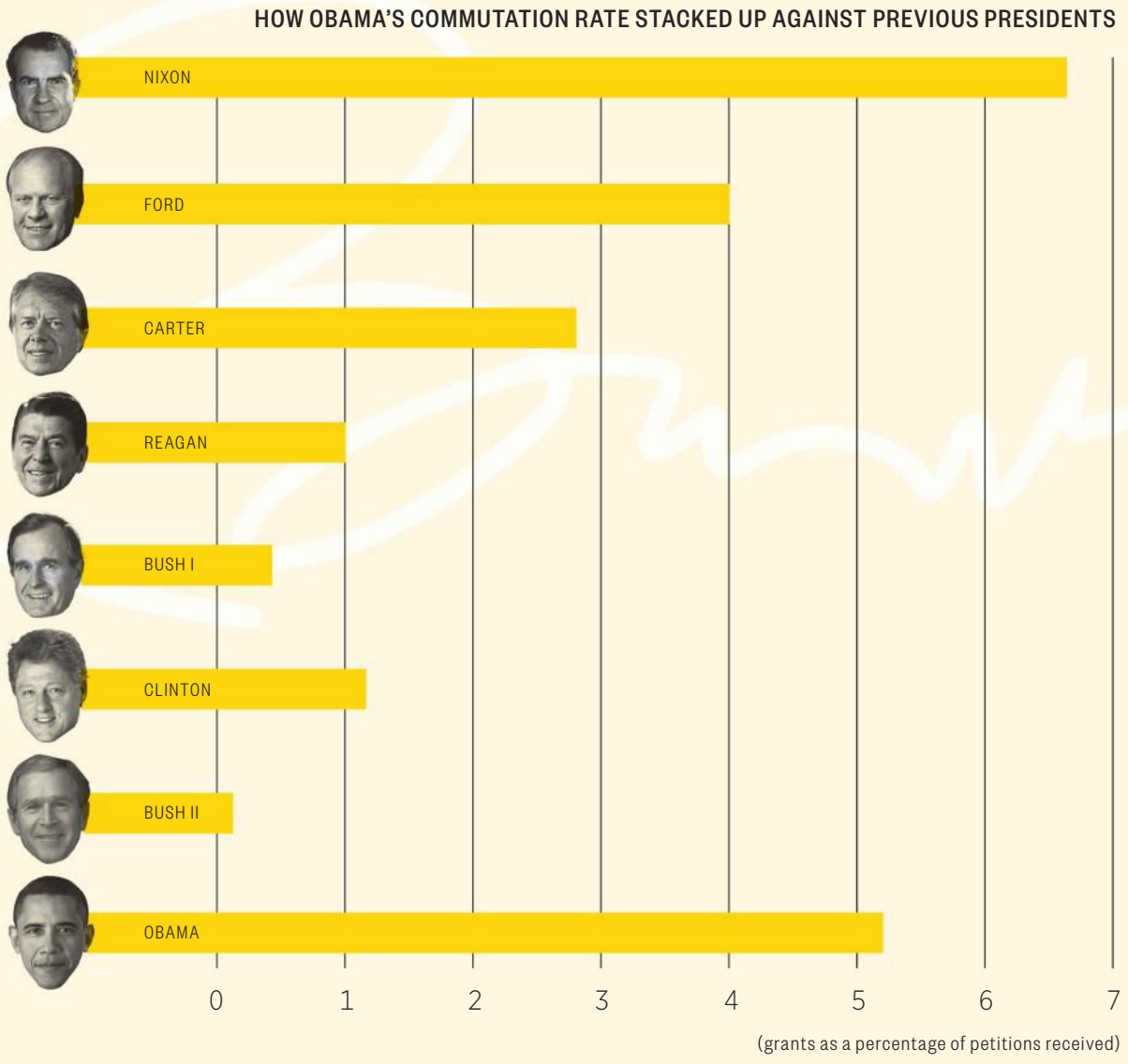
AFTER SHORTENING JUST one prison sentence in his first term and just 21 in his first six years, President Barack Obama seemed intent on making up for lost time. He ultimately granted 1,715 commutations, more than any other president in U.S. history and more than his 13 most recent predecessors combined. Almost all of the recipients were drug offenders, 568 of whom were serving life terms.

Obama's commutation total was less impressive as a share of federal prisoners (less than 1 percent) or as a share of the petitions he received (5.2 percent, which made him much more merciful than his four most recent predecessors, significantly more merciful than Jimmy Carter or Gerald Ford, and somewhat less merciful than Richard Nixon).

Although Obama received a lot more petitions than any other president, the Justice Department's capacity for considering them did not increase commensurately, and the process was plagued by understaffing and bottlenecks.

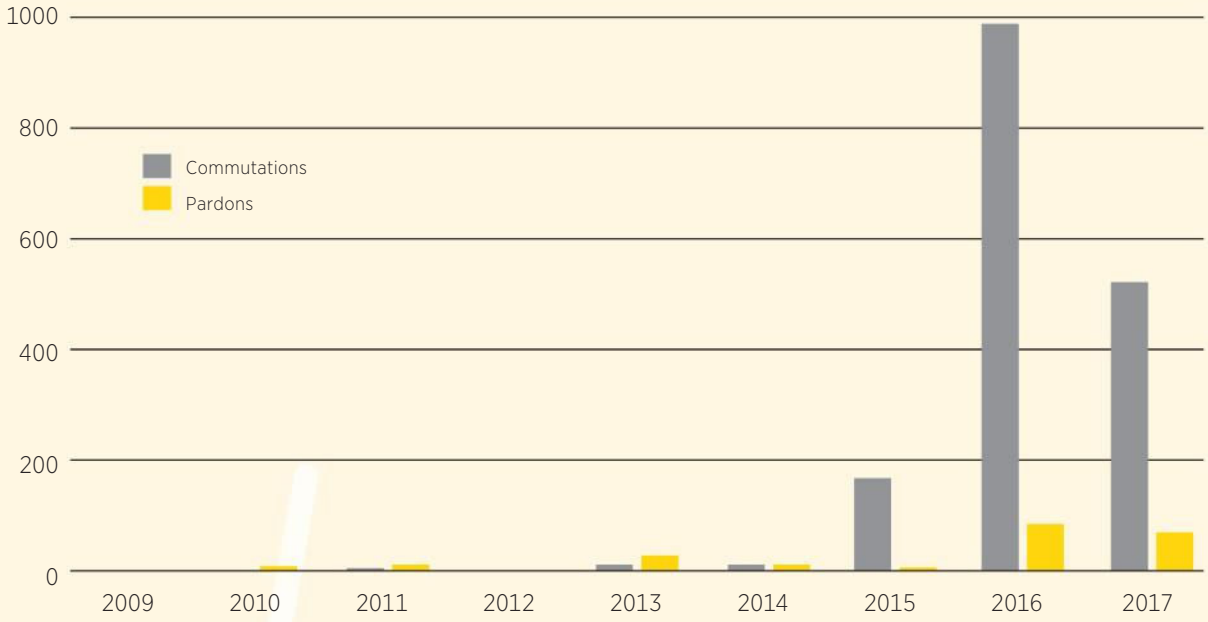
"President Obama was, at the end of his second term, extraordinarily generous with commutations of sentence for drug offenders," clemency expert P.S. Ruckman Jr., a professor of political science at Rock Valley College, wrote on his blog. But he added that because Obama did not make any institutional changes to the clemency process, it "pretty much remains a big bag of 'no.'"

—JACOB SULLUM



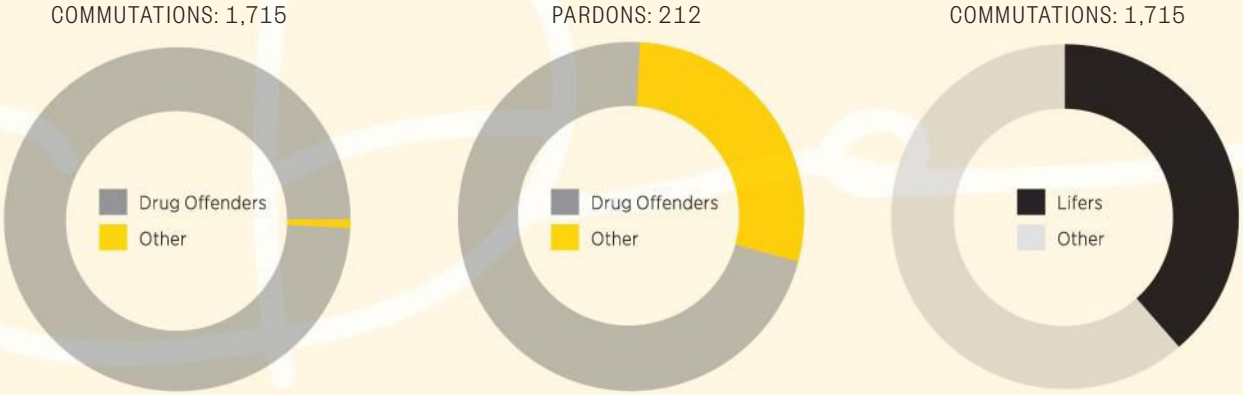
Infographic by Joanna Andreasson

OBAMA CAME LATE TO CLEMENCY

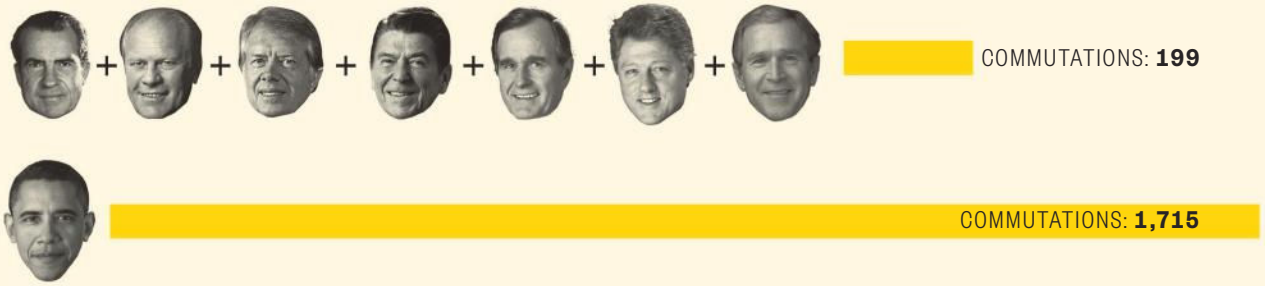


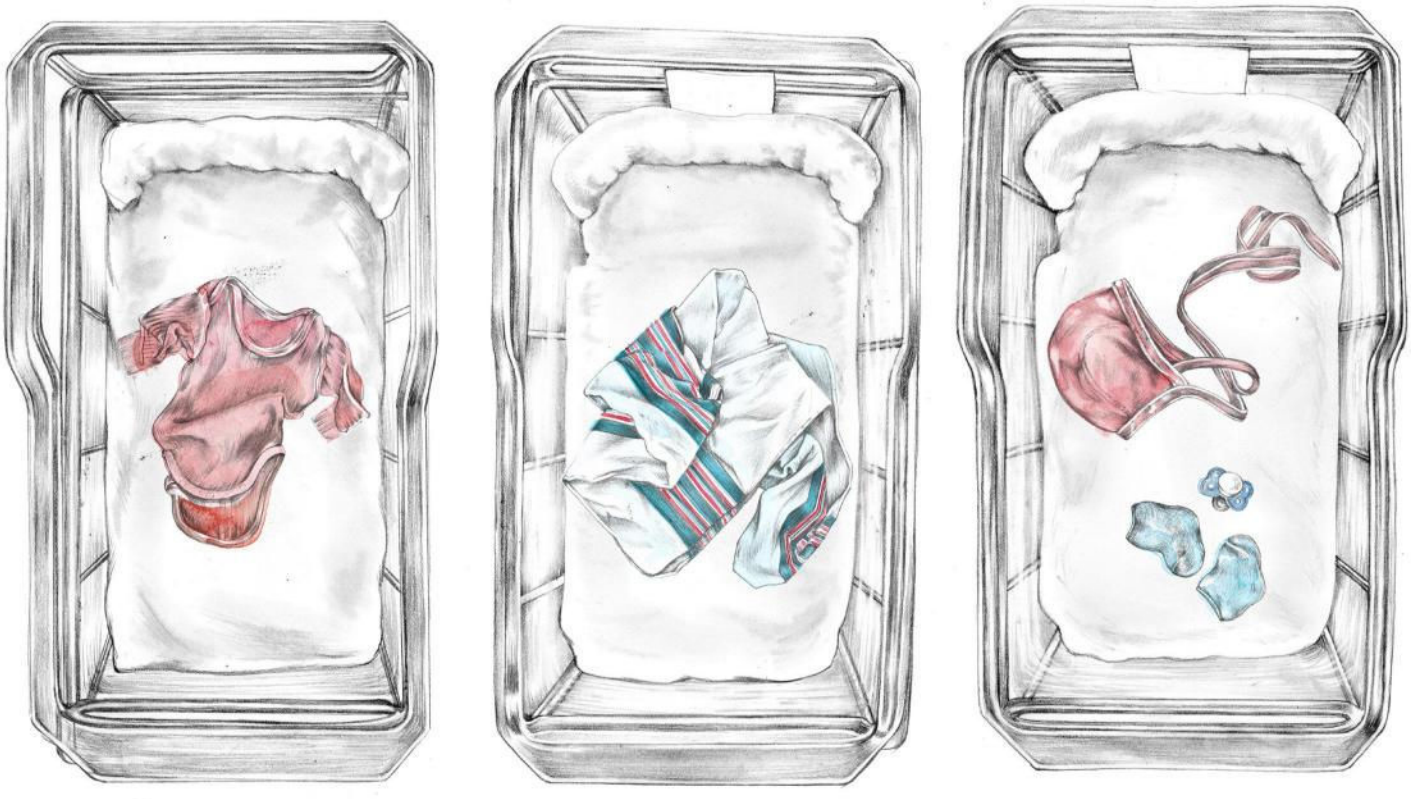
(Commutations shorten prison sentences, while pardons clear people's records, typically long after they have served their sentences.)

