THE CONSTITUTIONAL GUARANTEE OF CRIMINAL JUSTICE TRANSPARENCY

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This Article identifies and explores a transparency guarantee that permeates the Constitution's criminal procedure provisions. This guarantee protects multiple dimensions of transparency—which I categorize as participatory, informational, and corporal—through overlapping structural safeguards and individual rights, and through protections afforded to both the public and the accused. Despite the strength and pervasiveness of the overarching transparency guarantee, the discrete provisions from which it is derived are often peripheral in today's criminal justice system, which is dominated by plea bargaining and incarceration rather than trials and public-square punishment. And, because the constitutional transparency protections are viewed in clause-bound isolation, modern transparency deficits are generally viewed as policy problems, not constitutional ones. I urge that renewed attention to the overarching constitutional transparency guarantee can support doctrinal and legislative efforts to strengthen criminal justice transparency in modern times.

INTRODUCTION

This Article offers a core insight: that the Constitution's criminal procedure provisions contain an implicit, overarching transparency guarantee. Transparency is protected not only in the First Amendment, which safeguards public access to certain criminal court proceedings,[1] but also in discrete constitutional guarantees focused on criminal adjudication and, specifically, trials—primarily in the Sixth Amendment, but also in the Fourth, Fifth, and Eighth Amendments; in the Suspension Clause's protection of habeas corpus; in the procedural guarantees of the Treason Clause and the Ex Post Facto clause; and in the protections of due process.

The Supreme Court often conceptualizes the Sixth Amendment in terms of its function of protecting substantive and procedural fairness in criminal

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1. *E.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality opinion) ("We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'" (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972))); Press-Enter. Co. v. Superior Ct., 464 U.S. 501, 508–10 (1984) (recognizing the public's right to open jury voir dire proceedings); Presley v. Georgia, 558 U.S. 209, 212 (2010) (per curiam) ("[T]he public trial right extends beyond the accused and can be invoked under the First Amendment.").

trials,[2] ensuring an adversarial system of justice,[3] and promoting accuracy of criminal justice outcomes.[4] I do not dispute that the Constitution speaks to these values. Yet, overlooked in that account is that every provision of the Sixth Amendment[5] is fundamentally a prohibition on government secrecy in criminal adjudication.[6] The public trial is an obvious guarantee of transparency and accountability.[7] The participation of a jury drawn from the community ensures community oversight and decision-making.[8] The speedy trial right prevents the government from bypassing the public jury trial through indefinite and secretive

2. *E.g.*, Duncan v. Louisiana, 391 U.S. 145, 157–58 (1968); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.").

3. *E.g.*, Strickland v. Washington, 466 U.S. 668, 685 (1984) ("[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." (quoting Adams v. U.S. *ex rel.* McCann, 317 U.S. 269, 275 (1942))); Crawford v. Washington, 541 U.S. 36, 61–62 (2004); Faretta v. California, 422 U.S. 806, 818 (1975).

4. *E.g.*, *Strickland*, 466 U.S. at 685 ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."); *id.* at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."); *id.* at 687 (characterizing a "fair trial" as "a trial whose result is reliable").

5. The Sixth Amendment reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

6. Professor Meghan Ryan also describes the transparency dimensions of the Sixth Amendment. *See* Meghan J. Ryan, *Criminal Justice Secrets*, 59 AM. CRIM. L. REV. 1541, 1574 (2022) ("These Sixth Amendment guarantees are ones of transparency, pledging that defendants have the right to have the public watch over their trials and determine their fates, that they should be provided with information related to their prosecutions, and that they have the opportunity to face their accusers. Keeping information at the heart of the prosecution process secret is entirely opposed to these basic constitutional principles."); c*f.* Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965, 966–67 (2008) ("In recognition of the centrality of information, many of the system's foundational doctrines are actually information rules, defining and constraining the ways that information moves through the criminal process. In many ways, the concept of due process itself can be seen as an informational construct, demanding that the system obtain and process information in ways that are deemed to promote fairness, accuracy, and governmental accountability. For example, the democratic requirement that the criminal process be transparent and politically accountable is typically effectuated by information rules governing public access to records and proceedings.").

7. *E.g.*, Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2176 (2014); Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 982–85 (2021); Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 157 (2018).

8. *E.g.*, Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 420 (2009); Aliza Plener Cover, *Supermajoritarian Criminal Justice*, 87 GEO. WASH. L. REV. 875, 884 (2019).

pretrial detention.[9] Providing information about the nature of the accusation yields transparency and access to information for the accused. The confrontation right ensures that no secret witnesses are used against the defendant and that witnesses may be probed through cross-examination.[10] Compulsory process allows the defendant to mandate transparency by bringing in his own witnesses and information and thereby challenging the state's version of events.[11] The assistance of counsel limits incommunicado detention or conviction: the accused cannot be convicted without at least the measure of openness inherent in the presence of counsel.[12]

These Sixth Amendment transparency protections are bolstered by the Suspension Clause, which ensures the availability of habeas corpus and protects against secret executive detention;[13] the Ex Post Facto Clause, which provides the public with notice of what is illegal;[14] the Treason Clause, which requires the corroboration of two witnesses or a "Confession in *open* Court" for a treason conviction;[15] the First Amendment, which has been understood to protect a "freedom to listen" and to access criminal proceedings;[16] the Fourth Amendment, which forces informational exchange about the bases for a search or arrest;[17] the Eighth Amendment's prohibition on excessive bail, which guards against incommunicado pretrial detention;[18] the Fifth Amendment's Grand Jury Clause, which demands public involvement in the initiation of criminal proceedings;[19] the Fifth Amendment's Self-Incrimination Clause, which prevents the government from coercing confessions in the isolation of detention and using them against the defendant at trial; [20] and the Fifth and Fourteenth Amendment protections for due process.[21] The anti-secrecy thrust

9. *See* George C. Thomas III, *Remapping the Criminal Procedure Universe*, 83 VA. L. REV. 1819, 1845 (1997) (book review).

10. *See* Ryan, *supra* note 6, at 1544.

11. *See* Strickland v. Washington, 466 U.S. 668, 691–92 (1984).

12. *Id.* at 685.

13. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

14. *Id.* art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); *id.* art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law . . . .").

15. *Id.* art. III, § 3, cl. 1 (emphasis added) ("No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.").

16. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) (plurality opinion) ("Free speech carries with it some freedom to listen.").

17. U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

18. *Id.* amend. VIII ("Excessive bail shall not be required . . . .").

19. *Id.* amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .").

20. *Id.* ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

21. *Id.* ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."); *id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

of these protections, taken together, is not surprising. Many of them are rooted in a response to the abuses of the Star Chamber and the continental inquisitorial system, in which secrecy was seen to enable arbitrary punishment and abuses of power.[22]

While these discrete protections have in many ways served us well in ensuring transparency in criminal trials, many have diminishing significance in the modern criminal justice system, in which trials are the aberration and not the norm.[23] New features of our criminal justice system have created new problems with transparency. Today, there is wide acknowledgement that our plea bargaining and prison systems have deep transparency deficits;[24] these transparency deficits have helped enable a generation of mass incarceration. Yet, these particular transparency problems did not exist in the Founding Era, a time before the rise of professional prosecutors' offices[25] and the explosion of plea bargaining[26] when punishment was often violent, visceral, and public—carried out in the town square.[27] Because the Founders focused on other transparency problems and not these ones, the discrete constitutional protections they established do not speak to these modern problems. And although the Supreme Court has to some degree expanded constitutional protections for public access to criminal court proceedings beyond the trial,[28] its doctrines largely fail to reach the core transparency deficits inherent in a system of plea bargaining and carceral punishment. Because there is no recognition that, taken together, the discrete constitutional protections establish an overarching transparency guarantee, these modern transparency deficits are not understood as problems of constitutional stature.

This Article looks holistically at these constitutional provisions and develops a theory of a trans-clausal constitutional guarantee of transparency in

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22. *See, e.g.*, *In re* Oliver, 333 U.S. 257, 268–69 (1948); Culombe v. Connecticut, 367 U.S. 568, 581–82 (1961). *But see* David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1674-77 (2009) (critiquing the originalist arguments for anti-inquisitorialism, including those of Justice Scalia).

23. Missouri v. Frye, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); Natapoff, *supra* note 6, at 966–67 (explaining informational deficits in the modern system).

24. *E.g.*, Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 923–29 (2006) (describing transparency deficits in a system dominated by plea bargaining); Turner, *supra* note 7, at 978–82 (same); Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 462–64 (2014) (describing transparency deficits in prisons).

25. I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1573–81 (2020) (describing the historical dominance of private prosecution in the colonial and early American criminal justice system).

26. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1199 (1991).

27. Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, *in* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 96, 101–07 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006); STUART BANNER, THE DEATH PENALTY 24, 31–32 (2002); Bibas, *supra* note 24, at 920–21.

28. *E.g.*, Waller v. Georgia, 467 U.S. 39, 44–45, 47 (1984) (citing the public's "qualified First Amendment right" to attend jury selection proceedings, established in *Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501 (1984), and finding a Sixth Amendment right against "closure of a suppression hearing over the objections of the accused").

criminal justice proceedings.[29] Attention to this constitutional guarantee could serve as an impetus and theoretical justification for doctrinal and non-doctrinal efforts to bolster transparency in the criminal justice system, such as greater openness of court proceedings,[30] new efforts to promote transparency in plea bargaining,[31] and new proposals to incorporate modified juries into different stages of the criminal justice system.[32]

There is an acute need for these types of transparency mechanisms in our criminal justice system today.[33] In the wake of the deaths of George Floyd, Breonna Taylor, Michael Brown, and too many others at the hands of police, American society has increasingly realized the value of body camera and cell phone footage that subject police use of force to public scrutiny.[34] The violence of the adjudicative criminal justice system is more diffuse, more shrouded in legalese, and more difficult to pin down than police violence, which can be bloody, visceral, and overt. Yet, the need for transparency within this system is no less significant.

This Article proceeds in three parts. Part I discusses, at a conceptual level, the importance of transparency to democratic governance generally and to a democratic criminal justice system specifically, and it develops a framework of multidimensional transparency within such a system. Part II identifies and explores an overarching transparency guarantee within the text of the U.S. Constitution and shows that the constitutional criminal procedure protections track a multidimensional theory of transparency. Part III explains how key features of the modern criminal justice system weaken the efficacy of the constitutional transparency protections and argues that renewed attention to the overarching constitutional transparency guarantee could strengthen efforts to promote accountability and transparency in the criminal justice system today.

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29. *Cf.* Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."); Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) ("[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ."); *see also infra* Subpart II.D.

30. Simonson, *supra* note 7, at 2177–78; *see* Stephanos Bibas, *Restoring Democratic Moral Judgment Within Bureaucratic Criminal Justice*, 111 NW. U. L. REV. 1677, 1691 (2017).

31. Turner, *supra* note 7, at 1000–22.

32. Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 733 (2010) [hereinafter Appleman, *The Plea Jury*] (proposing "plea juries"); Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1366 (2012) [hereinafter Appleman, *Justice in the Shadowlands*] (proposing bail juries); Josh Bowers, *Upside-Down Juries*, 111 NW. U. L. REV. 1655, 1659–60 (2017) (proposing the introduction of "normative juries"); Jenia Iontcheva, *Jury Sentencing As Democratic Practice*, 89 VA. L. REV. 311, 314–16 (2003) (urging the use of sentencing juries).

33. *See* Ryan, *supra* note 6, at 1547–64 (describing pervasive secrecy within the criminal justice system).

34. *See, e.g.*, Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 394–97 (2016).

I. THE VALUE OF CRIMINAL JUSTICE TRANSPARENCY

A. The Heightened Need for Transparency in Criminal Proceedings

Government transparency is commonly understood as a basic and necessary feature of a functioning democracy.[35] Although there may be limits to both the desirability and efficacy of transparency,[36] the idea that transparency promotes healthy democracy has deep roots and enduring significance in democratic political theory.[37] The government must be transparent to earn its legitimacy through the informed consent of the governed,[38] and the populace must be well-informed to exercise its electoral power rationally and effectively.[39] While government transparency is important in many contexts, transparency considerations in the criminal justice system are unique—and heightened—for two primary reasons: first, because of the special coerciveness of criminal punishment, and second, because transparency is tightly linked to the penological goals that justify punishment in the first place.

First, the criminal justice system sits at the pinnacle of government's exercise of coercive—indeed, violent—control over its citizens.[40] Without the accountability that transparency brings,[41] the coercive can swiftly devolve into the tyrannical. As history amply teaches, a criminal justice system shrouded in secrecy can become the tool of political repression. American courts often look back to the English Star Chamber, abolished in the mid-1600s, and the continental inquisitorial court systems it was associated with as noxious examples of how secrecy corrupts criminal law in service of authoritarianism.[42] More recent examples include the enforced disappearances[43] of political

35. *See, e.g.*, Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 895–901 (2006).

36. *Id.* at 902–10.

37. *Id.* at 895–96 (describing oft-cited support for open government by Madison, Locke, Mill, Rousseau, Bentham, Kant); Gannett Co. v. DePasquale, 443 U.S. 368, 422 (1979) (Blackmun, J., concurring in part and dissenting in part) (quoting Bentham, who wrote that publicity was "the soul of justice" and who "believed that, above all, publicity was the most effectual safeguard against judicial abuse" (first quoting JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 67 (1925); then quoting 1 JEREMY BENTHAM, THE RATIONALE OF JUDICIAL EVIDENCE 67 (1825))); *In re* Oliver, 333 U.S. 257, 271 (1948) (quoting Bentham, who wrote, "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.").

38. Fenster, *supra* note 35, at 897 ("Only to the extent that these laws gain the consent of the governed—which itself can only be freely given if the laws and their enforcement are public—will the political and administrative authorities that enact and enforce these laws be legitimate.").

39. *Id.* at 896–97.

40. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601, 1607 n.16 (1986).

41. Transparency does not always result in accountability, but the information it provides is often a necessary first step toward that separate goal. *See* Armstrong, *supra* note 24, at 459–60.

42. *E.g.*, *Oliver*, 333 U.S. at 268–69; Wardius v. Oregon, 412 U.S. 470, 479 (1973) (Douglas, J., concurring); Culombe v. Connecticut, 367 U.S. 568, 581–82 (1961).

43. The International Convention for the Protection of All Persons from Enforced Disappearance defines "enforced disappearance" as:

dissidents in places such as modern Chechnya[44] and Bangladesh,[45] Chile under Augusto Pinochet,[46] and Argentina under the military junta.[47] Such enforced disappearances blend the boundaries of criminal punishment and warfare, with totalitarian governments exercising police and punishment power without transparency or accountability.

The emergence of truth and reconciliation commissions as a response to some of these human rights violations highlights the significance of transparency to democratic governance. Countries such as Chile and post-apartheid South Africa, which worked to build democracies after ousting authoritarian regimes, established truth and reconciliation commissions as important tools of transitional justice.[48] The idea behind these commissions is that truth—transparency—is traded for amnesty. They are predicated on the theory that, after massive human rights abuses are committed in secret, on a large scale, and with government sanction, criminal prosecution of all such abuses would be infeasible; a more promising step toward national healing is developing a common understanding of what happened and how.[49] These commissions unearthed powerful evidence of human rights abuses done in secret and, despite critiques about their efficacy and adequacy,[50] show the potential for democratic healing by virtue of transparency itself.[51]

> the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

International Convention for the Protection of All Persons from Enforced Disappearance, art. 2, Dec. 23, 2010, 2716 U.N.T.S. 48088.

44. *Last Seen . . .: Continued "Disappearances" in Chechnya*, 14 HUM. RTS. WATCH, no. 3, 2002, at 1, 2–3, https://www.hrw.org/reports/2002/russchech02/chech0402.pdf (reporting thousands of instances of detention in Chechnya without warrant, often at "unofficial detention facilities," always without counsel, often leading to torture, mistreatment, or even death; and often with denial by Russian authorities that the detainees are in their custody).

45. *Bangladesh: End Enforced Disappearances*, HUM. RTS. WATCH (Aug. 28, 2020, 6:00 AM), https://www.hrw.org/news/2020/08/28/bangladesh-end-enforced-disappearances.

46. "According to a national truth and reconciliation commission, at least 3,196 people were killed or forcibly disappeared during Pinochet's . . . 17-year dictatorship. Thousands more were tortured or exiled." Stacie Jonas, *The Ripple Effect of the Pinochet Case*, 11 HUM. RTS. BRIEF, no. 3, 2004, at 36, 36.

47. Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. INT'L L.J. 295, 295–96 (2005) ("In Argentina, a 2001 court ruling abrogated laws giving immunity to military officers who oversaw and participated in the kidnapping and secret execution ('disappearance') of as many as 30,000 people between 1976 and 1983.").

48. Cody Corliss, *Truth Commissions and the Limits of Restorative Justice: Lessons Learned in South Africa's Cradock Four Case*, 21 MICH. ST. INT'L. L. REV. 273, 276 (2013) ("In addition to South Africa, notable truth and reconciliation commissions have been created in Chile, El Salvador, Guatemala, and Argentina. Uruguay, the Philippines, Chad, Bolivia, Zimbabwe, Ethiopia, Germany, and Uganda also created some of the earliest truth commissions." (footnotes omitted)).

49. Tracey B.C. Begley, *Strengthening the Right to Know Through Truth and Reconciliation Commissions*, 23 HUM. RTS. BRIEF, no. 1, 2020, at 25, 25.

50. Corliss, *supra* note 48, at 277, 280–81.

51. Begley, *supra* note 49, at 25, 28–29.

Second, some measure of transparency is necessary to realize the unique substantive goals of the criminal justice system. Criminal punishment is often defined and justified as an expression of the moral condemnation of the community[52] and, further, as society's reaffirmation of the victim's moral worth.[53] If the public does not see criminal justice in action or participate in its processes, and if victims do not see or understand that justice is being done, the expressive utility of criminal punishment is diminished.

Moreover, the deterrent effects that ostensibly flow from the pain of punishment rely on public participation in and awareness of criminal justice proceedings for their utility. Many scholars have cast doubt on whether—if at all—the criminal justice system meaningfully deters people from engaging in criminalized conduct,[54] and current social science literature suggests that what deterrent effect it has flows more from certainty of detection rather than severity of punishment.[55] Yet, without information about what happens in the criminal justice system, general deterrence loses what force it has.[56]

Finally, transparency about criminal justice outcomes and processes is important to the overall legitimacy of the system. The link between punishment and community values about desert is critical to its legitimacy,[57] and public participation in the criminal justice system directly facilitates the connection between criminal justice outcomes and the community's values.[58] Perceptions of fair process, or "procedural justice," also contribute to the criminal justice system's legitimacy[59] and efficacy.[60] Public visibility of and participation in the

52. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 598 (1996) ("Under the expressive view, the signification of punishment is moral condemnation. By imposing the proper form and degree of affliction on the wrongdoer, society says, in effect, that the offender's assessment of whose interests count is wrong. It follows, moreover, that when society deliberately forgoes answering the wrongdoer through punishment, it risks being perceived as endorsing his valuations; hence the complaint that unduly lenient punishment reveals that the victim is worthless in the eyes of the law." (footnote omitted)); Cover, *supra* note 8, at 876, 891–95.

53. *See* Jean Hampton, *An Expressive Theory of Retribution*, *in* RETRIBUTIVISM AND ITS CRITICS 1, 15–17 (Wesley Cragg ed., 1992); Kahan, *supra* note 52, at 598.

54. Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 766 (2010) ("In spite of its central importance, and the very high expectation we have that legal punishment and criminal justice policies can inhibit crime, we do not have very solid and credible empirical evidence that deterrence through the imposition of criminal sanctions works very well.").

55. Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 201 (2013).

56. *See* Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 LEWIS & CLARK L. REV. 573, 598–99 (2017).

57. Paul H. Robinson et al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 2017, 2025–26 (2010).

58. Witherspoon v. Illinois, 391 U.S. 510, 519–20 n.15 (1968) ("And one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" (quoting Trop v. Dulles, 536 U.S. 86, 101 (1958))).

59. Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119, 120–21 (2012).

60. Robinson et al., *supra* note 57, at 2025–26.

criminal process can help maintain public confidence that justice is, in fact, being done—or create a baseline for reform if it is not.[61]

B. A Transparency Taxonomy

In many areas of government, outside the criminal justice system, transparency is primarily defined by access to information,[62] public observation,[63] and, in some cases, opportunities for public input through comment or petition.[64] Because of its unique features, however, genuine transparency within the criminal justice system requires more: a multifaceted framework of transparency protections with implications both for the public and for the accused. Here, I identify three different types of transparency that are critical for a democratic criminal justice system.

The first type—which I call "informational transparency"—may most readily come to mind when one thinks about transparency. Broadly speaking, informational transparency holds the government accountable by providing information about government conduct and decision-making to the people affected by those decisions and to the electorate at large. A free press is one paradigmatic vehicle for such informational transparency;[65] so too are statutory mechanisms such as the Freedom of Information Act, state public records acts, and other "sunshine laws."[66] In the criminal context, informational transparency extends to specific evidence and information relevant to an individual prosecution, as well as to information about the criminal laws more broadly. Such transparency promotes fair outcomes by allowing defendants to meaningfully dispute the government's case—including by contextualizing government evidence, challenging its validity, or providing alternative explanations for its existence—and gain access to evidence that might tend to

61. Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 445–46 (2008) ("While it remains difficult to isolate the public's principal objection to plea bargaining, there are good reasons to believe that the secretiveness of the practice greatly contributes to the negative perceptions. Measures that enhance the transparency of plea bargaining therefore may contribute to the criminal justice system's perceived legitimacy, or, at the very least, better inform misguided public debate over the practice." (footnotes omitted)).

62. *E.g.*, Freedom of Information Act, 5 U.S.C. § 552.

63. Open meeting laws are prototypical means of ensuring in-person public observation. *See* William R. Sherman, *The Deliberation Paradox and Administrative Law*, 2015 BYU L. REV. 413, 414.

64. Notice-and-comment rulemaking in the administrative context is one example. *See, e.g.*, Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2065–66 (2011).

65. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.").

66. *See, e.g.*, 5 U.S.C. § 552; Christina Koningisor, *Transparency Deserts*, 114 NW. U. L. REV. 1461, 1480 (2020) (describing state public records laws).

exculpate them.[67] Informational transparency thus frustrates government overreach by making it more difficult for the state to fabricate guilt or conceal evidence of innocence.[68] Moreover, informational transparency assures that the public knows what conduct is criminalized as well as what punishment they risk if they disobey the law—ensuring the government actors are subservient to the law rather than the other way around—and holds the government accountable to the public as to how it handles criminal cases on a systemic level.

The second type of transparency—what I call "participatory transparency"—requires public participation in criminal adjudication proceedings. Partial participatory transparency would be characterized by public participation through observation. Full participatory transparency would also entail public participation in decision-making roles. Direct public participation in decision-making is uniquely important in the context of the criminal justice system because of the coercive impact of individual judgments on defendants' lives[69] and because of the need to link criminal judgment outcomes to community values.[70] And while public observation is important to government transparency more broadly, it is particularly crucial when punishment is at stake as a check against cruelty and arbitrariness.

The third and most unique type of transparency needed in a democratic criminal justice system is "corporal transparency," which places limits on incommunicado or secret detention. In the criminal context, there is a special concern that *defendants themselves* (not just proceedings or information) will be secreted away and hidden from public view.[71] Such seclusion can enable prolonged or indefinite pretrial detention, coercive or torturous interrogation practices, and cruel punishments.[72] Corporal transparency minimizes the opportunities for such abuses.

These three types of transparency work together to protect against government overreach and abuse in the criminal justice context. It is worth noting, however, that absolute transparency is not necessarily a good thing. There can and should be some limits in the interests of both the prosecution and the defense. Criminal investigations may be frustrated and witnesses endangered if there is no room for secrecy while the government builds its case. Conversely, excessive pretrial publicity[73] and the introduction of inflammatory

67. *See* O'Hear, *supra* note 61, at 416–17, 436.

68. *See* Natapoff, *supra* note 6, at 980.

69. *See supra* notes 37–40 and accompanying text.

70. *See supra* notes 54–58 and accompanying text.

71. *See, e.g.*, *supra* notes 43–47 and accompanying text. There are other contexts in which secret detention arises as a concern, including immigration detention and the detention of "enemy combatants." *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004).

72. *See supra* notes 43–47 and accompanying text.

73. Gannett Co. v. DePasquale, 443 U.S. 368, 378 (1979) ("This Court has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial. To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial

evidence at trial[74] can be highly prejudicial to defendants' rights. Moreover, some measure of deliberative secrecy has recognized benefits and a long historical pedigree.[75] With certain limits in place, however, transparency serves as a critical protection against an unjust and even tyrannical criminal justice system.

II. THE CONSTITUTIONAL TRANSPARENCY GUARANTEE

The primary contribution of this Article is to identify and explore a broad and deep criminal justice transparency imperative embedded within the Constitution.[76] This imperative encompasses, but extends beyond, public participation in judgment (through the jury) and observation (through the criminal trial audience)[77] to ensuring access to information as a critical dimension of criminal adjudication and protecting against secret and coercive detentions.

Many theorists recognize that the Bill of Rights protects access to information about, and public participation in, governance, including the criminal justice system. In recent years, scholars such as Stephanos Bibas,[78] Alexandra Natapoff,[79] Jocelyn Simonson,[80] and Jenia Iontcheva Turner[81] have drawn attention to some of the transparency and democracy deficits in the modern American criminal justice system and have demonstrated various ways in which the Constitution should be read to promote democratic participation. Much of their discussion is rooted in the public trial right, the jury trial right, the First Amendment, and due process.

My goal is to go further and explain how transparency-protective rights are both interconnected and deeply rooted in the Constitution. They establish not only discrete protections for transparency but an overarching and multifaceted guarantee of transparency that is at its zenith in the context of criminal justice. I endeavor to take a holistic approach to the transparency guarantee and avoid "[t]he clause-bound approach" which "misses the ways in which structure and

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pretrial publicity. And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary." (citations omitted)).

74. *See* Old Chief v. United States, 519 U.S. 172, 180–81 (1997).

75. *See* United States v. Thomas, 116 F.3d 606, 618–21 (2d Cir. 1997) (describing the long history and venerability of jury secrecy).

76. David Pozen traces the existence or non-existence of an anti-secrecy principle in the Constitution as a whole, but he does not focus on criminal procedure provisions or ask whether there is a special concern with transparency in this context. David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 292–305 (2010).

77. Simonson, *supra* note 7.

78. Bibas, *supra* note 24.

79. Natapoff, *supra* note 6.

80. *See* Simonson, *supra* note 7.

81. Turner, *supra* note 7.

rights mutually reinforce."[82] My methodology here is not originalist—though some originalist thinkers such as Justice Scalia have interpreted the Constitution in ways that are broadly consistent with my interpretation[83] and though I include a fair amount of historical discussion about the relevant constitutional provisions—because I anticipate that readers will find it useful, and because I view history, along with text, to be relevant to (though not strictly determinative of) the constitutional analysis. Fundamentally, however, I look to the structure and the function of the substantive protections in the text, and I identify common themes and linkages between them.

The constitutional guarantees of transparency are multidimensional. The Constitution protects all three different *types of transparency* identified in Part I, and in the following Subparts, I discuss each type of transparency in turn. The Constitution also provides for multiple forms of enforcement; the protections for transparency are overlapping and sometimes redundant.[84] They extend to different actors and entail both structural and individual rights protections. The Constitution weaves together individual rights of access on the part of the public,[85] protections for defendants' individual rights,[86] and structural institutions[87] designed to promote transparency. Transparency is thus both a deep and broad constitutional imperative protected through checks and balances and redundancies.