WHO RECEIVED OBAMA'S MERCY?



OBAMA'S COMMUTATION TOTAL DWARFS HIS PREDECESSORS'



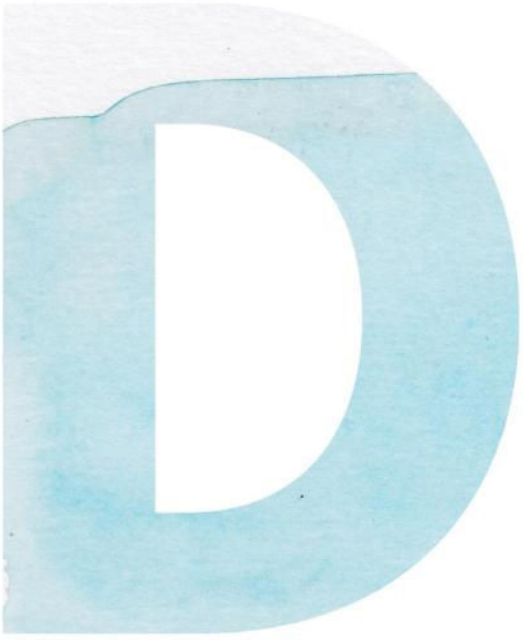


The lethal consequences of a common, obscure hospital licensing law

A Baby Dies in Virginia

ERIC BOEHM

illustrations by Lisel Ashlock



DOCTOR JOHN HARDING was on call when the patient arrived. Twenty-four weeks pregnant, she was bleeding and in pain, suffering from a condition known as a placental abruption, where the placenta detaches from the inner walls of the uterus and triggers premature labor. It can be deadly for both mother and child.

As his colleague in the obstetrics unit at LewisGale Medical Center in Salem, Virginia, tended to the patent, Harding rushed to the phone. At Carilion Medical Center, six miles away near downtown Roanoke, there was a special treatment center for premature and ill infants. The other hospital had a special ambulance equipped with medical bassinets, and Harding knew the mother and baby needed that ambulance as quickly as possible.

"We've got a chance," he later recalled thinking.

But the special ambulance was not available. It was on another call, miles away on the opposite side of the service area, he was told. There was no way to get the critically ill newborn to the neonatal intensive care unit at Carilion.

"I had to go back in there and tell her, you know, it's not coming," Harding said, describing the incident a month later during a public hearing with officials from the state Department of Health.

With no emergency transportation available, Harding and his colleague Kevin Walsh called for whatever assistance they could muster. A pediatrician and anesthesiologist joined the two doctors and their nurses in the delivery room.

They saved the mother's life.

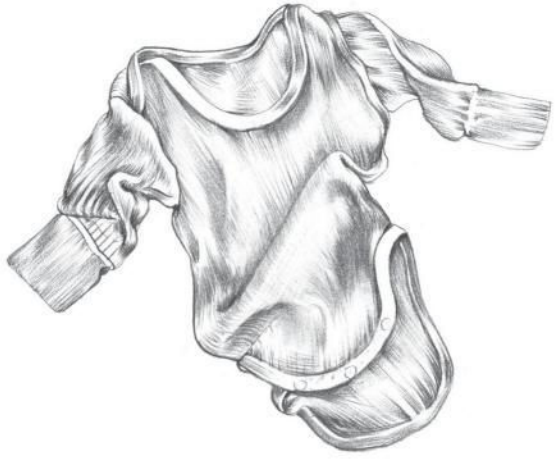
The baby didn't make it.

The infant, who died in February 2012, died not only because of medical complications but because the hospital where it had the misfortune to be born did not have the equipment necessary to give it a better chance at survival. The institution was not equipped to handle the difficult birth because the government of Virginia had refused to let it have high-tech neonatal care facilities, declaring that a high-tech nursery was not necessary.

This baby died, at least in part, because bureaucrats in Richmond—acting in accordance with the wishes of LewisGale's chief competitor and against the wishes of doctors, hospital administrators, public officials, and the people of Salem, Virginia—let it happen.

Like many states, Virginia has a Certificate of Public Need (COPN) law requiring hospitals and other medical providers to get special permission from the state government before they are allowed to offer new services, such as the specialty nursery that may have saved that child's life in 2012. These COPN licensing processes are supposed to balance the interests of hospitals with the needs of the public, but in reality they are fraught with politics and allow special interests to effectively veto unwanted competition.

In July 2010, two years before Harding made his frantic phone call, administrators from LewisGale Medical Center submitted an application to the state Department of Health seeking permission to build a small specialty care nursery service. It was denied. The state's refusal ensured that, sooner or later, some child would face an ugly fate.



II

LEWISGALE'S INITIAL APPLICATION for a COPN license called for a $3.4 million project that would have included an eight-bed neonatal specialty care unit, or NICU.

The hospital was growing, as was the surrounding community. Though it's the smaller half of the binary Roanoke-Salem metropolitan area, it's by no means insignificant. More than 24,000 people live in the city itself and more than 300,000 call the Salem area home, making it the fourth largest metro area in the state and the largest, by far, in the state's mostly rural, mountainous southwestern quadrant.

The number of babies born in the area had nearly doubled in just two years, LewisGale reported in its 2010 application to the state Department of Health. The hospital had expanded its

obstetric staff accordingly, and now it was hoping to expand the services available to mothers and babies.

It had to win permission from the state first.

LewisGale Medical Center is the smaller of the two hospitals operating in the Roanoke-Salem area. Even though it's a 500-bed facility that's part of a larger regional hospital system, it competes with the 760-bed Carilion Roanoke Memorial Hospital—known locally as Carilion Clinic—that houses a 60-bed NICU, the third largest such facility in the state.

In its COPN application, LewisGale argued that "there is tremendous, on-going public need for NICU services." More than 2,300 residents of southwest Virginia signed petitions in support of the project. The Department of Health's review of the application noted that LewisGale's proposed NICU "enjoys an atypically broad array of informed, enthusiastic support from nearly 70 leading citizens, business leaders, and government leaders and officials who are not working in health care or otherwise stand to be professionally affected by approval of the project," including state lawmakers, a congressman, county officials, and the mayors of five towns in the area.

"We are talking about families, we are talking about babies who have great needs, we are talking about the need for bringing the mothers and babies together at a time when sometimes they are separated because of the need to go to a hospital with specialty-level care," said state Sen. John S. Edwards (D–Roanoke) during a public hearing on LewisGale's application.

Ninety-four people came to that hearing. The Department of Health noted, in an August 2011 report, that "no one who attended spoke in opposition, or otherwise indicated opposition to the project."

The only opposition came from Alice Ackerman, a professor of pediatrics at Virginia Tech's medical school—the Carilion School of Medicine, which has longstanding ties to Carilion hospital. In written testimony submitted to the Department of Health, Ackerman argued that the number of specialty bassinets at Carilion was sufficient to meet the needs of southwest Virginia. Approval of a small NICU at LewisGale, she wrote, "has the potential to erode the existing high level of neonatal care" because "small, low-volume NICUs are generally not in the best health interests of the community."

LewisGale was willing to spend the money to build and staff a new NICU. It had nearly unanimous support from the Roanoke-Salem community. Still, after months of consideration, the state Department of Health's Division of Certificate of Public Need sided with Ackerman and Carilion. Building a NICU at LewisGale, the bureaucrats concluded, "would foster institutional competition."

"Patients and obstetricians who may have been reluctant to choose [LewisGale Medical Center] for obstetrical care, due to its lack of either specialty or intermediate level special care nursery services, will be more inclined to use LGMC if the project is approved," wrote Douglas Harris, the state-appointed analyst who handled the first COPN application from LewisGale, essentially arguing that giving people a choice would mean some people choose to take it.

He recommended to Karen Remley, at that point the state's health commissioner, that the application be rejected "despite the many expressions of community support" because the facility "is not needed."

Two weeks after Harris filed his report, Remley accepted his conclusions and denied LewisGale's license application. Under Virginia's Certificate of Public Need laws, she alone had the final say in the matter. (Remley resigned from the state Department of Health in 2013 and now works at the M. Foscue Brock Institute for Community and Global Health at Eastern Virginia Medical School. She did not return requests for comment.)

Virginia's Department of Heath had never before rejected a COPN application to build a NICU. In approving a similar proposal from Chesapeake General Hospital in 2007, it had noted that on-site specialty care for infants "appears to be becoming the standard of care for hospitals providing substantial volumes of newborn care as safety has improved and technology and expectations have evolved."

Less than six months after Remley rejected LewisGale's application, doctors Harding and Walsh would fight their losing battle on behalf of a premature infant.

III

CERTIFICATE OF PUBLIC Need laws—or Certificate of Necessity (CON) laws, as they are known in most of the country—have their roots in the 19th century. Politicians decided that, if they were going to subsidize railways, they should take steps to ensure that there weren't too many being built in a certain location. In other words, they wanted to make sure they were spending the public's money only in places where railroads were actually needed and not encouraging competing rail lines to operate in a location where one line would be sufficient.

Today, these laws are used in a variety of ways to give government planners greater control over the economy. Often, the agencies responsible for determining the "public need" for certain services are controlled by the very industries they are

"I had to go back to the mother and tell her, 'We did what we could, but your baby died,'" Dr. Harding recalled. "We need that NICU," he said, his voice cracking. "We just— we need it."

regulating. Even when a direct conflict of interest is not present on the boards governing CON licensing processes, the process allows incumbent businesses to object to new competition, as Carilion did when LewisGale proposed building a NICU.

The result is to give incumbent businesses what critics call a "competitors' veto."

Darpana Sheth, an attorney with the Arlington, Virginia–based Institute for Justice, a libertarian law firm, says CON laws should be called "Certificates of Monopoly." "It's not about increasing access to health care," she says. "It's a government permission slip to compete that favors established businesses."

Hospitals that want to build a NICU—or open a new surgical center, purchase new medical imaging equipment, or make any substantial capital investment in their facility—are already subject to licensing and inspections by the state. The CON process has nothing to do with protecting patients' health or safety and everything to do with preventing unwanted competition, Sheth says. The underlying idea is that central planners can better sort out patients' needs than the hospitals serving those patients.

The Institute for Justice has challenged CON laws in several states. The firm has also been involved in a legal challenge to a COPN ruling that prevented a doctor from opening a new, non-invasive colonoscopy clinic in Virginia because the state decided there were already enough medical imaging devices being used by other providers.

Thirty-six states now employ some form of CON regulations for health care, according to the National Conference of State Legislatures, thanks to a twisted history that involves hospital lobbyists, the influence of the federal government, and inertia in state capitals.

In the early part of the 20th century, CON laws were still used mostly to regulate the transportation industry. That changed in 1964, when New York passed a law requiring a government permit before new hospitals or nursing homes could be built. A 2009 study by Pamela Smith and Dana Forgione, originally published in the *Journal of Health Care Finance*, recounts how four other states (California, Connecticut, Maryland, and Rhode Island) followed suit by the end of the '60s, as hospital executives began to recognize the value of getting governments to erect barriers to future competition.

Starting in 1969, the American Hospital Association began lobbying for a federal CON law. It never got the law it wanted, but three years later, within a series of amendments to the Social Security Act, Congress included a mandate that states review all capital expenditures for hospitals and medical facilities costing more than $100,000 or for any changes to existing services.

In 1974, Congress doubled down by tying federal Medicaid funding to the mandate, so states that did not comply risked losing their federal subsidies. The arm-twisting worked. By the end of the 1970s, every state except Louisiana had passed some form of CON requirement, giving state officials the final say on whether new hospitals could be built or offer new medical services.

In theory, this was supposed to reduce costs. Proponents argued that too much investment in health care in one place would mean higher prices for customers. Giving states control over hospitals' capital investments was supposed to prevent overinvestment and keep hospitals from having to charge higher prices to make up for unnecessary outlays.

But the mandate did not reduce costs. Instead, as a 1982 Congressional Budget Office (CBO) study found, it increased them.

That study found "no evidence that CON review has limited the growth in hospital unit costs" and noted that state-level CON laws were more focused on the distribution of health care services, even though the intention of the federal mandate was to control costs. In one study cited by the CBO, the availability of hospital beds had fallen by 6 percent, though the CBO said it could not prove the regulations had led to the decline in access.

In 1987, with support from the Reagan administration, Congress killed the CON mandate. Since then, 14 states have repealed their health care CON laws. But many others—including Virginia—still rely on them.

In 2016, the Federal Trade Commission and the U.S. Department of Justice issued a joint statement calling for state governments to roll back CON laws in order to free health care markets and lower prices. "CON laws raise considerable competitive concerns and generally do not appear to have achieved their intended benefits for health care consumers," the two agencies concluded, warning that these laws have been exploited by competitors seeking to protect exclusive markets by raising the cost of entry.

"It's been a big failed experiment," says Sheth.

IV

JUST WEEKS AFTER watching an infant die on their watch, doctors Harding and Walsh sat before a state Department of Health committee, pleading for help in making sure something like that would not happen again. Walsh had come down with the flu, but he made the trip to the campus of Western Virginia Community College anyway, because "this is so important."

The occasion was the first and only public hearing held by the Virginia Department of Health's Certificate of Public Need Committee regarding LewisGale's second application to build a NICU. The hospital had, in January 2012, applied to add eight specialty bassinets. Again, the crowd at the public hearing was nearly unanimous in favor of letting the hospital do what it wanted.

Walsh told the story of how his patient had come to the E.R., bleeding and in pain. He told the committee about the placental abruption, the calls to Carilion, and the ambulance that never came. The mother, he said, now was being treated for depression.

"We've tried to help her understand what's happened, because she's had a loss, and there's no good spin on this," he said. "And the one question I can't answer for her is: Why was there not a way for her baby to be stabilized?"

"I implore whoever can help us with this decision," Walsh said. "Give us the tools we need to take care of our patients, the people that have come to us and entrusted their care in us." Anything short of that, he said, was unacceptable.

After Walsh spoke, Harding took to the microphone to tell his version of the tragic events that had unfolded a few weeks earlier. "I had to go back to the mother and tell her, 'We did what we could, but your baby died,'" he recalled.

"We need that NICU," he said, his voice cracking. "We just—we need it."

Over the next hour, the committee heard from LewisGale doctors and nurses, hospital administrators, local residents, elected officials, and business leaders. If there was any difference between the March 2012 hearing and the one that took place in 2010, it was the frustration that comes across even in the written transcripts of the event.

"I'm not happy to be here again," said Alice Gordon. She had given birth at LewisGale, but her son had to be transported to Carilion's NICU when he had trouble breathing the next day. The boy turned out to be fine, but mother and child were separated for days and the ordeal created weeks of stress, as well as a hefty ambulance bill, for the new mother.

When LewisGale applied for a COPN to build a NICU in 2010, Gordon had traveled to Richmond, more than three hours away, to share her story at the public hearing. The experience left her embittered at the state's health care bureaucracy.

"After hearing—having the opportunity to go as a layperson and hear even more-qualified individuals testify in favor of this petition, I sat there and listened, and I got angry," she told the committee.

Gordon wasn't the only one who couldn't understand why the first application had been rejected.

"The state's denial of LewisGale's previous application has robbed us of our ability to provide the best quality care to the people of southwest Virginia," said Kim Beck, a labor and delivery nurse at the hospital, during the March 2012 hearing.

"If LewisGale is willing to spend the money and the time to add these facilities, the staff, and the equipment for better patient care, I don't see a reason why they should be denied it," testified Natasha Lee, another woman whose son was delivered at LewisGale. "If it can save one baby's life, if it can prevent one baby from having permanent complications—because, you know, it is about life and death, but it's also about preventing long-term lifelong complications that babies can have from not getting the early care they need."

Lee speaks from experience. Her son was born in May 2011 without complications. The next night, however, his oxygen levels dropped and his skin color changed. He had to be transferred to Carilion. Lee then discharged herself from LewisGale—against her doctor's wishes—so she could be with her newborn child. He survived and recovered. But it left a mark. It was, she told the COPN board, "the worst experience of my life."

Lee isn't the only mother to face separation from her newborn because of LewisGale's lack of facilities. Misty McGuire's son was born at LewisGale in April 2008 and began suffering from seizures a day later. He needed to be transported to Carilion, McGuire told the board, but her insurance wouldn't cover it. She ended up with a $4,200 medical bill for the 10-minute drive between hospitals. But the worst part for the new mother was that she had to be away from her child so soon after he was born.

"We couldn't understand why LewisGale did not have the ability to care for our new baby," she said at the hearing. "I want doctors that know me, that know my family, nurses that care and

will be honest with me, and that does not come with changing hospitals."

Midway through the hearing, the lone voice of opposition spoke up. Wanda Ostrander, vice president of the Carilion Clinic Children's Hospital, spent a few brief moments at the microphone to explain the Roanoke hospital's opposition to letting a competitor build a NICU. "We have the capacity to take care of all the babies in the region," she said.

All the babies in southwest Virginia would be perfectly fine, Ostrander maintained—as long as they were born at her hospital instead of a competitor's.

She did not return requests for comment, and a spokesman for Carilion hospital declined to answer a direct question from *Reason* about the hospital's ability to care for all the newborn infants in the Roanoke area. Instead, the spokesman directed us to a 2014 letter from Carilion School of Medicine's Ackerman to Virginia's Department of Health. The letter repeats the same arguments made by Ackerman in 2010 and Ostrander in 2012, points out that Carilion's NICU typically is filled to 75 percent capacity, and concludes by telling the state that "another neonatal specialty care nursery is not needed in southwest Virginia."

The letter also acknowledges one of the strongest arguments in LewisGale's favor: that separating mothers and infants creates unnecessary emotional stress, which could be prevented if LewisGale had a NICU on location. "We agree that this type of transfer is not ideal for mother and baby," Ackerman conceded. Citing state-issued health guidelines, she argued that potentially sick or premature babies should be transferred to Carilion "in utero for optimal outcomes."

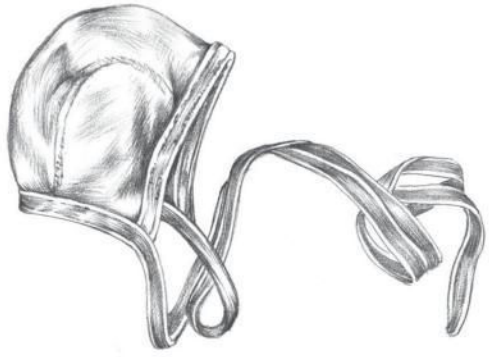
Ackerman suggests that the best way to avoid transferring babies to Carilion after birth is for mothers to give birth at Carilion. That's also a prominent feature of Carilion's advertising efforts, which stress the fact that it has the region's only NICU.

Asked why the hospital has repeatedly, single-handedly opposed the building of a NICU at LewisGale, Carilion Clinic spokesman Chris Turnbull pointed to the state's authority. "The Commonwealth of Virginia has established through its repeated reviews of the request for an 8-bed NICU that there is already adequate or excess capacity for NICU patients in our region," he said via email. Denise King, who joined the LewisGale board of directors in 2005, was at the COPN hearing in 2012. Even now, she remains angry about it. A resident of Salem for more than 30 years and a former president of the region's Chamber of Commerce, King was shocked to find out that LewisGale's first application for a NICU was denied. She says the lack of such a unit hurts the hospital's ability to provide top-notch care for patients, and she believes the rejection was the result of the state putting Carilion's interests ahead of the community's.

"In a region as big as ours, to only have one option [for infants needing intensive care], it's just difficult for me to understand," she says. "It's never a problem to have competition in business."

According to the state Department of Health, the COPN application process takes at least 90 days. It took more than two years for the state Department of Health to make a decision about LewisGale's second application to build a NICU. When the decision came, the state again said no.

"While there is substantial support for the proposed project, there is compelling opposition from the regional perinatal center [Carilion] which is located reasonably close to the proposed project," the department concluded in April 2014.



NUMEROUS SOURCES DESCRIBE the fight between Carilion and LewisGale as a "turf war." Carilion, with the backing of the Department of Health's Division of Certificate of Public Need, appears to be winning.

"You have two competing hospitals and you would expect a certain amount of we-don't-want-them-to-have-what-we-have between them," says King.

But what did Carilion really stand to lose? In a lawsuit appealing the Department of Health's second rejection of LewisGale's request, attorneys for the Salem hospital argued that even if its proposed NICU was filled to maximum capacity at all times, it would reduce Carilion's occupancy by no more than 5 percent. Carilion—with 60 bassinets in its NICU compared to eight at LewisGale—would remain the third largest provider of neonatal intensive care in the state.

This local conflict raises bigger questions about the role the state government, or any government, should play in the decisions made by hospitals, by doctors, and by patients. Who gets to decide whether LewisGale should build a NICU? Who gets to decide whether any hospital should build any new facility or offer new services? There's no compelling reason for anyone besides the hospital administrators to make that decision. They know what their doctors and their patients need, surely, better than a bureaucratic analyst or a commissioner in a state capital.

That would be true even if CON laws were serving their purpose and lowering the cost of health care. It's even truer when CON laws have failed so spectacularly, surviving only because of

Who gets to decide whether a hospital should build a new facility or offer a new service? The administrators know what their doctors and patients need better than a commission in a state capital.

legislative inertia and the influence of those few special interests who benefit from limiting competition and keeping prices higher.

Competition between hospitals can lower prices for patients. In a 2015 paper, economists from Yale, Carnegie Mellon, and the London School of Economics evaluated claims data from Aetna, Humana, and UnitedHealth. They found that costs were 15.3 percent higher, on average, in areas with just one hospital compared with those served by four or more hospitals.

Competition also increases quality. In a paper published last year by the Mercatus Center at George Mason University, Thomas Stratmann and David Wille argue that hospitals in states with CON laws have higher mortality rates than hospitals in non-CON states. The average 30-day mortality rate for patients with pneumonia, heart failure, and heart attacks in states with CON laws is between 2.5 percent and 5 percent higher, even after demographic factors are taken out of the equation.

"This is alarming news, but it shouldn't be too surprising," the researchers note. "Providers compete on a variety of margins beyond price, and quality is one of them. As a result, when CON laws artificially restrict the number of providers in a local market—protecting those few favored providers from increased competition—there is less pressure for them to worry about the quality of care. Patients are then left with fewer options."

There are other consequences that can't be easily measured. Because of the time and expense necessary to get a CON license—and without any guarantee that a competitor won't block your application—some would-be providers don't even try to enter the market in states, like Virginia, with onerous CON processes.

"It can easily cost six figures to go through the CON process," says Sheth, the attorney from the Institute for Justice. "You have to hire attorneys and other professionals, and you have to go through what's basically a legal process. It hurts independent doctors and small facilities the most."

VI

SHETH BELIEVES THE best chance for change lies with state lawmakers, because courts view CON laws as a matter of regulatory policy and are often unwilling to wade into that thicket. Some legislators are trying to reform or end these laws. Wisconsin and New Hampshire, for example, suspended the enforcement of their CON requirements in 2016.

In many state capitals, however, it's been difficult to muster support for repealing the laws, which remain popular with influential interest groups.

Delaware's failed effort to wipe its Certificate of Need laws from the books shows how hard it can be. In 1993, the state legislature passed a law freeing Delaware hospitals from CON regulations. It was supposed to take effect the following year. But before that could happen, lawmakers took up the issue again and extended the sunset date to 1996. They would later kick the expiration date back to 2002, then 2005, and eventually 2009. Finally, in 2009, legislators voted to remove the sunset provision and keep the law on the books.

Virginia's reform efforts have struggled as well. In 2015, lawmakers convened a "study group" to review the state's COPN laws for hospitals, ultimately recommending a series of reforms that would have trimmed the state Department of Health's ability to determine which hospitals would be allowed to offer what services.

But when bills implementing some of those reforms passed the state House and moved to the state Senate, hospital executives stepped up their efforts to kill the legislation, meeting directly with high ranking senators, according to the *Richmond Times-Dispatch*.

Meanwhile, the Virginia Hospital and Healthcare Association ran television ads across the state asking residents to call

lawmakers and urge a negative vote on the bills. In the campaign-style ads, a voice-over warns that COPN reform will "financially ruin your local hospitals, putting lives at risk."

The bills never made it across the finish line. During the short 2017 legislative session, which end February 25, another effort at reform has fallen short.

"Reforming Virginia's outdated COPN laws is the most important thing legislators can do this year to help constituents get affordable care close to home," Virginia state Del. John O'Bannon (R–Henrico), the main sponsor of the most far-reaching proposal advanced this year, said in January. "These laws provide hospital systems with a protected monopoly that works against useful health care reform and patients' choice."

A month later, as it became clear that several COPN bills would not pass before the end of the 2017 session, O'Bannon said the legislature's failure to act was "a loss for all residents of Virginia."

VII

TO PROTECT FAVORED hospitals from competition—under the guise of looking out for the public—state governments are driving up health care costs and decreasing the availability of quality care. The end result is that people die.

After its request was denied for the second time, LewisGale appealed the decision, arguing that the Department of Health was wrong to have rejected its application. The case was ultimately dismissed, but during the legal battle the Department of Health filed a brief arguing that "there is no factual evidence to support the allegation that the baby would not have expired if LewisGale had a specialty level NICU in operation."

To ignore the government's role in the death that occurred at LewisGale Medical Center in February 2012 by declaring that maybe the infant would have died anyway is to ignore the facts of that specific incident and the general consequences of CON laws in health care.

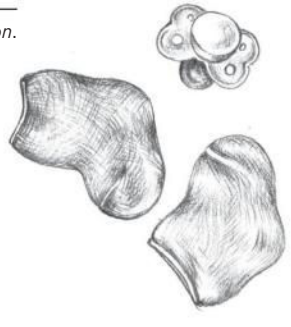
Because of the time and expense necessary to get a Certificate of Need license, some would-be health care providers don't even try to enter the market in states, like Virginia, with onerous processes.

Public records don't reveal the name of that baby or its mother, and Harding and Walsh declined to comment for this story. But public testimony and multiple interviews confirm that the death occurred, and they validate other details of the incident—like Harding's desperate phone calls to Carilion seeking emergency transportation. According to legal documents filed as part of a 2014 lawsuit, Carilion's NICU ambulance still had not arrived 45 minutes after it was requested, at which point the doctors canceled the call because the baby had died.

"Obviously we never know whether the outcome would have been the saving of the life," Denise King says. "But we knew that without the NICU there was no chance."

"Concerns about duplicative services pale when compared to the life and death real-world consequences of whether LewisGale's NICU application should have been approved," Charlotte Tyson, the hospital's chief operations officer, told members of the Virginia legislature during a public hearing in October 2015. "Pregnant women should be able to deliver their babies knowing that, God forbid, should something go wrong, the hospital they are in is able to offer the best treatment. The story of LewisGale's failed efforts to secure COPN approval for its NICU is a valuable lesson in how a law with good intentions can have terrible real-world consequences."

ERIC BOEHM is a reporter at *Reason*.



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Christians Started the Wedding Wars

DEFENDERS OF TRADITIONAL MARRIAGE USED THE LAW TO PERSECUTE POLYGAMISTS. NOW THEY'RE THE ONES UNDER ATTACK.

STEPHANIE SLADE

A MAN WHO lived with more than one woman was anathema in the 19th century; the media called polygamy an "act of licentiousness" that deserved to be categorically denounced, its adherents disenfranchised. In 1885, the U.S. Supreme Court upheld a federal law making plural marriage a felony, declaring that "the union for life of one man and one woman in the holy estate of matrimony [is] the sure foundation of all that is stable and noble in our civilization." A *New York Times* editorial celebrated that result, observing cheekily that "we had not supposed there had ever been any serious question."