This multidimensionality explains why scholars and judges have debated who we should understand to be the beneficiary of certain transparency rights, such as the public trial right. The public at large has a claim through the First Amendment and Article III, and due to the centrality within the nation's founding political theory of the jury as a "fourth branch" of government, it makes sense that some scholars—Akhil Amar, Laura Appleman, and others—focus on the public's right, the collective right.[88] But in another sense, the public jury trial is clearly the *defendant's* right—housed, as it is, within the Sixth Amendment guarantees afforded to "the accused."[89] The public's rights are

82. Amar, *supra* note 26, at 1201.

83. *See, e.g.*, Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting) (characterizing the jury as the "spinal column of American democracy"); Crawford v. Washington, 541 U.S. 36, 43 (2004).

84. *See, e.g.*, U.S. CONST. art. III, § 2, cl. 3 (establishing that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

85. *E.g.*, *id.* amend. I; Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) (plurality opinion).

86. *E.g.*, U.S. CONST. amends. V, VI.

87. *See, e.g.*, *id.* art. III, § 2, cl. 3 (guaranteeing trial by jury); *id.* art. I, § 9, cl. 2 (securing the writ of habeas corpus).

88. Appleman, *supra* note 8, at 405 ("Akhil Amar has briefly touched upon the idea of a collective jury trial right, arguing that the right to a jury trial focused on the local community during the ratification debates due to concerns over popular representation. I expand on this assertion by illustrating that the right to a jury trial, particularly in the criminal context, was viewed almost exclusively as the people's right, not as a right of the accused, as demonstrated by the original historical sources." (footnote omitted)).

89. Gannett Co. v. DePasquale, 443 U.S. 368, 392 (1979).

complemented and enforced by similar guarantees expressed as individual rights. And the protection of transparency is not limited to the participatory jury trial right. It is supported and deepened by the protections of corporal and informational transparency discussed above, some of which are more unambiguously personal to the accused.[90]

If we look holistically at this constellation of individual and structural rights, we see an overarching constitutional imperative of a transparent *system*.

A. Participatory Transparency

The Constitution establishes an active role for public participation in, and oversight of, criminal adjudication through the Fifth Amendment right to grand jury indictment[91] and through the Sixth Amendment rights to a "public trial" and to "an impartial jury of the State and district wherein the crime shall have been committed."[92] These Fifth and Sixth Amendment rights, combined with the First Amendment rights of the public to listen and observe,[93] provide for two different forms of public participation: the grand jury and petit jury rights protect participation through public adjudication while the public trial guarantee and the First Amendment ensure that the public may participate as an audience, ensuring transparency through public observation.[94]

1. Public Decision-Makers

The criminal jury was of central importance to the Founders. Indeed, the denial of trial by jury was one of the grievances laid out in the Declaration of Independence,[95] and the criminal jury was guaranteed in Article III before the ratification of the Bill of Rights.[96] The criminal jury is the only criminal procedure right secured both in the original Constitution (as a structural right) and in the Bill of Rights (as an individual right).[97]

The Bill of Rights expands upon the Article III criminal jury guarantee by enshrining it as an individual right of the defendant and by ensuring its local composition; the defendant is guaranteed a trial "by an impartial jury of the State and district wherein the crime shall have been committed, which district

90. *E.g.*, U.S. CONST. amend. V, cl. 3 (privilege against self-incrimination).

91. *Id.* amend. V, cl. 1; *see also* Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2348–49 (2008) (arguing that revitalizing the grand jury would promote civic participation in the criminal justice system).

92. U.S. CONST. amend. VI.

93. *Id.* amend. I; Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) (plurality opinion).

94. *See* Simonson, *supra* note 7.

95. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776) (complaining of the King "depriving us in many cases, of the benefits of Trial by Jury").

96. U.S. CONST. art. III, § 2, cl. 3.

97. Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting).

shall have been previously ascertained by law."[98] This predetermined locality resists co-optation by a central government and ensures that criminal justice is seen and carried out by members of the community[99]—a protection that has important consequences both for the defendant and for the People.[100] For the defendant, the jury right erects a bulwark against arbitrary and unjust government action.[101] For the community, the jury trial ensures democratic control over the criminal justice system and connects punishment to community standards of morality.[102] To Alexis De Tocqueville, the jury was fundamentally a political institution rather than a judicial one: together, the jury system and universal suffrage "are two instruments of equal power, which contribute to the supremacy of the majority."[103]

It bears noting that the original exclusion of women, Black Americans, and others from jury service sharply curtailed the participatory bona fides of the Founding Era criminal jury.[104] However, the ratification of the Reconstruction Amendments and the Nineteenth Amendment made the constitutionally guaranteed jury a more inclusive institution. Race-based juror exclusion was first held unconstitutional under the Fourteenth Amendment in *Strauder v. West Virginia* in 1879,[105] although the Supreme Court has continued to grapple into the present day with how to prevent wrongful exclusion[106] and marginalization[107] of Black American jurors in practice. It took longer—in many states, not until well after the Nineteenth Amendment granted them suffrage—for recognition of women's rights to serve on juries.[108]

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98. U.S. CONST. amend. VI, cl. 1.

99. Duncan v. Louisiana, 391 U.S. 145, 156 (1968) ("Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." (citing *Duncan*, 391 U.S. at 155–56)).

100. Powers v. Ohio, 499 U.S. 400, 407 (1991) ("Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people.").

101. *Duncan*, 391 U.S. at 156; *Taylor*, 419 U.S. at 530.

102. Witherspoon v. Illinois, 391 U.S. 510, 519–20 n.15 (1968).

103. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 283 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1989) (1899).

104. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 876–901 (1994).

105. Strauder v. West Virginia, 100 U.S. 303, 304 (1879); *see also Ex parte* Virginia, 100 U.S. 339, 345 (1879).

106. *See* Batson v. Kentucky, 476 U.S. 79, 82 (1986); Foster v. Chatman, 578 U.S. 488, 491 (2016); Flowers v. Mississippi, 139 S. Ct. 2228, 2239–41 (2019).

107. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1396–97, 1405) (2020) (striking down nonunanimous jury verdicts as unconstitutional and pointing to the explicitly racist origins of the nonunanimous jury laws in Louisiana and Oregon, which were designed to neutralize the impact of Black Americans receiving the right to sit on juries); *see also* Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593 (2018) (chronicling the nineteenth-century effort to eliminate racial discrimination in juries as well as the persistence of racial inequality today).

108. Alschuler & Deiss, *supra* note 104, at 898-901

Moreover, the Supreme Court has interpreted the Sixth Amendment's "impartial jury"[109] guarantee to require a jury drawn from "a representative cross section of the community."[110] This fair cross section requirement further enhances the jury guarantee's local, participatory ethic by protecting the jury's "diffused impartiality" and preventing criminal justice decision-making from falling into the control of one faction[111]—though, in practice, its effects have been limited by the Court's restriction of the doctrine to the composition of the jury venire and not the seated petit jury.[112]

Beyond the petit jury right described above, the Fifth Amendment's grand jury clause provides another important constitutional protection for participatory transparency.[113] Although the modern grand jury is often dismissed as impotent, unimportant, or even detrimental to liberty,[114] in colonial America, grand juries gained fame and popular acclaim for frustrating the enforcement of British laws deemed unjust by the colonists,[115] and the Founders valued the grand jury as a communitarian check against overreaching by the centralized government.[116] While there is a long history of secrecy in grand jury proceedings,[117] the grand jury guarantee ensured that no defendant could be prosecuted (let alone convicted) unless the community was involved in the process and gave its imprimatur that the cause was fair.[118]

2. Public Observers

The criminal jury and grand jury guarantees are the most obvious protections in the Constitution, ensuring that the public will participate in the criminal justice system as *decision-makers*. The First Amendment, due process, and the public trial guarantee, on the other hand, serve to protect public participation as an *audience*. Jocelyn Simonson has persuasively explored the

109. U.S. CONST. amend. VI, cl. 2.

110. Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

111. *Id.* at 530 (explaining that the protection against arbitrary power "is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.").

112. Lockhart v. McCree, 476 U.S. 162, 173–74 (1986).

113. U.S. CONST. amend. V, cl. 1 ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .").

114. Washburn, *supra* note 91, at 2335–36; Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 264 (1995).

115. Washburn, *supra* note 91, at 2344.

116. *Id.* at 2346.

117. *See, e.g.*, Trump v. Vance, 140 S. Ct. 2412, 2427 (2020).

118. The Grand Jury also traditionally served an investigative function, which helped to hold government officials accountable for potential corruption. *See* discussion *infra* Subpart II.C.2.

essential—and often overlooked—role that the Constitution contemplates for the public as observers of the criminal justice process through these guarantees.[119]

Like the jury right, the public trial right has important benefits that inure to both the defendant and the public. The Supreme Court has stated firmly that the public trial right is "personal to the accused" and pointed out that "[t]he Constitution nowhere mentions any right of access to a criminal trial on the part of the public."[120] Accordingly, the Supreme Court has prioritized the defendant's rights over the public's when a trial's publicity would jeopardize its fairness.[121] This is not to say, however, that the public has no cognizable interest in the openness of criminal proceedings. The Supreme Court has held that members of the press and the public have a right through the First and Fourteenth Amendments to open criminal trials,[122] and "lower courts have extended the First Amendment freedom to listen as far as bail hearings, sentencings, and plea allocutions."[123] This First Amendment right to access criminal court proceedings is explicitly predicated on the traditional openness of criminal trials,[124] as ultimately guaranteed through the Sixth Amendment, and marks one of several narrow exceptions to the ordinary rule that there is no First or Fourteenth Amendment right to view government proceedings or obtain information from the government.[125]

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119. Simonson, *supra* note 7, at 2176 ("This single-minded focus on the jury as a constitutional fix inside the courtroom is a mistake. For the criminal court audience is not just normatively important; it is constitutionally important. The criminal court audience is protected by both the defendant's right to a public trial under the Sixth Amendment and the public's right to access criminal proceedings—the 'freedom to listen'—under the First Amendment. As a result, the audience can and should be a central constitutional mechanism for popular accountability in modern criminal justice. . . . [T]he Sixth and First Amendment rights together protect the ability of community members sitting in local courtrooms to promote fairness and accountability in the post-trial world."(emphasis omitted)).

120. Gannett Co. v. DePasquale, 443 U.S. 368, 379–80 (1979).

121. *Id.* at 392.

122. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575–77 (1980) (plurality opinion) ("The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself; the conduct of trials 'before as many of the people as chuse to attend' was regarded as one of 'the inestimable advantages of a free English constitution of government.' In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. . . . Free speech carries with it some freedom to listen. . . . What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." (citations omitted)); Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 605 (1982).

123. Simonson, *supra* note 7, at 2195.

124. Press-Enter. Co. v. Superior Ct., 478 U.S. 1, 8(1984) (looking first to "whether the place and process have historically been open to the press and general public" in determining whether a First Amendment right to view criminal proceedings attaches).

125. Eugene Volokh, *First Amendment Right of Access to Judicial Proceedings*, WASH. POST: THE VOLOKH CONSPIRACY (Mar. 18, 2014, 5:32 AM) https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/18/first-amendment-right-of-access-to-judicial-proceedings/ ("The Supreme Court has rejected the view that there is a First Amendment right to attend all government proceedings —

Like many of the rights that implicate transparency in the Constitution, the origins of the public trial right have been attributed to "the notorious use of [secret trials] by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*."[126] Yet the public trial's historical roots extend much deeper: the record of public criminal proceedings in England goes back more than a thousand years.[127] The Supreme Court has relied on the long and uninterrupted history of open criminal trials in recognizing the rights of both defendants[128] and the public[129] to open trials.

The Supreme Court has lauded the audience as a critical protection for the accused against unjust criminal proceedings:

> Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.[130]

Beyond these immediate protections for the defendant, the participation of the community as audience can also have a larger impact on the criminal justice system as a whole—fostering dialogue, critiques, and democratic participation through social mobilization and electoral change.[131] The Supreme Court has recognized that a public right of access to criminal trials has important benefits for the integrity, legitimacy, and democracy of the criminal justice system as a whole.[132]

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e.g., jury deliberations, grand jury hearings, executive agency meetings, and so on — or to view government documents. The federal Freedom of Information Act and many state public records acts give the public the right to access various government documents, but those statutes stem from legislative decision, not constitutional command.").

126. *In re* Oliver, 333 U.S. 257, 268–69 (1948) (footnotes omitted).

127. Gannett Co. v. DePasquale, 443 U.S. 368, 419 (1979) (Blackmun, J., concurring in part and dissenting in part).

128. *Oliver*, 333 U.S. at 266–71 (detailing at length the historical pedigree of the public trial).

129. Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 605 (1982) ("First, the criminal trial historically has been open to the press and general public. '[A]t the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open.' And since that time, the presumption of openness has remained secure. Indeed, at the time of this Court's decision in *In re Oliver*, the presumption was so solidly grounded that the Court was 'unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country.' This uniform rule of openness has been viewed as significant in constitutional terms not only 'because the Constitution carries the gloss of history,' but also because 'a tradition of accessibility implies the favorable judgment of experience.'" (citations omitted)).

130. *Oliver*, 333 U.S. at 269–70 (footnote omitted).

131. Simonson, *supra* note 7, at 2182–83.

132. *Globe Newspaper Co.*, 457 U.S. at 606 ("[T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an

Thus, by guaranteeing to the defendant an indictment by grand jury and a public trial by jury and by ensuring public access to the proceedings as decision-makers and audience, the Constitution protects a robust and multi-modal participatory transparency.