Today, it's the old-timey view that marriage is between one man and one woman only—and that sex should be reserved to that union—that raises the Grey Lady's ire. When Californians sought to ban gay marriage in 2008, the editors of the *Times* called the initiative a "mean-spirited" effort "to enshrine bigotry in the state's Constitution."

Even assuming you think the paper was right the second time around, the reversal is striking. But while the norms have clearly changed, the desire to punish anyone who refuses to comply with those norms appears to be forever.

As the nation goes to war over birth control mandates and gay wedding cakes, many religious supporters of traditional marriage and sexual mores understandably feel their rights are being trampled. But so did the Mormons a century ago. To justify the anti-polygamy laws forbidding that group to live out its faith, Christian traditionalists stretched the First Amendment to precarious lengths. Now, the arguments they created and employed are being turned against them.

DISCRIMINATION NATION

"WE CAN'T PROMOTE a marriage that God says isn't really marriage," the blog post would have read. "Even if our beliefs are a bit different or unpopular, we have to stick to them."

But those words, penned by Joanna Duka and Breanna Koski, were never published to their website. The authors feared the government of Phoenix might come after them if they were.

The young women, aged 23 and 24 respectively, are the owners of Brush & Nib Studio, an Arizona-based custom artwork and calligraphy shop. Shortly after getting their new business off the ground in 2015, they realized that a city ordinance passed two years earlier opened them up to enormous fines and even jail time as a result of their beliefs. The law forbids certain companies not just from discriminating against gays and lesbians but also from saying anything that so much as implies a customer would be unwelcome because of his or her sexual orientation.

Duka and Koski don't want to be forced to create wedding invitations and other artwork that celebrate same-sex marriage, so they're suing to overturn the Phoenix regulation as a violation of their First Amendment rights. Their prospects seem grim, however: In September of last year, the Maricopa County Superior Court denied their request for a temporary injunction to stop the law from being enforced while the challenge proceeds. "There is nothing about custom wedding invitations made for same-sex couples that is expressive," the decision, incredibly, reads.

That ruling is just one in a litany of recent instances in which small business owners have faced serious legal consequences for not wanting to be involved in commemorating same-sex unions. In Colorado, the owner of Masterpiece Cakeshop was hauled before the state's Civil Rights Commission. In Oregon, the proprietors of Sweet Cakes by Melissa were fined an eye-popping $135,000 and had to shutter their storefront. In New Mexico, the state Supreme Court told photographer Elaine Huguenin that she and her husband would be "compelled by law to compromise the very religious beliefs that inspire their lives." In upstate New York, a couple was forced to stop renting out their farm for wedding ceremonies unless they agreed to let gay couples marry there as well.

In theory, the Constitution is supposed to prevent things like this. The First Amendment says that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In each of the above cases, though, the government got around that limitation by arguing that individuals have the right to believe as they like on their own time, but when they venture out into the marketplace, they forfeit the privilege of acting in accordance with the dictates of their faith.

The same supposed distinction between private opinions and public behaviors also features prominently in debates over the Obama administration's contraception mandate.

That rule, which was handed down by the federal Department of Health and Human Services (HHS) in 2012 as part of the Affordable Care Act, said that free birth control coverage had to be included in all employee health insurance packages. But some religiously affiliated employers, and in particular Roman Catholic ones, believe that facilitating the use of contraception makes one complicit in sin.

The agency exempted houses of worship from the rule, which let Catholic churches off the hook. But that did nothing for Catholic schools, hospitals, nursing homes, adoption agencies, and other charities. Eventually, the administration offered an "accommodation" in which the groups' insurers, rather than the groups themselves, would technically be responsible for paying for the coverage. Not surprisingly, this accounting sleight of hand did not allay the charities' concerns.

In *Zubik v. Burwell*, a coalition of faith-based nonprofits asked the Supreme Court to determine whether the mandate,

Illustration: Joanna Andreasson

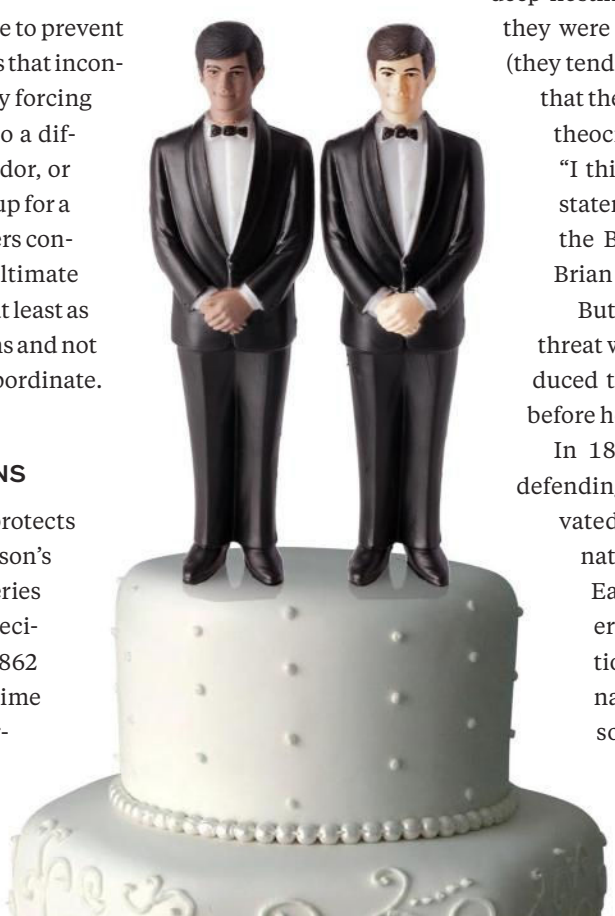
as applied to such organizations, violated their religious freedom. Among the petitioners are the Little Sisters of the Poor, an order of Catholic nuns who care for the indigent elderly and have become the public face of this dispute.

Despite the nuns' sympathetic character, the political left remains strongly opposed to allowing them and their coreligionists to opt out of the requirement. "What these people are after isn't religious freedom," wrote Barry W. Lynn, executive director of Americans United for Separation of Church and State, in a blog post that represents the general tenor of progressive rhetoric on the matter. "It's the right to use theology to control the private behavior of others, to impose their religion on the unwilling and to employ narrow dogma as an instrument of discrimination."

Discrimination is a term that comes up frequently in these debates, since "the very nature of religion is 'discriminatory,'" says U.S. Civil Rights Commissioner Peter Kirsanow. "Now, it's not *invidious* discrimination. But Catholics are different from Jews. And Jews are different from Muslims. And Muslims are different from Protestants, and on and on."

Kirsanow argues that those differences ought to be respected. "One of my main concerns is the elevation of principles of nondiscrimination over principles of liberty," he says. "We should be more concerned about government coercion than we are about individual coercion. Both may be bad, but one is scores of orders of magnitude more serious than the other. And one was the principal reason we fought a revolution."

Yet in case after case, the desire to prevent business owners from taking steps that inconvenience someone else—either by forcing a customer to drive a few miles to a different pharmacy or wedding vendor, or by requiring an employee to sign up for a separate insurance plan that covers contraceptives—is treated as the ultimate consideration. Religious liberty, at least as far as it informs a believer's actions and not just her opinions, is treated as subordinate.



AMERICA VS. THE MORMONS

THE IDEA THAT the Constitution protects only what happens between a person's ears isn't novel. It has roots in a series of laws, and the Supreme Court decisions that upheld them, from 1862 through 1890. The goal at the time was to rein in a new and dangerous-seeming religious movement called Mormonism by criminalizing its most eccentric practice: polygamy. But by claiming the right to regulate the behavior of people of faith, mainstream believers set the stage for the modern political left to step in and regulate *them*—and to have 150 years' worth of precedents on their side when they did it.

The Mormon faith, today known as the Church of Jesus Christ of Latter-day Saints (LDS), was founded in 1830 by a farmer named Joseph Smith. As the nascent religion picked up followers, it attracted an increasingly violent resistance from the non-Mormon "gentile" community, eventually culminating in an all-out legal assault against the early Church.

Smith and his followers were repeatedly driven westward—forced from their encampments in Kirtland, Ohio; Jackson County, Missouri; and Nauvoo, Illinois, before settling in the Great Basin region of what is now Utah. They were harassed wherever they went, often with the approval of local officials. On one occasion Smith was tarred and feathered. Years later he was murdered by a mob that broke into the Illinois jail cell where he was being held. Even after the Mormons settled along the Great Salt Lake, they were still hounded by government authorities. In the 1850s, President James Buchanan sent forces to Utah in what the people there viewed as a military invasion. Relations between the federal troops, the Latter-day Saints, and the fortune seekers streaming west to partake in the Gold Rush remained tense for decades.

There were a number of reasons for Americans' deep hostility toward the Mormons, from fears they were amassing too much political power (they tended to vote as a bloc) to the perception that they were zealots bent on establishing a theocratic government on American soil. "I think they were *unwise* in some of the statements they made to the locals," says the Brigham Young University historian Brian Cannon.

But the emblem of the alleged Mormon threat was polygamy, a practice Smith introduced to his inner circle in Nauvoo shortly before he was killed.

In 1852, the LDS Church began openly defending plural marriage. This is what elevated the "Mormon problem" to the national stage. Beginning in the 1850s, Eastern newspapers were rife with references to polygamy as "evil," "licentious," a "brutalizing practice," "repugnant to our sentiments of morality and social order," and "shocking to the moral sense of the world." *The New*

York Times editorialized repeatedly for taking direct action against the Latter-day Saints. "The fact, if it be a fact, that the women are willing to live in polygamy, is no reason for our allowing them to do so," the editors of the paper wrote in March 1860. What had begun as rival groups skirmishing over frontier resources came to be seen as an existential conflict: The soul of the whole country seemed to be at stake if the federal government allowed such behavior to continue.

PLURAL MARRIAGE 'EXTIRPATED'

PLURAL MARRIAGE WAS tied up with slavery in the politics of the day. The GOP platform in 1856 famously called upon Congress "to prohibit in the territories those twin relics of barbarism, polygamy and slavery." But not everyone agreed—with the second half of the Republicans' prescription.

In 1853, a "Southern contributor" to one of New York City's daily newspapers published a lecture arguing that of the two, polygamy was actually the worse offense. (At least slavery, he said, was tolerated in the early Christian faith.) Arguably one reason a prohibition on plural marriage wasn't passed sooner was a fear among some Democrats that abolition might follow. North Carolina Rep. Lawrence O'Bryan Branch said he could not support a federal ban because "if polygamy was declared criminal, there would be no reason why the same action might not be taken regarding slavery."

Even so, they made their feelings about the Mormon practice clear. "The knife must be applied to this pestiferous disgusting cancer which is gnawing into the very vitals of the body politic," thundered presidential hopeful Stephen Douglas in 1857. "It must be cut out by the roots and seared over by the red hot iron of stern and unflinching law."

The Civil War eventually put an end to the prohibitionists' need to allay Southern concerns about federalism, and in July 1862 the Morrill Anti-Bigamy Act became law. "That the purpose of the bill is entirely right and commends itself to every true friend of morality and civilization," wrote the editors of the *Times*, "will scarcely be questioned anywhere outside the circles of Mormondom."

> "The fact, if it be a fact, that the women are willing to live in polygamy," wrote the editors of *The New York Times* in 1860, "is no reason for our allowing them to do so."

At first it meant little. Since most everyone in Utah territory was Mormon, attempts to enforce the ban turned out to be virtually impossible. How do you prove a man has taken multiple wives if no one will testify against him? With the judges and juries populated by polygamists and their neighbors, the Morrill Act was effectively a dead letter.

Lawmakers in Washington and the good, upstanding Christians they represented were not about to roll over and accept polygamy, though—even 2,000 miles away. Agitation began for legislation to increase the penalties against those who condoned plural marriage.

By the early 1880s, the Rev. Dr. John Philip Newman, a bishop of the Methodist Episcopal Church, was giving sermons in which he "pleaded in behalf of women, God's last, best gift to man, that the curse should be wiped out." He didn't mince words: Since "the people of Utah are clothed with the rights of citizenship, and have their courts," he said, "the courts must therefore be overthrown by a military invasion."

The government didn't quite go to war. But it took to arresting those it found to be living with multiple women, even if it couldn't show they were married. According to law professor Ray Jay Davis in the *Encyclopedia of Mormonism*, more than 1,300 Mormons were jailed as "cohabs" during the 1880s.

Prosecutors even tried to argue they could re-arrest cohabs as they left prison—after all, residing with more than one wife was a "continuing offense." But "in a rare win for the Mormons, the courts ruled that officials had to find

new evidence of violations of the law before arresting someone who had already done time," says Kenneth L. Cannon, an attorney whose great-great-grandfather, the Mormon leader George Q. Cannon, was convicted of unlawful cohabitation in 1888.

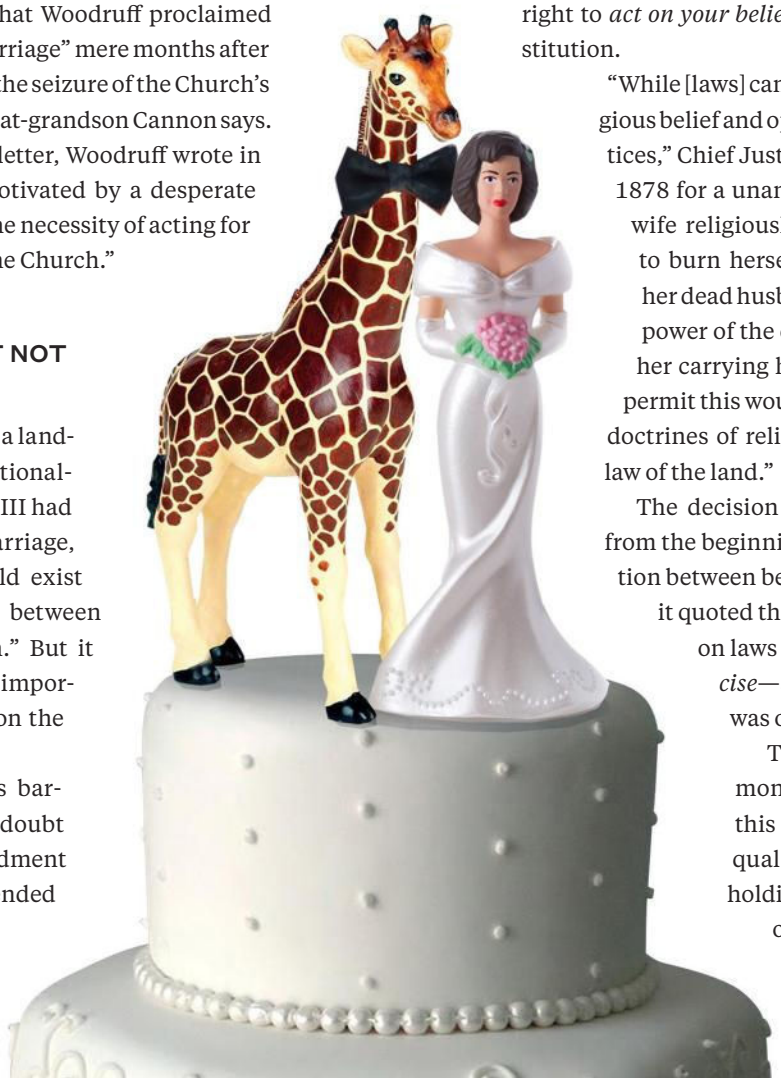
In December 1881, Sen. George F. Edmunds of Vermont introduced a law to make anyone who accepted the Church's teachings on polygamy ineligible to vote, hold public office, or serve on a jury. Again, the editors of the *Times* endorsed the act's passage: "It must be admitted that the Edmunds bill is a harsh remedy for polygamy. But then the disease in Utah has gone beyond remedies that are not more or less heroic."

It passed, as did another law five years later disincorporating the Church and declaring that all Church property and assets above $50,000 would be confiscated by the government.

The efforts worked—but only "after four years of harsh and in some cases ruthless enforcement, and only after thousands of lives had been ruined," according to a 1987 article in *The John Whitmer Historical Association Journal*.

On October 6, 1890, LDS President Wilford Woodruff published a manifesto reversing the institution's position on polygamy: "I now publicly declare that my advice to the Latter-day Saints is to refrain from contracting any marriage forbidden by the law of the land."

"It is not coincidental that Woodruff proclaimed the official end of plural marriage" mere months after the Supreme Court upheld the seizure of the Church's assets, George Q.'s great-great-grandson Cannon says. The day after penning the letter, Woodruff wrote in his journal that he was motivated by a desperate pragmatism: "I am under the necessity of acting for the temporal salvation of the Church."



FREE TO BELIEVE BUT NOT TO ACT

THE MANIFESTO OF 1890 was a landmark victory for the traditionalist view that, as Pope Leo XIII had put it a decade earlier, "marriage, from its institution, should exist between two only, that is, between one man and one woman." But it came at the expense of important constitutional limits on the state's power.

Proponents of the laws barring polygamy were no doubt aware that the First Amendment was implicated. Yet they tended to dismiss these concerns. When pressed on the issue, the New York Democrat Hyrum Waldridge likely summed up the feelings of many supporters of the ban: "I do not propose to say whether it is constitutional or not—I am viewing this as a great moral question."

The laws outlawing plural marriage and then ratcheting up the punishments didn't go without legal challenge. In 1875 George Reynolds, secretary to Church President Brigham Young, agreed to be prosecuted for bigamy as a means of forcing the Supreme Court to consider whether the Morrill Act violated the Constitution. Convicted of having two wives and sentenced to two years' hard labor, he appealed on the following grounds: that he was a member of the LDS Church; "that it was the duty of male members of said church, circumstances permitting, to practise polygamy"; that the punishment for refusing "would be damnation in the life to come"; and that, since his behavior was "in conformity with what he believed at the time to be a religious duty," he should not have been found guilty.

The justices were not persuaded. They acknowledged that "Congress cannot pass a law...which shall prohibit the free exercise of religion." Nonetheless, they held that the conviction in *Reynolds v. United States* would stand, and they got there by declaring that only the right to *believe*, and not the right to *act on your beliefs*, is protected by the Constitution.

"While [laws] cannot interfere with mere religious belief and opinions, they may with practices," Chief Justice Morrison Waite wrote in 1878 for a unanimous court. After all, "if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband; would it be beyond the power of the civil government to prevent her carrying her belief into practice?...To permit this would be to make the professed doctrines of religious belief superior to the law of the land."

The decision should have been suspect from the beginning. It turned on the distinction between beliefs and behaviors, even as it quoted the constitutional prohibition on laws that impinge religious *exercise*—an active word if ever there was one.

Twelve years later the Mormons filed another objection, this time to Edmunds' law disqualifying them from voting, holding public office, or serving on a jury. Again the Court

rejected the challenge. Again the ruling was unanimous.

"It was never intended that the first Article of Amendment to the Constitution…should be a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society," wrote Justice Stephen J. Field in *Davis v. Beason*. "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country."

To justify a prohibition against polygamy, the Court had taken the teeth out of the First Amendment.

What traditionalist supporters of the bans did not know at the time was that they had set a precedent with *Reynolds* and *Davis* that would later be turned against them. Today, a century after they succeeded in "extirpating" the "evil" of polygamy, it's those who believe in marriage as an institution between one man and one woman only who are left to appeal to the importance of free exercise. Meanwhile, their secular opponents argue that the Constitution protects beliefs but not practices—and certainly not *institutional* practices.

A BALANCING TEST UPENDED

THE TABLES DIDN'T turn all at once, and there have been some wins for religious liberty in the last hundred years. For a time, the Supreme Court used a balancing test to limit the government's power to regulate religion.

In the 1972 case *Wisconsin v. Yoder*, the Court declared that the Amish could not be punished for taking their children out of school after eighth grade. The requirement "affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs," the Court said. And granting an exception would not cause "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare."

Note that the justices didn't find that the law automatically succeeded because it was a regulation of behavior. Nor did they find that it automatically failed because it was an infringement on someone's First Amendment rights. Instead, they weighed the government's interest in enforcing the schooling requirement against the burden it placed on the petitioners' religious freedom.

The idea that there should be a balancing test had been introduced in *Sherbert v. Verner* in 1963, when the Supreme Court held that South Carolina could not withhold unemployment benefits from a member of the Seventh-day Adventist Church who found herself without work because of her religion's proscription on laboring on Saturdays. Her religious liberty was found to outweigh the government's interests.

Making restrictions on religious liberty subject to a stringent balancing test (that is, subjecting them to "strict scrutiny") might seem like it opens the door to much friendlier rulings for people of faith. But a 1992 article in the *Virginia Law Review* found that in fact, the courts rarely sided with people seeking exemptions on religious grounds. Of the 97 free exercise claims brought in the federal courts of appeals from 1980 to 1990, 85 were rejected. "For some courts, the mere fact that a law or regulation existed sufficed to demonstrate a compelling state interest," the author wrote. A *George Washington Law Review* article that same year described the balancing test as "strict in theory, but ever-so-gentle in fact."

Then in 1990 came the knockout punch to defenders of religious freedom. Adding insult to injury, the ruling was handed down by a conservative folk hero—Supreme Court Justice Antonin Scalia.

The recently departed jurist is today remembered as a champion of the rights of believers. During oral arguments in *Obergefell v. Hodges*, the case that legalized same-sex marriage throughout the country, Scalia voiced his apprehension about what he and his colleagues were being asked to do: "I'm concerned about the wisdom of this Court imposing through the Constitution a requirement of action which is unpalatable to many of our citizens for religious reasons."

But 25 years earlier, in *Employment Division v. Smith*, Scalia wrote a decision that dramatically curtailed Americans' ability to make free exercise claims. In that case, two members of the Native American Church sought an exception to an Oregon statute prohibiting the use of the hallucinogen peyote. Federal law said the substance could be used in bona fide religious ceremonies, but the state law contained no such caveat.

Though Scalia acknowledged that the Church members' use of the drug was religiously motivated, he concluded that the ban was not: It applied to *all* Oregonians, not just adherents of one particular faith. "The right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability," he wrote. Thus, Oregon was under no obligation to allow peyote use, even for religious reasons.

Scalia made it clear his reasoning was grounded in the Supreme Court decisions that had validated the bans on polygamy 100 years earlier. "The rule to which we have adhered ever since *Reynolds*," he wrote—the rule, that is, that gives the state maximum berth to regulate people's behavior, including religious behavior—"plainly controls."

This time, the public was aghast. The *Los Angeles Times* described *Smith* as "strip[ping] religious believers whose practices violate certain general laws of the[ir] constitutional protection." *The Washington Post* accused Scalia of having read the "protection of individual conscience" out of the First Amendment. A spokesman for the American Civil Liberties Union called the ruling "terrible" and "an end run around" the country's longstanding commitment to religious freedom. And at a hearing on the matter, Rep. Stephen J. Solarz—a New York

Democrat—said the justices had "virtually removed religious freedom from the Bill of Rights."

Americans of all stripes suddenly realized the Constitution would not be enough to shield against laws that interfered with the practice of faith, assuming the laws were "generally applicable." What if the authorities decided to go after a Catholic church for serving Communion wine in a dry county? Or an Orthodox rabbi for "discriminating" by only solemnizing marriages between Jews?

"The ruling galvanized virtually the entire American religious landscape, in part because every faith can envision itself as a vulnerable minority in some situation," the University of Oklahoma political scientist Allen Hertzke wrote.

"To many groups concerned with religious liberty, the case was an alarm bell," Peter Steinfels explained in *The New York Times*. The Court "was petitioned to reconsider its decision by an improbable alliance" that included everyone from civil libertarian groups to the Traditional Values Coalition.

Some 55 constitutional scholars signed on to the letter, but the justices refused to give the case another hearing. Because of *Smith*, the government no longer needed to show it had a "compelling interest" when it came to laws that incidentally burdened someone's religion.

Exactly 100 years after the Mormons were bullied into giving up polygamy, those legal precedents had come home to roost.

FREEDOM FIGHTS BACK

RECOGNIZING THAT THE *Smith* ruling could prove dangerous not just for small minorities like Native Americans and Mormons but for mainstream believers as well, activists, scholars, and legislators sprang into action. Their solution was to pass a law, the Religious Freedom Restoration Act (RFRA), that would reinstate the *Sherbert* balancing test.

Even *The New York Times* endorsed the idea. Whereas in *Smith* the Court "threw away decades of precedent and watered down the religious liberty of all Americans," it editorialized, this law "reasserts a broadly accepted American concept of giving wide latitude to religious practices that many might regard as odd or unconventional."

In November 1993, RFRA passed by the lopsided margin of 97–3 in the Senate and by a unanimous voice vote in the House. Over 30 states would eventually follow suit, ensuring that both the federal government and most state governments would have to meet a high bar before they could burden religious liberty.

"Usually the signing of legislation by a president is a ministerial act, often a quiet ending to a turbulent legislative process," then–President Bill Clinton said upon inking the bill into law. "Today this event assumes a more majestic quality because of our ability together to affirm the historic role that people of faith have played in the history of this country and the constitutional protections those who profess and express their faith have always demanded and cherished."

The *Smith* decision's smothering of the First Amendment had seemingly been forestalled. And indeed, a 2014 study by Robert Martin and Roger Finke found that in the post-*Smith*, pre-RFRA period (1990–1993), just 28 percent of free exercise legal challenges had been successful. In the four years following the act's passage (1993–1997), the success rate jumped to 45 percent.

In 2014, the foresight that caused people of faith to support RFRA paid off when the Hahn and Green families (owners, respectively, of Conestoga Wood Specialties, a cabinet-making company, and Hobby Lobby, a chain of craft stores) brought a suit against the federal government. The families objected to the HHS rule requiring employers to provide coverage to their workers for abortifacient drugs.

The Supreme Court, looking to RFRA, sided with the petitioners. "A Government action that imposes a substantial burden on religious exercise," wrote Justice Samuel Alito for the majority, has to "constitute the least restrictive means of serving that interest, and the mandate plainly fails that test."

Justice was restored—except that now, many of the same groups who had praised RFRA's passage in the '90s had come to see things differently. No longer was religious freedom "the most precious of all American liberties," as Bill Clinton had said in his signing statement. Clinton's wife, gearing up for her second presidential campaign, now blasted the *Hobby Lobby* decision as "deeply disturbing."

The next year, Indiana, which did not yet have a state-level RFRA on its books, moved to enact one. The reaction was explosive. Hillary Clinton tweeted that it was "sad" such a law could "happen today," while TV and radio personality Larry King described it as "absurd," "insulting," and "anti-gay." Major corporations, including Nike, Apple, and Marriott, condemned the proposal. The National Collegiate Athletic Association, headquartered in Indianapolis, threatened to leave the state if the statute passed. Public opinion had once again turned.

BELIEFS VS. CONDUCT

TIME AND AGAIN, liberal activists return to one idea in today's religious liberty controversies: that the First Amendment protects your right to believe whatever you want, but not your right to act on those beliefs. The monster legal precedent that Chief Justice Waite forced into being in *Reynolds* slipped its cage and found a home on the political left. And like so many invasive species, it strangled much of what predated it, including the previously widespread notion that religious

liberty is and should remain America's first freedom.