B. Corporal Transparency

The second type of transparency protects against the isolation and secret detention of criminal defendants. The Sixth Amendment rights to counsel and a speedy trial, the Fifth Amendment privilege against self-incrimination, the Fifth and Fourteenth Amendment rights to due process, the Eighth Amendment right against excessive bail, and the Suspension Clause—which ensures the availability of habeas corpus relief—all protect against secret detention without trial or oversight, as well as against coercive incommunicado interrogations outside the public eye.[133] In the unique context of treason trials—especially fraught with opportunities for government abuse—the Treason Clause precludes the reliance on incommunicado confessions to obtain a conviction by requiring either "the Testimony of two Witnesses" or a "Confession in *open Court*."[134]

Corporal transparency combats two interrelated practices of tyrannical criminal justice: the first is secret or indefinite pretrial detention, and the second is coercive interrogation, including torture. These two concerns are connected because secret detention sets the stage for and enables coercive interrogation. I discuss them in turn here.

1. Limits on Detention

The Constitution protects against secret and prolonged detention through a bundle of five rights: habeas corpus,[135] the speedy trial right,[136] the right to

appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience." (footnotes omitted)); Press-Enter. Co. v. Superior Ct., 464 U.S. 501, 508 (1984) ("The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569–571 (1980) (plurality opinion))).

133. *See infra* Subparts II.B.1.; II.B.2.

134. U.S. CONST. art. III, § 3, cl. 2 (emphasis added).

135. *Id.* art. I, § 9, cl. 2.

136. *Id.* amend. VI.

counsel,[137] the right against excessive bail,[138] and due process.[139] Through these rights, the Constitution creates opportunities for transparency (both through public decision-making and observation) before the accused can experience lengthy and oppressive detention.

Habeas corpus—the "Great Writ"—is the central protection against secret and illegally prolonged detention, alone guaranteed in the original Constitution of 1787.[140] Habeas corpus literally means "have the body"—a requirement of physical transparency by bringing the body of a person in prison before a judge.[141] Habeas corpus has traditionally functioned as an essential protection against unlawful executive detention[142] but at the time of the Founding was also understood to extend to detention pursuant to judicial order.[143] Rather than explicitly guaranteeing a *right to* habeas corpus, the Suspension Clause places restrictions on the writ's suspension and presumes its availability.[144]

Habeas corpus is one of the most ancient individual rights recognized at common law. It was first codified in Magna Carta, but it took centuries for the right to firmly establish itself in England, with significant government abuse of the writ along the way.[145] The modern right to habeas corpus—and the "model upon which the habeas statutes of the 13 American Colonies were based"—is generally traced to the Habeas Corpus Act of 1679.[146] The Act sought to prevent people from being "long detained in Prison in such Cases where by Law they are baylable"[147] and set specific timeframes by which prison custodians must "bring or cause to be brought the Body of the Partie soe committed or restrained" to the appropriate judicial or other officer and "certifie the true causes of his Detainer or Imprisonment."[148]

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137. *Id.*

138. *Id.* amend. VIII.

139. *Id.* amends. V, XIV.

140. *Id.* art. I, § 9, cl. 2.

141. *Habeas Corpus*, BLACK'S LAW DICTIONARY (11th ed. 2019).

142. INS v. St. Cyr, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."), *superseded by statute,* 8 U.S.C. § 1252(a)(5), *as stated in* Nasrallah v. Barr, 140 S. Ct. 1683, 1690 (2020).

143. Fay v. Noia, 372 U.S. 391, 403 (1963) ("[I]t is not true that at common law habeas corpus was exclusively designed as a remedy for executive detentions; it was early used by the great common-law courts to effect the release of persons detained by order of inferior courts." (footnote omitted)), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977), *and abrogated by* Coleman v. Thompson, 501 U.S. 722 (1991).

144. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

145. Boumediene v. Bush, 553 U.S. 723, 740–743 (2008) (describing the "painstaking" development of the British right to habeas corpus, "even by the centuries-long measures of English constitutional history").

146. *Id.* at 742 ("The Act, which later would be described by Blackstone as the 'stable bulwark of our liberties,' established procedures for issuing the writ; and it was the model upon which the habeas statutes of the 13 American Colonies were based." (citation omitted)).

147. Habeas Corpus Act 1679, 31 Car. 2 c. 2 (Eng.).

148. *Id.* at § I.

To the Founders, habeas corpus was a critically important protection.[149] Hamilton, citing to Blackstone, described the right to habeas corpus in laudatory terms that specifically conceptualized the writ as a protection against secretive detention:

> [T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone . . . are well worthy of recital: . . . "[C]onfinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government." And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls "the BULWARK of the British Constitution."[150]

Recent Supreme Court jurisprudence emphasizes the writ of habeas corpus as an essential separation of powers protection[151]—and it is. But, as Blackstone's words evocatively express, it also protects against tyranny by guaranteeing a window for the public, through the judicial process, to view an otherwise obscured confinement.[152]

The Suspension Clause's protection against secret and prolonged detention is bolstered in the Bill of Rights by the Eighth Amendment right against excessive bail and the Sixth Amendment speedy trial right. Together, these two guarantees ensure that the government cannot evade the requirement of the public trial by indefinitely detaining defendants pretrial.

The origins of the Sixth Amendment's speedy trial guarantee date back to the Assize of Clarendon and Magna Carta, which stated, "[W]e will not deny or defer to any man either justice or right."[153] The text of the Eighth Amendment's

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149. *E.g.*, *Boumediene*, 553 U.S. at 743 ("Surviving accounts of the ratification debates provide additional evidence that the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme."); Fay v. Noia, 372 U.S. 391, 399–400 (1963) (describing "the extraordinary prestige of the Great Writ, *habeas corpus ad subjiciendum*" (footnote omitted)), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977), *and abrogated by* Coleman v. Thompson, 501 U.S. 722 (1991).

150. THE FEDERALIST NO. 84, at 496–97 (Alexander Hamilton) (Am. Bar Ass'n ed., 2009) (footnote omitted) (first quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *136; and then quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *438).

151. *Boumediene*, 553 U.S. at 743 ("Surviving accounts of the ratification debates provide additional evidence that the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme.").

152. Judith Resnik, *Detention, the War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579, 670 (2010) ("The constitutional writ of habeas corpus sought to mediate the authority exercised in custodial detention that is otherwise far from public view.").

153. Klopfer v. North Carolina, 386 U.S. 213, 223–25 (1967) ("[The speedy trial] right has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, 'We will sell to no man, we will not deny or defer to any man either justice or right'; but evidence of recognition of the right to speedy justice in even earlier times is found in the Assize of Clarendon (1166). . . . To Coke, prolonged detention without trial would have been contrary to the law and custom of England; but he also believed that the delay in trial, by itself, would be an improper denial of justice. . . . Coke's Institutes were read in the American Colonies by virtually every student of the law." (footnotes omitted) (quoting Magna Carta 1225, 9 Hen. 3 c. 29 (Eng.), *reprinted in*

ban on excessive bail was adopted nearly verbatim from the English Bill of Rights of 1688, which complained that "excessive Baile hath beene required of Persons committed in Criminall Cases to elude the Benefitt of the Lawes made for the Liberty of the Subjects,"[154] and guaranteed "[t]hat excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted."[155]

Functionally, both of these protections place limits on the government's ability to detain individuals without trial. Reasonable bail allows defendants awaiting trial to be released upon specified conditions. Justice Marshall, dissenting in *United States v. Salerno*, characterized such access to bail as a safeguard against the practice of indefinite detention seen elsewhere in the world for alleged conduct that was not criminal.[156] The speedy trial right supplements this protection because if a defendant is detained pretrial, either because he cannot post bail or because the offense is non-bailable, that detention cannot be indefinite; the public must ratify it through a jury trial before the detention becomes truly oppressive.[157]

Interestingly, the speedy trial right—though textually located as a guarantee for the accused—also serves a significant public interest, especially when seen alongside the right to bail. The Supreme Court has recognized that the speedy trial benefits both the accused and the public: "In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused."[158] The speedy trial right ensures that a defendant who is not granted bail cannot be detained indefinitely pretrial, but it also assures the public that an indicted

EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45 (Brooke 5th ed., 1797))).

154. Bill of Rights 1689, 1 W. & M. Sess. 2 c. 2.

155. *Id.* The text of the Eighth Amendment reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

156. United States v. Salerno, 481 U.S. 739, 767 (1987) (Marshall, J., dissenting) ("Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be 'dangerous.' Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power.").

157. Thomas, *supra* note 9, at 1845 ("The speedy trial right is a perplexing part of the Sixth Amendment, not fully explained by the deep structure of truth/reliability. Clearly, a speedy, but not too speedy, trial is more likely to be reliable than a trial years later, but the Framers likely had other interests in mind. The tendency of the King to detain prisoners for long periods in the Tower of London led to the English Habeas Corpus Act of 1679, which served as a 'beacon by which framing lawyers in America consciously steered their course.' It seems likely that the Framers intended the speedy trial right to permit defendants to demand that they be released or tried, an action which would be in substance, and perhaps in form, a petition for a writ of habeas corpus." (footnote omitted) (quoting AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 105 (1997))).

158. Barker v. Wingo, 407 U.S. 514, 519 (1972).

defendant released on bail will not remain perpetually free without the accountability of a trial.[159]

Finally, the right to counsel also protects against isolation throughout the proceedings, including while the defendant is in pretrial detention. Attorney access to the defendant while in confinement is an important transparency guarantee, ensuring the presence of an outside observer and a communicative link to the outside. The first English codification of the right to counsel was in the Treason Act of 1696,[160] and the Act specifically guarantees that "Counsel shall have free Accesse" to the accused "at all seasonable Houres"[161]—an explicit recognition of the importance of attorney access to the accused as a protection against unjust detention. The presence of counsel has also been understood by the courts as a protection against coercive custodial interrogation, and I turn to that issue next.

2. Limits on Coercive Interrogation

One of the major concerns with incommunicado detention is that the lack of oversight can set the stage for coercive interrogation practices and involuntary confessions. The privilege against self-incrimination, due process, the right to counsel, and the Treason Clause all work to combat these pressures.

The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[162] This privilege is rooted in antipathy to the use of torture and other coercive methods to extract confessions—a practice that was associated with the civil law systems of continental Europe, as well as excesses in England prior to the late 1600s.[163] At

159. *Id.* at 519–20 ("[T]here is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. . . . [P]ersons released on bond for lengthy periods awaiting trial have an opportunity to commit other crimes. It must be of little comfort to the residents of Christian County, Kentucky, to know that Barker was at large on bail for over four years while accused of a vicious and brutal murder of which he was ultimately convicted. Moreover, the longer an accused is free awaiting trial, the more tempting becomes his opportunity to jump bail and escape." (footnote omitted)).

160. Erica J. Hashimoto, *An Originalist Argument for a Sixth Amendment Right to Competent Counsel*, 99 IOWA L. REV. 1999, 2001 (2014) ("[The Treason] Act [of 1696] was the one and only statute that guaranteed a right to counsel in England prior to the adoption of the Bill of Rights." (citing John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 309–10 (1978); Alexander H. Shapiro, *Political Theory and the Growth of Defensive Safeguards in Criminal Procedure: The Origins of the Treason Trials Act of 1696*, 11 LAW & HIST. REV. 215 (1993))).

161. Treason Act 1695, 7 & 8 Will. 3 c. 3, § 1 (Eng.).

162. U.S. CONST. amend. V.

163. *See In re* Oliver, 333 U.S. 257, 269 n.22 (1948) ("Apparently all authorities agreed that the accused himself was grilled in secret, often tortured, in an effort to obtain a confession and that the most objectionable of the Star Chamber's practices was its asserted prerogative to disregard the common law rules of criminal procedure when the occasion demanded."); Carter v. Kentucky, 450 U.S. 288, 299 n.14 (1981); Culombe v. Connecticut, 367 U.S. 568, 581–82 (1961) ("This principle, branded into the consciousness of our civilization by the memory of the secret inquisitions, sometimes practiced with torture, which were borrowed briefly from the continent during the era of the Star Chamber, was well known to those who established the American governments. Its essence is the requirement that the State which proposes to convict and punish

least "[s]ome leading Framers thought of the Self-Incrimination Clause as a protection against torture,"[164] and the Supreme Court has for more than a century interpreted the Fifth Amendment privilege in similar terms.[165]

This animating concern means that although the Fifth Amendment certainly also protects against being forced to testify against oneself in open court,[166] it squarely targets the confession extracted by coercive methods outside the watchful eyes of the court—and the public.[167] Similarly, the Supreme Court has found that due process protects against involuntary confessions, both those elicited through torture[168] and those elicited through the subtler coercion of prolonged and seemingly indefinite incommunicado interrogation.[169] It is precisely the seclusion of the accused in such

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an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." (footnotes omitted)).

164. Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 865 & n.20 (1995) (describing concerns expressed by Patrick Henry during the ratification debates that the Federal Constitution did not protect against "the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime" and responses linking state rights against self-incrimination to protections against confession by torture (quoting 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447–48 (Jonathan Elliot ed., 1886))).

165. Miranda v. Arizona, 384 U.S. 436, 442–43 (1966) ("The maxim '*Nemo tenetur seipsum accusare*,' had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, [were] not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." (alterations in original) (quoting Brown v. Walker, 161 U.S. 591, 596–97 (1896))).

166. *See, e.g.*, Griffin v. California, 380 U.S. 609, 614 (1965) (affirming not only the defendant's right not to testify at trial, but also prohibiting comment by the prosecution on the exercise of that right, "[f]or comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice' which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege." (footnote omitted) (citation omitted)).

167. David Alan Sklansky, *supra* note 22, at 1666–67 (2009) ("When the Court first used inquisitorial methods as a contrast model for the protections the Constitution provided against coerced confessions, the methods it had foremost in mind were torture and prolonged questioning in isolation: '[t]he rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular'—tactics that 'had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose.'" (alteration in the original) (quoting Chambers v. Florida, 309 U.S. 227, 237–38 (1940))).