In September 2016, the U.S. Commission on Civil Rights released a report asserting that "ensuring nondiscrimination" is of "preeminent importance in American jurisprudence," and should be privileged, even when it conflicts with free exercise claims. After all, the report suggested, "a doctrine that distinguishes between beliefs (which should be protected) and conduct (which should conform to the law) is fairer and easier to apply."

That idea is the (sometimes explicit) rationale for going after wedding vendors who don't want to participate in same-sex commitment celebrations. As recently as November 2016, when Barronelle Stutzman went before the Washington Supreme Court to challenge a fine for declining to make custom floral arrangements for a gay wedding, the refrain reared its head.

Asked by the court how he would respond to the florist's objections, state Attorney General Bob Ferguson replied: "There is a difference, your honor, between the freedom to believe and a freedom to act. Ms. Stutzman is free to believe what she wishes. But when she...avails herself of the protections and the benefits that come with being a business, there are of course responsibilities that flow from that."

Discussing an attempt by Sen. Mike Lee (R–Utah) to stop states from forcing people to work gay weddings against their will, *Washington Post* columnist Joe Davidson dismissed the Mormon senator's concerns because, he said, "at question is offensive action, not a belief."

It's the same idea that undergirds the federal government's assault on the Little Sisters of the Poor and countless other religious nonprofits. And it's the same justification Washington invoked in 2007 when it required even privately owned pharmacies to stock and dispense the morning-after pill. Under the rule, pharmacists with conscience-based objections are forbidden from referring customers to another nearby store to fill such prescriptions—they're required to do it themselves.

In 2012, the American Pharmacists Association and more than 30 similar groups submitted an *amicus* brief to the Supreme Court expressing deep concerns about the regulation. "Pharmacies have long enjoyed nearly unfettered control over stocking decisions," the document read. "Indeed, the ability of health professionals to opt out of services they find personally objectionable is an important component of the health care system."

It didn't matter. The U.S. Court of Appeals for the 9th Circuit upheld the requirement on the grounds that, like the Oregon peyote ban, it is "both neutral and generally applicable," and the Supreme Court declined the pharmacy associations' pleas to reconsider the decision.

A century ago, the notion that sex and marriage ought to be expanded beyond their traditional confines was considered depraved, and the use of force was considered justified to stop it. Ironically, the same is now true for old-fashioned beliefs about marriage and sex.

The lesson in all this could not be more clear: When a group uses the law to enforce its particular version of morality on others, it sets precedents that may in time be turned against it. The lawmakers (and their constituents) who voted to punish polygamists in the 1800s had every reason to believe they would remain in the political majority. It would have been unthinkable at the time that the Supreme Court might one day rule nontraditional marriage unions a fundamental right. Yet on June 26, 2015, *Obergefell* did just that.

> A century after mainstream Christians "extirpated" the "evil" of polygamy, it's those who believe in marriage as an institution between one man and one woman only who are left to appeal to the importance of free exercise.

Christian traditionalists today, instead of being the propagators of moral norms, increasingly find themselves painted as on the "wrong side of history": opposed to marriage equality, favoring discrimination, supporting policies that are anti-woman. A hundred and fifty years after the Morrill Act, they're finally discovering just how important it is to have a legal system that tolerates dissent and carves out space for lifestyle choices beyond the cultural mainstream. Because suddenly, they are the dissenters.

But there's a cautionary tale here for the political left as well. Loose talk about the "right" and "wrong" sides of history suggests progressives are busily making the same error mainstream Christians did in the second half of the 19th century: assuming the moral forces that are ascendant now will continue to be.

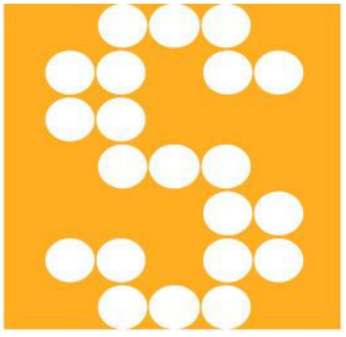
As modern supporters of traditional marriage can tell them, social values aren't set in amber. There's no telling whose beliefs will carry the day down the line.

STEPHANIE SLADE is managing editor at *Reason*.

Where Did All the Investigative Journalism Go?

The economics of the exposé

JACK SHAFER



SLOSHED ON 30 percent profit margins, the news media went on a drunkard's tear over the final three decades of the 20th century. Some publishers, such as Gannett, spent their loot acquiring more newspapers. *The Boston Globe* blew a portion of its windfall on foreign bureaus, establishing its first in the early 1970s and eventually expanding to five. Newspapers everywhere expanded regional and national bureaus, sprouted additional sections, added color printing, hired more journalists, and boosted circulation as the money bender continued.

Almost every news outlet—print or broadcast—spent heavily on investigative journalism, producing a scoop renaissance. The Johnny Deadlines dug deep to bust crooked cops, call out polluting corporations, and expose criminal justice outrages. Health care fraud, banking hijinks, payoffs, bribes, and government waste got a full press airing.

But the renaissance stalled at the new century mark as cable TV and the web encroached on the advertising monopoly the press had grown sozzled on. Then came the 2008–09 recession, reversing the grand expansion. The *Globe* closed all of its foreign bureaus; newspapers shed their suburban and regional bureaus; whole newspaper sections folded; and tens of thousands of journalists got sacked.

The investigative beat took a hit too, as James T. Hamilton, a Stanford professor of communications, explains in his comprehensive study, *Democracy's Detectives: The Economics of Investigative Reporting*. Unmistakable proof of the decline: No trade honors itself as grandly as journalism, so submissions to investigative award programs are a fine marker of how much of that genre is being produced. During the 2008–09 recession, submissions to the popular Investigative Reporters and Editors contest dropped 34.1 percent compared to 2006–07, indicating the extent of the cutback.

The biggest losers haven't been journalists—who cares about them, anyway?—but members of the public, from whom more perfidy is concealed, while public officials, bureaucrats, and corrupt businessmen have scored. "Which stories get discovered where depends on economics," Hamilton writes. By bringing the economist's eye to the business of investigative journalism, Hamilton sharpens our appreciation of the craft as he explores its history, the motivations publishers have to fund the work, and the cash benefits investigations pay out.

Investigative journalism, Hamilton tells us, produces extraordinary benefits—perhaps billions of dollars' worth. A journalistic investigation of government waste can save taxpayers a lot of dough if officials pay attention. A successful probe of commercial fraud can likewise prevent crooks from looting millions from consumers and investors. And where a dollar figure can be placed on health, the best investigations can save untold millions when policies change.

The tragedy of investigative journalism is that its publishers can never come close to fully monetizing those benefits. Investigative journalism, in the economist's parlance, produces *positive externalities* by the tanker-load which almost everybody except news outlets ends up reaping. If it were feasible for an outlet to claim even a tiny vig from the benefits they produce, we'd likely see tons more investigations.

Instead, investigative journalists and their publishers must depend on indirect payouts. Reporters can reap psychic income for their work, for example, and the proliferation of investigative journalism prizes show that they're cleaning up in that market. Some publications back investigative projects for partisan reasons. Others depend on them as part of the bundle that attracts paying customers and advertisers. Still others publish investigations out of a desire to change or improve the world.

Because the number of readers willing to help underwrite ambitious investigations is always relatively few, and because news outlets can never capture the benefits generated by their work, many projects depend on a pattern of direct subsidies—the NPR, *ProPublica*, and *Mother Jones* nonprofit model. The commercial press generally pumps indirect subsidies from the profitable sides of the business, entertainment and service journalism and advertising, to this money-losing side. As newspaper profits have eroded, as Hamilton and everybody else has noted, this subsidy has receded, diminishing accountability journalism in many places.

What is to be done? Must every investigative outlet rely on patrons like Joan Kroc, whose estate gave $200 million to NPR,

or Herbert and Marion Sandler, who staked *ProPublica*, or eBay billionaire Pierre Omidyar, who started *The Intercept*, or other foundation support?

Perhaps the salvation of investigative reporting lies not with finding additional filthy rich contributors or the return of 30 percent margins. Hamilton's book explicitly states that one reason for the high costs of investigations is the government's resistance to making information easily accessible. Every journalist who has filed a Freedom of Information Act (FOIA) request for documents or data has a favorite story about the months or years it takes the authorities to comply. Many of these stories have a coda: Often the most pertinent information has been redacted or gone missing in the archives.

Such foot-dragging and obfuscation cost journalists time, and time is money. (Side thought, via novelist Martin Amis: "If time is money, fast food saves both.") Hamilton echoes journalists by calling for stronger FOIA laws to speed the release of information, for hosting FOIA releases in computer-retrievable portals, and for lowering the fees some agencies demand for their searches and releases. If investigative reporting were easier and cheaper to do, we'd get a lot more of it, and the sort of people targeted by investigations might be deterred from breaking the law if they knew they were being watched.

But most policy makers have little interest in improving the investigative environment. As Michael Schudson points out in his recent book *The Rise of the Right to Know*, the federal FOIA owes its origins less to an impulse to assist journalists than to Congress' desire to rein in the imperial presidency. FOIA applies only to the executive branch, not to the courts or Congress itself. In other words, it was first and foremost an injury one branch of government inflicted on another, not a good-government attempt at transparency.

Rather than waiting for more journalism philanthropy, tougher FOIA, and greater data transparency—laudable as they all may be—we might be better served in the short term by first asking why we need investigative journalism in the first place. The chart of the most popular topics among investigative and reporter contest entries indicates that some form of government malfeasance or dereliction attracts the majority of meaningful investigation. In other words, government is the great fertilizer of the investigative pasture. Its contracting frauds, the police abuses it perpetuates, and its endless futzing with schools, transportation, the military, the prisons, and everything else in its portfolio suggest that investigative journalist may have their priorities wrong. Instead of attacking the branches of government corruption, perhaps reporters and editors should ask if the most tainted part of the tree isn't really the trunk.

This is not to suggest that reducing the reach and scope of government alone would make investigative journalism obsolete. Thieves and miscreants infest the private sector too, so policing government better or making it smaller and more accountable won't eliminate the need for investigations. Man's heart is a big slab of dark meat, after all. But any serious effort to rescue investigative journalism from its current decline should be preceded by a meta-investigation of the basic reasons we need the form in the first place. r

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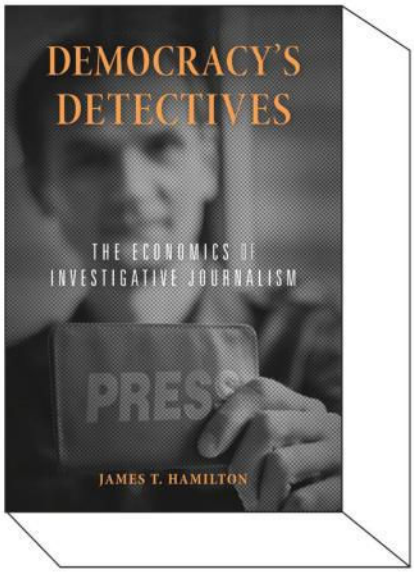


Democracy's Detectives: The Economics of Investigative Reporting, by James T. Hamilton, Harvard University Press, 368 pages, $35

The Limits of Expertise

A defense of experts exhibits the very problems it complains about.

NOAH BERLATSKY

BELIEVE THE EXPERTS! Experts are not perfect, but they are more likely than non-experts to be right. Experts know what they do not know, and are therefore more cautious and better able to self-correct. Sometimes, in small ways, non-experts may outperform experts. But in general, America and the world need more respect for expertise.

That is the thesis of Tom Nichols' *The Death of Expertise: The Campaign Against Established Knowledge and Why It Matters*. It is also, as it turns out, a critique of the book itself. Nichols, a professor at the U.S. Naval War College, is an expert on Russia and national security; he is not, however, an expert on expertise. His discussion of democracy is not backed up by credentials in political science. His hand wringing about kids today is not grounded in a scholarly background in education policy or the history of student activism. He is a generalist dilettante writing a polemic against generalist dilettantes. As such, the best support for his argument is his own failure to prove it.

There are two central flaws in *The Death of Expertise*. The first is temporal. As the title implies, the book is written as though there were once a golden age when expertise was widely valued—and when the democratic polity was well-informed and took its duty to understand foreign and domestic affairs seriously. "The foundational knowledge of the average American is now so low that it has crashed through the floor of 'uninformed,' passed 'misinformed' on the way down, and finally is now plummeting to 'aggressively wrong,'" Nichols declares. His proof for this statement is that "within my living memory I've never seen anything like it."

As Nichols would ordinarily be the first to point out, the vague common-sense intuitions and memories of non-experts are not a good foundation for a sweeping theory of social change. Nichols admits that Americans are not actually any more ignorant than they were 50 years ago. But he quickly pivots to insist that "holding the line [of ignorance] isn't good enough" and then spends the rest of the book writing as if he didn't know that Americans are not getting more ignorant.

The myth of the informed democratic voter is itself an example of long-ingrained, stubborn anti-knowledge. In their brilliant new *Democracy for Realists* (Princeton University Press), the political scientists Christopher H. Achen and Larry M. Bartels explain that laypeople and experts alike have developed a "folk theory" holding that American democracy is built on an engaged electorate that casts its votes for rational policy reasons. Unfortunately, as Achen and Bartels demonstrate, decades of research have shredded this theory, stomped on it, and set the remains on fire.

In fact, Americans have long been so uninformed that they barely can be said even to have opinions at all, much less wrong ones. In one of the most extreme examples in Achen and Bartels' book, New Jersey voters in 1916 opposed Woodrow Wilson because they'd experienced a freak series of shark attacks. The president had no way to stop the sharks, but that didn't stop voters from punishing the incumbent for them. (Or at least that's how Achen and Bartels interpret the electoral data. Other experts disagree, as experts will.) Nichols thinks democracy is threatened because Americans know so little about policy, but if democracy depended on Americans knowing something about policy, Achen and Bartels argue, the United States would have collapsed long ago.

Nichols' lack of historical perspective on ignorance is mirrored by the second central flaw in his book: a lack of historical perspective on knowledge.