168. *E.g.*, Brown v. Mississippi, 297 U.S. 278, 286–87 (1936).

169. Haynes v. Washington, 373 U.S. 503, 514 (1963) ("Confronted with the express threat of continued incommunicado detention and induced by the promise of communication with and access to

circumstances that raises the prospects of abuse. *Miranda v. Arizona*, the Supreme Court's most famous exploration of the coercive potential of incommunicado detention,[170] requires that law enforcement give warnings to the suspect about his rights under the Fifth Amendment as a prophylactic protection against such coercion.

The Court has explicitly relied on the right to counsel as a mechanism to break the isolation—and hence the inherent coercion—of custodial detention.[171] While counsel is often valued for her persuasive skills or knowledge of the law, in the context of interrogations and confessions, counsel's *physical and ongoing presence* seems most important as a bulwark against the psychological pressures of isolation.[172] A secondary benefit is that counsel serves as an outside witness who can ensure some measure of transparency. Through such observation, counsel may discourage—or else testify to—coercive interrogation techniques and ensure that any confession is accurately reported by law enforcement.[173]

The Treason Clause, housed in Article III, demonstrates a similar concern for coerced confessions elicited in private isolation. Treason cases were fertile ground for government abuse in seventeenth-century England, and Parliament

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family Haynes understandably chose to make and sign the damning written statement; given the unfair and inherently coercive context in which made, that choice cannot be said to be the voluntary product of a free and unconstrained will, as required by the Fourteenth Amendment. We cannot blind ourselves to what experience unmistakably teaches: that even apart from the express threat, the basic techniques present here—the secret and incommunicado detention and interrogation—are devices adapted and used to extort confessions from suspects."); *see also* Lynumn v. Illinois, 372 U.S. 528, 534 (1963) ("These threats were made while she was encircled in her apartment by three police officers and a twice convicted felon who had purportedly 'set her up.' There was no friend or adviser to whom she might turn. She had had no previous experience with the criminal law, and had no reason not to believe that the police had ample power to carry out their threats. We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced.").

170. *Miranda*, 384 U.S. at 457–58 (1966) ("The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.").

171. *Id.* at 469 ("The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.").

172. *Id.* at 466 ("The presence of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion."); *id.* at 470 ("Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.").

173. *Id.* at 470 ("The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.").

responded by passing key reforms to treason trials in the Treason Act of 1696.[174] The Framers borrowed from—and strengthened—that Act's evidentiary requirements in drafting Article III's Treason Clause,[175] which requires that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, *or on Confession in open Court*."[176] This guarantee of a public confession prohibits the government from eliciting a confession through torture or other coercive means in private and relying solely upon that confession to gain a conviction at trial. Openness—transparency—is a guarantee of voluntariness, both protecting against cruel methods of elicitation and ensuring the defendant's free will.

C. Informational Transparency

The Supreme Court has generally taken the position that the First Amendment does not protect a right of access to information in the government's possession.[177] But in the criminal context, the Constitution specifically guarantees access to certain types of government information.[178] In this Subpart, I discuss three different types of informational transparency protected by the Constitution: the defendant's right to access and elicit information about his individual prosecution; the grand jury's right to access information through investigation; and the public's right to information about the nature of the criminal law itself.

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174. Hashimoto, *supra* note 160, at 2002–04 (describing historical context for passage of Treason Act).

175. Treason Act 1695, 7 & 8 Will. 3 c. 3, § 2 (Eng.) ("And bee it further enacted That . . . noe Person or Persons whatsoever shall bee indicted tryed or attainted of High Treason . . . but by and upon the Oaths and Testimony of Two lawfull Witnesses either both of them to the same Overtact or one of them to one and another of them to another Overtact of the same Treason unlesse the Party indicted and arraigned or tryed shall willingly without violence in open Court confesse the same or shall stand Mute or refuse to plead or in cases of High Treason shall peremptorily challenge above the Number of Thirty five of the Jury Any Law Statute or Usage to the contrary notwithstanding.").

176. U.S. CONST. art. III, § 3, cl. 1 (emphasis added).

177. Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978); Zemel v. Rusk, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information."); L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 40 (1999) ("[W]hat we have before us is nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment."); Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 251–52 (2004) (summarizing the Court's "erratic and fragmented" case law on the right to gather information, and noting that "the Court later decided that if information (whether 'news' or otherwise) is being sought from governmental bodies about their actions or decisions, no First Amendment rights are implicated when access to that information is denied unless the information concerns the conduct of criminal trials (in which case the strictest form of First Amendment scrutiny does apply to any governmental interference)" (emphasis omitted) (footnote omitted)).

178. *See infra* Subparts II.C.1–II.C.3.

1. Evidentiary Transparency

The second half of the Sixth Amendment focuses on multiple ways of ensuring evidentiary transparency for the accused. The defendant has the right "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."[179] Three of these rights find their origins in the Treason Act of 1696,[180] which—in the limited context of treason cases—guaranteed the right to an indictment; the right to be informed about it by receiving a copy of the indictment in advance of trial;[181] the right to counsel (remarkably, including appointed counsel);[182] and the right to compulsory process.[183]

All three of these rights ensure transparency by granting access to government information—and the ability to rebut it. Specificity about the "nature and cause of the accusation" ensures transparency about the essential components of the government's case and enables the defendant to know enough about the crime he is accused of to properly prepare for trial by investigating and gathering witnesses.[184] Compulsory process allows the defendant to compel his own witnesses to testify—including government officials with relevant information. The Compulsory Process Clause is thus a mechanism to force transparency through witness testimony, even when the

179. U.S. CONST. amend. VI.

180. Hashimoto, *supra* note 160, at 2007 ("In addition to the counsel guarantee, the Treason Act required: (1) that any prosecution be commenced with an indictment; and (2) that defendants have a right to 'compell their Witnesses to appeare for them att any such Tryal or Tryale as is usually granted to compell Witnesses to appeare against them.' The Bill of Rights provided these very same protections in the Fifth and Sixth Amendments, respectively. And although, unlike with the right to counsel, Parliament acted relatively quickly after the Treason Act to extend at least the right to compulsory process to all felony cases, the Treason Act provided the first English basis for both of these criminal process guarantees." (footnotes omitted)).

181. Treason Act 1695, 7 & 8 Will. 3 c. 3, § 7 (Eng.) ("[A]ll and every Person and Persons whatsoever that shall bee accused and indicted for High Treason . . . shall have a true Copy of the whole Indictment but not the Names of the Witnesses delivered unto them or any of them Five Days att the least before hee or they shall bee tryed for the same whereby to enable them and any of them respectively to advise with Counsell thereupon to plead and make their Defence . . . .").

182. *Id.* at § 1 ("And that every such Person soe accused and indicted arraigned or tryed for any such Treason . . . shall bee received and admitted to make his and their full Defence by Counsel learned in the Law and to make any Proof that hee or they can produce by lawfull Witnesse or Witnesses who shall then bee upon Oath for his and their just Defence in that behalfe And in case any Person or Persons so accused or indicted shall desire Counsel the Court before whom such Person or Persons shall bee tryed or some Judge of that Court shall and is hereby authorized and required im[m]ediately upon his or their request to assigne to such Person and Persons such and soe many Counsel not exceeding Two as the Person or Persons shall desire to whom such Counsel shall have free Accesse at all seasonable Houres Any Law or Usage to the contrary notwithstanding."); *see also* Hashimoto, *supra* note 160, at 2007.

183. Treason Act 1695, 7 & 8 Will. 3 c. 3, § 7 (Eng.) ("And that all Persons soe accused and indicted for any such Treason as aforesaid shall have the like Processe of the Court where they shall bee tryed to compell their Witnesses to appeare for them att any such Tryal or Tryals as is usually granted to compell Witnesses to appeare against them.").

184. U.S. CONST. amend. VI; *cf.* Russell v. United States, 369 U.S. 749, 761–64 (1962) (discussing how indictments are intended to inform defendants of the charges against them).

government does not wish it. Compulsory process also facilitates transparency by allowing the defendant to present his side of the story—ensuring that the government's account is not the only one heard.[185]

The right to counsel also serves a critical facilitative role in the flow of information. Counsel (even lay counsel, consistent with early practice)[186] is a free person who can investigate the case, especially while the accused may be detained. Counsel can also question witnesses, both on cross-examination or direct examination, to make the rights to confrontation and compulsory process meaningful and to realize the information-gathering function of the trial. The "Counsel learned in the Law" contemplated by the Treason Act gave value to the compulsory process right, for it was counsel who could "make any Proof that hee or they can produce by lawfull Witnesse or Witnesses who shall then bee upon Oath for his and their just Defence in that behalfe."[187]

The Confrontation Clause, in many ways a complementary partner to the Compulsory Process Clause, ensures that defendants will not be convicted based on secretly obtained or decontextualized out-of-court statements.[188] As articulated by Justice Scalia in *Crawford v. Washington*, "[t]he common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers."[189] He continued:

> [T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.[190]

The Confrontation Clause thus ensures a public airing of information, with access by the accused—and, by extension, by the public as jury and audience—

185. Washington v. Texas, 388 U.S. 14, 19–20 (1967) ("Joseph Story, in his famous Commentaries on the Constitution of the United States, observed that the right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all. Although the absolute prohibition of witnesses for the defense had been abolished in England by statute before 1787, the Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses . . . ." (footnotes omitted)).

186. Faretta v. California, 422 U.S. 806, 820 n.16 (1975) ("The first lawyers were personal friends of the litigant, brought into court by him so that he might 'take "counsel" with them' before pleading. Similarly, the first 'attorneys' were personal agents, often lacking any professional training, who were appointed by those litigants who had secured royal permission to carry on their affairs through a representative, rather than personally." (citation omitted)).

187. Treason Act 1695, 7 & 8 Will. 3 c. 3, § 1 (Eng.)

188. *See* U.S. CONST. amend. VI.

189. Crawford v. Washington, 541 U.S. 36, 43 (2004) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *373–74).

190. *Id.* at 50.

to the entirety of the witness's testimony. The concomitant right to cross-examine witnesses, moreover, ensures that the defendant has a means of extracting the full truth rather than a partial or one-sided version.[191] In rejecting judicially-managed balancing of "reliability" in favor of the constitutionally-mandated face-to-face confrontation, Justice Scalia emphasized that the Founders believed open confrontation was both the best method for ascertaining truth[192] and a critical check on government power.[193]

This bundle of Sixth Amendment rights ensures that the trial itself will be a locus of informational transparency: a meaningful, open, and adversarial exchange of information, rather than a one-sided and private accusation or inquiry.

Outside the Sixth Amendment, the Fourth Amendment's warrant requirement can also be understood to ensure a degree of transparency in criminal investigations. Law enforcement must disclose certain information to secure a search or arrest warrant, and warrants must convey specific information with particularity about the authorized scope of the search or seizure: "[N]o Warrants shall issue, but upon probable cause, *supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized*."[194] Law enforcement must submit information to a magistrate, ensuring review by a neutral party, but warrant applications are generally reviewed ex parte,[195] outside the public eye, and without the participation of the suspect—in other words, without the hallmarks of informational transparency discussed above. One might describe the warrant requirement as a form of *intragovernmental transparency*; but there may be limited utility in characterizing it

191. *Id.* at 61–62.

192. *Id.* at 61 ("To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined."); *cf.* 3 WILLIAM BLACKSTONE, COMMENTARIES *373 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth . . . ."); MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 345 (6th ed., Henry Butterworth 1820) (1713) (adversarial testing "beats and boults out the truth much better").

193. *Crawford*, 541 U.S. at 67–68 ("[The Framers] knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands. By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear. It is difficult to imagine *Roberts'* providing any meaningful protection in those circumstances." (footnote omitted) (citations omitted)).

194. U.S. CONST. amend. IV, cl. 2 (emphasis added).

195. *See* Franks v. Delaware, 438 U.S. 154, 169 (1978) ("The pre-search proceeding is necessarily *ex parte*, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence.").

in this way, rather than, as more traditionally understood, as a check on governmental abuse achieved through the separation of powers.[196]

Nonetheless, in another sense, the warrant requirement does protect broader informational transparency. Absent an exception to the warrant requirement, law enforcement must swear out an affidavit establishing probable cause, and the warrant that issues must be sufficiently particularized.[197] When an arrest occurs without a warrant, a magistrate must find probable cause in a *Gerstein* hearing within 48 hours of arrest, again by collecting sworn testimony or affidavits from law enforcement that establish the basis for the arrest.[198] As a result, the defendant receives a record of the justifications for a search or arrest, and of the intended scope of a search. This information provides a basis upon which the defendant can litigate the legality of the search or arrest[199]—making transparent law enforcement practices that would otherwise be opaque and difficult to challenge.

Beyond these clearly articulated rights, courts have also read the broader Due Process guarantees in the Fifth and Fourteenth Amendments to require certain additional guarantees of informational transparency. Most significantly, the Supreme Court held in *Brady v. Maryland* and its progeny that, as a matter of due process, the prosecution must disclose favorable, material evidence to the accused.[200] Under due process and equal protection, the Court has held that indigent defendants with a right to appeal must be provided a transcript of the trial proceedings, or the equivalent.[201] While the Court's decisional rationale centered on equal protection for indigent defendants,[202] its inescapable premise was that an appeal without access to information is a meaningless one: by denying a transcript, the state "has thereby shut off means of appellate review for indigent defendants."[203] The Supreme Court has also held "that the

196. United States v. U.S. Dist. Ct., 407 U.S. 297, 317 (1972) ("The Fourth Amendment contemplates a prior judicial judgment . . . . This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government." (footnote omitted)); Gerstein v. Pugh, 420 U.S. 103, 118 (1975) ("The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." (quoting McNabb v. United States, 318 U.S. 332, 343 (1943))).