Nichols does admit that experts can be wrong in numerous ways. They sometimes make outright mistakes, as when nutritionists decided that eggs were bad for you. They may use their authority to talk about issues beyond their area of expertise, as Nichols himself does. They may also stray from description into prediction, where they are as likely to be wrong as anyone else. And they have been known to deliberately fudge studies, sometimes because of a financial conflicts of interest, sometimes to advance their careers by generating more newsworthy, publishable results. All this is discussed in the book.

But *The Death of Expertise* doesn't grapple with the most serious way expertise can be flawed. Individual expert failure is relatively minor. The real damage occurs when entire fields are built on error or, worse, on prejudice. A century ago,

biology, medicine, and sociology all broadly accepted a racist and eugenicist consensus. To be an educated elite at that time meant to believe in the scientific basis of racism. American eugenic theories were picked up and used by Hitler, so this particular expert failure is implicated in horrific acts of genocide.

Nor is this kind of systematic expert bias limited to the past. American birth practices have swung strongly toward medicalization over the last 100 years, as doctors and obstetricians have wrested control over pregnancy and delivery from midwives. Maternal mortality actually rose among the upper classes as credentialed experts took over a process they didn't fully understand, introducing new risks of infection and birth injury with their interventions. Those numbers have since dropped, but even today, American doctors continue to perform Caesareans at alarmingly high rates and to rely on controversial technologies such as electronic fetal monitoring.

You could argue that this is simply another case of expertise being neglected—perhaps medical doctors are failing to pay attention to the research of scientific experts. But this kind of contest between competing groups of professionals isn't what Nichols means when he talks about the death of expertise. The arguments between doctors on one hand and midwives (or researchers) on the other isn't about ignoramuses fighting experts. It's a contest between different groups with different priorities and incentives. It's a struggle about power as much as it is one about knowledge.

The institution of *the expert* is, after all, basically a system for turning knowledge into power and vice versa. Licensing, credentialing, and peer reviewing are a way to certify that certain knowledge is valid. But they are also a way of conferring respect, authority, and status on certain speakers. When that authority and power is misused, you can't always expect experts to self-correct. The hard work of dethroning eugenics and race science was done by the Holocaust, which discredited both, and then by the civil rights movement. Experts didn't just decide to reverse themselves.

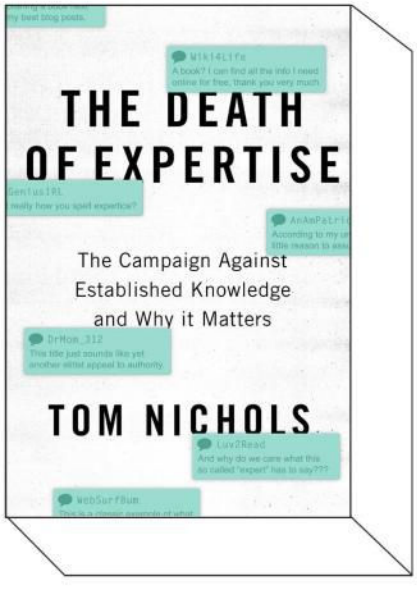
Nichols is certainly correct that the internet has spread a lot of dubious conspiracy theories and ignorant bluster. When he writes that "everything becomes a matter of opinion, with all views dragged to the lowest common denominator in the name of equality," he offers a good thumbnail description of just about every website comments section ever. But Nichols seems largely oblivious to the virtues of allowing non-credentialed people a chance to challenge the experts. In the past, to give just one example, experts could talk about transgender people all day every day, making invidious policy recommendations and promulgating stereotypes without fearing contradiction. The internet has made it possible for trans people to talk about their experiences and challenge expert interpretations in ways that were not possible before. (See Deirdre McCloskey on her own experience on page 12.) The resulting conversations have certainly been frustrating for many experts. But the previous expert-only conversations were frustrating, and in some cases life-threatening, for trans people.

Even Donald Trump doesn't fit so simply into the death-of-expertise narrative. It's true that his election demonstrates that an influential minority of voters are broadly uninterested in traditional expertise. It's also true, as Nichols notes, that Trump ran a campaign that sneered at elites and experts. Nonetheless, his election was enabled as much by elite failure as by anti-elitism. Professional politicians, both Republican and Democrat, stumbled repeatedly by underestimating Trump. Journalists were convinced that he couldn't win and shaped their coverage accordingly. Experts and non-experts, ignorant and enlightened, all had to work together to create a catastrophe like 2016.

Experts will undoubtedly be studying Trump's victory for decades. But they're not likely to find answers in polemics about how ignorant Americans don't respect smart people anymore.

The balance between trusting experts and challenging conventional wisdom is always difficult. How do you create discussions online where folks who have been traditionally marginalized are welcome without empowering bad actors determined to harass them or spread disinformation? How can political parties encourage participation and democratic engagement without opening themselves up to opportunists and quacks? Those are questions worth asking, but Nichols, alas, is not the writer to answer them. Someone with more expertise is needed. Or, possibly, with less.

NOAH BERLATSKY is the author, most recently, of *Corruption: American Political Films*.



The Death of Expertise: The Campaign Against Established Knowledge and Why It Matters, by Tom Nichols, Oxford University Press, 272 pages, $24.95

FILM
MOONLIGHT

SCOTT SHACKFORD

Barry Jenkins' *Moonlight* is a triptych tale delving into the childhood, adolescence, and adulthood of a young gay black man immersed in poverty and the drug trade in Southern Florida.

That summary may sound like a recipe for lectures and melodrama. But the life of Chiron (played by three different actors at different ages) is instead a quiet, reflective coming-of-age story of a young man learning how to fit in, but also to find himself, in what is at times a harsh culture. The viewer watches Chiron working around his mother's drug problems as a child, coming to terms with his sexuality as a teen, and reflecting on how all these experiences inform the decisions he makes as a man.

Drug dealing and addiction, violence, desperation, bullying, and incarceration all play important roles in the story, but Chiron's life story is not framed as a warning or even a tragedy, though it is at times achingly emotional. *Moonlight* doesn't preach. It simply lives.

The result is a more powerful exposé of the decay and dysfunction wrought upon poor minorities by decades of the drug war than any compilations of statistics. But even that laudable goal plays back seat to the film's fundamental humanity.

GAME
DOMINION ONLINE

ROBBY SOAVE

The world of board gaming has grown richer—and more intellectually demanding—over the last decade. In the eyes of serious gamers, once-popular pastimes like Monopoly and Risk are now basically indistinguishable from Candyland. Too much luck, not enough skill.

The most addictive next-generation game is Dominion, a medieval-themed "deck building" card game that recently debuted its long-awaited, new-and-improved online mode. Each player begins with a hand of weak cards that are worth a certain amount of coin and must use them to purchase more valuable cards. Some of these produce additional coin, others increase the number of cards a player can hold at one time, and still others flood opponents' decks with worthless junk.

The story of Dominion Online is as entertaining as the game itself. For years, the games' internet presence took place on a couple of unofficial sites. One was a strategy and discussion forum for the game's sizable fan community, and another site, dominion.isotropic.org, provided a place for actual (unlicensed) play. Isotropic's programmer agreed to shut down that site after an official online implementation went live in 2013.

Unfortunately, the fan community despised the 2013 release, which was ugly, non-intuitive, and geared toward more casual players. The company in charge of Dominion Online seemed deaf to criticism and failed repeatedly to make necessary updates.

Finally, two of the world's highest-ranked players—known on the online forums as "Stef" and "SCSN"—formed a company, Shuffle iT, and pitched their own implementation to Dominion's inventor, Donald X. Vaccarino.

"Shuffle iT showed us what they'd managed to do in two months, and we were impressed," says Vaccarino. Stef and SCSN got official approval from the game's owner to take matters into their own hands, and they released their considerably improved version of Dominion Online on January 1.

THEATER
SWEAT

RONALD BAILEY

"You've got to see *Sweat*," urged a friend who had just attended the play during its premiere run in early 2016 at Washington, D.C.'s Arena Stage. "It's why Donald Trump is going to be president."

I finally got a chance to follow his advice at the Public Theater in New York in December, after an election in which white working-class votes propelled the billionaire reality TV star into the Oval Office. When it comes to Broadway's Studio 54 in March, still more theatergoers will be able to check out my friend's bold claim for themselves.

The play is a personal and political drama that searingly portrays how mechanization and globalization upend blue-collar Americans' lives. Written by the Pulitzer-winning playwright Lynn Nottage, *Sweat* is set in a fading central Pennsylvania manufacturing town in 2000 and 2008. It opens with two young men, Chris and Jason, meeting with their parole officer. They have evidently been convicted of the same crime.

The arc of the play is the story of how they got there. The main characters are three middle-aged women—Jason's mother Tracey, Chris' mother Cynthia, and their friend Jessie—who have proudly worked their whole lives on the line at a local factory. In 2000, they are regulars at the neighborhood bar run by Stan. A former factory worker, Stan is more aware of how the broader economic winds are blowing. He warns the three friends, "You could wake up tomorrow and all your jobs are in Mexico, wherever."

Sure enough, the company announces that it will move its operations south of the border unless the workers take a pay cut. A strike ensues, and the company hires immigrants at lower wages to replace them. The friendships fray spectacularly as each woman tries to survive her personal economic apocalypse. Yes, it will give coastal elites (you know who you are) some insight about Trump's victory.

Moonlight poster (detail) Plan B Entertainment
Will Pullen, James Colby, and Khris Davis in *Sweat*, Photo: Joan Marcus

TOY

THE WORLD'S SMALLEST CAMERA DRONE

KATHERINE MANGU-WARD

It sounds like a deranged hummingbird, it has a comically small range, and its photo quality is abysmal, but there's something weirdly appealing about The World's Smallest Camera Drone ($26.99 from the *BoingBoing* online store; also available at Amazon).

The temptation to personify the wee unmanned aerial vehicle—with its cheerful red and blue LED lights, drunken bumblebee flight patterns, fleeting battery life, and tendency toward rotor jams—is almost irresistible. From the first jerky takeoff, the bright orange mini-drone feels more like a recalcitrant pet than cutting-edge tech, even though it can capture a rather large volume of video footage and still photos on the 2GB of storage on the included micro SD card.

If you're looking to conduct stealth surveillance, take keepsake photographs, deliver tacos, or rain death on your enemies from the sky, this is not the drone for you. But for all its failings, The World's Smallest Camera Drone really is a remarkable piece of engineering: For less than the cost of a couple of pizzas, you can own a remote-operated quadcopter so small it can land in the palm of your hand. And while the current model is little more than a fluky novelty item, it's not hard to imagine how traveling with a personal drone videographer and archivist could easily become a staple of modern life.

MUSEUM

NATIONAL MUSEUM OF AFRICAN AMERICAN HISTORY AND CULTURE

STEPHANIE SLADE

It's remarkably difficult to gain admission to the newly opened National Museum of African American History and Culture—powerful evidence that such an institution was long overdue.

The stunning, 400,000-square-foot structure now situated on the National Mall in Washington, D.C., houses a tribute to African Americans' vast contributions to music, sports, and other aspects of the country's culture, as well as a memorial to the violence and injustice of slavery and segregation.

The museum opened in fall 2016. By December, new admissions procedures had to be implemented. With luck, on a weekday afternoon, you might obtain a walk-up pass; advance tickets—available three months out or starting at 6:30 a.m. for same-day entry—are strictly required for a weekend visit.

Want more proof of sky-high demand? Look no further than the timed passes being shamelessly (but not surprisingly) scalped on Craigslist.

BOOK

WE TOLD YOU SO

BRIAN DOHERTY

Like most comics devotees of the late 20th century, Gary Groth—co-founder of America's leading publisher of high-quality comics, Fantagraphics Books—started off as a superhero obsessive. But Groth grew out of that passion, and he loved a good fight. So in the mid-'70s he started slamming his aesthetic foes and advocating for smarter, more literary, more adult comics in his pugnacious and brilliant magazine *The Comics Journal*. By the early 1980s, he was seeking out and publishing such comics despite the total lack of a demonstrated market for such things.

Over the next four decades, Fantagraphics launched or elevated the careers of many of modern comics' most vital and brilliant creators, including Jaime Hernandez, Gilbert Hernandez, Chris Ware, Daniel Clowes, Joe Sacco, Carol Tyler, and *Reason*'s own Peter Bagge. Publications of Robert Crumb, Charles Schulz, and others have established the publishing house as the medium's top archivist and curator as well.

We Told You So: Comics As Art is an excellent oral history of Fantagraphics by Tom Spurgeon and Michael Dean. Histories of artsy young rebels changing the world are too often self-indulgent and unconvincing, or vaguely tawdry and juvenile. *We Told You So*, though, makes a compelling case for the revolutionary nature of the undertaking while being pleasingly self-aware about the childish absurdity of the flawed humans involved.

Fantagraphics, a portmanteau of *fantasy* and *graphics*, turned out to be a marvelously apt name. The notion of comics as a rich, vast literary art was pretty much just Gary Groth's fantasy. Forty years down the line, it's wonderfully real.

TV

DESIGNATED SURVIVOR

ELIZABETH NOLAN BROWN

Designated Survivor, Kiefer Sutherland's follow-up to *24*, imagines the actor as Tom Kirkman, a mild-mannered minor Cabinet member—he's the secretary of housing and urban development—catapulted into the presidency after nearly everyone else in the federal government is killed in a State of the Union night attack on the U.S. Capitol.

Debuting in September 2016, the first half of the ABC series has played out as almost as much of a libertarian fantasy as *The West Wing*'s president was a progressive one. As Kirkman—who describes himself as "a registered independent"—works to find and punish the perpetrators, rebuild the ranks of the federal government, and restore some semblance of normalcy to America, he opposes rash militarization, eschews "enhanced interrogation," welcomes Syrian refugees, prizes practicality over partisanship, reveres due process, and has little time to focus on any but the most limited and essential of government functions.