197. *See Franks*, 438 U.S. at 164–66.

198. *See* Riverside v. McLaughlin, 500 U.S. 44, 55–59 (1991).

199. *See, e.g.*, *Franks*, 438 U.S. at 155–56 (holding that a "search warrant must be voided and the fruits of the search excluded" where "a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and . . . the allegedly false statement is necessary to the finding of probable cause").

200. Brady v. Maryland, 373 U.S. 83, 87 (1963); *see also, e.g.*, United States v. Bagley, 473 U.S. 667, 682 (1985).

201. Griffin v. Illinois, 351 U.S. 12, 19 (1956) (plurality opinion).

202. *Id.* ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.").

203. *Id.* at 23 (Frankfurter, J., concurring).

fundamental constitutional right of access to the courts" requires prisons to provide people in prison with "adequate law libraries or adequate assistance from persons trained in the law"[204]—the informational basis for meaningful court access.

2. Investigative Transparency

The discussion above described the extensive constitutional protections for the defendant's right to access the government's information, and to present his own, when charged with a crime. In this Subpart, I discuss a distinct form of informational transparency safeguarded by the Constitution: the grand jury as a mechanism for public investigations. The grand jury has two recognized functions: the first, to serve as a "shield" against unjust or corrupt prosecutions, discussed in Subpart II.A.1; and the second, to serve as a crime-fighting "sword" with broad investigative powers.[205] The grand jury's "sword" function has often been criticized as a de facto grant of expansive power to the prosecutor, who advises the grand jury while its "shield" power, designed to protect against government overreach, has proved weak and ineffectual.[206]

Yet in an important sense, the grand jury's investigative power (including its broad subpoena power) is one of the rare grants of constitutional authority to the People to compel access to government information and thereby exercise oversight over government misconduct. In colonial America, lay grand juries—not professional police forces—were the main institutions to investigate criminal allegations.[207] And, although the grand jury proceedings themselves have long been secret, their findings were made public and served a key role in educating the populace and holding government accountable. As described by Akhil Amar:

> [T]he grand jury had sweeping proactive and inquisitorial powers to investigate suspected wrongdoing or coverups by government officials and make its findings known through the legal device of "presentment"—a public document stating its accusations. Presentments were not limited to indictable criminal offenses. The grand jury had a roving commission to ferret out official malfeasance or self-dealing of any sort and bring it to the attention of the public at large. In the words of James Wilson:
>
> The grand jury are a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered. All the operations of government, and of its ministers and

204. Bounds v. Smith, 430 U.S. 817, 828 (1977), *abrogated by* Lewis v. Casey, 518 U.S. 343 (1996).

205. *E.g.*, Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1172–73 (2008).

206. *Id.* at 1176; Washburn, *supra* note 91, at 2335–37; United States v. Mara, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting).

207. Leipold, *supra* note 114, at 283.

> officers, are within the compass of their view and research. They may suggest publick improvements and the modes of removing publick inconveniences: they may expose to publick inspection, or to publick punishment, publick bad men, and publick bad measures.[208]

When the prosecutor chose not to prosecute, the grand jury "could nonetheless use presentments to publicize to the people at large any suspicious executive decisions to decline prosecution."[209] And by requiring the participation of the lay grand jury in the investigation and initiation of criminal proceedings, the Constitution assured the public an important measure of informational transparency about government conduct generally and prosecutorial practice in particular.

3. Criminal Law Transparency

The third type of informational transparency guaranteed by the Constitution is the right to an open predetermination of what conduct is criminal. The original Constitution directly prohibits both Congress and the states from passing any "*ex post facto* Law."[210] "Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation."[211] Alexander Hamilton, among others, extolled the ex post facto guarantee as a key safeguard against despotism, writing in the *Federalist No. 84* that "[t]he creation of crimes after the commission of the fact, or in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny."[212]

The basic import of the ex post facto guarantee is that the government may not convict people retroactively for conduct that, at the time of commission, was not criminalized. A core piece of this guarantee involves government transparency: to satisfy the constitutional requirement, the government must establish the criminal law ahead of time, thus providing information to the People about what they may and may not do. A closely connected due process

208. Amar, *supra* note 26, at 1184 (quoting 2 JAMES WILSON, WORKS OF JAMES WILSON 537 (Robert McCloskey ed., 1967)); *see also* Leipold, *supra* note 114, at 283 ("Grand juries were an effective and important institution in colonial America, keeping a watchful eye on government and their fellow citizens, and serving as quasi-legislative and executive bodies when circumstances warranted." (footnotes omitted)).

209. Amar, *supra* note 26, at 1184.

210. U.S. CONST., art. I, §§ 9–10.

211. Weaver v. Graham, 450 U.S. 24, 28–29 (1981) (citations omitted).

212. THE FEDERALIST NO. 84, at 496 (Alexander Hamilton) (Am. Bar Ass'n ed., 2009).

requirement of "fair notice" mandates that the government must provide sufficient clarity in its statutes about what is prohibited and what is not.[213]

D. Synthesizing a Transparency Guarantee

The discussion above shows that an overarching concern with transparency is woven throughout the Constitution's criminal procedure protections. The Constitution ensures transparency in multiple ways—through public participation in criminal proceedings, protections against secretive detention and incommunicado interrogation, and assurances of access to information. And the Constitution arms both the defendant and the public with mechanisms to enforce these protections, creating a robust and self-reinforcing system of criminal justice transparency.

One could understand these transparency protections in clause-bound isolation, as a discrete set of specific rights that apply at particular moments during the criminal process—or become irrelevant if those moments do not occur. Alternatively, one could understand these protections as establishing a trans-clausal and dynamic guarantee which may apply in new contexts not specifically contemplated by the enumerated provisions.

The most famous and controversial judicial doctrine that takes this latter approach is the penumbral "right of privacy" derived from the First, Third, Fourth, Fifth, and Ninth Amendments.[214] Yet scholars have pointed out that judges identify "hybrid"[215] or "intersectional right[s]"[216] far more commonly than the traditional criticism might suggest—and across the ideological spectrum.[217] Standing doctrine is one example:

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213. *See* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. . . . 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'" (footnote omitted) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926))); *see also* Keeler v. Superior Ct., 470 P.2d 617, 626 (Cal. 1970) ("The first essential of due process is fair warning of the act which is made punishable as a crime."), *superseded by statute*, Cal. Penal Code § 187 (West 2022), *as stated in* People v. Taylor, 86 P.3d 881, 885 (Cal. 2004).

214. Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

215. Dan T. Coenen, *Reconceptualizing Hybrid Rights*, 61 B.C. L. REV. 2355, 2363–64 (2020).

216. Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. Rev. 1309, 1313 (2017) ("The third type, intersectional rights, occurs when the action in question violates more than one constitutional provision and when the constitutional provisions are read to inform and bolster one another, as in *Obergefell*.").

217. Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1333 (1992).

> [T]he courts decided upon the need for standing and related doctrines by looking at the overall structure of the Constitution—in which powers of one sort were given to the political branches, and in which powers of another sort were given to the judiciary—and by extracting from that structure an idea expressed nowhere in the document's words: the idea that access to courts should be limited to concrete disputes.[218]

Relatedly, the Court often uses higher-order principles to decide cases involving modern problems that would have been unanticipated to the founding generation but which jeopardize core liberty concerns implicated by the Constitution. For example, in struggling to adapt Fourth Amendment jurisprudence to the onslaught of new privacy-threatening technologies, the Court has relied on animating Fourth Amendment principles to guide its doctrinal development.[219]

Transparency is a higher-order principle that pervades the Constitution's criminal procedure protections with unusual strength and consistency. The Court has recognized connections between some of the guarantees discussed above, such as between the Sixth Amendment public trial guarantee and the First Amendment right to access criminal trials[220] and between the compulsory process and confrontation rights.[221] However, the Supreme Court has only partially recognized a structural imperative that extends beyond specific clause-bound textual hooks. For example, the Court has looked beyond the literal text to find an implicit First Amendment right to access criminal trials.[222] Yet, in

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218. *Id.* at 1339.

219. For example, in *Carpenter v. United States*, Chief Justice Roberts articulated two principles behind the Fourth Amendment: "First, that the Amendment seeks to secure 'the privacies of life' against 'arbitrary power.' Second, and relatedly, that a central aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance.'" 138 S. Ct. 2206, 2214 (2018) (citation omitted). The Court characterized cell phone locational tracking technology as a tool that "risks Government encroachment of the sort the Framers, 'after consulting the lessons of history,' drafted the Fourth Amendment to prevent," and held that "[t]he Government's acquisition of the cell-site records [in that case] was a search under [the Fourth] Amendment." *Id.* at 2223.

220. *E.g.*, Waller v. Georgia, 467 U.S. 39, 44–45, 47 (1984).

221. Holmes v. South Carolina, 547 U.S. 319, 324 (2006) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'").

222. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579–80 (1980) (plurality opinion) ("The State argues that the Constitution nowhere spells out a guarantee for the right of the public to attend trials, and that accordingly no such right is protected. . . . Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees. The concerns expressed by Madison and others have thus been resolved; fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined. We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people

determining the scope of this protection, the Court has adopted an "experience and logic" test, wherein it asks, first, whether the "*particular proceeding in question*"[223] has "historically been open to the press and general public,"[224] and second, "whether public access plays a significant positive role in the functioning of the particular process in question."[225] This approach tethers transparency protections to specific historical analogs, making it difficult to enhance overall transparency within a system that has evolved significantly from its historical origins.

By contrast, in *Missouri v. Frye*[226] and *Lafler v. Cooper*,[227] which extended the Sixth Amendment right to effective assistance of counsel to plea negotiations, the Supreme Court recognized that the modern criminal justice system is not the one we started with—and constitutional doctrine must adapt to that reality:

> The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours "is for the most part a system of pleas, not a system of trials," it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. . . . "[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system." . . . In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.[228]

Similarly, the trial is no longer the epicenter that assures the transparency of the criminal justice system. Without recognizing a broader transparency imperative, much of the openness of a system that is transparent by constitutional design will be—and has been—lost. I turn next to discuss this historical shift, and to consider possible applications of the transparency guarantee in modern times.

III. REVITALIZING THE TRANSPARENCY GUARANTEE

In this Part, I survey some of the major transparency gaps in the modern criminal justice system, both in the adjudication of guilt and the imposition of punishment, and I explain the limits of the constitutional transparency guarantees in ameliorating them. I suggest that these transparency gaps emerged

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have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'" (footnotes omitted)).

223. Press-Enter. Co. v. Superior Ct., 478 U.S. 1, 9 (1986) (emphasis added).

224. *Id.* at 8.

225. *Id.*

226. Missouri v. Frye, 566 U.S. 134 (2012).

227. Lafler v. Cooper, 566 U.S. 156, 162 (2012).

228. *Frye*, 566 U.S. at 143–44 (citation omitted).

in the spaces between the individual safeguards established by the Founders because the modern criminal justice system does not map onto the system they would have contemplated. By and large, the Constitution's robust transparency guarantees are predicated upon the trial as the locus of transparency—including the public jury trial itself; the access to information it entails; and the protection against incommunicado detention it ensures. But in today's world, the trial is a vanishing phenomenon,[229] and the trial-based transparency guarantees fall short. Moreover, the change to a carceral system of punishment means that serious concerns about punishment transparency have arisen where they did not exist before.[230]

I propose that a higher-level attention to the Constitution's multifaceted transparency guarantee can help support and justify doctrines and policies that enhance transparency in these non-analogous modern circumstances. Although it is beyond the scope of this paper to fully operationalize the transparency guarantee, I discuss some basic lessons that may be distilled from it, and I situate reform proposals developed by other scholars within the constitutional concern for a robust and multifaceted systemic transparency.

A. Modern Transparency Deficits and the Limits of a Clause-Bound Approach

In this Subpart, I discuss two major features of the modern criminal justice system that have transformed it from its historical origins: plea bargaining and carceral punishment.

1. The Plea Bargaining System

The Framers did not draft the protections of the Constitution and the Bill of Rights with a system of pleas in mind.[231] But that is the system we have today. In the modern criminal justice system, in which well over 90% of convictions are obtained through guilty plea rather than jury verdict, the trial is the rare exception rather than the norm.[232]

Plea bargaining hampers transparency in significant ways. It sidesteps the central opportunity for public oversight, participation, and access to information by both the defendant and the public. Cases often resolve without

229. *See* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000).

230. Turner, *supra* note 7, at 993.

231. *See* Amar, *supra* note 26, at 1199 ("As a practical matter, the back door opened by guilty pleas was of little significance 200 years ago, for as Professor Alschuler has shown, such pleas were then highly atypical, and plea bargaining was generally viewed with suspicion, if not hostility. Today, by contrast, roughly ninety percent of criminal defendants convicted in American courts plead guilty, and plea bargaining has the explicit sanction of the Supreme Court." (footnote omitted)).

232. *Frye*, 566 U.S. at 143–44.

any witness testimony.[233] Although a plea colloquy is constitutionally required,[234] and although often some details of the plea agreement are formally placed on the record,[235] little information is ever revealed to the public about the substance of plea negotiations.[236] In fact, the defendant may not see the negotiations in action either, as they can involve off-the-record exchanges between lawyers outside the defendant's presence.[237] Criminal justice "insiders"—professional prosecutors (in professional prosecutor offices unknown in founding times),[238] defense attorneys, and judges—have increasingly bureaucratized criminal court proceedings such that the public and even the defendant often have limited understanding of what is transpiring.[239]

Moreover, specific transparency-enhancing constitutional doctrines do not apply in the plea context. For example, the right to *Brady* evidence applies only partially or not at all during plea bargaining.[240] At the sentencing hearing, which is often the most meaningful, contested in-court proceeding for the defendant who pleads guilty, the Sixth Amendment right to confrontation does not apply.[241]

Some scholars have argued for, and courts have to some degree endorsed, a right of the public to access and observe the court hearings that bear new significance in the absence of trials.[242] But the transparency deficit is not fully resolved through such access. The jury trial has transparency benefits not only because it is conducted openly with an opportunity for public observation, but also because of the nature and quality of the information that is aired and because the public plays a role in decision-making through the lay jury. Proceedings such as preliminary hearings, suppression hearings, change of plea hearings, and sentencing hearings—though meaningful in a real sense—do not

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233. Ram Subramanian et. al, *In the Shadows: A Review of the Research on Plea Bargaining*, VERA INST. JUST., (Sept. 9, 2020), https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf.

234. Boykin v. Alabama, 395 U.S. 238, 242–44 (1969) (requiring judges to establish a record of defendant's knowing and voluntary waiver of constitutional rights before accepting a guilty plea).

235. *See, e.g.*, FED. R. CRIM. P. 11.

236. Turner, *supra* note 7, at 980.

237. For example, in *Missouri v. Frye*, the defense attorney failed to even communicate to the client the existence of a formal, written plea offer. *Frye*, 566 U.S. at 147. While the Court held that this omission constituted deficient performance, *id.*, this lack of communication is enabled by a system in which the communications between lawyers happen outside the defendant's presence and in which the defendant relies on the competency of his attorney to access information about his own case.

238. Bibas, *supra* note 30, at 1682–83.

239. *Id.* at 1678–79; *see also* Conrad & Clements, *supra* note 7, at 157–59 (describing transparency deficits and public confusion created by the plea system).

240. *See* United States v. Ruiz, 536 U.S. 622, 629 (2002) ("We must decide whether the Constitution requires that preguilty plea disclosure of impeachment information. We conclude that it does not."); Marci A. Hamilton & Clemens G. Kohnen, *The Jurisprudence of Information Flow: How the Constitution Constructs the Pathways of Information*, 25 CARDOZO L. REV. 267, 97 (2003).

241. Shaakirrah R. Sanders, *Unbranding Confrontation as Only a Trial Right*, 65 HASTINGS L.J. 1257, 1258–59 (2014) (critiquing case law holding that "the Confrontation Clause is a right that only applies at trial" and "arguing that this right should in fact extend through felony sentencing").

242. *E.g.*, Simonson, *supra* note 7.

provide the same kind of transparency that trials do. The plea colloquy does not encapsulate the negotiations and compromises between the parties, nor does it reveal the entirety of the evidence in a way that explains the outcome, as a trial does. Access to these hearings is a good and important development—but it is not a substitute for increased transparency regarding the core functioning of the criminal justice system.

2. The Carceral State

As discussed above, the Constitution robustly protects participatory transparency in the adjudication of guilt by guaranteeing a system of public trials by jury both to the accused and the public. However, the Constitution provides no explicit protection for public participation, either as decision maker or audience, in the act of punishment itself. There is no recognized right to jury sentencing, though scholars have noted that in practice, early American juries had expansive power to dictate the defendant's sentence through findings about guilt.[243] Nor is there any explicit guarantee within the constitutional text about public observation of punishment, although some courts have held that the First Amendment applies to a limited degree.[244]

As a historical matter, however, punishment took place before a public audience at the time of the founding—and well before and after. For centuries, executions were carried out publicly in England, and they were "fully open events in the United States as well."[245] Executions were performative events designed to enforce social control and, often, racial hierarchy.[246] Noncapital punishments were also generally carried out in the public square as expressive displays of community justice and morality.[247] Indeed, punishment's publicity

243. *See* Nancy Gertner, *Juries and Originalism: Giving "Intelligible Content" to the Right to a Jury Trial*, 71 OHIO ST. L.J. 935, 937 (2010); Chris Kemmitt, *Function over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 126 (2006); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 69 (2003).

244. *E.g.*, Associated Press v. Otter, 682 F.3d 821, 822 (9th Cir. 2012) ("Nearly a decade ago, we held in the clearest possible terms that 'the public enjoys a First Amendment right to view executions from the moment the condemned is escorted into the execution chamber, including those "initial procedures" that are inextricably intertwined with the process of putting the condemned inmate to death.'" (quoting Cal. First Amend. Coal. v. Woodford, 299 F.3d 868, 877 (9th Cir. 2002))).

245. *Cal. First Amend. Coal.*, 299 F.3d at 875.

246. Banner, *supra* note 27, at 100–01; BANNER, *supra* note 27, at 24, 31–32 ("Until the nineteenth century, hangings were conducted outdoors, often before thousands of spectators, as part of a larger ritual including a procession to the gallows, a sermon, and a speech by the condemned prisoner. Hangings were not macabre spectacles staged for a bloodthirsty crowd. A hanging was normally a somber event, like a church service. Hanging day was a dramatic portrayal, in which everyone could participate, of the community's desire to suppress wrongdoing. It was a powerful symbolic statement of the gravity of crime and its consequences. The person hanged had been condemned in court weeks earlier, but hanging day was a second, more collective condemnation—of the individual and of crime in general. We have no comparable ritual today." (emphasis omitted)).

247. Bibas, *supra* note 30, at 1679–80 ("In most colonies, laymen sat in judgment both on juries and in the town square during public punishment. The jury trial and ensuing punishment were a morality play: a

was part of the point—necessary to shame, to teach and deter, to vindicate the victim, and ultimately to promote reconciliation.[248]

Since the founding, however, punishments have become increasingly shielded from public view. The modern prison isolates people behind bars, sometimes for decades, away from the public eye—a "profound innovation" from previous practice:

> In the eighteenth century, crimes were typically punished with fines, corporal punishment, public humiliation, banishment, or execution. Imprisonment was rarely used and sentences of more than a few years were almost never imposed. Moreover, the modern prison, in which prisoners are completely segregated from society . . . was not born until 1790 and did not achieve anything like its current form until the end of the nineteenth century. And certainly, the current regime of long mandatory minimum sentences [and] life sentences for some first-time drug offenders . . . are all new. These changes reflect certain fundamental reorientations in criminal punishment: from public to private, from short-term pain or humiliation to long-term incapacitation and segregation, from retributive justice to social control.[249]

Prisons are inherently removed from public oversight because part of their purpose is to segregate and distance offenders away from the rest of society. The Supreme Court, for its part, has done little to enforce transparency, instead holding that the level of access for the press and public to a prison is a matter of legislative discretion.[250] In many prisons and especially local jails, such transparency is limited; even data about demographics of detained people, the programs they are offered, and the outcomes they experience is hard to come by.[251] Secrecy is often justified in the name of prison security or discipline.[252] Through the Prison Litigation Reform Act (PLRA), Congress has also limited mechanisms for people in prison to force transparency through judicial process;

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form of educational social theater. Trial and punishment were didactic, teaching and reinforcing citizens' understandings of right and wrong. They were expressive, condemning the guilty and vindicating victims or innocent defendants. They were cathartic, purging the criminal's debt to society and to his victims. And they were restorative, paving the way for remorse, apology, forgiveness, and reconciliation. Sanctions were very public but very temporary. American criminal justice was in many ways less bloody than the English system; the death penalty and disfiguring punishments were infrequently imposed and even less often carried out. Fines and shaming were probably most common, as well as restitution, though whipping and other corporal punishments were used too. Once wrongdoers had paid their debts to society and victims, they were forgiven and welcomed back—there was no permanent underclass of ex-cons." (footnotes omitted)).

248. *Id.*

249. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1818 (2008).

250. Houchins v. KQED, Inc., 438 U.S. 1, 12 (1978) ("Whether the government should open penal institutions in the manner sought by respondents is a question of policy which a legislative body might appropriately resolve one way or the other.").

251. Armstrong, *supra* note 24, at 462–64.

252. *E.g.*, Pell v. Procunier, 417 U.S. 817, 826 (1974) ("When, however, the question involves the entry of people into the prisons for face-to-face communication with inmates, it is obvious that institutional considerations, such as security and related administrative problems, as well as the accepted and legitimate policy objectives of the corrections system itself, require that some limitation be placed on such visitations.").

for example, the PLRA's stringent and difficult-to-navigate exhaustion requirements often preclude judicial review and "effectively internalize[] the inmate complaint process such that they occur almost exclusively behind prison walls and thus out of public sight."[253] Privatization of prisons further frustrates transparency, especially because private institutions may not be subject to public records laws and may not be subject to the same judicial scrutiny.[254]

Capital punishment, too, has retreated away from the public square and behind prison walls. Some courts have recognized the imperative of public access to executions through the press,[255] but executions may not be directly observed by the broader public.[256] Changing methods of execution further diminish the transparency of executions by masking their inherent violence under a medicalized veneer.[257] Lethal injection, designed to make executions more "humane," can also function to conceal severe pain experienced by the condemned. For example, because the second execution drug traditionally used in a three-drug cocktail is a powerful paralytic agent, it is "impossible to tell whether the condemned inmate in fact remain[s] unconscious" during the delivery of the excruciatingly painful third drug.[258]

Secrecy surrounding the larger execution process, including the nature and source of execution drugs, has also become an issue of national significance and

253. Armstrong, *supra* note 24, at 461–62 ("Such restrictions limit the ability of relying on civil lawsuits to provide any measure of transparency on prison operations. The usual democratic methods for oversight are simply not present in the penal institution context."); *see also* Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 150 (2008) ("[B]y cutting off judicial review based on an inmate's failure to comply with his prison's own internal, administrative rules—regardless of the merits of the claim—the PLRA exhaustion requirement undermines external accountability. Still more perversely, it actually undermines internal accountability, as well, by encouraging prisons to come up with high procedural hurdles, and to refuse to consider the merits of serious grievances, in order to best preserve a defense of non-exhaustion.").

254. Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 473–76 (2011) (describing privatization of prisons and probation services); David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1461–62 (2010).

255. Cal. First Amend. Coal. v. Woodford, 299 F.3d 868, 876 (9th Cir. 2002) ("To determine whether lethal injection executions are fairly and humanely administered, or whether they ever can be, citizens must have reliable information about the 'initial procedures,' which are invasive, possibly painful and may give rise to serious complications. This information is best gathered first-hand or from the media, which serves as the public's surrogate." (citation omitted)).

256. *Id.* at 875 ("California abolished public executions in 1858, moving them within prison walls, and the last 'town square' execution in the United States took place in 1937.").

257. *See* Wood v. Ryan, 759 F.3d 1076, 1102–03 (9th Cir. 2014) (Kozinski, J., dissenting from denial of rehearing en banc) ("Using drugs meant for individuals with medical needs to carry out executions is a misguided effort to mask the brutality of executions by making them look serene and peaceful—like something any one of us might experience in our final moments. But executions are, in fact, nothing like that. They are brutal, savage events, and nothing the state tries to do can mask that reality. Nor should it. If we as a society want to carry out executions, we should be willing to face the fact that the state is committing a horrendous brutality on our behalf. . . . Sure, firing squads can be messy, but if we are willing to carry out executions, we should not shield ourselves from the reality that we are shedding human blood. If we, as a society, cannot stomach the splatter from an execution carried out by firing squad, then we shouldn't be carrying out executions at all." (citation omitted)), *vacated*, 573 U.S. 976 (2014).

258. Glossip v. Gross, 576 U.S. 863, 967 (2015) (Sotomayor, J., dissenting).

considerable litigation.[259] As execution drugs have become harder to obtain, states have gone to considerable lengths to conceal—often successfully—the sources of their chemicals, despite serious concerns about the legality, safety, and efficacy of the drugs.[260] In response to some of these concerns, the American Bar Association has passed a resolution urging transparency in executions.[261]

The secrecy that is endemic to modern prisons and the modern capital punishment system is a phenomenon the Founders likely did not think to protect against, as it runs contrary to the traditional assumptions they held about public punishment and its purpose. With a clause-bound interpretive approach to the Constitution's transparency guarantees, the Constitution has little to say about this lack of transparency.

B. Toward a More Transparent Future

There is no straight and easy path from the identification of the constitutional transparency guarantee to a comprehensive doctrinal and policy fix for the transparency deficits in the modern criminal justice system. This Article's central purpose is to uncover and explain the constitutional transparency guarantee itself; thus, a full exploration of transparency reform goes beyond its scope. However, in this Subpart, I discuss some lessons that can be learned from the constitutional transparency guarantee, and I suggest that attention to the transparency guarantee can provide impetus and justification for existing proposals and insights by other scholars that are worthy of serious attention.

1. Multidimensional Transparency

The first lesson is that criminal justice transparency should be multidimensional. The Constitution guarantees multiple forms of transparency—participatory, corporal, and informational.[262] When seeking to enhance transparency in the modern system, through either doctrinal or legislative reform, it is important to keep this multidimensionality in mind. I briefly categorize some existing scholarly proposals along these three transparency axes.

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259. I myself have engaged in protracted litigation to seek access to public records about Idaho's lethal injection drugs. *See* Cover v. Idaho Bd. of Corr., 476 P.3d 388 (2020).

260. *See, e.g.*, ROBIN KONRAD, DEATH PENALTY IN THE U.S., BEHIND THE CURTAIN: SECRECY AND THE DEATH PENALTY IN THE UNITED STATES 24–45 (Robert Dunham & Ngozi Ndulue eds., 2018), https://files.deathpenaltyinfo.org/legacy/files/pdf/SecrecyReport.pdf.

261. ABA H.D. RES. 108B (2015), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/dp-policy/2015_my_108b.pdf.

262. *See* discussion *supra* Subparts II.A., II.B., and II.C.