Designated Survivor, ABC

15 YEARS AGO

April 2002

"Immediately after the attacks, President Bush was widely mocked for imploring people to go shopping, to get on with their normal lives, to do anything to show the terrorists that they couldn't destroy our way of life. At times, he seemed to stop just short of telling people to have more sex to enrage Osama bin Laden and company."

NICK GILLESPIE

"Back to Bedrock"

"No cause in the history of mankind has produced more cold-blooded tyrants, more slaughtered innocents, and more orphans than communism. It surpassed, exponentially, all other systems of production in turning out the dead."

ALAN CHARLES KORS

"Rose-Colored Glasses"

"The ACLU report focuses on Ybor City, Florida, where police began installing surveillance cameras with facial recognition technology last July. Faces caught on camera were compared by a computer to a database of 30,000 wanted criminals, a scheme that resulted in a loud outcry from privacy advocates. One dismayed resident told the local alternative paper *The Weekly Planet* that 'citizens of [Ybor] are now subjected to a police lineup for the crime of walking down the street.'"

JEREMY LOTT

"Fake IDs"

25 YEARS AGO

April 1992

"*The Global 2000 Report to the President*...estimated that by the end of this century deforestation and industrial activity could wipe out 15 percent to 20 percent of all the planet's species."

CHARLES OLIVER

"All Creatures Great and Small"

"As the Cold War fades, it is clear that many conflicts, once deemed of vital strategic importance, are now regional wars of little concern to the United States. As Irving Kristol has observed, what difference does it make to America who rules Liberia?"

MARTIN MORSE WOOSTER

"The Third Way"

"Citizens of Singapore, the former British colony on the southern tip of the Malaysian peninsula, have learned to live with laws and ordinances that cover virtually every aspect of their highly supervised lives. Undercover litter police hand out $500 fines for an errantly tossed soda can; failure to flush a public toilet carries a penalty of $250; and jaywalking at one of the city's tightly regulated intersections can land the offender in jail."

MICHAEL KONIK

"Studs"

"The right to construct your own identity...has never included the right to control the speech or thoughts of others—to dictate to them how they should perceive you."

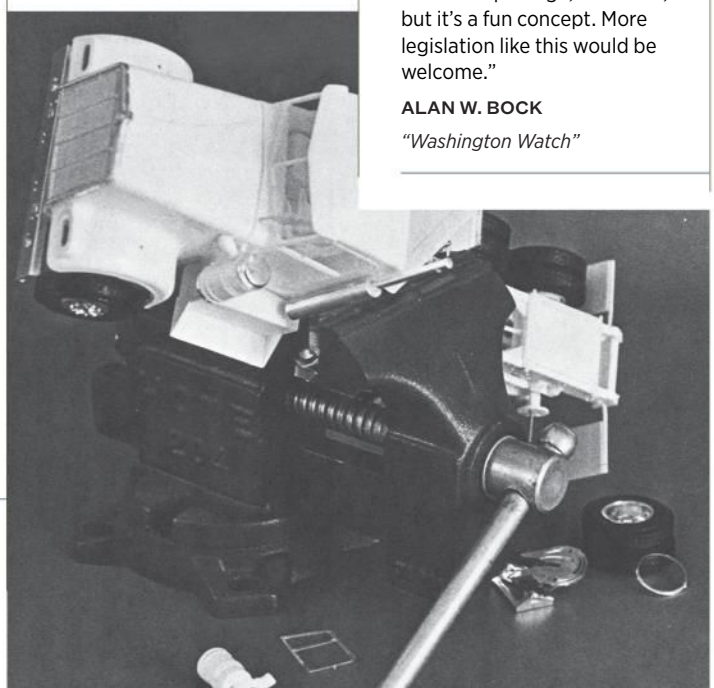
JACOB SULLUM

"Secrets for Sale"

"Which brings us to the fate of the West. It no longer exists. The term has ceased to be meaningful, for without an East there can be no West. Regions, nations, cultures still express themselves, still claim allegiances. But 'the West' has blended into a world civilization, to which many cultures contribute. This civilization is greater than and different from the sum of its parts. And its basis is liberal democracy—an idea that wasn't supposed to work in Germany, or southern Europe, or Latin America, or Russia, or Asia, and still isn't supposed to work in Africa."

VIRGINIA POSTREL

"New World Man"



40 YEARS AGO

April 1977

"In 1960, the total employed by federal, state and local governments was 8.3 million. By 1976, the number had increased to 15 million, an increase three times faster than the growth of the U.S. population."

ABRAHAM H. KALISH

"Buying Off Bureaucrats"

"A list of the myriad detrimental effects that a vast military-industrial complex imposes on society could go on and on. There would, for example, be no national debt and no inflation, and the United States would be infinitely wealthier for not having wasted so much of its scarce national resources on production yielding no return."

BRUCE BARTLETT

"Why We Still Have a War Economy"

"Marvin (Mickey) Edwards, the new Republican Congressman from Oklahoma, is introducing legislation which would provide for Congressional salaries to fall as inflation rises. It doesn't have a snowball's chance of passage, of course, but it's a fun concept. More legislation like this would be welcome."

ALAN W. BOCK

"Washington Watch"

Top: Chip Bok, Akron Beacon Journal

ETHAN PRITCHARD, Students For Liberty Campus Coordinator at the **University of Maryland**, says his goal is to promote and protect academic freedom.

Ethan's SFL group hosts high-profile speakers on campus in order to foster constructive conversations – often stretching students' imaginations and the boundaries of academic thought. **Students are encouraged to disagree with one another.**

In fact, Pritchard admits, "At a few meetings this year, our regular members were outnumbered by students that aren't libertarian or classical liberal."

"**One thing we try to avoid is having all like-minded attendees at our events.** This year, we are hosting an event with 20 different political, religious, and racial clubs"

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Sgt. Eliezer Pabon of the New York Police Department shoved a handcuffed 14-year-old boy through a store window after the boy mouthed off at him. The boy suffered a punctured lung and had to have glass removed from his heart. Pabon's punishment: He was stripped of five vacation days.

Jon Carey says the pond on his 10-acre home near Butte Falls, Oregon, is the best part of the property that he and his wife bought two and a half years ago. The pond has been there for 40 years. But now the Jackson County watermaster says it is illegal. State law gives the county rights to all rainfall, and the Careys are not authorized to collect it.

Two Washington state lawmakers have introduced a bill that would make it illegal even to touch your phone while driving. The bill would also more than double the fine for distracted driving from $124 to $350.

When Elmo Jones of Aurora, Colorado, divorced his wife, the court found that her son was not fathered by Jones and refused to award her any child support. Despite that, the Department of Veterans Affairs (V.A.) began to garnish his military retirement benefits. When he complained, officials demanded he prove the boy was not his son. He sent them a copy of the court ruling and the results of a DNA test, but the agency continued to withhold his pay. Only after a local TV station began asking questions did the V.A. stop withholding the money.

Police in the United Arab Emirates have arrested a maid from Somalia for giving birth out of wedlock. The baby is being held in the prison nursery; the mother may visit only to feed him.

Thomas Opperman, the chairman of Germany's Social Democratic Party, has proposed fining Facebook 500,000 euros for each "fake" news story on the site. How will Facebook determine which news is fake? Opperman says the company should be required to set up a commission within Germany to allow citizens to file complaints.

A New York law that supporters claimed would protect boxers is killing the sport in the state. The law, passed last year, requires $1 million of insurance for each boxer who enters a fight, to cover life-threatening brain injuries. Promoters say they can afford that for big championship events but not for the small, local shows that are the lifeblood of the sport.

Domonique Yatsko, 9, was so proud when she killed her first deer in Ohio that her family had a photo of her with the eight-point buck put on a sweatshirt. But when she wore the shirt to school, she says one of her teachers

"yelled at" her, told her killing animals was "not what we do," and demanded she take the shirt off. Superintendent Catherine Aukerman claims the teacher merely told Yatsko the shirt was upsetting other students and asked her to take it off.

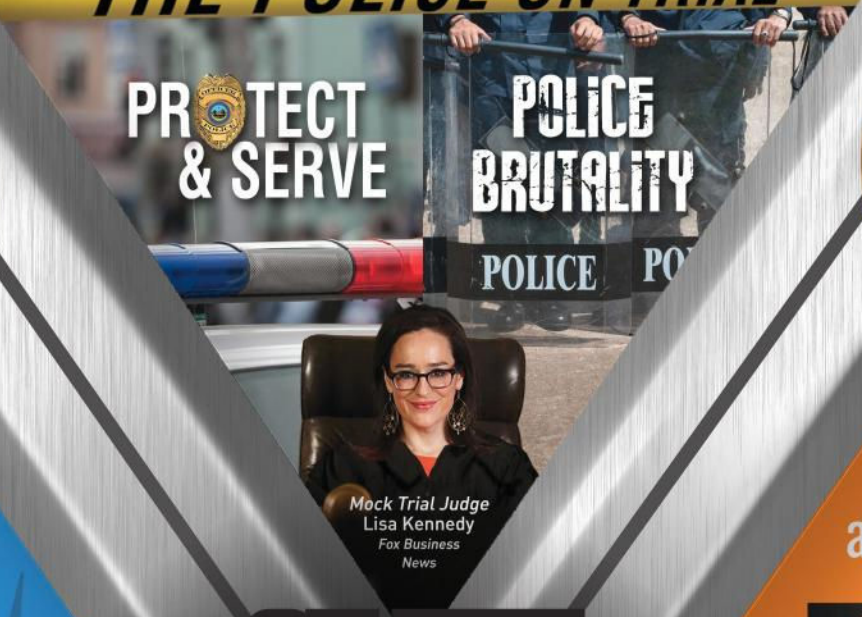
Shortly before she left office in January, Patty Hajdu, Canada's Minister of Status of Women, called a proposal to legalize pepper spray so that women can better defend themselves "offensive" because it "places the onus on women to defend themselves rather than focusing on addressing and preventing gender-based violence."

Iesha Conley, a postal worker in Brooklyn, has been charged with stealing gift cards from the mail. She reportedly used one card to buy almost $100 in sex toys.

Terry Colon

Our MOCK TRIAL takes on one of the most critical topics EVER.

THE POLICE ON TRIAL



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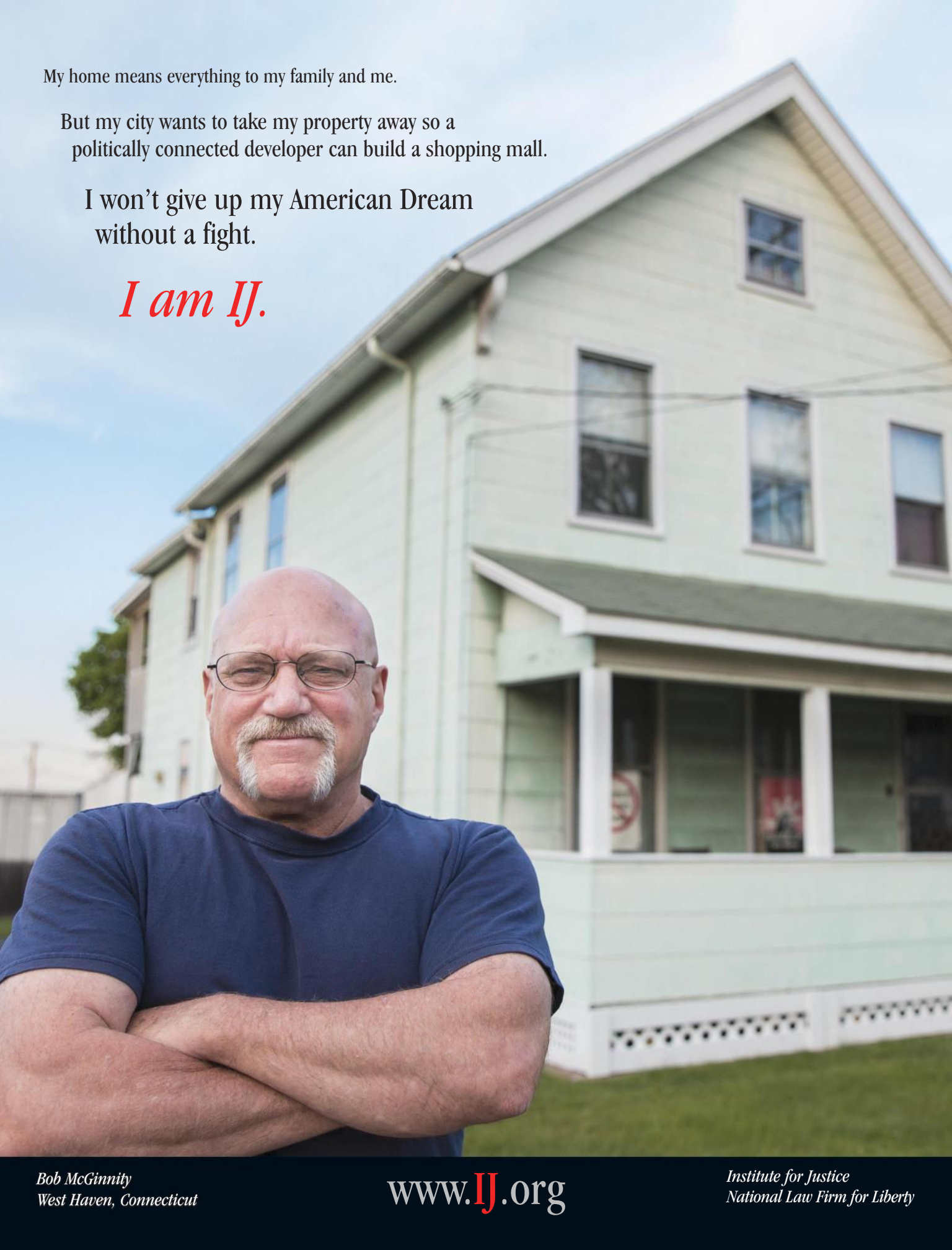
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