A chorus of scholars have urged criminal justice reforms that would enhance *participatory transparency*. Some of these reforms involve new opportunities for citizens to take on decision-making roles, often by reincorporating juries in new or revitalized forms. For example, Kevin Washburn proposes increasing civic participation by restoring the grand jury.[263] Laura Appleman urges the use of "plea juries"[264] and "bail juries."[265] Josh Bowers suggests that "normative juries," valued for their moral intuitions rather than their fact-finding skill, should be incorporated into criminal proceedings.[266] Jenia Turner advocates jury sentencing,[267] and Rachel Barkow proposes that juries should decide whether to apply mandatory minimums.[268] Others—notably, Jocelyn Simonson[269] and Stephanos Bibas[270]—have emphasized reforms that protect and enhance the public's participatory role as the audience and observers of the criminal process.

Reforms that implicate *corporal transparency* are not always framed in the language of transparency, especially because incarceration and pretrial detention are deprivations of physical liberty as well as barriers to transparency. Yet, an attention to the transparency deficits experienced by people in prisons and jails can support the growing calls to reform our bail and pretrial release systems;[271] improve the often-appalling conditions of pretrial detention;[272] ensure meaningful access by pretrial detainees to their attorneys,[273] who are the communicative link to the outside world; limit or prohibit the isolating and nontransparent practice of solitary confinement;[274] amend the PLRA;[275] and ensure the vitality of habeas corpus in the face of statutory limitations such as

263. Washburn, *supra* note 91, at 2348–49.

264. Appleman, *The Plea Jury*, *supra* note 32, at 733.

265. Appleman, *Justice in the Shadowlands*, *supra* note 32, at 1366.

266. Bowers, *supra* note 32, at 1659–60.

267. Iontcheva, *supra* note 32, at 314–16.

268. Barkow, *supra* note 243, at 107.

269. Simonson, *supra* note 7, at 2177–78; Simonson, *supra* note 34, at 391.

270. Bibas, *supra* note 24, at 959–60.

271. *See, e.g.*, Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 492, 560–61 (2018).

272. Appleman, *Justice in the Shadowlands*, *supra* note 32, at 1312–17.

273. *See* Johanna Kalb, Gideon *Incarcerated: Access to Counsel in Pretrial Detention*, 9 U.C. IRVINE L. REV. 101, 104–05 (2018).

274. *See* John F. Stinneford, *Experimental Punishments*, 95 NOTRE DAME L. REV. 39, 85 (2019) ("The empirical literature confirms what the historical record also tends to show: long-term solitary confinement causes mental suffering so extreme that a large proportion of the people subjected to it suffer severe psychological damage that worsens over time. Human beings are not beasts or gods. We need at least some social interaction. Because long-term solitary confinement is significantly more harmful than imprisonment involving some social interaction, it is cruel and unusual."); ASS'N OF STATE CORR. ADM'RS & LIMAN CTR. FOR PUB. INT. L., REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 4 (Oct. 2018), https://law.yale.edu/sites/default/files/area/center/liman/document/asca_liman_2018_restrictive_housing_released_oct_2018.pdf.

275. Schlanger & Shay, *supra* note 253.

the Antiterrorism and Effective Death Penalty Act[276] and in the context of the war on terror.[277]

Scholars have also made proposals that would boost *informational transparency* in the criminal justice system. Andrew Crespo urges criminal courts to make publicly available "systemic facts" through the data they already collect about the criminal cases in their courtrooms;[278] Jenia Turner proposes that states should collect and make available aggregate information about plea processes and outcomes.[279] Andrea Armstrong would require prisons to collect and make public aggregate information about the people in prison, the programs available to them, and the outcomes they experience.[280] In the context of lethal injection secrecy, scholars and litigants have urged greater transparency about execution methods and drug sources,[281] as well as the assurance of public access to the execution room.[282] Others have argued for the extension of *Brady* obligations in the pre-plea context to ensure that defendants have access to favorable evidence when it matters[283] or for expanding the transparency guarantee in *Brady v. Maryland* by requiring open file discovery, perhaps with limited carve-outs for sensitive witness information upon in camera inspection.[284] Others have criticized the Supreme Court's refusal to acknowledge a due process right to post-conviction DNA testing where that testing could reveal that the convicted defendant was factually innocent.[285]

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276. *E.g.*, Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 348–50 (2006).

277. *E.g.*, Resnik, *supra* note 152, at 588 ("Legislative initiatives since 9/11 have repeatedly sought to bar detainees from access to redress, akin to efforts by Congress to limit federal review of claims brought by onshore prisoners and detained migrants. By reading 9/11 law alongside the doctrine and statutes governing various detained populations, one finds repeated patterns of lawmaking that leave confined persons with minimal or no access to independent judges working before the public." (footnotes omitted)).

278. Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2106 (2016) ("[C]ourts . . . ought not underestimate the simple power of transparency. In a digital age, opening a court's internal systemic facts to litigants, researchers, other institutional actors, and even to the public could invite crowdsourced solutions to some of systemic factfinding's inherent practical challenges—drawing in expertise and resources from outside the court system and perhaps even from farther afield than a given criminal court's immediate surrounds. Indeed, multiple recent efforts to incorporate more sophisticated empirical analysis into questions of criminal justice reform highlight the promise and the potential of such an approach.").

279. Turner, *supra* note 7, at 1009–16.

280. Armstrong, *supra* note 24, at 470–75.

281. *E.g.*, Clay Calvert et. al., *Access to Information About Lethal Injections: A First Amendment Theory Perspective on Creating a New Constitutional Right*, 38 HASTINGS COMM. & ENT. L.J. 1, 35 (2016); Cover v. Idaho Bd. of Corr., 476 P.3d 388, 392 (2020).

282. *See, e.g.*, David Lat & Zachary Shemtob, *The Execution Should Be Televised: An Amendment Making Executions Public*, 78 TENN. L. REV. 859 (2011).

283. Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years After* Brady v. Maryland, 38 N.Y.U. REV. L. & SOC. CHANGE 407, 408–09 (2014); Daniel S. McConkie, *Structuring Pre-Plea Criminal Discovery*, 107 J. CRIM. L. & CRIMINOLOGY 1, 7 (2017) (proposing a due process balancing test in the pre-plea context to ensure the defendant receives adequate information).

284. Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1560 (2010).

285. Dist. Att'y's Off. for Third Jud. Dist. v. Osborne, 557 U.S. 52, 72 (2009) ("Osborne seeks access to state evidence so that he can apply new DNA-testing technology that might prove him innocent. There is

Some of these reforms could be accomplished through judicial expansion of current doctrines, such as firmly extending *Brady* to the plea context and expanding First Amendment rights of access to judicial proceedings, prisons, and information about punishment. Others cannot be achieved without legislative or rulemaking authority. But all of them could be supported by greater consideration of an overarching and multifaceted transparency guarantee.

2. A Multi-Beneficiary System

The second lesson is that the public and the accused each have interests in transparency.[286] Sometimes these interests overlap and mutually enforce each other; sometimes they are separate and distinct; at other times, they conflict. Even "the public" is not a monolithic group, and different segments of the community will have different interests—sometimes more aligned with criminal defendants, sometimes with prosecutors, sometimes with victims, and sometimes looking out for interests that are distinct, such as conservation of resources or efficiency. A robust system of transparency should take these different—and sometimes competing—interests into account.

The Constitution provides some insights into how to balance these various interests.[287] Although there are clear protections in the Constitution for the public's interest in transparency, it is equally clear that the interests of the defendant take precedence. Many of the transparency rights are directly afforded to "the accused," and the Court has firmly—and, in my view, correctly—recognized that when the defendant's right to a fair trial is jeopardized by the public's right of access, the defendant's right takes priority.[288] When the defendant and the public *share* an interest in transparency, however, the interest in transparency peaks.[289] As a result, there should be a strong presumption against secrecy when the prosecution seeks to conceal information

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no long history of such a right, and '[t]he mere novelty of such a claim is reason enough to doubt that "substantive due process" sustains it.'" (quoting Reno v. Flores, 507 U.S. 292, 303 (1993))).

286. The victim is not explicitly contemplated in the Constitution. The victim, it seems, benefits derivatively from the public's interest in transparency: if the trial is open to the public, for instance, it is open to the victim as well. In this Article, I focus more directly on transparency rights of the defendant and the public writ large, but future work could investigate the appropriate scope of transparency for victims within the current system.

287. *See* Hamilton & Kohnen, *supra* note 240, at 272–77.

288. Gannett Co. v. DePasquale, 443 U.S. 368, 392–93 (1979).

289. Simonson, *supra* note 7, at 2204–05 ("When the interests of the defendant and the public align, the rights are strongest. A defendant's due process rights protect against any public presence in the courtroom that prejudices the case *against the defendant*, but the prosecutor and the judge enjoy no such protection. The confluence of the defendant's and the public's interest in open proceedings is most likely to happen in routine, nontrial appearances, where concerns about prejudicing factfinding proceedings give way to a 'common concern [in] the assurance of fairness.' In the absence of juries, it becomes *appropriate* for actors in the courtroom—especially prosecutors and judges—to adjust their conduct in reaction to the presence of the local public." (foonote omitted)).

or deny access to proceedings when both the public and the defendant have an interest in openness.

In the modern context, scholars have debated whether greater criminal justice transparency will work to the detriment or benefit of defendants. Many advocate increased transparency, including by enhancing public oversight over prosecutorial discretion in charging and plea bargaining practices.[290] At the same time, scholars have raised concerns that, within our existing, harshly punitive system, increased prosecutorial transparency may only harm defendants. Jeffrey Bellin, for example, has argued that "[g]iven that most of what prosecutors do out of public sight is dismiss cases, these transparency proposals are . . . more likely to increase rather than decrease incarceration levels."[291]

The most persuasive account is that increased transparency would yield both positive and negative effects for defendants and other stakeholders. Jenia Turner identifies four broad advantages to nontransparency in plea negotiations: encouraging candor between the parties; protecting prosecutors' discretion to "go easy" on defendants in the interests of justice; protecting cooperating witnesses; and conserving resources.[292] She balances these against strong and competing interests in transparency—including promoting equal treatment of defendants; exposing systemic deficiencies such as ineffective assistance of counsel and the imposition of a "trial penalty"; providing information and opportunities for input to victims; and enabling meaningful criminal justice reform efforts that are responsive to existing problems.[293] For Turner, the interests in transparency prevail and support the insertion of targeted transparency reforms—such as the publication of aggregate plea databases.[294]

In evaluating the modern costs and benefits of transparency, it may be helpful to distinguish between *isolated* instances of transparency and the broader *system* of transparency they are intended to create. The constitutional transparency guarantee traced in Part II is the product of broad, deep, and overlapping transparency protections—in other words, it reflects a *system* of transparency. Achieving systemic transparency may not require pure and unadulterated openness in all individual cases. Just as the American criminal justice system has always had useful pockets of secrecy—for example, in jury deliberations—it may be appropriate to maintain spaces of non-transparency

290. *E.g.*, JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 158 (2017).

291. Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 854 (2018).

292. Turner, *supra* note 7, at 987–92.

293. *Id.* at 992–1000.

294. *Id.* at 1009–16.

today as long as there are adequate mechanisms for robust transparency for the system as a whole.

Identifying why transparency is important, and to whom, can help achieve systemic transparency that benefits both the public and the accused. While *individualized* information may be crucial to vindicate the *defendant*'s interest in the transparency and accountability in his own case, *aggregate* information about pleas overall may sometimes be adequate to ensure the informational transparency that the *public* needs. Jenia Turner similarly describes a continuum of transparency options, varying along dimensions including the timing of disclosure, the type of information disclosed, and the audience who receives it.[295]

Individual instances of transparency will not always promote fairness, especially when located within a system that is otherwise nontransparent. If a single defendant's plea negotiations are made public, a prosecutor may be less willing to offer concessions that might be criticized by a tough-on-crime public. But if data about *all* plea negotiations is aggregated and made public, standards and norms will emerge that put pressure on prosecutors to act in a fair way—or, if not, that give the public the information needed to press for reform.

Ronald Wright reaches a similar conclusion about the pitfalls and promise of prosecutorial transparency. He acknowledges that within our current system of harsh sentencing laws, "[p]erhaps the only way to remove some of the severity is to allow prosecutors to operate quietly, dispensing mercy in a few cases, even if it is done inconsistently. Under this view, it may be better to have unequal justice for some than equal injustice for all."[296] Yet ultimately, he

> remain[s] hopeful about the virtues of law and transparency, even in the prosecutor's office—*especially* in the prosecutor's office. The public routinely calls for disappointing and destructive policies in criminal justice, policies that tempt the professionals in the system to evade such unhappy outcomes, invisibly and inconsistently. Yet voters are also capable of learning about the full costs of abstract punishments when they apply not just to hypothetical worst-case defendants, but to a full range of men and women with families and lives, offenders whose sentences force the government to fund an expensive corrections program for the entire group. When prosecutors declare their plans openly and allow others to watch those plans unfold in particular cases, the public can better judge whether to change course.[297]

And, he adds, "if the public, despite full information about prosecutorial practices and correctional costs, endorses cruel and pointless policies, [he] will face a deeper dilemma about democracy."[298]

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295. *Id.* at 1000–02.

296. Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN ST. L. REV. 1087, 1104 (2005).

297. *Id.* at 1104–05 (footnotes omitted).

298. *Id.* at 1105.

CONCLUSION

The Constitution reflects a special cognizance of the dangers of government secrecy in criminal adjudication. A transparency guarantee is woven throughout the text of the Constitution, tying together the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, along with the Suspension Clause, the Ex Post Facto Clause, the Article III jury guarantee, and the Treason Clause of the original Constitution. The Constitution affords multidimensional safeguards against secrecy, both to the public and to the accused, through structural institutions and individual rights. However, within a transformed criminal justice system based on plea bargaining and incarceration, both adjudication and punishment increasingly elude the reach of these discrete protections, which are predicated on the trial as the focal point of transparency. Renewed attention to the overarching constitutional transparency guarantee can support doctrinal and legislative efforts to strengthen criminal justice transparency in modern times.